



**Submission by the Office of the United Nations High Commissioner for Refugees  
in the case of *S.S. and Others. v. Italy* (Appl. No. 21660/18)  
before the European Court of Human Rights**

**1. Introduction\***

1.1. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and together with Governments, to seek solutions for them.<sup>1</sup> UNHCR is also responsible for supervising the application of international conventions for the protection of refugees.<sup>2</sup> UNHCR welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights ('the Court') in its letter of 14 October 2019.

1.2. In this submission, UNHCR addresses the situation for non-nationals, including asylum-seekers and refugees, in Libya (part 2) and provides UNHCR's interpretation of the relevant principles of international refugee and human rights law regarding the extraterritorial scope of the *non-refoulement* obligation (part 3), principles of State responsibility in situations of rescue and interception at sea involving a non-Contracting State (part 4) and capacity development and responsibility for aiding or assisting internationally wrongful conduct (part 5). Consistent with its practice in other cases and its role as a third party, it does not address nor comment on the facts or merits of the case.

**2. The situation of asylum-seekers and refugees in Libya**

2.1. UNHCR's views on the situation in Libya, and in particular on returns of Libyans or non-nationals to Libya, were set out in its 2014 *Position on returns to Libya*.<sup>3</sup> This document was updated in October 2015<sup>4</sup> and again in September 2018.<sup>5</sup> The 2015 paper represented UNHCR's position at the time of the events in question in this case. The 2018 paper, together with the comments that follow, reflect UNHCR's current position.

2.2. UNHCR notably clarified in the 2015 update that Libya, in view of the situation described therein, could not be considered a 'place of safety'<sup>6</sup> for disembarking people rescued at sea. This was due to the volatile security situation in general and the particular protection risks for non-nationals (including detention in substandard conditions and reports of serious abuses against asylum-seekers, refugees and migrants).<sup>7</sup> This has remained UNHCR's public position<sup>8</sup> (including throughout 2017), and was repeated in the 2018 update.<sup>9</sup>

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\* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

<sup>1</sup> UNGA, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1 ('UNHCR Statute'), <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

<sup>2</sup> *Ibid.*, para. 8(a) and Article 35 of the *1951 Convention relating to the Status of Refugees* ('1951 Convention') and Article II of the *1967 Protocol Relating to the Status of Refugees* ('1967 Protocol'), <https://www.unhcr.org/4ec262df9.pdf>.

<sup>3</sup> UNHCR, *UNHCR Position on Returns to Libya*, 12 November 2014 ('UNHCR Libya position 2014'), [www.refworld.org/docid/54646a494.html](http://www.refworld.org/docid/54646a494.html).

<sup>4</sup> UNHCR, *UNHCR Position on Returns to Libya - Update I*, October 2015 ('UNHCR Libya position Update I'), <https://www.refworld.org/docid/561cd8804.html>.

<sup>5</sup> UNHCR, *UNHCR Position on Returns to Libya - Update II*, September 2018, ('UNHCR Libya position Update II'), <https://www.refworld.org/docid/5b8d02314.html>.

<sup>6</sup> See paragraph 4.2. below for a definition of the term.

<sup>7</sup> UNHCR Libya position Update II, note 5 above, para. 42; UNHCR Libya Update (16 August 2019): <http://bit.ly/2rg95w0>. Council of Europe Commissioner for Human Rights, *Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean, Recommendation* ('CoE Commissioner for Human Rights Recommendation'): p. 28: <http://bit.ly/2ChTEWc>.

<sup>8</sup> See, UNHCR, *News comment by UN High Commissioner for Refugees Filippo Grandi on anniversary of Lampedusa shipwreck*, 3 October 2019 ('UNHCR News comment 3 October 2019'), where the High Commissioner for Refugees notes that 'people rescued and intercepted at sea by the Libyan Coast Guard continue to be returned to Libya and routinely detained inside detention centres, where they face terrible conditions, appalling human rights abuses and the rising threat of being caught up in the hostilities.': <http://bit.ly/2Ch5MXG>.

<sup>9</sup> UNHCR Libya position Update II, note 5 above, para. 42.

2.3. Although Libya has ratified a number of international and regional human rights and refugee law instruments,<sup>10</sup> it is not a party to the 1951 Convention, and it has not enacted asylum legislation or established any asylum procedures. Libyan laws criminalize all irregular entry, stay, or exit, without special provision for persons who may be seeking asylum or in need of international protection, or for victims of trafficking. Violations are penalized with an indefinite prison sentence of ‘hard labour’ or a fine and eventually deportation once the sentence is completed.<sup>11</sup>

2.4. Following interception or rescue of individuals at sea, upon disembarkation in Libya, the Libyan Coast Guard (LCG) hands those concerned over to the authorities of the Directorate to Combat Illegal Migration (DCIM),<sup>12</sup> which transfers them directly to government-run detention centres, where they are held for indefinite periods.<sup>13</sup> At the time of the events in question in the present application, there was no possibility of release, except in the context of repatriation, evacuation or resettlement to third countries.<sup>14</sup> In late October 2018, UNHCR estimated<sup>15</sup> that some 4,500 refugees and migrants were held in detention centres in Libya, out of whom some 3,400 were persons of concern to UNHCR. There are no available figures for those held by various armed factions or criminal networks in unofficial detention centres, including in warehouses and farms.<sup>16</sup>

2.5. In all facilities that UNHCR has visited, detention conditions fail to meet international standards. They have widely been described as ‘appalling’,<sup>17</sup> ‘nightmarish’<sup>18</sup> and ‘cruel, inhuman and degrading’.<sup>19</sup> Both male and female asylum-seekers, refugees, and migrants, including children, are reportedly systematically subjected to or are at very high risk of torture and other forms of ill-treatment, including rape and other

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<sup>10</sup> Libya is a party to the 1969 Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa and the African Charter on Human and Peoples’ Rights. Libya has also ratified: the International Convention on the Elimination of All Forms of Racial Discrimination (in 1969), the International Covenant on Economic, Social and Cultural Rights (1976), the International Covenant on Civil and Political Rights (1976), Convention on the Elimination of All Forms of Discrimination against Women (1989), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1989) and Convention on the Rights of the Child (1993). In 2004, Libya also signed the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. Libya has further acceded to the United Nations Convention against Transnational Organized Crime, and its two Protocols on migrant smuggling and human trafficking.

<sup>11</sup> UNHCR Libya position Update II, note 5 above, para. 15.

<sup>12</sup> UNHCR Libya position Update II, note 5 above, para. 19. The DCIM was established as a division of the GNA’s Ministry of Interior in 2012 to tackle irregular migration flows into the country. It is responsible for arresting anyone who has entered the country irregularly, organizing the deportation of irregular migrants and managing the detention centres.

<sup>13</sup> UNHCR Libya position Update II, note 5 above, para. 19.

<sup>14</sup> UNHCR, *Desperate Journeys. Refugees and migrants arriving in Europe and at Europe’s borders*, January-August 2018: <https://data2.unhcr.org/en/documents/download/65373> and UNHCR Libya position Update II, note 5 above, para. 19. At the relevant time, many of the individuals disembarked in Libya were disembarked in Az-Zawiyah and subsequently transferred to Al Nasr facility, which, according to the UN Panel of Experts is ‘commanded by a former army Colonel, Fathi al-Far, [and] used to ‘sell’ migrants to other smugglers.’ See *Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council*, Annex 17 para. 3: <https://undocs.org/S/2017/466>.

<sup>15</sup> ‘Since there is no registration system in place for those disembarked and subsequently detained, it is impossible to know with any degree of accuracy how many people are being held in official detention at any given time, the length of their detention and, ultimately, their fate.’ IRC, *Pushing the Boundaries: insights into the EU’s response to mixed migration on the Central Mediterranean Route*, 11 July 2018, at p.15 (<http://bit.ly/33kjuoy>), quoted in UNHCR Libya position Update II, note 5 above, para. 19, fn. 111.

<sup>16</sup> UNHCR Libya position Update II, note 5 above, para. 19.

<sup>17</sup> OHCHR, *Oral Update of the United Nations High Commissioner for Human Rights on Libya*, 20 March 2018: <https://www.refworld.org/docid/5b55b92c4.html>.

<sup>18</sup> Medecins Sans Frontieres, *An Open Letter from MSF International President Dr Joanne Liu to European Government Leaders*, 6 September 2017: <http://bit.ly/33fYmQe>.

<sup>19</sup> Amnesty International, *Libya’s Dark Web of Collusion: Abuses Against Europe-Bound Refugees and Migrants*, 11 December 2017, pp. 9, 53: <http://www.refworld.org/docid/5a2fa1cb4.html>. See also UNSMIL and OHCHR, “*Detained and Dehumanised*” *Report on Human Rights Abuses Against Migrants In Libya*, 13 December 2016 (‘UNSMIL and OHCHR Report’), p. 1 (<http://bit.ly/2NlrWY5>), describing detention conditions as ‘generally inhuman’ and pp. 44-47, for the situation in Tajoura, specifically. See also Human Rights Watch, *Libya: End ‘Horrific’ Abuse of Detained Migrants*, 14 December 2016; Amnesty International, *Amnesty International Report 2015/16 - Libya*, 24 February 2016: <https://www.refworld.org/docid/56d05b3c6.html>; Overseas Development Institute, *Migrants and refugees in detention centres: the humanitarian consequences of Libya’s governance breakdown*, September 2016: <https://www.refworld.org/docid/583c0d874.html>.

forms of sexual violence, slavery and other forms of forced labour<sup>20</sup> as well as extortion, both in official and unofficial detention facilities. Those detained have no possibility to challenge the legality of their detention or treatment.<sup>21</sup>

2.6. Non-nationals in detention are also affected by the general security situation in the country as demonstrated during the August 2018 escalation in fighting between rival armed groups in Tripoli,<sup>22</sup> as well as the July 2019 airstrike on the *Tajoura* detention centre, which killed more than fifty refugees and migrants who were being held inside.<sup>23</sup>

2.7. In view of this situation, UNHCR has called on, and continues to call on, all countries to allow civilians fleeing Libya access to their territories.<sup>24</sup> UNHCR has also, in particular, urged States to refrain from returning to Libya any individuals ‘intercepted or rescued at sea and to ensure that those in need of international protection are able to access fair and effective asylum procedures upon disembarkation.’<sup>25</sup>

### 3. Protection from *refoulement*

#### 3.1. Extraterritorial scope of *non-refoulement* under international refugee law

3.1.1. The obligation of States not to expel or return a person to territories where his or her life or freedom would be threatened is the cornerstone of international refugee law, most prominently expressed in Article 33 of the 1951 Convention. Article 33(1) prohibits States from expelling or returning (*refouler*) a refugee in any manner whatsoever to a territory where she or he would be exposed to such threats.<sup>26</sup>

3.1.2. The principle of *non-refoulement* constitutes an essential binding and non-derogable component of international refugee protection<sup>27</sup> which has been restated in international<sup>28</sup> and regional human rights instruments.<sup>29</sup> The fundamental and non-derogable character of the principle of *non-refoulement* has also been reaffirmed by the Executive Committee of the High Commissioner’s Programme (‘ExCom’) in

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<sup>20</sup> See also *High Commissioner for Refugees Calls Slavery, Other Abuses in Libya ‘Abomination’ That Can No Longer Be Ignored, while Briefing Security Council*, 28 November 2017: <https://www.un.org/press/en/2017/sc13094.doc.html>.

<sup>21</sup> UNHCR Libya position Update II, note 5 above, para. 19. and UNSMIL and OHCHR Report, note 19 above; Human Rights Watch, *No Escape from Hell: EU Policies contribute to abuse of migrants in Libya*, 21 January 2019 (‘HRW January 2019 Report’): <http://bit.ly/33kjSDw>; Amnesty International, *Between the devil and the deep blue sea: Europe fails refugees and migrants in the Central Mediterranean*, August 2018, (‘AI August 2018 Report’): <http://bit.ly/34waGMp>; See also OHCHR’s concerns about people being sold from detention in Al Khoms and deaths in Zintan detention centre, OHCHR, *Press briefing note on Libya*, 7 June 2019: <http://bit.ly/2Nlv7Gd>.

<sup>22</sup> UNHCR Libya position Update II, note 5 above, para. 19, and UNSMIL and OHCHR Report, note 19 above; HRW January 2019 Report, note 21 above, and AI August 2018 Report, note 21 above.

<sup>23</sup> UNHCR News comment 3 October 2019, see note 8 above.

<sup>24</sup> UNHCR Libya position Update II, note 5 above, para. 34, UNHCR Libya position Update I, note 4 above, para. 25.

<sup>25</sup> UNHCR Libya position Update II, note 5 above, para. 39, UNHCR Libya position Update I, note 4 above, para. 30.

<sup>26</sup> Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition but is recognized because he or she is a refugee. It follows that the principle of *non-refoulement* applies not only to recognized refugees, but also to those whose status has not yet been determined. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, para. 28: <https://www.refworld.org/docid/5cb474b27.html>. See also, ExCom Conclusion, No. 6 (XXVIII) - 1977, para. (c); ExCom Conclusion, No. 79 (XLVII) - 1996, paras. (i)(j); UNHCR, *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 (Conclusion No. 1 – 114)*, October 2017, <https://www.refworld.org/docid/5a2ead6b4.html>.

<sup>27</sup> Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. See also, UNHCR, *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, para. 4: <http://www.unhcr.org/refworld/docid/3d60f5557.html>.

<sup>28</sup> An explicit *refoulement* provision is contained in Article 3 of the *1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The International Covenant on Civil and Political Rights*, as interpreted by the Human Rights Committee also encompasses the obligation not to extradite, deport, expel or otherwise remove a person from a State’s territory where there are substantial grounds for believing that there is a real risk of irreparable harm.

<sup>29</sup> In the Americas, the principle of *non-refoulement* is enshrined in Article 22(8) of the American Convention on Human Rights, whereas the jurisprudence of this Court has held that *non-refoulement* is an inherent obligation under Article 3 ECHR. See, for example, European Court of Human Rights (‘ECtHR’), *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, para. 114: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-109231%22%5D%7D>.

numerous Conclusions since 1977.<sup>30</sup> It is a norm of customary international law<sup>31</sup> and is consequently binding for all States, whether or not they are parties to the 1951 Convention or its 1967 Protocol.<sup>32</sup>

3.1.3. The prohibition of *refoulement* is applicable to any form of return, including deportation, expulsion, extradition, informal transfer or ‘renditions’ and non-admission at the border. This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or return (*refoulement*) ‘in any manner whatsoever’.<sup>33</sup> This wording should be understood as indicating that a wide range of State conduct, the categories of which do not fall into a ‘closed’ list, may engage *non-refoulement* obligations. UNHCR considers that a purposive interpretation and implementation of Article 33(1), oriented by the harms it seeks to prevent, is most consistent with the ordinary meaning of the provision in light of its object and purpose.

3.1.4. While the territorial scope of Article 33(1) is not explicitly defined in the 1951 Convention, UNHCR is of the view that the purpose, intent and meaning of *non-refoulement* obligations are unambiguous and that these obligations apply wherever a State exercises jurisdiction,<sup>34</sup> including notably ‘when acting outside its territory (including outside its territorial waters) in the context of maritime search-and-rescue operations or interception at sea.’<sup>35</sup> As this Court has stated ‘the rules for the rescue of persons at sea [...] impose on States the obligation to fulfil the obligations arising out of international refugee law, including the *non-refoulement* principle.’<sup>36</sup>

3.1.5. Jurisdiction in the relevant sense can be based on *de jure* entitlements and/or *de facto* control.<sup>37</sup> The principle of *non-refoulement* applies ‘to the conduct of State officials or those acting on behalf of a State wherever [that conduct] occurs, whether [in, or] beyond the national territory of the State in question.’<sup>38</sup> The existence or exercise of jurisdiction, and so the applicability of *non-refoulement* obligations, is not to be determined solely by reference to whether a person is within a State’s territory but also by reference to whether she or he has come under the effective control of, or was affected by those acting on behalf of that State.<sup>39</sup> Therefore, wherever a State’s actions at sea outside its own territory (whether on the high seas or in

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<sup>30</sup> See ExCom Conclusions No. 25 (XXXIII) 1982, (b); No. 29 (XXXIV) 1983, para. (c); No. 50 (XXXIX) 1988, para. (g); No. 52 (XXXIX) 1988, para. (5); No. 55 (XL) 1989, para. (d); No. 62 (XLI) 1990, para. (a) (iii); No. 65 (XLII) 1991, para. (c); No. 68 (XLIII) 1992, para. (f); No. 71 (XLIV) 1993, para. (g); No. 74 (XLV) 1994, para. (g); No. 77 (XLVI) 1995, para. (a); No. 81 (XLVIII) 1997, para. (h); No. 82 (XLVIII) 1997, para. (d)(i); No. 85 (XLIX) 1998, para. (q); No. 91 (LII) 2001, para. (a); No. 94 (LIII) 2002, para. (c)(i); No. 99 (LV) 2004, para. (1); No. 103 (LVI) 2005, para. (m); and No. 108 (LIX) 2008, para. (a).

<sup>31</sup> UNHCR, *Note on the Principle of Non-Refoulement*, November 1997: <http://www.unhcr.org/refworld/docid/438c6d972.html>; and Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, June 2003 (‘The Scope and Content of Non-Refoulement’), p. 140-163: <https://www.refworld.org/docid/470a33af0.html>. See also, Concurring Opinion of Judge Pinto de Albuquerque in ECtHR, in *Hirsi*, note 29 above. See further, Conclusion III(5): *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984: <http://www.refworld.org/docid/3ae6b36ec.html>. This principle has also been confirmed by the Inter-American Court of Human Rights in *Advisory Opinion OC-21/14, “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection”*, 19 August 2014, para. 211: <https://www.refworld.org/cases.IACRTHR.54129c854.html> and *Advisory Opinion OC-25/18*, 30 May 2018, para. 181: <https://www.refworld.org/cases.IACRTHR.5c87ec454.html>.

<sup>32</sup> *Ibid.*, para. 211.

<sup>33</sup> UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007 (‘UNHCR Advisory Opinion’), para. 7: <https://www.refworld.org/docid/45f17a1a4.html>.

<sup>34</sup> UNHCR Advisory Opinion, note 33 above, para. 24.

<sup>35</sup> UNHCR, *General legal considerations: search-and-rescue operations involving refugees and migrants at sea*, November 2017: (‘UNHCR SAR Considerations’), para. 1: <https://www.refworld.org/docid/5a2e9efd4.html>. See also UNHCR Advisory Opinion, note 33 above, para. 24.

<sup>36</sup> *Hirsi*, note 29 above, para. 134.

<sup>37</sup> UNHCR, *UNHCR intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy*, March 2010, Application no. 27765/09 (‘UNHCR *Hirsi* intervention’), para. 4.3.1: <https://www.refworld.org/docid/4b97778d2.html>. ‘*De jure* jurisdiction on the high seas derives from the flag state jurisdiction. *De facto* jurisdiction on the high seas is established when a state exercises effective control over persons.’

<sup>38</sup> *The Scope and Content of Non-Refoulement*, note 31 above, para. 67.

<sup>39</sup> *Ibid.*, para. 63. See also, in particular the ‘within the power or effective control’ standard adopted by the UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 10: <https://www.refworld.org/docid/478b26ae2.html>. See also UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, para. 16 (<https://www.refworld.org/docid/47ac78ce2.html>), where the UN CAT requires States ‘take effective measures to prevent acts of torture [...] in any territory under its jurisdiction, [including] all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control’ (emphasis added).

the territorial waters of another State) constitute an exercise of effective control (*de facto* jurisdiction) over people at sea – in particular in the course of a rescue operation or an interception measure – that State’s *non-refoulement* obligations apply.<sup>40</sup>

3.1.6. UNHCR underlines that the responsibility of a State to protect a person from *refoulement* is engaged wherever its conduct exposes that person to a risk of being subject to persecution or ill-treatment in another country, in particular if the person has expressed a fear of such, or the individual circumstances or characteristics of the person or group to which she belongs indicates a risk of which the State ought to be aware.<sup>41</sup> Similarly, in the context of persons rescued or intercepted at sea, ‘[i]f the State concerned is aware or ought to be aware [...] of circumstances in the country to which return is contemplated, which indicate a risk that such return may constitute *refoulement*, these must be taken into account – regardless of whether there has been an explicit and articulated request for asylum.’<sup>42</sup>

3.1.7. Further, whenever, taking into account all of the relevant circumstances, a State can be said to exercise effective control in a context where there is a risk of return to serious harm, both negative obligations (to refrain from conduct inconsistent with the *non-refoulement* principle) and positive obligations (including relevant procedural obligations, as well as obligations to take appropriate preventive or protective measures, consistent with international law, notably against conduct by third parties leading to return to a place where life or freedom would be threatened) are engaged.

## 3.2. Extraterritorial jurisdiction under European human rights law<sup>43</sup>

3.2.1. This Court’s jurisprudence in the context of interceptions at sea, has underlined two important principles: first, jurisdiction may be engaged when intercepting persons on the seas, whether in or outside their territorial waters;<sup>44</sup> and second, a State cannot circumvent jurisdiction by describing its actions as rescue operations<sup>45</sup> or by relying on obligations under bilateral agreements with third States.<sup>46</sup> This Court has further underlined that ‘the special nature of the maritime environment [...] cannot justify an area outside the law,’<sup>47</sup> and that ‘problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State’s obligations.’<sup>48</sup>

3.2.2. As the Court has reiterated, ‘[w]hensoever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual.’<sup>49</sup> For example, jurisdiction in interception cases on the High

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<sup>40</sup> ‘As well as RCCs and other State agencies and services, State-controlled vessels (such as coastguard vessels and warships) have direct obligations under international refugee law (notably, the obligation not to engage in or allow *refoulement*) which bear upon their obligations under international maritime law.’ International Maritime Organization (IMO); United Nations High Commissioner for Refugees (UNHCR); International Chamber of Shipping (ICS), *Rescue at Sea. A Guide to Principles and Practice as Applied to Refugees and Migrants*, January 2015: <https://www.refworld.org/docid/54b36554.html>.

<sup>41</sup> See UNHCR’s oral intervention at the European Court of Human Rights Hearing of the case *Hirsi and Others v. Italy*, p. 4: <https://www.refworld.org/pdfid/4e0356d42.pdf>. See also, UNHCR’s oral intervention before the European Court of Human Rights Grand Chamber hearing in the case of *N.D. and N.T. v. Spain*, 26 September 2018, p. 6: <http://www.refworld.org/docid/5bb3873b4.html>.

<sup>42</sup> UNHCR SAR Considerations, note 35 above, para. 6.

<sup>43</sup> While this section only addresses the ECHR, EU Member States’ action must also be in line with EU fundamental rights. Where they act within the scope of EU law, the prohibition of *refoulement* enshrined in Article 19 of the Charter of Fundamental Rights applies (see Court of Justice of the European Union, *Åkerberg Fransson*, C-617/10, para. 21: <https://bit.ly/2QaL57R>). In addition, Article 4 of the Schengen Borders Code may apply which equally recalls EU Member States’ obligations ‘related to access to international protection, in particular the principle of *non-refoulement*’.

<sup>44</sup> *Hirsi*, note 29 above, para. 81. In line with earlier case law, e.g. ECtHR, *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, 7 July 2011 paras. 131-139: [https://www.refworld.org/cases/ECHR\\_4e2545502.html](https://www.refworld.org/cases/ECHR_4e2545502.html). See also ECtHR, *Women on Waves v. Portugal*, Application no. 31276/05, 3 February 2009: <https://hudoc.echr.coe.int/eng/?i=001-91046>.

<sup>45</sup> *Hirsi*, note 29 above, para. 79.

<sup>46</sup> *Hirsi*, note 29 above, para. 129, see also UNHCR *Hirsi* intervention, note 37 above, para. 2.1.2.

<sup>47</sup> ECtHR, *Medvedyev and Others v. France*, Application no. 3394/03, 29 March 2010, para. 81: [https://www.refworld.org/cases/ECHR\\_502d45dc2.html](https://www.refworld.org/cases/ECHR_502d45dc2.html) and *Hirsi*, note 29 above, para. 178.

<sup>48</sup> *Hirsi*, note 29 above, para. 179.

<sup>49</sup> *Hirsi*, note 29 above, para. 74.

Seas has been accepted where a State exercised *de facto* control over a boat and its crew,<sup>50</sup> but also where a State, in the context of a bilateral migration control cooperation agreement, intercepted a migrant boat.<sup>51</sup>

3.2.3. Extraterritorial jurisdiction has also been recognised ‘when, through the consent, invitation or acquiescence of the Government of that territory, [a Contracting State] exercises all or some of the public powers normally to be exercised by that Government.’<sup>52</sup> The Grand Chamber held that ‘where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the [ECHR] as long as the acts in question are attributable to it rather than to the territorial State.’<sup>53</sup> Jurisdiction was accepted based on the ‘authority and responsibility’ exercised over the situation.<sup>54</sup>

3.2.4. Under the ECHR, states not only have the obligation not to violate the ECHR: an omission to act could also engage responsibility if the state had the power to prevent harm, in particular where there is a risk of grave and irreversible violations.<sup>55</sup> For example, in *Al-Adsani v. the United Kingdom*, this Court held that Article 3 (together with Article 1) ECHR ‘places a number of positive obligations, [...] designed to prevent and provide redress for torture and other forms of ill-treatment.’<sup>56</sup>

#### 4. Search and Rescue situations involving a non-Contracting Party

4.1. Ordinarily, search and rescue (SAR) coordination and post-rescue disembarkation arrangements are determined by reference to the applicable provisions of international maritime law.<sup>57</sup> However, such arrangements must also have regard to applicable State obligations under international refugee and human rights law. As indicated above, the ‘principle of *non-refoulement* applies wherever the State exercises jurisdiction, including when acting outside its territory (including outside its territorial waters) in the context of maritime search and rescue operations or interceptions at sea.’<sup>58</sup> Whenever a State exercises effective control, it must in particular not, by its conduct or conduct attributable to it, summarily turn back or otherwise return rescued or intercepted persons to a country of departure, where to do so would deny them a fair opportunity to seek asylum or subject them to the risk of a serious threat to their life, physical integrity or freedom.<sup>59</sup> Although search and rescue operations and interceptions at sea are distinct, *non-refoulement* obligations are engaged equally in both circumstances.<sup>60</sup>

4.2. Although international maritime law does not provide for specific obligations which would determine in all cases which State is responsible to allow disembarkation on its territory, key treaties indicate that the State responsible for the search and rescue region in which a rescue takes place is required to ‘exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and relevant IMO guidelines.’<sup>61</sup> ‘Place of safety’ is not defined in the relevant

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<sup>50</sup> *Medvedyev*, note 47 above, para. 67, *Hirsi*, note 29 above.

<sup>51</sup> ECtHR, *Xhavara* (admissibility), Application no. 39473/98, 11 January 2001, para. 1.

<sup>52</sup> *Al-Skeini*, note 44 above, para. 135, and cases cited.

<sup>53</sup> *Al-Skeini*, note 44 above, para. 135, and cases cited.

<sup>54</sup> *Al-Skeini*, note 44 above, para. 149.

<sup>55</sup> See, for example, ECtHR, *Bljakaj and Others v. Croatia*, Application no. 74448/12, 18 September 2014, para. 106: <http://hudoc.echr.coe.int/eng?i=001-146392>, and the case law quoted; see also ECtHR, *H.L.R. v. France*, Application no. 24573/94, 29 April 1997, para. 34: [https://www.refworld.org/cases/ECHR\\_5034e6ec2.html](https://www.refworld.org/cases/ECHR_5034e6ec2.html).

<sup>56</sup> ECtHR, *Al-Adsani v. the United Kingdom*, Application no. 35763/97, 21 November 2001, para. 38 and cases cited: <http://hudoc.echr.coe.int/eng?i=001-59885>.

<sup>57</sup> See notably United Nations Convention on the Law of the Sea 1982; International Convention for the Safety of Life at Sea; International Convention on Maritime Search and Rescue 1979. These treaties have been complemented by guidelines developed by the International Maritime Organization (IMO): IMO, *Guidelines on the Treatment of Persons Rescued at Sea*, 20 May 2004, MSC.167(78) (‘IMO Rescue Guidelines’): [www.refworld.org/docid/432acb464.html](http://www.refworld.org/docid/432acb464.html). The UN General Assembly has called on Member States to implement these Guidelines: see A/RES/61/222, 20 December 2006, para. 70: <https://bit.ly/2NZbgvE>.

<sup>58</sup> UNHCR SAR Considerations, note 35 above, para. 1.

<sup>59</sup> UNHCR SAR Considerations, note 35 above, paras. 5 and 6.

<sup>60</sup> UNHCR SAR Considerations, note 35 above, para. 5.

<sup>61</sup> UNHCR SAR Considerations, note 35 above, para. 13. See in particular IMO Rescue Guidelines, note 57 above, and IMO, *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea*, 22 January 2009, FAL.3/Circ.194 (‘IMO Disembarkation Principles’): [www.refworld.org/docid/524be8244.html](http://www.refworld.org/docid/524be8244.html).

treaty law.<sup>62</sup> However, ‘arrangements for the disembarkation or transfer of rescued persons (whether disembarkation to land territory or transfer to another vessel) should *not* be considered as meeting the requirements of delivery to a ‘place of safety’ if there is reason to believe that they may entail a risk of violating *non-refoulement* obligations under international refugee or human rights law.’<sup>63</sup> In identifying a place of safety, ‘[t]he need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea.’<sup>64</sup> Furthermore, the ‘identification of a place of safety for the delivery of rescued persons needs to take into account any risk that rescued asylum-seekers or refugees might subsequently be transferred or returned from that place to a place where they would be at risk (indirect *refoulement*).’<sup>65</sup>

4.3. In cases where a possible distress incident is identified in a place where there is no declared Search and Rescue Region (SRR), or no functioning maritime rescue coordination centre (MRCC), the MRCC of a coastal State may assume responsibility for coordinating SAR responses outside its own region.<sup>66</sup> Further, the IMO Sea Rescue Guidelines note that the first MRCC contacted remains responsible for coordinating the case until the responsible MRCC or other competent authority assumes responsibility.<sup>67</sup>

4.4. Coastal State authorities which assume responsibility for coordinating rescue operations involving other actors (such as private vessels or assets of other States) ‘need to act consistently with the implementation in good faith of their obligations under international law, including international maritime law, refugee law, and human rights law. It is consistent with those obligations, and with the imperative to protect human life at sea, that an MRCC coordinating a SAR response outside its own SRR will seek to mobilize those assets which are best able to respond in a timely and effective manner.’<sup>68</sup> Moreover, ‘an MRCC that coordinates SAR operations outside its own SRR should refrain from giving directions or advice which it knows or ought reasonably to know would have negative human-rights implications for those requiring assistance, unless doing so is unavoidable in order to respond to serious and imminent risks to human life at sea in a situation of distress or force majeure.’<sup>69</sup>

4.5. A coastal State whose MRCC coordinates a SAR response is not necessarily responsible, under international law, for the conduct of assisting vessels involved in that response. Relatedly, the mere fact that a coastal State’s MRCC coordinates a SAR response outside its own SRR, or transfers coordination as appropriate to the authorities of another coastal State, would generally speaking be unlikely, by itself, to amount to an exercise of effective control or jurisdiction over persons receiving assistance.<sup>70</sup> ‘Where the rescue operation involves the coordinating State’s own assets (or assets acting directly under its control), relevant conduct is likely to be attributable to that State. Rescued persons in such cases will typically come under the jurisdiction of the coordinating State either *de jure* (by virtue of flag State jurisdiction), or because it has otherwise exercised effective control over them. By contrast, where the rescue operation involves private or public vessels flagged to another State, the State of the coordinating MRCC could not usually be said to be responsible for the conduct of those vessels, or to exercise jurisdiction in respect of rescued persons.’<sup>71</sup> However, if a coordinating authority issues instructions to an assisting vessel in circumstances where it can be said that its coordination or involvement in a SAR operation, in view of all the relevant facts, is likely to determine the course of events, UNHCR’s view is that the concerned State’s negative and positive

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<sup>62</sup> UNHCR SAR Considerations, note 35 above, para. 15.

<sup>63</sup> UNHCR SAR Considerations, note 35 above, para. 16.

<sup>64</sup> UNHCR SAR Considerations, note 35 above, para. 16. See also, IMO Rescue Guidelines, note 57 above, para. 6.17, and IMO Disembarkation Principles, note 61 above, para. 2.5 and accompanying footnote.

<sup>65</sup> UNHCR SAR Considerations, note 35 above, para. 17.

<sup>66</sup> UNHCR SAR Considerations, note 35 above, para. 18.

<sup>67</sup> IMO, Resolution MSC 167(78) (adopted on 20 May 2004), *Guidelines on the Treatment of Persons Rescued at Sea*, para. 6.7: <https://www.refworld.org/docid/432acb464.html>; and CoE Commissioner for Human Rights Recommendation, note 7 above, p. 20.

<sup>68</sup> UNHCR SAR Considerations, note 35 above, para. 19. As recommended by the CoE’s Parliamentary Assembly, rescue actions should also be undertaken with the assistance of NGOs who should be allowed to carry out their life-saving missions in the Mediterranean Sea, recognizing their capacities to organize rapid-reaction rescues. See Council of Europe Parliamentary Assembly, Resolution 1872 (2012), *Lives lost in the Mediterranean Sea: Who is responsible?*, 24 April 2012, para. 13.3: <http://bit.ly/2r8Xi2m>.

<sup>69</sup> UNHCR SAR Considerations, note 35 above, para. 20.

<sup>70</sup> UNHCR SAR Considerations, note 36 above, para. 21.

<sup>71</sup> UNHCR SAR Considerations, note 35 above, para. 21.

obligations under applicable international refugee and human rights law, including *non-refoulement*, are likely to be engaged. Notably, where a course of action is reasonably open that is most consistent both with the preservation with human life at sea, and with avoiding the delivery of rescued persons to foreseeable risk of serious human rights violations, an MRCC should seek so far as possible to promote that course, whether or not it has assumed formal coordination of the response.

4.6. Cooperation and coordination in SAR matters need to be directed at strengthening collective efforts to save human life. As UNHCR's ExCom has highlighted with regard to 'interception' measures,<sup>72</sup> it should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law.

4.7. UNHCR and IOM have advised states that '[i]n all cases, including where a SAR area is not clearly established or falls short of fully effective functioning, speedy and equitable cooperation among State-managed MRCCs is required to ensure that lives are saved and not put at risk through delayed disembarkation or disembarkation in a location that is not safe.'<sup>73</sup> Similarly, the Parliamentary Assembly of the Council of Europe, in its resolution on the urgent need to save lives in the Mediterranean which had been adopted in October 2019, urged all Council of Europe member states to 'ensure respect for the principle of *non-refoulement*, in particular in the context of joint or "aggregate rescue" operations, where the prohibition of *refoulement* cannot be collectively evaded under the obligations stemming from refugee law and the European Convention on Human Rights'.<sup>74</sup>

## 5. Responsibility for aiding or assisting internationally wrongful conduct

5.1. In assessing whether a State that provides capacity-building or other forms of assistance to a coastal State – for instance, to support SAR or law-enforcement capabilities – may be responsible under international law in respect of human rights violations committed by the latter, regard should be had to Article 16 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ASR),<sup>75</sup> which addresses State responsibility in cases of aid or assistance in the commission of an internationally wrongful act by another State.<sup>76</sup>

5.2. Chapter IV of Part 1 of the ASR sets out a number of principles on the basis of which a State may be held to be internationally responsible in connection with conduct attributable to another State, giving body to the concept that a State 'cannot do by another what it cannot do itself'.<sup>77</sup> UNHCR's view is that this concept is resonant in the context of the international protection regime: States may not avoid their

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<sup>72</sup> UNHCR ExCom, *Conclusion on Protection Safeguards in Interception Measures No. 97 (LIV) – 2003*, <https://www.refworld.org/docid/3f93b2894.html>.

<sup>73</sup> UNHCR and IOM, *Proposal for a regional cooperative arrangement ensuring predictable disembarkation and subsequent processing of persons rescued-at-sea*, 27 June 2018, p. 3: <http://bit.ly/2K7BI5h>.

<sup>74</sup> Parliamentary Assembly of the Council of Europe, Resolution 2305 (2019), *Saving lives in the Mediterranean Sea: the need for an urgent response*, 3 October 2019, para. 4.1.6, para. 4.7: <http://bit.ly/32hXNnG>.

<sup>75</sup> Article 16 ASR provides that '[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.' See International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, December 2001, [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf).

<sup>76</sup> The Articles on State Responsibility (ASR) codify rules of customary international law, and have been referred to in ECtHR, *Jaloud v. the Netherlands*, Application no. 47708/08, 20 November 2014, para. 98: <http://hudoc.echr.coe.int/eng?i=001-148367> and by Judge Pinto de Albuquerque in his concurring opinion in *Hirsi*, note 29 above, where he stated that '[t]he applicable rules on international liability for human rights violations are those established in the Articles on State Responsibility for Internationally Wrongful Acts', p. 75.

<sup>77</sup> International Law Commission, *Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001 ('ILC Commentary to Draft ASR'), p. 66, para. 6: <http://bit.ly/2WJBSEO>.



obligations under international refugee law by acting ‘through’ another State. The ASR provides the relevant standards for assessing responsibility in such situations.

5.3. Chapter IV addresses situations in which a State aids or assists, directs or controls, or coerces the conduct of another State. Notably, Article 16 ASR, which provides for circumstances in which international responsibility may be attributed to a State that has aided or assisted the wrongful conduct of another State, has been recognized as reflecting a rule of customary international law by the International Court of Justice.<sup>78</sup>

5.4. According to the International Law Commission’s (ILC) commentary to this article, it can be understood as limiting the scope of derivative responsibility for aid and assistance in three ways: ‘[f]irst, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.’<sup>79</sup>

5.5. Since ‘aid or assistance’, which may cover a wide range of activities, is left undefined in the ASR, the criterion of knowledge of the circumstances of the assisted State’s wrongful conduct has been considered as important.<sup>80</sup> On the standard of knowledge required to attract responsibility for violating primary obligations under the ECHR that raise related considerations (notably return to a risk of ill-treatment in the sense of Article 3 ECHR), this Court has held that where a ‘situation was well known and easy to verify on the basis of multiple sources’, that fact was capable of supporting a finding that the State authorities in question ‘knew or should have known’ of a risk of ill-treatment upon return, and so exposed the applicants to that risk ‘in full knowledge of the facts’.<sup>81</sup>

5.6. On the second criterion (link between aid and commission of the internationally wrongful act by the assisted State), the ILC clarifies that ‘a State is not responsible for aid or assistance under Article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct’ and that ‘[t]here is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.’<sup>82</sup>

5.7. The ILC has suggested that ‘a State may incur responsibility [in connection with aid or assistance to another State] if it [...] provides material aid to a State that uses the aid to commit human rights violations.’<sup>83</sup> Relevant primary human rights obligations whose breach by an assisted State may, if the relevant conditions referred to above are met, entail the ‘secondary’ responsibility of an assisting State under Article 16 ASR could include, notably, the prohibitions of torture, slavery and arbitrary detention;<sup>84</sup> *non-refoulement* obligations;<sup>85</sup> and the right to leave under Article 12(2) ICCPR.<sup>86</sup>

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<sup>78</sup> International Court of Justice, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)*, 26 February 2007, para. 420: <http://bit.ly/2qDzZNP>.

<sup>79</sup> ILC Commentary to Draft ASR, Article 16, note 77 above, p. 66, para. 3.

<sup>80</sup> See, for example, Second report on State responsibility, by Mr. James Crawford, Special Rapporteur, DOCUMENT A/CN.4/498 and Add.1–4, 17 March, 1 and 30 April, 19 July 1999, p. 50 at note 349: <http://bit.ly/2WMgijj>. See also Graefrath, *Complicity in the law of international responsibility*, p. 374: <http://bit.ly/2NkvwbU>.

<sup>81</sup> *Hirsi*, note 29 above, paras. 131, 137. See also ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, paras. 366-367: <https://www.refworld.org/cases/ECHR.4d39bc7f2.html>. On the question whether a State had information, or ought to have known about the appalling human rights and asylum situation in Libya, see also *UNHCR oral intervention at the European Court of Human Rights Hearing of the case Hirsi and Others v. Italy*, note 41 above, p. 4.

<sup>82</sup> ILC Commentary to Draft ASR, Article 16, note 77 above, para. 5.

<sup>83</sup> The ILC Commentary indicates that ‘[w]here the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.’ By way of example, an Article 16 ASR situation arises where a State aids or assists another State in violating international obligations, ‘for example, by knowingly providing an essential facility or financing the activity in question.’ See ILC Commentary to Draft ASR, Article 16, note 77 above, Article 16, p. 67, para. 9.

<sup>84</sup> See, in particular, Articles 7-9 ICCPR.

<sup>85</sup> Under Article 7 ICCPR, Article 2 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and as a norm of customary international law.

<sup>86</sup> Article 12(2) ICCPR states that ‘[e]veryone shall be free to leave any country, including his own.’ An identical provision is contained in Article 2 of Protocol No. 4 ECHR. See also UNHCR, *Submission by the Office of the United Nations High*

5.8. UNHCR submits that wherever a State provides material or other forms of aid or assistance to another State in circumstances where the assisting State has actual knowledge of risks that its assistance is likely to be used to facilitate serious human rights violations, or where it is otherwise on notice of such risks because their existence is well known and easy to verify on the basis of multiple sources, the assisting State should at minimum closely and systematically monitor and evaluate the human rights impacts of that assistance, and where necessary take appropriate steps to avoid, prevent, or mitigate those impacts. Compliance with international obligations, including the requirement to avoid knowingly assisting violations by another State of obligations binding upon both, may require suspending further aid or assistance where a State is unable to monitor and effectively mitigate the foreseeable and significant impacts of that assistance. The fact that a State has, or conversely has not, taken such mitigating measures may not itself be determinative, but may be one indicator as to whether the aid or assistance it provides is so provided ‘with a view to facilitating the commission of [internationally wrongful acts], and [has] actually [done] so’.

5.9. In the search-and-rescue context, any assistance provided to coastguard authorities or participation in coordination arrangements between States, in circumstances where it is foreseeable that these are likely to result in serious human rights violations, needs at minimum to be conditioned on clear and effective measures to mitigate that risk. Such assistance or arrangements need notably to include effective guarantees that rescued persons will not be arbitrarily detained or subject to ill-treatment or other serious human rights violations. Without clear evidence that such measures and guarantees are in place – particularly where significant risks or harms persist over time and are not adequately addressed – such assistance or arrangements may not be compatible with the implementation in good faith of international refugee and human rights law obligations.<sup>87</sup>

## 6. Conclusion

6.1. States participating in search and rescue operations at sea need to act consistently with the implementation in good faith of their obligations under international law. UNHCR emphasises that the principle of *non-refoulement* applies wherever a state exercises jurisdiction, including where it exercises effective control in the context of search and rescue operations outside its territory. Where a State’s coordination or involvement in a SAR operation, in view of all the relevant facts, is likely to determine the course of events, UNHCR’s view is that the concerned State’s negative and positive obligations under applicable international refugee and human rights law, including *non-refoulement*, are likely to be engaged. UNHCR further reiterates that at the time of the events in question, Libya was not and is currently not a place of safety for the disembarkation of persons rescued at sea. Any assistance provided to coastguard authorities or participation in coordination arrangements, in circumstances where it is foreseeable that these are likely to result in serious human rights violations, needs at minimum to be conditioned on clear and effective measures to mitigate that risk. Without clear evidence that such measures and guarantees are in place and effective, providing such assistance or participating in such arrangements may not be compatible with a good faith implementation of international refugee and human rights law.

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*Commissioner for Refugees in the case of Seraj Eddin v. Serbia* (Appl. No. 61365/16) before the European Court of Human Rights, 13 June 2018, paras. 3.7, 3.8 and the ECtHR cases of *Napijalo v. Croatia*, 66485/01, Application no. 66485/01, 13 November 2003, para. 68: <https://www.refworld.org/docid/402b56e34.html>; *Bartik v. Russia*, Application no. 55565/00, 21 December 2006, para. 36: <http://hudoc.echr.coe.int/eng?i=001-78792>; UN Human Rights Committee, *General Comment 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, para. 11: <https://www.refworld.org/docid/45139c394.html>, and Council of Europe: Commissioner for Human Rights, *The right to leave a country*, October 2013, p. 8: <http://bit.ly/2NHchYZ>.

<sup>87</sup> Further, in a joint statement with IOM, UNHCR underlined that ‘[a]ny assistance and responsibilities assigned to relevant Libyan entities should be made conditional on no one being arbitrarily detained after they have been rescued and guarantees of human rights standards being upheld. Without such guarantees, support should be halted.’ See UNHCR and IOM joint statement: International approach to refugees and migrants in Libya must change, 11 July 2019: <https://www.unhcr.org/news/press/2019/7/5d2765d04/unhcr-iom-joint-statement-international-approach-refugees-migrants-libya.html>.