Search and Rescue as Politics of International Law:
Assessing Italy’s Obligations towards Migrants in Distress at Sea

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Abstract
This thesis examines the extent to which Italy can instrumentalize international law to eschew protection responsibilities for migrants in distress at sea. In doing so, this study delimits itself by focusing on three legal cases: *Aquarius*, *Hirsi Jamaa*, and *GLAN*. These cases are analyzed against relevant international legal doctrine by means of Martti Koskenniemi’s deconstructive method, in order to explicate the political maneuvering embedded in the international legal framework. By adopting B.S. Chimni’s theory on the non-entrée regime, this thesis finds that Italy exploits the legal ambiguity in international law, in order to distance themselves from rescue and protection obligations. Conclusively, instead of creating a legal framework that is responsive to the protection needs of boat migrants, international law simultaneously enables Italy to barter off responsibility for refugees in distress at sea. Thus, this thesis contributes with a critical perspective to international law related to migrants in distress at sea.

**Keywords:** extraterritorialization, TWAIL, migration control, refugee law, search and rescue
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1. Introduction

1.1 Research problem

The central Mediterranean route is known to be the most active, yet most deadly route for migrants trying to reach Europe by sea. Despite a decrease in arrivals since the "refugee crisis" in 2015, the recorded numbers of migrant fatalities on the central Mediterranean route remains high (UNHCR, Mediterranean Situation). In 2018 1,314 migrant deaths were recorded - accounting for approximately sixty percent of overall migrant fatalities in the Mediterranean (Missing Migrants Project, Deaths by route). By late December, the percentage for 2019 surpassed the data from the year prior (Ibid).

From the perspective of Italy, the boat migrant has become the embodiment of the inability to protect and control access to its sovereign territory. Therefore, Italy has introduced policies closing its ports for NGO boats to disembark rescued migrants, while its maritime border controls have been expanded to the high seas (Gammeltoft-Hansen, 2013: 120). Moreover, Libya has been conscripted to grant access to their territorial waters, and through bilateral agreements, the Libyan authority is now effecting migration control on behalf of Italy (Memorandum of Understanding, 2017).

However, as the externalization policies involving maritime interception and international cooperation to prevent migrant arrivals flourish, the maritime tradition to rescue people in distress is often ignored. Fearing that asylum-processing obligations will follow from rescue missions; Italy and its neighboring Mediterranean states repeatedly lock horns over-restrictive obligations vis-à-vis migrants lost at sea. Here, the territorial delineations of the high seas, territorial waters, or territorial waters of third-states, become platforms in which Italy can claim or disclaim sovereign freedoms or responsibilities to eschew responsibility for saving lives at sea. For instance, several claims have been made that Italy is deliberately dumping rescued boat migrants in foreign territorial waters or search and rescue regions to barter off responsibility for potential asylum applications (CEAR, 2007; CIR, 2007).

The politico-legal complexity at sea has led some scholars to describe the protection of migrant lives on the central Mediterranean route as the "Wild West" (Lutterbeck, 2009: 131). However, despite a complex net of overlapping legal regimes, the high seas are not devoid of regulation. The law of the sea, international human rights law, and international refugee law together provide a normative framework for Italy's navigation in migration control and search and rescue in the Mediterranean (Aalberts & Gammeltoft-Hansen, 2018: 207).

Consequently, intercepted at sea, the boat migrant become embedded into a complex international legal field, where multiple bases for jurisdiction and interlocking legal regimes are at
play in the context of rescue at sea and international human rights law(Gammeltoft-Hansen, 2013: 120). This dynamic opens for a particular interaction between international law and politics; where Italy can enforce its non-entrée regime through the legal ambiguity in international law, and Libya can capitalize on policy agreements and legal developments to address Italy's political imperative of managing irregular migration. However, from the perspective of the boat migrant, the political imperative of managing irregular migration at sea often overwrites humanitarian principles of protection. Conclusively, the objective of this thesis is to explicate the extent to which international law on the high seas has, instead of ensuring the protection of boat migrants, simultaneously creates loopholes that enable Italy to barter off sovereignty at the expense of migrants in distress at sea.

1.2 Aim and research question

Under international law, the tradition to assist people in distress at sea, is increasingly becoming marred by political stand-offs between Italy and its neighboring states, as they are facing a growing number of capsizing migrants, potentially claiming asylum once disembarked. Moreover, the externalization and outsourcing of migration control have increasingly become an attractive strategy for Italy. The externalization of the high seas opens up a possibility for political maneuvering, as the legal geography of the high seas is less defined and subject to less oversight than on sovereign territory(Gammeltoft-Hansen, 2013: 11).

Italy stands out as an apt case, given that their non-entrée regime is heavily enforced through the closure of ports for migrant disembarkation(Flint, 2018), and developed co-operation with Libyan Authorities on maritime migrant interception and rescue missions(Memorandum of Understanding, 2017). The Italian case should be seen as a small fraction of the broader European tendency, which increasingly closes access to protection in Europe through co-operation with countries of transit and origin(Gammeltoft-Hansen, 2013: x). However, the findings of this thesis do not account for how other European countries can instrumentalize international law to protect the European non-entrée regime.

Particular focus is given to identifying the politico-legal strategies though which international law might be enabling legal loopholes by reference to traditional norms of sovereignty and the law of the sea. As the broad array of politico-legal strategies used by states to instrumentalize international law to eschew responsibility are too far reaching for the present thesis, it delimits itself, by aiming to identify three strategies outlined by Aalberts & Gammeltoft-Hansen; interpretative framing, regime shopping, and marketization and jurisdiction shopping(2018: 189). With these strategies in mind, this thesis will explore:
To what extent can international law enable Italy to barter off responsibility for refugee protection at sea?

Some hold the view that "protection gaps" in international law can be overcome by developing and implementing more regulation (Hart, 1970: 253). However, doctrine becomes irrelevant if it cannot respond to the practice of states. Doctrines are overwritten every day by political practices, informal agreements, and understandings. If not overwritten, this seems to be more a matter of compliance being politically useful than a result of "legal" character (Koskenniemi, 2007: 3). Others claim that state practices of eschewing responsibility for saving lives at sea, has to be understood as exceptions to the function of international law; as something taking place “beyond the rule of law, or in a "legal black hole" (Henkin, 1979: 47). Nevertheless, such dismissals fail to grasp how these practices are in fact enabled by international law (Johns, 2005: 613-635).

Both aspects of the debate above refers to the definition of the purpose of international law. In this debate, we are given the universal purpose behind human rights, one the one hand, and the codification of human rights law, as part of an international law built on sovereignty on the other. The positivist tradition perceives the protection of the sovereign as the central purpose of international law (Anghie, 2007: 43), whereas scholars from the Third World Approach to International Law (TWAIL) argue that international law ought to be responsive to the needs of marginalized peoples (Anghie, 2007: 8).

Informed by the latter of these traditions and drawing on B.S Chimni’s theory of the non-entrée regime, the present thesis argues that international law possesses the possibility for political maneuvering to barter off responsibility for saving migrants lives. Utilizing Koskenniemi’s method of deconstruction (2007: 7), it aims to visualize the extent to which international law allows Italy to eschew responsibility for refugee protection at sea and simultaneously pursue sovereign state-interests, which is simply; the protection of sovereign territory through the expansion of the non-entrée regime (Chimni, 1998: 351).

1.3 Structure

In the empirical analysis, Chapter 4.1, the law and politics of saving lives at sea, will outline the international legal framework related to the migrant in distress at sea, as it provides an essential starting point for further analysis. The law of the sea, international human rights and international refugee law will be discussed with reference to the current problematization.
The following three chapters sets out to analyze the extent to which international law can be instrumentalized by Italy to barter off responsibility for migrants in distress, through three legal cases and corresponding legal doctrine. Firstly, chapter 4.2, interpretative framing, will analyze the Aquarius case, to understand if Italy can use interpretative framing regarding the definition of “distress” and “disembarkation obligations” under international maritime law, to eschew responsibility. Secondly, chapter 4.3, regime shopping, will analyze the Hirsi case, to understand the extent to which the overlapping legal regimes at sea allow Italy to resolve legal conflicts, in the most favorable juridical venue. Lastly, chapter 4.4, marketization and jurisdiction shopping, will analyze the ongoing GLAN case, concerning the possibility of Italy to outsource unwanted sovereign functions, such as migration control and search and rescue operations, to Libyan authorities to avoid liability. Moreover, it aims to shed light on the economic aspect of Italian-Libyan co-operation on boat migration.

Lastly, Chapter 4.5 will reflect on the findings of the analysis and make concluding remarks.

2. Literature review

This literature review aims to outline the existing literature on boat migration from a holistic perspective by highlighting three aspects crucial to this issue. The first theme considers the "globalization of migration control" as a political phenomenon. The second theme is concerned with the "legal complexity" between migration control and search and rescue, as this is central in understanding the protection challenges faced by boat migrants. The final theme, “international law and politics”, demonstrates the ongoing the scholarly debate between TWAIL and positivism, and outlines the consequences that positivist scholarship has had on international refugee law scholarship.

2.2 The globalization of migration control

Much scholarship rooted in the critical and post-colonial tradition has emphasized geo-political changes as drivers for the globalization of migration control. Some have identified how, in the Cold War context, the asylum seeker served an ideological purpose (Castles & Miller 2014: 105). Moreover, other scholars have explored how the fall of the Iron curtain marked a paradigm shift from non-exit regimes in the east to non-entrée regimes in the West (Loescher 1992; Hathaway 1992).

The non-entrée regime, as a concept, has been explored by many scholars. Zolberg has emphasized how the non-entrée regime creates a discourse that the migrant from the Global South is here for "no good reason" (1989). In contrast, Chimni has explored how the non-entrée regime
became a natural response to new migration flows from the Global South in the 1980s, as the refugee was no longer welcome in the Global North (1998). Moreover, some points to the Western history of international refugee law, explaining how the globalization of migration control becomes a venue to pursue self-interest at the expense of refugee protection (Chimni, 1998; Hathaway and Gammeltoft-Hansen, 2015).

Other scholars have equally begun to explore the involvement of third-state or private actors in migration control, as part of a trend to outsource sovereign tasks hitherto carried out by the state. Some have pointed to the economic perspective of outsourcing, as private migration control has been argued to be cost-saving, creating competition among several bidding contractors (Scholten & Minderhoud, 2008). Moreover, outsourcing and privatization of migration control have been argued to be fashionable because it opens a potential for states to release themselves - de facto and de jure - from some of the legal constraints otherwise imposed by international law (Gammeltoft-Hansen, 2013: 8).

2.3 Overlapping and inter-locking legal regimes

A common trend emerges from the below-described scholarship, which is its interdisciplinary approach to international law, aiming to reconcile State powers with their international commitments. Firstly, Coppens focuses on interdiction, taking the law of the sea as a starting point (2017). Secondly, Komp has explored the duty to rescue and relation to human rights (2017). Thirdly, Giuffre’s contribution maps out the positive obligations of the principle of non-refoulment, appraising it against the requirements of access to asylum (2017). Lastly, Gammeltoft-Hansen considers the complexity of the legal regimes altogether, exploring how its ambiguity allows states to claim or disclaim responsibility in self-interest (2013).

Firstly, Coppens engages with the legality of migrant interception at sea (2017). By discussing international law related to the interception of boat migrants, she identifies possible gaps within existing regulation. Analyzing how the law of the sea must be supported by human rights and refugee law to provide a comprehensive picture of State powers and their limits, Coppens argues that states should adopt a humanitarian approach to rescue at sea and emphasizes that conducting migrant interception at sea does not justify an area outside the law. However, she acknowledges that States try to avoid their obligations by ‘cherry picking’ only some of the rules applicable (ibid).

Further, Komp explores the interlink between the maritime tradition and interdiction (2017). More precisely, he focuses on the connection between interdiction policies and search and rescue,
identifying that the maritime tradition of aiding people in distress often stands in the way of migration control (ibid). Having the duty to aid people in distress at his forefront, he identifies the lack of definition of the term "distress,"; arguing that an inclusive interpretation must be adopted to comply with the principle of "good faith." Conclusively he argues that once the duty to assist arises, it continues until successful disembarkation in a place of safety has occurred (Ibid).

Equally, the right to asylum for refugees intercepted at sea is explored by Giuffré (2017). She highlights the lacking disembarkation obligations, as disembarkation is required to gain access to adequate procedures, because of the territoriality principle in human rights and refugee law. She claims that principle of non-refoulment must be understood as a positive obligation by granting refugees access to sovereign territory, in order to enable access to asylum claims and effective asylum procedures. Moreover she establishes that preventing such procedures can be equivalent to refoulment (Ibid).

Lastly, Gammeltoft-Hansen ads to the difference between law and state-practice at sea (2013). He argues that the tension between interception and search and rescue often makes questions of refugee protection and access to asylum a secondary consideration (2013). He identifies how states can shift protection burdens away from the acting state and responsibilities assigned according to territorial or zonal divisions as agreed among the states in the region, by referring solely to the search and rescue regime (ibid).

Drawing primarily on interdisciplinary contributions to the field is deliberate, as this thesis works from a holistic perspective. However, existing scholarship has predominantly been examining the phenomenon from a single disciplinary perspective (Mares, 2002; Pugh, 2000). Within the legal discipline, the question of whether international protection obligations extend protection to non-citizens at sea has primarily been dealt with from the law of the sea (Guilfoyle, 2009; Klein, 2012; Papastavridis, 2013). International refugee law, through the question of non-refoulment and access to asylum (Pugh, 2004); and international human rights law, through discussions on extraterritorial applicability, have joined the debate recently (Ryan & Mitsilegas, 2010). However, none of these works engages at once with the relevant frameworks from an integrated perspective. This thesis thus seeks to make a distinct interdisciplinary contribution, by drawing on a board aspect of the ongoing dialogue in the literature, as a contribution to the bridge the gap in scholarship on the topic.
2.3 International law and politics

It is hoped that the above literature review provides an understanding of how scholarship has dealt with the phenomenon of boat migration and the protection challenges under international law. This part will now focus on the scholarly debate within refugee law between positivist voices and TWAIL, to understand the potential of why scholarship must move beyond the positivist tradition to be responsive to the needs of boat migrants.

Firstly, refugee scholars of the positivist tradition have established that international law ought to limit the possibility of engagement with politics (Grahl-Madsen, 1996; Goodwin-Gill, 2007). Characteristics of this tradition are the understanding that international law is a system of rules that can be identified, objectively interpreted, and enforced. Hart analyzes how both politics and questions of morality have no place within the law (1970: 253). Moreover, due to its separation of law and politics, Chimni has explored how positivism has resulted in a depoliticization of international refugee law. Firstly, because of the dominance of positivism in international legal scholarship, and secondly, because the positivist tradition was ideally suited for Cold War politics (1998: 353).

On the contrary, since the 1980s, critical scholars have criticized the central role of positivism within the discipline. The critique came from two different directions. Firstly, Alejnikoff criticized international refugee law (and scholarship) for its distance from the lived experiences of refugees. He argued that refugee voices and interpretations should be an integral part of the international refugee law (1992: 134-138). Moreover, Coles explored how positivists upheld principles out of tune with reality (1988: 212), whereas Adelman's argued that it “lost its relevance and utility” (1995: 148). Adelman rightly explored the need to overcome the restraints by positivist scholarship, to be able to write forth the politics embedded in international law:

… legal theorists and practitioners, need to escape the clutches of a Kantian propensity to insist on assessing the developments in the legal regime provided to protect refugees from categorical imperatives indifferent to the historical circumstances, and the moral and ethical tensions that permeate the refugee issue, and the historical and empirical conditions in which the problem is mired (Adelman, 1995: 152).

Thus, TWAIL scholars has explored how the deconstruction of positivist dominance of refugee law is essential, as it has severe theoretical and practical consequences for refugee protection. Coles has explored how the dominance of the positivist tradition has led to a process of “intellectual fragmentation”, because considerations of refugee problems became increasingly detached from issues of human rights and justice (1988: 212). Drawing on Cole's research on intellectual
fragmentation, Chimni has argues how, by refusing to engage with questions of politics and morality in international law, positivist scholarship has disarmed itself when it comes to the non-entrée regime (1998: 354-355).

Along this vein, critical scholarship has explored why scholars need to adopt a new approach to refugee law research, that distance itself from the positivist tradition. Koskenniemi has pointed out how positivist scholarship is limited in the challenges it makes to the interpretation of power in international law (2007). Building from this reasoning, Chimni argues that the new approach must reject the positivist reasoning, as positivism cannot respond to the tension between sovereign states right to control its borders and the rights and needs of migrants whose life is at risk (1998: 369). Moreover, he argues that the new approach must be vested in principles of solidarity and embrace a conception of legal scholarship that has the potential of articulating a comprehensive and humane response to the contemporary refugee problem (ibid).

3. Theoretical and methodological framework

3.1 Third World Approach to International Law (TWAIL) theory

As Okafor argues, despite being internally diverse in their approaches and conclusions, the unifying core of TWAIL theory can be understood as:

TWAIL scholars (or "TWAILers") are solidly united by a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the intellectual legal system that help create or maintain the generally unequal, unfair, or unjust global order… a commitment to centre the rest rather then merely the west, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case (2005: 176-177).

Within the TWAIL scholarship, one major scholar stands out concerning his work on exposing the western bias in international (refugee) law. The article by B.S Chimni, *The Geopolitics of Refugee Studies: A View From the South* (Chimni, 1998), attempts to unravel the political imperatives embedded in international law related to refugee protection. Chimni argues that Western domination of international law has given rise to situations where international law is both inadequate in protecting the human rights of migrants from the Global South; but also allows for inconsistency and ambiguities in legal interpretations and practice of protection obligations (1998: 350).

Therefore, TWAIL's determination to explicate the power and politics embedded in international law has determined the choice of theory. Aiming to expose the unjust dynamics of
international law, Chimni's scholarship has two main potentials for this thesis. Firstly, to expose the Italy’s instrumentalization of politico-legal strategies related to migrants in distress at sea, and secondly, the ability to bridge the gap between law and politics in international refugee scholarship, that has been inadequately developed due to positivist dominance (see literature review).

The non-entrée regime and international law

A central concept for Chimnis TWAIL theory is the European “non-entrée” regime, which is defined as "barriers to the mobility of oppressed human beings” (1998: 359). According to Chimni, the non-entrée regime must be understood as a response to the growing migration flows from the Global South to the Global North since the 1980s (1998: 357). Since receiving refugees fleeing Nazi and communist regimes during the Cold War entailed ideological value, international refugee protection was at that time in the interest of European states. However, that picture changed with the new refugee flows of the 1980s, where the rights ensured by the 1951 Convention increasingly hindered European states' protection of sovereign territory. Thereby the non-entrée regime became a natural response to prevent access to European territory, as refugees were considered no longer welcome in the North (Chimni, 1998: 357).

However, as international human rights and refugee law bind European states in their sovereign territory, the non-entrée measures are increasingly “offshored” to the high seas, or territorial waters of a third-state, in order to avoid or shift legal liability (Gammeltoft-Hansen, 2013: 32). The legal geography of the sea allows states a crucial “wiggle room” where they can eschew protection responsibilities (ibid, ix). Moreover, it allows the Global North to exploit the legal ambiguity to distance themselves from the boat migrant and discharge responsibilities selectively, following their state-interests (Chimni, 1998: 354). The international legal framework at sea thus opens for a potential for political maneuvering in international law, where protection of the non-entrée regime can outweigh the legal, ethical, and moral commitments to saving lives. Selective enforcement of international obligations related to the boat migrant must be understood as a terrain traversed by discourses of power; as the site where contesting ideas about appropriate protection regimes for the boat migrant locks horns, and reproduce the structural inequalities in the international system (Chimni, 1998: 354).

Lastly, Chimni argues that we must understand the non-entrée regime as an imperial practice (1998: 359). Imperialism here has to be understood as indicating the totalitarian relationship between states from the Global North and the boat migrant, where exploitation and domination are sustained (Patnaik, 1997: 183). As international law has developed to impose jurisdiction for certain
human rights and refugee rights obligations outside a state's sovereign territory, active avoidance now requires another state to claim sovereignty for migration control or refugee protection (Gammeltoft-Hansen, 2013: x). Hence, a potential of an “outsourced” corporate market for migration control is created to keep migrants within the territorial waters of third-states and, thus, their jurisdiction (Chimni, 1998: 359). This way, third-world-countries, often with poor human rights records, can offer the most competitive deflection option, which results in the protection and rescue options being potentially compromised (Gammeltoft-Hansen, 2013: x).

Returning to the debate between positivist and TWAIL scholarship, Chimni argues that it is first when the scholarship can explicate the above power relations embedded in international law, that it can respond to the non-entrée regime (1998: 355). As Chimni’s theory works to expose western domination in international law, it is hoped that this theory can contribute to identifying and challenging the extent to which Italy can instrumentalize international law to eschew the legal, ethical, and moral commitments to saving lives in the Mediterranean.

### 3.2 Methodological considerations

**Choice of method**

The theoretical framework described above suggests that, in order to identify the instrumentalization of international law, research should be able to explicate the relationship between international law and politics (Chimni, 1998: 335). To operationalize the selected aims presented in the previous chapter, Martti Koskenniemi’s “deconstructive” approach to legal analysis (2007: 7) will be applied as method, to interpret the empirical material. In this context, the present thesis should be seen as an attempt to deconstruct the division between legal doctrine and state-practice, in order to explore the political landscape in which they relate. Rooted in the French Philosopher Jaques Derrida’s idea about the elusiveness of meaning, the deconstructionist method strongly separates from positivist legal scholars, as it allows an interpretation that moves beyond the idea of “neutral” international law (ibid).

By deconstructing the relation between doctrine and caselaw related to the migrant in distress at sea, I am hoping to identify the possible strategies in international law that can be used by Italy to rid themselves of liability.

Conclusively, in order to explicate the political strategies of international law, Koskenniemi’s deconstructive method is holistic in the sense that it allows interpretation to go beyond specific doctrines or case law of document analysis (ibid). Attempting to measure the research question, *to*
what extent the legal regimes have enabled Italy to barter off responsibility for refugee protection at sea, the interplay between TWAIL theory and deconstruction method thus serves as a heuristic tool for understanding this particular dynamic (Aalberts & Gammetoft-Hansen, 2018: 28).

In more practical terms, introducing a methodology aiming to visualize the political dynamics of international law, the deconstruction method presents a significant advantage for the TWAIL argument. It provides an operationalization of the "practical struggle to expose, reform, or even retrench those features of the intellectual legal system that help create or maintain the generally unequal, unfair or unjust global order" (Okafor, 2005: 176-177), which describes the unifying core of TWAIL scholarship. In order to systematize his steps of analysis, Koskenniemi identifies three steps crucial to follow in the interpretation of legal documents (2007: 7):

1. Close reading of the law
2. Identify possible gaps/ divergence of state practice
3. Identify what we can assume from the findings

The first step locates the surface appearance of the relevant legal doctrine, by outlining the legal freedoms and obligations as stated in the document (Koskenniemi, 2007: 7). The second step identifies the political and social context in which the doctrine is given meaning (Ibid). In this context, relevant caselaw will be utilized in order to identify divergent state-practice. The third step allows for a critical deconstruction of the essential politico-legal strategies and how they relate to the theoretical perspective (ibid). In sum, Koskenniemi argues, that doctrine and legal frameworks must be understood as a façade that refers to the underlying political assumptions in international law, which can be explicated by deconstructing its meaning (ibid).

All three steps are thus crucial in order to measure extent to which international law can be instrumentalized by Italy to pursue self-interest. Therefore, each chapter will follow the three strategies to guide the analysis.

Law as politics

Having the above arguments as a steppingstone, Critical Legal Scholarship (CLS) spearheaded by Koskenniemi and David Kennedy in the 1980s, argues that it would be a case of doctrinal irrelevance to work with international law in abstraction from theories about politics (Koskenniemi, 2007: 1). As highlighted by Judge Alvares in the 1949 Corfu Channel Case (the United Kingdom v. Albania):
… pure law does not exist: law is the result of social life and evolves with it; in other words, it is, to a large extend, the effect of politics - especially of a collective kind - as practiced by States. We must therefore beware of considering law and politics as mutually antagonistic (IV).

Judge Alvares essentially points to the need to move beyond the conceptualization of law and politics as mutually exclusive and instead appreciate how international law and politics regularly inform and transform each other (Aalberts & Gammetoft-Hansen 2018: 28).

As shown in the literature review, positivist scholarly dominance has resulted in an “intellectual fragmentation” regarding migrant and refugee protection, as the refugee problem has become detached from questions of human rights and justice (Coles, 1988: 212). In order to overcome the intellectual fragmentation, Koskenniemi’s work within CLS, has informed the methodology of this thesis. CLS encourages an interdisciplinary approach to international law, attempting to unravel the contradictions of international legal discourse, by offering a critical view of international law’s universal aspirations and its confrontations with state sovereignty (Slaughter, 1999: 294). Building on this tradition, one of the principal theses of Koskenniemi’s book From Apology to Utopia, is that it is neither useful nor possible to work with international law in abstraction from theories about the social life of states and normative views about principles of justice that should govern international conduct (Koskenniemi, 2007:1).

However, due to scholarly positivist dominance, discussions on the politics of international law has become a marginalized occupation. Scholars have, to a certain extent, acknowledged the law’s instrumental role of fulfilling the normative ideals of "world order." However, they have had difficulties measuring political maneuverability in international law. Consequently, reflections on the "political foundations" of international law have been undertaken in the introductory sections, but have had only marginal, if any, challenge to unjust state-practice (Ibid: 1). Thus, CLS enables an understanding of the dynamics that if doctrines are not overwrittten, this seems to be more a matter of compliance being politically useful than a result of “legal” character (Ibid:3), because it allows an analysis to go beyond the textual understanding of the law. Conclusively, as CLS aims to write forth how political practices can overwrite legal doctrine, it serves as a methodological attempt to overcome positivist restraints of doctrinal irrelevance.

Bias

The argument of the present thesis is based on the fundamental presumption that aiding boat migrants in distress is a humanitarian and moral imperative. The present starting point is, therefore, to an extent bias. The goal of qualitative research is not to be objective, but to make explicit the experiences or
beliefs that affect the way research is conducted. Therefore, as a researcher, I cannot position myself outside of the ‘knowledge-power’ nexus as I am not liberated from its discursive construction (Moses and Knutsen 2012, p. 184). I am not unaware of the contingencies and the politics of knowledge, and in how even attempting to engage with these questions might re-inscribe the dominant ideas about what constitutes knowledge, and whose knowledge is the real knowledge. My position is, nor never will be neutral, and I acknowledge my positionality and how this may affect the research (ibid.).

Moreover, applying TWAIL theory as a European, I must be sensible to my role as a researcher. Further, I must be sensible to the currently distorted international division of intellectual labor (Chimni, 1998: 369). Consequently, I do not view research about the boat migrant from the Global South as an empty field of knowledge to be filled by Western thinking. Having this as my starting point, I will attempt to contribute to the dialogue by articulating some of the structural flaws of international law related to migrants in distress at sea.

3.3 Methodological Choices and challenges

Sources of empirical material

Studying international law related to boat migrants presents a range of empirical challenges. As establishing extraterritorial jurisdiction, or secondary responsibility for outsourced violations under the law of the sea or international refugee law is still a developing area of law, finding empirical material has been challenging. Consequently, despite being one of the most pressing contemporary issues related to migration, relatively limited case law is available. Therefore, the analysis will draw primarily on available case law to analyze state-practice, but in instances of lacking available material, legal reviews from the European Journal of International law will be utilized. Moreover, all cases will be analyzed against relevant legal doctrine. The basis of this thesis will, therefore, be predominantly based on primary legal sources and will use selected examples of critical theoretical scholarship to underline and illuminate the arguments presented.

Providing a background for the relevant legal framework, Chapter 4.1 deals solely with the doctrinal sources relevant for the boat migrant in distress. Primary data is thus subtracted from doctrine related to the law of the sea, international human rights law, and international refugee law.

Secondly, chapter 4.2 will analyze the Aquarius case from 2012. As no primary source is available, because no case has been submitted, this chapter draws on two legal reviews in the European Journal of International Law (Fink, 2018; Papastavridis, 2018). Moreover, relevant doctrine related to Italy’s disembarkation responsibilities is interpreted as part of the analysis (primarily the
Search and Rescue Convention (SAR), Art. 1.3.13). Thirdly, chapter 4.3, analyzes case law from the 2012 landmark decision in the European Court of Human Rights (ECtHR), *Hirsi and Others v. Italy*. It further draws on relevant parts of the SAR Convention and the 1951 Convention. Moreover, chapter 4.4 deals with the ongoing *GLAN* case. As this case is currently being processed in the ECtHR, and caselaw is thus not yet available, empirical material is distracted from the case-applicants website, where detailed case information is presented (Glanlaw, 2018). Further, the 2007 Bilateral Agreement between Libya and Italy, and the 2017 Memorandum of Understanding (MoU) are applied in the analysis to identify the agreements facilitating jurisdiction shopping. However, as the bilateral agreements are only available in Italian and Arabic, relevant parts of the 2007 agreement are subtracted from the *Hirsi* case. Moreover, the 2017 MoU translation is provided by the Academic Network for Legal Studies on Immigration and Asylum in Europe (Memorandum of Understanding, 2018).

**Reliability and validity of data**

Within the critical legal research tradition, truth itself is never neutral (Koskenniemi, 2007: x). Thus, the principle of validity becomes somewhat subjective. However, Silverman writes that reliability in qualitative work require transparency “through describing our research strategy and data analysis […] [and] paying attention to ‘theoretical transparency’ by making explicit the theoretical stance from which the interpretation takes place and showing how this produces particular interpretations and excludes others” (2014, p. 84). Credibility in this thesis is thus obtained by making explicit the methodological and theoretical premises, methodological choices, and delimitations.

Moreover, qualitative studies are often criticized for not producing generalizable knowledge due to its focus on a limited number of sources, which arguably limits validity and reliability (Jorgensen & Philips, 2002, p. 120). However, analyzing three primary sources may be adequate, as engaging closely with those cases will allow a visualization of the politico-legal strategies available to Italy, whereas studying multiple cases would only enable a superficial detection of these strategies (ibid). Furthermore, document analysis allows for in-depth exploration of a limited number of sources, providing the researcher with a detailed understanding of the political patterns in international law, which might enhance validity (Moses & Knutsen 2012, p. 156). It could, however, be objected that existing caselaw regarding boat migrants in distress is scarce and may still be too limited to contribute to a solid foundation for a more systematic interpretation. As O’Boyle notes, "the law on jurisdiction is still at its infancy" (2004: 139).
Delimitation

Realizing the physical limits of this project, delimitation in time and space has been attempted. Thus, although the historical context of international law is an essential feature of TWAIL theory, the subsequent analysis in Chapter 4.1-4.5, takes as its historical starting point the 2012 Hirsi case, as an example of Italy’s externalization practices. Despite being more than ten years old, the Hirsi case is utilized due to its significant implications on Italy’s political maneuvers at sea. The Aquarius case is from 2018 (Fink, 2018), and the GLAN case is currently being processed (Glanlaw, 2018). However, both provide great potential for illustration of Italy’s politico-legal strategies to barter off responsibility for the boat migrant.

Delimitating the analysis in space has been more difficult, as it has been a deliberate political strategy to mask migrant interception and international co-operation in humanitarian terms as "search and rescue" (Aalberts & Gammeltoft-Hansen, 2018: 189). The first limitation is thematic in that it traces the link between Italy’s potential for political maneuvering and relevant international law related to the boat migrant. Secondly, the level of analysis is limited to international law rather than national or regional EU law. It further does not consider internal EU matters, such as economic funding or internal burden sharing. The last limitation is theoretical and follows from the critical framework developed in the previous sections of this chapter. This thesis does not aim to provide an exhaustive account of all the elements of Italy’s response to boat migration but will focus on the degree to which international law can be utilized for political maneuvering to eschew responsibility for the boat migrant in distress.

Concluding remarks

Having set out the theoretical and methodological premise adopted in addressing the research question, attention now shifts to the task at hand. The following four chapters start by first outlining the legal framework. The next three chapters then examine to what extent international law allows Italy to eschew responsibility for refugee protection at sea. By linking these chapters, it is hoped that the analysis may shed new light on how to ensure better protection for refugees at sea.
4. Empirical analysis

4.1 The law and politics of saving lives at sea

This chapter seeks to describe the legal framework relevant to migrants in distress at sea. Outlining the legal framework is pursued by a short overview of the sovereignty concept at sea, and how that relates to rights and obligations under both the law of the sea and international human rights law. In order to understand the current problematization of the issue, a few paragraphs will be devoted to the history of the two legal regimes, and as will be shown, how they were never intended to protect the boat migrant.

An important note on method; as this introductory chapter will provide a legal overview to guide the analysis of the following three chapters, it will not strictly follow Koskenniemi’s three steps of deconstruction(2007: 7). Whereas the following chapters will be concerned with caselaw to deconstruct the relation between doctrine and state-practice, this chapter will focus on doctrine and its relation to the relevant historical developments in international law, to illuminate the current problematization.

Legal overview

Contrary to the principle of sovereignty within the territory of a given state (Klabbers, 2017: 99), the high seas are known as an area of non-sovereignty. Developing the principle of the *Mare Liberum*, Hugo Grotius established that the high seas are governed by an inherent freedom, allowing all vessels the right of passage and exploitation, and cannot, therefore, be subject to any national jurisdiction(1916). Grotius's principle of freedom in the *Mare Liberum* is reflected in contemporary maritime law. The 1958 Convention of the High Seas states that the “high seas are open to all States, no State may validly purport to subject any part of it to its sovereignty”(Art. 2), and gives all states freedom of navigation and infrastructure(ibid). Whereas on land, jurisdiction is established by the notion that sovereignty and territory go hand in hand, on the high seas jurisdiction can, therefore, be harder to establish(Klabbers, 2017: 100). Consequently, the high seas must be thought of as an *international* sphere, including both the freedom to exercise sovereign power, but as a result also pose a potential for conflict in the absence of explicit dilations between completing claims(Aalberts & Gammeltoft-Hansen, 2018: 190).

However, despite the inherent freedom dominating the high seas, it is not a space devoid of regulation. The 1979 Search and Rescue Convention(SAR Convention) invokes an obligation for states to develop an adequate SAR service(Art.1). In contrast, the 1971 Convention for Safety of Life
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at Sea(SOLAS) established an obligation to assist vessels in distress(Art.1). In this context, international law provides various overlapping concepts attempting to establish jurisdiction for people in distress; territorial waters, and the contiguous zone\(^1\), flag state jurisdiction\(^2\), nearest port of safety\(^3\), next port of call\(^4\), and the division of the oceans into regional search and reduce zones\(^5\).

Contrary to the Law of the Sea, international human rights and refugee law are still based on territorial proximity, and human rights treaties thus provide protection, in the words of Art.1 of the ECHR "to everyone within their jurisdiction." The human rights regime succeeded in introducing a set of norms to international law, which not only is concerned with the horizontal relation between states but also a vertical relation between the state and the individual(Gibney & Skogly, 2002: 782).

However, both the law and the sea and international human rights law impose obligations outside sovereign territorial waters. Grotius highlighted that correlate to the sovereign freedom afforded in the *Mare Liberum*, is an obligation to obey by the law of hospitality(1916: 1). The positive obligation to assist migrants at sea and to ensure disembarkation of the rescued to a place of safety is universal obligations of international law, as well as codified in the search and rescue regime(UNCLOS; SOLAS; SAR). Central to the principle of hospitality is Art. 98(1) of UNCLOS, which requires a state to ensure that a captain flying its flag to "render assistance to any person found at sea in danger of being lost" and to "proceed with all possible speed to the rescue of persons in distress." Beyond the responsibility for states to ensure that vessels flying its flag sets out to rescue anyone in distress, coastal states further have a positive duty to ensure a sufficient and adequate search and rescue regime(UNCLOS, Art. 98(2). This obligation has led to a division of the world's oceans into thirteen national search and rescue zones, to ensure the efficiency of responses to distress calls(SOLAS, as amended).

Simultaneously, the cornerstone of international refugee law, the principle of *non-refoulment*, obliges a state not to return a person with a well-founded fear of persecution(1951 Convention, Art

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\(^1\) UNCLOS, Art.3 establishes that a state's territorial waters are considered sovereign territory. Moreover, it defines that territorial waters extend twelve miles from the coastline(UNCLOS, Art. 3). Art 24. of the Convention on the Territorial Sea and the Contiguous Zone defines the sovereign right to prevent, for example, immigration within its territorial waters and contiguous zone.

\(^2\) The Convention of the High Seas, Art. 6 establish that Flag-states are bound by international maritime law. However, flag state responsibility differs for commercial or governmental vessels. Whenever governmental vessels engage in rescue operations in territorial waters and the high seas, the responsibility of those rescued devolves on that state(UNHCR, 2002, Art. 9).

\(^3\) SAR Annex, §1.3.13, defines that a rescued person must be delivered to a place of safety. However, central terms such as "distress" or responsibility for disembarkation is not defined.

\(^4\) The term "next port of call" is not stated anywhere in the doctrine concerning rescue-at-sea, but is used in this context by UNHCR's Executive Committee in several Conclusions on the subject, to ensure prompt disembarkation(UNHCR, 2002, Art.12).

\(^5\) SAR Convention(Res. MSC.70(69) Capt.2), divided the world's oceans into 13 search and rescue areas.
33(1). Previously, the *non-refoulment* principle has been interpreted only to apply to the sovereign territory(*Sale*). However, nowadays, international human rights and refugee law have come to understand *non-refoulment* as one of the few rights applying anywhere a state exercises jurisdiction(*Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations* (AO), Art.9).

**Historical overview**

Regarding international maritime law, the issue of rescue and disembarkation, and return to the country of origin, was historically considered a relatively uncontroversial areas of law mainly related to sailors(*Aalberts & Gammeltoft-Hansen, 2018: 192*). As such, the obligations imposed by international law regarding boat migrants were then reconcilable with the perceived self-interest of states. Similarly, under international refugee law, refugees entailed ideological value during the Cold War. Thus access to asylum was perceived as in line with the interest of European States(*Chimni, 1998: 350*).

However, as new refugee flows to Europe emerged from the Global South in the 1980s, this picture changed(*Zolberg, 2001: 1-19*). *Chimni* argues that once the Cold War ended, refugees were no longer welcome in Europe; By posing practical barriers to the mobility of boat migrants, the non-entrée regime became instrumentalized(*1998: 359*). The growing number of boat migrants thus made European states concerned that asylum processing and protection obligations would follow from rescue missions. As a result, *Aalberts & Gammeltoft-Hansen* argue that the issue of disembarkation of those rescued became politicized. Consequently, international obligations related to rescue at sea became subject various interpretations and resulted in political stalemates between states all denying responsibility(*2018: 193*).

In this context, the *non-refoulment* principle and the duty to rescue have posed significant challenges to state prerogatives to control access to its borders. The drafting committee of the 1951 Refugee Convention established that that the *non-refoulment* clause creates an “exceptional limitation of the sovereign right of states to turn back aliens to the frontiers of their country of origin”(*E/AC.32/SR.20, Art.49*). The *non-refoulment* principle, thus, require border officials to ensure access to asylum application procedures, before applying generalized measures to block or return irregular migrants(*Aalberts & Gammeltoft-Hansen, 2018: 193*). Similarly, when conducting migrant interceptions at sea, search and rescue obligations often gets triggered, either because migrant vessels are unseaworthy, or because they capsize during the encounter(*ibid*).
Both the search and rescue regime and the international human rights regime have responded to the new politico-legal developments. The principle of *non-refoulment*, as well as other human rights norms, has increasingly come to be understood as applying in situations of extraterritorial migration control (Gammeltoft-Hansen, 2013: 95). Concurrently, the search and rescue regime has attempted to resolve the issue related to the division of responsibilities and disembarkation for rescued migrants (SAR & SOLOS amendments). However, evidenced by the growing death toll (Missing Migrants Project, Deaths by Route), and continuous political clashes on the issue (*Aquarius; Hirsi; GLAN*), the legal responses have not necessarily resulted in better protection of the boat migrants.

In sum, on the high seas, the precise divisions of sovereign rights and obligations related to boat migrants are harder to establish and open to more interpretation than on sovereign territory. Here Aalberts & Gammeltoft-Hansen claims a particular geopolitics emerges, “where the zonal divisions of a state’s search and rescue obligations and territorial logics in regard to asylum obligations, clash with the more functional divisions of authority and assertions of power pertaining migration control at sea” (2018: 194). As a result, the boat migrant intercepted at sea is caught in a complex international legal field where states migration control prerogatives threaten to undermine rights to rescue and protection.

**4.2 Interpretive framing**

This chapter sets out to investigate to what extent legal interpretation allows Italy to operate in international law per its self-interest (Aalberts & Gammeltoft-Hansen 2018: 14). Aalberts & Gammeltoft-Hansen claims that international law tends to be “open-textured,” and how international law is applied thus depends on the interpretation of general principles, custom, and state practice (2018:14). As the next two chapters, this chapter will follow Koskenniemi’s three deconstructive steps. Firstly, it carefully defines the doctrinal definition of what constitutes “distress” and disembarkation obligations under the SAR regime. Next, the relation to Italy’s actions in the *Aquarius* case is deconstructed in order to explicate potential legal gaps. Lastly, by applying Chimni’s theory, it aims to measure how the potential instrumentalization relates to Italy's non-entrée regime (1998).

**Summary of the Aquarius case**

On June 10, 2018, Italy refused *Aquarius*, a German NGO rescue vessel, access to its ports and disembarkation of 600 migrants (Papastavridis, 2018). *Aquarius* was aimed at Italy, as it was Italy whose Maritime Rescue Coordination Centre (MRCC) who coordinated the operations. Around 35
nautical miles off the Italian coast, Italian authorities ordered the Aquarius to stop (Fink, 2018). Malta's Prime Minister Joseph Muscat tweeted that Italy's instructions to the Aquarius, "manifestly goes against international rules"(Twitter, 2018). However, Muscat refused disembarkation of the Migrants in Malta, claiming that he was in full compliance with international law to do so(Fink, 2018). As both countries refused disembarkation, a political stand-off between Italy and Malta started, both arguing against its humanitarian commitments(Papastavridis, 2018).

“Distress”
As outlined in chapter 4.1, the Mare Liberum can be understood as a territory beyond the jurisdiction of any state. However, within Italy's territorial waters and contiguous zone, international law imposes both sovereign responsibilities and freedoms.

As Italy is bound by its human and refugee rights jurisdiction within its territorial waters and contiguous zone (UNCLOS, Art.3), Italy adopted in 2017 a policy denying NGO rescue boats access to ports. This policy became an effective way for Italy to prevent migrants and asylum seekers from entering its territory, and thus avoid human rights jurisdiction(Komp, 2017: 224). Because Italy has the freedom to enjoy exclusive sovereignty in their territorial waters(Papastavridis, 2018), Italy was, according to Lowe, in its full right to deny Aquarius to duck(1977). However, an exception to this right is established, if the situation onboard constitutes distress (Churhill & Lowe, 1999: 63).

In the SAR Convention, distress is defined as "a situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by a grave or imminent danger and requires immediate assistance”(Art.1.3.13). However, this vague definition of distress has led to varying interpretations in the context of migrants and asylum seekers in distress at sea. A narrow definition of distress would be beneficial for Italy, because if Aquarius was not in distress, Italy would not be under an obligation to allow disembarkation of the migrants(Churchill & Lowe, 1999: 63).

In the Aquarius case, the apparent ground on which, arguably, access should have been given was distress, as many migrants on board were reported to be in medical need (BBC News, 2018). However, as neither the SAR(1979) nor the SOLAS(1974) conventions provides a solid definition of what constitutes distress, both legal regimes failed to determine if Aquarius was indeed in distress, and thus obliged to let the ship duck(Aalberts & Gammeltoft-Hansen, 2018: 14).

Thus, Italy’s interpretation of distress in the Aquarius case was indeed narrow. By providing “immediate assistance” to the migrants in distress on board, as required by Art1.3.13 of the SAR Convention, Italy argued that the situation constituting distress had terminated, and thereby Italy was
no longer under an obligation to disembark the migrants (Papastavridis, 2018). Immediate assistance on board the Aquarius constituted, according to Fink, providing the necessities necessary for the migrants to reach Spain without their life or health being in danger (2018). The legality of such a maneuver is supported by the decision of the Irish High Court of Admirability in *ACT Shipping (OTE) Ltd v Minister of the Maritime* 48, which established that coastal states are not obliged to grant access to vessels if the life of the people on board is not at risk anymore (Ibid).

However, one of Chimni’s main critiques of international law is that the legal ambiguity makes international law inadequate at protecting the human rights of the refugees (1998: 350). Chimni’s critique seems to be a case in point regarding Italy’s interpretation of *distress* in the Aquarius case. By applying a narrow definition of *distress*, Italy could legally deny access provided that the necessary measures are taken vis-à-vis the persons on board terminating the situation of *distress*.

Yet, despite Italy’s actions during the Aquarius incident did not directly violate international law, the narrow interpretation of rescue responsibilities failed to interpret its obligation in "good faith," as established by Art.31(1) of the Vienna Convention on the Law of Treaties. According to the International Law Commission, the reference to good faith includes the principle of effectiveness, meaning that a treaty must be interpreted to have an appropriate effect (Vol. II 219, 1996). Moreover, the wording of the provisions in UNCLOS denotes that the central aim of the duty to assist is to prevent loss of human lives (Komp, 2017: 235).

From this perspective, Italy’s interpretation of *distress* in the Aquarius incident, arguably, did violate both the principle of good faith and effective interpretation. The effect of providing “immediate assistance” onboard Aquarius seems to be more a way to terminate responsibility for disembarkation than to provide a sustainable humanitarian response to *distress*. According to the International Law Commission, the *distress* clause should have let Italy to allow disembarkation of the Aquarius because:

> [w]hen a treaty is open to two interpretations, one of which does and the other does not enable the treaty to have the appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted (n55) 219).

**Disembarkation obligations**

Moreover, the SAR Convention is the principal Treaty governing search and rescue and aims to create an international system for coordinating rescue operations and ensuring their efficiency and
safety (SAR, Art.1). In 2004 the SAR Convention was amended as an attempt to specify responsibility divisions related to people rescued at sea (Res. MSC.1SS(78), §1.3.19 states:

… The Party responsible for the search and rescue region in which such assistance is rendered shall 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…

However, the only clarification the 2004 amendment brought was to define the state responsible for co-ordination and co-operation of the rescue operation but did not specify any obligation for a given state to allow disembarkation (Res. MSC.1SS(78), §3.1.9). Accordingly, Fink and Gombeer rightly assert that even if Italy was “the state responsible under the SAR Convention, it only follows that it would have to take the lead in finding a port of disembarkation, it would not, however, place Italy under an obligation to allow disembarkation on its own territory” (2018). As Aquarius docked in Spain after a week at sea, Italy did live up to its obligations to ensure disembarkation in a place of safety following the 2004 SAR amendments, but did not interpret the law to entail disembarkation responsibilities (Res. MSC.1SS(78), §3.1.9).

In response, Papastavridis criticized the 2004 SAR amendments for failing to not formally oblige the coastal state responsible for the Search and Rescue Region (SRR) to disembark rescued persons on its territory (2018). The International Maritime Organisation (IMO) claims, the amendments aimed to ensure disembarkation in a place of safety within a reasonable time (MSC Res 153(78)). Accordingly, as established by the 2004 amendment, the primary responsibility to provide a place of safety within reasonable time falls on the primary state responsible for the SRR; Italy, as they are coordinating rescue operations in Libyan SRR (Fink, 2018). Because Aquarius was on its way to Italy with the rescued migrations, Italy’s decision not to let the migrants disembark, arguably, disregards the IMO’s emphasis on disembarkation within a reasonable time. However, even though a humanitarian interpretation of the relevant provision of the SAR convention based on the principle of effective disembarkation would support a default obligation for Italy to disembark the migrants, the divergent practice, is not strictly illegal under international maritime law.

The external dimension

Moreover, a small reference on the external dimension of the 2004 SAR amendments deserves attention. The 2004 SAR amendments created a considerable narrowing of the interpretive scope towards establishing primary responsibility to ensure disembarkation with the state in charge of the
SAR region (§3.1.9). In this context, Aalberts & Gammeltoft-Hansen argues that externalizing migration control and search and rescue operations to North African territorial waters has become an attractive strategy for European states (2018: 196). While Italy's actions regarding disembarkation during the Aquarius incident implied that they adopted a rather narrow interpretation of rescue obligations to eschew responsibility for disembarkation, the 2004 SAR amendments have simultaneously created a potential for Italy to outsource rescue and disembarkation to Libya.

As the Law of the Sea, Art.3 establishes territorial waters as sovereign territory; the territoriality principle thus might trigger Libyan jurisdiction if migrants are intercepted or rescued in Libyan Territorial waters. The growing co-operation between Italy and Libya on migration management and rescue seems to confirm this tendency. The 2017 Memorandum of Understanding (MoU) between Libya and Italy serves as an apt case; The MoU establish that Italy is to train, equip and finance the Libyan coastguard in return for Libya conducting migration control and search and rescue on behalf of Italy (Memorandum of Understanding, Art. 1.B). This co-operation thus builds on the reasoning that Libya would be responsible for allowing disembarkation of rescued migrants within their search and rescue zone, and from then on, presumably take on any asylum claims or enforce returns to the country of origin (Aalberts & Gammeltoft-Hansen, 2018: 197). Aalberts & Gammeltoft-Hansen stresses that if such an interpretation of disembarkation responsibilities is accepted, the amended SAR regime will create a normative structure for jurisdiction shopping, which will be explored in detail in Chapter 4.4 (ibid).

Simultaneously, the narrowing of the interpretative scope following the 2004 SAR amendments seem to have been utilized by Italy to expand its co-operation on migration control and search and rescue with Libya. By using a broad interpretation of disembarkation and "distress," Italy can thus shift the primary obligation for search and rescue and following asylum application to Libya. As David Kennedy argued, it is precisely international laws' appearance of objectivity that makes it such a powerful tool for the pursuit and legitimation of political objectives (2010: 61-72).

4.2 Regime shopping

In chapter 4.1, interpretative framing established that Italy’s interpretation of relevant legal doctrine in the Aquarius case was used to enforce its non-entrée regime at the expense of the humanitarian concerns for the rescued boat migrant. Now focus shifts to regime shopping, which aims to explore the extent to which Italy can shift between legal regimes to eschew protection responsibilities for
migrants at sea. Aalberts & Gammeltoft-Hansen argues how regime shopping is premised on the co-existence of multiple, overlapping treaty regimes (2018: 13), which in the relevant case is the law of the sea and international human rights law. Regime shopping is built on the notion of “international regime complexity” (Alter & Meunier, 2009), stating that an issue can be dealt with via multiple regimes, and with different responsibilities towards different parties (Aalberts and Gammeltoft-Hansen, 2018: 13). Firstly, this chapter will outline the regime complexity between the law of the sea and international refugee law. Next it will deconstruct it in relation to Italy’s state practice in Hirsi, in order to explicate the political assumptions that might be embedded.

**Summary of the Hirsi case**

*Hirsi Jamaa and Others v. Italy* is a 2012 case in the European Court of Human Rights. It is concerned with 24 migrants who, after having departed from Libyan territorial waters in 2009, were intercepted by the Italian coastguard in a rescue mission in international waters (*Hirsi*, §9-10). Anticipated by the 2009 Bilateral Agreement between Italy and Libya, the migrants were returned to Tripoli (*Hirsi*, §19). None of the migrants were offered to apply for asylum by the Italian Authorities (*Hirsi*, §9-17).

"*International regime complexity.*"

The growing density of international regimes has added to an “international regime complexity” relating to the boat migrant (Alter & Meunier, 2009: 13). In this context, both the law of the sea and international refugee law create sovereign rights and sovereign obligations for Italy, related to the boat migrant in distress.

Hence, the application of the international refugee regime primarily triggers sovereignty as responsibility. If it can be established that a state does exercise jurisdiction at sea, they are thus bound by the principle of *non-refoulment*; not to return a person to the frontiers of territories where their lives or freedoms would be at risk (1951 Convention, Art33(1)). Moreover, this includes introducing screening measures onboard migrant interception vessels in order to ensure that Art.33(1) is not violated. However, the rest of international refugee law remains a reactive obligation in the sense that it presumes a qualified contact between the state and the asylum seeker. Conversely, refugees or asylum seekers not present at the territory of the asylum state, but under its jurisdiction, such as on the high seas, are only entitled to a limited set of rights centered around the *non-refoulment* obligation (Hathaway, 2005: 160).

Contrary, the law of the sea establishes certain sovereign freedoms. In contrast to the territorial focus of refugee law, the law of the sea is informed by a “functional logic” (Gavouneli, 2007). Given
this background, the law of the sea must be understood as protecting the right of the sovereign state to exercise migration control on the high seas and in the contiguous zone, because it acknowledges that certain prerogatives may be protected beyond the state's territorial jurisdiction (Convention on the Territorial Sea and the Contiguous Zone, Art. 24(1)).

**Hirsi**

Regime-shopping has to be understood as facilitating the possibility of using the law of the sea and the international refugee regime selectively, in order to gain the most beneficial outcome of a given case (Alter & Meunier, 2009: 13). Therefore, this politico-legal strategy establishes a potential pretext for political attempts to detach the bond between sovereignty as freedom and sovereignty as responsibility, leaving states free to assert sovereign prerogatives, such as migration control, without taking on the correlate duties that would follow from international and refugee law on its territory (Aalberts & Gammeltoft-Hansen, 2018: 198).

In the 2012 *Hirsi* case, regime shopping can be extensively explored through the Italian government's attempts to avoid triggering the 1951 Convention. Reflecting on extraterritorial jurisdiction, Art.9 of the *Advisory Opinion on the Extraterritorial Application of Non-Refoulement* (AO), establishes that the principle of non-refoulment applies wherever a state exercises jurisdiction. In this context, Italy would be bound by the 1951 Convention if it was established that they in fact had jurisdiction for the migrants in *Hirsi*. In its case assessment, the ECtHR confirms the findings in the AO, noting that jurisdiction is primarily territorial, but extraterritorial jurisdiction can be established “whenever the State through its agents, cooperating outside its territory exercises control and authority over an individual” (*Hirsi*, §71).

Consequently, disclaiming jurisdiction can become a strategy to avoid triggering jurisdiction under the 1951 Convention. In *Hirsi*, Italy, therefore, argued that even though the asylum applicants were brought on board an Italian Navy vessel, Italy had not exercised “absolute and exclusive control” (*Hirsi*, §64) and did therefore not trigger jurisdiction. They pointed to the fact that they were only bound the Law of the Sea, as migrants were intercepted in the context of a rescue operation, which is their obligation under UNCLOS (*Hirsi*, §65). Moreover, Italy argued that their obligation to save lives on the high seas under UNCLOS did not in itself create a link between the State and the state's jurisdiction (ibid).

Italy thus attempted to argue its way out of establishing jurisdiction under international refugee law, as returning the migrants to Libya would be in direct violation of the non-refoulment principle.
and access to asylum (Art 33.1). However, the ECtHR found that since the events took place on board an Italian navy vessel and conducted entirely by Italian authority, the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities (Hirsi, §81). The ECtHR thus established that Italy did exercise jurisdiction over the migrants (ibid), and violated the principle of non-refoulment under Art.3 of ECHR, by exposing them to the risk of ill-treatment in Libya (direct refoulment) and the risk of being repatriated to their countries of origin (indirect refoulment) (Hirsi, §84).

Moreover, the ECtHR rejected that Italy could displace its obligations under international refugee law, by reference to the legal ambiguity of the maritime environment. The ECtHR emphasized that despite the legal ambiguity, the high seas are not a place in which states are can rid themselves of human rights obligations:

"…The special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them the enjoyment of the rights and guarantees protected by the Convention…" Moreover, that "problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State’s obligations under the Convention" (Hirsi, §178-179).

In sum, in Hirsi, the ECtHR was clear in reiterating that pressures to manage migratory flows did not justify Italy to apply only the most beneficial legal regimes in this context. Despite the critical decision that the ECtHR did establish Italy’s jurisdiction under the 1951 Convention for violation of non-refoulment (Art.33(1), Italy’s attempts to eschew responsibility for refugee protection demonstrates its willingness to instrumentalize international law though regime shopping.

4.3 Marketization and jurisdiction shopping

The present chapter, contains two elements that Aalberts & Gammeltoft-Hansen argues are interlinked; marketization and jurisdiction shopping (2018: 11-12). Whereas regime shopping established that Italy attempted to prevent triggering its obligations under the international refugee regime, by solely referring to its obligations under the SAR regime, jurisdiction shopping can be seen to engage international co-operation to circumvent international obligations. Involving another state's authority, thus, can be used to bypass legal responsibility liability on behalf of the sponsoring state, to circumvent constraints otherwise posed by international law (Aalberts & Gammeltoft-Hansen, 2018: 12). The marketization aspect emerges because jurisdiction shopping is based on creating deals.

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6 Whenever a navy vessel engage in rescue operations, the responsibility of those rescued would devolve on the flag-states (UNHCR, 2002, Art. 9).
which "sell" sovereign functions to the highest bidder; a tendency which is termed the "commercialization of sovereignty" (Aalberts & Gammeltoft-Hansen, 2018: 203). This chapter starts out by identifying the relevant doctrine related to Italian-Libyan co-operation on interception and rescue. Next, it will be deconstructed against the state-practice identified in the GLAN case, to explicate the extend to which Italy can employ jurisdiction shopping to eschew liability.

**Summary of the GLAN case**

The GLAN case is an ongoing case, currently being processed in the ECtHR. It is concerned with the Libyan Authorities' interference with an attempt by the NGO vessel Sea-Watch 3 to rescue 130 migrants in distress in 2017 (Glanlaw, 2018). The Libyan vessel was donated by Italy, as part of the 2017 bilateral agreement, Memorandum of Understanding (MOU) (Ibid). Twenty migrants died in the incident, and survivors were "pulled back" to Libya, where they faced grave human rights violations; a condition created on Italy's behest due to the MoU (Ibid).

**Jurisdiction shopping and commercialization of sovereignty**

As the Hirsi judgment established that the attempted regime shopping violated Italy's obligations under the international refugee regime, attempts of jurisdiction shopping increasingly seems to be favored (Aalberts & Gammeltoft-Hansen, 2018: 201). In the aftermath after Hirsi, Italy was quick to negotiate a new bilateral agreement with Libya in 2017, the Memorandum of Understanding (MoU). Under the MoU, Italy is to train, equip, and finance the Libyan coastguard, in expense for Libya to conduct maritime control and rescue on behalf of Italy (MoU, 2017). In contrast to Italy’s actions in the Hirsi case, under the MoU migration control and search and rescue functions are entirely outsourced to Libyan Authorities within Libyan territorial waters (Aalberts & Gammeltoft-Hansen, 2018, 200). The MoU thus establishes a pretext for jurisdiction shopping, as the territorial waters of Libya are considered sovereign territory, and therefore within Libyan jurisdiction (UNCLOS, Art.3).

Moreover, Aalberts & Gammeltoft-Hansen argues that the boat migrants are caught up in a more general shift towards neo-liberal governance (2018: 201), which is reflected in the economic conditions for the bilateral agreements between Italy and Libya. The 2017 MoU, for instance, established Italian funding to Libyan coastguards in exchange for stalling boat migration towards Europe (MoU, 2017). Moreover, the political backdrop in the Hirsi case was the 2007 bilateral agreement between Italy and Libya, which promised Libya US$5 billion, to cooperate with Italy to prevent departures (Hirsi, §19). The marketization must be understood in the context that migration control traditionally was considered an utterly sovereign function of a state. However, nowadays,
migration management is increasingly becoming a foreign policy issue or even a commodity, where deals are being struck between the Global North and countries of origin and transit to enforce the European non-entrée regime (Zoomers et al., 2010: 42-75).

The increasing marketization and jurisdiction shopping thus can be conceptualized as a way for Italy to outsource less attractive sovereign functions, such as migration control and search and rescue, in order to uphold the non-entrée regime. In contrast, Libya is making their territory and authorities available for the same purpose in exchange for funds, development assistance, and trade privileges. This dynamic, according to Pugh, results in that sovereign prerogatives, territory, and functions are traded and commodified (2002: 151-176).

GLAN

The extent to which Italy can be held responsible for Libya’s “pull-backs” of migrants rescued at sea, is currently being treated by the ECtHR in the GLAN case (Glanlaw, 2018). Here Italy has outsourced its sovereign functions of migration control to the Libyan Authorities through the 2017 MoU, in return for Italian investment in the Libyan coastguard and development programs within the field of renewable energy, infrastructure, and transport ((MoU, 2017, Art. 1.B-1.C). In this context, the MoU thus served as a pretext for Italy to effectively avoid jurisdiction by outsourcing sovereign functions (MoU, 2017). This way Italy can potentially avoid triggering jurisdiction by letting the Libyan Coastguard "pull back" the rescued survivors on the behest of Italy. In return, the 2017 MoU thus will facilitate Italian investment in Libya. The GLAN case is thus a case in point regarding jurisdiction shopping and commercialization of migration.

However, the question remains if Italy can be held accountable for Libyan “pull-backs” of intercepted migrants in the GLAN case since they, through the MoU, are entitled to equip, train, and possibly instruct Libyan vessels. Baumgärtel argues that the 2017 MoU “pull-back” model has been an evolution in regards to Italy’s chance of jurisdiction shopping, compared to earlier state practice, as seen in Hirsi (2018). In Hirsi, the ECtHR condemned Italy for its “pushback” policy established by the 2007 bilateral agreement (Hirsi, §19), arguing that Italy did not rid itself of extraterritorial jurisdiction by establishing the 2007 bilateral agreement (Ibid, §81). On the contrary, Baumgärtel argues that because the 2017 MoU completely outsources sovereign functions to Libyan authorities and territorial waters, this agreement may constitute a "blueprint" of jurisdiction shopping, if it is not challenged (2018).

Identifying the core problem of jurisdiction shopping, the GLAN legal advisor Violeta Moreno-Lax states that “the Italian authorities are outsourcing to Libya what they are prohibited from
doing themselves, flouting their human rights obligations. They are putting lives at risk and exposing migrants to extreme forms of ill-treatment by proxy, supporting and directing the action of the so-called Libyan Coast Guard” (Glanlaw, 2018). Moreover, GLAN legal advisor Itamar Mann adds: "We hope this new case will serve to establish the critical principle that so-called 'pull-backs' are contrary to basic human rights standards. The Libyan Coast Guard and Libyan militia forces cannot become Italy's vehicle for migrant abuses in the Central Mediterranean” (Ibid).

The outcome of the GLAN case can thus go two ways. In the worst-case scenario, the ECtHR could argue that Italy will not have jurisdiction for the "pullback" policies established by the 2017 MoU, as it is Libya who carries out the sovereign function. Such an outcome will thus establish a chance for normalizing the commercialization of sovereignty, where states can barter off refugee rights protection by “selling” migration control functions to states Global South.

However, Buamgätel argues that it is more likely that the ECtHR will challenge the legality of the “pullbacks” and thus the entire foundation of jurisdiction shopping (2018). He explains that the “pull-back” policies in question are standard practice in Europe today. The GLAN case thus offers a chance to establish to what extent states can legally "sell" control practices they aren't allowed to exercise themselves, to countries, like Libya, that are not parties to, and therefore not bound to the same international treaties (Ibid). As Talya Lockman-Fine, part of the GLAN legal team, added: “International law must not be misinterpreted to permit countries to subcontract their human rights violations and avoid all accountability.” (Glanlaw, 2018). Conclusively, the outcome of the GLAN is essential for establishing the legal responsibility of the Italian Government for ongoing systematic violations of international refugee rights law, established by the 2017 MoU.

Human rights implications for the boat migrant
Lastly, the introduction of a market-based logic into the field of migration control has, according to Aalberts & Gammeltoft-Hansen, had troubling consequences for migrants' rights (2018:203). The political and legal distancing from less attractive parts of migration governance, jurisdiction shopping serves to rid Italy of accountability for rescue and protection. Combining the above reasoning with the territorial logic of the high seas, outsourcing of migration control to Libyan authorities and territorial waters, may shift Italy’s legal obligations to Libya, whose human rights records have been heavily criticized for grave violations (Human Rights Watch, 2019). Well knowing that Libya has no existing asylum-system, Italy is actively ignoring the fact that this practice poses severe threats to
refugees life and freedom when “pulled-back” to Libya after being rescued at sea (States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol).

4.4 Concluding remarks

How can we account for the analysis above and the extent to which international law has enabled Italy to barter off responsibility for refugees in distress at sea?

In terms of accountability for migrants in distress at sea, the somewhat successful attempts of Italy’s interpretative framing, regime shopping, and jurisdiction shopping seems to have enabled a geographical, political and legal distancing from the less attractive parts of migration governance. As evidenced by Aalberts & Gammeltoft-Hansen, by claiming and disclaiming sovereignty at sea, Italy seems enabled to use the legal geography at sea to barter off responsibility for migrants in distress (2018: 205).

Chapter 4.2 demonstrated how the legal ambiguity was used by Italy to deny migrants on board the Aquarius access to their sovereign territory, by reference to a narrow interpretation of its international legal obligations. Concurrently, it demonstrated how the growing emphasis on cooperation enabled Italy to outsource its sovereign responsibilities for migrants in distress to Libya. Secondly, chapter 4.3 confirmed Italy’s willingness to barter off responsibilities for refugee protection in the Hirsi case by actively avoiding triggering obligations under the 1951 Convention. As the ECtHR deemed Italy’s attempt to eschew refugee rights jurisdiction through a bilateral agreement with Libya illegal, complete outsourcing of sovereign functions became favored. Lastly, chapter 4.4 thus found that the 2017 MoU possibly creates a legal loophole. Here Libya can conduct migration control and protection functions in Libyan territorial waters on behalf of Italy, without Italy being accountable for it. The legality of such a maneuver is currently being processed by the ECtHR in the GLAN case submission.

Moreover, if we accept the market-based dynamics between Italy and Libya, outlined in chapter 4.4, the interdependence will result in an understanding that Italy can rid themselves of unwanted sovereign functions, such as refugee protection and migration control, by posting enormous sums of money into Libya. This perspective is supported by Aalberts & Gammeltoft-Hansen who argues that, outsourcing migration control and refugee protection can be understood to work as a “zero-sum game” (Aalberts & Gammeltoft-Hansen, 2018: 205).

Yet, as essential to Chimni’s theorization, such an understanding fails to grasp the complicated relationship between sovereignty, power and international law that seems to be at play in the
encounter between Italy and migrants in distress at sea (1998: 335). The analysis identified a shift from Italy aiming to claim sovereignty at sea in order to enjoy its freedoms of migration control on the *Mare Liberum* as seen in chapter 4.2, to Italy attempting to disclaim sovereignty for rescue at sea by "offshoring" and "outsourcing" to Libya, in order to avoid triggering sovereign responsibilities as seen in chapter 4.3 and 4.4.

Therefore, Italy's attempt to barter off responsibility for migrants in distress at sea is not separate from international law but enabled by it. As Aalberts & Gammeltoft-Hansen argues, it precisely because of the legal ambiguity of the SAR regime that Italy can eschew responsibility for migrants in distress (2018: 205). Moreover, the zonal divisions of search and rescue regions, established by the IMO's Maritime Safety Committee after the 1979 adoption of the SAR Convention (International Maritime Organization, 1985), seems to replicate the dominant focus on territorial jurisdiction. This perspective opens the possibility for Italy to "shift" responsibility for rescue and protection of migrants in distress at sea to Libya (Aalberts & Gammeltoft-Hansen, 2018: 205).

Together this establishes a legal framework where Italy can pursue its non-entrée regime on the high seas while disregarding humanitarian concerns for saving the lives of boat migrants in distress. In the context of preventing entry, using the search and rescue regime as a pretext of migrant interception at sea, has become a contemporary way for Italy to overcome the principles of territoriality posed by international human rights and refugee law (Chimni, 1988: 357). Returning to Henkin's argument that disregarding obligations for refugees in distress at sea must be understood as something taking place "beyond the rule of law," thus proves not to hold (1979: 47). Italy is not in this context, pursuing strategies that blatantly disregards international law. Instead, it is because of the legal geography established by the search and rescue regime and refugee law that they can disclaim their sovereignty, rather than guard it.

5. Conclusion

This thesis began by inquiring into Italy’s relationship between international law and politics in the context of the boat migrant in distress at sea. It found that the high seas are subject to an overwhelming amount of overlapping legal rules and regimes, whose legal ambiguity can be used by Italy to navigate selectively in international obligations. Furthermore, the thesis established that the specific legal geography at sea, seems to enable Italy to navigate in sovereign freedoms and responsibilities to avoid legal liability for refugee protection. Lastly, it identified how "offshoring" of migration control and
“outsourcing” to Libyan authorities has become a way in which the less attractive sovereign obligations can be avoided entirely.

Using the disparity between legal obligations and state-practice, as a springboard, the research question posed was: To what extent international law can enable Italy to barter off responsibility for migrants in distress at sea? By adopting a critical legal methodology, this thesis has probed into legal doctrine and relevant legal cases, trying to explicate the politico-legal strategies embedded in international law. Using the Koskenniemi’s method to interpret the empirical material has contributed with a compelling deconstruction of Italy’s political maneuverability in international law related to the boat migrant, as it has allowed the interpretation to move beyond the strictly doctrinal reading of the law.

In conclusion, the analysis found that Italy, to a large extent, can instrumentalize international law to eschew responsibility for the migrant in distress at sea. In the light of Chimni’s TWAIL theory, the political strategies identified in the analysis seems to have enabled Italy to enforce its non-entrée regime at the expense of the humanitarian commitment of saving lives at sea. In sum, rather than creating a legal framework that is responsive to the protection needs of the boat migrant, international law on the high seas has simultaneously created loopholes for Italy to barter off sovereignty at the expense of the responsibilities towards the boat migrant.

By adopting an interdisciplinary and holistic approach to the current thesis, reflected in both theory, methodology, and empirical material, this thesis has contributed to migration scholarship in two ways. Firstly, as limited interdisciplinary scholarship is available in the field, the thesis has attempted to fill a gap, by analyzing across legal regimes and drawing on both political and legal aspects of boat migration. Moreover, by explicating the political and moral issues embedded in international law, this thesis has sought to overcome the positivist dominance of refugee scholarship, which is crucial for the scholarship to be responsive to the restrictive and unjust expansions of international law.

5.1 Avenues for further study

Due to the aim of this thesis, I have not been able to explore all aspects of a particular politico-legal strategy, doctrine, or case-law. However, during the process of writing this thesis, especially the GLAN case stood out as an example of the current Italian trend, attempting to legalize pushbacks, by outsourcing migration control to Libya.
Against this background, there are several areas where further research is essential to push the 
debate to decrease avenues for political maneuvering. The GLAN case identified how outsourcing of 
sovereign functions related to migration control and search and rescue to Libya increasingly is 
becoming a reality to avoid effective liability. As international law has not yet established the concept 
of "shared responsibility" or "secondary responsibility" for such acts, this avenue would be essential, 
as it is necessary to explore the extent of states’ extraterritorial human rights obligations when co-
operating with third-states. Secondly, further analysis of the legal clarity of increased co-operation 
on migration management seems necessary to identify and further discussions on burden-sharing and 
distributive justice. Lastly, analysis of the legal effect of bilateral agreements is crucial to challenge 
potential protection gaps that can arise with such agreements, and to ensure proper avenues of 
accountability.
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