



VU Migration Law Series No 22

**Exploring the African Accountability
Avenue: Libya's Responsibility for Violating
the Right to Leave under Article 12 (2)
ACHPR through pullback operations**

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Working Paper Series

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**Exploring the African Accountability Avenue:
Libya's Responsibility for Violating the Right to Leave under Article 12 (2) ACHPR
through pullback operations**

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Abstract

This master's thesis examines to what extent Libya can be held responsible under the African Charter on Human and Peoples' Rights (ACHPR) for violating the right to leave through carrying out pullbacks. Considering the increased legal complexity of cooperative migration control mechanisms and the systematic lack of accountability pertaining to it, this thesis aims to demonstrate possible avenues for interpretation that could arguably lead to overcome these legal challenges. This is done by focussing on the responsibility of a departure state under the rather unexplored legal framework of African human rights law. Adopting a doctrinal research method, it focuses on three main legal issues: the imputability of pullbacks conducted by the Libyan Coast Guard to Libya, the (in)compatibility of pullbacks with Libya's legal obligations under the right to leave as stipulated in the ACHPR, and the viability of the African human rights system as an avenue for accountability that provides migrants with potential remedies. This thesis finds that, while the pullbacks practices by Libya present certain legal difficulties pertinent to accountability, the elements in the right to leave, rules of state responsibility, and the institutional structure of the African human rights system, allow for the argument that Libya can be held responsible for pullbacks – in theory and in practice.

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHPR Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of and African Court on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
ASR	Draft Articles on Responsibility of States for Internationally Wrongful Acts
ECtHR	European Court on Human Rights
ECHR	European Convention on Human Rights
EU	European Union
GCAS	General Administration for Coastal Security
GNA	Government of National Accord
GNU	Government of National Unity
HRC	UN Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
IOM	International Organization for Migration
LCG	Libyan Coast Guard
LCGPS	Libyan Coast Guard and Port Security
NGO	Non-governmental organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
SAR	Search and Rescue
SAR Convention	International Convention on Maritime Search and Rescue
Smuggling Protocol	Protocol against the Smuggling of Migrants by Land, Sea and Air
Treaty of Friendship	Treaty of Friendship, Partnership, and Cooperation
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNSMIL	United Nations Support Missions Libya

Introduction

From the early 2000s, Libya has served as a transit point for migrants¹ from Africa and the Middle East trying to reach Europe.² Due to restricted legal options for migrating to Europe, the number of people arriving by boat from Libya has increased dramatically, with 77,000 migrants leaving Libya for Italy beginning of 2021.³ To close this gateway, European states have sought collaboration with Libya to prevent migrants from reaching European territory.⁴ Under this cooperative migration control policy, Italy intercepted migrants at sea and returned them to Libya, a practice known as ‘pushbacks’.⁵

In 2012, the European Court of Human Rights (ECtHR), however, ruled in *Hirsi Jamaa v Italy* that Italy had violated the principle of *non-refoulement* by intercepting and returning refugees under their *de jure* and *de facto* control to Libya, an unsafe country. Therefore, Italy revised its deterrence strategy, resulting in the Memorandum of Understanding (MoU) with Libya of 2 February 2017. Under this MoU, Italy offers financial and material support to the Libyan Coast Guard (LCG), the state apparatus responsible for maritime surveillance and rescue missions. This allowed the LCG to intercept and return migrants at sea, preventing them from reaching Italian shores – so-called ‘pullback’ practices.

Italy thereby appears to reason that, while the prohibition of *refoulement* prohibits returning migrants to unsafe countries, they can prevent their arrival by handing control of interceptions over to Libyan actors, thereby limiting both the number of migrants arriving in Italy *and* their *de facto* *an de jure* control over them. Scholars therefore argue that *Hirsi Jamaa* ‘contributed to an understanding of how to evade judicial review in future cases’.⁶ Indeed, by stating that a state cannot push back migrants on vessels under their control, a court encourages the creation of similar policies carried out without such control.⁷

However, pullbacks create a new legal issue: if Libya prevents a migrant from reaching Italy on behalf of the latter, which state is responsible? Scholars have so far principally focused on

¹ The term ‘migrant’ will be employed to refer to both refugees and labour migrants. When a between the two must be made, this is made explicit.

² Tiziana Torresi, ‘An Emerging Regulatory Framework for Migration: The Libya-Italy Agreement and the Right of Exit Special’ (2013) 22 Griffith Law Review 648, 650.

³ Ruud Elmendorp, ‘IOM Says Despite Risks, Number of Migrants Crossing the Mediterranean Sea Has Doubled’ (VOA, 30 November 2021) <<https://www.voanews.com/a/iom-says-despite-risks-number-of-migrants-crossing-the-mediterranean-sea-has-doubled/6333695.html>> accessed 13 July 2022.

⁴ Hein de Haas, ‘Irregular Migration from West Africa to the Maghreb and the European Union: An Overview of Recent Trends’ (International Organization for Migration, May 2008) <<https://www.unhcr.org/afr/49e479ca0.pdf>> accessed 12 January 2021, 11.

⁵ The term ‘pushback’ has been heavily criticized by various scholars and migrant advocates, considering it a euphemism due to the indifference of government officials regarding whether the refugee or migrant will in fact arrive to the point of departure or will drown. See for example: Niamh Keady-Tabbal and Itamar Mann, ‘“Pushbacks” as Euphemism’ (*EJIL: Talk!*, 14 April 2021) <<https://www.ejiltalk.org/pushbacks-as-euphemism/>> accessed 13 July 2022. Due to the unfortunate lack of alternative terms used in migration discourse, the terms ‘pushback’ and ‘pullback’ will nevertheless be used throughout this thesis.

⁶ Itamar Mann, ‘Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013’ (2013) 54 Harvard International Law Journal 315, 369.

⁷ Ibid.

Italy's responsibility for violating the principle of *non-refoulement* through its pushback practices.⁸ This exclusive focus may be justified: cooperative structures allow wealthy states to contract with poorer states to provide access to their territory.⁹ However, this exclusive focus on Italy's responsibility ignores from view both Libya's responsibility *and* the accountability structures available within Libya's jurisdiction.¹⁰ Most importantly, successful litigation has had limited impact as Italy adjusted its migration policies to judicial interventions. Therefore, research on state responsibility for human rights abuses under extraterritorial migration control 'must be mindful of the adaptability of European migration policy in case of judicial intervention'.¹¹ Otherwise, accountability gaps will continue to exist and there will likely be no return to legality.

The study of state responsibility for interceptions at sea must therefore shift in two ways. Given that Italy's cooperative migration policy has changed from returning migrants to Libya to preventing their departure, the focus of analysis should similarly shift from *refoulement* to the right to leave. Secondly, a broader regional accountability perspective is required. As Italy's migration control is executed in cooperation with Libya, the options for pursuing accountability for human rights violations expand to other regional courts than ECtHR. The African human rights system, to which Libya is a party, has been rather unexplored but may be more promising for protection of migrant rights. Moreover, distributing litigation efforts among African and European judicial bodies makes it difficult for states to anticipate and adapt policies to new jurisprudence.¹²

The African judicial bodies tasked with monitoring compliance of the African Charter on Human and Peoples' Rights (ACHPR) have recently been identified as 'an arena for increased interventions'.¹³ The African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) are innovative in allowing petitions from individuals and NGOs who are not victims of violations. In addition, they may respectively draw inspiration from international law and directly apply provisions from other international human rights law instruments. For partner states acting on behalf of destination states, a successful case on Libya's responsibility for pullbacks might provide ground to deny future cooperation on migration control.¹⁴ In addition, it could be argued

⁸ See e.g. Mariagiulia Giuffr , 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-Backs to Libya?' (2012) 24 International Journal of Refugee Law 692; Giulia Ciliberto, 'Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law Hard Cases' (2018) 4 Italian Law Journal 489; Matteo Tondini, 'The Legality of Intercepting Boat People Under Search and Rescue and Border Control Operations with Reference to Recent Italian Interventions in the Mediterranean Sea and the ECtHR Decision in the Hirsi Case' (Social Science Research Network 2012) SSRN Scholarly Paper 2096156 <<https://papers.ssrn.com/abstract=2096156>> accessed 11 May 2022.

⁹ Nikolas Feith Tan and Thomas Gammeltoft-Hansen, 'A Topographical Approach to Accountability for Human Rights Violations in Migration Control' (2020) 21 German Law Journal 335, 339.

¹⁰ Ibid

¹¹ See Itamar Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013' (2013) 54 Harvard International Law Journal 315, 369.

¹² Ibid

¹³ Ibid, 348

¹⁴ Nikolas Feith Tan and Thomas Gammeltoft-Hansen, 'A Topographical Approach to Accountability for Human Rights Violations in Migration Control' (2020) 21 German Law Journal 335, 349.

that this strategy is less susceptible to court intervention, as even a shift from current policies characterized by financial control to, say, mere diplomatic pressure on Libya, would not affect Libya's responsibility.

For this reason, this thesis will explore to what extent the African human rights system may serve as a potential avenue for providing victims of pullbacks with potential remedies. This is done by analyzing Libya's responsibility for pulling back migrants to the Libyan coast, looking for complementary protection in the right to leave under Article 12 (2) ACHPR. In line with this, the research question of this thesis is: *To what extent can Libya, in theory and in practice, be held responsible under the ACHPR for violating the right to leave through carrying out pullbacks in cooperation with Italy?* This question will be answered through the following sub-questions: 1. *Can the pullbacks by the LCG be attributed to Libya?* 2. *Does Libya exercise jurisdiction over the migrants when pulling them back to the Libyan coast?* 3. *To what extent are the pullbacks carried out by the LCG in accordance with Libya's obligations under the right to leave as established in Article 12 (2) ACHPR?* 4. *To what extent do the African judicial bodies provide an accountability avenue for violations of migrant's right to leave?*

To answer the research question, doctrinal legal research of international and human rights law provisions concerning the right to leave and state responsibility will be conducted. Doctrinal legal methodology comprises in-depth analysis of the legal doctrine and its development and application.¹⁵ Its purpose is to 'gather, organize, and describe the law, provide commentary on the sources, and then identify and describe the underlying theme or system and how each source of law is connected'.¹⁶ Using this method, a detailed analysis will be conducted on the accountability mechanisms under the African human rights system and the Articles on Responsibility of States for Internationally Wrongful Acts (ASR), as well as the substantive provisions of the right to leave found in the ACHPR and jurisprudence thereunder. In addition, Article 60 ACHPR allows legal reasoning based on other international human rights instruments. Under this article, the African Commission has the competence to 'draw inspiration from international law on human and peoples' rights'. This provision therefore provides legal basis for interpreting the right to leave under the ACHPR by reference to the ICCPR and the European Convention on Human Rights (ECHR), which will be done throughout the thesis. In addition, qualitative empirical research will be conducted to establish the factual background and to provide insight on the meanings of the scope of the right to leave and principles of state responsibility. Secondary sources such as human rights reports from NGOs and IOs, news articles, and academic articles will be consulted to establish the content of pullback operations and actors involved in these operations.

This thesis is structured as follows. Chapter 1 will provide a factual background laying ground for subsequent chapters. First, the Libyan political landscape will be illustrated to provide context on Libya's migration management. After setting the scene by outlining Libya's

¹⁵ Salim Ibrahim Ali, Zuryati Mohamed Yusoff and Zainal Amin Ayub, 'Legal Research of Doctrinal and Non-Doctrinal' (2017) 4 International Journal of Trend in Research and Development 493, 493.

¹⁶ Ibid

evolving role as Europe's 'gatekeeper', the chapter explores Italy and Libya's present cooperative migration policy, i.e., pullback operations. Chapter 2 will then assess whether the pullback operations described in Chapter 1 can be attributed to Libya by analyzing the LCG's structure and Libya's respective control over the LCG units in different parts of the country. Furthermore, an analysis will be conducted on whether Libya exercises jurisdiction over the migrants intercepted by the LCG. To establish whether Libya can, in theory, be held responsible for violations of the right to leave through pullbacks, Chapter 3 will analyze if pullbacks constitute a breach of Libya's international obligations under the right to leave established in Article 12 (2) ACHPR. Firstly, the personal and material scope of the right will be defined and it will be analyzed whether pullbacks fall under this scope. Secondly, it will be analyzed on what grounds the right to leave can be limited, and whether pullback operations could be justified on the basis of these. Finally, Chapter 4 will assess whether migrants can invoke this alleged responsibility in front of the African judicial bodies, i.e., whether the African human rights system presents a viable forum for the enforcement of their right to leave. An assessment will be made of how a communication may be brought before African judicial bodies by an NGO, and what opportunities or obstacles this would bring for vindicating migrants' rights.

Chapter 1: ‘Pulling back’ migrants to the Libyan coast

Introduction

This chapter will present the factual background for answering this thesis’ research question, namely, whether Libya can be held responsible for violating the right to leave under Article 12 (2) ACHPR through its pullback practices. To answer this question, it is critical to define the Libyan political context, its role in migration deterrence, and actors involved in its pullbacks. This chapter will first provide context on Libya’s fragmented political landscape, to then move to the state’s evolving role as a ‘gatekeeper’ of Europe. Finally, an assessment will be made of the current practice of ‘pulling back’ migrants to Libya.

1.1. Political contextualisation: Libya as a fragmented state

The political landscape of Libya is characterized by a variety of state and non-state actors, which coexist and strive for political power throughout the country.¹⁷ This power is very localized: since 2011, there has not been one political actor who has been able to gain control of the entire territory and hence present a central authority.¹⁸ This section will present a contextualization of Libya’s political situation to understand its involvement in migration management, thereby laying ground for analytical reflections on its responsibility. It will provide an overview of the main political actors in Libya from 2014 until now, to illustrate the fragmentation of Libya’s political landscape and demonstrate the weakness of the official government.

1.1.1. 2014 – 2021: Fragmentation after Gaddafi’s rule

After the fall of the Gaddafi regime, Libya held its first elections in July 2012 leading to the formation of the General National Congress based in Tripoli.¹⁹ In April 2014, after the mandate expired, new elections were held.²⁰ The General National Congress was replaced by a new parliament, the House of Representatives in Tripoli.²¹ However, in August 2014, militia groups caused the House of Representatives to retreat from Tripoli and establish a government in Tobruk.²² A remnant of the General National Congress was renamed the ‘Government of National Salvation’ in Tripoli. Khalifa al-Ghawil, its leader, claimed to be Libya’s prime minister while the House of Representatives maintained it was the legitimate government. This left Libya with two governments, one in Tobruk and one in Tripoli.²³

¹⁷ Matteo Capasso and others, ‘Libya Country Report’ (EU-LISTCO 2019) <<https://www.eu-listco.net/publications/libya-country-report>>, 12.

¹⁸ Wolfram Lacher, *Libya’s Fragmentation: Structure and Process in Violent Conflict* (Bloomsbury Publishing 2020), 4.

¹⁹ Jason Pack and Haley Cook, ‘The July 2012 Libyan Election and the Origin of Post-Qadhafi Appeasement’ (2015) 69 Middle East Journal 171, 171.

²⁰ Mesfin Gebremichael and others, ‘Libya Conflict Insight’ (Institute for Peace and Security Studies, Addis Ababa University 2018) <https://media.africaportal.org/documents/libya_formatted_final_21.02.2018.pdf>, 2.

²¹ Syed Huzaifah Bin Othman Alkaff, ‘Libya’ (2015) 7 Counter Terrorist Trends and Analyses 96, 97.

²² Ibid

²³ Ibid

The turmoil that erupted between these rival parties in 2014 prompted the United Nations (UN) to start negotiations to form a unity government.²⁴ The result was the Libyan Political Agreement, which established the UN-recognized Government of National Accord (GNA), led by Fayez Al-Sarraj, with the goal of uniting disparate factions under a central authority.²⁵ The House of Representatives, however, did not ratify the Libyan Political Agreement, claiming that the GNA lacked legitimacy because it was appointed by the international community.²⁶ As a result, the House of Representatives has failed to pass the required constitutional amendment to allow the Libyan Political Agreement to take effect and become part of national law.²⁷ This way, the House of Representatives has also not enshrined itself as an authoritative institution.²⁸ The House of Representatives appointed Khalifa Haftar, founder of his own military group called the Libyan National Army, to lead Libyan armed forces.²⁹ For this reason, the Libyan National Army and Tobruk government are seen as aligned.³⁰

Neither of the two government have, however, been able to establish authority over the whole of the territory.³¹ Many armed groups and militias have attempted to exert state authority, capturing state institutions,³² and become political actors themselves in an attempt for legitimization.³³ More than fifteen armed groups are currently present on Libyan territory. In the East, the Libyan Arab Armed Forces has emerged as the most powerful political, security, and economic force. In the West, four main armed groups have gained control over Tripoli.³⁴ Their power is very localized: most military actors are only active within local communities and have failed to establish exclusive control beyond.³⁵ Figure 1 depicts the division of control over territory from 2014 until 2021.

²⁴ Chatham House, 'Libya's Governance Crisis' (6 September 2017) <<https://www.chathamhouse.org/2017/09/libyas-governance-crisis>> accessed 13 July 2022.

²⁵ Wolfram Lacher, *Libya's Fragmentation: Structure and Process in Violent Conflict* (Bloomsbury Publishing 2020), 42.

²⁶ Syed Huzaifah Bin Othman Alkaff, 'Libya' (2015) 7 Counter Terrorist Trends and Analyses 96, 00.

²⁷ Azza K. Maghur, 'Libyan Political Agreement: Recipe for Peace or Disaster?' (openDemocracy, 26 November 2016) <<https://www.opendemocracy.net/en/north-africa-west-asia/libyan-political-agreement-recipe-for-peace-or-nightmare/>> accessed 13 July 2022

²⁸ Mary Fitzgerald Toaldo Mattia, 'A Quick Guide to Libya's Main Players – European Council on Foreign Relations' (ECFR, 19 May 2016) <https://ecfr.eu/special/mapping_libya_conflict/> accessed 13 July 2022.

²⁹ Ibid

³⁰ Syed Huzaifah Bin Othman Alkaff, 'Libya' (2015) 7 Counter Terrorist Trends and Analyses 96, p. 97.

³¹ Jose Serralvo, 'Government Recognition and International Humanitarian Law Applicability in Post-Gaddafi Libya' in Terry D Gill (ed), *Yearbook of International Humanitarian Law Volume 18, 2015* (TMC Asser Press 2016) <https://link.springer.com/chapter/10.1007/978-94-6265-141-8_1> accessed 13 July 2022, 9.

³² Adel-Naim Reyhani, 'Anomaly upon Anomaly: Refugee Law and State Disintegration' (4 June 2020) <<https://papers.ssrn.com/abstract=3693620>> accessed 14 July 2022, 4.

³³ Matteo Capasso and others, 'Libya Country Report' (EU-LISTCO 2019) <<https://www.eu-listco.net/publications/libya-country-report>>, 12.

³⁴ Tim Eaton and others, 'The Development of Armed Groups Since 2014' (Chatham House, 17 March 2020) <<https://www.chathamhouse.org/2020/03/development-libyan-armed-groups-2014/1-introduction-development-armed-groups-2014>> accessed 13 July 2022, 7.

³⁵ Wolfram Lacher, *Libya's Fragmentation: Structure and Process in Violent Conflict* (Bloomsbury Publishing 2020), 2.

1.1.2. 2021 – Now: A unified government?

In March 2021, a new government was formed in Libya: The Government of National Unity (GNU).³⁶ A UN mediation procedure which began in 2019, led to the formation of this new transitional government which was tasked with preparing the country for new elections in June 2022. The creation of the GNU was contingent on the approval of House of Representatives, which did so on 25 February 2021.³⁷ It therefore seemed to be the first government in many years that gained support from both Tripoli and Tobruk.³⁸ However, it has been argued that neither local nor international political parties were entirely committed to the GNU's electoral ambitions,³⁹ as Tobruk and armed groups were incentivized by the unfreezing of their oil revenues.⁴⁰ It has therefore also been said that the GNU 'only in name effectively absorbed the pre-existing divided governments under one umbrella'.⁴¹

Libya thus remains fragmented, as depicted in Figure 2.⁴² Khalifa Haftar and the Tobruk government maintain a tight territorial and political hold on eastern Libya. Furthermore, the GNU's arrival in the West has done little to reduce the power of armed groups. In reality, the GNU, like its predecessor, remains relatively weak in relation to armed groups, who are 'resiliently embedded within key security sector institutions after seeing their legitimizing strategies bearing fruit'.⁴³ The prime minister of the GNU, Abdel Hamid Dbeibeh, has been forced into an alliance with Tripoli-based armed groups – thereby gaining support of these groups' representatives in Zawiya.⁴⁴ By aligning with the GNU, these groups have been able to expand their criminal activities in major departure points for migrants crossing the Central Mediterranean, such as Zawiya.⁴⁵

This way, the instable and fragmented political landscape has an impact on migration management as well, creating room for increased role of militias in state institutions responsible for migration management and contributing to migrants' human rights abuses. The next sections will discuss Libya's evolving role in managing irregular migration from the early 2000s until it obtained its role in the contemporary pullback operations.

³⁶ Emadeddin Badi, 'Libya's Government of National (Dis)Unity: the misleading choreography of conflict resolution' (2021) 118 *Confluences Méditerranée* 23, 25.

³⁷ Sami Zaptia, '74 HoR Members Announce Unconditional GNU Support – in Lieu of an Announcement of a Unified HoR Meeting' (LibyaHerald, 25 February 2021) <<https://libyaherald.com/en/2021/02/74-hor-members-announce-unconditional-gnu-support-in-lieu-of-an-announcement-of-a-unified-hor-meeting/>> accessed 13 July 2022.

³⁸ Al Jazeera, 'Libya's Interim Government Takes Power after Handover in Tripoli' (26 April 2021) <<https://www.aljazeera.com/news/2021/3/16/libyas-interim-government-takes-power-after-handover-in-tripoli>> accessed 13 July 2022.

³⁹ Ibid

⁴⁰ Emadeddin Badi, 'Libya's Government of National (Dis)Unity: The Misleading Choreography of Conflict Resolution' (2021) 118 *Confluences Méditerranée* 23, 27.

⁴¹ Ibid

⁴² Al Jazeera, 'Libya: Armed Haftar Supporters Prevent PM's First Meeting in East' (26 April 2021) <<https://www.aljazeera.com/news/2021/4/26/haftar-supporters-prevent-the-first-meeting-of-the-dbeibah-govt>> accessed 13 July 2022.

⁴³ Emadeddin Badi, 'Libya's Government of National (Dis)Unity: The Misleading Choreography of Conflict Resolution' (2021) 118 *Confluences Méditerranée* 23, 31.

⁴⁴ Ibid, 32

⁴⁵ Ibid

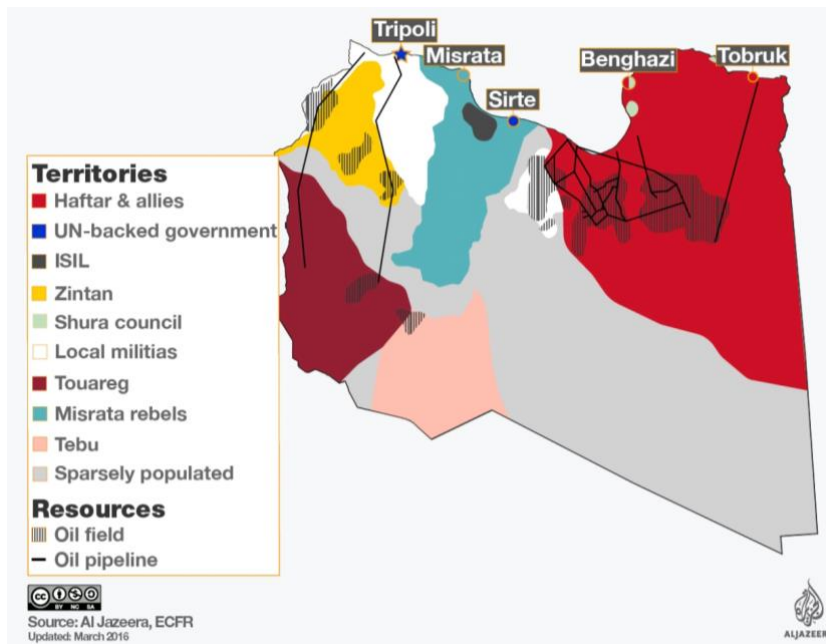


Figure 1 Control over Libyan territory from 2014 until 2021⁴⁶

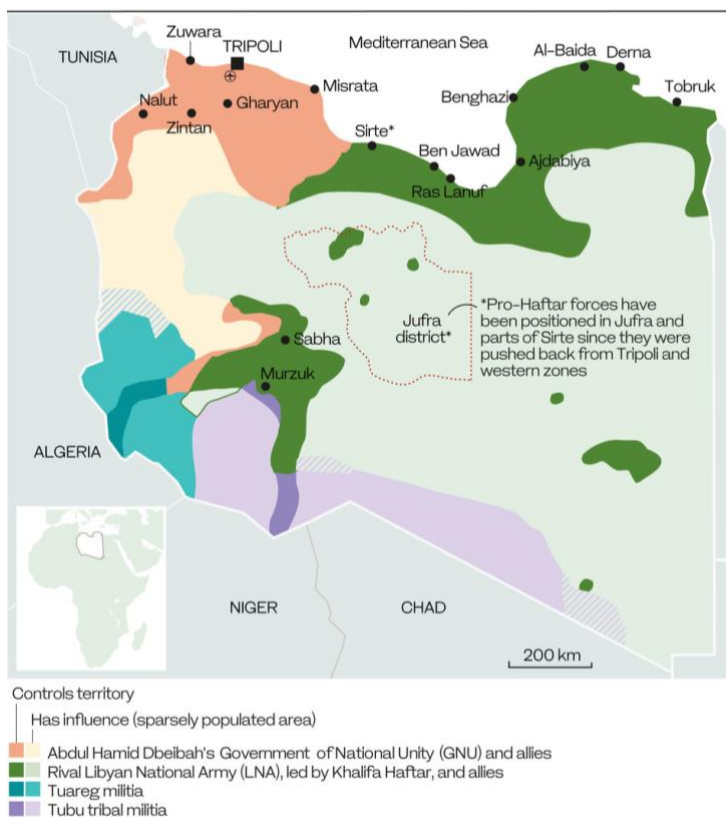


Figure 2 control over Libyan territory 2021 to date

⁴⁶ Al Jazeera, 'Libya: Who Controls What' (22 March 2017) <<https://www.aljazeera.com/news/2017/3/22/libya-who-controls-what>> accessed 13 July 2022.

1.2. Libya's role in preventing migrants from reaching EU territory

Libya has long been a major transit point for those fleeing Africa and the Middle East seeking to reach Europe.⁴⁷ As legal options for migrating to Europe have decreased, the number of migrants seeking to enter Europe irregularly from Libya has notably increased. To close this gateway, states have sought cooperation with Libya to prevent migrants from reaching European soil⁴⁸ — ultimately resulting in the current pullback practices. This section will discuss Libya's role as Europe's 'border agency', first complicit in pushbacks, later in direct control of pullbacks.

1.2.1. 2003-2012: Joint migration control by Italy and Libya

In the early 2000s, Libya saw an increasing number of migrants arriving to reach Europe. Concerned about the increase in the number of irregular migrants entering from Libya, European nations sought collaboration to stop migrants from arriving.⁴⁹ Italy, as the principal point of entry into the EU for those arriving by sea, pushed the EU's approach toward boosting cooperation with Libya.⁵⁰

In 2003, Italy and Libya signed an agreement on organized crime and irregular migration that involved Italian and Libyan police cooperating in Tripoli.⁵¹ Following that, the Italian authorities took efforts to bolster Libya's ability to curb migratory movements by providing training, equipment, and funding a charter jet program for the repatriation of illegal migrants to their countries of origin.⁵² In addition, the two countries signed a readmission agreement in 2004, resulting in the repatriation of an estimated 3,000 migrants from Italy to Libya until March 2006.⁵³ In 2007, Italy and Libya agreed on joint coast and port patrols in northern Libya. Under this agreement, Libyan and Italian police forces jointly patrolled the departure and transit areas of vessels transporting irregular migrants in territorial and international waters, using Italian ships.⁵⁴ The deal also stated that Italian police would train Libyan officers and assist with these ships.⁵⁵

In 2008, Libya and Italy signed the five billion dollar Treaty of Friendship, Partnership and Cooperation (Treaty of Friendship) addressing bilateral relations, collaboration, development

⁴⁷ Tiziana Torresi, 'An Emerging Regulatory Framework for Migration: The Libya-Italy Agreement and the Right of Exit Special' (2013) 22 Griffith Law Review 648, 650.

⁴⁸ Hein de Haas, 'Irregular Migration from West Africa to the Maghreb and the European Union: An Overview of Recent Trends' (IOM 2008) <<https://www.unhcr.org/afr/49e479ca0.pdf>>, 11.

⁴⁹ Sara Hamood, 'African Transit Migration through Libya to Europe: The Human Cost' <<http://migreurop.org/IMG/pdf/hamood-libya.pdf>> accessed 12 January 2021, 65.

⁵⁰ Ibid

⁵¹ European Commission 'Technical Mission to Libya on Illegal Immigration 27 Nov - 6 Dec 2004' (2005) 7753/05 <<https://www.statewatch.org/news/2005/may/eu-report-libya-ill-imm.pdf>> accessed 12 January 2021, 63.

⁵² Ibid.

⁵³ Emanuela Paoletti, 'Power Relations and International Migration: The Case of Italy and Libya' (2011) 59 Political Studies 269, 275.

⁵⁴ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012) para 19.

⁵⁵ Ibid

aid, and a pledge to cooperate ‘in the fight against terrorism, organized crime, drug trafficking, and illegal migration’.⁵⁶ The agreement included provisions on the strengthening of controls over territorial waters by Libya and the return of intercepted migrants attempting to cross the Mediterranean.⁵⁷ In this respect, Article 19 Treaty of Friendship calls for the implementation of previous agreements and protocols, and the patrolling of the Libyan coast by mixed crews on patrol boats provided by Italy. The agreements state that the EU and Italy would finance its provisions jointly.⁵⁸

The Treaty of Friendship paved the way for Italy’s so-called ‘pushback’ policy, which saw migrants being ferried back by Italy to Libya immediately, without assessment of refugee status.⁵⁹ At the time, various human rights organizations expressed concern about the Treaty’s harmful impact on migrants’ rights.⁶⁰ In May 2009, the United Nations High Commissioner for Refugees (UNHCR) stated that the new pushback restrictions impeded access to asylum for people who might require international protection and risked violating the principle of *non-refoulement*.⁶¹ Despite widespread condemnation, the agreement and the system it established lasted until the February 2011 Libyan insurrection, when Gaddafi was deposed.⁶²

1.2.2. Hirsi Jamaa as the catalyst for pullback policies

In 2012, Libya’s role in migration deterrence changed from accomplice to being in direct control of interceptions at sea. On 23 February 2012, The European Court of Human Rights (ECtHR) ruled on Italian ‘pushback’ operations in *Hirsi Jamaa v Italy* (*Hirsi Jamaa*). The 24 applicants of Somali and Eritrean nationality were on board three vessels departing from Libya to Italy. The vessels were intercepted by Italian police while still inside the Maltese Search and Rescue (SAR) area of responsibility. In accordance with the Treaty of Friendship, Italy intercepted these vessels and transferred all migrants aboard Italian military ships to return them to Libya.⁶³

⁵⁶ Article 19 (1) Law No (2) of 1377 FDP/2009 AD on ratifying the Treaty of Friendship, Partnership, and Cooperation between the Great Socialist People’s Libyan Arab Jamahiriya and the Republic of Italy (adopted 30 August 2008).

⁵⁷ Luiza Bialasiewicz, ‘Off-Shoring and Out-Sourcing the Borders of Europe: Libya and EU Border Work in the Mediterranean’ (2012) 17 *Geopolitics*, 853; Tiziana Torresi, ‘An Emerging Regulatory Framework for Migration: The Libya-Italy Agreement and the Right of Exit’ (2013) 22 *Griffith Law Review* 648, 652.

⁵⁸ Article 19 (2) Law No (2) of 1377 FDP/2009 AD on ratifying the Treaty of Friendship, Partnership, and Cooperation between the Great Socialist People’s Libyan Arab Jamahiriya and the Republic of Italy (adopted 30 August 2008).

⁵⁹ Tiziana Torresi, ‘An Emerging Regulatory Framework for Migration: The Libya-Italy Agreement and the Right of Exit’ (2013) 22 *Griffith Law Review* 648, 652-653.

⁶⁰ See for example Amnesty International, ‘Libya/Italy: Bilateral Cooperation Should Not Be at the Price of Human Rights’ (2010) <<https://www.amnesty.org/en/wp-content/uploads/2021/07/mde190172010en.pdf>> accessed 12 January 2021.

⁶¹ UNHCR, ‘Follow-up from UNHCR on Italy’s Push-Backs’ (12 May 2009) <<https://www.unhcr.org/news/briefing/2009/5/4a0966936/follow-up-unhcr-italys-push-backs.html>> accessed 13 July 2022; Tiziana Torresi, ‘An Emerging Regulatory Framework for Migration: The Libya-Italy Agreement and the Right of Exit’ (2013) 22 *Griffith Law Review* 648, 652-653.

⁶² Amnesty International, ‘Libya’s Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants’ (2017) <<https://www.amnesty.org/en/documents/mde19/7561/2017/en/>> accessed 12 January 2021, 14.

⁶³ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012) paras 9-12.

The ECtHR made several statements in this judgment that are pertinent to European migration control policy and, consequently, Libya's role in exercising migration control. Firstly, the ECtHR confirmed the exercise of jurisdiction when a state intercepts a vessel on the high seas. Considering the applicants were on board Italian ships with crews made up of Italian men, they were 'under the continuous and exclusive *de jure* and *de facto* authority of the Italian authorities'.⁶⁴ Secondly, the Strasbourg Court acknowledged that a Member State's obligations under other legal systems, as well as agreements with other states, had no influence on the assessment of its human rights responsibilities.⁶⁵ As a result, a State cannot escape its obligations under the ECHR through obligations under other international treaties.⁶⁶ Thirdly, the ECtHR ruled that the prohibition of collective expulsion in Article 4 Protocol No. 4 to the ECHR extended to high-seas interceptions.⁶⁷

Scholars have argued that 'precisely when they try the hardest to protect rights beyond territorial borders, courts acquire the most significant role in providing the conditions of the rights' further violations'.⁶⁸ While *Hirsi Jamaa* might confirm that international refugee law constrains migration control strategies, numerous issues left unresolved in the judgment may be seen to have indirectly encouraged the formation of pullback policies. While the ruling clarified transferring migrants onto military ships on the high seas triggers jurisdiction, it left unaddressed whether other forms of interception fall under the exercise of jurisdiction.⁶⁹ This way, Italy was able to evade the ruling. While the prohibition of *refoulement* forbids states from sending refugees back to unsafe places, destination states have now taken steps to prevent migrants from arriving in the first place, thereby achieving the intended result of limiting arrivals while avoiding the exercise of jurisdiction, and supposedly complying with the principle of *non-refoulement*.⁷⁰

1.2.3. 2012-to date: From a transit state to a state of containment

Many scholars have argued that *Hirsi Jamaa* set the ground for contemporary pullback operations directed by the LCG.⁷¹ By establishing that direct involvement in extraterritorial pushback operations activates state jurisdiction and hence legal obligations,⁷² states were encouraged to reform their policies to prevent contact with migrants crossing the

⁶⁴ Ibid, para 81.

⁶⁵ Ibid

⁶⁶ Ibid, para 79.

⁶⁷ Ibid, para 180.

⁶⁸ Annick Pijnenburg, 'Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?' (2020) 20 Human Rights Law Review 306, 309.

⁶⁹ Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?' (2018) 20 European Journal of Migration and Law 396, 401.

⁷⁰ Annick Pijnenburg, 'Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?' (2020) 20 Human Rights Law Review 306, 309-310.

⁷¹ See e.g. Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?' (2018) 20 European Journal of Migration and Law 396; Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 European Journal of International Law 591.

⁷² Patrick Müller and Peter Slominski, 'Breaking the Legal Link but Not the Law? The Externalization of EU Migration Control through Orchestration in the Central Mediterranean' (2020) 28 Journal of European Public Policy 1, 808.

Mediterranean.⁷³ While it was now established that a state is liable under the principle of *non-refoulement* for actions taken under its jurisdiction, actions conducted under the jurisdiction of third countries were regarded to be legally risk-free.⁷⁴ Thus, Italy believed that having such action take place under the authority of Libya would enable it to escape legal obligations for migrant deterrence.⁷⁵

On 2 February 2017, Italy and Libya therefore signed a new MoU to ‘combat’ irregular migration.⁷⁶ This MoU reaffirms the parties’ commitment to cooperate to address irregular migrants crossing the Central Mediterranean from Libya to Italy and stresses the need to improve maritime border security and control in Libya to reduce irregular migrants in Europe. The MoU has extensively been criticized for its ambiguous language and disdain for migrants’ rights. What is essential for this thesis, however, is the primary practices and instruments it implemented, i.e., the rehabilitation of the LCG through equipment shipment, personnel training, and funding, allowing it to conduct pullbacks.

Article 1 and 4 MoU provide the foundation for pullback operations. Article 1 (c) MoU stipulates that Italy pledges to provide technical support to the Libyan border and coast guards. Article 4 MoU states that Italy provides funding for the execution of the initiatives in the MoU, without addressing the exact operations that Italy is intended to facilitate.⁷⁷ Although it does not state that Libyan authorities should intercept migrants at sea, this goal can be inferred from Article 1, which establishes Italy’s provision of technical support in border control and border control systems ‘to stem the illegal migrants’ fluxes’.⁷⁸ It therefore seemed that under the existing agreement, migrants who are returned to Libya are intercepted by the LCG rather than Italian ships.

Indeed, following the agreement, Italy provided four patrol ships to Libya in 2018, ten more in 2019, and six more in 2020. Furthermore, in the summer of 2017, the Italian government authorized a naval mission, operation *Mare Sicuro*, to give technical support to the LCG.⁷⁹ In that same period, Libya declared the extension of its SAR zone to 94 nautical miles off its coast.⁸⁰ In summer 2018, Italy turned over SAR responsibilities to Libya; Italy and Libya

⁷³ Annick Pijnenburg, ‘Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?’ (2020) 20 Human Rights Law Review 306, 310.

⁷⁴ Itamar Mann, ‘Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013’ (2013) 54 Harvard International Law Journal 315, 369

⁷⁵ Ibid

⁷⁶ Memorandum of Understanding on Cooperation in the Fields of Development, the Fight against Illegal Immigration, Human Trafficking, and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic (adopted 2 February 2017)

⁷⁷ Ibid, Article 1; Elisa Vari, ‘Italy-Libya Memorandum of Understanding: Italy’s International Obligations’ (2020) 43 Hastings International and Comparative Law Review 105, 113.

⁷⁸ Elisa Vari, ‘Italy-Libya Memorandum of Understanding: Italy’s International Obligations’ (2020) 43 Hastings International and Comparative Law Review 105, 113.

⁷⁹ Agence France-Presse, ‘Italy Impounds NGO Rescue Ship and Sends Navy Patrol Boat to Libya’ *The Guardian* (2 August 2017) <<https://www.theguardian.com/world/2017/aug/02/italy-impounds-ngo-rescue-ship-sends-navy-patrol-boat-to-libya-migrant-refugee-route-europe>> accessed 12 January 2022.

⁸⁰ United Nations Human Rights Office of the High Commissioner, ‘“Lethal Disregard” Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea’ (2021) <<https://www.ohchr.org/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf>>, 9.

restored their Treaty of Friendship; and Italy supplied more vessels and other equipment to the LCG.⁸¹

1.3. Current pullback practices by the Libyan Coast Guard

The previous section described the policy instrument used by the LCG to pull back migrants to Libya. These pullbacks, as this section will show, are arguably more complicated and problematic than the MoU implies. To properly frame the analytical observations on Libya's alleged responsibility, this section will focus on the current pullback operations and the abuses associated with these.

The work of the LCG appears to fulfil what the MoU initially prospected: a decrease in the number of arrivals through the rebuilding of the LCG, enabling it to conduct pullback operations. While it could be argued that pullback practices are precarious by its nature, they are also accompanied by physical and verbal abuse. This section will set out what kinds of conduct encompasses and is associated with pullback operations.

Pullback operations are geared towards physically preventing migrants from leaving their country of origin or transit state, and to forcefully return them to the location from whence they left before they can reach the jurisdiction of their destination state.⁸² Since the LCG has increased capacity, thousands of migrants were pulled back to Libya's coast. The International Organisation for Migration (IOM) reported that in the first half of 2021, 77,000 people had been intercepted at sea and returned to Libya by the LCG.⁸³ Over 1,100 migrants were reported dead or presumed dead due to the LCG's conduct in this same period.⁸⁴ It is further reported that the LCG intercepted 11,891 persons in 2020, 9,035 in 2019, and 14,949 in 2018.⁸⁵ The large majority of migrants are intercepted after embarkation from western Libya.⁸⁶

⁸¹ The EU has consistently supported Italy, providing financial assistance through the European Trust Fund for Africa and personnel training under the EunavforMed Sophia operation See 'Libya: "Between Life and Death": Refugees and Migrants Trapped in Libya's Cycle of Abuse' (Amnesty International 2020); Annick Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?' (2018) 20 European Journal of Migration and Law 396, 403; <<https://www.amnesty.org/en/wp-content/uploads/2021/05/MDE1930842020ENGLISH.pdf>>, 16

⁸² Human Rights Council 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2018) <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Documents/A_HRC_37_50_EN.docx> accessed 12 January 2021, 15.

⁸³ Ruud Elmendorp, 'IOM Says Despite Risks, Number of Migrants Crossing the Mediterranean Sea Has Doubled' (VOA, 30 November 2021) <<https://www.voanews.com/a/iom-says-despite-risks-number-of-migrants-crossing-the-mediterranean-sea-has-doubled/6333695.html>> accessed 13 July 2022.

⁸⁴ Samy Magdy, 'UN: Over 550 Europe-Bound Migrants Intercepted off Libya' (AP News, 3 October 2021) <<https://apnews.com/article/business-middle-east-africa-libya-migration-7b53aa26118937f0c0c88e3297d59bcd>> accessed 13 July 2022.

⁸⁵ Reliefweb, 'Libya: Record Numbers Intercepted at Sea and Detained; IRC Calls for Their Immediate Release' (2 September 2021) <<https://reliefweb.int/report/libya/libya-record-numbers-intercepted-sea-and-detained-irc-calls-their-immediate-release>> accessed 13 July 2022

⁸⁶ See UNHCR, 'Libya: Activities at Disembarkation, Monthly Update - October 2021 - Libya' (2021) <<https://reliefweb.int/report/libya/libya-activities-disembarkation-monthly-update-october-2021>> accessed 11

While Libya has stated that pullbacks by the LCG are intended to rescue migrants in distress from unseaworthy vessels,⁸⁷ it is now well established that intercepted migrants are typically returned to their point of departure.⁸⁸ Various human rights organizations have reported about grave human rights violations during these interceptions. Amnesty International, the UN Human Rights Office of the High Commissioner 2021 (OHCHR) and United Nations Support Mission in Libya (UNSMIL) have all issued extensive reports assessing patterns of interceptions at sea.

Amnesty International identified consistent aggressive and reckless behavior by the LCG, at times threatening to shoot before aggressively transferring migrants on board.⁸⁹ Some interviewees also reported Libyan coast guards deliberately shooting at them, damaging their boats with the passengers still inside, leading to capsizing and loss of life at sea.⁹⁰ The OHCHR has similarly described the LCG's behavior as life-threatening, stating the LCG rammed or fired at the interviewees' boats, causing them to capsize or individuals to jump into the ocean in despair. Other migrants described kicking, beating, and other physical aggression. According to the report, LCG personnel have come on board NGO SAR vessels and threatened the crew and rescued migrants, fired in the air or in the direction of these vessels, and threatened SAR NGOs that they will be 'targeted' if they do not disembark migrants in Libya or leave the Libyan SAR zone.⁹¹ UNSMIL confirms testimonies by Amnesty International and OHCHR, which detail the use of guns, physical assault, and threatening or racist language – causing anxiety among migrants, some of whom jump in the ocean out of despair.⁹²

Additionally, several NGOs have reported on individual violent LCG interceptions at sea. German NGO Sea-Watch drew attention to the attack on 150 migrants on board a rubber boat

May 2022; UNHCR, 'Monthly Update on UNHCR's Interventions at Disembarkation Points, September 2021' (2021) <<https://data2.unhcr.org/en/documents/details/89003>>;

UNHCR, 'Monthly Update on UNHCR's Interventions at Disembarkation Points, December 2017' (2017)

<<https://data2.unhcr.org/en/documents/details/61535>>; UNHCR, 'Overview 2018' (2018)

<<https://reliefweb.int/report/libya/unhcr-libya-overview-2018-jan-dec-2018-enar>>.

⁸⁷ LCG personnel defended using force and firing warning shots into the air during rescue operations in a May 2017 meeting with UNSMIL in order to 'restore calm' among migrants who 'aggressively resist return to Libya.' The LCG defended any use of force during operations in October 2018 as necessary to fulfil their "life-saving aim." United Nations Support Mission In Libya and United Nations Human Rights Office of the High Commissioner, 'Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya' (2018) <<https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>>, 38.

⁸⁸ Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2018)

<https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Documents/A_HRC_37_50_EN.docx> accessed 12 January 2021, 5.

⁸⁹ Amnesty International, "'No One Will Look for You" Forcibly Returned from Sea to Abusive Detention in Libya' (2021) <<https://www.amnesty.org/en/wp-content/uploads/2021/07/MDE1944392021ENGLISH.pdf>> accessed 12 January 2021, 6.

⁹⁰ Ibid

⁹¹ United Nations Human Rights Office of the High Commissioner, "'Lethal Disregard" Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea' (2021)

<<https://www.ohchr.org/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf>>, 15.

⁹² United Nations Support Mission In Libya and United Nations Human Rights Office of the High Commissioner, 'Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya' (2018) <<https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>>, 35.

by the LCG on 21 October 2016, causing the death of thirty migrants.⁹³ Only seven months later, they reported an LCG patrol boat interfering with a Sea-Watch rescue effort involving 500 migrants on a wooden vessel. According to accounts from the rescue team and survivors, the LCG officers fired their firearms at the migrants, threatened and shouted at them, and slammed their boat. Libyan officials then transferred hundreds of migrants to a Libyan patrol boat without providing them life jackets. Others were left in their dinghy without life jackets and were piloted back to shore.⁹⁴

On 6 November 2017, Sea-Watch again reported a violent interception. LCG members were accused of threatening the Sea-Watch crew, throwing potatoes at rescuers and migrants, and travelling at an excessively fast pace with one migrant still hanging down the side of the vessel.⁹⁵ According to Sea-Watch, 59 people were rescued, while the LCG only returned 42 to Libya. Five bodies were found at sea, while forty went missing and are assumed dead.⁹⁶ On May 8, 2018, 17 survivors filed a complaint with the ECtHR against Italy, blaming it for fatalities at sea and allowing migrants to be pulled back to Libya, where they face serious danger.⁹⁷ The most recent documented violent interception occurred in July 2021, when LCG members were captured on tape firing at a migrant boat. The footage appeared to show the Libyan coastguard firing at least two bullets in the direction of the migrant boat as they attempted to ram it.⁹⁸

Those rescued or intercepted at sea off the coast of western Libya are disembarked at thirteen predetermined locations. Migrants intercepted at sea are detained in official centers run by the Directorate of Combatting Illegal Migration, where they continue to be exposed to a variety of human rights violations.⁹⁹

Conclusion

This chapter provided a factual background to the pullback operations by the LCG. In the last two decades, the role of Libya as ‘gatekeeper of Fortress Europe’ has evolved from assisting

⁹³ Reuters, “‘Libyan Coastguard’ Speedboat Attacked Migrant Dinghy, Says NGO’ *The Guardian* (21 October 2016) <<https://www.theguardian.com/world/2016/oct/21/men-on-libyan-coastguard-boat-reportedly-attack-dinghy-of-refugees-and-migrants>> accessed 12 January 2022.

⁹⁴ Sea-Watch e.V., ‘Press Release: Sea-Watch Demands Independent Investigation of the Illegal Return of an Overcrowded Wooden Boat Sea-Watch e.V.’ (11 May 2017) <<https://sea-watch.org/en/pm-sea-watch-demands-independent-investigation-of-the-illegal-return-of-an-overcrowded-wooden-boat/>> accessed 12 January 2022.

⁹⁵ Sea-Watch e.V., ‘Clarification on the Incident of November 6th • Sea-Watch e.V.’ (7 November 2017) <<https://sea-watch.org/en/clarification-on-the-incident-of-november-6th/>> accessed 12 January 2022.

⁹⁶ United Nations Support Mission In Libya and United Nations Human Rights Office of the High Commissioner, ‘Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya’ (2018) <<https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>>, 36.

⁹⁷ Stephanie Kirchgaessner and Lorenzo Tondo, ‘Italy’s Deal with Libya to “pull Back” Migrants Faces Legal Challenge’ *The Guardian* (8 May 2018) <<https://www.theguardian.com/world/2018/may/08/italy-deal-with-libya-pull-back-migrants-faces-legal-challenge-human-rights-violations>> accessed 12 January 2022.

⁹⁸ Sea-Watch e.V., ‘So-Called Libyan Coast Guard Firing Shots at Migrant Boat in Distress’ (5 July 2021) <https://sea-watch.org/en/libyan_coast_guard_shots_fired/> accessed 13 July 2022.

⁹⁹ United Nations Human Rights Office of the High Commissioner, ‘Unsafe and Undignified: The Forced Expulsion of Migrants from Libya’ (2021) <https://www.ohchr.org/Documents/Issues/Migration/Unsafe_and_Undignified.pdf> accessed 12 January 2021, 23.

Italy and the EU in preventing irregular migrants from arriving in Europe, to being in direct control of pullbacks. This chapter has shown that pullbacks often involve physical and verbal aggression and pose a risk to migrants' lives. Now that the kind of conduct encompassed by pullback practices has been set out, the question arises whether this conduct by the LCG can be attributed to Libya. The next chapter will therefore assess whether the pullback operations identified in this chapter can be attributed to Libya under African human rights law.

Chapter 2: Imputability of pullbacks by the Libyan Coast Guard to Libya under the African human rights system

Introduction

This chapter analyzes to what extent the pullbacks conducted by the LCG, as described in the previous chapter, are imputable to Libya. In this regard, Article 1 African Charter on Human and Peoples' Rights (ACHPR) is essential. This article charges State Parties with the fundamental duty to 'recognize the rights and undertake to adopt legislative or other measures to give effect to them'.¹⁰⁰ Based on this article, a Member State accepts responsibility under the ACHPR for 1) conduct that is imputable to it and that is 2) in violation of ACHPR rights.¹⁰¹ For the purpose of analyzing whether Libya can be held responsible for violating the right to leave, this chapter focuses on the condition of imputability. Under this condition, it must be assessed whether pullbacks can be attributed to the state and whether Libya exercises jurisdiction over victims when they are intercepted and returned to the Libyan coast.¹⁰² This chapter will first define the concepts of attribution and jurisdiction and will assess whether these two conditions for state responsibility under the ACHPR are fulfilled.

2.1 The attribution of acts committed by the Libyan Coast Guard to Libya

To establish whether Libya can be held responsible for the acts committed by the LCG, one needs to assess whether this violation can be attributable to the state. This section will set out the definition of attribution and will apply this to pullbacks conducted by the LCG.

2.1.1. The concept of attribution

From jurisprudence of the African Commission it follows that establishing state responsibility requires an assessment of whether the breach of an international obligation is 'attributable to it in the form of action or omission [not] in conformity with what is expected of it by the obligation in question'.¹⁰³ This principle flows from the rules of attribution set out in the Articles on State Responsibility for Internationally Wrongful Acts (ASR). The ASR is largely codified international law,¹⁰⁴ drafted by the ILC which has the mandate to codify and progressively develop international law.¹⁰⁵ As the African Commission has not clarified its attribution standards, the ASR articles will be used to determine if the LCG pullbacks can be attributed to Libya.

¹⁰⁰ Article 1 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58

¹⁰¹ *Zimbabwe Human Rights NGO Forum v Zimbabwe* [2006] African Commission on Human and Peoples' Rights Communication no 245/2002, para 142.

¹⁰² *Ibid*

¹⁰³ *Hossam Ezzat & Rania Enayet (represented by Egyptian Initiative for Personal Rights & INTERIGHTS) v The Arab Republic of Egypt* [2016] African Commission on Human and Peoples' Rights Communication no 355/07, para 124.

¹⁰⁴ Jan Klabbbers, *International Law* (Third edition, Cambridge University Press 2021), 360.

¹⁰⁵ David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority Symposium: The ILC's State Responsibility Articles' (2002) 96 *American Journal of International Law* 857, 858.

Attribution rules tie conduct to an actor with international legal personality, in this case a State Party. It can be defined as a matter of state control over the perpetrators of human rights violations.¹⁰⁶ The state itself is not a living person capable of acting on its own. For this reason, the (in)actions of certain groups of persons are attributed to the state. ASR lists the entities of which (in)actions are attributable to states and further provides the circumstances under which those acts merit attribution.

2.1.2. Attributing conduct of the Libyan Coast Guard to Libya

An examination of whether Libya can be held responsible for pullbacks requires an assessment of whether the coast guards respond to state actors, and thus under which authority they operate.¹⁰⁷ Chapter 1 discussed Libya's political fragmentation. This section will show that this fragmentation also has an impact on the management of irregular migration. Firstly, this section will focus on the organizational structure of the LCG to examine the extent to which this apparatus is controlled by the state. Drawing on this, it will be assessed whether the pullbacks can be attributed to Libya in the different factual situations of state control over the LCG.

i) The Libyan Coast Guard: organizational structure and mandate

As has become clear in Chapter 1, the main apparatus involved in pullback operations is the LCG. As aforementioned, Italy and the EU helped rebuild this institution through funding, providing equipment and training personnel since 2017. To determine whether LCG pullbacks can be attributed to Libya, the LCG's structure and connection to the state must be analysed. It will become clear that, contrary to its appearance of official state security structure, the LCG is composed of both state and non-state actors. Due to the lack of more recent information, the analysis in this section is based on LCG's organizational structure under ruling of the GNA. It is unclear to what extent the transition to the GNU in 2021 influenced the LCG's structure. However, recent available information on Libya's political landscape shows Libya's continuing political fragmentation,¹⁰⁸ suggesting that the control over the LCG is still distributed.

Libya's coast guard is not a unitary body. The Libyan coastline is being monitored by two key parties: the General Administration for Coastal Security (GACS) under the Ministry of Home Affairs, and the Libyan Coast Guard and Port Security (LCGPS) under the Ministry of Defence. The mandate of the latter is broader than that of the former: the GACS has competence to patrol in territorial waters, while the LCGPS patrols in both territorial and international waters.¹⁰⁹ The GACS has branches in Sabratha, Zawiyah, Tripoli, Khoms, Misuratah, Sirte, Ajdabiya,

¹⁰⁶ Marko Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 Human Rights Law Review 411, 446.

¹⁰⁷ As per the *Yeager* case, *Kenneth P Yeager v The Islamic Republic of Iran* [1987] IUSCT Case no 10199.

¹⁰⁸ 'UN Warns Libya Could Be Divided Again, Urges 2022 Elections' (AP NEWS, 16 March 2022)

<<https://apnews.com/article/middle-east-africa-elections-libya-presidential-elections-e3c07939539c342370bd31cd7091f0dd>> accessed 13 May 2022; Emadeddin Badi, 'Libya's Government of National (Dis)Unity: The Misleading Choreography of Conflict Resolution' (2021) 118 Confluences Mediterranée 23, 32.

¹⁰⁹ Cabinet Decree No. (145) of 2012 on Adopting the Organisational Structure and Powers of the Interior Ministry and the Organisation of its Administrative Unit 2012 (adopted 23 May 2012); 'Amnesty International, 'Libya's Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants' (2017) <<https://www.amnesty.org/en/documents/mde19/7561/2017/en/>> accessed 12 January 2021, 8.

Benghazi, Green Mountain and Tobruk and its headquarters is based in Zuwara. The LCGPS is divided in six sectors and fifty locations. The GNA controlled three of these sectors: the Western, Tripoli and Gulf of Sidra sector.¹¹⁰ The other three, the Tobruk, Darnah, and Bangaze sector, are controlled by the Tobruk House of Representatives.¹¹¹ It is unclear whether the change of government in 2021 has affected this division.

The LCG's involvement with informal networks of militias, human smugglers and traffickers has given rise to the primary difficulties surrounding it. Many militias and criminals joined with the GNA and branded themselves as official members of the LCG. As they sensed the political status quo was in their final phases,¹¹² many attempted to 'launder their reputations by accepting incentives to serve as law enforcement partners of international donors',¹¹³ such as the EU and Italy. They are now considered part of the official state system.¹¹⁴

In some places, among which even the capital of Tripoli controlled by the GNA/GNU, whole militias have formed a coast guard unit.¹¹⁵ In other places, such as Zuwara, these militias are referred to as 'support' units. In addition, some units employ individuals from militias with or without formal training.¹¹⁶ As a result, coast guard units act with a great deal of autonomy with regards to their headquarters. A Zuwara coast guard official stated toward Altai Consulting: 'We exchange information with [the coast guard] in Tripoli and we are still under Tripoli bureaucratically speaking. But Tripoli has no budget because of the political stalemate, and we are stalemated with them'.¹¹⁷ This suggests that a chain of command within the LCG does not exist.¹¹⁸

Because of their close ties with security services, militias have also colluded with smugglers, as they intercepted migrants on Libyan coasts and profit from them via extortion and sale to

¹¹⁰ EU External Action Service, EUBAM Libya Initial Mapping Report Executive Summary, 25 January 2017, 5616/17, <https://www.statewatch.org/media/documents/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf>, 41.

¹¹¹ Ibid, 41; According to Amnesty International the LCG has been largely unaffected by this division on an operational level, and coordination across all sectors continues; Amnesty International, 'Libya's Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants' (2017) <https://www.amnesty.org/en/documents/mde19/7561/2017/en/> accessed 12 January 2021, 35.

¹¹² Mark Micallef and Tuesday Reitano, 'The Anti-Human Smuggling Business and Libya's Political End Game' (Institute for Security Studies, The Global Initiative against Transnational Organized Crime 2017) 2 https://globalinitiative.net/wp-content/uploads/2018/01/Libya_ISS_Smuggling.pdf, 2.

¹¹³ Ibid

¹¹⁴ Foreign Policy, 'Nearly There, But Never Further Away' (4 October 2017) <http://europeslamsitgates.foreignpolicy.com/part-3-nearly-there-but-never-further-away-libya-africa-europe-EU-militias-migration--intro> accessed 24 April 2022.

¹¹⁵ Altai Consulting, 'Leaving Libya: Rapid Assessment of Municipalities of Departures of Migrants in Libya' (2017) https://www.altaiconsulting.com/files/ugd/fe5272_bbee10f8553c4dc4baaf7d603ff0ce05.pdf, 42.

¹¹⁶ Ibid

¹¹⁷ Ibid

¹¹⁸ Adel-Naim Reyhani, 'Anomaly upon Anomaly: Refugee Law and State Disintegration' (4 June 2020) <https://papers.ssrn.com/abstract=3693620> accessed 14 July 2022, 12.

other smuggling networks.¹¹⁹ The instance of the coast guard unit of Zawiya in the Western sector, which is responsible for monitoring some of Libya's most notorious smuggling ports in Zawiya, Zawara and Sabatha,¹²⁰ is the most emblematic example of collaboration between the LCG, local traffickers, and militias.¹²¹ Al-Bija is a militia leader from Zawiya who gained control of the city's port as more migrants arrived in Libya and migration control became a source of revenue.¹²² This militia was later designated as a coast guard unit and was hired by the GNA as an institutional authority. However, in June 2017, a UN panel of experts on Libya released a report identifying persons suspected of human trafficking and smuggling collusion with the LCG. In this report, Al-Bija was identified as one of the suspects.¹²³ Despite this, Al-Bija continued to be the head of the coast guard unit of Zawiya until 2019.¹²⁴

Even if the extent of coordination and the specific participation of non-state actors are still unknown, it is commonly known that the LCG, local traffickers, and militias have networks of collaboration and rivalry that decide whether a migrant boat is intercepted. This shows that pullbacks have been carried out by both state and non-state actors. What this composition means in terms of attributing these pullbacks to Libya will be discussed in the next section.

ii) Attributing pullbacks to Libya in GNU/GNA controlled LCG units

As established in the previous section, the Tripoli, Western, and Gulf of Sidra sectors under the LCGPS are officially controlled by the recognized government. While based on available information it cannot be ascertained which authorities control the GACS branches, it is reasonable to assume that these units also respond to the UN-backed government, due to their

¹¹⁹ Amnesty International, 'Libya's Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants' (2017) <<https://www.amnesty.org/en/documents/mde19/7561/2017/en/>> accessed 12 January 2021, 34; See also UN Security Council, Final Report of the Panel of Experts on Libya Established Pursuant to Resolution 1973 (2017) S/2017/466 <<https://reliefweb.int/report/libya/final-report-panel-experts-libya-established-pursuant-resolution-1973-2011-s2017466>>.

¹²⁰ Amnesty International, 'Libya's Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants' (2017) <<https://www.amnesty.org/en/documents/mde19/7561/2017/en/>> accessed 12 January 2021, 35, 15, 16.

¹²¹ UN Security Council, Final Report of the Panel of Experts on Libya Established Pursuant to Resolution 1973 (2017) S/2017/466 <<https://reliefweb.int/report/libya/final-report-panel-experts-libya-established-pursuant-resolution-1973-2011-s2017466>>, 63; Arezo Malakooti, 'The Political Economy of Migrant Detention in Libya: Understanding the Players and the Business Models' (Clingendael, Global Initiative Against Transnational Organized Crime 2019) <<https://globalinitiative.net/wp-content/uploads/2019/11/Final-Report-Detention-Libya.pdf>>, 72.

¹²² Foreign Policy, 'Nearly There, But Never Further Away' (4 October 2017) <<http://europeslamsitsgates.foreignpolicy.com/part-3-nearly-there-but-never-further-away-libya-africa-europe-EU-militias-migration--intro>> accessed 24 April 2022.

¹²³ UN Security Council, Final Report of the Panel of Experts on Libya Established Pursuant to Resolution 1973 (2017) S/2017/466 <<https://reliefweb.int/report/libya/final-report-panel-experts-libya-established-pursuant-resolution-1973-2011-s2017466>>, 63.

¹²⁴ 'Al-Bija was arrested for people and fuel smuggling in October 2020, but was released in April 2021 by the new Dbeibah government for 'lack of evidence.' His release came with a promotion inside the LCG for his role in the latest conflict against Haftar; Al Marsad, 'Fratoanni: The Release of Al-Bija Is Disturbing News' (13 April 2021) <<https://almarsad.co/en/2021/04/13/fratoanni-the-release-of-al-bija-is-disturbing-news/>> accessed 24 April 2022; See also UN Security Council, 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 2017 [S/2017/466], 103.

geographical location in the West¹²⁵ of Libya – an area which is largely controlled by the recognized government.

Both the GACS and the LCGPS are established by government decisions and fall respectively under the Ministry of Defense and the Ministry of Home Affairs.¹²⁶ Therefore, it can be argued that the LCG is under complete dependency of the state and qualifies as a state organ according to Article 4 (2) ASR.¹²⁷ Under Article 4 (1) ASR, which establishes that ‘the conduct of any State organ shall be considered an act of the State under international law’, LCG pullbacks could be attributed to the state.

However, the recognized government has so far avoided the recognition of its coast guard units as an institution part of the state structure.¹²⁸ Whether the LCG is a state organ can therefore be debated. If the LCG cannot be considered a state organ in the concerned areas, it is at least ‘empowered by the law to exercise elements of government authority’ under Article 5 ASR. As the LCG was established to provide for the surveillance of national waters by Government Decision 372/1996 and the MoU empowers the LCG to pull back vessels to the Libyan coast, the LCG has been empowered by law to exercise these functions. As demonstrated by the ILC commentaries to Article 5 ASR, these functions can be considered ‘elements of government authority’, as the commentaries name ‘delegated powers in relation to immigration control’¹²⁹ as an example of ‘element of governmental authority’ under Article 5 ASR. Therefore, it could be argued that pullbacks by the LCG are attributable to Libya under Article 5 ASR. If Article 5 is applicable, Libya might be held responsible for the core of its functions, i.e., pullbacks, as well as *ultra vires* acts connected to the scope of their official functions,¹³⁰ such as ill-treatment of migrants on intercepted vessels discussed in Chapter 1.

Due to the complicated security environment in Libya, it is difficult to determine which units are in fact controlled by the recognized government. Even when NGOs and IOs count units as GNU/GNA-controlled, the reality is more difficult to determine.¹³¹ The next section will assess whether LCG conduct can be attributed to Libya in units where the recognized government is officially in control, but in reality, lacks authority.

¹²⁵ Sabratha, Zawiyah, Tripoli, Khoms, Misuratah, and Sirte

¹²⁶ LCGPS per Government decision 372/1996 and GACS responsibilities were extended by Cabinet Decree 145/2012 and MoI instruction 982/2013; EU External Action Service, EUBAM Libya Initial Mapping Report Executive Summary (2017) 5616/17, <https://www.statewatch.org/media/documents/news/2017/feb/eu-eas-libya-assessment-5616-17.pdf>, 38.

¹²⁷ Article 4 (2) stipulates that ‘an organ includes any person or entity which has that status in accordance with the internal law of the State’.

¹²⁸ UN Security Council, Final Report of the Panel of Experts on Libya Established Pursuant to Resolution 1973 (2017) S/2017/466 <<https://reliefweb.int/report/libya/final-report-panel-experts-libya-established-pursuant-resolution-1973-2011-s2017466>>, 152.

¹²⁹ United Nations, Draft Articles on Responsibility of States for Internationally Wrongful, with commentaries International Law Commission, Yearbook of the International Law Commission (1996) Vol II Part 2, 43.

¹³⁰ Ibid, 46.

¹³¹ Eugénie Deval, ‘Trafficking and Exploitation of Migrants in Libya: Focus on the Legal and Administrative Framework, and Exploration of the International Responsibility of the State of Libya Studies’ (2018) 51 *Revue Belge de Droit International / Belgian Review of International Law* 43, 69.

iii) *Attributing pullbacks to Libya in LCG units controlled by militias*

Even though the aforementioned sectors are officially controlled by the official government, it is alleged that militias have joined the LCG units in these sectors. Particularly the units in the Western sector (covering the two main departure points Zawiya and Zuwara) are heavily influenced by militias and armed groups. As a result, certain LCG units tend to act with a large degree of autonomy with regards to the recognized government. Under these circumstances, the LCG cannot be considered a state organ under Article 4 (2) ASR. Even if the UN-recognized government retains some influence – since practically all militias operating as coastguards officially back this government¹³² – one may assume that the heavy influence of militias will prevent them from directing actions. Even if the GNU/GNA would seek to end pullback operations, it would not have the authority to do so. Article 4 (2) ASR is therefore unlikely to provide legal basis for attributing pullbacks conducted by militias to Libya.

Alternatively, Article 9 ASR might be applicable. In *African Commission (Kadhafi) v Libya* the African Court established that Libya was responsible for acts committed by armed groups. The African Court ruled that, even though the applicant might have been detained by a non-governmental entity, Libya was nevertheless liable for the group's conduct and omissions. Thereby the African Court established the attributability of actions of armed groups to Libya. The African Court determined, citing Article 9 ASR, that an armed group's activity can be regarded as an act of the state if the group 'is in fact exercising elements of governmental authority in the absence or default of the official authorities and in circumstance such as to call for the exercise of those elements of authority'.¹³³ The African Court thus ruled that acts of armed groups can be attributed to Libya by virtue of Article 9 ASR, and consequently found that Libya had violated Article 6 and 7 ACHPR.

This decision is of great significance for establishing Libya's responsibility for pullbacks. While it could be argued that LCG actions are out of Libya's hands due to the loss of control over certain units, the African Court has clarified that the state remains responsible for activities of armed groups under three conditions: 1) when they exercise governmental authority 2) do so in the absence of the official authorities and 3) in circumstances such as to call for the exercise of those elements of authority.

In the case at hand, pullbacks can be considered activities which are 'governmental' in nature. Given the existence of coast guard units under the control of the recognized government, it is reasonable to presume that these tasks are generally fulfilled by governmental organs.¹³⁴ This is also evidenced by the commentary to Article 5 ASR, referred to in the previous section, that migration control constitutes 'elements of governmental authority'. Secondly, the phrase 'in the absence or default of' in Article 9 ASR was intended to cover situations when 'the official

¹³² Adel-Naim Reyhani, 'Anomaly upon Anomaly: Refugee Law and State Disintegration' (4 June 2020) <<https://papers.ssrn.com/abstract=3693620>> accessed 14 July 2022, 12.

¹³³ *African Commission on Human and Peoples' Rights v Libya* [2016] African Court on Human and Peoples' Rights Communication no 002/2013, para 50.

¹³⁴ Adel-Naim Reyhani, 'Anomaly upon Anomaly: Refugee Law and State Disintegration' (4 June 2020) <<https://papers.ssrn.com/abstract=3693620>> accessed 14 July 2022, 13.

authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality'.¹³⁵ As has become clear in Chapter 1, the Libyan political landscape is severely fragmented and the Libyan government has lost control over large parts of Libyan territory. It can therefore be argued that this second condition of 'absence or default of the official authorities' is fulfilled in the territories where the recognized government is not exerting power. Finally, the state remains responsible for activities of armed groups when they exercise governmental authority in the absence of official authorities and *in circumstances such as to call for the exercise of those elements of authority*. Since pullbacks often cause anxiety and fear of loss of life among migrants on intercepted vessels, causing some to even jump in the ocean, coast guard rescue operations are necessary.¹³⁶ It could therefore be argued that in this situation of fear of loss of life, pullbacks call for the use of governmental authority.

It could therefore be argued that pullbacks by the LCG units controlled by armed groups or militias can be attributed to Libya, who remains responsible for these acts. If Article 9 ASR applies, the core of the LCG's work, i.e., pullback operations, remains attributable to Libya. *Ultra vires* acts can, in this instance, not be attributed to Libya as these are only attributable to the state if the legal basis for attribution is Article 4, 5, or 6 ASR.¹³⁷ Other articles are unlikely to be applicable. Article 8 ASR cannot be applied in areas controlled by non-state actors due to the lack of a functioning chain of command which excludes it as 'activity directed or controlled by a State' under this article.¹³⁸ Furthermore, Article 5 is not applicable as militias and armed groups have not been empowered by Libyan law to exercise elements of government authority.

iv) *Attributing pullbacks to Libya by units controlled by the Tobruk House of Representatives*

The units in the East of Libya – in LCGPS sectors Tobruk, Darna and Bangaze and GACS units in Ajdabiya, Benghazi and Green Mountain – are controlled by the rival Tobruk government. The recognized government exercises no control over this part of territory. While information on GNU/GNA involvement in eastern LCG units is lacking, it is reasonable to assume the Tobruk government has exclusive control over the LCG in this area.

The Tobruk House of Representatives has yet to pass a valid constitutional amendment to reinstate itself as a government institution.¹³⁹ Without political and legal recognition, the House

¹³⁵ United Nations, Draft Articles on Responsibility of States for Internationally Wrongful, with commentaries International Law Commission, Yearbook of the International Law Commission (1996) Vol II Part 2, 49.

¹³⁶ Adel-Naim Reyhani, 'Anomaly upon Anomaly: Refugee Law and State Disintegration' (4 June 2020) <<https://papers.ssrn.com/abstract=3693620>> accessed 14 July 2022, 13.

¹³⁷ Ibid, 12; United Nations, Draft Articles on Responsibility of States for Internationally Wrongful, with commentaries International Law Commission, Yearbook of the International Law Commission (1996) Vol II Part 2, 45

¹³⁸ Adel-Naim Reyhani, 'Anomaly upon Anomaly: Refugee Law and State Disintegration' (4 June 2020) <<https://papers.ssrn.com/abstract=3693620>> accessed 14 July 2022, 12.

¹³⁹ Mary Fitzgerald Toaldo Mattia, 'A Quick Guide to Libya's Main Players – European Council on Foreign Relations' (ECFR, 19 May 2016) <https://ecfr.eu/special/mapping_libya_conflict/> accessed 14 July 2022

of Representatives lacks rights and obligations that come with statehood under international law. Indeed, according to Article 1 Montevideo Convention, the Tobruk administration is not a government as it cannot enter relations with other states.¹⁴⁰ Coast guard units acting on the behalf of the House of Representatives are thus not organs ‘empowered with elements of governmental authority’.¹⁴¹ This excludes the application of Article 4 and 5 ASR as, in principle, there is no link between these coast guards and the state and thus no attribution.¹⁴²

There are two instances where a state can nonetheless be held responsible for actions by non-state actors.¹⁴³ Firstly, Article 10 ASR establishes that ‘the conduct of an insurrectional movement [or other movement] which becomes the new Government of a State shall be considered an act of that State under international law’. An ‘insurrectional movement’ is defined by the ILC as one that is organized and controls territory, usually in the same state as the government against which it has revolted.¹⁴⁴ In order for Article 10 ASR to apply, the insurrectional movement must have been successful. It is therefore not clear whether Article 10 applies to the situation at hand where a government without political and legal legitimacy (the Tobruk government) in one part of the state coexists with a *de jure* government (GNU/GNA) in another part of the state. It could be questioned whether the Tobruk government is a successful movement if it has not been recognized as the *de jure* government.

Alternatively, Article 9 ASR could also apply to pullbacks by the LCG units under control of the House of Representatives. Article 9 ASR covers instances where governmental authority has partially collapsed and non-state actors execute governmental functions, but only applies if three conditions are fulfilled: As established above, the first two conditions – the performance of governmental tasks in absence of official authorities, and the necessity of exercise of governmental functions – are fulfilled when applied to LCG pullbacks. Regarding the third condition, it must be proven that it was necessary to exercise elements of governmental authority considering the circumstances. It has been argued that this ‘necessity requirement’ implies that Article 9 ASR only covers temporary assumptions of authority and not long-term ones.¹⁴⁵ However, the aim of the Tobruk government is to either take over control from the

; Jose Serralvo, ‘Government Recognition and International Humanitarian Law Applicability in Post-Gaddafi Libya’ in Terry D Gill (ed), *Yearbook of International Humanitarian Law Volume 18, 2015* (TMC Asser Press 2016) <https://link.springer.com/chapter/10.1007/978-94-6265-141-8_1> accessed 13 July 2022, 13; A ruling from the Libyan Supreme Court in Tripoli deemed the HoR unconstitutional and illegal. See Omneya Makhoulouf, ‘United Nations Access Challenges and Non-State Armed Groups in Conflict Situations: The Need for Legal Reform’ [2016] Theses and Dissertations <<https://fount.aucegypt.edu/etds/562>>, 17.

¹⁴⁰ Article 1, Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933) 164 LNTS 19. The other three conditions are fulfilled, i.e., a permanent population, defined territory, a government.

¹⁴¹ Article 5 Draft Articles on Responsibility of States for Internationally Wrongful Acts (adopted November 2001) Supplement No 10 A/56/10 chp.IV.E.1.

¹⁴² Nicholas Tsagourias, ‘Responsibility of Non-State Rulers in Areas of Limited Statehood’ [2021] Rule of Law and Areas of Limited Statehood 162, 6.

¹⁴³ Nicholas Tsagourias, ‘Non-State Actors, Ungoverned Spaces and International Responsibility for Cyber Acts’ (2016) 21 Journal of Conflict and Security Law 455, 463.

¹⁴⁴ *Prosecutor v Limaj et al* [2005] International Criminal Tribunal for the former Yugoslavia IT-03-66-T, paras 88-170.

¹⁴⁵ Nicholas Tsagourias, ‘Non-State Actors, Ungoverned Spaces and International Responsibility for Cyber Acts’ (2016) 21 Journal of Conflict and Security Law 455, 464.

recognized government or share power with it.¹⁴⁶ It is therefore questionable whether their rule is temporary as understood by Article 9 ASR and thus whether the third requirement for attribution to Libya is met.

2.2. State responsibility under the ACHPR: State jurisdiction over pullbacks

Section 2.1 brought forward arguments for the attribution of conduct by the LCG to Libya. If this conduct can indeed be attributed to it, Libya must still have jurisdiction over the migrants on intercepted vessels in order to be held responsible. Otherwise, the ACHPR might not be applicable, and Libya cannot be held responsible for potential violations thereunder. It is thus important to distinguish between the Charter's binding nature because of ratification and the ACHPR's applicability to the circumstances. While the first criterion is met, as Libya has ratified the ACHPR, it remains to be seen if the ACHPR applies to the LCG's pullbacks. This requires the exercise of jurisdiction by Libya.

2.2.1. The concept of State jurisdiction

Jurisdiction is the question of state control over the victims of human rights violations through its agents, or, more generally, control over the territory in which these victims are located.¹⁴⁷ It is thought of as a threshold criterion: to have human rights obligations towards an individual, the state must have jurisdiction over them.¹⁴⁸ Without jurisdiction, there are no human rights applicable and therefore no duties. There can then be no acts that would violate those duties and hence no responsibility.¹⁴⁹

Two matters are important when assessing jurisdiction: firstly, whether the state agents exercise legal and political authority 'with a claim to legitimacy',¹⁵⁰ whether this is justified or not. Secondly, state jurisdiction 'provides the practical circumstances for [human rights] to be feasible rights and duties in practice',¹⁵¹ meaning there needs to be an institutional framework in place to 'enact and protect human rights, and to identify and allocate the corresponding duties in practice'.¹⁵² This implies that state authority should be effective and exercised rather than simply asserted.¹⁵³ There are five models of jurisdiction¹⁵⁴ of which two are most relevant here: personal and territorial jurisdiction. These each correspond to a different form of state control

¹⁴⁶ TRT World 'Libya PM Dbeibah: Tobruk Parliament Trying to Take Tripoli by Force' (11 February 2022) <<https://www.trtworld.com/africa/libya-pm-dbeibah-tobruk-parliament-trying-to-take-tripoli-by-force-54631>> accessed 13 May 2022.

¹⁴⁷ Lea Raible, 'Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship' (2018) 31 *Leiden Journal of International Law* 315, 320.

¹⁴⁸ *Ibid*

¹⁴⁹ Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 *Leiden Journal of International Law* 857, 867.

¹⁵⁰ *Ibid*, 865; See also Jan Klabbbers, *International Law* (Third edition, Cambridge University Press 2020), 302.

¹⁵¹ Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 *Leiden Journal of International Law* 865, 865.

¹⁵² *Ibid*

¹⁵³ *Ibid*, 872

¹⁵⁴ Jan Klabbbers, *International Law* (Third edition, Cambridge University Press 2021), 301.

over the victim.¹⁵⁵ The next section will discuss these two models of jurisdiction and whether they apply to the LCG pullbacks in territorial waters.

2.2.2. Territorial jurisdiction over interceptions in Libyan waters

The basic rule in international human rights law is that a state exercises jurisdiction over acts occurring on its territory. While the ACHPR does not contain an explicit provision that limits State Parties' human rights obligations to their respective territories or jurisdiction, in *Al-Asad v Djibouti*, the African Commission held the view that 'the Charter applies primarily within the territorial jurisdiction of State Parties'.¹⁵⁶ As established in Chapter 1, pullbacks are largely conducted on Libyan territory. One could therefore conclude that Libya exercises jurisdiction over migrant vessels in territorial waters.

However, as argued above, a state only has jurisdiction over territory when authority is effective and exercised rather than simply asserted. Indeed, even though the ACHPR presumes territorial jurisdiction, this presumption is not absolute.¹⁵⁷ For instance, when a state is unable to exercise authority over its entire territory,¹⁵⁸ this presumption can be rebutted. In line with Article 60 ACHPR, according to which provisions of the ACHPR can be interpreted in light of other international instruments, it is appropriate to refer to the ECtHR case *Ilascu v Moldova*. In *Ilascu v Moldova* the ECtHR acknowledged that the presumption of territorial jurisdiction may be limited if a state cannot exercise power over parts of its territory.¹⁵⁹ However, in this case, the Strasbourg Court argued that the state nonetheless retains positive obligations in this situation.¹⁶⁰ It held that the Moldovan government had the obligation regarding Transdniestria – part of the territory over which the recognized Moldovan government did not exercise control – to 'take the diplomatic, economic, judicial or other measures that it is in its power to take ... to secure to the applicants the rights guaranteed by the convention'.¹⁶¹ This is in line with the reasoning of the African Court in *African Commission (Kadhafi) v Libya*, where it addressed the question of attribution of acts of armed groups to Libya as part of the African Court's jurisdiction *ratione personae*.¹⁶² As part of the assessment of attribution, it argued that Libya

¹⁵⁵ The five principles of jurisdiction are: territoriality, nationality, protection, passive personality, universality; *Ibid*, 280.

¹⁵⁶ *Mohammed Abdullah Saleh Al-Asad v The Republic of Djibouti* [2014] African Commission on Human and Peoples' Rights Communication 383/10, para 134.

¹⁵⁷ Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 *Leiden Journal of International Law* 857, 872.

¹⁵⁸ E.g., as a result of military occupation by another state's forces. See *Loizidou v Turkey* App no 15318/89 (ECtHR, 23 March 1995).

¹⁵⁹ *Ilascu v Moldova* App no 48787/99 (ECtHR, 8 July 2004) para 312.

¹⁶⁰ *Ibid*, para 313

¹⁶¹ *Ibid*

¹⁶² According to Besson, an analysis on attribution may conflate with assessments on jurisdiction. She states that 'this would be the case for instance, in the context of assessing whether there is state jurisdiction when de facto organs act or when the acts of state agents need to be delineated from those of an international organization they work for: in those circumstances, attribution to the state is also a condition of jurisdiction.' In the analysis at hand, the acts of state agents and armed groups needs to be delineated. Therefore, even though the reflections of the African Commission relate to attribution, these are still relevant for the establishment of jurisdiction. See Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 *Leiden Journal of International Law* 857, 867.

cannot ignore its responsibilities under the ACHPR despite its ‘volatile political and security situation’.¹⁶³

Applying this to pullbacks in territorial waters, Chapter 1 described that areas in the Northwest of Libya are governed by the recognized government, the East by the Tobruk government, and the lesser-populated South and Southwest by different militias. As the GNU currently maintains control over the Northwest, and the GNA controlled Tripoli and its vicinity (see figure 1 and 2 in Chapter 1), it can be said that the Libyan State currently exercises or exercised jurisdiction over migrant vessels in these areas. It is doubtful, however, whether the government is able to ‘enact and protect human rights, and to identify and allocate the corresponding duties in practice’¹⁶⁴ in the East, South, and Southwest.¹⁶⁵ Nonetheless, following from *African Commission (Kadhafi) v Libya* and *Ilascu v Moldova*, Libya can still be held responsible for refraining from preventing potential human rights violations caused by pullbacks in these areas, despite the absence of jurisdiction in certain parts of its territory.

Territorial jurisdiction could, according to Besson, also be challenged based on lack of legitimacy of the recognized government. As demonstrated in Chapter 1, in particular the recognized government, the GNU (or formerly the GNA), undoubtedly lacks legitimacy. However, both governments were endorsed by the UN Security Council.¹⁶⁶ Taking a positivist approach, jurisdiction cannot be denied through an argument of illegitimacy as the GNU is the only government recognized by international law, and therefore legitimate under it. It follows from this analysis that even if Libya does not exercise jurisdiction over parts of its territory, it could be argued that it nonetheless can be held responsible for not taking any positive action regarding potential human rights violations related to pullbacks on the whole of its territory.

2.2.3. Personal jurisdiction over interceptions in international waters

As discussed in Chapter 1, in addition to intercepting migrants in its territorial waters, the LCG has upscaled its interception in international waters. Therefore, it must be assessed whether Libya has jurisdiction over vessels pulled back from international waters. While the African Commission, in *Al-Asad v Djibouti*, held that the ACHPR applies primarily within the territorial jurisdiction of states, it did recognize that states may assume obligations beyond its territorial jurisdiction such as when a state exercises control over an individual.¹⁶⁷ This means that the

¹⁶³ *African Commission on Human and Peoples’ Rights v Libya* [2016] African Court on Human and Peoples’ Rights Application 002/2013, para 50. See also *The Prosecutor v Saif Al-Islam Gaddafi* [2014] International Criminal Court ICC-01/11-01/11, para 32.

¹⁶⁴ Samantha Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To’ (2012) 25 *Leiden Journal of International Law* 865, 865.

¹⁶⁵ Statements such as from an official of the Directorate for Combating Illegal Migration (DCIM) confirm this assessment: ‘The DCIM is weak in comparison to some of the smuggling gangs, such as the Al-Ammu Gang in Sabratha. The general security situation since 2014 is an obstacle too as the armed conflicts turned some areas into zones outside state control, including Sabratha and Bani Walid’; See Altai Consulting, ‘Leaving Libya: Rapid Assessment of Municipalities of Departures of Migrants in Libya’ (2017) 39.

¹⁶⁶ UN News, ‘Libya: UN Envoy Hails New National Government after Years of “Paralysis and Internal Divisions”’ (24 March 2021) <<https://news.un.org/en/story/2021/03/1088192>> accessed 13 May 2022.

¹⁶⁷ *Mohammed Abdullah Saleh Al-Asad v The Republic of Djibouti* [2014] African Commission on Human and Peoples’ Rights Communication no 383/10, para 134.

ACHPR may most certainly be triggered extraterritorially and with regards to foreign nationals. In *Al Asad v Djibouti*, the African Court cited the ECtHR case *Al-Skeini and others v United Kingdom* which establishes that when ‘the State through its agents 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 1 of the ECHR that are relevant to the situation of that individual’.¹⁶⁸ The African Commission did not find it necessary to elaborate further on the notion of extraterritorial application.¹⁶⁹ Therefore, in line with Article 60 ACHPR, the jurisprudence of the ECtHR will be consulted for guidance on the concept of extraterritorial obligations.

To establish extraterritorial jurisdiction under the ECHR, the ECtHR distinguishes explicitly between two forms of effective control: *de jure* and *de facto* control. Regarding the former, it stated that ‘nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality’¹⁷⁰ may serve as ‘suggested bases’ of extraterritorial *de jure* jurisdiction.¹⁷¹ The latter includes factual exercise of state authority.¹⁷² As discussed in Chapter 1, the ECtHR applied the concepts of *de facto* and *de jure* control concerning interceptions at sea in *Hirsi Jamaa v Italy*. The Court observed that anyone on board the Italian ships was legally subject to the exclusive jurisdiction of Italy, the vessel’s flag state. The flag state therefore enjoys exclusive jurisdiction and hence *de jure* control. Because the event happened on board of ships owned by the Italian military, with crews composed of Italian military personnel, the ECtHR also ruled that Italy exercised *de facto* control over the applicants. Applying this judgment to the interceptions on international waters by Libya, there is strong basis to argue that Libya exercises both *de jure* and *de facto* jurisdiction. The vessels on international waters pulled back by the LCG fly the Libyan flag. In that regard, Libya is exercising *de jure* control. As the interceptions have taken place nearly exclusively on board of LCG ships, and the crews on the LCG vessels are exclusively composed of Libyan personnel, Libya also exercises *de facto* control.

Conclusion

Based on the rules of state responsibility adhered to by the African judicial bodies, this chapter brought forward several arguments for the imputability of LCG pullbacks to Libya. While the respective degree of control over each LCG unit is unclear due to the complicated security environment, three different factual situations could be identified, i.e., LCG units in control of the recognized government, the rival (and not recognized) Tobruk government, or militias. In this chapter, it was argued that for each of these factual situations, Article 5 and 9 ASR respectively provide the strongest legal bases based on which LCG pullbacks could potentially be attributed to Libya. Moreover, it has been argued that Libya exercises jurisdiction over

¹⁶⁸ *Al-Skeini and Others v United Kingdom* App no 55721/07 (ECtHR, 7 July 2011), para 137.

¹⁶⁹ *Mohammed Abdullah Saleh Al-Asad v The Republic of Djibouti* [2014] African Commission on Human and Peoples’ Rights Communication 383/10, para 134.

¹⁷⁰ *Bankovic and Others v Belgium* App no 52207/99 (ECtHR, 12 December 2001), para 59.

¹⁷¹ *Ibid*

¹⁷² Fabian Othmerding, ‘Third Country Capacity-Building as a Means of Extraterritorial Migration Control: A Doctrinal Analysis of the European Union’s Support for the Libyan Coastguard in Light of the Human Right to Leave and the Obligation of Non-Refoulement’ (2021) 2021 Bristol Law Review 226, 237.

migrants intercepted in territorial waters and international waters. It has been contended that even though Libya might not exercise jurisdiction over parts of its territory, it is nonetheless likely that it can be held responsible for failing to secure the rights laid down in the ACHPR in the territories that it does not control. In addition to territorial jurisdiction, *Hirsi Jamaa v Italy* suggests that Libya exercises personal jurisdiction over migrants intercepted on the high seas. For a complete analysis on Libya's responsibility for violating the right to leave through pullbacks, it must be established whether it breached an international obligation it was bound by. In the next chapter, it will therefore be examined whether Libya violated the right to leave under Article 12 (2) ACHPR.

Chapter 3: Libya's Legal Obligations under the Right to Leave in Article 12

(2) ACHPR

Introduction

This thesis has demonstrated that the so-called Libyan Coast Guard has been intercepting migrants and returning them to the Libyan coast. These pullback operations might have important implications for the right to leave, as they are operated towards interfering with the departure of migrants and stalling onward movement. For this reason, states involved in these pullbacks need to be held accountable for potential violations of the right to leave. Attempts have already been made to hold destination states accountable for violating this right. However, the ECtHR ruled that this right has no bearing on these states.¹⁷³ Therefore, it is argued that attention must be shifted to transit or departure states' obligations under the right to leave. In Chapter 2, it has already been argued that pullbacks can be attributed to Libya. To complete the analysis on whether Libya can – in theory – be held responsible for violating the right to leave, this chapter will set out Libya's legal obligations under this right as stipulated in the African Charter on Human and Peoples' Rights (ACHPR) and analyze to what extent these pullbacks are in accordance with these obligations.

3.1. Scope of the Right to Leave

The right to leave under the ACHPR is stipulated in Article 12 (2). This right is often considered by analogy to the right to freedom of movement stipulated in Article 12 (1) ACHPR. These articles state the following:

- '1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health, or morality.'

Only limited guidance on the scope of the right to leave has been provided by African judicial bodies. However, the African Commission may consider other international human rights instruments under Article 60 ACHPR.¹⁷⁴ This Article states that the Commission shall 'draw inspiration from international law on human and peoples' rights'.¹⁷⁵ Article 60 ACHPR thus instructs the African Commission to draw inspiration from international human rights treaties

¹⁷³ *Xhavara and Others v Italy and Albania* App no 39473/98 (ECtHR, 11 January 2001); Galina Cornelisse, 'European Vessels, African Territorial Waters and "Illegal Emigrants": Fundamental Rights and the Principle of Legality in a Global Police of Movement' <<https://research.vu.nl/ws/portalfiles/portal/2913400/pdf+illegal+emigrants+cornelisse.pdf>>, 21.

¹⁷⁴ Burgorgue-Larsen L, "Decomartmentalization": The Key Technique for Interpreting Regional Human Rights Treaties' (2018) 16 International Journal of Constitutional Law 187, 193.

¹⁷⁵ Article 53 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

beyond its mandate of applying the ACHPR. This provision, however, does not empower it to oversee the application and implementation of other international treaties.¹⁷⁶

The African Court, on the other hand, ‘shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the State concerned’.¹⁷⁷ This means that the Court has the authority to not only draw inspiration from international instruments (like the African Commission), but also to interpret and apply the provisions of these instruments. It thus exercises jurisdiction over all human rights treaties that Libya has ratified with the same legal force as the ACHPR and its protocols.¹⁷⁸

The Human Rights Committee’s (HRC) and ECtHR’s jurisprudence and General Comments may therefore serve as an interpretative guidance where African jurisprudence falls short and might provide a stronger foundation for protecting this right. These provisions are also interesting from a broader perspective of strategic litigation, as applicants can file a complaint alleging a violation of the right to leave as established in the ICCPR to potentially secure better protection. By bringing together international and regional human rights instruments on the right to leave, a more coherent and consistent ruling could be issued.¹⁷⁹

3.1.1. Personal scope of the right to leave

An assessment of the application of the right to leave to migrants leaving Libya by sea requires a determination of the personal scope of Article 12 (2) ACHPR. IOM reported that in 2018, merely four percent of migrants that arrived in Italy through the Central Mediterranean route originated from Libya.¹⁸⁰ The remaining 96 percent originate from various (neighbouring) countries such as Sudan, Niger, Nigeria, Mali, Egypt, Ethiopia, Chad, Ghana, Benin, and Burkina Faso.¹⁸¹ It is reported that these migrants usually arrive in Libya irregularly.¹⁸² According to Article 12 (2) ACHPR ‘every individual shall have the right to leave’. However, this article does not specify whether the right applies to both nationals and non-nationals. As

¹⁷⁶ Annika Rudman, ‘The ACHPR: Just One Treaty among Many? The Development of the Material Jurisdiction and Interpretive Mandate of the African Court on Human and Peoples’ Rights’ (2021) 21 African Human Rights Law Journal 699, 720.

¹⁷⁷ Article 7 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (adopted 10 June 1998, entered into force 25 January 2004)

¹⁷⁸ Juan Bautista Cartes Rodríguez and Laura Íñigo Álvarez, ‘The Case Law of the African Court on Human and Peoples’ Rights in Libya Following the Arab Uprisings: Lessons Learned for the Consolidation and Legitimation of the Court’ (2020) 20 African Human Rights Law Journal 78, 94-95.

¹⁷⁹ Ibid, 95

¹⁸⁰ International Organization for Migration (IOM), ‘Mixed Migration Flows in the Mediterranean: Compilation of Available Data and Information’ (2018) <https://reliefweb.int/sites/reliefweb.int/files/resources/Flows_Compilation_Report_February_2018_%20.pdf>, 10.

¹⁸¹ International Organization for Migration (IOM), ‘Mixed Migration Flows in the Mediterranean: Compilation of Available Data and Information’ (2018) <https://reliefweb.int/sites/reliefweb.int/files/resources/Flows_Compilation_Report_February_2018_%20.pdf>, 17-18.

¹⁸² Altai Consulting, IMPACT, UNHCR, ‘Mixed Migration Trends in Libya: Changing Dynamics and Protection Challenges: Evolution of the Journey and Situations of Refugees and Migrants in Southern Libya’ (2017) <<https://www.unhcr.org/595a02b44.pdf>>, 1.

migrants departing from Libya by sea originate from various countries and usually also arrive in Libya irregularly, it is vital to define the term ‘every individual’.

The African Commission has not yet ruled on the applicability of the right to leave to non-nationals. In all its communications on the right to leave concerning non-nationals, the African Commission ruled that the applicant had been denied or deprived of their nationality unlawfully, and therefore did not engage with the question whether the scope of the right to leave extends to non-nationals.¹⁸³ However, according to General Comment No 5 on the right to freedom of movement under Article 12 (1) ACHPR, recognition as a rights holder under this right is not conditional on being legally within a state – therefore including documented and undocumented migrants under its scope.¹⁸⁴ By analogy, Article 12 (2) ACHPR also applies to ‘every individual’ regardless of their national status or (il)legal residence. This is further supported by the African Court’s references to the HRC’s General Comment No 27 in its reasoning on the right to leave. This General Comment also grants the right to leave to individuals regardless of their nationality or residency status.¹⁸⁵

It follows from the above that the right to leave arguably applies to these migrants regardless of their residence status or nationality. Therefore, if other procedural requirements for bringing a claim are fulfilled, the right to leave could be invoked by intercepted migrants against Libya in front of African judicial bodies.

3.1.2. Material scope of the right to leave

The question addressed in this chapter is whether Libya is in violation of the right to leave under Article 12 (2) ACHPR through conducting pullbacks. It could be argued that the interception on the high seas by the LCG does not come under the scope of the right as migrants have already left Libyan territory. Moreover, even though the route to Italy might be blocked, migrants can still return to their country of origin or travel to any country bordering Libya. This section will first explore whether the right to leave covers high-seas interceptions. Secondly, it will be analyzed whether the option of returning or leaving for a neighbouring country has implications for the right to leave.

i) Interceptions on the high seas

As established in Chapter 1, Libya’s SAR zone has been extended to 94 nautical miles off its coast,¹⁸⁶ meaning Libya also intercepts migrants on the high seas. Given that these migrants

¹⁸³ See *Open Society Justice Initiative v Côte d’Ivoire* [2016] African Commission on Human and Peoples’ Rights Communication no 318/06; *Democratic Republic of Congo v Burundi, Rwanda and Uganda* [2003] African Commission of Human and Peoples’ Rights Communication no 227/99; *John K Modise v Botswana* [2000] African Commission on Human and Peoples’ Rights Communication no 97/93.

¹⁸⁴ African Commission on Human and Peoples’ Rights ‘General Comment No. 5 On the ACHPR: The Right to Freedom of Movement and Residence (Article 12 (1))’ (2020), para 8.

¹⁸⁵ UN Human Rights Council ‘General Comment No. 27: Article 12 (Freedom of Movement)’ (1999) CCPR/C/21/Rev.1/Add.9, para 8.

¹⁸⁶ As territorial sea is defined under UNCLOS as the 12-nautical mile zone from the baseline or low-water line along the coast, Libya has been conducting pullbacks in international waters and territorial waters; Article 3 United Nations Convention on the Law of the Sea (adopted 10 December 1982) UNTS 1833.

have already left Libya, the question arises whether Libya is infringing their right to leave when it intercepts a vessel in international waters and re-enters Libyan territory.

As stated in the introduction, interceptions by destination states in international waters do not fall within the scope of the right to leave according to the ECtHR. The ECtHR reasoned in *Xhavara* that these are aimed to prevent entry, rather than exit.¹⁸⁷ As a result, it could be argued that any pre-border control measures, from which it can be presumed they all pursue the objective of preventing irregular entry, do not fall within the scope of the right.¹⁸⁸ Den Heijer, however, argues that in *Xhavara*, the ECtHR inappropriately considered the objective of interceptions as part of the assessment of the material scope of the right to leave, rather than part of the ‘legitimate aim’ assessment – which is its usual approach.¹⁸⁹ Den Heijer therefore argues that ‘a more meaningful distinction between measures which essentially fall within the state’s sovereign prerogative to control the entry of aliens and measures which interfere with the right to leave another country would be to construe entry control measures as coming within the ambit of the right to leave only if the legal or practical effect of the measure occurs in the country of departure.’¹⁹⁰ Following this argument, pullbacks by Libya (a departure or transit state), whether in territorial or international waters, interfere with the right to leave. According to Den Heijer, because these migrants are instantly and forcefully returned as soon as they reach the territorial sea’s boundary, ‘a person’s right to leave is deprived of any meaningful effect and the prevention of departure constitutes an essential element of the enforcement activity’.¹⁹¹ From this perspective, it could thus be argued that interceptions on the high seas still fall within the scope of the right to leave.

ii) *Leaving to return to one’s country of origin*

One could argue Libya does not infringe the right to leave of intercepted migrants, since they have the option of returning to their own country. However, the rationale behind the departure of migrants trying to reach Italy through Libya is relevant to consider in this regard. Any person risking their life by crossing the Mediterranean has imperative reasons to do so.¹⁹² The question of whether one qualifies for refugee status affects one’s right to leave, as a refugee cannot be expected to return to their country of origin. This would violate the principle of *non-refoulement*.

¹⁸⁷ *Xhavara and Others v Italy and Albania* App no 39473/98 (ECtHR, 11 January 2001).

¹⁸⁸ Maarten Den Heijer, ‘Extraterritorial Asylum under International Law’, *Europe and Extraterritorial Asylum* (Hart Publishing 2012)
<<https://search.ebscohost.com/login.aspx?direct=true&db=e000xww&AN=476210&site=ehost-live&scope=site>> accessed 13 May 2022, 152.

¹⁸⁹ Ibid

¹⁹⁰ Ibid

¹⁹¹ Ibid

¹⁹² Vladislava Stoyanova, ‘The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law’ (2020) 32 *International Journal of Refugee Law* 403, 407.

Along the Central Mediterranean route from Libya to Italy, both refugees and migrants use the same methods and routes to arrive at their intended destination.¹⁹³ Thus, a number of those seeking to reach Italy, i.e., those seeking international protection, are not able to return to their countries of origin. This would otherwise violate the principle of *non-refoulement*.¹⁹⁴ The argument that these refugees can return to their own country can thus not be used to nullify the right to leave of refugees departing from Libya to Italy by sea.

Can migrants who do *not* qualify for international protection then be expected to return to their country of origin? Article 12 (2) ACHPR does include a right to return. However, this right can arguably not be invoked to justify enforced return, and thus does not constitute an obligation to return.¹⁹⁵ The obligation under this right is rather upon the state of nationality to admit.¹⁹⁶ According to Stoyanova, ‘not availing oneself of the right to return cannot be held against an individual to nullify the right to leave for a country other than his or her country of origin’.¹⁹⁷ This argument is reinforced by the HRC’s clarification that ‘the right of the individual to determine the State of destination is part of the legal guarantee inherent in the right to leave’.¹⁹⁸ In addition, potential practical obstacles to returning must be considered. Nonetheless, it seems that the ‘link between departure prevention measures and the interests protected by the right to leave [weakens]’,¹⁹⁹ when migrants have the option of returning to their country of origin.²⁰⁰ It could be contended that LCG pullbacks do not interfere with the right to leave of migrants (as opposed to refugees) when there are no legal and practical barriers to returning to one’s country of origin.

iii) *Leaving for other countries*

Migrants departing from Libya by sea may also have the option to leave for another (neighboring) country. The problem at hand is analogous to those addressed by the ECtHR in *Amuur v France*²⁰¹ *Ilias and Ahmed v Hungary*,²⁰² and *ZA v Russia*,²⁰³ which addressed the right to liberty. In these cases, the ECtHR ruled that the applicants right to liberty had been violated even though they could leave for places other than the respondent states. The ECtHR held that the person’s individual circumstances must be the starting point, and that multiple

¹⁹³ Sara Hamood, ‘African Transit Migration through Libya to Europe: The Human Cost’ <<http://migreurop.org/IMG/pdf/hamood-libya.pdf>> accessed 12 January 2021, 25; International Organization for Migration (IOM), ‘Four Decades of Cross-Mediterranean Undocumented Migration to Europe A Review of the Evidence’ (2017) <https://www.consilium.europa.eu/media/52760/dtm_libya_r38_migrant_report.pdf>, 5.

¹⁹⁴ That a person seeking international protection cannot be expected to return to their own country in the context of the right to leave has also been recognized by the UN Human Rights Council. See *El Dernawi v Libyan Arab Jamahiriya* [2007] UN Human Rights Committee Communication No 1143/2002.

¹⁹⁵ Vladislava Stoyanova, ‘The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law’ (2020) 32 International Journal of Refugee Law 403, 406.

¹⁹⁶ Ibid

¹⁹⁷ Ibid

¹⁹⁸ UN Human Rights Council ‘General Comment No. 27: Article 12 (Freedom of Movement)’ (1999) CCPR/C/21/Rev.1/Add.9, para 8.

¹⁹⁹ Vladislava Stoyanova, ‘The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law’ (2020) 32 International Journal of Refugee Law 403, 407.

²⁰⁰ Ibid

²⁰¹ *Amuur v France* App no 19776/92 (ECtHR, 25 June 1996).

²⁰² *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 15 March 2017).

²⁰³ *ZA and others v Russia* App nos 61411/15, 61420/15, 61427/15, 3028/16 (ECtHR, 28 March 2017).

factors must be considered.²⁰⁴ As a result, the ECtHR requires a more contextualized approach on an assessment of an infringement of the right to liberty, taking into consideration legal protections as well as any negative consequences that the migrant may face, without dismissing this right merely because departure to another state is an option.²⁰⁵ If this reasoning applies to the right to liberty, a right that requires a high definitional barrier (i.e. detention), then it could be argued that it is equally important to apply it to the right to leave.

In *Ilias and Ahmed v Hungary*, the ECtHR endorsed the necessity of a contextualized approach. However, in this case ECtHR still found that the applicants were *not* deprived of their liberty, because they were located in a land border transit zone making it ‘practically possible [for them] to walk to the border and cross into Serbia, a country bound by the Geneva Convention relating to the Status of Refugees’. Despite this pronouncement, it appears that any practical and formal hurdles to alternate means of exercising one’s right, and any attempts to leave by the individuals, are part of the assessment. It seems that the existence of these options does not necessarily exclude the exercise of the right.²⁰⁶

Moreover, given the ECtHR pronouncements in *Ilias and Ahmed v Hungary*, it is crucial whether the alternative destination protects refugees as a party to the 1951 Refugee Convention. This argument is confirmed by *Amuur v France*, in which the ECtHR states that ‘[t]he possibility [of leaving the country voluntarily] becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in’.²⁰⁷ Therefore, it seems that the right to leave can be infringed when destinations do not offer protection comparable to the protection that can be found in the states they wish to depart to.²⁰⁸

Furthermore, African jurisprudence reveals that the scope of the right to leave in Article 12 (2) ACHPR does not entail a total inability to leave a state’s territory. For instance, in *Open Society Justice Initiative v Côte d’Ivoire* the African Commission ruled that a requirement to pay an extra fee for public transport to travel outside the country constitutes a violation of the right to leave.²⁰⁹ From this jurisprudence, it follows that the right to leave is not merely triggered by a

²⁰⁴ Ibid paras 134, 138; *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 2017) paras 212, 217. Such factors include ‘the type, duration, effects and manner of implementation of the measure in question’. The court further summarized the factors as ‘i) the applicants’ individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by the applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants’.

²⁰⁵ Vladislava Stoyanova, ‘The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law’ (2020) 32 International Journal of Refugee Law 403, 408.

²⁰⁶ Ibid, 410

²⁰⁷ *Amuur v France* App no 19776/92 (ECtHR, 25 June 1996) para 48.

²⁰⁸ Vladislava Stoyanova, ‘The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law’ (2020) 32 International Journal of Refugee Law 403, 411.

²⁰⁹ *Open Society Justice Initiative v Côte d’Ivoire* [2016] African Commission on Human and Peoples’ Rights 318/06, para 161; See also African Commission on Human and Peoples’ Rights, ‘Consideration of Reports Submitted by States Parties under Article 62 of the ACHPR: Concluding Observations and Recommendations on

complete inability to leave a state's territory, but that a State Party violates Article 12 (2) ACHPR if it creates a situation that makes it excessively difficult for people to leave.

When the above legal analysis is applied to intercepted migrants, it follows that the possibility of leaving for other countries does not conclusively preclude the activation of the right to leave. This requires an assessment of their individual circumstances, considering, e.g., their reason for departure and practicalities such as the distance to another country. In this context, the options available to migrants wishing to leave Libya using the Central Mediterranean route must be evaluated.

Firstly, they can exercise their right to leave for neighboring countries. Egypt, Algeria, Chad, Tunisia, Niger, and Sudan are direct neighboring countries to Libya. Due to the tight security along its borders, the UNHCR has claimed that there is very little movement from Libya to its neighboring countries. The Libyan borders with Egypt, Algeria, and Sudan 'were reportedly highly militarized and difficult to cross into',²¹⁰ therefore constituting practical barriers to leave for these countries. Moreover, as aforementioned, a number of migrants on the Central Mediterranean route are seeking international protection. For these persons, the equality of protection available in the neighbouring countries to Libya is relevant as follows from *Ilias and Ahmed v Hungary* and *Amuur v France*.

While all these six neighboring countries have ratified the Refugee Convention, this does not mean that equality of protection is available. For instance, both Algeria and Tunisia have yet to establish a comprehensive asylum system, and the latter has been actively carrying out pushbacks of people fleeing Libya.²¹¹ Moreover, in all six countries migrants are at risk of facing human rights abuses. In these countries, being refugee-producing states themselves, migrants risk being exposed to persecution, torture or inhuman treatment.²¹² For example, in Egypt, Sudanese and Ethiopian refugees have been subject to torture by government

the Initial and Combined Periodic Report of the State of Eritrea on the Implementation of the ACHPR' (2017) <https://www.achpr.org/public/Document/file/English/Concluding%20Observations%20and%20Recommendations%20Initial%20and%20Combined%20Periodic%20Eritrea_1999-2016.pdf>, para 88, in which the African Commission condemns the obligation of possessing an exit visa to leave the country.

²¹⁰ UNHCR, 'Libya: Mixed Migration Routes and Dynamics in Libya in 2018' (2019) <https://reliefweb.int/sites/reliefweb.int/files/resources/impact_lby_report_mixed_migration_routes_and_dynamics_in_2018_june_2019.pdf>, 24.

²¹¹ United Nations High Commissioner for Refugees, 'Algeria Fact Sheet' (2016) <<https://www.unhcr.org/protection/operations/53cd1ec19/algeria-fact-sheet.html>> accessed 7 April 2022, 2; UNHCR, 'UNHCR Tunisia Factsheet - September 2020 [EN/AR] - Tunisia' (2020) <<https://reliefweb.int/report/tunisia/unhcr-tunisia-factsheet-september-2020-enar>> accessed 7 April 2022.

²¹² Henry Martensonre and John McCarthy, "In General, No Serious Risk of Persecution": Safe Country of Origin Practices in Nine European States' (1998) 11 Journal of Refugee Studies 304, 304; See e.g. Amnesty International, 'Niger: More than a Hundred Sudanese Nationals Deported to Libya in Critical Situation and at Risk of Serious Abuses Including Torture' (11 May 2018) <<https://www.amnesty.org/en/latest/news/2018/05/niger-more-than-a-hundred-sudanese-nationals-deported-to-libya/>> accessed 7 April 2022. On torture of refugees in Chad see e.g. Amnesty International, "'No Place for Us Here'" Violence against Refugee Women in Eastern Chad' (2009) AFR 20/008/2009 <<https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR200082009ENGLISH.pdf>>.

authorities.²¹³ Forcing persons to leave for these neighbouring countries could therefore be in violation of the principle of *non-refoulement*.

This section has noted the difficulties and possibilities surrounding the questions of whether migrants intercepted on the Central Mediterranean fall within the ambit of the right to leave under Article 12 (2) ACHPR. The analysis suggests that mere interception does not automatically activate protection under the right to leave, but that this is dependent on several factors such as the place of interception, and individual legal and practical obstacles for returning to one's country of origin or leaving for alternative destinations. Applying this more contextualized approach, considering the characteristics of the migratory flow on the Central Mediterranean route, it could be asserted that the LCG pullback practices are an infringement of the right to leave. However, whether this infringement would amount to a violation under Article 12 (2) ACHPR depends on whether the right to leave can be justifiably limited.

3.2. Limitations upon the right to leave

If LCG pullbacks attract protection under the right to leave, this does not in itself mean that Article 12 (2) ACHPR is violated. The right to leave as laid down in Article 12 (2) ACHPR is not absolute. While the ACHPR does not allow for derogations of rights even in an emergency, its provisions do allow for limitations.²¹⁴ Article 12 (2) ACHPR stipulates that the right to leave 'may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality'. It follows that the question whether pullback practices by the LCG constitute a violation of the right to leave as laid down in Article 12 (2) ACHPR depends on whether this right can be justifiably limited based on one of these grounds. Libya may have valid grounds to restrict people's right to leave by preventing them from crossing the Central Mediterranean that might constitute a legitimate aim. However, any interference with the right to leave must comply with all the elements in the limitation clause of Article 12 (2) ACHPR.

3.2.1. The meaning of 'provided by law'

The starting point of the analysis on the justifiable restrictions of the right to leave is the requirement that such restrictions must be 'provided for by law', meaning that the law sets out the grounds and conditions under which it is permissible to impose restrictions on the right to

²¹³ See e.g. Human Rights Watch, 'Sinai Perils: Risks to Migrants, Refugees, and Asylum Seekers in Egypt and Israel' (2008) <<https://www.hrw.org/report/2008/11/12/sinai-perils/risks-migrants-refugees-and-asylum-seekers-egypt-and-israel>> accessed 7 April 2022; Amnesty International, 'Egypt: Protests by Sudanese Migrants and Refugees over Brutal Killing of a Child Met with Violence and Arrests' (4 November 2020) <<https://www.amnesty.org/en/latest/press-release/2020/11/egypt-protests-by-sudanese-migrants-and-refugees-over-brutal-killing-of-a-child-met-with-violence-and-arrests/>> accessed 13 July 2022; Human Rights Watch 'Egypt: Forced Returns of Eritrean Asylum Seekers' (27 January 2022) <<https://www.hrw.org/news/2022/01/27/egypt-forced-returns-eritrean-asylum-seekers>> accessed 13 May 2022. In 2020, a Sudanese refugee child was killed by Egyptian authorities. See Amnesty International, 'Egypt: Protests by Sudanese Migrants and Refugees over Brutal Killing of a Child Met with Violence and Arrests' (4 November 2020) <<https://www.amnesty.org/en/latest/news/2020/11/egypt-protests-by-sudanese-migrants-and-refugees-over-brutal-killing-of-a-child-met-with-violence-and-arrests/>> accessed 7 April 2022.

²¹⁴ William Eduard Adjei, 'Re-Assessment of "Claw-Back" Clauses in the Enforcement of Human and Peoples' Rights in Africa' (2019) 24 Journal of Legal Studies "Vasile Goldiş" 1, 1.

leave.²¹⁵ This means that ‘[t]he laws authorizing the application of restrictions should also use precise criteria and may not confer unfettered discretion on those charged with their execution’.²¹⁶ In addition, any limitation on the right to leave must be in conformity with the provisions of the African Charter and international law more generally and must thus pursue one of the legitimate reasons provided for in Article 12 (2) ACHPR.²¹⁷ Furthermore, ‘provided by law’ means that decisions restricting the right to leave can be appealed or challenged within the domestic legal system.²¹⁸ The continuation of this section will analyze whether the pullback practices by the LCG are ‘provided by law’ according to the above set-out criteria.

i) *Libyan domestic law*

According to Libyan legislation, migrant vessels are not entitled to innocent passage and may be stopped and examined. In Libya, irregular entry into, stay in and exit from Libya is criminalized regardless of one’s protection needs. According to Article 5 Law No. (6) of 1987 on organizing entry, residence, and exit of foreigners in Libya, those who wish to leave the Libyan territory must have an exit visa. An attempt to leave without such a visa can be punished by imprisonment or a fine according to Article 19 of Law No. (6). No further criteria are established for refusing to allow persons to exit Libya, nor do they embody guarantees against arbitrary application. This therefore seems to run contrary to the requirement set by the HRC to ‘use precise criteria and [...] not confer unfettered discretion on those charged with their execution’, and thus Article 12 (2) ACHPR.²¹⁹

More generally, the Libyan migration framework seems unfit to provide legitimate grounds for a restriction in accordance with Article 12 (2) ACHPR. No asylum system is established in Libya, neither in law nor in practice. UNSMIL summarizes Libya’s national legal framework as follows: ‘In practice, the overwhelming majority of migrants are placed in indefinite detention pending deportation without being charged, tried or sentenced under applicable Libyan laws’.²²⁰ Libya’s migration governance framework can be described as insufficient and to ‘fall short of international standards’.²²¹ As also follows from the African Commission in

²¹⁵ Maarten Den Heijer, ‘Interdiction at Sea’, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) <<https://search.ebscohost.com/login.aspx?direct=true&db=e000xww&AN=476210&site=ehost-live&scope=site>> accessed 13 May 2022, 248.

²¹⁶ UN Human Rights Council ‘General Comment No. 27: Article 12 (Freedom of Movement)’ (1999) CCPR/C/21/Rev.1/Add.9, para 13.

²¹⁷ *Media Rights Agenda v Nigeria* [2000] African Commission on Human and Peoples’ Rights Communication no 224/98, para 66.

²¹⁸ Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (1987th edition, Springer 1987), 25.

²¹⁹ UN Human Rights Council ‘General Comment No. 27: Article 12 (Freedom of Movement)’ (1999) CCPR/C/21/Rev.1/Add.9, para 12.

²²⁰ United Nations Support Mission In Libya and United Nations Human Rights Office of the High Commissioner, ‘Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya’ (2018) <<https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>>, 5.

²²¹ United Nations Support Mission in Libya and United Nations Human Rights Office of the High Commissioner “‘Detained and Dehumanised” Report on Human Rights Abuses against Migrants in Libya’ (2016) <https://unsmil.unmissions.org/sites/default/files/unsmil_ohchr_joint_report_on_abuses_against_migrants_in_libya_english.pdf> accessed 12 January 2021, 11.

Jawara v The Gambia,²²² Libya is obliged to ensure an ‘an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity’.²²³ However, the country lacks any such ‘legislative and administrative structures’ according to the HRC’s most recent concluding observations’.²²⁴ Restrictions of the right to leave can therefore also not be challenged within the domestic legal system, which suggests that the criteria to be considered under ‘provided by law’ are not met.

ii) *Libya-Italy Cooperative framework*

The Libya-Italy cooperative framework may, instead, lay ground for permissible interceptions under Article 12 (2) ACHPR. The MoU is an informal arrangement and is not equally legally binding as traditional bilateral agreements.²²⁵ Any ‘restrictions which are not provided for in the law’²²⁶ pose a risk of unlawful restrictions to the right to leave. Even if the framework were legally binding, it would not become any less problematic. Any provision that merely restricts someone’s right to leave on the grounds that they are accused of irregular migration likely lacks the precision necessary to comply with Article 12 (2) ACHPR, as ‘no assessment has been made as to their proportionality in relation to the specific individuals affected’.²²⁷ Further, the cooperative framework misses any procedural guarantees for the migrants to object their interception and effectively provides the LCG with exactly such ‘unfettered discretion’ that is incompatible with Article 12 (2) ACHPR. Both Libyan domestic law as well as the cooperative framework are therefore incapable of satisfying the requirement of a restriction being ‘provided by law’.

3.2.2. The requirement of a ‘legitimate aim’

The lack of a legal basis automatically leads to the conclusion that there can be no legitimate aim for pullbacks. However, as argued in the introduction of this thesis, an analysis on the legality of pullback measures must ‘be aware of the adaptability of European asylum and migration policy in case of judicial intervention’.²²⁸ Assuming pullback practices could be

²²² *Sir Dawda K Jawara v The Gambia* [2000] African Commission on Human and Peoples’ Rights 147/95-149/96, para 32-38.

²²³ African Commission on Human & Peoples’ Rights, ‘Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa’ (2003) <[²²⁴ Fabian Othmerding, ‘Third Country Capacity-Building as a Means of Extraterritorial Migration Control: A Doctrinal Analysis of the European Union’s Support for the Libyan Coastguard in Light of the Human Right to Leave and the Obligation of Non-Refoulement’ \(2021\) 2021 Bristol Law Review 226, 240.](https://www.achpr.org/legalinstruments/detail?id=38#:~:text=Prosecutors%20shall%20have%20the%20right,a%20objective%20evaluation%20and%20decision.>”, 5.</p>
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²²⁵ *Ibid*, 241.

²²⁶ UN Human Rights Council ‘General Comment No. 27: Article 12 (Freedom of Movement)’ (1999) CCPR/C/21/Rev.1/Add.9, para 11.

²²⁷ Elspeth Guild and Vladislava Stoyanova, ‘The Human Right to Leave Any Country: A Right to Be Delivered’ in Wolfgang Benedek, Christian Strohal and Stefan Kieber (eds), *European Yearbook on Human Rights 2018* (Institute of Southeast Asian Studies 2018) <https://www.cambridge.org/core/product/identifier/CBO9781780688008A029/type/book_part> accessed 6 March 2022, 393.

²²⁸ Adel-Naim Reyhani, ‘Anomaly upon Anomaly: Refugee Law and State Disintegration’ [2020] SSRN Electronic Journal, 10; See also Itamar Mann, ‘Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013’ (2013) 54(2) Harvard International Law Journal.

successfully challenged in court, it is still relevant to assess whether the pullback practices would pursue a legitimate aim if they were to have a legal basis. The African Court has held that the justification grounds of Article 12 (2) ACHPR are similar to those of Article 12 (3) ICCPR.²²⁹ The concepts stipulated in these respective provisions will thus be considered as synonymous.

The next sections will focus exclusively on the limitation grounds ‘protection of [...] law and order’. It can be observed that the aim of pullbacks is to prevent irregular entry. Irregular entry constitutes a breach of Libyan domestic law. The limitation ground of protection of ‘law and order’²³⁰ can therefore be considered the most relevant legitimate aim for LCG pullbacks. It will be assessed whether the possible aims of pullbacks, i.e., prevention of irregular entry of Libya or prevention of irregular entry to Italy, constitute a legitimate aim under protection of ‘law and order’. Second, the legitimacy of pullbacks will be examined considering Libya’s other international obligations, such as saving lives at sea and preventing human smuggling.

i) ‘Protection of [...] law and order’

The justification ground of ‘public order (*ordre public*)’ and by analogy ‘protection of [...] law and order’ is difficult to define. In this respect, the *travaux préparatoires* of Article 12 (3) ICCPR might be relevant. At the time of drafting the ICCPR, there were hesitations about inserting ‘public order’ in the text of Article 12 (3). States were divided about the notion, as it has often been characterized as ‘vague and indefinite’.²³¹ An amendment had been proposed that included the expression ‘*ordre public*’. However, in common law countries the term ‘public order’ was ordinarily understood as indicating the absence of disorder, while in civil law countries the notion meant public security, health and peace.²³² According to the UK representative, the English text must state that the words ‘public order’ do not have their ordinary meaning but are intended to cover the same range as the French expression ‘*ordre public*’. Therefore, ‘*ordre public*’ was included in Article 12 (3) ICCPR in parenthesis. Public order therefore constitutes all the mandatory rules connected to the general organization of the state and the economic system, morals, health, security, public peace, rights, fundamental rights, and freedoms of each citizen. Indeed, it appears that all the ACHPR’s limitation grounds represent various components of public order.²³³ Therefore, public order can be defined as ‘the set of mandatory norms organizing life in society of a given state’.²³⁴

Evidently, the fundamental purpose of the pullback measures is to restrict irregular migratory flows into Italy and the EU, as the strengthening of third state borders indirectly strengthens

²²⁹ *Gihana and others v Rwanda* [2019] African Court on Human and Peoples’ Rights Application no 017/2015, para 90.

²³⁰ The terms ‘law and order’ and ‘public order’ will be used interchangeably, in accordance with the African Court’s pronouncements in *Gihana and others v Rwanda*.

²³¹ Marjoleine Zieck, ‘Refugees and the Right to Freedom of Movement: From Flight to Return’ (2018) 39 Michigan Journal of International Law 19, 29.

²³² Ibid

²³³ Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (1987th edition, Springer 1987), 29.

²³⁴ Marie Ghantous, ‘Ordre Public Protection as Legitimate Aim for Freedom of Expression Restriction in the International Legal Order’ (2018) 31 *Revue Québécoise de Droit International* 243, 251.

EU borders.²³⁵ However, Libya might also have good reason to stop persons from crossing international borders irregularly, for instance, to enforce its immigration laws. This section will assess whether these aims are legitimate aims for the purpose of protection of law and order.

Protection of law and order in Italy

There are multiple objectives that could be pursued with pullbacks. It could be argued that Libya carries out pullbacks to prevent breaches of Italy's immigration law.²³⁶ This aim could well be considered for the benefit of 'law and order'. According to Den Heijer, however, pre-border controls, such as pullbacks, are primarily installed to reduce the possible burden of rejected asylum seekers. By preventing persons who are unlikely to have a right of entry from coming to the border, the risk of incurring administrative, financial, and social costs associated with processing asylum seekers is minimized.²³⁷ If this is indeed the aim of the LCG pullbacks, the question arises whether this aim can be considered legitimate.

Scholars are divided on whether this asserted objective pursued with pullbacks can be considered fit within 'public order'. According to Den Heijer, while regular border controls may be for the benefit of protecting 'public order', their goal being to prevent entry of persons without legal residence status, it is more difficult to argue this for the goal of pre-border controls, i.e., reducing economic and social costs involved in processing and accommodating migrants. According to Den Heijer, this aim would rather fall under 'economic well-being' of the country, which is not a recognized legitimate aim under Article 12 (2) ACHPR.²³⁸ Stoyanova and Guild, however, argue that reducing the potential burden of failed asylum seekers, *could* be deemed for the benefit of 'public order'.²³⁹ Not unimportantly, they add that

²³⁵ Anja Palm and Istituto Affari Internazionali, 'The Italy-Libya Memorandum of Understanding: The Baseline of a Policy Approach Aimed at Closing All Doors to Europe? – EU Immigration and Asylum Law and Policy' <<https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>> accessed 13 July 2022.

²³⁶ This was seen in *Stamose v Bulgaria*, where Bulgaria prevented a Bulgarian national from leaving to the United States, to prevent a breach of the latter's immigration law. This way, Bulgaria tried to prevent tightening of US migration control vis-à-vis Bulgarian citizens; *Stamose v Bulgaria* App no 29713/05 (ECtHR, 27 November 2012).

²³⁷ M den Heijer, 'Europe and Extraterritorial Asylum' (Leiden University 2011) <<https://hdl.handle.net/1887/16699>> accessed 13 May 2022, 163; See also *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] House of Lords UKHL 55, para 2, where the posting of British immigration officers at the airport of Prague was explained from the background of there being an 'administrative, financial and indeed social burden borne as a result of failed asylum-seekers'.

²³⁸ Maarten Den Heijer, 'Extraterritorial Asylum under International Law', *Europe and Extraterritorial Asylum* (Hart Publishing 2012) <<https://search.ebscohost.com/login.aspx?direct=true&db=e000xww&AN=476210&site=ehost-live&scope=site>> accessed 13 May 2022, 163.

²³⁹ Elspeth Guild and Vladislava Stoyanova, 'The Human Right to Leave Any Country: A Right to Be Delivered' in Wolfgang Benedek and others (eds), Christian Strohal and Stefan Kieber, *European Yearbook on Human Rights 2018* (Institute of Southeast Asian Studies 2018) <https://www.cambridge.org/core/product/identifier/CBO9781780688008A029/type/book_part> accessed 6 March 2022, 385.

courts, particularly the ECtHR, have been ‘very cautious in finding an illegitimate aim’ in the context of migration control.²⁴⁰

While this latter conclusion might be applicable to the ECtHR, it could arguably not be drawn for African judicial bodies. From a European standpoint, the African Commission has taken a relatively ‘liberal’ approach to migration, expressing different normative concepts than the ECtHR.²⁴¹ When examining the case law of the African Commission, it can be signaled that the African Commission generally begins with stating the human rights provisions and then moves on to consider states’ migration policy. Even though the African Commission notes that it ‘is aware that African countries generally [...] face a lot of challenges when it comes to hosting refugees from neighbouring war-torn countries [...] *such measures should not be taken to the detriment of the enjoyment of human rights*’.²⁴² This is in contrast to the ECtHR, which consistently starts its reasoning in migration-related judgments by declaring that, under international law, a state has the right to control the entry of non-nationals into its territory.²⁴³ This demonstrates that the African Commission prioritizes the individual, rather than the sovereignty of the state. While this different approach does not necessarily produce different results — just because the argument begins with human rights does not guarantee that a finding on a violation of human rights will follow, or vice versa — it could well be that the African judicial bodies provide a different perspective on whether an aim related to migration control can be considered ‘legitimate’.

Whether the objective of pullbacks is to prevent breaches of Italy’s immigration laws or reducing the socio-economic burden associated with asylum seekers, and whether the latter could be deemed for the benefit of ‘public order’ can thus be disputed. Assuming that pullbacks are based on reasons fit for ‘public order’, could Libya justify pullbacks on this ground? Notably, the cooperative migration framework within which pullbacks take place strongly suggests that pullbacks are carried out to protect Italy’s public order, rather than Libya’s. Therefore, one must consider whether a state can limit a right for the purpose of protecting public order of another country.

In line with Article 60 ACHPR, case law of the European Court of Justice (as it then was) and the ECtHR may provide guidance on this issue. Firstly, an analogy may be drawn with the right to freedom of movement. In 2008, the European Court of Justice determined that restrictions of this right must be justified by concerns for public order in the *acting* state, not in another state. The Court ruled that ground relating to public order in another state may be taken into account,

²⁴⁰ Elspeth Guild and Vladislava Stoyanova, ‘The Human Right to Leave Any Country: A Right to Be Delivered’ in Wolfgang Benedek and others (eds), Christian Strohal and Stefan Kieber, *European Yearbook on Human Rights 2018* (Institute of Southeast Asian Studies 2018) <https://www.cambridge.org/core/product/identifier/CBO9781780688008A029/type/book_part> accessed 6 March 2022, 385.

²⁴¹ Manisuli Ssenyonjo, ‘Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples’ Rights (1987–2018)’ (2018) 7 *International Human Rights Law Review* 1, 10.

²⁴² *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea* [2004] African Commission on Human and Peoples’ Rights Communication no 249/02, para 67.

²⁴³ See e.g. *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012) para 113.

but that ‘no specific assessment of [the applicant’s] personal conduct and no reference to any threat that he might constitute to public policy or public security’²⁴⁴ had been made by the authorities.²⁴⁵ When applied to the right to leave by analogy, in any case, individual circumstances must be taken into consideration

In 2012, the ECtHR ruled similarly in *Stamose v Bulgaria* concerning the right to leave. In *Stamose v Bulgaria*, the objective of protecting other state’s law and order to justify an interference with the right to leave was addressed. The applicant was banned from leaving Bulgaria for a period of two years on account of having breached US immigration laws. This measure of interference was ‘designed to discourage and prevent breaches of the immigration laws of other States’.²⁴⁶ The ECtHR observed that:

‘Although the Court might be prepared to accept that a prohibition to leave one’s own country in relation to breaches of the immigration laws of other States may in certain compelling situations be regarded as justified, it does not consider that the automatic imposition of such a measure without any regard to the individual circumstances of the person concerned may be characterized as necessary in a democratic society’.²⁴⁷

This suggests that human rights law only permits restrictions to prevent threats to other states’ law and order, in exceptional circumstances where individual circumstances are taken into consideration. It should be noted that in this case, both the US and Bulgaria prohibited the individual from leaving the country. This should therefore be borne in mind when considering the extension of this jurisprudence to the legality of measures to pullbacks.²⁴⁸

In sum, it could be asserted that Libya restricting the right to leave through pullbacks may be based on reasons of public order in Italy, such as possibly the reduction of socio-economic costs associated with processing asylum claims in Italy or preventing a breach of Italy’s immigration laws. Jurisprudence, however, suggests that in any case individual circumstances of the person whose right to leave is restricted must be considered. Given the widespread and indiscriminate nature of pullbacks, this condition is unlikely to be fulfilled.

Protection of law and order in Libya

Due to the lack of consideration of individual circumstances of intercepted migrants, it is doubtful whether protecting Italy’s public order constitutes a legitimate aim that may justify pullbacks. However, LCG pullbacks may serve to protect *Libya’s* law and order. Migrants trying to reach Italy from Libya by sea aim to cross international borders irregularly. As

²⁴⁴ Case 33/07 *Jipa v Romania* [2008] European Court of Justice ECR I-5157, paras 26–27.

²⁴⁵ *Ibid*

²⁴⁶ *Stamose v Bulgaria* [2012] European Court of Human Rights Application no 29713/05, para 32.

²⁴⁷ *Ibid*

²⁴⁸ Elspeth Guild and Vladislava Stoyanova, ‘The Human Right to Leave Any Country: A Right to Be Delivered’ in Wolfgang Benedek and others (eds), Christian Strohal and Stefan Kieber, *European Yearbook on Human Rights 2018* (Institute of Southeast Asian Studies 2018) <https://www.cambridge.org/core/product/identifier/CBO9781780688008A029/type/book_part> accessed 6 March 2022, 385.

elucidated in section 3.2.1., in Libya, irregular entry into, stay in and exit from Libya is criminalized indiscriminately. Those migrants seeking to cross the Mediterranean are therefore in breach of Libya's immigration laws and may face imprisonment. It could be argued that pullbacks are therefore conducted in the context of law enforcement and can thus serve as a legitimate aim to protect law and order in Libya. While the prevention of crime could well be included in the concept protecting 'law and order', Article 31 of the 1951 UN Refugee Convention forbids the penalization of irregular entry. This has also been recognized by the African Union in its Draft Policy on the Prevention of Smuggling of Migrants in Africa.²⁴⁹ Therefore, pullbacks for the purpose of protection of law and order in Libya cannot serve as a legitimate aim, as this limitation would be contrary to international law. As shown in section 3.2.1, limitations on the right to leave cannot be contrary to international law, even if they are prescribed in national law.

3.3. Restricting the right to leave to comply with other international obligations

Aside from the limitation grounds of Article 12 (2) ACHPR, Libya may be obligated to conduct pullbacks to save lives at sea or prevent human trafficking or smuggling. This section will examine whether the right to leave can be nullified to comply with these obligations.

3.3.1. Preventing and combating human trafficking and smuggling

Controlling irregular migration is also part of underlying international community interests.²⁵⁰ Important in this context is the commitment to fight human trafficking and smuggling. Under the MoU, Italy and Libya have agreed to set up a joint operations center to identify migrant smugglers and human traffickers.²⁵¹ It should therefore be assessed whether the prevention of human trafficking and smuggling can serve as a legitimate aim to limit the right to leave. The focus of this analysis shall be on the Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol),²⁵² as smuggling by definition involves the crossing of borders irregularly.

The Smuggling Protocol obliges states to cooperate 'to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea'.²⁵³ To achieve this, states must *inter alia* secure the validity and legitimacy of travel or

²⁴⁹ African Union, Draft Policy on the Prevention of Smuggling of Migrants in Africa 2021 [Rev. 2], 13.

²⁵⁰ Fabian Othmerding, 'Third Country Capacity-Building as a Means of Extraterritorial Migration Control: A Doctrinal Analysis of the European Union's Support for the Libyan Coastguard in Light of the Human Right to Leave and the Obligation of Non-Refoulement' (2021) 2021 Bristol Law Review 226, 241.

²⁵¹ See e.g. Patrick Kingsley and Sara Creta, 'The Ship That Stopped 7,000 Migrants, and Smuggled 700,000 Cigarettes' *The New York Times* (28 September 2020)

<<https://www.nytimes.com/2020/09/28/world/europe/italy-warship-migrants-libya-cigarettes-smuggling.html>> accessed 7 April 2022; Tuesday Reitano and Mark Micallef, 'Human Smuggling and Libya's Political End Game' (Institute for Security Studies, 2017) <<https://globalinitiative.net/wp-content/uploads/2018/01/2017-12-13-pamphlet-migration.pdf>>, 2.

²⁵² Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) UNTS 2241 Doc A55/383 (Smuggling Protocol).

²⁵³ Article 7 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) UNTS 2241 Doc A55/383 (Smuggling Protocol).

identity documents.²⁵⁴ If suspicions are confirmed, the coastal state shall take ‘appropriate measures with respect to the vessel and persons [...] on board’.²⁵⁵ Akin to the operation of international rules against illicit drug trafficking, this will most possibly imply confiscating the ship and arresting and prosecuting the crew.²⁵⁶ This has led some commentators to conclude that the Smuggling Protocol ‘establishes a treaty framework by which states can control the departure of migrants’.²⁵⁷

It is doubtful, however, whether this equally applies to both the smugglers *and* the smuggled. Article 5 Smuggling Protocol stipulates that those smuggled ‘shall not become liable to criminal prosecution’. Also, while a state ‘shall consider taking measures that permit [...] the denial of entry [...] of persons implicated in the commission of offences’²⁵⁸, denying departure to those smuggled is not mentioned anywhere.²⁵⁹ What measures are then appropriate towards those persons, since ‘the safety and humane treatment of the persons on board’²⁶⁰ must always be ensured? Since the Smuggling Protocol lacks a clear answer, the general rules governing interdictions at high seas must be consulted.²⁶¹ In the case of stateless vessels, the answer to what constitutes ‘appropriate measures’ is to be determined by the domestic law of the coastal state, i.e., Libya.²⁶²

As stated previously, Libya’s domestic laws on irregular migration are inadequate to fulfil any international human rights criterion. Thus, human rights standards would not be met if international requirements of intercepting vessels to prevent smuggling rely on Libya’s migration law. Moreover, according to the ECtHR, a state’s responsibilities under other legal systems do not affect the assessment of its human rights commitments, as indicated in Chapter 1.²⁶³ This suggests that a state cannot escape its obligations under the right to leave through obligations under other international treaties, such as the Smuggling Protocol. Consequently, the Smuggling Protocol does not provide sufficient ground for justifying infringements on the right to leave through the LCG’s pullback operations.

²⁵⁴ Ibid, Article 13

²⁵⁵ Ibid, Article 8 (2) and (7)

²⁵⁶ Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) <<https://www.cambridge.org/core/books/shipping-interdiction-and-the-law-of-the-sea/4EAEF145B1D2D1DD26B4317C66CC8BB5>> accessed 14 July 2022, 14.

²⁵⁷ Colin Harvey and Robert P. Barnidge, Jr., ‘The Right to Leave One’s Own Country under International Law: A Paper Prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration’, 12.

²⁵⁸ Article 11 (5) Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) UNTS 2241 Doc A55/383 (Smuggling Protocol).

²⁵⁹ Nora Markard, ‘The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries’ (2016) 27 European Journal of International Law 591, 607.

²⁶⁰ Article 9 (1) (a) Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) UNTS 2241 Doc A55/383 (Smuggling Protocol).

²⁶¹ Fabian Othmerding, ‘Third Country Capacity-Building as a Means of Extraterritorial Migration Control: A Doctrinal Analysis of the European Union’s Support for the Libyan Coastguard in Light of the Human Right to Leave and the Obligation of Non-Refoulement’ (2021) 2021 Bristol Law Review 226, 242.

²⁶² Ibid

²⁶³ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012) para 81.

3.3.2. Saving lives at sea

The LCG interceptions are frequently referred to as SAR operations in the Italy-Libya cooperation framework, aimed to ensure safety at sea.²⁶⁴ As Libya carries out pullbacks in territorial and international waters, the maritime legal framework for such SAR operations may possibly serve as a legitimate ground for the LCG to intercept migrant vessels.

To define states' duties in maritime rescue operations, international SAR obligations are relevant in two regards. Primarily, they impose the overall responsibility to assist any person 'in distress at sea' in their SAR zone. According to the International Convention on Maritime Search and Rescue (SAR Convention), to which Libya is a party,²⁶⁵ a distress phase is 'a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'.²⁶⁶ As the typical vessel departing from Libya carrying migrants across the Mediterranean is overcrowded and unseaworthy, it seems reasonable to assume that it is also, upon departure, in 'distress'. Once rescued, the coastal state, i.e., Libya, has the obligation to bring those rescued to a 'place of safety'. What is meant by a 'place of safety' is not laid down in the SAR Convention.²⁶⁷

While it is questionable that the notion of safety under the Law of the Sea and that under the principle of *non-refoulement* can be considered synonymous, the UNHCR has emphasized that state commitments under international refugee law must also inform the choice of port of disembarkation.²⁶⁸ In the European context, the ECtHR concluded in *Hirsi Jamaa* that the concept of a 'place of safety' should not be restricted to the physical protection of people, but also entails respect for their fundamental rights.²⁶⁹ Because of the thoroughly reported abuses of migrants, Libya cannot be regarded a 'place of safety'.²⁷⁰ As described in Chapter 1, once returned to Libya, migrants have been detained where they suffer from inhuman treatment. It is thus arguably inconsistent with international human rights to justify the LCG pullbacks under the guise of SAR obligations. Rather, it has been argued by scholars that through such a

²⁶⁴ United Nations Support Mission In Libya and United Nations Human Rights Office of the High Commissioner, 'Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya' (2018) <<https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>>, 17; See also European Commission, 'Migration on the Central Mediterranean Route. Managing Flows, Saving Lives' (2017) JOIN(2017) 4, 2.

²⁶⁵ Iole Fontana, 'Migration Crisis, Organised Crime and Domestic Politics in Italy: Unfolding the Interplay' (2020) 25 South European Society and Politics 49, 69.

²⁶⁶ Article 1.1, International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) No 23489.

²⁶⁷ Maarten Den Heijer, 'Interdiction at Sea', *Europe and Extraterritorial Asylum* (Hart Publishing 2012) <<https://search.ebscohost.com/login.aspx?direct=true&db=e000xww&AN=476210&site=ehost-live&scope=site>> accessed 13 May 2022, 235.

²⁶⁸ Maarten Den Heijer, 'Interdiction at Sea', *Europe and Extraterritorial Asylum* (Hart Publishing 2012) <<https://search.ebscohost.com/login.aspx?direct=true&db=e000xww&AN=476210&site=ehost-live&scope=site>> accessed 13 May 2022, 236.

²⁶⁹ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012) para 27.

²⁷⁰ Even the State of Libya itself considers its ports unsafe for the disembarkation of migrants. See IOM, 'Libya Considers Its Ports Unsafe for the Disembarkation of Migrants' (9 April 2020) <<https://www.iom.int/news/libya-considers-its-ports-unsafe-disembarkation-migrants>> accessed 12 May 2022.

narrative, interdictions are falsely ‘laundered into an ethically sustainable strategy of border governance’.²⁷¹

Conclusion

This chapter has demonstrated the difficulties and possibilities surrounding the question whether LCG pullbacks constitute a violation of the right to leave under Article 12 (2) ACHPR. The analysis in this chapter suggested that interception does not automatically equate a violation of the right to leave. Firstly, whether interception of a migrant activates protection under this right seems to be dependent on the place of interception, and individual legal and practical obstacles that the migrant faces to return to their country of origin or alternative destinations. Considering the widespread nature of pullbacks as well as the characteristics of the migratory flow on the Central Mediterranean, it was argued that the LCG pullback practices infringe the right to leave under Article 12 (2) ACHPR. Arguably, it is difficult to justify this infringement as the limitation of the right is not provided by clear legal criteria. In the (possible future) scenario that they were to have a legal basis, pullbacks could arguably be considered for the benefit of ‘public order’. Jurisprudence suggests, however, that justifying pullbacks for reasons of protecting ‘public order’ of another state than the acting state requires an assessment of the individual circumstances of each migrant obstructed from leaving. Due to the widespread nature of pullbacks, it is unlikely that this condition is fulfilled. Further, the argument that pullbacks could be justified on grounds of protecting Libya’s immigration laws would not stand, as Libya’s immigration laws run contrary to international law. Finally, because Libya cannot be regarded as a safe location for disembarkation, pullbacks cannot be justified by Libya’s SAR duties. The Smuggling Protocol also does not offer ground to prevent smuggled persons from entry. Connecting these findings to the analysis in Chapter 2, it can be argued that Libya can, in theory, be held responsible for violating the right to leave through carrying out pullbacks. The next chapter will assess whether the African human rights system constitutes a viable forum to hold Libya responsible for these violations in practice.

²⁷¹ Fabian Othmerding, ‘Third Country Capacity-Building as a Means of Extraterritorial Migration Control: A Doctrinal Analysis of the European Union’s Support for the Libyan Coastguard in Light of the Human Right to Leave and the Obligation of Non-Refoulement’ (2021) 2021 Bristol Law Review 226, 244.

Chapter 4: The African Human Rights System as an Accountability Venue

Introduction

In academic literature, the African human rights system has been labelled a ‘viable forum for the enforcement of refugee rights’.²⁷² This chapter analyses how Libya can be held accountable under this avenue, demonstrating the ways in which certain characteristics could present hurdles or opportunities for victims of pullbacks to realize their right to leave. The primary judicial bodies with a human rights-related mandate are the African Commission and the African Court. While each body has its own mandate, both can determine individual complaints against states, hold public hearings, and urge action by states when a subject of a pending complaint is at risk of irreparable harm.²⁷³ This means that, in front of these bodies, a communication alleging a violation by Libya of migrants’ right to leave could potentially be brought. In this chapter, the functioning of the African Commission and the African Court as well as their unique features will be set out in more detail. Furthermore, this chapter examines how an NGO may bring a communication alleging Libya has violated migrants’ right to leave through pullbacks before these bodies, and the viability of realizing victims’ right to leave in front of them.

4.1. The African Commission on Human and Peoples’ Rights

The African Commission has a dual promotional and protective mandate.²⁷⁴ The African Commission discharges its protective mandate primarily by hearing oral arguments and issuing findings in adversarial proceedings regarding alleged ACHPR violations.²⁷⁵ Under this mandate, the African Commission’s duty is to examine communications or complaints, which are classified into communications from Member States and ‘other communications’.²⁷⁶ The latter is also termed the ‘individual complaints procedure’.²⁷⁷

The individual complaints procedure constitutes one of the most significant components of the African human rights system and is particularly important for the purpose of this thesis, as it has been said to ‘offer the clearest means of holding states accountable to their ACHPR

²⁷² Marina Sharpe, ‘The African Commission and Human Rights Courts’, *The Regional Law of Refugee Protection in Africa* (Oxford University Press 2018) <<https://oxford.universitypressscholarship.com/10.1093/oso/9780198826224.001.0001/oso-9780198826224-chapter-7>> accessed 24 January 2022, 212.

²⁷³ See African Court on Human and Peoples’ Rights ‘Rules of Court’ (adopted 1 September 2020); African Commission on Human and Peoples’ Rights ‘Rules of Procedure of the African Commission on Human and Peoples’ Rights’ (adopted on 6 October 1995).

²⁷⁴ Marina Sharpe, ‘The African Commission and Human Rights Courts’, *The Regional Law of Refugee Protection in Africa* (Oxford University Press 2018) <<https://oxford.universitypressscholarship.com/10.1093/oso/9780198826224.001.0001/oso-9780198826224-chapter-7>> accessed 24 January 2022, 194.

²⁷⁵ Ibid, 196.

²⁷⁶ Articles 55-59 African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

²⁷⁷ Frans Viljoen, ‘The African Commission: Protective Mandate’, *International Human Rights Law in Africa* (2nd edn, Oxford University Press 2012) <<https://oxford.universitypressscholarship.com/10.1093/acprof:osobl/9780199645589.001.0001/acprof-9780199645589-chapter-7>> accessed 14 January 2022, 304.

obligations'.²⁷⁸ Under this procedure, non-state actors may submit communications with the African Commission to redress human rights breaches inflicted by State Parties. This section will set out the procedural requirements for filing a claim in front of the African Commission, to understand whether submitting a claim to the Commission might be a viable option.

4.1.1. Admissibility criteria

In order for individual communications to be admissible, seven conjunctive criteria set out in Article 56 ACHPR must be met.²⁷⁹ These are: the indication of authors in the communication; compatibility with the African charters; not written in insulting or disparaging language, not solely based on information disseminated through the mass media; sent after the exhaustion of domestic remedies; submitted within a reasonable time after the exhaustion of such remedies; and to not have already been settled by the state involved. What matters most in bringing a communication against Libya for a breach of the right to leave is whether the victims can bring a communication and whether they must exhaust domestic remedies in Libya.

i) *The identity of the author*

Before the African Commission can consider a communication on its merits, the author's standing must be established. State Parties to the ACHPR have automatic standing. In addition, Article 55 ACHPR states that: 'the Secretary of the Commission shall make a list of the communications *other than those of States parties* to the present Charter [...]'. From this it follows that parties other than states may file a communication. While the ACHPR is silent on who these parties may be, individual complaints practice before the African Commission shows that natural persons and NGOs can be considered 'other parties' for the purpose of litigating before the Commission.²⁸⁰

As NGOs are allowed to have standing, this also means that the author does not need to be the victim of the alleged violation.²⁸¹ Rather, the African Commission has embraced an *actio popularis* approach, which means that besides any 'non-victims' being able to submit a communication, the author also does not need to act with the victim's consent or have any relationship with the victim.²⁸² It is also not required that the applicant is a citizen or registered in the country to which the communication is addressed, nor that the applicant is of African

²⁷⁸ Frans Viljoen, 'The African Commission: Protective Mandate', *International Human Rights Law in Africa* (2nd edn, Oxford University Press 2012) <<https://oxford.universitypressscholarship.com/10.1093/acprof:osobl/9780199645589.001.0001/acprof-9780199645589-chapter-7>> accessed 14 January 2022, 304.

²⁷⁹ See *Anuak Justice Council v Ethiopia* [2006] African Commission on Human and Peoples' Rights Communication no 299/05.

²⁸⁰ Sabelo Gumedze, 'Bringing Communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 118, 121.

²⁸¹ Dorcas Baah and others, 'Redress Mechanisms at the African Commission on Human and Peoples' Rights for Victims of Torture in Cameroon' (Edinburgh International Justice Initiative, The Centre for Human Rights and Democracy in Africa, 2021) <<https://hrirc.org/wp-content/uploads/2021/06/Redress-Mechanisms-at-the-African-Commission-on-Human-and-Peoples-Rights-for-Victims-of-Torture-in-Cameroon.pdf>>, 27.

²⁸² *Article 19 v Eritrea* [2007] African Commission on Human and Peoples' Rights Communication no 275/03; *Law Society of Zimbabwe and Others v Zimbabwe* [2016] African Commission on Human and Peoples' Rights Communication no 321/2006.

descent or based in an African country.²⁸³ These provisions are also translated well into practice, as most of the communications received by the African Commission have been submitted by NGOs, both African and foreign on behalf of (a group of) individuals.²⁸⁴

This unique *actio popularis* approach is arguably beneficial for realizing the right to leave of pullback victims. Any victim or NGO may bring a communication to the African Commission alleging Libya has violated their right to leave. By allowing the latter to submit an application without the identification of victims, the African Commission accepts communications that would not otherwise be made owing to fear of retaliation, as well as owing to financial constraints, or lack of education.²⁸⁵ A study on the socioeconomic background of migrants who have crossed the Central Mediterranean and arrived in Italy demonstrates that these migrants generally have a low education level.²⁸⁶ It shows that only 24 percent of the interviewees completed secondary school.²⁸⁷ Moreover, many of these migrants come from countries that lie at the very bottom of the UN Human Development Index, such as Nigeria, Eritrea, and Ghana, which are characterized by poverty, growing socioeconomic inequality and insecurity.²⁸⁸ In this context, it can be argued that the African Commission becomes more accessible to victims of pullbacks by allowing NGOs to file application on their behalf,²⁸⁹ as NGOs have the funds and knowledge to increase the likelihood of obtaining a favourable decision for them.

Furthermore, by allowing group applications on behalf of NGOs, the procedure seems suitable for the LCG's pullbacks as these operations have generated many victims. In Chapter 1, it was stated that in the last four years, over 100,000 migrants have reportedly been pulled back. In this situation, it is virtually impossible to make arguments that remain at the individual level. Instead, this type of procedure may allow to address the systemic and structural nature of pullbacks. Considering the number of potential clients and the fact that no victims need to be

²⁸³ Frans Viljoen, 'The African Commission: Protective Mandate', *International Human Rights Law in Africa* (2nd edn, Oxford University Press 2012)

<<https://oxford.universitypressscholarship.com/10.1093/acprof:osobl/9780199645589.001.0001/acprof-9780199645589-chapter-7>> accessed 14 January 2022, 34.

²⁸⁴ van Aaken A, 'Making International Human Rights Protection More Effective: A Rational-Choice Approach to the Effectiveness of Ius Standi Provisions' (1 September 2005) <<https://papers.ssrn.com/abstract=802424>> accessed 14 July 2022, 43.

²⁸⁵ Nisrine Eba Nguema, 'Recevabilité des communications par la Commission africaine des droits de l'homme et des peuples' [2014] *La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux* <<https://journals.openedition.org/revdh/803?lang=en>> accessed 17 January 2022, 4.

²⁸⁶ 80.1% of these migrants departed from Libya; Luigi Achilli and others, 'Study on Migrants' Profiles, Drivers of Migration and Migratory Trends' (2016) <<https://cadmus.eui.eu/handle/1814/43964>> accessed 13 May 2022, 24.

²⁸⁷ The data presented are based on interviews with 1,031 migrants carried out between 19 April 2016 and 24 April 2016; Luigi Achilli and others, 'Study on Migrants' Profiles, Drivers of Migration and Migratory Trends' (2016) <<https://cadmus.eui.eu/handle/1814/43964>> accessed 13 May 2022, 13 and 22.

²⁸⁸ *Ibid*, 5

²⁸⁹ Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018)' (2018) 7 *International Human Rights Law Review* 1, 41.

identified, this type of procedure may save time and costs as it requires less fact-finding than a case relying on individual victims requires.²⁹⁰

ii) *Exhaustion of local remedies*

According to Article 56 (5) ACHPR, local remedies must be exhausted in conformity with internationally recognized principles before a communication to the African Commission can be filed.²⁹¹ This is in accordance with the ACHPR's establishment of a human rights protection mechanism subordinate to national human rights protection systems, preventing the Commission from acting as a court of first instance.²⁹²

According to the African Commission's jurisprudence, domestic remedies should only be exhausted if they are 'available, effective, and adequate', as well as 'realistic' or 'sufficiently certain'.²⁹³ This means they must be accessible, capable of offering redress for the complaint with reasonable chances of success, both in theory and in practice.²⁹⁴ Victims must thus be given a real chance to prove the illegality of state acts in court. In *Rencontre africaine pour la défense des droits de l'homme (RADDHO) v Zambia*, the African Commission considered that the complaint was admissible because 'the mass nature of the arrests, the fact that victims were kept in detention prior to their expulsions, and the speed with which the expulsions were carried out gave the Complainants no opportunity to establish the illegality of these actions in the courts'.²⁹⁵ The Commission's jurisprudence also suggests that in cases of major human rights violations, to which a state fails to react, remedies are considered to be unavailable.²⁹⁶ Lastly, the African Commission has stated that it is only the author that must have exhausted local remedies, not the victim.²⁹⁷

This means that, if an NGO files a communication to the African Commission, it is the NGO instead of the victim which needs to exhaust local remedies. If migrant victims file a

²⁹⁰ Lilla Farkas, 'Limited Enforcement Possibilities under European Anti-Discrimination Legislation - A Case Study of Procedural Novelties: Actio Popularis Action in Hungary' (2010) 3 Erasmus Law Review 181, 186.

²⁹¹ Article 56 (5) ACHPR; Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987-2018)' (2018) 7 International Human Rights Law Review 1, 8.

Sir Dawda K Jawara v The Gambia [2000] African Commission on Human and Peoples' Rights Communication no 147/95-149/96, para 25.

²⁹³ Ibid, paras 31-35

²⁹⁴ *Purohit and Moore v The Gambia* [2003] African Commission on Human and Peoples' Rights Communication no 241/01, paras 37-38.

²⁹⁵ *FIDH, Organisation nationale des droits de l'Homme (ONDH) and Rencontre africaine pour la défense des droits de l'Homme (RADDHO) v Senegal* [2006] African Commission on Human and Peoples' Rights Communication no 304/05, para 1; *Union interafricaine des droits de l'Homme, Fédération internationale des ligues des droits de l'Homme, Rencontre africaine des droits de l'Homme, Organisation nationale des droits de l'Homme au Sénégal and Association malienne des droits de l'Homme v Angola* [1997] African Commission on Human and Peoples' Rights Communication no 159/96, para 12; *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea* [2004] African Commission on Human and Peoples' Rights Communication no 249/02, para 35.

²⁹⁶ See for example: *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea* [2004] African Commission on Human and Peoples' Rights Communication no 249/02, para 34.

²⁹⁷ *Article 19 v Eritrea* [2007] African Commission on Human and Peoples' Rights Communication no 275/03, para 65.

communication with the Commission, jurisprudence in front of this body suggests that those who have not (yet) obtained refugee status must meet the Article 56 (5) requirement as well.²⁹⁸ However, it is questionable whether domestic remedies in Libya are available. Migrants pulled back by the LCG are subsequently detained without charge and are neither brought before a judicial authority or have access to legal counsel or family.²⁹⁹ Following the reasoning of the African Court in *African Commission (Kadhafi) v African Court*,³⁰⁰ this shows that these migrants are barred from seeking local remedies, rendering the criteria of exhaustion of local remedies difficult to fulfill.³⁰¹ The applicant in this case, Mr. Kadhafi, had been isolated from friends and family, without access to a lawyer of his choice and sentenced to death in absentia. The Court concluded that this constituted ‘sufficient ground to conclude that the detainee had been prevented from legally seeking local remedies as prescribed by Libyan law.’³⁰²

The improbability of access to an effective remedy in Libya is argued to be exacerbated by the near collapse of rule of law in the country. Firstly, there is no right to judicial review in Libya’s constitution.³⁰³ Secondly, Libya’s state institutions, including the judiciary, have been severely weakened. The judiciary has been struggling to address human rights violations committed against migrants by state and non-state actors.³⁰⁴ According to the OHCHR, no migrant lawsuits have been filed in Libyan courts in 2019 or 2020 challenging, for example, interceptions at sea or arbitrary detention practices which have generated many victims.³⁰⁵ Moreover, intercepted migrants who have left the country irregularly are rarely prosecuted as required by Libyan law. UNSMIL confirmed one instance of a Tripoli court convicting North African migrants of attempting to leave Libya irregularly in 2017-2018.³⁰⁶ The right to a fair trial is thus compromised when judicial institutions are weak or dysfunctional and domestic remedies cannot be considered available or effective.³⁰⁷ On the basis of this information, it can be argued that it is unlikely that victims of pullback and NGOs will have to exhaust domestic remedies in order to bring a communication before the African Commission.

²⁹⁸ *Chinhamo v Zimbabwe* [2007] African Commission on Human and Peoples’ Rights Communication no 307/2005; *Majuru v Zimbabwe* [2008] African Commission on Peoples’ Rights Communication no 308/2005.

²⁹⁹ International Commission of Jurists, ‘Accountability: Libya in Law International under Criminal the of Assessment An System’ (2019) <<https://www.icj.org/wp-content/uploads/2019/07/Libya-Accountability-serious-crimes-Publications-Reports-Thematic-reports-2019-ENG.pdf>>, 12.

³⁰⁰ *African Commission (Kadhafi) v Libya* [2016] African Court on Human and Peoples’ Rights Communication no 002/2013, para 69.

³⁰¹ Ibid

³⁰² Ibid

³⁰³ John L. S. Simpkins, ‘Libya’s Legal System and Legal Research’ (NYU Law Global, January 2008) <<https://www.nyulawglobal.org/globalex/Libya.html>> accessed 24 January 2022.

³⁰⁴ Ibid

³⁰⁵ United Nations Human Rights Office of the High Commissioner, ‘Unsafe and Undignified: The Forced Expulsion of Migrants from Libya’ (2021) <https://www.ohchr.org/Documents/Issues/Migration/Unsafe_and_Undignified.pdf> accessed 12 January 2021, 32.

³⁰⁶ United Nations Support Mission In Libya and United Nations Human Rights Office of the High Commissioner, ‘Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya’ (2018) <<https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>>, 39.

³⁰⁷ United Nations Human Rights Office of the High Commissioner, ‘Unsafe and Undignified: The Forced Expulsion of Migrants from Libya’ (2021) <https://www.ohchr.org/Documents/Issues/Migration/Unsafe_and_Undignified.pdf> accessed 12 January 2021, 31.

4.1.2. Enforcement of recommendations

The above-mentioned requirements are but a few aspects of whether rights are realized in front of the African Commission. Equally important are remedies, their legal status and whether they are implemented. The ACHPR is silent regarding remedies, stating only that the African Commission may make ‘recommendations to the OAU Assembly of Heads of State and Government’ (rather than to the respondent state) in Article 53 ACHPR. This has led to the widely held view that African Commission decisions are not legally binding.³⁰⁸

Failure to comply with an unfavourable merit judgment by the Commission may result in the case being referred to the African Court.³⁰⁹ Rule 118 of the 2010 Commission’s Rules of Procedure authorizes the Commission to refer matters to the African Court in respect of all states signatory to the African Court Protocol under four conditions: where a State has not complied or is unwilling to comply with the Commission’s recommendations; where a State has not complied with the Commission’s request for provisional (interim/precautionary) measures; (situations involving serious or massive violations of human rights; and if the Commission ‘deems necessary’ to refer a communication to the Court at any stage. The decision to refer a non-compliance rest on the Commission’s discretion.³¹⁰

4.2. The African Court on Human and Peoples’ Rights

Even if the Commission found a violation of Libya’s obligations under the right to leave, it is thus uncertain whether Libya would comply with this recommendation due to their non-binding nature. In this situation, however, the case could be referred to the African Court. This section will explore whether, in this respect, the African Court may present a more suitable forum for victims of pullbacks to realize their right to leave.

In 1998, the African Court was established to complement the African Commission’s protective mandate.³¹¹ However, the Court did not become operational until November 2006.³¹² It is composed of eleven judges, who are nationals of AU Member States and elected in their personal capacity by the Assembly, on a part-time basis.³¹³ The Court’s mandate to protect human rights is divided into two parts: resolving disputes involving human rights violations and offering legal guidance through advisory opinions.³¹⁴ The continuation of this chapter will

³⁰⁸ Inger Osterdahl, *Implementing Human Rights in Africa: The African Commission on Human and Peoples’ Rights and Individual Communications* (Lustu Forlag 2002), 154-155.

³⁰⁹ Rule 118(1) African Commission on Human and Peoples’ Rights ‘Rules of Procedure of the African Commission on Human and Peoples’ Rights’ (adopted on 6 October 1995). Although this provision is not specifically provided for in the 2020 Rules, the nature of the complementary relationship between the Commission and the Court in my view logically allows for this possibility.

³¹⁰ Rainer G, Mariela MA and Davide P, *Research Handbook on Compliance in International Human Rights Law* (Edward Elgar Publishing 2021), 375.

³¹¹ Robert Wundeh Eno, ‘The Jurisdiction of the African Court on Human and Peoples’ Rights’ (2002) 2 *African Human Rights Law Journal* 223, 225.

³¹² *Ibid*

³¹³ Chronique de Jurisprudence de La Cour Africaine Des Droits de l’homme et Des Peuples (2015-2016)’ (*Association des Cours Constitutionnelles Francophones*) <<https://accf-francophonie.org/chronique-de-jurisprudence-de-la-cour-africaine-des-droits-de-lhomme-et-des-peuples-2015-2016/>> accessed 19 January 2022.

³¹⁴ Article 4 (1) Protocol Establishing an African Court on Human and Peoples’ Rights.

focus on the contentious procedures of the Court, to assess whether Libya could potentially be held responsible under this procedure.

4.2.1. *Ratione personae*

Access for individuals to the African Court differs from access to the African Commission. For an individual to file an application to the Court, the respondent state must be a signatory to the ACHPR, the State must have ratified the ACHPR Protocol, and it must have issued a declaration under Article 34 (6) ACHPR Protocol accepting the competence of individual and NGOs to refer a matter to the African Court. While many states fulfil the first two conditions, only eight states have made a declaration under Article 34 (6) ACHPR Protocol.³¹⁵ Libya has not made such a declaration, meaning that victims of pullbacks or NGOs cannot bring their case directly to the Court. Moreover, even if a declaration were issued under Art 34 (6) ACHPR Protocol, these NGOs must have observer status with the Commission. Article 5 (3) ACHPR Protocol limits access only to ‘relevant NGOs having observer status before the African Commission’. The meaning of ‘relevant’ is unknown.

Individuals and NGOs, however, do have the possibility to refer a case to the African Commission with the expectation that it will then refer the case to the African Court. Indeed, it was shown in the last sub-section that the Commission may refer a case to the Court when a State Party to the ACHPR does not comply with recommendations or interim measures, but also when a situation is brought to its attention which, in the Commission’s opinion, forms a grave violation of human rights. Although the African Commission only does so rarely,³¹⁶ it did refer a case involving human rights breaches by Libya to the African Court after non-compliance by the state twice.³¹⁷ In this case, *In the Matter of African Commission on Human and Peoples’ Rights v Great Socialist People’s Libyan Arab Jamahiriya*, the Court confirmed this possible alternate route for applicants attempting to bring a case before the African Court where the member state has not signed the Article 34 (6) ACHPR Protocol declaration.³¹⁸ Applicants can either submit cases to the African Commission and request that they be transferred to the African Court, or they can hope that the African Commission chooses to send them to the African Court. However, no mention is made of any standards used by the African

³¹⁵ See ‘Basic Information’ (*African Court on Human and Peoples’ Rights*) <<https://www.african-court.org/wpafc/basic-information/>> accessed 19 January 2022. Out of these, three have withdrawn their declaration in the last five years. Benin, Cote d’Ivoire and Rwanda. Tanzania initially also withdrew from Article 34 (6) Protocol but reversed its decision. See for example: ‘Withdrawal of States from African Court a Blow to Access to Justice in the Region’ (*International Commission of Jurists*, 1 May 2020) <<https://www.icj.org/withdrawal-of-states-from-african-court-a-blow-to-access-to-justice-in-the-region/>> accessed 19 January 2022; IJRC, ‘Rwanda Withdraws Access to African Court for Individuals and NGOs’ (*International Justice Resource Center*, 14 March 2016) <<https://ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/>> accessed 19 January 2022; ‘Tanzania Reverses Decision to Withdraw from the African Court - The East African’ <<https://www.theeastafrican.co.ke/tea/news/east-africa/tanzania-reverses-decision-to-withdraw-from-the-african-court-3415592>> accessed 19 January 2022

³¹⁶ According to the statistics of the African Court, the Commission has only done so three times. See ‘African Court Cases | Statistic’ <<https://www.african-court.org/cpmt/statistic>> accessed 19 January 2022.

³¹⁷ *African Commission (Kadhafi) v Libya* [2016] African Court on Human and Peoples’ Rights Communication no 002/2013; *African Commission on Human and Peoples’ Rights v Great Socialist People’s Libyan Arab Jamahiriya* [2011] African Court on Human and Peoples’ Rights Application no 004/2011.

³¹⁸ *African Commission on Human and Peoples’ Rights v Great Socialist People’s Libyan Arab Jamahiriya* [2011] African Court on Human and Peoples’ Rights Communication no 004/2011.

Commission or the African Court in its decision to transfer cases.³¹⁹ As a result, if an NGO would wish to reach the African Court it would be challenging to persuade the African Commission to transfer the case. In any case, an NGO with observer status would be able to do so.

4.2.2. Enforcement of the decision

It has been argued that the African Court has a lenient rule of standing (albeit less than the African Commission) and bases its reasoning on a broad range of international human rights provisions. However, it should be noted that the African Court is confronted with consistent non-compliance. State Parties to the ACHPR Protocol expressly agree to comply with the African Court's judgments against them and to 'guarantee' the implementation of remedies 'within the time stipulated by the Court',³²⁰ and execution is monitored by the Council of Ministers.³²¹ However, according to the African Union's relevant activity report, only one out of one hundred judgments rendered by the African Court was fully complied with in 2021.³²²

Libya has also not complied with many judgments that have been issued against it by international courts.³²³ This non-compliance with recommendations by the African Commission led to a referral of a complaint to the African Court after a request from Human Rights Watch, Interights, and the Egyptian Initiative for Personal Rights, and the order of provisional measures.³²⁴ These two actions have been lauded to be 'a bold statement to states that have ratified the [ACHPR Protocol] and the [ACHPR] that it would react to massive human rights violations in the region', thereby taking 'an innovative step'.³²⁵

In accepting the African Commission's referral, the African Court held that, due to the continuing instability in Libya making it impossible to schedule a hearing, the Court decided to grant an order for provisional measures nine days after it had received the application, without a written or oral hearing. Importantly, the African Commission had not requested that remedy. This arguably exemplifies how the African Commission and Court can work together to combat grave human rights violations.³²⁶ It could also be argued that, while Libya's compliance with a judgment might still be unlikely, the African Court has taken an innovative stance and thereby

³¹⁹ Oliver Windridge, 'In Default: African Commission on Human and Peoples' Rights v Libya' (2018) 18 African Human Rights Law Journal 758, 769.

³²⁰ Article 30 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004).

³²¹ Ibid, Article 29.

³²² African Union 'Activity Report of the African Court on Human and Peoples' Rights (AfCHPR)' (2021) EX.CL/1258(XXXVIII) <<https://www.african-court.org/wpafc/wp-content/uploads/2021/03/Activity-report-of-the-Court-January-to-December-2020.pdf>> accessed 19 January 2021, 13.

³²³ Carla Ferstman and others, 'The International Criminal Court and Libya: Complementarity in Conflict' <https://www.chathamhouse.org/sites/default/files/field/field_document/20140922Libya.pdf>, 8.

³²⁴ *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* [2011] African Court on Human and Peoples' Rights Communication no 004/2011.

³²⁵ Judy Oder, 'The African Court on Human and Peoples' Rights' Order in Respect of the Situation in Libya: A Watershed in the Regional Protection of Human Rights?' (2011) 11 African Human Rights Law Journal 495, 496.

³²⁶ Juan Bautista Cartes Rodríguez and Laura Íñigo Álvarez, 'The Case Law of the African Court on Human and Peoples' Rights in Libya Following the Arab Uprisings: Lessons Learned for the Consolidation and Legitimation of the Court' (2020) 20 African Human Rights Law Journal 78, 92.

expressed increased willingness to address mass human rights violations.³²⁷ This cooperation between the two bodies may potentially strengthen enforcement of a judgment against Libya on violating the right to leave.

Conclusion

After Chapter 3 established that Libya can be held responsible for violating the right to leave through pullbacks by the LCG, this final chapter assessed the viability of an NGO bringing a communication in front of the African judicial bodies in order to vindicate victims' right to leave. It has been argued that the rather unique features of the African human rights system allow NGOs to submit a communication to the African Commission without the identification nor consent of victims. This is particularly valuable in the context of pullbacks, as these produce many victims and these victims often do not have the means nor the knowledge to file a communication to the Commission themselves. Combining this with the observations made in Chapter 3, i.e., the broad range of provisions on which the Commission and Court can base their reasoning and their priority for migrant rights as opposed to state interests, it is asserted that the African human rights system presents a viable forum for holding Libya accountable. In practice, it is questionable whether a disintegrated state such as Libya would comply with a judgment, and whether victims would be provided justice through this accountability route. However, the African Court and Commission have expressed willingness to ensure compliance with the ACHPR through cooperation, turning a non-binding recommendation by the Commission into a binding decision by the Court.

³²⁷ Tashmin Ali, 'Case Watch: African Court Takes Bold Stand on Libya' (*Open Society Justice Initiative*, 28 April 2011) <<https://www.justiceinitiative.org/voices/case-watch-african-court-takes-bold-stand-libya>> accessed 14 July 2022.

Conclusions

Since *Hirsi Jamaa v Italy*, Libya has evolved into the gatekeeper of Fortress Europe. After the ECtHR ruled that Italy had violated the principle of *non-refoulement* by pushing back migrants under their *de jure* and *de facto* control to Libya, Italy handed this control over to the LCG. Through financial and material support by Italy, this coast guard is now in control of intercepting migrants at sea and returning them to Libya, preventing them from leaving in the first place. This change in policy gave rise to new legal questions on which state could be held responsible for potential violations of migrants' human rights. From the perspective of strategic litigation, this thesis sought to explore new accountability avenues for human rights violations in the context of migration control by answering the question: *To what extent can Libya, in theory and in practice, be held responsible under the ACHPR for violating the right to leave through carrying out pullbacks in cooperation with Italy?* This thesis draws the following conclusions.

1. *Pullbacks conducted by the Libyan Coast Guard could be imputable to Libya despite the government's lack of authority over its territory and certain coast guard units.*

This thesis demonstrated the legal challenges for imputing pullbacks by the LCG to Libya, arising from Libya's political fragmentation. It was shown that the recognized Libyan government, lacks authority over the LCG, due to the infiltration of militias and armed groups in the apparatus and control of the Tobruk government over the East. This thesis provided insight on the question whether this weakened link between the actors carrying out pullbacks and the Libyan state has consequences for the imputability of pullbacks to Libya. While the reality of power divisions is unclear, the rules of attribution were applied in three different factual circumstances of control over Libyan territory that could be identified.

Firstly, it was contended that in the Western areas controlled by the UN-recognized government, Article 5 ASR allows for attribution of the LCG's acts to the state due to the LCG's authorization by law to execute governmental activities. In many Western districts, however, militias have either taken over coast guard units or are enrolled individually. Their influence undermines the authority of the government over the LCG. This thesis argued that also in these circumstances of factual control by militias, the conditions of Article 9 ASR are fulfilled to attribute pullbacks to the state. These units exercise elements of governmental authority in the absence of governmental authority due to the official government's loss of territorial control. This while pullbacks call for such exercise of authority, because migrants run the risk of serious injury or death during interceptions – as evidenced by human rights reports. Finally, it was held that Article 9 ASR might serve as a legal basis for attributing acts of units under the control of the (unofficial) Tobruk government to Libya. However, this article only covers temporary assumptions of authority. It is doubtful whether the Tobruk government meets this requirement, as it aims to either take over control from the official government or share powers with them.

2. *Pullbacks by the Libyan Coast Guard are likely to be a violation of the right to leave of all victims of pullbacks, but most probably that of refugees.*

Stopping persons from leaving does not automatically activate protection under the right to leave as laid down in Article 12 (2) ACHPR. To determine whether victims of pullbacks are protected under this right, Chapter 3 analysed whether this conduct falls within the personal and material scope of Article 12 (2) ACHPR. This thesis relied on other international human rights instruments such as the ECtHR and the ICCPR to establish the scope of Article 12 (2) ACHPR. These instruments are highly relevant because the African judicial bodies have the competence to draw inspiration from these instruments or apply their legal provisions, in accordance with Article 60 ACHPR and Article 7 ACHPR Protocol respectively.

This thesis found that under Article 12 (2) ACHPR, all migrants regardless of their nationality are protected. Whether these migrants have the option of returning to their home country or leaving for other destinations, arguably weakens protection under the right to leave. However, having these alternatives can also not conclusively mean that the right to leave is not infringed. For refugees, legal barriers exist to return to one's country of origin, as this would constitute *refoulement*. Alternatively, they could leave for other neighbouring countries. However, they would likely not receive equal protection there – as required by the ECtHR. For migrant workers, the existence of alternative destinations does, however, weaken the link between departure prevention measures and the protection of the right to leave. Nonetheless, jurisprudence suggests that the migrant's individual circumstances need to be considered. As migrants are intercepted indiscriminately and in high numbers, it was argued that pullbacks do not meet this requirement. Finally, according to scholars, interceptions in international waters would still fall within the scope of the right to leave. However, this issue remains contested as it has not been clarified in jurisprudence. Therefore, while certain issues remain disputed, the right to leave under Article 12 (2) ACHPR could be interpreted to be infringed by pullbacks.

Whether this infringement amounts to a violation depends on whether the right can justifiably be limited under Article 12 (2). As no legal criteria on the limitation of the right to leave in neither the Libyan domestic legal framework nor the Italy-cooperative framework exists, it was found that pullbacks are likely unjustifiable. In the possible future scenario that they were to have a legal basis, it is also not likely that pullbacks can be justified. The argument that pullbacks protect Libya's immigration laws would not stand, as these laws run contrary to international law. Justifying pullbacks based on protecting Italy's law and order is also questionable. Firstly, due to the African judicial bodies' focus on human rights as opposed to the state's migration control interests, it can be doubted whether these bodies would find a legitimate aim for the benefit of Italy's public order. If this would be found, jurisprudence suggests that justifying pullbacks for reasons of protecting 'law and order' of another state requires an assessment of the individual circumstances of each migrant obstructed from leaving. Due to the widespread nature of pullbacks, it is unlikely that this condition is fulfilled. Finally, pullbacks cannot be excused under Libya's SAR obligations, as Libya cannot be considered a safe place to which migrants can be returned. The relevance of the Smuggling Protocol can also be questioned, as there is no ground under this framework to prevent smuggled persons from

entry. Connecting these findings to the above conclusion, this thesis argued that Libya can, in theory, be held responsible for violating the right to leave through carrying out pullbacks.

3. *The African judicial bodies present viable fora to hold Libya responsible for violating the right to leave of migrants intercepted and returned to the Libyan shore.*

The above conclusions have considerable value for victims of pullbacks. As NGOs have the right to standing and victims do not need to be identified nor is consent of victims required, NGOs may file a communication in front of the African Commission on behalf of migrants, invoking their right to leave and possibly obtaining a non-binding recommendation. This *actio popularis* approach is particularly interesting in the context of pullbacks, due to their widespread nature and the fact that their victims often do not have the means or knowledge to file a communication themselves. For an NGO to bring a communication to the African Commission, it arguably does not need to exhaust local remedies in Libya as these can be considered unavailable and ineffective.

It is probable that Libya will not comply with a non-binding recommendation by the African Commission. However, this recommendation has potential to transform into a binding judgment as the African Commission may transfer a case to the African Court. While this forum also faces the challenge of non-compliance, the African judicial bodies have shown that they are willing to cooperate in this manner to ensure compliance with the ACHPR and put an end to mass human rights violations. Based on these observations, as well as the Commission and Court's broad mandate to interpret or apply other human rights instruments, it can be argued that the African human rights system is a viable forum for holding Libya responsible for pullbacks by the LCG.

It is evident that complex migration control practices, such as the one at issue, present legal difficulties because they challenge the prevalent assumptions of jurisdiction and attribution. The involvement of different states, different actors, and different legal frameworks complicates and cloud questions of responsibility. However, this thesis has shown that the involvement of the multiplicity of actors and states also allows for new avenues of interpretation that could arguably lead to overcoming these challenges.

While the positive appraisal in this thesis shows that Libya can be held responsible for pullbacks under African human rights law, the analysis carried out in this thesis also merits a more critical assessment of the legal framework. As has become clear, establishing jurisdiction extraterritorially or attributing conduct of actors in different situations of factual control is a complicated legal manoeuvre which requires detailed assessments and is subject to several limitations. Much still depends on how certain issues are tackled, such as, Libya's history of non-compliance with binding and non-binding judgments, how the option of migrants to leave for other destinations is evaluated and whether the right to leave is applicable to interceptions in international waters. However, this thesis has shown that, while assertions that pullbacks are carried out in a 'legal black hole' from the perspective of destination state's responsibility are valid, human rights norms under the African human rights system remain applicable to Libya. This thesis has thus affirmed an avenue for interpretation that could lead to the assertion that

Libya can, in theory and in practice, be held responsible under the ACHPR for violating the right to leave through carrying out pullbacks in cooperation with Italy. This accountability avenue persists even if Italy would increasingly limit its role in pullbacks.

Perhaps the international human rights bodies will soon clarify remaining contested issues: a complaint is currently pending in front of the HRC on the role of Italy, Malta, and Libya in violating the right to leave.³²⁸ In addition, these same NGOs have called on the African Commission to address the human rights abuses of migrants in Libya.³²⁹ It will be fascinating to see how the HRC approaches the aforementioned issues, whether the migrants subjected to pullbacks will have their rights vindicated and what effect this would have on Libya's willingness to cooperate with Italy.

³²⁸ 'Complaint to the UN Human Rights Committee over the Role of Italy, Malta, and Libya in Violating the Right to Leave Libya, Resulting in Denial of the Rights of Asylum Seekers' (*Sciabaca&Oruka*, 24 July 2020) <<https://sciabacaoruka.asgi.it/en/complaint-to-the-un-human-rights-committee-over-the-role-of-italy-malta-and-libya-in-violating-the-right-to-leave-libya-resulting-in-denial-of-the-rights-of-asylum-seekers/>> accessed 13 May 2022.

³²⁹ 'NGO Coalition Requests African Commission on Human Rights to Probe Atrocities against Migrants in Libya' (*Sciabaca&Oruka*, 11 October 2019) <<https://sciabacaoruka.asgi.it/en/ngo-coalition-requests-african-commission-on-human-rights-to-probe-atrocities-against-migrants-in-libya/>> accessed 14 July 2022.

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