



VU Migration Law Series No 19

**Italy's Responsibility Under International Law
for Human Rights Violations of Migrants
Intercepted at Sea and Returned to Libya by the
Libyan Coast Guard with the Support of Italy**

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Working Paper Series

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‘Taking them back to Libya, at this moment, means taking them back to hell’

- Mario Giro, Deputy Minister of Foreign Affairs of Italy (August 2017)

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List of abbreviations

ACHPR	African Charter on Human and Peoples' Rights
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
DCIM	Directorate for Combatting Irregular Migration
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
EUBAM	European Union Border Assistance Mission
EUNAVFOR MED	European Union Naval Force Mediterranean
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
IMO	International Maritime Organization
IOM	International Organization for Migration
LNCC	Liaison Navy and Communication Centre
MRCC	Maritime Rescue Coordination Centre
MSF	Médecins Sans Frontières / Doctors Without Borders
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
OHCHR	Office of the High Commissioner for Human Rights
RHIB	rigid-hulled inflatable boat
SAR	search and rescue
SMART	Service-oriented infrastructure for MARitime Traffic
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNSMIL	United Nations Support Mission in Libya

Introduction

As a Mediterranean coastal state, Italy has been greatly affected by migrants crossing the Mediterranean in search of safety in Europe. In order to stem this influx of migrants, Italy has been cooperating with Libya, a main point of departure, since the early 2000s. As part of this policy of cooperation, Italy has successfully intercepted migrants at sea and returned them to Libya, resulting in decreasing numbers of migrants arriving in Italy. However, in 2012, the European Court of Human Rights (ECtHR) forced Italy to end this practice through its *Hirsi Jamaa* judgment,¹ in which it held that Italy was responsible for exposing migrants to the risk of human rights violations in Libya by intercepting and returning them to this unsafe country, thereby violating the prohibition of refoulement. In order to avoid such responsibility in the future, while still preventing migrants from reaching its shores, Italy decided to take a different approach, as expressed in the Italy-Libya Memorandum of Understanding of 2 February 2017.

This new policy of cooperation with Libya entailed the provision of support by Italy to Libya's coast guard,² which is part of the Libyan navy and responsible for surveillance and rescue operations at sea.³ As a result of Italy's support, the Libyan coast guard has been able to intercept and return to Libya increasing numbers of migrants, thereby preventing them from reaching Italian shores and subjecting them to human rights violations instead. Thus, this new approach basically enables Italy to achieve the same results as before the *Hirsi Jamaa* judgment, i.e. stemming the flow of migrants to Italy by intercepting and returning migrants to Libya, deemed an unsafe country. In ethical terms, it thus does not seem any different than Italy's old approach, condemned by the ECtHR, since migrants are still being returned to Libya and subjected to human rights violations as a result of Italy's efforts. Therefore, in ethical terms, it seems difficult to justify how Italy could be held responsible for its former conduct while remaining free from responsibility with regard to its recent practice. In legal terms, however, such reasoning appears to be less evident, since, contrary to its conduct condemned by the ECtHR, Italy itself, now, is not (directly) carrying out the interception and return of migrants to Libya, which could be problematic in terms of attribution or jurisdiction. The aim of this thesis is to provide more clarity on this issue and to find out whether Italy's new practice, which seems morally reprehensible, could also entail its legal responsibility. In line with this aim, which is based on my personal curiosity, the research question of this thesis is: *'To what extent can Italy be held responsible under international law for the human rights violations of migrants intercepted at sea and returned to Libya by the Libyan coast guard through its support of the Libyan coast guard in doing so?'*

¹ European Court of Human Rights (ECtHR), *Hirsi Jamaa and Others v. Italy* ('*Hirsi Jamaa*'), 23 February 2012, appl. no. 27765/09.

² Formally termed the Libyan Coast Guard and Port Security (LCGPS), referred to in this thesis as Libyan coast guard.

³ European External Action Service, *Strategic Review on EUBAM Libya, EUNAVFOR MED Op Sophia & EU Liaison and Planning Cell*, 15 May 2017, p. 16, available at: <http://www.statewatch.org/news/2017/jun/eu-eeas-strategic-review-libya-9202-17.pdf>.

In order to answer this question, both doctrinal legal research and qualitative empirical research are conducted. The doctrinal legal research mainly includes the analysis of human rights law and the law of state responsibility, in order to determine their content and validity in the context of human rights violations of migrants and Italy's responsibility under international law respectively. In doing so, primary sources like human rights treaties, case law and the ILC Articles⁴ are examined, as well as secondary sources like commentaries, books and academic articles. The objective of the qualitative empirical research is primarily to determine the exact content of Italy's support of the Libyan coast guard and Libya's conduct towards migrants, which is necessary for an accurate legal assessment. The research technique employed to get a clear picture of this content is the analysis of documents, in particular secondary sources like (field) reports from organizations and news articles.

The structure of this thesis, set out in accordance with the different elements of the research question, is as follows. Chapter 1 examines the content of Italy's support of the Libyan coast guard in intercepting migrants at sea and returning them to Libya. After providing the necessary context by tracing Italy's track record of cooperation with Libya to stem migrant crossings, the chapter discusses Italy's current policy of cooperation in support of the Libyan coast guard, as well as supportive EU cooperation initiatives. Based on Italy's current policy of cooperation and the EU cooperation initiatives, the concrete support provided by Italy to the Libyan coast guard is set out. The chapter concludes with a discussion of the results of Italy's support in the context of the Libyan coast guard's capacity to intercept and return migrants to Libya.

Chapter 2 analyzes the human rights violations faced by migrants who are intercepted at sea and returned to Libya by the Libyan coast guard, with the support of Italy. First, the content of Libya's conduct towards these migrants is examined, which includes the behavior of the Libyan coast guard towards migrants and their treatment in Libya's detention centers, to which they are usually transferred upon arrival in Libya. Having established Libya's conduct, the content of Libya's human rights obligations under international law is determined and subsequently applied to this conduct, thereby indicating to what extent migrants are subjected to human rights violations.

Chapter 3 provides an answer to the research question by analyzing to what extent Italy can be held responsible under international law for the human rights violations of migrants intercepted at sea and returned to Libya by the Libyan coast guard through its support of the Libyan coast guard in doing so, thereby drawing on the findings of the previous chapters. After identifying the ILC Articles as a source for determining state responsibility under international law, the relevant rules of these Articles are set out and subsequently applied to Italy's conduct in order to determine its responsibility under these Articles, as well as the consequences of such responsibility. Having considered the practical significance of these consequences for migrants (which seems little), the possibility of invoking Italy's responsibility under human rights treaties is explored.

⁴ The Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001, referred to in this thesis as ILC Articles.

The thesis concludes with a summary of the findings obtained and articulates the answer to the research question, thereby revealing to what extent Italy's ethically reprehensible conduct of supporting the Libyan coast guard in intercepting and returning migrants to Libya could also entail its legal responsibility. Furthermore, it reflects on the meaning of this answer in practice and considers whether it provides hope to those halted in their attempt to cross the Mediterranean in search of safety and forced to suffer human rights violations instead, the victims of Italy's support to the Libyan coast guard.

Chapter 1: Italy's support of the Libyan coast guard in intercepting migrants at sea and returning them to Libya

Introduction

This chapter examines the content of Italy's support of the Libyan coast guard in intercepting migrants at sea and returning them to Libya. This support includes the provision of concrete or practical support as well as a policy of cooperation in support of the Libyan coast guard, based on which such concrete support is taken. First, the history of Italy's cooperation with Libya to stem migrant crossings is traced, which is necessary in order to provide a better understanding of Italy's current support of the Libyan coast guard. The second section discusses Italy's current policy of cooperation with Libya in support of the Libyan coast guard. In the third section, EU cooperation initiatives in support of the Libyan coast guard are outlined. The fourth section sets out the concrete support provided by Italy to the Libyan coast guard based on its current policy of cooperation and the EU cooperation initiatives described in the previous sections. Finally, the results of such support with regard to the Libyan coast guard's capacity to intercept and return migrants to Libya are discussed.

1.1 History of Italy's cooperation with Libya to stem migrant crossings

The emergence of Italy's cooperation with Libya to stem migrant crossings

Italy has a long track record of cooperation with Libya to stem migrant crossings from Libya into Italy, which is important to trace in order to understand Italy's current support of the Libyan coast guard. Cooperation first emerged in response to an increase in migrant crossings from North and sub-Saharan Africa via the central Mediterranean from the early 2000s onwards, when Libya became a transit country for sub-Saharan migrants.⁵ Until 2000, Libya's Gaddafi regime encouraged sub-Saharan Africans to work in Libya (as part of its foreign policy and for economic reasons), making the country a major destination for African migrants (eventually hosting between 1 and 2 million African migrant workers⁶). However, this position changed in 2000 after strong popular resentment against African workers in Libya, leading to riots which killed dozens of sub-Saharan Africans, to which the Libyan authorities responded by introducing more restrictive immigration regulations and expelling thousands of migrants. As a result, migrants in

⁵ G. Tsourapas, 'Migration Diplomacy in the Global South: Cooperation, Coercion and Issue Linkage in Gaddafi's Libya', *Third World Quarterly* 2017, vol. 38, no. 10, p. 2376.

⁶ P. Fargues, International Organization for Migration (IOM), *Four Decades of Cross-Mediterranean Undocumented Migration to Europe: A Review of the Evidence*, 24 November 2017, pp. 10-11, available at: https://publications.iom.int/system/files/pdf/four_decades_of_cross_mediterranean.pdf.

Libya have increasingly tried to cross the Mediterranean to Europe.⁷ Moreover, following this shift, the Gaddafi regime began to use migration control as a bargaining chip at the negotiating table with Italy and the EU (initially for the lifting of economic sanctions imposed upon Libya since the Lockerbie events of 1986), which entailed the gradual release of irregular migrants into Italy.⁸

Indeed, in the early 2000s, the Italian authorities recorded a significant rise in migrants (primarily of sub-Saharan origin) apprehended in Sicily and its dependent islands (mainly Lampedusa), indicating an increase in migration from nearby Libya and Tunisia. While in 2000 Italian authorities intercepted 1.724 migrants in Sicily and belonging islands, this number rose to 18.225 in 2002, followed by 14.017 migrants in 2003 and 12.737 in 2004,⁹ after which numbers increased again.¹⁰ Thus, the Sicily Channel became the most travelled sea route for migrants towards Italy in the 2000s, with Libya and Tunisia as main points of departure.¹¹ This increase in migrant crossings occurred in the context of the progressive implementation of the EU Dublin Convention of 1990, coming into force in 1997, according to which asylum seekers' first country of entry into the EU would be responsible for examining their asylum claims.¹² This made Italy, as a Mediterranean coastal state, reluctant to see migrants arriving on its shores and strengthened its resolve to stem migrant crossings.¹³

Thus, since the early 2000s, Italy has signed various cooperation agreements with Libya aimed at curbing the flow of migrants crossing the Mediterranean Sea. In December 2000, the two countries signed the so-called Memorandum of Intent to strengthen their cooperation, inter alia, in the fight against irregular immigration (which became effective on 22 December 2002 after ratification by the Italian Parliament). A separate paragraph dedicated to migration called for three measures: the exchange of information on the modus operandi and the itineraries of illegal migrant flows, as well as on organizations specialized in the falsification of documents and passports, and reciprocal assistance and cooperation in the fight against illegal immigration

⁷ H. de Haas, 'The Myth of Invasion: The Inconvenient Realities of African Migration to Europe', *Third World Quarterly* 2008, vol. 29, no. 7, pp. 1307-1308.

⁸ Tsourapas 2017, above n 5, pp. 2376-2377.

⁹ J. Simon, 'Irregular Transit Migration in the Mediterranean: Facts, Figures and Insights', in N.N. Sørensen (ed.), *Mediterranean Transit Migration*, Copenhagen: Danish Institute for International Studies 2006, pp. 37-38. Original source referenced: Italian Ministry of Interior, Department of Public Security, Immigration and Border Control Services.

¹⁰ P. Cuttitta, 'Readmission in the Relations Between Italy and North African Mediterranean Countries', in J.-P. Cassarino (ed.), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area*, Washington: Middle East Institute 2010, p. 49, table 1. Original source referenced: Italian Ministry of Interior.

¹¹ P. Fargues and S. Bonfanti, Migration Policy Centre, EUI, *When the Best Option Is a Leaky Boat: Why Migrants Risk Their Lives Crossing the Mediterranean and What Europe is Doing About It*, October 2014, pp. 4-5, available at: http://cadmus.eui.eu/bitstream/handle/1814/33271/MPC_PB_2014-05.pdf?sequence=1&isAllowed=y.

¹² E. Guild, 'The Europeanisation of Europe's Asylum Policy', *International Journal of Refugee Law* 2006, vol. 18, no. 3-4, pp. 636-638.

¹³ C. Heller and L. Pezzani, Forensic Oceanography, *Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration Across the Mediterranean*, May 2018, p. 22, available at: <http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>.

(including cooperation between police forces on specialized training).¹⁴ In February 2003, Italy established a permanent liaison with Libya on organized crime and migration, consisting of Italian police officers collaborating with their Libyan colleagues in Tripoli. Its main goals included designing and testing joint projects for border control, sharing intelligence on criminal organizations, and halting boats of irregular migrants at sea.¹⁵ In July, Italy reached an agreement with Libya on further joint measures to control irregular migration, which included the exchange of information on migrant flows and the provision to Libya of equipment to control its sea and land borders (although the text of the agreement has never been made public).¹⁶ In August 2004, Italy agreed to provide Libya with training, technology and equipment to help it curb irregular immigration (further details remain unknown as Italy refused again to make the agreement public).¹⁷

Following these agreements, Italy has provided training and equipment (including technological means for sea rescue) to Libya to stem illegal immigration.¹⁸ Furthermore, since 2003, Italy has financed a program of charter flights for the repatriation of illegal immigrants from Libya to their countries of origin, resulting in the return of at least 5.688 migrants to various countries at the end of 2004.¹⁹ In total (including outside the flight program), Libyan authorities repatriated about 43.000 illegal immigrants in 2003 and 54.000 in 2004.²⁰ In October 2004, after Italy and Libya agreed upon the readmission to Libya of migrants who had reached Italy by boat,²¹ return flights from Italy to Libya commenced as well, resulting in the removal of an estimated 3.034 migrants from Italy to Libya (from which they were sent right back to their countries of origin) until March 2006 (after which no further repatriations to Libya have been reported).²²

Cooperation through joint patrolling

The next sequence of cooperation between Italy and Libya focused on the joint patrolling of the seas to stem migrant crossings. On 29 December 2007, the two countries signed an Agreement to regulate the joint patrolling of the seas and the delivery of ships to Libya to prevent irregular

¹⁴ E. Paoletti, *The Migration of Power and North-South Inequalities: The Case of Italy and Libya*, Basingstoke: Palgrave Macmillan 2011, pp. 120-121. Original source referenced: Memorandum of Intent, December 2000.

¹⁵ Ibid., p. 125.

¹⁶ Ibid., p. 125. Original source referenced: Ministero dell'Interno, *Comunicato Stampa del 3.07. 2003, Firmata dal Ministro dell'Interno Pisanu un'intesa operativa con la Libia sulle modalità pratiche della collaborazione per la lotta all'immigrazione clandestina*, 2003; Parlamento Italiano, *Seduta n. 329 del 25 giugno 2003, Informativa urgente del Governo sulla politica in materia di immigrazione*, 2003.

¹⁷ Human Rights Watch, *Stemming the Flow: Abuses Against Migrants, Asylum Seekers and Refugees*, September 2006, p. 101, available at: <https://www.hrw.org/sites/default/files/reports/libya0906webwcover.pdf>.

¹⁸ European Commission, *Technical Mission to Libya on Illegal Immigration, 27 Nov – 6 Dec 2004, Report*, 4 April 2005, pp. 15, 59-60 and 63, available at: <http://www.statewatch.org/news/2005/may/eu-report-libya-ill-imm.pdf>.

¹⁹ Ibid., pp. 59 and 61-62.

²⁰ Ibid., p. 14.

²¹ Paoletti 2011, above n 14, p. 126.

²² E. Paoletti, 'Relations Among Unequals? Readmission Between Italy and Libya', in J.-P. Cassarino (ed.), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area*, Washington: Middle East Institute 2010, pp. 61-65, table 1.

migration.²³ According to Article 2 of the Agreement, both countries ‘undertake to organize maritime patrols using six ships made available on a temporary basis by Italy. Mixed crews shall be present on ships, made up of Libyan personnel and Italian police officers, who shall provide training, guidance and technical assistance on the use and handling of the ships. Surveillance, search and rescue operations shall be conducted in the departure and transit areas of vessels used to transport clandestine immigrants, both in Libyan territorial waters and in international waters.’²⁴ Article 3 committed Italy to cede three ships to Libya for a period of three years.²⁵ In January 2008, the Italian Parliament approved the allocation of over €6 million for the Guardia di Finanza (an Italian militarized police force) to execute the agreement.²⁶

On 31 August 2008, the two countries signed the Treaty of Friendship, Partnership and Cooperation.²⁷ Article 19 of this Treaty has been devoted to improving cooperation in the fight against illegal immigration and contains the commitment to develop a system to control Libya’s borders, to be implemented by Italian companies. According to the Article, the costs of this initiative were supposed to be covered half by the Italian government and half by the EU.²⁸

On 4 February 2009, Italy and Libya signed an Additional Protocol to further strengthen cooperation in the fight against illegal immigration. The Protocol amended the Agreement of 2007, in particular through the inclusion of a new Article stating that: ‘The two countries undertake to organize maritime patrols with joint crews, made up of equal numbers of Italian and Libyan personnel having equivalent experience and skills. The patrols shall be conducted in Libyan and international waters under the supervision of Libyan personnel and with participation by Italian crew members, and in Italian and international waters under the supervision of Italian personnel and with participation by the Libyan crew members.’²⁹ Furthermore, the Article provided for Libya’s definitive ownership of the ships offered by Italy under Article 3 of the 2007 Agreement.³⁰

On 14 May 2009, in accordance with the agreements, the three promised patrol boats were handed over to the Libyan authorities and another three in the following weeks. The vessels were to be jointly operated by Italian and Libyan authorities to monitor Libya’s coastline.³¹ According

²³ E. Paoletti, *A Critical Analysis of Migration Policies in the Mediterranean: The Case of Italy, Libya and the EU*, RAMSES Working Paper 12/09, April 2009, p. 15. Original source referenced: Ministero dell’Interno, *Amato: via libera dell’Europa per la fornitura alla Libia di un sistema di sorveglianza elettronica delle frontiere*, 18 September 2007.

²⁴ Cited in: ECtHR, *Hirsi Jamaa*, 23 February 2012, appl. no. 27765/09, para. 19.

²⁵ *Ibid.*, para. 19.

²⁶ Paoletti 2009, above n 23, p. 15. Original source referenced: Senato della Repubblica, *281a Seduta pubblica resoconto sommario e stenografico*, 26 February 2008, available at: <http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=Resaula&leg=15&id=298782>.

²⁷ Available at: <https://www.perfar.eu/policies/treaty-friendship-partnership-and-cooperation-between-italian-republic-and-great-0>.

²⁸ A. de Guttry, F. Capone and E. Sommario, ‘Dealing with Migrants in the Central Mediterranean Route: A Legal Analysis of Recent Bilateral Agreements Between Italy and Libya’, *International Migration* 2018, vol. 56, no. 3, p. 51.

²⁹ Cited in: ECtHR, *Hirsi Jamaa*, 23 February 2012, appl. no. 27765/09, para. 19.

³⁰ *Ibid.*, para. 19.

³¹ ‘Libya Given Migrant Patrol Boats’, *BBC*, 15 May 2009, available at: <http://news.bbc.co.uk/2/hi/europe/8051557.stm#blq-nav>.

to the then commander of the Guardia di Finanza, the boats were to be used ‘*in joint patrols in Libyan territorial waters and international waters in conjunction with Italian naval operations*’.³² The Libyan crew operating the donated patrol vessels was trained by the Guardia di Finanza.³³ Just after the delivery of the boats, in the same month, the joint patrols began, during which Italy, with Libya, directly took part in intercepting migrants at sea and returning them to Libya.³⁴ During this practice, migrant crossings from Libya dropped considerably. While in 2008 Italian authorities reported 34.540 migrants landing on the Sicilian islands, this number decreased to 8.282 in 2009 and 1.264 in 2010 (after which numbers rose again).³⁵

The undermining effects of the Libyan civil wars and the Hirsi Jamaa judgment on cooperation

However, just as it seemed to have succeeded, this cooperation between Italy and Libya to stem migrant crossings, in particular through the joint patrolling of the seas, was undermined by some major events: the Libyan civil war of 2011, the judgment of the European Court of Human Rights (ECtHR) of 2012 in the *Hirsi Jamaa* case, and the outbreak of a second civil war in 2014.³⁶

The first Libyan civil war, which broke out in early 2011, caused chaos in Libya and led to the fall of the Gaddafi regime, with which the Italian government had signed the cooperation agreements. As a result, the agreements between Italy and Libya were suspended.³⁷ However, already on 17 June 2011, Italy signed a Memorandum of Understanding with the new de facto government of Libya, the National Transitional Council, which made reference to previous agreements signed between Italy and Libya and focused on mutual assistance and cooperation in the fight against irregular immigration (including through the exchange of information).³⁸ With the gradual normalization of the situation in Libya and in order to further restore bilateral cooperation, on 21 January 2012, the Italian and Libyan governments signed the Declaration of Tripoli, which encompasses the main provisions of the 2008 Treaty of Friendship, Partnership and Cooperation.³⁹ On 3 April 2012, a more detailed agreement on migration control between the

³² Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, 21 September 2009, p. 23, available at: https://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf. Original source referenced: Ministero dell'Interno, *Consegnate alla Libia tre motovedette della Guardia di finanza per il pattugliamento nel mar Mediterraneo*, 14 May 2009.

³³ European External Action Service, *EUBAM Libya Initial Mapping Report Executive Summary*, 18 January 2017, p. 42, available at: <http://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf>.

³⁴ Heller and Pezzani 2018, above n 13, p. 28.

³⁵ G. Campesi, 'Italy and the Militarization of Euro-Mediterranean Border Control Policies', in B. Elaine and W. Kira (eds.), *Contemporary Boat Migration: Data, Geopolitics and Discourses*, London: Rowman & Littlefield 2018, table 2. Original source referenced: Ministero dell'Interno (1998; 2000; 2008; 2011; 2013; 2014; 2015).

³⁶ De Guttry, Capone and Sommaro 2018, above n 28, p. 51.

³⁷ ECtHR, *Hirsi Jamaa*, 23 February 2012, appl. no. 27765/09, para. 21.

³⁸ N. Frenzen, *Memorandum of Understanding Between Italy and Libyan NTC* (blog), Migrants At Sea, 20 June 2011, available at: <https://migrantsatsea.org/2011/06/20/memorandum-of-understanding-between-italy-and-libyan-ntc/>.

³⁹ International Federation for Human Rights (FIDH), Migreurop and Justice Without Borders for Migrants (JWBM), *Libya: The Hounding of Migrants Must Stop*, 2012, pp. 35-36, available at: <https://www.fidh.org/IMG/pdf/libyemignantsuk-ld.pdf>. Original source referenced: 'Libia, Monti firma la 'Tripoli

two countries was reached, which, inter alia, committed Italy to provide technical assistance for the control of Libya's maritime borders in order to combat irregular immigration.⁴⁰

While these new cooperation agreements (partly) revived previous agreements signed with the fallen Gaddafi government, another more irretrievable consequence of the war was the destruction of much of Libya's naval fleet (in particular by NATO airstrikes), which greatly reduced Libya's capacity to control the seas and thus to implement the agreements. According to a spokesman for Libya's coast guard, about 30 boats or 70% of Libya's sea forces, including coast guard boats, were destroyed during the war.⁴¹ Among the destroyed coast guard boats were two of the six patrol boats donated by Italy.⁴² The four patrol boats that survived the war were brought to Italy for maintenance.⁴³ Besides the loss of its vessels, the communication and radar equipment of the Libyan coast guard's operations room in Tripoli were destroyed as well during the civil war. As a result, the post-Gaddafi Libyan coast guard no longer possessed the operational means to implement the cooperation agreements (until 2016).⁴⁴

As mentioned in the introduction, in the *Hirsi Jamaa* judgment of 23 February 2012, the ECtHR ruled on the Italian practice of intercepting migrants at sea and returning them to Libya. The specific case concerned the interception by Italian ships of three migrant vessels carrying about 200 migrants heading towards Italy and their subsequent return to Tripoli, where they were handed over to the Libyan authorities. According to Italy, the operation, which took place on 6 May 2009, was the consequence of the joint patrolling agreements concluded with Libya (which entered into force on 4 February 2009).⁴⁵ The Court reached the conclusion that in returning migrants intercepted at sea to Libya, Italian authorities, with full knowledge of the facts, had violated the prohibition of refoulement under Article 3 of the European Convention on Human Rights (ECHR) since the applicants had been exposed to the risk of ill-treatment in Libya and to the risk of arbitrary repatriation to their (insecure) countries of origin.⁴⁶ The Court based its conclusion on various reports from international organizations,⁴⁷ which all clearly showed that irregular migrants intercepted at sea and returned to Libya were exposed to risks of torture and other ill-treatment (including detention in inhuman conditions) and to the risk of being returned to their countries of origin.⁴⁸ Notably, the Court reasoned that the violations fell within Italy's

Declaration", *Quotidiano*, 21 January 2012, available at: https://www.quotidiano.net/esteri/2012/01/21/656741-libia_monti_firma_tripoli_declaration.shtml.

⁴⁰ Ibid., p. 36.

⁴¹ B. Daragahi, 'Embattled Libyan Coastguard Struggles to Stop Migrants', *Financial Times*, 15 May 2015, available at: <https://www.ft.com/content/2c9f22c0-f949-11e4-be7b-00144feab7de>; K. Sieff, 'Meet the Libyan Coast Guard: Few Ships, No Lights, Little Hope of Stopping Migrants', *The Washington Post*, 17 October 2015, available at: https://www.washingtonpost.com/news/worldviews/wp/2015/10/17/meet-the-libyan-coast-guard-few-ships-no-lights-little-hope-of-stopping-migrants/?utm_term=.456cd64a5225.

⁴² FIDH, Migreurop and JWBM 2012, above n 39, p. 39.

⁴³ Daragahi 2015, above n 41.

⁴⁴ Heller and Pezzani 2018, above n 13, pp. 32-33.

⁴⁵ ECtHR, *Hirsi Jamaa*, 23 February 2012, appl. no. 27765/09, paras. 9-14.

⁴⁶ Ibid., paras. 137 and 158.

⁴⁷ Including reports from Amnesty International, Human Rights Watch and the UNHCR.

⁴⁸ ECtHR, *Hirsi Jamaa*, 23 February 2012, appl. no. 27765/09, paras. 125-126.

jurisdiction because the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities.⁴⁹ As a result of this judgment, Italy changed its policy and decided that it would no longer return persons intercepted at sea to Libya as long as the situation in the country did not change.⁵⁰ This altered position has affected the implementation of the cooperation agreements between Italy and Libya as it forced Italy to refrain from directly taking part (through its control) in the interception of migrants at sea followed by their return to Libya.

In 2014, the situation in Libya deteriorated again. While in July 2012 elections were held to form a General National Congress, Libya remained highly divided between factions vying for power, and following increasing violence spreading across the country, Libya descended into a second civil war in May 2014.⁵¹ As a result, since mid-2014, political power in Libya has been mainly split between two rival governments: the Government of National Accord (GNA) in Tripoli led by Prime Minister Al-Sarraj, and the House of Representatives in Tobruk controlled by general Haftar. On the ground, armed militias, ‘city-states’ and tribes vie for power.⁵² This fragmented political landscape has also affected the Libyan coast guard. Since 2011, its national command in Tripoli has little control over its six different sectors, which all have progressively been infiltrated to different degrees by militias. Furthermore, since the division of the country in two competing governments in 2014, the coast guard units in eastern Libya report to the government in Tobruk and thus do not fall under the national command in Tripoli.⁵³ This fragmentation and lack of control has made the Libyan coast guard institutionally weak and difficult to cooperate with. In addition, the Libyan coast guard became involved in criminal activity (within the smuggling business) and violent behavior.⁵⁴

1.2 Italy’s current policy of cooperation with Libya in support of the Libyan coast guard

As a result of the events mentioned above (the Libyan civil war in 2011, the *Hirsi Jamaa* judgment of 2012 and the outbreak of a second civil war in 2014), the implementation of the cooperation agreements between Italy and Libya to curb migrant flows was undermined, allowing migrants to cross the Mediterranean in greater numbers again (due to a lack of interceptions). Moreover (and perhaps more importantly), the Libyan civil wars seem to have provided an incentive or opportunity for more migrants to attempt to make the crossing to Italy.⁵⁵ Although a causal relationship seems difficult to establish, the fact is that during the period in which these

⁴⁹ Ibid., paras. 81-82.

⁵⁰ De Guttry, Capone and Sommaro 2018, above n 28, p. 52.

⁵¹ Heller and Pezzani 2018, above n 13, p. 30.

⁵² M. Toaldo and M. Fitzgerald, European Council on Foreign Relations, *A Quick Guide to Libya’s Main Players*, December 2016, available at: https://www.ecfr.eu/page/-/Lybias_Main_Players_Dec2016_v2.pdf.

⁵³ Heller and Pezzani 2018, above n 13, p. 31.

⁵⁴ Ibid., pp. 39-40.

⁵⁵ Fargues 2017, above n 6, p. 11.

events occurred the flow of migrants towards Italy indeed increased significantly. While in 2010 Italy reported only 1.264 migrants to have arrived on the Sicilian islands, this number rose to 57.181 in 2011 (during the first Libyan civil war), followed by 8.488 migrants in 2012 and 37.886 in 2013, after which numbers greatly increased again to 120.239 in 2014 (when the second civil war started) and 104.709 in 2015.⁵⁶ Unsurprisingly, the Italian government was pressured to stem this influx.⁵⁷ Despite the fact that Libya was still a fragmented country affected by war and with a barely functioning coast guard, Italy chose to re-engage in bilateral cooperation. As a result of the *Hirsi Jamaa* judgment, however, it made sure that this new cooperation would not involve any physical contact between the migrants and the Italian authorities as to exclude Italy's control over them.⁵⁸ Furthermore, Italy aimed to re-establish the Libyan coast guard as a functioning institution that could carry out interceptions again (while ending their criminal activities and violent behavior towards migrants seemed no priority).⁵⁹

Thus, following a series of political and technical meetings,⁶⁰ on 2 February 2017, a new Memorandum of Understanding (MoU) on cooperation in the fight against illegal immigration was signed between the Italian government and the (UN-backed) Libyan Government of National Accord.⁶¹ While the implementation of the MoU was shortly suspended by a Libyan court on formal grounds, the Libyan Supreme Court annulled the verdict on 26 August 2017, making the Memorandum legal and active on the ground.⁶²

In the Preamble of the MoU,⁶³ reference is made to the need to implement the previous agreements between Italy and Libya, including the 2008 Treaty of Friendship, Partnership and Cooperation and the 2012 Tripoli Declaration. Furthermore, the parties reaffirm their determination to cooperate to address the issue of irregular migrants crossing Libya to reach Europe by sea, while recognizing the sensitive situation of Libya as a country in transition affected by a complex war. In order to ensure the reduction of illegal migratory flows towards Europe, the importance of improving the control and security of Libya's sea borders is underlined. Finally, the Preamble considers the obligations of both parties under international law (including treaties and customary international law).

⁵⁶ Campesi 2018, above n 35, table 2.

⁵⁷ De Guttry, Capone and Sommaro 2018, above n 28, p. 52.

⁵⁸ Heller and Pezzani 2018, above n 13, pp. 36-37; V. Moreno-Lax and M. Giuffr , 'The Raise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows', 31 March 2017, to appear in S. Juss (ed.), *Research Handbook on International Refugee Law* (Edward Elgar, forthcoming).

⁵⁹ Heller and Pezzani 2018, above n 13, p. 40.

⁶⁰ European Commission, *Action Fiche of the EU Trust Fund to Be Used for the Decisions of the Operational Committee*, 27 July 2017, p. 5, available at: https://ec.europa.eu/europeaid/sites/devco/files/action-document-libya-action-fiche-20170727_en.pdf.

⁶¹ Statewatch, *Italy-Libya: New Memorandum of Understanding on 'Illegal Immigration' and Border Security Signed*, 2 February 2017, available at: <http://www.statewatch.org/news/2017/feb/italy-libya-mou.htm>.

⁶² A. Assad, 'Supreme Court Annuls Verdict that Suspended Implementation of Italy-Libya MoU', *The Libya Observer*, 26 August 2017, available at: <https://www.libyaobserver.ly/news/supreme-court-annuls-verdict-suspended-implementation-italy-libya-mou>.

⁶³ Available in Italian at: Statewatch, <http://www.statewatch.org/news/2017/feb/it-libya-memo-immigration-border-security-2-2-17.pdf>. Available in English at: Odysseus Network, https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

Article 1 of the MoU commits Italy and Libya to cooperate in the support of Libya's security and military institutions in order to stem the illegal migrants' fluxes. In this regard, Italy is bound to provide '*technical and technologic support to the Libyan institutions in charge of the fight against illegal immigration*', including the Libyan coast guard. Article 4 requires Italy to provide for the financing of these cooperation initiatives, making use of available EU funds. Under Article 5, both parties commit to implement the MoU in accordance with their international obligations and human rights agreements. This new cooperation agreement between Italy and Libya thus stresses the need to support and strengthen the capacity of Libya's institutions, including its coast guard, in order to prevent irregular migration, thereby ensuring that Italy does not directly take part in the interception of migrants at sea followed by their return to Libya (which it is explicitly prohibited from doing following the *Hirsi Jamaa* judgment).

In order to implement the MoU and other agreements, Italy has set up funds. On 1 February 2017, it set up a €200 million fund to help Libya and other African countries control their borders and stop migrants from leaving towards Europe.⁶⁴ The fund is intended to provide training and equipment to the nations' security forces to control their borders. With regard to the fund, Italy's Foreign Minister has stated that '*we give money to these countries, and in return they must use it to reduce the number of illegal migrants arriving here*'.⁶⁵ The fund is also being used to directly support the Libyan coast guard, according to so-called Africa Fund agreements obtained by an Italian human rights lawyer. These documents show various projects, including \$3 million to support the Libyan coast guard with equipment and training and \$12 million for other border control projects in Libya.⁶⁶ It has also been reported that Italy signed a €220 million agreement with the Libyan government on 3 February 2017 to directly fund the Libyan coast guard and provide it with equipment and training. In exchange, the Libyan coast guard is expected to intercept migrants at sea and return them to Libya.⁶⁷

⁶⁴ S. Scherer and G. Baczyńska, 'Italy Sets Up Fund to Help African Countries Stop Migrants', *Reuters*, 1 February 2017, available at: <https://www.reuters.com/article/us-europe-migrants-italy/italy-sets-up-fund-to-help-african-countries-stop-migrants-idUSKBN15G4GR>.

⁶⁵ 'Italy Sets Up €200 Million Fund to Help African Countries Stop Migrants Leaving', *The Local (AFP)*, 1 February 2017, available at: <https://www.thelocal.it/20170201/italy-will-give-200-million-to-african-states-to-stop-migrant-flow>.

⁶⁶ Z. Campbell, 'Europe's Plan to Close Its Sea Borders Relies on Libya's Coast Guard Doing Its Dirty Work, Abusing Migrants', *The Intercept*, 25 November 2017, available at: <https://theintercept.com/2017/11/25/libya-coast-guard-europe-refugees/>. The Africa Fund agreements are available in Italian at: <https://www.documentcloud.org/documents/4262423-Allegato-2.html>.

⁶⁷ A. Merelli, 'Like Trump in the US, Europe Is Finding New Ways to Keep Refugees Out', *Quartz*, 8 February 2017, available at: <https://qz.com/904026/europe-has-a-genius-new-strategy-to-deal-with-migrants-pay-war-torn-libya-to-detain-them/>; 'Italy Is Paying Libya to Intercept Migrants on the Mediterranean', *VICE News*, 25 October 2017, available at: https://news.vice.com/en_us/article/ned4dg/italy-is-paying-libya-to-intercept-migrants-on-the-mediterranean; D. Jandová, 'Italy's Response to Migration in Libya Full of Problems', *European Security Journal*, 5 February 2018, available at: <https://www.esjnews.com/italy-libya-migration-problems>.

1.3 EU cooperation initiatives in support of the Libyan coast guard

Following the rising numbers of migrant arrivals in Italy and Malta since the early 2000s, the EU (which includes Italy) also started to cooperate with Libya to stem migrant crossings.⁶⁸ On 11 October 2004, the Council of the EU decided to lift the EU arms embargo and economic sanctions on Libya (which followed the Lockerbie events of 1986) and announced a new ‘*policy of engagement*’ with Libya on migration matters.⁶⁹ The decision was taken after considerable pressure from Italy, which wanted to enable Libya to import military equipment to control its borders and limit migration flows.⁷⁰ Following the decision, the Council sent a technical mission to Libya, in particular to examine arrangements with the country for combatting illegal migration.⁷¹ In June 2005, the Council decided to move ahead on a series of ad hoc cooperation measures on migration issues, including ‘*reinforcing systematic operational cooperation between the respective national services responsible for the sea borders*’ and ‘*developing common operations in the Mediterranean sea [...] to which EU Member State vessels and aircrafts could be made available*’.⁷² In the following years, the EU has taken various initiatives in cooperation with Libya to tackle the issue of irregular migration. In May 2013, for example, it launched the EU Integrated Border Assistance Mission in Libya (EUBAM Libya) to achieve this aim by supporting the Libyan authorities to develop capacity to control Libya’s borders,⁷³ including through training activities.⁷⁴ It goes beyond the scope of this thesis, however, to discuss and elaborate on all these initiatives. The aim of this section is to describe EU cooperation initiatives in support of the Libyan coast guard and in particular those on which Italy’s (current) support of the Libyan coast guard is based, like Operation Sophia.

EU Operation Sophia

On 22 June 2015, the Council of the EU launched EUNAVFOR MED Operation Sophia, a military operation addressing the smuggling of migrants in the Mediterranean Sea.⁷⁵ Notably, the

⁶⁸ S. Hamood, ‘EU–Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?’, *Journal of Refugee Studies* 2008, vol. 21, no. 1, p. 20.

⁶⁹ Council of the European Union, *2609th Council Meeting, General Affairs and External Relations, Luxembourg, 11 October 2004*, 11 October 2004, available at: http://europa.eu/rapid/press-release_PRES-04-276_en.htm.

⁷⁰ B. Cataldi, ‘Analysis: Italy Woos Libya’, *BBC*, 8 October 2004, available at: <http://news.bbc.co.uk/2/hi/europe/3727218.stm>.

⁷¹ European Commission 2005, above n 18, p. 5.

⁷² Council of the European Union, *2664th Council Meeting Justice and Home Affairs Luxembourg, 2-3 June 2005*, 3 June 2005, p. 18, available at: <http://register.consilium.europa.eu/doc/srv?!=EN&f=ST%208849%202005%20INIT>.

⁷³ Council of the European Union, *Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya)*, 22 May 2013, Article 2; European External Action Service, *Factsheet on EU Border Assistance Mission (EUBAM) in Libya*, April 2018, available at: https://eeas.europa.eu/headquarters/headquarters-homepage/10979/factsheet-eu-border-assistance-mission-eubam-libya_en.

⁷⁴ European External Action Service 2017, above n 33, pp. 42-43.

⁷⁵ Council of the European Union, *Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED) (‘Council Decision (CFSP) 2015/778’)*, 18 May 2015.

Operation is commanded by Italian Rear Admiral Enrico Credendino and its headquarters are located in Rome, Italy.⁷⁶ Operation Sophia consists of three phases (phase 2 has two parts).⁷⁷ After having completed the first phase of patrolling on the high seas and gathering information on migrant smuggling networks, the Operation moved to phase 2A on 7 October 2015, which includes the boarding, search, seizure and diversion on the high seas of suspected smuggling vessels.⁷⁸ During phase 2B, the mission would move into Libya's territorial waters, and in phase 3, the mission would expand its operations further in Libyan territory (which would require a UN mandate or the consent of Libya).⁷⁹ However, the Operation has not yet moved into either of these last phases, and this is considered unlikely to happen given the current political and security environment in Libya.⁸⁰

According to Operation Sophia, critical to its strategy is the creation of '*a capable and well-resourced Libyan Coastguard who can protect their own borders and therefore prevent irregular migration taking place from their shores*', which requires capacity building of the Libyan coast guard.⁸¹ Thus, on 20 June 2016, the Council of the EU decided to expand the Operation's mandate to include capacity building and training of the Libyan coast guard.⁸² The decision states that: '*As a supporting task, EUNAVFOR MED operation SOPHIA shall assist in the development of the capacities and in the training of the Libyan Coast Guard and Navy in law enforcement tasks at sea, in particular to prevent human smuggling and trafficking.*'⁸³

On 23 August 2016, the commander of Operation Sophia and the commander of the Libyan coast guard signed the Memorandum of Understanding on the training of the Libyan Coast Guard and Navy.⁸⁴ The agreement entails that training of the Libyan coast guard will be conducted under Operation Sophia, including training at sea, ashore (in EU member states or in Libya) and on board Libyan coast guard patrol boats. According to Operation Sophia's commander, the training program '*will improve the security of the Libyan territorial waters, including the capacity of the Libyan Coast Guard and Navy to perform law enforcement actions*'.⁸⁵

⁷⁶ Ibid., Articles 3 and 4.

⁷⁷ Ibid., Article 2.

⁷⁸ European External Action Service, *EUNAVFOR MED - OPERATION SOPHIA Enters Phase 2*, 7 October 2015, available at: <http://briguglio.asgi.it/immigrazione-e-asilo/2015/ottobre/com-eunavfor-med-7-10-2015.pdf>.

⁷⁹ Council of the European Union, *Council Decision (CFSP) 2015/778*, 18 May 2015, Article 2.

⁸⁰ House of Lords, European Union Committee, *Operation Sophia: A Failed Mission*, 2nd Report of Session 2017–19, HL Paper 5, 12 July 2017, para. 65, available at: <https://publications.parliament.uk/pa/ld201719/ldselect/lducom/5/5.pdf>.

⁸¹ European External Action Service, *EUNAVFOR MED Op SOPHIA - Six Monthly Report 22 June - 31 December 2015*, 28 January 2016, p. 3, available at: <https://wikileaks.org/eu-military-refugees/EEAS/EEAS-2016-126.pdf>.

⁸² Council of the European Union, *Council Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA)*, 20 June 2016.

⁸³ Ibid., Article 2a sub 1.

⁸⁴ EUNAVFOR MED Operation Sophia, *Operation SOPHIA: Signed the Agreement on Libyan Coast Guard and Navy Training*, 23 August 2016, available at: <https://www.operationsophia.eu/operation-sophia-signed-the-agreement-on-libyan-coast-guard-and-navy-training/>.

⁸⁵ Ibid.

On 30 January 2017, the commander of Operation Sophia and the commander of the Italian Guardia di Finanza signed a technical agreement on the contribution of the Guardia di Finanza to the EU training of the Libyan coast guard.⁸⁶ The training is meant to enhance the capacity of the Libyan coast guard to perform coast guard functions and search and rescue activities, in order to improve the security of Libya's territorial waters. According to the agreement, the Guardia di Finanza will train the Libyan coast guard, on board Italian patrol boats in international waters, in order for the Libyan coast guard to get to know such patrol boats for a specific coast guard role.⁸⁷

EU cooperation plans and funds in support of the Libyan coast guard

On 3 February 2017, the members of the European Council adopted the Malta Declaration, which aims to reduce the flow of migrants from Libya into the EU.⁸⁸ The Declaration emphasizes the importance of capacity building for the Libyan authorities to control their sea borders.⁸⁹

According to the Declaration, priorities include *'training, equipment and support to the Libyan national coast guard'* and *'continuing support to efforts and initiatives from individual Member States directly engaged with Libya'*.⁹⁰ In this respect, it explicitly states that the EU welcomes and supports Italy in the implementation of the MoU (signed a day before). In order to fund these objectives, the Declaration mentions the initial allocation of €200 million for migration-related projects concerning Libya and further refers to the EU Trust Fund for Africa, which mobilizes €1.8 billion from the EU budget and €152 million from member states.⁹¹

On 4 July 2017, the European Commission released an action plan to support Italy and Libya and reduce the migration flows towards Europe. The proposed set of measures to be taken by the EU and its member states includes: *'further enhance the capacity of the Libyan authorities through a €46 million project prepared jointly with Italy'* and *'support the establishment of a fully operational Maritime Rescue and Coordination Centre in Libya'*.⁹²

On 28 July 2017, following up on the Commission's action plan, the EU Trust Fund for Africa adopted a program worth €46 million to reinforce the border management capacities of the Libyan authorities, including the Libyan coast guard.⁹³ The program is to be implemented by the

⁸⁶ EUNAVFOR MED Operation Sophia, 'EUNAVFOR MED and the Italian 'Guardia di Finanza' Sign a Technical Agreement on the Libyan Training', 31 January 2017, available at: <https://www.operationsophia.eu/eunavfor-med-and-the-italian-guardia-di-finanza-sign-a-technical-agreement-on-the-libyan-training/>.

⁸⁷ Ibid.

⁸⁸ Council of the European Union, *Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route*, 3 February 2017, available at: <http://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>.

⁸⁹ Ibid., para. 5.

⁹⁰ Ibid., para. 6.

⁹¹ Ibid., para. 7.

⁹² European Commission, *Central Mediterranean Route: Commission Proposes Action Plan to Support Italy, Reduce Pressure and Increase Solidarity*, 4 July 2017, available at: http://migration.europa.eu/rapid/press-release_IP-17-1882_en.htm.

⁹³ European Commission, *EU Trust Fund for Africa Adopts €46 Million Programme to Support Integrated Migration and Border Management in Libya*, 28 July 2017, available at: http://europa.eu/rapid/press-release_IP-17-2187_en.htm.

Italian Ministry of Interior and co-financed by Italy and includes the following measures. First, *‘strengthening the operational capacities of the Libyan coast guards’*. This includes providing training, equipment, repair and maintenance of the existing fleet. Second, *‘set up of basic facilities in order to provide the Libyan coast guards with initial capacity to better organize their control operations’*. This entails the provision of equipment necessary to coordinate maritime operations. Third, *‘conduct feasibility studies for two fully-fledged control facilities in Tripoli’*. The two control facilities refer to an Interagency National Coordination Centre under the control of the Ministry of Interior and a Maritime Rescue Coordination Centre under the control of the Ministry of Defense. Furthermore, the measure involves providing assistance to the authorities in defining and declaring a Libyan Search and Rescue Region.⁹⁴

In November 2017, the EU and Italy set aside €285 million for the next few years (up until 2023) to boost up the Libyan coast guard. According to an official from the Italian Ministry of Interior, the plan is to create operational centers in Libya to assist search and rescue operations at sea and to better coordinate fleets between the Italian and Libyan coast guards. A European Commission official said that the creation of a search and rescue operation center was planned for 2018.⁹⁵

Following these plans to create coordination centers in Libya and establish a Libyan search and rescue region, Italy has presented a €44 million plan to equip and enable the Libyan coast guard to realize these objectives by 2020. The proposed search and rescue region for which Italy wants the Libyan coast guard to take responsibility covers about a tenth of the Mediterranean. The project draws on EU and Italian funds and needs EU approval.⁹⁶

1.4 Concrete support provided by Italy to the Libyan coast guard

Based on its current policy of cooperation with Libya (which followed the undermining events of Libya’s civil wars and the *Hirsi Jamaa* judgment) and the EU cooperation initiatives described in the previous sections, Italy has provided concrete or practical support to the Libyan coast guard, making use of the available funds. These concrete measures taken by Italy, set out below, support the Libyan coast guard (in practice) in intercepting migrants at sea and returning them to Libya.

Providing patrol boats

Italy has provided the Libyan coast guard with patrol boats. On 15 May 2017, Italy handed over four repaired patrol boats to the Libyan coast guard to beef up its efforts to stop the smuggling of migrants. These vessels had been donated earlier but were sent to Italy for maintenance in 2012

⁹⁴ Ibid.; European Commission 2017, above n 60, pp. 8-11.

⁹⁵ N. Nielsen, ‘EU and Italy Put Aside €285m to Boost Libyan Coast Guard’, *EUobserver*, 29 November 2017, available at: <https://euobserver.com/migration/140067>.

⁹⁶ S. Scherer and A. Lewis, ‘Exclusive: Italy Plans Big Handover of Sea Rescues to Libya Coastguard’, *Reuters*, 15 December 2017, available at: <https://www.reuters.com/article/us-europe-migrants-libya-exclusive/exclusive-italy-plans-big-handover-of-sea-rescues-to-libya-coastguard-idUSKBN1E91SG>.

(as mentioned above). They had been due for delivery in 2014, but this was postponed because of violence and instability in Libya. According to the Italian Minister of Interior, the boats were to be used by their Italian trained crews to control Libyan waters.⁹⁷ Indeed, over the following months, they were used in most operations of the Libyan coast guard.⁹⁸

On 22 February 2018, another vessel was reportedly delivered to the Libyan coast guard after undergoing a maintenance and repair service in Tunisia, sponsored by Italy.⁹⁹ According to an Italian analyst, three Italian patrol vessels in total were delivered to the Libyan coast guard in February,¹⁰⁰ although this has not been officially confirmed by the Italian government.

On 6 August, the Italian parliament approved the provision of a further 12 patrol boats (including maintenance) to the Libyan coast guard to help it stem the flow of migrants towards Europe.¹⁰¹ So far, however, the boats have not yet been delivered. With such promise, Italy responds to the request of the Libyan coast guard for more boats in order to stop migrants trying to cross the Mediterranean. According to the Libyan coast guard, it currently only has three operational patrol boats out of four boats donated by Italy (one needs to be repaired).¹⁰²

Thus, Italy has at least provided four patrol boats to the Libyan coast guard, possibly more (although this has not been officially confirmed), and has promised to deliver another 12 patrol vessels in the near future.

Maintaining Libyan coast guard assets

Italy maintains and repairs Libyan coast guard assets, including by providing the necessary equipment for such maintenance. Assets of the Libyan coast guard include the patrol boats or Coastal Patrol Vessels (CPV) donated by Italy, which have been used to intercept migrant boats.

⁹⁷ Ibid.; 'Italy Gives Libya Four Patrol Boats to Help Fight Illegal Immigration', *The Local (AFP)*, 16 May 2017, available at: <https://www.thelocal.it/20170516/italy-gives-libya-four-patrol-boats-to-bolster-coastguard>.

⁹⁸ Heller and Pezzani 2018, above n 13, p. 44. Original source referenced: EUNAVFOR MED Operation Sophia, *EUNAVFOR MED Op Sophia - Monitoring of Libyan Coast Guard and Navy Report October 2017 - January 2018*, 9 March 2018, p. 5, available at:

http://www.consilium.europa.eu/register/en/content/out/?&typ=ENTRY&i=ADV&DOC_ID=ST-6961-2018-INIT (not accessible).

⁹⁹ S. Alharathy, 'Libyan Coast Guard Vessel Returns Home After Italy-Sponsored Maintenance in Tunisia', *The Libya Observer*, 25 February 2018, available at: <https://www.libyaobserver.ly/inbrief/libyan-coast-guard-vessel-returns-home-after-italy-sponsored-maintenance-tunisia>.

¹⁰⁰ G. Pelosi, 'Libia e Niger: il bilancio dell'Italia e l'eredità per il prossimo governo', *Il Sole 24 Ore*, 25 February 2018, available at: <http://www.ilsole24ore.com/art/mondo/2018-02-24/libia-e-niger-bilancio-dell-italia-e-l-eredita-il-prossimo-governo--212523.shtml?uuid=AEwxvQ6D>.

¹⁰¹ T. Kington, 'Italy Gifts Migrant Patrol Boats to Libya Coastguard', *The Times*, 7 August 2018, available at: <https://www.thetimes.co.uk/article/italy-gifts-migrant-rescue-boats-to-libya-coastguard-1f2vtqgdd>; D. Ghiglione, 'Italy Donates 12 More Vessels to Libya to Stem Migration', *Financial Times*, 7 August 2018, available at: <https://www.ft.com/content/391ed012-9a28-11e8-9702-5946bae86e6d>; 'Italy Donates 12 Migrant Patrol Boats to Libya', *EUobserver*, 8 August 2018, available at: <https://euobserver.com.vu-nl.idm.oclc.org/tickers/142539>.

¹⁰² B. Trew, 'We Don't Have Lifejackets, Says Libyan Coastguard', *The Times*, 2 July 2018, available at: <https://www.thetimes.co.uk/article/we-dont-have-lifejackets-says-libyan-coastguard-6gvlggb57>; 'Libya Navy Bemoans Lack of EU Support over Migrants', *News24*, 29 June 2018, available at: <https://www.news24.com/Africa/News/libya-navy-bemoans-lack-of-eu-support-over-migrants-20180628>.

In addition, the Libyan coast guard possesses a number of smaller boats, namely four fast boats, three small fiberglass boats and an undefined number of dinghy boats.¹⁰³

On 13 May 2018, the Libyan coast guard received from Italy new equipment and spare parts for the maintenance and repair of its fleet. According to the Italian embassy, *‘the equipment included technical and logistical support provided by the Italian Coast Guard to the Libyan Coast Guard in order to ensure the maintenance of the marine units’*.¹⁰⁴ As will be further discussed below, Italy has also ships docked in Libya with materials, equipment and a technical team on board used for the repair and maintenance of Libyan coast guard assets.¹⁰⁵ Italy’s exact record on maintenance activities, however, seems difficult to trace, making it hard to provide numbers in this regard.

Providing training through Operation Sophia

Through Operation Sophia, Italy has provided training to the Libyan coast guard, which in January 2017 reportedly consisted of 3.369 personnel, who had not received any training since 2011 (outside the EU initiative).¹⁰⁶

On 30 August 2016, based on Operation Sophia’s mandate to train the Libyan coast guard, the start of such training by the EU Operation under the command of Italian Rear Admiral Enrico Credendino was formally authorized.¹⁰⁷ On 26 October 2016, the training of the first 78 Libyan coast guard and navy members under Operation Sophia started on board of two EU training vessels on the high seas. This first package of training activities, which ranges from basic seamanship to more advanced specialist skills, was delivered over the following three months. The objective of the training was *‘to enhance their capability to disrupt smuggling and trafficking in Libya and to perform search and rescue activities’*.¹⁰⁸

On 30 January 2017, the second package of training activities under Operation Sophia started, which is considered the next step from the application of basic seamanship delivered in the first

¹⁰³ European External Action Service 2017, above n 33, p. 43.

¹⁰⁴ S. Alharathy, ‘Italy Provides Marine Equipment to Libya Coast Guard’, *The Libya Observer*, 14 May 2018, available at: <https://www.libyaobserver.ly/inbrief/italy-provides-marine-equipment-libya-coast-guard%C2%A0>.

¹⁰⁵ Heller and Pezzani 2018, above n 13, pp. 48-49. Original source referenced: Senato della Repubblica, *Relazione analitica sulle missioni internazionali in corso e sullo stato degli interventi di cooperazione allo sviluppo a sostegno dei processi di pace e di stabilizzazione, deliberata dal Consiglio dei ministri il 28 dicembre 2017*, 28 December 2017, available at: <http://www.senato.it/service/PDF/PDFServer/BGT/1063681.pdf>.

¹⁰⁶ European External Action Service 2017, above n 33, p. 43; Altai Consulting, *Leaving Libya: A Rapid Assessment of Municipalities of Departure of Migrants in Libya*, June 2017, pp. 42-43, available at: http://www.altaiconsulting.com/wp-content/uploads/2017/08/2017_Altai-Consulting_Leaving-Libya-Rapid-Assessment-of-Municipalities-of-Departure-of-Migrants-in-Libya.pdf.

¹⁰⁷ Political and Security Committee of the EU, *Political and Security Committee Decision (CFSP) 2016/1635 of 30 August 2016 on the Commencement of the Capacity Building and Training of the Libyan Coast Guard and Navy by the European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED Operation SOPHIA) (EUNAVFOR MED/3/2016)*, 30 August 2016.

¹⁰⁸ European External Action Service, *EUNAVFOR MED Operation Sophia Starts Training of Libyan Navy Coast Guard and Libyan Navy*, 27 October 2016, available at: https://eeas.europa.eu/headquarters/headquarters-homepage/13195/eunavfor-med-operation-sophia-starts-training-of-libyan-navy-coast-guard-and-libyan-navy_en.

training package. The training was delivered by the Operation to 20 Libyan coast guard and navy senior officers throughout 2017 in various locations in the Mediterranean.¹⁰⁹

Following the 2017 technical agreement between the commanders of Operation Sophia and the Guardia di Finanza, the Italian military police force trained 39 Libyan coast guard members halfway through the same year.¹¹⁰ In parallel, the Italian coast guard has cooperated with Operation Sophia in planning and conducting a training on coast guard functions for the Libyan coast guard.¹¹¹

On 17 September 2017, in accordance with the 2016 Memorandum of Understanding between the commanders of Operation Sophia and the Libyan coast guard, 87 Libyan coast guard and navy personnel arrived at the Italian Navy Petty Officer Academy in Taranto, where they received training until mid-November 2017. The training was partly provided by military trainers from the Italian armed forces. According to Operation Sophia, the objective of the training was *'to increase the security of Libyan territorial waters, implementing the capacities of the Libyan Coastguard and Navy to perform their duties, thus enhancing the capacity in basics of maritime security skills, including search and rescue activities to save lives and to disrupt smuggling and trafficking from/to Libyan shores'*.¹¹²

From 26 March to 9 May 2018, 22 Libyan coast guard and navy members were trained under Operation Sophia in Greece. They followed the second training package, which included a course on the system (SMART) used in coast guard and navy operational rooms, to which Italian navy trainers contributed.¹¹³ From 2 to 20 July, another 26 Libyan coast guard and navy trainees completed the second training package in Spain.¹¹⁴

On 8 October, 69 Libyan coast guard and navy personnel started a new training module of package two, which includes training in the general activity on board an off shore patrol vessel.

¹⁰⁹ European External Action Service, *Operation SOPHIA: Package 2 of the Libyan Navy Coast Guard and Libyan Navy Training Launched Today*, 30 January 2017, available at: https://eeas.europa.eu/headquarters/headquarters-homepage/19518/operation-sophia-package-2-libyan-navy-coast-guard-and-libyan-navy-training-launched-today_en.

¹¹⁰ European Commission 2017, above n 60, p. 5; Senato della Repubblica 2017, above n 105, p. 75.

¹¹¹ European Commission 2017, above n 60, p. 5.

¹¹² 'Italy Begins Training Libyan Navy and Coastguard', *Middle East Monitor*, 19 September 2017, available at: <https://www.middleeastmonitor.com/20170919-italy-begins-training-libyan-navy-and-coastguard/>; EU Neighbours, *EU's Operation SOPHIA Provides Training to Libyan Coastguards*, 20 March 2018, available at: <https://www.euneighbours.eu/en/south/stay-informed/news/eus-operation-sophia-provides-training-libyan-coastguards>.

¹¹³ EUNAVFOR MED Operation Sophia, *Operation SOPHIA: Training Activity in Progress: A Training Package 2 Module for Libyan Coastguard and Navy Ended in Crete (Greece)*, 10 May 2018, available at: <https://www.operation sophia.eu/operation-sophia-training-activity-in-progress/>.

¹¹⁴ EUNAVFOR MED Operation Sophia, *Operation SOPHIA: Training Activity in Progress: A Training Package 2 Module for Libyan Coastguard and Navy Ended in Cartagena (Spain)*, 23 July 2018, available at: <https://www.operation sophia.eu/operation-sophia-training-activity-in-progress-2/>.

The training, which is expected to last eight weeks, is conducted in Italy and hosted by the Italian navy.¹¹⁵

So far, at least 237 Libyan coast guard and navy members have been trained under Operation Sophia.¹¹⁶ After completion of the last training module, the threshold of 305 Libyan coast guard and navy personnel trained under the Operation will be reached,¹¹⁷ thereby allowing the manning of additional vessels provided to Libya by Italy.¹¹⁸

With regard to the content of the training provided to the Libyan coast guard under Operation Sophia, it should be noted that while the EU has claimed that the training includes ‘*a substantial focus on human rights and international law*’,¹¹⁹ this does not seem to be the case based on training materials disclosed by the European Border and Coast Guard Agency (Frontex).¹²⁰ The released training materials, which are used in the training of the Libyan coast guard under Operation Sophia, reveal that only 0.5% of the content is dedicated to human rights protection. Instead, the documents mainly cover possible indications of human trafficking, interrogation, documentation techniques, and the handling of weather apps.¹²¹

Conducting a naval operation in Libyan waters with various supportive tasks

Italy has deployed Italian naval ships in Libyan waters to support the Libyan coast guard in various ways. On 2 August 2017, after receiving parliamentary approval, Italy launched a naval operation in Libyan waters to support the Libyan coast guard (through aerial and naval means) in their activities against irregular migration and human smuggling.¹²² In the following days, two

¹¹⁵ EUNAVFOR MED Operation Sophia, *Operation Sophia: New Training Module in Italy: A Training ‘Package 2’ Module in Favour of Libyan Coastguard and Navy Started in La Maddalena (Italy) on October the 8, 9 October 2018*, available at: <https://www.operationsophia.eu/operation-sophia-new-training-module-in-italy/>.

¹¹⁶ EUNAVFOR MED Operation Sophia 2018, above n 114.

¹¹⁷ EUNAVFOR MED Operation Sophia 2018, above n 115.

¹¹⁸ European External Action Service, *Strategic Review on EUNAVFOR MED Op Sophia, EUBAM Libya & EU Liaison and Planning Cell*, 26 July 2018, pp. 25-26, available at: <http://www.statewatch.org/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf>.

¹¹⁹ European External Action Service 2016, above n 108.

¹²⁰ Access Info Europe, *Disclosed Documents Reveal that EU Training of Libyan Coast Guard Makes Negligible Reference to Human Rights Protection*, 30 November 2017, available at: <https://www.access-info.org/article/30058>; Statewatch, *Frontex Training Materials for Libyan Coast Guard Come Up Short on Human Rights*, 8 December 2017, available at: <http://www.statewatch.org/news/2017/dec/eu-frontex-libya-cg.htm>.

¹²¹ Ibid.

¹²² C. Balmer, ‘Italy Begins Naval Mission to Help Libya Curb Migrant Flows’, *Reuters*, 2 August 2017, available at: <https://www.reuters.com/article/us-europe-migrants-italy-libya/italy-begins-naval-mission-to-help-libya-curb-migrant-flows-idUSKBN1AI1JC>; ‘Migrant Crisis: Italy Approves Libya Naval Mission’, *BBC*, 2 August 2017, available at: <https://www.bbc.com/news/world-europe-40802179>; ‘Italy Parliament Approves Libya Naval Mission’, *News24*, 2 August 2017, available at: <https://www.news24.com/Africa/News/italy-parliament-approves-libya-naval-mission-20170802>. Original source referenced: Camera dei Deputati, *Deliberazione del consiglio dei ministri in merito alla partecipazione dell’Italia alla missione internazionale in supporto alla guardia costiera Libica, adottata il 28 luglio 2017*, 28 July 2017, available at: <http://www.camera.it/ dati/leg17/lavori/documentiparlamentari/IndiceETesti/250/002/INTERO.pdf>.

Italian naval ships (including a team of mechanics) were deployed in the port of Tripoli.¹²³ According to Italy's Minister of Defense, '[the operation] provide[s] logistical, technical and operational support for Libyan naval vessels, helping them and supporting them in shared and coordinated actions'.¹²⁴ The mission supplements the Italian operation Mare Sicuro (launched in 2015), which in 2017 involved four warships and five aerial assets to monitor and ensure security in the central Mediterranean.¹²⁵

One of the objectives of the new naval operation is to protect Libyan vessels involved in activities against irregular migration. In order to achieve this aim, ships taking part in operation Mare Sicuro have been deployed in Libyan waters as well.¹²⁶

Another objective of the new mission is the provision of surveillance and reconnaissance capabilities.¹²⁷ As will be discussed in the following subsection, based on these surveillance and reconnaissance activities, Italian ships operating off the coast of Libya have played a substantial role in coordinating and directing interceptions of migrants at sea by the Libyan coast guard.

A third objective is the provision of technical and logistical support and advice to the Libyan coast guard.¹²⁸ According to a report of the Italian government, the Italian ships docked in the port of Tripoli have onboard materials, equipment and a technical team which have been used for the repair and maintenance of Libyan coast guard and navy assets.¹²⁹

A final purpose of the Italian naval operation is to assist the Libyan coast guard and navy in setting up a center responsible for coordinating their operations.¹³⁰ In March 2017, the Italian government already requested its coast guard (a body of its navy¹³¹) to assist its Libyan counterpart in setting up a Libyan Maritime Rescue Coordination Centre (MRCC) in order to enable it to coordinate search and rescue activities in its own search and rescue zone (which it estimated would take at least 18 months).¹³² The report from the Italian government confirms that

¹²³ D. Jandová, 'Italy Launches Naval Mission to Libyan Coast, Haftar Threatens Confrontation', *European Security Journal*, 6 August 2017, available at: <https://www.esjnews.com/italy-naval-mission-libya-haftar>; M. Al Araby, 'Italian Ship Arrives in Tripoli Port Despite Threat', *Al Arabiya*, 4 August 2017, available at: <http://english.alarabiya.net/en/News/middle-east/2017/08/04/Italian-ship-arrives-in-Tripoli-port-despite-threat.html#>.

¹²⁴ Balmer 2017, above n 122.

¹²⁵ Heller and Pezzani 2018, above n 13, pp. 47-48. Original source referenced: Senato della Repubblica, *Deliberazione del consiglio dei ministri in merito alla partecipazione dell'Italia alla missione internazionali, adottata il 14 gennaio 2017*, 14 January 2017, available at: <http://www.senato.it/service/PDF/PDFServer/BGT/1000608.pdf>.

¹²⁶ *Ibid.*, p. 48. Original source referenced: Camera dei Deputati 2017, above n 122.

¹²⁷ *Ibid.*

¹²⁸ Amnesty International, *Italy: Submission to the United Nations Committee Against Torture*, 6 December 2017, p. 16, available at: <https://www.amnesty.org/download/Documents/EUR3072412017ENGLISH.pdf>. Original source referenced: Camera dei Deputati 2017, above n 122.

¹²⁹ Heller and Pezzani 2018, above n 13, pp. 48-49. Original source referenced: Senato della Repubblica 2017, above n 105.

¹³⁰ Amnesty International 2017, above n 128, p. 16. Original source referenced: Camera dei Deputati 2017, above n 122.

¹³¹ Ministero della Difesa, *Coast Guard - Port Authorities* (website), available at: <http://www.marina.difesa.it/EN/thefleet/coastguard/Pagine/default.aspx>.

¹³² Amnesty International, *Italy: Refugees and Migrants in the Central Mediterranean, Cutting the Lifelines*, 22 May 2017, p. 2, available at: <https://www.amnesty.org/download/Documents/EUR3063192017ENGLISH.pdf>.

the Italian navy has indeed conducted activities ‘to establish a Liaison Navy and Communication Centre (LNCC), initially onboard, for the cooperation and coordination of the joint activities of the Libyan Coast Guard and Navy’.¹³³ Until such a coordination center has been set up in Libya, the Italian navy functions as an LNCC (or MRCC). This has been confirmed in an Operation Sophia report, which refers to an Italian ‘Naval Liaison Communication Centre located on board the Italian warship moored in Tripoli’.¹³⁴ Furthermore, the Head of the International Cooperation Office of the Libyan Coast Guard has stated that when the Libyan coast guard has difficulties in communicating with one of its assets on the high seas, it uses the communication equipment on board the Italian navy’s ship.¹³⁵ Thus, the Italian naval operation also facilitates the communication of the Libyan coast guard to coordinate its operations at sea.

Coordinating and directing the interception of migrants by the Libyan coast guard

Italy has coordinated and directed the interception of migrants at sea by the Libyan coast guard followed by their return to Libya. An analysis of 16 documented incidents (in 2017 and 2018)¹³⁶ in which the Libyan coast guard intercepted migrants at sea and returned them to Libya shows that the Italian MRCC and the Italian navy have played an important role in coordinating and directing such interceptions.¹³⁷

In almost all cases, the Italian MRCC transferred received information on boats in distress to the Libyan coast guard, which then claimed the coordination of the search and rescue operations, while NGO vessels were asked to stand-by. In this sense, the Italian MRCC thus de facto privileged interceptions by the Libyan coast guard over the rescue by NGO vessels.¹³⁸

In three of these cases,¹³⁹ it was recorded that the Italian navy gave clear operational instructions to the Libyan coast guard to intercept migrants, while refraining from rescuing the migrants itself (even while being the closest asset). While the provision of such instructions by the Italian navy was not recorded in the other cases, as recording depends on the chance of a nearby NGO vessel overhearing radio communication, it probably took place in some of the other cases too without being recorded.¹⁴⁰

These incidents demonstrate that the Libyan coast guard has been able to carry out the interception of migrants at sea followed by their return to Libya through the coordination and direction by Italian actors. In a court case following one of the incidents, an Italian judge held that the coordination of rescue operations by the Libyan coast guard is ‘essentially entrusted to

¹³³ Heller and Pezzani 2018, above n 13, p. 48. Original source referenced: Senato della Repubblica 2017, above n 105.

¹³⁴ Ibid., p. 49. Original source referenced: EUNAVFOR MED Operation Sophia, above n 98, p. 26.

¹³⁵ Ibid., p. 49.

¹³⁶ Ibid., pp. 68-82 and 87-99.

¹³⁷ Ibid., pp. 57-58.

¹³⁸ Ibid., pp. 58 and 83.

¹³⁹ Ibid., pp. 68-73 and 76-78 (the cases of 27 September 2017, 11 October 2017 and 15 December 2017).

¹⁴⁰ Ibid., pp. 58, 73 and 83.

the Italian navy, with its own naval assets and with those provided to the Libyans'.¹⁴¹ In the above context, a researcher for the Refugee Studies Centre at Oxford University has stated that: 'What we've got now are Italian boats off the Libyan coast identifying boats that are leaving, then information being related to Libyan coast guards, so they can do the interception and return people to Libya.'¹⁴² A spokesperson for the Libyan coast guard confirmed that they regularly receive information from the Italian MRCC and from the Italian coast guard and that such information is used to intercept migrants at sea and return them to Libya.¹⁴³

Supporting a Libyan SAR region

Italy has supported the declaration of a Libyan search and rescue (SAR) region, a defined area within which Libya would be responsible for the coordination of search and rescue operations.¹⁴⁴ On 10 July 2017, as required under the SAR Convention (to which Libya is party¹⁴⁵),¹⁴⁶ the Libyan authorities notified the International Maritime Organization (IMO) of the designation of a Libyan SAR zone.¹⁴⁷ While the IMO had received the notification but sought further clarifications,¹⁴⁸ Libya already announced on 10 August that it had officially declared a Libyan SAR region and ordered foreign vessels, in particular rescue NGOs, to stay out of it without authorization from the Libyan authorities. A Libyan navy spokesman said that the measure was aimed against 'NGOs which pretend to want to rescue illegal migrants'.¹⁴⁹ It should be noted, however, that while the Libyan government used the declaration to exercise its exclusive control over the SAR area extending over the high seas, the high seas are open to all states and a state may not subject any part of it to its sovereignty.¹⁵⁰ A SAR zone does not grant any sovereign rights either, as it only gives competence over the coordination of search and rescue activities (as mentioned above).

In accordance with the stated objective of Italy and the EU to establish a Libyan SAR region, Italy has endorsed the declaration of a Libyan SAR zone. Following the declaration, Italy's then Foreign Minister stated that the Libyan government was 'ready to put in place a search-and-rescue zone in its waters' and that this meant that 'balance is being restored in the

¹⁴¹ Ibid., p. 49. Original source referenced: Tribunale di Catania, *Sezione del Giudice per le Indagini Preliminari, Decreto di convalida e di sequestro preventivo*, 16 April 2018, available at: <http://www.statewatch.org/news/2018/apr/it-open-arms-sequestration-judicial-order-tribunale-catania.pdf>.

¹⁴² Campbell 2017, above n 66.

¹⁴³ Ibid.

¹⁴⁴ International Maritime Organization (IMO), *International Convention on Maritime Search and Rescue*, 1979, Annex, Rules 1.3.1 and 2.

¹⁴⁵ IMO, *Status of Conventions* (website), available at:

<http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>.

¹⁴⁶ IMO, *International Convention on Maritime Search and Rescue*, 1979, Annex, Rule 2.1.2.2.

¹⁴⁷ 'Libya Drops Claim to Search-and-Rescue Zone, IMO Confirms', *News Deeply*, 14 December 2017, available at: <https://www.newsdeeply.com/refugees/executive-summaries/2017/12/14>.

¹⁴⁸ Ibid.

¹⁴⁹ 'Libya Navy Bars Foreign Ships from Migrant 'Search and Rescue' Zone', *Daily Mail (AFP)*, 10 August 2017, available at: <http://www.dailymail.co.uk/wires/afp/article-4779316/Libya-navy-bars-foreign-ships-migrant-search-rescue-zone.html>.

¹⁵⁰ UN General Assembly, *Convention on the Law of the Sea*, 1982, Articles 87 and 89.

Mediterranean'.¹⁵¹ It can be argued that the logic for Italy to support the establishment of a Libyan SAR zone (and a Libyan MRCC) is the following. In order for the Libyan coast guard to carry out interceptions of migrants at sea with impunity, they have to be framed as rescues. The Libyan coast guard, however, needs to be competent to coordinate such rescues (including at the high seas), which requires a SAR zone (and a functioning MRCC).¹⁵²

On 10 December 2017, Libya withdrew its earlier notification on the designation of a Libyan SAR zone to the IMO.¹⁵³ On 14 December, this withdrawal was followed by the submission of a new notification,¹⁵⁴ with the help of the Italian navy,¹⁵⁵ and apparently with success this time. In June 2018, after receiving the necessary information from the Libyan authorities, the IMO confirmed the existence of a Libyan SAR region and publicized its coordinates and other relevant information in the Global Integrated Shipping Information System (which is publicly accessible).¹⁵⁶ With regard to Libya's new responsibility for its own SAR zone, Italy's Minister of Defense has stated that: '*Libya's coast guard now carries this responsibility. It was trained by our own coast guard. And it has the capacity to fulfill its duty.*'¹⁵⁷ The EU has recognized the Libyan SAR area as well,¹⁵⁸ and there has been no opposition from neighboring countries.¹⁵⁹

While the information publicized by the IMO also includes the details of a Libyan MRCC (with coordinates referring to a location at the international airport of Tripoli¹⁶⁰), a UN report mentions that the full operational capability of such a center is expected to be achieved no sooner

¹⁵¹ A. Rettman, 'Italy Backs Libya as NGOs Chased out of Mediterranean', *EUobserver*, 14 August 2017, available at: <https://euobserver.com.vu-nl.idm.oclc.org/migration/138736>.

¹⁵² Heller and Pezzani 2018, above n 13, pp. 50-51; Deutscher Bundestag, Research Services, *Maritime Rescue in the Mediterranean: Rights and Obligations of Vessels Under the SAR Convention and Manifestations of the Principle of Non-Refoulement on the High Seas* (translation), available at: <http://www.statewatch.org/news/2018/feb/bundestag-Research-Services-Maritime-rescue-in-Med.pdf>.

¹⁵³ 'Libya Drops Claim to Search-and-Rescue Zone, IMO Confirms', 2017, above n 147.

¹⁵⁴ UN Security Council, *Report of the Secretary-General: Implementation of Resolution 2380 (2017)*, 31 August 2018, UN doc. S/2018/807, para. 12.

¹⁵⁵ A. Hunko, Member of the German Bundestag and Member of the Parliamentary Assembly of the Council of Europe, *Libyan Coast Guard Attacks Rescuers after Training by EU Military Operation*, 18 December 2017, available at: <http://www.statewatch.org/news/2017/dec/eu-libyan-coast-guard-eu-training-abuses-hunko-pr-18-12-17.pdf>;

S. Lösing (GUE/NGL), Parliamentary question to the European Commission, Subject: *Search and Rescue Area Off Libya*, 3 July 2018, available at: http://www.europarl.europa.eu/doceo/document/P-8-2018-003665_EN.html.

¹⁵⁶ IMO, *Global SAR Plan, Rescue Co-ordination Centre / Libya* (website), below, available at: <https://gisis.imo.org/Public/COMSAR/RCC.aspx?CID=LBY&Action=View&ID=2032> (registration required); UN Security Council 2018, above n 154, para. 12; O. Spaggiari, *La Libia ha dichiarato la sua zona SAR: lo conferma l'IMO*, *Vita*, 28 June 2018, available at: <http://www.vita.it/it/article/2018/06/28/la-libia-ha-dichiarato-la-sua-zona-sar-lo-conferma-limo/147392>.

¹⁵⁷ B. Riegert, 'Libya Takes Over from Italy on Rescuing Shipwrecked Migrants', *Deutsche Welle*, 5 July 2018, available at: <https://www.dw.com/en/libya-takes-over-from-italy-on-rescuing-shipwrecked-migrants/a-44546754>.

¹⁵⁸ 'The Latest: EU Says Libya Responsible for Rescue Ship', *Fox News (AP)*, 25 September 2018, available at: <https://www.foxnews.com/world/the-latest-eu-says-libya-responsible-for-rescue-ship>.

¹⁵⁹ Mr. Avramopoulos, on behalf of the European Commission, Answer to parliamentary question to the European Commission, Subject: *Search and Rescue Area Off Libya*, 4 September 2018, available at: http://www.europarl.europa.eu/doceo/document/P-8-2018-003665-ASW_EN.html.

¹⁶⁰ Google Maps, coordinates 32° 40.00' N 13° 09.00' E.

than 2020, with the help of the Italian coast guard.¹⁶¹ Under the SAR Convention, however, a state responsible for a SAR region must be able to ‘*arrange that [its] search and rescue services are able to give prompt response to distress calls*’,¹⁶² and must have a functioning MRCC with ‘*adequate means for communication with its rescue units and with [MRCC’s] in adjacent areas*’.¹⁶³ In addition, it must be able to provide ‘*a place of safety*’¹⁶⁴ for persons rescued in its SAR region.¹⁶⁵ It can be argued that Libya does not meet these requirements and thus cannot be responsible for a SAR zone.¹⁶⁶ Nevertheless, the fact is that, with the support of Italy, Libya now has a SAR region officially endorsed by the IMO, giving it competence over the coordination of search and rescue operations in the defined area, as desired by Italy and the EU.

1.5 Results of Italy’s support to the Libyan coast guard

As a result of the concrete measures taken by Italy in support of the Libyan coast guard, its operational capacity has grown considerably.¹⁶⁷ In particular, the patrol vessels used by the Libyan coast guard to intercept migrant boats have all been provided by Italy and Italy has trained their crews to use them. Before the provision of such patrol boats, the Libyan coast guard only possessed a number of smaller boats (as mentioned above), which means it had a lower capacity to intercept migrant boats. According to the Libyan coast guard, the smaller boats are not suitable for extensive sea patrols (further off shore) or rescue operations.¹⁶⁸ The training provided by Italy through Operation Sophia also contributed to the enhanced capacity of the Libyan coast guard, which (as mentioned) had not trained its officers since 2011, resulting in untrained (and thus less capable) personnel.¹⁶⁹ In this sense, a spokesman for the Libyan coast guard underlined its deteriorated state prior to Italy’s support by stating that: ‘*The coast guard has not seen any development for the past six years*’.¹⁷⁰ Furthermore, due to Italy’s support, the search and rescue activities of the Libyan coast guard can be coordinated. In this regard, it should be recalled that coordination equipment of the Libyan coast guard was destroyed during the civil war. In addition, through its maintenance support, Italy contributes to the continuation of the coast guard’s activities.

¹⁶¹ UN Security Council 2018, above n 154, para. 12.

¹⁶² IMO, *International Convention on Maritime Search and Rescue*, 1979, Annex, Rule 2.1.8.

¹⁶³ *Ibid.*, Rule 2.3.3.

¹⁶⁴ IMO, *Resolution MSC.70(69): Adoption of Amendments to the International Convention on Maritime Search and Rescue*, 1979, 18 May 1998, para. 1.3.2.

¹⁶⁵ IMO, *Resolution MSC.167(78): Guidelines on the Treatment of Persons Rescued at Sea*, 20 May 2004, para. 2.5.

¹⁶⁶ Heller and Pezzani 2018, above n 13, p. 52; ‘Libya Drops Claim to Search-and-Rescue Zone, IMO Confirms’, 2017, above n 147; P. Cuttitta, *Pushing Migrants Back to Libya, Persecuting Rescue NGOs: The End of the Humanitarian Turn (Part II)* (blog), *Border Criminologies*, 19 April 2018, available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/pushing-0>.

¹⁶⁷ Heller and Pezzani 2018, above n 13, pp. 33 and 63.

¹⁶⁸ Altai Consulting 2017, above n 106, p. 41.

¹⁶⁹ *Ibid.*, pp. 42-43; European External Action Service 2017, above n 33, p. 43.

¹⁷⁰ Altai Consulting 2017, above n 106, pp. 40-41.

It has been argued that before the provision of Italy's (current) support, the Libyan coast guard lacked both the interest and the capacity to intercept and return any significant number of migrant boats.¹⁷¹ In this sense, Italy's Minister of Interior recalled that prior to 2017, 'when we said we had to relaunch the Libyan coastguard, it seemed like a daydream'.¹⁷² It can be argued that the increased capacity of the Libyan coast guard as a result of Italy's support has indeed led to a higher number of migrants intercepted and returned to Libya. Although a causal relationship seems difficult to prove, it is a fact that, following Italy's support to the Libyan coast guard, migrant interceptions increased and arrivals in Italy dropped significantly.

The provision of Italy's support described above took place mainly in late 2016, 2017 and 2018. Before this time, in 2015, the UNHCR, which monitors Libya's interception operations at sea, estimated that the Libyan coast guard had intercepted and returned at least 7.650 migrants.¹⁷³ In 2016, this number rose to 14.332,¹⁷⁴ and again to 15.358 migrants in 2017.¹⁷⁵ In 2018, until September, the Libyan coast guard intercepted a total of 13.898 migrants, which is an increase of 12.3% compared to the same period last year.¹⁷⁶ A significant increase in migrant interceptions since 2016 can thus be observed.

A related trend is the drop in migrants reaching Italian shores (mainly from Libya). While in 2015, the UNHCR estimated that 153.842 migrants arrived in Italy by sea, followed by 181.436 migrants in 2016, this number decreased significantly in 2017, with 119.369 reported arrivals.¹⁷⁷ Moreover, so far in 2018, until September, only 20.948 migrants arrived on Italian shores, which is a dramatic 80% decrease in arrivals compared to the same period last year.¹⁷⁸

Although it is difficult to draw any definite conclusions from these numbers, they do seem to indicate that, due to Italy's support, the Libyan coast guard has been able to stop significantly more migrants, in absolute terms as well as relatively. In 2015 (before the provision of Italy's support), the Libyan coast guard was able to intercept 5% compared to the number of migrants arriving in Italy by sea. In the following years, this rate increased to 8% in 2016, 13% in 2017,

¹⁷¹ P. Biondi, 'The Case for Italy's Complicity in Libya Push-Backs', *News Deeply*, 24 November 2017, available at: <https://www.newsdeeply.com/refugees/community/2017/11/24/the-case-for-italys-complicity-in-libya-push-backs>; Heller and Pezzani 2018, above n 13, p. 33.

¹⁷² 'Italy's Libyan 'Vision' Pays Off as Migrant Flows Drop', *Politico*, 10 August 2017, available at: <https://www.politico.eu/article/italy-libya-vision-migrant-flows-drop-mediterranean-sea/>.

¹⁷³ UN High Commissioner for Refugees (UNHCR), *Operational Update on the Libya Situation: September - December 2015*, December 2015, p. 3, available at: <http://reporting.unhcr.org/sites/default/files/UNHCR%20Operational%20Update%20on%20the%20Libya%20Situation%20-%20September-December%202015.pdf>.

¹⁷⁴ UNHCR, *Libya: Rescue at Sea - Overview 2016*, 17 January 2017, available at: <https://reliefweb.int/report/libya/libya-rescue-sea-overview-2016>.

¹⁷⁵ UNHCR, *Libya: Activities at Disembarkation, Monthly Update, December 2017*, 8 January 2018, available at: <https://data2.unhcr.org/en/documents/download/61535>.

¹⁷⁶ UNHCR, *Libya: Activities at Disembarkation, Monthly Update, September 2018*, 1 October 2018, available at: <https://data2.unhcr.org/en/documents/download/66196>.

¹⁷⁷ UNHCR, *UNHCR Refugees Operational Data Portal, Italian Situation* (website), available at: <https://data2.unhcr.org/en/situations/mediterranean/location/5205>.

¹⁷⁸ UNHCR, *Italy Sea Arrivals Dashboard (September 2018)*, 10 October 2018, available at: <https://data2.unhcr.org/en/documents/download/66286>.

and no less than 66% so far in 2018.¹⁷⁹ Of course, it can be argued that the decrease in arrivals contributes to the higher interception rates (especially in 2018), as it (most likely) also implies fewer embarkations from Libya (taking into account numbers of dead and missing¹⁸⁰), which makes it easier for the Libyan coast guard to acquire higher interception rates. Nevertheless, based on these numbers, it can be argued that, as a result of Italy's support, Libya's interception operations at sea have increased or have become more successful, resulting in higher numbers of migrants being intercepted and returned to Libya, instead of reaching Italy. The Libyan coast guard thereby acts in line with the aim of stemming migrant crossings emphasized in the agreements with Italy and the EU.

Conclusion

Italy's track record of cooperation with Libya to stem migrant crossings has led to its current policy of cooperation in support of the Libyan coast guard. Based on this policy, as well as EU cooperation initiatives, Italy has provided concrete support to the Libyan coast guard. Such concrete measures taken by Italy include: providing patrol boats, maintaining Libyan coast guard assets, providing training through Operation Sophia, conducting a naval operation in Libyan waters with various supportive tasks, coordinating and directing the interception of migrants by the Libyan coast guard, and supporting a Libyan SAR region. As a result of Italy's support, the Libyan coast guard's operational capacity has grown considerably, allowing it to intercept and return to Libya significantly more migrants. Indeed, following Italy's support, the Libyan coast guard was able to stop increasingly higher numbers of migrants from reaching Italy, as demanded from it by Italy and the EU.

¹⁷⁹ Calculated based on the above-mentioned numbers provided by the UNHCR.

¹⁸⁰ Numbers of dead and missing migrants on the central Mediterranean route based on UNHCR data: 2.913 in 2015, 4.578 in 2016, 2.873 in 2017, and 1.245 so far in 2018 (until September).

Chapter 2: Human rights violations of migrants intercepted at sea and returned to Libya by the Libyan coast guard

Introduction

This chapter analyzes the human rights violations faced by migrants who are intercepted at sea and returned to Libya by the Libyan coast guard, with the support of Italy. First, the conduct of the Libyan coast guard towards intercepted migrants is examined. The second section analyzes the treatment of migrants in detention centers, to which they are usually transferred by the Libyan coast guard upon arrival in Libya. The final section sets out Libya's human rights obligations under international law and applies them to the conduct described in the previous sections, thereby indicating to what extent migrants, halted in their attempt to reach safety in Italy, are being subjected to human rights violations instead.

2.1 Violent and reckless conduct of the Libyan coast guard towards intercepted migrants

Before and during the provision of Italy's current support, the Libyan coast guard has been involved in violent and reckless conduct against migrants during interceptions at sea and after disembarkation in Libya, thereby endangering their lives and causing suffering and death. As shown below, such conduct has been widely reported.

Human Rights Watch reported four accounts of abuse of migrants by the Libyan coast guard during interceptions at sea in 2016. The abuse allegedly included beatings, pushing people overboard causing them to drown, and reckless behavior causing a migrant boat to break down, leading to panic on board and people getting trampled.¹⁸¹

The UN Support Mission in Libya (UNSMIL) reported several accounts of migrants being beaten and shot by the Libyan coast guard during interceptions at sea and after disembarkation in Libya in 2016, causing injuries and deaths.¹⁸²

The accusations of the Libyan coast guard beating migrants have also been backed up by video footage. In a video filmed in September 2016, intercepted migrants, including women and

¹⁸¹ Human Rights Watch, *EU/NATO: Europe's Plan Endangers Foreigners in Libya. Migrants, Asylum Seekers Face Killings, Torture, and Rape*, 6 July 2016, available at: <https://www.hrw.org/news/2016/07/06/eu/nato-europes-plan-endangers-foreigners-libya>.

¹⁸² UN Office of the High Commissioner for Human Rights (OHCHR) and UN Support Mission in Libya (UNSMIL), *'Detained and Dehumanised': Report on Human Rights Abuses Against Migrants in Libya*, 13 December 2016, pp. 20-21, available at: https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf.

children, are lashed with plastic pipes and kicked in the face by Libyan coast guard personnel.¹⁸³ In another video, a Libyan coast guard member strikes a shirtless migrant with a bullwhip in an overcrowded dinghy boat, causing some migrants to panic and fall into the sea, struggling to clutch the side of the boat.¹⁸⁴ Libyan coast guard members have stated that they strike migrants because it is necessary ‘*to make them calm down*’¹⁸⁵ and ‘*so they sit correctly and don’t move about*’.¹⁸⁶ However, it should be noted that the beatings have also caused panic and seem to have been carried out despite everyone sitting still.

The German NGO Sea-Watch reported that, on 21 October 2016, a vessel with Libyan coast guard insignia attacked a migrant boat off the Libyan coast carrying about 150 migrants. According to Sea-Watch, the Libyan coast guard vessel violently intervened just as the NGO’s personnel were about to deliver aid, boarding the overcrowded migrant boat and beating people with sticks, thereby creating a situation of panic. When one tube of the rubber migrant boat subsequently collapsed, the majority of migrants fell into the water, causing at least four people to drown.¹⁸⁷

Based on interviews conducted by Médecins Sans Frontières (MSF) in 2017 with 70 migrants who had been intercepted by the Libyan coast guard and returned to Libya, 19 of them reportedly said that they had experienced violence during the interception.¹⁸⁸ Furthermore, MSF reported that during a rescue on 23 May 2017, it witnessed the Libyan coast guard approaching boats in distress, intimidating the passengers with weapons to take their belongings, and then firing gunshots into the air, which caused panic to break out and many passengers (who had already received lifejackets) jumped into the sea. Although eventually no one drowned or was injured, according to MSF, the behavior of the Libyan coast guard was ‘*reckless – if not directly threatening – to the people on the boats*’.¹⁸⁹ The incident has been partly recorded in video, showing how Libyan coast guard members point their gun at migrants and fire shots in the air, as

¹⁸³ B. Trew and T. Kington, ‘Video Shows Libyan Coastguard Whipping Rescued Migrants’, *The Times*, 14 February 2017, available at: <https://www.thetimes.co.uk/article/video-shows-libyan-coastguard-whipping-rescued-migrants-6d8g2jgz6>.

¹⁸⁴ S. Raghavan, ‘Libya’s Coast Guard Abuses Migrants Despite E.U. Funding and Training’, *The Washington Post*, 11 July 2017, available at: https://www.washingtonpost.com/world/middle-east/libyas-coast-guard-abuses-desperate-migrants-despite-eu-funding-and-training/2017/07/10/f9bfe952-7362-4e57-8b42-40ae5ede1e26_story.html?noredirect=on&utm_term=.d406b256d9fe.

¹⁸⁵ *Ibid.*

¹⁸⁶ A. Al-Warfalli, ‘Exclusive: Sanctioned Libya Coastguard Commander Says Hits Migrants to Protect Them’, *Reuters*, 19 June 2018, available at: <https://www.reuters.com/article/us-europe-migrants-libya-exclusive/exclusive-sanctioned-libya-coastguard-commander-says-hits-migrants-to-protect-them-idUSKBN1JF2HL>.

¹⁸⁷ ‘Libyan Coastguard’ Speedboat Attacked Migrant Dinghy, Says NGO’, *The Guardian*, 21 October 2016, available at: <https://www.theguardian.com/world/2016/oct/21/men-on-libyan-coastguard-boat-reportedly-attack-dinghy-of-refugees-and-migrants>.

¹⁸⁸ Heller and Pezzani 2018, above n 13, p. 84. Original source referenced: MSF 2017 data shared with the authors.

¹⁸⁹ Médecins Sans Frontières (MSF), *MSF Accuses Libyan Coastguard of Endangering People’s Lives During Mediterranean Rescue*, 24 May 2017, available at: <https://www.msf.org/msf-accuses-libyan-coastguard-endangering-peoples-lives-during-mediterranean-rescue>.

well as migrants subsequently struggling desperately in the water.¹⁹⁰ The Libyan coast guard's behavior of threatening migrants with violence while pointing a gun at them and firing warning shots, causing panic and people falling into the water, has been reported by NGOs on multiple other occasions as well.¹⁹¹

The UN Panel of Experts on Libya reported in June 2017 that the Libyan coast guard was directly involved in abuses against migrants, including executions and torture. It also claimed that the head of the regional coast guard unit in Zawiyah, Abd Al Rahman Al-Milad, and other Libyan coast guard members were '*directly involved in the sinking of migrant boats using firearms*'.¹⁹² Based on this claim, the UN has put Abd Al Rahman Al-Milad on its Sanctions List (subjecting him to an asset freeze and a travel ban).¹⁹³

On 6 November 2017, the Libyan coast guard, using a patrol boat donated by Italy, was involved in a well-documented¹⁹⁴ and video-recorded incident¹⁹⁵ where its reckless and dangerous actions contributed to the drowning of at least 20 and up to 50 migrants.¹⁹⁶ On that day, just before the arriving of rescue NGO vessel Sea-Watch 3, the Libyan coast guard approached a sinking inflatable boat in international waters, carrying between 130 and 150 migrants. According to several survivor testimonies, the Libyan coast guard first circled around the boat and did not immediately assist the migrants in distress, but took pictures and cursed at them instead.¹⁹⁷ As the Sea-Watch 3 arrived, it put its rigid-hulled inflatable boats (RHIBs) in the water and started to rescue people, recording everything on video. In the meantime, the Libyan coast guard started taking people aboard as well. However, as it failed to deploy its RHIB to help facilitate the rescue, migrants were forced to climb the high side of the coast guard vessel and many fell into the water. As the RHIBs deployed by Sea-Watch 3 attempted to rescue these people, Libyan coast guard officials threw objects at them to keep them away, thereby hindering the rescue operation. Furthermore, the video footage shows that migrants aboard the coast guard

¹⁹⁰ R. Serdoz, RAI TG3, 'Search and Rescue - May 23rd - Video by RAI TG3 - Roberta Serdoz', *Medici Senza Frontiere* (YouTube channel), 25 May 2017, available at: <https://www.youtube.com/watch?v=3SLUDhMroZc>.

¹⁹¹ Heller and Pezzani 2018, above n 13, pp. 59-60; L. Dearden, 'Libyan Coastguard 'Opens Fire' During Refugee Rescue as Deaths in Mediterranean Sea Pass Record 1,500', *The Independent*, 24 May 2017, available at: <https://www.independent.co.uk/news/world/europe/refugee-crisis-deaths-mediterranean-libya-coastguard-opens-fire-drowned-gunshots-ngos-rescue-boat-a7754176.html>.

¹⁹² UN Security Council, *Final Report of the Panel of Experts on Libya Established Pursuant to Resolution 1973 (2011)*, 1 June 2017, UN doc. S/2017/466, paras. 104-105.

¹⁹³ UN, *As Security Council Imposes Sanctions on Six Human Traffickers in Libya, UN Chief Calls for More Accountability*, 8 June 2018, available at: <https://news.un.org/en/story/2018/06/1011751>.

¹⁹⁴ Based on testimonies from survivors, the crew of Sea-Watch, the Italian coast guard and the Libyan coast guard, and a range of evidence provided by Sea-Watch, including audio recordings of all communication that took place on the Sea-Watch 3 vessel, video footage recorded by several cameras positioned on the Sea-Watch 3 and its RHIBs, log books, and distress signals received, as well as AIS vessel tracking data.

¹⁹⁵ Sea-Watch, 'Exclusive: Full Incident of 6 November 2017 with the Libyan Coast Guard', *Sea-Watch e.V.* (YouTube channel), 13 November 2017, available at: https://www.youtube.com/watch?v=phi-f_yFXQ.

¹⁹⁶ Heller and Pezzani 2018, above n 13, pp. 87-99; Amnesty International, *Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*, 11 December 2017, p. 36, available at: <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>.

¹⁹⁷ Heller and Pezzani 2018, above n 13, p. 95.

vessel were being whipped with a rope and beaten. Some of them started jumping into the water to reach the RHIBs deployed by Sea-Watch 3. Then, the coast guard vessel took off at high speed, despite one man still hanging on a ladder down the side of the vessel. While most migrants were rescued and either brought to Italy by the Sea-Watch 3 or to Libya by the Libyan coast guard, it is estimated that at least 20 and up to 50 migrants disappeared at sea as a result of the incident.¹⁹⁸ This figure is corroborated by an Italian helicopter flying over the scene and communicating over the radio to Sea-Watch 3 the sighting of 22 dead people in the water.¹⁹⁹ Notably, the incident clearly proves the use of a boat donated by Italy, as the Libyan coast guard vessel in the video recorded by Sea-Watch 3 exactly matches the vessel donated by Italy during two video-recorded ceremonies on 21 April and 15 May 2017.²⁰⁰ Furthermore, 8 of the 13 crew members of the Libyan vessel involved in the incident had reportedly been trained under Operation Sophia.²⁰¹

In July 2018, the Spanish NGO Proactiva Open Arms reported that the Libyan coast guard had abandoned three people at sea, of which two died (including a toddler), after it intercepted a boat carrying around 160 migrants. According to the NGO, the three migrants refused to board the Libyan vessel with the rest of the intercepted group and were subsequently abandoned after the Libyan coast guard destroyed their boat, leaving the migrants drifting in a wreckage at sea about 90 miles from the Libyan coast.²⁰²

While these cases clearly demonstrate the violent and reckless behavior of the Libyan coast guard towards intercepted migrants, it should be noted that they only constitute reported cases. It seems likely that such conduct also took place in other cases without being reported, for example because no rescue NGOs were present. Furthermore, while Operation Sophia provides a monitoring mechanism of Libyan coast guard personnel trained under the EU Operation,²⁰³ in practice, it involves such personnel monitoring and drafting reports about themselves.²⁰⁴

¹⁹⁸ Heller and Pezzani 2018, above n 13, pp. 87 and 97; Amnesty International 2017, above n 196, p. 36.

¹⁹⁹ Heller and Pezzani 2018, above n 13, p. 97.

²⁰⁰ 'Migranti, Minniti: dieci motovedette alla Libia entro giugno', *Euronews*, 21 April 2017, available at: <http://it.euronews.com/2017/04/21/migranti-minniti-dieci-motovedette-alla-libia-entro-giugno>; 'Minniti ad Abu Sittah consegna altri due pattugliatori ai libici', *Analisi Difesa (AFP)*, 16 May 2017, available at: <https://www.analisedifesa.it/2017/05/minniti-ad-abu-sittah-consegna-altrui-due-pattugliatori-ai-libici/>; Amnesty International, *Libya: European Governments Complicit in Horrific Abuse of Refugees and Migrants*, 12 December 2017, available at: <https://www.amnesty.org/en/latest/news/2017/12/libya-european-governments-complicit-in-horrific-abuse-of-refugees-and-migrants/>.

²⁰¹ Heller and Pezzani 2018, above n 13, p. 91; Hunko 2017, above n 155.

²⁰² 'Libyan Coastguard Accused of Abandoning Three Migrants in Sea', *The Guardian (AP and AFP)*, 18 July 2018, available at: <https://www.theguardian.com/world/2018/jul/18/libyan-coastguard-accused-of-abandoning-three-migrants-in-sea>.

²⁰³ Council of the European Union, *EUNAVFOR MED Operation Sophia: Mandate Extended Until 31 December 2018*, 25 July 2017, available at: <http://www.consilium.europa.eu/en/press/press-releases/2017/07/25/eunavformed-sophia-mandate-extended/>.

²⁰⁴ N. Nielsen, 'EU Monitoring of Libyan Coastguard Done by Libyans', *EUobserver*, 21 November 2017, available at: <https://euobserver-com.vu-nl.idm.oclc.org/migration/139962>.

Unsurprisingly, the Libyan coast guard has not reported any abuses,²⁰⁵ despite the above-mentioned evidence suggesting otherwise.

2.2 Abusive treatment of migrants in detention centers

Irregular migration is criminalized in Libya and punished by imprisonment. Thus, when the Libyan coast guard intercepts migrants at sea and disembarks them on Libyan shores, it usually transfers them to detention centers, where they face abusive treatment.

The criminalization of irregular migration and the lack of protection for asylum seekers

Libyan law criminalizes irregular migration and there is no legislation or system in Libya that provides protection to asylum seekers. As a result, detention has become the primary migration management system in the country, leaving irregular migrants in Libya vulnerable to arrest and detention at any time.²⁰⁶

Law No. 6 of 1987 on Organizing the Exit, Entry and Residence of Foreign Nationals in Libya²⁰⁷ criminalizes the entry, stay or exit of foreign nationals without a valid visa. Article 19 of the Law provides for the imprisonment for an undefined period of time and a fine of 200 Libyan dinars (around €125) for ‘*anyone who enters, resides in, or exits the country without a valid visa*’. Furthermore, foreigners entering Libya without a valid visa are subject to deportation and may be detained until such deportation takes place.²⁰⁸ It should be noted that nationals from Arab states, excluding Iraqis and Palestinians, as well as from Ethiopia and Eritrea, are allowed to enter Libya without a visa.²⁰⁹ However, if they do not legalize their stay within two months, they are still considered illegal migrants.²¹⁰ Based on Article 6 of Law No. 19 of 2010 on Combating Irregular Migration, illegal migrants face imprisonment with forced labor or a fine of 1000 Libyan dinars (around €623), followed by deportation once they complete their sentence.²¹¹ Article 10 of the Law, however, requires the dignity, rights and property of an irregular migrant to be protected.²¹² It should also be noted that Libya’s Code of Criminal Procedure prohibits arbitrary arrest and detention.²¹³

²⁰⁵ Ibid.

²⁰⁶ Amnesty International 2017, above n 196, p. 7.

²⁰⁷ Available at: https://security-legislation.ly/sites/default/files/lois/1214-Law%20No.%20%286%29%20of%201987_EN.pdf.

²⁰⁸ Law No. 6 on Organizing the Exit, Entry and Residence of Foreign Nationals in Libya, 1987, Articles 17 and 18.

²⁰⁹ Ibid., Article 3; European Commission 2005, above n 18, p. 11.

²¹⁰ Law No. 19 on Combating Irregular Migration, 2010, Article 11; Global Detention Project, *Global Detention Project Submission to the UN Committee on Migrant Workers 27th Session (4-13 September 2017), List of Issues Under the Simplified Reporting Procedure – Libya Geneva, August 2016*, August 2016, p. 4, available at: https://tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/LBY/INT_CMW_NGO_LBY_28522_E.pdf.

²¹¹ Ibid., p. 3.

²¹² Amnesty International 2017, above n 196, p. 20.

²¹³ Global Detention Project 2016, above n 210, pp. 4-5.

Libya has consistently refused to sign or ratify the 1951 Refugee Convention²¹⁴ and its 1967 Protocol,²¹⁵ which offer protection to refugees and asylum seekers. However, Libya is party to the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa,²¹⁶ a regional legal instrument governing refugee protection in Africa that complements the Refugee Convention. It includes a provision on asylum committing state parties to use their best endeavors to receive refugees and to secure their settlement,²¹⁷ as well as a prohibition of non-refoulement.²¹⁸ It also encourages state parties to accede to the 1951 Refugee Convention and requires them to cooperate with the UNHCR.²¹⁹ Furthermore, Article 10 of Libya's Constitutional Declaration of 2011²²⁰ explicitly states that Libya 'shall guarantee the right of asylum' and prohibits the extradition of political refugees. Despite these obligations, however, Libya has failed to establish a system to implement them. There is no asylum legislation or procedure in the country and no process of refugee status determination. Thus, in practice, the protection of asylum seekers in Libya is not assured.²²¹ Moreover, the above-mentioned laws on irregular migration make no distinction between refugees (fleeing persecution) and other foreign nationals, meaning that (when illegally present) both may face detention and deportation.²²²

DCIM detention centers

When the Libyan coast guard intercepts migrants at sea and disembarks them on Libyan shores, it usually transfers them to detention centers run by the Directorate for Combatting Irregular Migration (DCIM), in execution of Libya's legislation criminalizing irregular migration. Here, migrants are often indefinitely detained under inhuman conditions and subjected to torture and other ill-treatment.²²³

The DCIM is a division of the Libyan Ministry of Interior established in 2012 to tackle irregular migration flows in Libya.²²⁴ In November 2017, it was estimated that up to 20,000 migrants were held in detention centers run by the DCIM.²²⁵ While the DCIM formally has 33 active detention centers under its control (mainly in the coastal areas),²²⁶ in practice, it is difficult

²¹⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 1951.

²¹⁵ UN General Assembly, *Protocol Relating to the Status of Refugees*, 1967.

²¹⁶ Organization of African Unity, *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1969.

²¹⁷ *Ibid.*, Article II sub 1.

²¹⁸ *Ibid.*, Article II sub 3.

²¹⁹ *Ibid.*, Preamble and Article VIII.

²²⁰ Available at: https://www.constituteproject.org/constitution/Libya_2011.pdf.

²²¹ Amnesty International 2017, above n 196, pp. 20-21; European Commission 2005, above n 18, p. 13.

²²² Amnesty International 2017, above n 196, p. 21.

²²³ *Ibid.*, p. 40; OHCHR and UNSMIL 2016, above n 182, pp. 19-20; UN Security Council, *Report of the Secretary-General Pursuant to Security Council Resolution 2312 (2016)*, 7 September 2017, UN doc. S/2017/761, para. 40.

²²⁴ Amnesty International 2017, above n 196, pp. 26-27.

²²⁵ *Ibid.*, p. 22; OHCHR, *UN Human Rights Chief: Suffering of Migrants in Libya Outrage to Conscience of Humanity*, 14 November 2017, available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22393&LangID=E>.

²²⁶ UNHCR, *Libya: Detention Centres - Active Official Detention Centres*, 21 September 2017, available at: <http://data2.unhcr.org/en/documents/download/61006>.

to determine whether a given center is actually under the control of the DCIM. The DCIM is headquartered in Tripoli and has only limited oversight over its detention centers, which are infrequently visited by DCIM officials and lack a clear reporting structure. As a result, detention centers are often only nominally under the control of the DCIM and are run by independent local militias instead. For example, the Nasser detention facility in Zawiya, used to detain migrants intercepted at sea by the Libyan coast guard, is in fact run by the head of a local militia.²²⁷ Another problem putting a massive strain on detention centers is a lack of funding, which has made the living conditions of detainees even worse.²²⁸

It should be noted that while most migrants intercepted by the Libyan coast guard are transferred to DCIM detention centers, some are brought to other places of captivity. Migrants have been held by armed groups, smugglers and traffickers in unofficial detention facilities like houses, farms or warehouses, where they face similar abuses.²²⁹ Armed groups have also pressured Libyan coast guard and DCIM personnel to hand over migrants.²³⁰

Indefinite detention

As mentioned, the detention of migrants in Libya occurs based on Libya's legislation criminalizing irregular migration. However, while migrants intercepted at sea by the Libyan coast guard have indeed reported to be arrested for reasons of irregular migration (a criminal charge), others said they were not given a reason.²³¹ When the Libyan coast guard subsequently brings illegal migrants into DCIM detention centers, they are not formally registered, making it impossible to determine exactly how many people are being held in detention centers or for how long they have been there. Furthermore, their documents and belongings are usually confiscated, which makes identification difficult (and makes them vulnerable upon release). In addition, immigration detention in Libya generally occurs outside judicial proceedings. The country's judiciary is weak and largely not functioning (especially following the conflict in the country), resulting in the absence of legal oversight by judicial authorities or legal remedies to challenge detention.²³² Thus, there is no system to monitor detention or to allow for the official release of migrants. This allows detention centers to release detainees at their discretion, usually following the payment of a ransom, and enables them to engage in extortion and torture with impunity.²³³ In this sense, it has also been reported that the Libyan coast guard, in collaboration with migrant

²²⁷ Amnesty International 2017, above n 196, p. 27.

²²⁸ Ibid.

²²⁹ Ibid., pp. 22 and 27-28; OHCHR and UNSMIL 2016, above n 182, pp. 15 and 19-20; I. Leghtas, Refugees International, *'Hell on Earth': Abuses Against Refugees and Migrants Trying to Reach Europe from Libya*, June 2017, pp. 7-8, available at:

<https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/592f37468419c2ac554b4c9f/1496266580341/2017.6.1+Libya.pdf>.

²³⁰ OHCHR and UNSMIL 2016, above n 182, p. 13.

²³¹ Xchange, *Libyan Detention Centers: A Legal Analysis*, 7 August 2017, available at:

http://xchange.org/map/Libya_DC.html.

²³² Amnesty International 2017, above n 196, pp. 24 and 28; OHCHR and UNSMIL 2016, above n 182, p. 15; Global Detention Project 2016, above n 210, p. 5.

²³³ Amnesty International 2017, above n 196, p. 28.

smugglers, has taken bribes from detained migrants for their release and safe passage.²³⁴ As a result of this discretion regarding the release of detainees, migrants are detained indefinitely for periods varying from days to months, unless they are able to secure their release by paying a ransom.²³⁵

However, there are some other possibilities for migrants to leave DCIM detention centers, forcibly or voluntarily. First, migrants might be deported, as provided for under Libyan law (mentioned above). Libya has carried out mass deportations of detained migrants to Niger in the period between 2012 and 2014, but such deportations came to a standstill following the outbreak of Libya's second civil war in 2014.²³⁶ Nevertheless, detainees remain at risk of being forcibly returned to their countries of origin or other countries without any consideration of their individual circumstances.²³⁷ Secondly, the IOM Voluntary Humanitarian Return program offers migrants in detention centers to voluntarily return to their home countries. However, since there is no process of refugee status determination and given the alternative of indefinite detention and ill-treatment in Libya, there is a real chance that migrants accept to return to their home countries even though they might face persecution there.²³⁸ Thirdly, people belonging to seven nationalities (Eritreans, Ethiopians, Iraqis, Palestinians, Somalis, Sudanese of Darfuri origin and Syrians) are de facto recognized as refugees in Libya. While these people still face indefinite detention, the UNHCR may advocate their release and process their asylum claims.²³⁹ However, these possibilities to leave the detention centers only concern a limited number of migrants. And since most migrants are unable to pay a ransom as well, the result is their indefinite detention.²⁴⁰

Inhuman detention conditions

The detention conditions in DCIM detention centers are generally inhuman. Many of the centers are structures unfit to hold people, like warehouses or factories, characterized by severe overcrowding and lack of light and ventilation.²⁴¹ The DCIM's Nasser detention center in Zawiya, for example, is an old factory with mostly sealed off windows, not designed to hold detainees, but nevertheless holds as many as thousand individuals.²⁴² In another center, a room that could reasonably hold less than 40 people held more than 200 men.²⁴³

Another problem is a lack of sanitation facilities, forcing detainees to openly defecate and urinate in their cells. In a number of centers, this has led to the spread of infectious diseases, like

²³⁴ L. Dearden, 'UK-Supported Libyan Forces 'Taking Bribes to Free Detained Migrants' After Pushing Boats Back to Shore', *The Independent*, 25 October 2017, available at: <https://www.independent.co.uk/news/uk/home-news/refugee-crisis-migrants-libya-coastguard-bribes-free-refugees-push-back-mediterranean-sea-detention-a8012256.html>; Amnesty International 2017, above n 196, pp. 37-38; OHCHR and UNSMIL 2016, above n 182, p. 13.

²³⁵ OHCHR and UNSMIL 2016, above n 182, p. 15.

²³⁶ Amnesty International 2017, above n 196, p. 29.

²³⁷ UN Security Council 2017, above n 223, para. 41.

²³⁸ Amnesty International 2017, above n 196, p. 29.

²³⁹ *Ibid.*, p. 29.

²⁴⁰ *Ibid.*, pp. 29-30.

²⁴¹ *Ibid.*, p. 30; OHCHR and UNSMIL 2016, above n 182, p. 15.

²⁴² Amnesty International 2017, above n 196, p. 30.

²⁴³ OHCHR and UNSMIL 2016, above n 182, p. 15.

scabies and chickenpox. Acute diarrhea and respiratory tract infections are also common in the detention centers, as well as infestation by lice and fleas.²⁴⁴

Due to a lack of adequate food, malnutrition is widespread. It has been reported that in some centers, around 50 percent of the detainees were suffering from malnutrition, with 10 percent suffering acute malnutrition. In detention centers in Tripoli, it was found that the average number of calories provided to migrants on a daily basis was only 35 percent of the calorie intake required for an adult male. Furthermore, migrants have described the water they get, which is sometimes less than one liter per person per day,²⁴⁵ as salty, dirty and undrinkable.²⁴⁶

Access to medical care for detainees is also grossly inadequate. While limited healthcare is provided by international organizations like MSF,²⁴⁷ the Libyan health system is close to collapse due to a lack of medicines, medical equipment and personnel.²⁴⁸ Furthermore, local hospitals require payment to treat foreign nationals, resulting in migrants being refused treatment due to a lack of payment. A fear of infectious diseases has resulted in the refusal of treatment as well.²⁴⁹

Finally, detainees are commonly denied access to the outside world, leaving them desperate to communicate with their relatives, and they often do not know what is going to happen to them, which causes stress.²⁵⁰

In 2017, MSF, which operates in seven detention centers in and around Tripoli, warned against the inhuman detention conditions described above, calling the lack of human dignity staggering. It also noted that the complaints of detainees treated by the organization mostly relate to the conditions inside the detention centers.²⁵¹ In January 2017, the European Commission and the High Representative of the EU for Foreign Affairs and Security Policy jointly stated with regard to Libya that: ‘*Conditions in the centers where migrants are held are unacceptable and fall short of international human rights standards.*’²⁵² The UN Secretary General has also raised concerns about the detention conditions of migrants in Libya, reporting to the UN Security

²⁴⁴ Ibid.

²⁴⁵ MSF, *MSF Warns of Inhumane Detention Conditions in Libya as EU Discusses Migration*, 2 February 2017, available at: <https://www.doctorswithoutborders.org/what-we-do/news-stories/news/msf-warns-inhumane-detention-conditions-libya-eu-discusses-migration>.

²⁴⁶ OHCHR and UNSMIL 2016, above n 182, p. 15.

²⁴⁷ MSF 2017, above n 245; MSF, *MSF Operational Update: Central Mediterranean, September - December 2017*, 29 January 2018, available at: <https://www.msf.org/medical-care-refugees-and-migrants-along-central-mediterranean-route>.

²⁴⁸ UN Office for the Coordination of Humanitarian Affairs, *Humanitarian Bulletin Libya*, Issue 08, October 2016, p. 4, available at:

https://unsmil.unmissions.org/sites/default/files/humanitarian_bulletin_libya_issue_8_october_2016_en_0.pdf.

²⁴⁹ OHCHR and UNSMIL 2016, above n 182, p. 16.

²⁵⁰ UN Security Council 2017, above n 223, para. 42; MSF 2017, above n 245.

²⁵¹ MSF 2017, above n 245.

²⁵² European Commission and High Representative of the Union for Foreign Affairs and Security Policy, *Joint Communication to the European Parliament, the European Council and the Council, Migration on the Central Mediterranean Route: Managing Flows, Saving Lives*, 25 January 2017, p. 10, available at:

https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20170125_migration_on_the_central_mediterranean_route_-_managing_flows_saving_lives_en.pdf.

Council in September 2017 that: ‘*The conditions of detention in most facilities are characterized by chronic severe overcrowding, poor hygiene, and a lack of access to basic necessities or adequate medical care. Undernutrition in adults and children is rampant [...]*’.²⁵³ In November 2017, following a UN visit to four DCIM facilities earlier that month, the UN High Commissioner for Human Rights called the suffering of migrants in Libyan detention centers ‘*an outrage to the conscience of humanity*’ and concluded that ‘*the detention system for migrants in Libya is broken beyond repair*’.²⁵⁴

Torture and other ill-treatment by detention guards

As mentioned above, the lack of control and judicial oversight over DCIM detention centers by the Libyan authorities has facilitated an environment of impunity for torture and other ill-treatment of migrants by detention guards, which include DCIM officials as well as members of militias. Often such torture is carried out for the purpose of extracting money, usually as ransom, or other profit. In this sense, migrants interviewed by Amnesty International and UNSMIL (in 2016 and 2017) who had been detained in Libya reported that guards would torture them while on the phone with their relatives, forcing their relatives to listen to their screams in order to compel them to transfer money. Some even recounted that others were shot dead or died from torture when they or their families were unable to pay the requested amount. Besides torture, migrants also reported to be ill-treated by detention guards for no apparent reason. The described torture and other ill-treatment mostly took place in the form of beatings, including with items such as sticks, rocks and metal bars, but also through food and water deprivation.²⁵⁵ Half of the migrants interviewed by UNSMIL reported to have witnessed the deaths of other detainees as a result of beatings and other violence, as well as due to severe malnutrition and illness.²⁵⁶ Based on interviews conducted by MSF in 2017 with 70 migrants who had been intercepted by the Libyan coast guard and returned to Libya, 39 of them reportedly said they had experienced violence, torture and other ill-treatment in the place they were held captive upon arrival.²⁵⁷ Survivors of the above-mentioned 6 November 2017 incident, who were sent back to Libya by the Libyan coast guard, reported that, upon arrival, they were detained in Tripoli’s Tajoura detention center for one month (in overcrowded conditions and with limited food and water), during which they were regularly beaten by guards with ropes and pipes.²⁵⁸

The violence reported by these migrants seems to be confirmed by their injuries. Many migrants interviewed by UNSMIL bore signs of serious injuries indicating beatings, as well as gunshot and knife injuries.²⁵⁹ From September to November 2017, MSF reported to have treated

²⁵³ UN Security Council 2017, above n 223, para. 42.

²⁵⁴ ‘EU’s Policy of Helping Libya Intercept Migrants Is ‘Inhuman’, Says UN’, *The Guardian (AFP)*, 14 November 2017, available at: <https://www.theguardian.com/world/2017/nov/14/eu-libya-coastguard-detention-centres-migration-mediterranean-un-zeid-raad-al-husseini>.

²⁵⁵ Amnesty International 2017, above n 196, pp. 31-33; OHCHR and UNSMIL 2016, above n 182, pp. 17-18.

²⁵⁶ OHCHR and UNSMIL 2016, above n 182, p. 17.

²⁵⁷ Heller and Pezzani 2018, above n 13, p. 84. Original source referenced: MSF 2017 data shared with the authors.

²⁵⁸ *Ibid.*, p. 98.

²⁵⁹ OHCHR and UNSMIL 2016, above n 182, p. 17.

over 76 migrants in Libya's detention centers for violence-related injuries, including broken limbs, electrical burns and gunshot wounds.²⁶⁰

In September 2017, the UN Secretary General confirmed the risk of torture and other ill-treatment against migrants in detention centers in Libya, as well as other abuses described below, by stating that: *'In detention facilities, controlled by either the [DCIM] or directly by armed groups, migrants and refugees are at significant risk of torture and other ill-treatment, forced labor, sexual violence and exploitation.'*²⁶¹

Sexual abuse

Migrants in Libyan detention centers, in particular women, also face sexual abuse. Interviewed migrants have described sexual abuse in detention as being widespread, affecting almost all women. According to their accounts, they witnessed women being taken away by armed men and guards for periods varying between hours and days, and when the women returned they said they had been sexually abused.²⁶² Indeed, alleged victims of sexual abuse reported to have experienced rape and other sexual violence in detention centers at the hands of armed men and guards.²⁶³ In some cases, sex was used as an alternative to payment for release.²⁶⁴ Doctors, gynecologists and psychologists who have treated migrants coming from Libya confirmed that many (including men) were sexually abused.²⁶⁵

Forced labor and slavery

Migrants in Libya's detention centers have also been subjected to forced labor and slavery. Migrants interviewed by UNSMIL reported that they were forced to work in farms, as domestic workers, construction and road paving workers, and rubbish collectors, in order to buy their way out of detention or without receiving any payment. In some cases, DCIM guards were paid for their work. In the evenings, after working during the day, some were taken back to the detention centers, while others were held at the workplace for a longer period, sometimes for weeks or months. Their accounts also describe unbearable working conditions, with little or no protection against the elements and often with inadequate food and water, resulting in rapidly deteriorating health conditions. Furthermore, migrants recounted that in order to force them to work, employers or DCIM staff threatened to kill them, beat them with items or shot at them. Some even witnessed the killing of friends who were unable to work.²⁶⁶

²⁶⁰ MSF 2018, above n 247.

²⁶¹ UN Security Council 2017, above n 223, para. 41.

²⁶² Leghtas 2017, above n 229, pp. 11-12; OHCHR and UNSMIL 2016, above n 182, pp. 21-22.

²⁶³ Human Rights Watch 2016, above n 181; 'EU's Policy of Helping Libya Intercept Migrants Is 'Inhuman', Says UN', 2017, above n 254.

²⁶⁴ Leghtas 2017, above n 229, p. 12; L. Dearden, 'EU Helping Force Refugees Back to 'Hell on Earth' in Push to Stop Boat Crossings from Libya, Report Finds', *The Independent*, 1 June 2017, available at: <https://www.independent.co.uk/news/world/europe/eu-refugee-boats-stop-migrant-crisis-libya-drowning-mediterranean-report-refugees-international-a7766531.html>.

²⁶⁵ Leghtas 2017, above n 229, pp. 11-12; Human Rights Watch 2016, above n 181.

²⁶⁶ OHCHR and UNSMIL 2016, above n 182, pp. 18-19.

While other previously detained migrants have shared similar stories of being leased out by the detention center for day labor under harsh conditions, some said they were sold as slaves to armed groups. Based on the number of accounts, it has been suggested that such forced labor and slavery is widespread in Libya's detention system.²⁶⁷

Outside detention centers

Even if migrants in Libya manage to regain their freedom and find themselves outside the detention centers, they are constantly at risk of being abducted, exploited and abused, in particular through their exposure to the generalized lawlessness and violence in the war-torn country.²⁶⁸ As mentioned above, Libya's political landscape has been fragmented since the outbreak of the second civil war in 2014, with two main governments competing for power, each with limited control over parts of the country, and with various armed groups fighting on the ground. Due to the lack of a central state authority with control on the ground and the absence of an effective security apparatus, these armed groups are able to carry out crimes in total impunity, with many engaging in the lucrative businesses of smuggling and trafficking migrants.²⁶⁹ In this context, migrants have been subjected to the above-mentioned abuses committed by these armed groups.²⁷⁰

Migrants have reported abuses like beatings, rape, forced labor, and food and water deprivation committed by armed groups pledging alliance to Islamic State.²⁷¹ So-called 'Asma Boys', referring to young members of armed criminal gangs, are known for the kidnapping and torturing of migrants for money.²⁷² Cases have also been reported of migrants being held by armed groups in so-called connection houses,²⁷³ where they face abuses like beatings and sexual violence,²⁷⁴ before being sold to traffickers.²⁷⁵ In 2017, the presence of slave markets in Libya was uncovered, exposing how migrants are bought and sold and women traded as sex slaves.²⁷⁶

²⁶⁷ 'Migrant Slavery in Libya: Nigerians Tell of Being Used as Slaves', *BBC*, 2 January 2018, available at: <https://www.bbc.com/news/world-africa-42492687>; Amnesty International 2017, above n 196, pp. 6 and 22.

²⁶⁸ UN Security Council 2017, above n 223, paras. 43-44; Amnesty International 2017, above n 196, p. 23.

²⁶⁹ Amnesty International 2017, above n 196, pp. 15-17.

²⁷⁰ UN Security Council, *Report of the Secretary-General on the United Nations Support Mission in Libya*, 22 August 2017, UN doc. S/2017/726, para. 34; Amnesty International 2017, above n 196, pp. 22-23.

²⁷¹ OHCHR and UNSMIL 2016, above n 182, p. 23.

²⁷² Amnesty International 2017, above n 196, p. 23; S. Scherer, 'Migrant Boys Tell of Attacks, Murder in Libyan 'Hell'', *Reuters*, 10 June 2016, available at: <https://www.reuters.com/article/us-europe-migrants-libya-gangs/migrant-boys-tell-of-attacks-murder-in-libyan-hell-idUSKCN0YW187>.

²⁷³ Places where armed groups, smugglers and traffickers hold migrants while in transit (before transfer to the next location).

²⁷⁴ OHCHR and UNSMIL 2016, above n 182, , pp. 15, 17 and 21-22.

²⁷⁵ UN Security Council 2017, above n 223, para. 43.

²⁷⁶ IOM, *IOM Learns of 'Slave Market' Conditions Endangering Migrants in North Africa*, 11 April 2017, available at: <https://www.iom.int/news/iom-learns-slave-market-conditions-endangering-migrants-north-africa>; N. Elbagir, R. Razek, A. Platt and B. Jones, 'People for Sale: Where Lives Are Auctioned for \$400', *CNN*, 14 November 2017, available at: <https://edition.cnn.com/2017/11/14/africa/libya-migrant-auctions/index.html>.

It should be noted that migrants originating from sub-Saharan Africa (constituting around 65 per cent of all migrants in Libya²⁷⁷) are particularly vulnerable to abuses due to racism and xenophobia in Libya towards migrants of this origin, whose large influx is viewed by Libyans as threatening.²⁷⁸

2.3 Human rights violations

As described in the previous sections, migrants intercepted and returned to Libya by the Libyan coast guard are subjected to violent and reckless conduct of the Libyan coast guard and abusive treatment in the detention centers to which they are transferred. This section analyzes to what extent such conduct towards migrants violates their human rights. In order to do so, Libya's human rights obligations under international law are first set out.

Libya is party to the core international human rights treaties of the UN, including the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1979 Convention on the Elimination of All Forms of Discrimination against Women, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the 1989 Convention on the Rights of the Child, and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.²⁷⁹ On a regional level, Libya is party to the 1981 African Charter on Human and Peoples' Rights (ACHPR),²⁸⁰ as well as its 2003 Protocol on the Rights of Women in Africa.²⁸¹ As shown below, Libya's conduct towards migrants violates various human rights contained in these treaties. Notably, some of these human rights provisions represent customary international law, and in this sense bind Libya as well.²⁸²

Violations of the right to life

The right to life is enshrined in Article 6 ICCPR and Article 4 ACHPR. The right includes a non-derogable prohibition on the arbitrary deprivation of life. Under Article 2 ICCPR, state parties

²⁷⁷ IOM, Displacement Tracking Matrix, *Libya's Migrant Report, Round 21, July - August 2018*, 3 October 2018, available at: <http://www.globaldtm.info/libya/>.

²⁷⁸ Amnesty International 2017, above n 196, p. 23.

²⁷⁹ OHCHR, *Status of Ratification Interactive Dashboard* (website), available at: <http://indicators.ohchr.org/>.

²⁸⁰ African Commission on Human and Peoples' Rights, *African Charter on Human and Peoples' Rights* (website), available at: <http://www.achpr.org/instruments/achpr/>.

²⁸¹ African Commission on Human and Peoples' Rights, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (website), available at: <http://www.achpr.org/instruments/women-protocol/#2>.

²⁸² According to the UN Human Rights Committee, the prohibitions of slavery, torture and ill-treatment, arbitrary deprivation of life, and arbitrary arrest and detention all represent customary international law. See: UN Human Rights Committee, *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant*, 11 November 1994, UN doc. CCPR/C/21/Rev.1/Add.6, para. 8.

must *'ensure'* the Covenant rights of all individuals within their territory and under their jurisdiction, which includes a negative duty to refrain from violating the Covenant rights and a positive duty to protect the Covenant rights (including the right to life), thereby taking appropriate measures and exercising due diligence to prevent any violations of those rights.²⁸³ Article 6 ICCPR has been interpreted by the UN Human Rights Committee as requiring states to adopt such positive measures *'not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces'*.²⁸⁴ The circumstances under which a person may be deprived of his life by state authorities are to be limited by law.²⁸⁵ It should be noted, however, that such circumstances and any other restriction of a Covenant right must be in accordance with the Covenant and *'necessary'* and *'proportionate to the pursuance of legitimate aims'*.²⁸⁶ According to the UN Human Rights Committee, the right to life also includes the obligation of states to investigate and prosecute potential cases of unlawful deprivation of life.²⁸⁷ In this regard, loss of life occurring in custody creates a presumption of arbitrary deprivation of life by state authorities, which can only be rebutted through a proper investigation.²⁸⁸

The ACHPR commits state parties to recognize the Charter rights and to *'undertake to adopt legislative or other measures to give effect to them'*.²⁸⁹ The Charter also establishes the African Commission on Human and Peoples' Rights²⁹⁰ to *'ensure the protection'* of the Charter rights and interpret them,²⁹¹ which arguably implies the binding nature of these rights.²⁹² The Commission has interpreted Article 4 ACHPR as including a positive duty for states to protect individuals from *'real and immediate risks to their lives'*, allowing the intentional lethal use of force by law enforcement officials only when *'strictly unavoidable in order to protect life'*.²⁹³ With regard to persons held in custody, the Commission has read Article 4 as requiring states to *'protect all detained persons from violence or from emergencies that threaten their lives, as well as to provide the necessary conditions of a dignified life, including food, water, adequate*

²⁸³ UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant ('General Comment No. 31')*, 29 March 2004, UN doc. CCPR/C/21/Rev.1/Add.13, paras. 6-8.

²⁸⁴ UN Human Rights Committee, *General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, para. 3.

²⁸⁵ *Ibid.*, para 3.

²⁸⁶ UN Human Rights Committee, *General Comment No. 31*, UN doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 6.

²⁸⁷ UN Human Rights Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life* (draft version), July 2017, UN doc. CCPR/C/GC/36, paras. 31-33.

²⁸⁸ *Ibid.*, para. 33.

²⁸⁹ African Charter on Human and Peoples' Rights, 1981, Article 1.

²⁹⁰ *Ibid.*, Article 30.

²⁹¹ *Ibid.*, Article 45(2) and (3).

²⁹² R. Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis', *Virginia Journal of International Law* 1982, vol. 22, no. 4, p. 689; R. Murray, *The African Commission on Human and Peoples' Rights and International Law*, Oxford: Hart Publishing 2000, pp. 53-55.

²⁹³ African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, 12 December 2015, paras. 27 and 41.

ventilation, an environment free from disease, and the provision of adequate healthcare'.²⁹⁴

Article 4 also includes a duty to investigate and prosecute potential cases of unlawful deprivation of life.²⁹⁵

As mentioned above, intercepted migrants have been killed directly by the Libyan coast guard and by detention guards in Libya's detention centers. Since nothing indicates a clear legal basis for such conduct or conformity to the principles of necessity and proportionality, such killings can be qualified as arbitrary and thus in violation of the right to life. Furthermore, the Libyan authorities have failed to comply with their duty to protect the lives of migrants, thereby violating the right to life. Instead of exercising due diligence, the Libyan coast guard has demonstrated reckless and dangerous behavior, putting the lives of migrants at risk and even causing deaths. The abusive treatment of migrants in detention centers formally run by the Libyan government also threatens their lives, resulting in deaths as well. In addition, Libyan authorities seem to have failed to conduct proper investigations into these deaths, again breaching the right to life.

Violations of the prohibition of torture and other ill-treatment

The absolute prohibition of torture and other cruel, inhuman or degrading treatment (ill-treatment) is enshrined in Article 7 ICCPR (complemented by Article 10 sub 1 ICCPR), Article 5 ACHPR and the CAT. Under Article 7 ICCPR, in conjunction with Article 2 ICCPR, states must take the necessary measures to protect individuals against acts of torture or cruel, inhuman or degrading treatment, which may be acts that cause physical pain as well as mental suffering, inflicted by state officials or private actors.²⁹⁶ Article 7 is complemented by Article 10 sub 1 of the Covenant, which stipulates that '*all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person*', independent of the available material resources in the state concerned.²⁹⁷ Article 5 ACHPR similarly includes a '*right to the respect of the dignity inherent in a human being*'.

Under the CAT, states are obligated to take measures to prevent acts of torture and other acts of cruel, inhuman or degrading treatment.²⁹⁸ Such acts have to be '*committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*'.²⁹⁹ With regard to detention centers run by private actors, the Committee against Torture has considered that '*personnel are acting in an official capacity on account of their responsibility for carrying out the State function*', which means that, like state officials, they are

²⁹⁴ Ibid., para. 36.

²⁹⁵ Ibid., para 7.

²⁹⁶ UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* ('General Comment No. 20'), 10 March 1992, paras. 2 and 5.

²⁹⁷ UN Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992, para. 4.

²⁹⁸ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984, Articles 2 and 16.

²⁹⁹ Ibid., Articles 1 and 16.

obligated to take all effective measures to prevent torture and other ill-treatment.³⁰⁰ With regard to acts of torture, severe pain or suffering, whether physical or mental, has to be intentionally inflicted on a person for such purposes as ‘*obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind*’.³⁰¹ Pain or suffering resulting from lawful sanctions is not considered torture.³⁰² Article 12 CAT (read together with Article 16 CAT) requires states to investigate potential acts of torture and other ill-treatment.

Intercepted migrants have been beaten, including with items, shot at and threatened with a gun by the Libyan coast guard, in particular to intimidate and coerce them, causing physical pain and mental suffering. Migrants in Libyan detention centers have also been tortured and ill-treated by detention guards, including through beatings and food and water deprivation, often for reasons of money extortion. Such conduct against migrants, which does not seem to be based on lawful sanctions, violates the prohibition of torture and other ill-treatment. Furthermore, it can be argued that the exposure of migrants to inhuman detention conditions, causing diseases, malnutrition and other suffering, shows a lack of respect for human dignity and amounts to ill-treatment.³⁰³ The sexual abuse of detained migrants and their subjection to forced labor and slavery can be considered ill-treatment as well.³⁰⁴ Libya has failed to take the necessary measures to protect migrants against these acts, thereby violating the prohibition of torture and other ill-treatment. In addition, Libyan authorities seem to have failed to investigate acts of torture and other ill-treatment against migrants, resulting in another violation.

Violations of the right to liberty

The right to liberty is enshrined in Article 9 ICCPR and Article 6 ACHPR. The right includes a non-derogable prohibition on arbitrary arrest and detention. Any deprivation of liberty must be based on grounds and procedures established by law, otherwise its arbitrary. However, according to the UN Human Rights Committee, the notion of arbitrariness is broader than unlawful, as it includes elements of ‘*inappropriateness, injustice, lack of predictability and due process of law*’ and ‘*reasonableness, necessity and proportionality*’.³⁰⁵ Article 9 ICCPR, read together with Article 2 ICCPR, requires states to take the necessary measures to protect individuals against

³⁰⁰ UN Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, UN doc. CAT/C/GC/2, para. 17.

³⁰¹ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984, Article 1.

³⁰² *Ibid.*

³⁰³ UN Security Council 2017, above n 223, para. 42.

³⁰⁴ African Commission on Human and Peoples’ Rights, *General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)* (‘*General Comment No. 4*’), 11 May 2017, para. 57.

³⁰⁵ UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)* (‘*General Comment No. 35*’), 16 December 2014, UN doc. CCPR/C/GC/35, para. 12.

arbitrary arrest and detention, including against abduction or detention by private actors (like armed groups) operating within their territory.³⁰⁶

Based on Article 9 sub 2 ICCPR, anyone who is arrested (meaning any apprehension commencing a deprivation of liberty³⁰⁷) has to be promptly informed of the reasons for his arrest and any charges against him. Article 9 sub 3 requires those arrested or detained on a criminal charge to be brought promptly before a judge or other judicial authority and to be entitled to trial within a reasonable time or to release. The requirement does not depend on the assertion of formal charges, but on the arrest or detention of a person on suspicion of criminal activity.³⁰⁸ Article 9 sub 4 provides anyone deprived of his liberty through arrest or detention the right to review by a court of the legality of his detention (and to be released if detention is unlawful). The Commission of the ACHPR has interpreted Article 6 of the Charter in line with the provisions of Article 9 ICCPR.³⁰⁹

According to the UN Human Rights Committee, detention for the purpose of immigration control is not per se arbitrary. Asylum seekers who unlawfully enter a state may be detained for a short period in order to document their entry, record their claims and determine their identity. However, any further detention requires particular reasons specific to the individual (like a danger of crimes against others or a risk to national security), may only be imposed as a measure of last resort, must be subject to judicial review, and (when necessary) should take place in appropriate, sanitary, non-punitive facilities.³¹⁰ According to the UN Special Rapporteur on the Human Rights of Migrants and the UN Working Group on Arbitrary Detention, irregular entry may never be considered a criminal offence as it is not a crime per se against persons, property or national security. Criminalizing it exceeds the legitimate interest of states to control irregular immigration and leads to unnecessary detention.³¹¹

Libyan law criminalizes irregular migration and in this sense provides a legal basis for the arrest and detention of migrants. However, as mentioned above, any restriction of a Covenant right must be necessary and proportionate to the pursuance of legitimate aims. It can be argued that the criminalization of irregular migration, punished by imprisonment, is not necessary and proportionate to Libya's aim of controlling such migration. In particular, Libya does not detain illegal migrants for a short period in order to document their entry, record their claims and determine their identity, which could be considered necessary and proportionate to the aim of immigration control. Instead, migrants brought into Libya's detention centers are not formally registered, are stripped of their documents and belongings, and are detained for periods of up to several months. It can be argued that such detention is unnecessary and unproportionate, as well

³⁰⁶ Ibid., para. 7.

³⁰⁷ Ibid., para. 13.

³⁰⁸ Ibid., para. 32.

³⁰⁹ African Commission on Human and Peoples' Rights, *Resolution On Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment In Africa (The Robben Island Guidelines)* ('The Robben Island Guidelines'), 23 October 2002, paras. 21-32.

³¹⁰ UN Human Rights Committee, *General comment No. 35*, 16 December 2014, para. 18.

³¹¹ UN General Assembly, *Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau*, 2 April 2012, UN doc. A/HRC/20/24, para. 13.

as inappropriate, and thus arbitrary and in violation of the right to liberty. Furthermore, migrants face indefinite detention in Libya, as detention generally occurs outside judicial proceedings, without legal oversight by judicial authorities or legal remedies to challenge detention. This makes such detention arbitrary, as it lacks predictability and due process of law, and thus in breach of the right to liberty (and more specifically sub 3 and 4 of Article 9 ICCPR). In addition, migrants have been arrested without being informed of the reasons for their arrest, which constitutes arbitrary arrest in contravention of the right to liberty (and more specifically sub 2 of Article 9 ICCPR). Libya has thus acted in disregard of its duty to protect migrants against arbitrary arrest and detention. Moreover, Libyan authorities have failed to protect migrants against violations of their right to liberty committed by private actors, like armed groups, which have freely abducted and detained migrants.

Violations of the prohibition of sexual violence (against women)

International human rights law clearly indicates that sexual violence is prohibited and more explicitly formulates such a prohibition with regard to women. As mentioned, sexual violence can be considered ill-treatment, which is explicitly prohibited under the ICCPR, the ACHPR and the CAT. Sexual violence against women specifically is prohibited under the Convention on the Elimination of All Forms of Discrimination against Women. According to the Convention's Committee, discrimination against women as defined under Article 1 of the Convention encompasses gender-based violence (violence directed against a woman because she is a woman or affecting women disproportionately), which includes sexual harm or suffering or threats thereof.³¹² Under Article 2, states are obliged to take measures to eliminate such discrimination (and thus sexual violence) against women by state and private actors. Article 6 of the Convention commits states to take measures to '*suppress all forms of traffic in women and exploitation of prostitution of women*'.

The Protocol to the ACHPR on the Rights of Women in Africa also prohibits sexual violence against women. Article 3 sub 4 of the Protocol requires states to take measures to ensure the protection of women from all forms of violence, '*particularly [...] sexual violence*'. Article 4 prohibits all forms of exploitation and ill-treatment of women and commits states to take various specific measures to eliminate, prevent and punish all forms of violence against women, including '*unwanted or forced sex*'. The Commission of the ACHPR has defined sexual violence as '*any non-consensual sexual act, a threat or attempt to perform such an act, or compelling someone else to perform such an act on a third person*'. It also notes that sexual violence does not necessarily involve physical contact and takes many forms, including sexual harassment, rape, forced nudity, and human trafficking for sexual exploitation and slavery.³¹³

Migrants in Libyan detention centers, mostly women, have been subjected to sexual abuse, including rape and other sexual violence. With regard to sexually abused men and women, it can

³¹² UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, 1992, para. 6.

³¹³ African Commission on Human and Peoples' Rights, *Guidelines on Combating Sexual Violence and its Consequences in Africa*, 5 November 2017, pp. 14-15.

be argued that this violates the prohibition of ill-treatment (mentioned above). With regard to sexually abused women specifically, this also violates the prohibition of sexual violence against women contained in the just mentioned Convention and Protocol on women's rights. Libya has failed to take measures to eliminate, prevent and punish such sexual violence (including by private actors like armed groups), thereby breaching its obligations to do so.

Violations of the prohibition of slavery and forced labor

Article 8 ICCPR explicitly prohibits slavery, slave trade and forced labor in a non-derogable manner. The Article does not include labor as punishment in pursuance of a sentence by a competent court or any work normally required of a person under detention in consequence of a lawful court order.³¹⁴ Article 8 ICCPR, in combination with Article 2 ICCPR, obligates states to take the necessary measures to protect individuals against being subjected to slavery, slave trade and forced labor. Under Article 5 ACHPR, all forms of exploitation and degradation of man are prohibited, including slavery and slave trade. As mentioned, forced labor and slavery can be considered ill-treatment as well.

Detained migrants in Libya have been forced to work without payment and in unbearable working conditions outside the official detention centers. Such forced labor, which does not seem to follow any court decision, violates the prohibition of forced labor. Furthermore, the holding and selling of migrants as slaves clearly violates the prohibition of slavery and slave trade. Libya has not taken the necessary measures to protect migrants from such treatment, thereby acting in contravention of its obligations.

Violations of the right to an adequate standard of living and the right to health

The right to an adequate standard of living, including adequate food, clothing and housing, is enshrined in Article 11 ICESCR, and the right to health in Article 12 ICESCR (both rights also contain a right to adequate water³¹⁵). Article 2 sub 1 ICESCR obligates states to take steps, to the maximum of their available resources, to progressively realize the Covenant rights by all appropriate means. Besides this obligation of '*progressive realization*', the Article also includes a core obligation for states to '*ensure*', thereby making every effort, the satisfaction of minimum essential levels of each right, as a matter of priority, taking into account the maximum available resources of the state concerned.³¹⁶

With regard to adequate food and water, this core obligation requires states to ensure for everyone under its jurisdiction, including prisoners,³¹⁷ '*access to the minimum essential food*

³¹⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 1966, Article 8(3).

³¹⁵ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* ('General Comment No. 15'), 20 January 2003, UN doc. E/C.12/2002/11.

³¹⁶ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, para. 10.

³¹⁷ UN General Assembly, *Resolution 45/111: Basic Principles for the Treatment of Prisoners*, 14 December 1990, UN doc. A/RES/45/111, Annex, Principle 5.

which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger’,³¹⁸ and ‘access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease’, as well as access to adequate sanitation.³¹⁹ The right to housing means ‘to live somewhere in security, peace and dignity’ and requires inter alia ‘adequate privacy, adequate space, adequate security, adequate lighting and ventilation’.³²⁰ The core obligations of the right to health³²¹ include ensuring ‘access to health facilities, goods and services on a non-discriminatory basis’, ‘access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone’ and ‘access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water’.³²² States must also guarantee non-discrimination, including based on national or social origin or other status, in the exercise of these rights.³²³

The right to health is also enshrined in Article 16 ACHPR, which requires states to protect the health of people and to provide medical attention when they are sick. Furthermore, the provision of an adequate standard of living and healthcare could also be required under the right to life and the prohibition of torture and other ill-treatment.

As mentioned, migrants in Libya’s detention centers face inhuman detention conditions, including overcrowding, a lack of light and ventilation, a lack of sanitation facilities, and a lack of adequate food and water, which have caused diseases and malnutrition among migrants. Furthermore, access to medical care for migrant detainees is grossly inadequate and discriminates against migrants. By subjecting migrants to such conditions, Libya violates the core obligations of the right to an adequate standard of living and the right to health. While Libya’s resources in this regard are of course limited, especially following the civil war, it seems unlikely that Libya has made every effort, using all its available resources, to satisfy these minimum obligations as a matter of priority.

Violations of the prohibition of refoulement

The non-derogable prohibition of refoulement is contained in various human rights provisions. The UN Human Rights Committee has held that Article 2 ICCPR includes the obligation of states not to remove a person to a country where there is a real risk of irreparable harm, such as

³¹⁸ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art. 11) ('General Comment No. 12')*, 12 May 1999, UN doc. E/C.12/1999/5, para. 14.

³¹⁹ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 15*, 20 January 2003, UN doc. E/C.12/2002/11, para. 37.

³²⁰ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, para. 7.

³²¹ The right to ‘the enjoyment of the highest attainable standard of physical and mental health’. See: UN, *International Covenant on Economic, Social and Cultural Rights*, 1966, Article 12(1).

³²² UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 11 August 2000, UN doc. E/C.12/2000/4, para. 43.

³²³ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 1966, Article 2(2).

arbitrary deprivation of life (under Article 6) or torture and ill-treatment (under Article 7).³²⁴ According to the Committee, Article 7 itself also includes the obligation of states not to expose individuals to the danger of torture or cruel, inhuman or degrading treatment upon return to another country.³²⁵ The Commission of the ACHPR has similarly interpreted Article 5 of the Charter as including the obligation of states to ensure that ‘*no one is expelled or extradited to a country where he or she is at risk of being subjected to torture*’.³²⁶ Article 3 CAT explicitly provides that states may not return a person to a state where they would be in danger of being subjected to torture. As mentioned, with regard to refugees, the Convention Governing the Specific Aspects of Refugee Problems in Africa also contains a prohibition of refoulement. In addition, the prohibition of refoulement is considered a principle of customary international law.³²⁷

As mentioned above, Libyan law criminalizing irregular migration allows for the deportation of illegal migrants, whether they are refugees or not. Mass deportations of detained migrants have indeed been carried out by Libya and detainees remain at risk of being forcibly returned to their countries of origin or other countries without any consideration of their individual circumstances. As a result, migrants in Libyan detention centers risk being returned by Libya to countries where they face a real risk of ill-treatment, in violation of the prohibition of refoulement. As indicated by the lack of protection for asylum seekers in the country, Libya does not provide the necessary protection to refugees to prevent such violations.

Violations of the right to an effective remedy

According to the UN General Assembly, under international human rights law, states are obliged to provide to victims of human rights violations access to justice and effective remedies, including reparation.³²⁸ Article 2 sub 3 ICCPR explicitly commits states to ensure that anyone whose Covenant rights are violated has an effective remedy, determined and enforced by competent authorities. Article 14 CAT contains the right to an effective remedy as well, committing states to ensure that victims of torture obtain redress and have an enforceable right to fair and adequate compensation. The ACHPR’s Commission has similarly held that state parties under the ACHPR are obliged to ensure that victims of violations of Charter rights have access to and obtain redress, which encompasses the right to an effective remedy and adequate reparation.³²⁹ While under the ICESCR no explicit right to an effective remedy exists, the

³²⁴ UN Human Rights Committee, *General Comment No. 31*, UN doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 12.

³²⁵ UN Human Rights Committee, *General Comment No. 20*, 10 March 1992, para. 9.

³²⁶ African Commission on Human and Peoples’ Rights, *The Robben Island Guidelines*, 23 October 2002, para. 15.

³²⁷ E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge: Cambridge University Press 2003, pp. 150-163.

³²⁸ UN General Assembly, *Resolution 60/147: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005, UN doc. A/RES/60/147.

³²⁹ African Commission on Human and Peoples’ Rights, *General Comment No. 4*, 11 May 2017, paras. 1 and 8.

Covenant's Committee has more or less implied such a right (in most cases) by stating that: '*A State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not 'appropriate means' within the terms of article 2.1 of the Covenant or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other 'means' used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.*'³³⁰

Libya has a weak and largely non-functional judiciary. Migrants are detained outside judicial proceedings, with no legal remedies to challenge their detention. The country does not consider individual complaints by migrants and has not accepted any of the inquiry procedures foreseen in several human rights treaties.³³¹ Thus, Libya does not seem to provide effective remedies to migrants whose rights have been violated, thereby breaching their right to an effective remedy.

Conclusion

Migrants who are intercepted at sea and returned to Libya by the Libyan coast guard, with the support of Italy, are subjected to violent and reckless conduct of the Libyan coast guard and abusive treatment in the detention centers to which they are transferred. Such conduct towards migrants amounts to various human rights violations by Libya, including violations of the right to life, the prohibition of torture and other ill-treatment, the right to liberty, the prohibition of sexual violence (against women), the prohibition of slavery and forced labor, the right to an adequate standard of living and the right to health, the prohibition of refoulement, and the right to an effective remedy. Thus, instead of facing Italian shores, migrants halted by the Libyan coast guard in their attempt to cross the Mediterranean in search of safety are destined to face a range of gross human rights violations.

³³⁰ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The Domestic Application of the Covenant*, 3 December 1998, UN doc. E/C.12/1998/24, para. 3.

³³¹ De Guttry, Capone and Sommaro 2018, above n 28, p. 46.

Chapter 3: Italy's responsibility under international law

Introduction

This chapter answers the research question by analyzing to what extent Italy can be held responsible under international law for the human rights violations of migrants intercepted at sea and returned to Libya by the Libyan coast guard through its support of the Libyan coast guard in doing so, thereby drawing on the findings of the previous chapters. First, the ILC Articles are analyzed as a source for determining state responsibility under international law. Secondly, the relevant rules of the ILC Articles for the determination of Italy's responsibility are set out. The third section applies these rules on state responsibility to Italy's conduct in order to find out to what extent it can be held responsible under the ILC Articles and what the consequences of such responsibility are. The final section examines the possibility of Italy's responsibility under human rights treaties.

3.1 State responsibility under international law: the ILC Articles

For a long time, the idea of state responsibility (responsibility of states for wrongful behavior) existed in the form of customary rules, confirmed and elaborated in the practice of states and in the judgments of courts and tribunals. Given the importance of these customary rules on state responsibility for the enforcement of international law, the thought arose after World War II to work towards their codification,³³² as part of the great effort to codify international law.³³³

In 1947, the International Law Commission (ILC) was established by the UN General Assembly³³⁴ as part of its mandate under the UN Charter to '*initiate studies and make recommendations for the purpose of [...] encouraging the progressive development of international law and its codification*'.³³⁵ In accordance with this mandate, the object of the ILC was defined as '*the promotion of the progressive development of international law and its codification*'.³³⁶ The Commission consists of 34 members of recognized competence in international law from different states,³³⁷ representing all continents.³³⁸ Following its

³³² J. Klabbbers, *International Law*, Cambridge: Cambridge University Press 2013, p. 125.

³³³ D.D. Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority', *American Journal of International Law* 2002, vol. 96, p. 859.

³³⁴ UN General Assembly, *Resolution 174 (II): Establishment of an International Law Commission*, 21 November 1947.

³³⁵ United Nations, *Charter of the United Nations*, 1945, Article 13(1)(a).

³³⁶ UN General Assembly, *Statute of the International Law Commission*, 1947, Article 1(1).

³³⁷ *Ibid.*, Article 2a(1) and (2).

³³⁸ UN General Assembly, *Resolution 36/39: Enlargement of the International Law Commission: Amendments to Articles 2 and 9 of the Statute of the Commission*, 18 November 1981, UN doc. A/RES/36/39.

establishment, the topic of state responsibility was selected as deserving the ILC's attention and work began in 1956. In 1996, after a long process involving the efforts of various Special Rapporteurs,³³⁹ the ILC provisionally adopted a full set of draft articles on state responsibility on first reading.³⁴⁰ In 2001, following the efforts of Special Rapporteur James Crawford during the second reading,³⁴¹ the ILC finally adopted the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles), a set of 59 provisions with commentary (for the interpretation of the Articles³⁴²).³⁴³

The ILC also recommended to the General Assembly, in accordance with its Statute,³⁴⁴ to take note of the ILC Articles in a resolution and to annex the Articles to the resolution, as well as to consider, '*at a later stage, and in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the [Articles] with a view to concluding a convention on the topic*'.³⁴⁵ The recommendation was a compromise between those members of the Commission who believed that the Articles would serve the international legal order best as simply evidence of international law, in the sense of '*subsidiary means for the determination of rules of law*' within the meaning of Article 38(1)(d) of the Statute of the International Court of Justice (ICJ Statute), and those who thought that their potential would be best served via their adoption as an international convention, a source of law proper within the meaning of Article 38(1)(a) ICJ Statute.³⁴⁶ Following the ILC's recommendation, in the same year, the General Assembly took note of the Articles in a resolution, annexed them to the resolution, and recommended them to all governments without prejudice to their future adoption or other appropriate action.³⁴⁷

In 2004 (and in following years), the General Assembly adjourned its decision as to the final form of the Articles and invited member states to comment as to how the matter was to proceed.³⁴⁸ Several states responded to this request and submitted their comments.³⁴⁹ However, a

³³⁹ J. Crawford, *State Responsibility: The General Part*, Cambridge: Cambridge University Press 2013, pp. 35-37.

³⁴⁰ International Law Commission, *Yearbook of the International Law Commission 1996*, vol. II, part 2, New York and Geneva: United Nations 1998, pp. 57-73.

³⁴¹ Crawford 2013, above n 339, pp. 39-41.

³⁴² G. Gaja, 'Interpreting Articles Adopted by the International Law Commission', *British Yearbook of International Law* 2015, vol. 85, no. 1, pp. 10-20.

³⁴³ International Law Commission, *Yearbook of the International Law Commission 2001*, vol. II, part 2, New York and Geneva: United Nations 2007, pp. 20-143.

³⁴⁴ UN General Assembly, *Statute of the International Law Commission*, 1947, Article 23(1).

³⁴⁵ International Law Commission 2007, above n 343, p. 25.

³⁴⁶ Crawford 2013, above n 339, p. 42; International Law Commission 2007, above n 343, pp. 24-25.

³⁴⁷ UN General Assembly, *Resolution 56/83: Responsibility of States for Internationally Wrongful Acts*, 12 December 2001, UN doc. A/RES/56/83.

³⁴⁸ UN General Assembly, *Resolution 59/35: Responsibility of States for Internationally Wrongful Acts*, 2 December 2004, UN doc. A/RES/59/35.

³⁴⁹ UN General Assembly, *Report of the Secretary-General: Responsibility of States for Internationally Wrongful Acts, Comments and Information Received from Governments*, 9 March 2007, UN doc. A/62/63; UN General Assembly, *Report of the Secretary-General: Responsibility of States for Internationally Wrongful Acts, Comments and Information Received from Governments*, 14 May 2010, UN doc. A/65/96; UN General Assembly, *Report of the Secretary-General: Responsibility of States for Internationally Wrongful Acts, Comments and Information Received*

more comprehensive picture of state views regarding the Articles, reflecting these comments, emerges from the meetings of a working group established in 2016, pursuant to the General Assembly's request,³⁵⁰ to further examine the question of a convention or other appropriate action on the Articles.³⁵¹ This working group represents a significant number of states,³⁵² which expressed their view that the Articles had become a useful and authoritative statement of the rules on state responsibility and enjoyed widespread acceptance by states, with some or most of the Articles reflecting customary international law.³⁵³ With regard to future action on the Articles, many states supported negotiations of a convention on the basis of the Articles, as a convention would strengthen the rule of law and enhance legal certainty (especially regarding those elements of the Articles that would not enjoy the status of customary international law). Some states favored the adoption of the Articles by the General Assembly in the form of a declaration or resolution. A number of states did not support the negotiation of convention at the present time, as this could undermine the current consensus on the Articles and might result in a convention deviating from existing rules or not enjoying widespread acceptance by states. Instead, they favored retaining the Articles in their present form with no further action, permitting them to develop organically, through state practice and their application by courts and tribunals.³⁵⁴ So far, no definite decision as to the final form of the Articles has been reached by the General Assembly.

In 2007, following the General Assembly's request,³⁵⁵ the UN Secretary-General compiled a list of 129 decisions of international courts (including the International Court of Justice),

from Governments, 27 March 2013, UN doc. A/68/69; UN General Assembly, *Report of the Secretary-General: Responsibility of States for Internationally Wrongful Acts, Comments and Information Received from Governments*, 21 April 2016, UN doc. A/71/79.

³⁵⁰ UN General Assembly, *Resolution 65/19: Responsibility of States for Internationally Wrongful Acts*, 6 December 2010, UN doc. A/RES/65/19.; UN General Assembly, *Resolution 68/104: Responsibility of States for Internationally Wrongful Acts*, 16 December 2013, UN doc. A/RES/68/104.

³⁵¹ UN General Assembly, Sixth Committee, 71st Session, *Responsibility of States for Internationally Wrongful Acts (Agenda Item 74)* (website), 2016, available at: http://www.un.org/en/ga/sixth/71/resp_of_states.shtml.

³⁵² Including the Dominican Republic (on behalf of the Community of Latin and Caribbean States (CELAC)), South Africa (on behalf of the African Group), Finland (on behalf of the Nordic countries), New Zealand (also on behalf of Australia and Canada (CANZ)), Cuba, El Salvador, Singapore, the Russian Federation, Venezuela (Bolivarian Republic of), the United Kingdom of Great Britain and Northern Ireland, Israel, Algeria, Portugal, Greece, Iran (Islamic Republic of), Peru, Malaysia, the United States of America, Mexico and China.

³⁵³ UN General Assembly 2016, above n 351; UN General Assembly, Sixth Committee, 71st Session, *Summary Record of the 9th Meeting*, 7 October 2016, UN doc. A/C.6/71/SR.9; UN General Assembly, Sixth Committee, 71st Session, *Summary Record of the 31st Meeting*, 4 November 2016, UN doc. A/C.6/71/SR.31; UN General Assembly, Sixth Committee, 71st Session, *Summary Record of the 33rd Meeting*, 11 November 2016, UN doc. A/C.6/71/SR.33.

³⁵⁴ *Ibid.*

³⁵⁵ UN General Assembly, *Resolution 59/35: Responsibility of States for Internationally Wrongful Acts*, 2 December 2004, UN doc. A/RES/59/35.

tribunals and other bodies referring to the ILC Articles with approval.³⁵⁶ In 2010,³⁵⁷ 2013,³⁵⁸ and 2016,³⁵⁹ a further 153 decisions referring to the Articles were added to this list. A growing number of decisions of international courts, tribunals and other bodies thus approvingly refer to the ILC Articles, as acknowledged by the General Assembly, which has also recognized the importance and usefulness of the Articles.³⁶⁰ In addition, several states have submitted information on their state practice regarding the Articles to the Assembly, including cases before their national courts in which the Articles were referenced.³⁶¹ Importantly, courts have referred to various rules on state responsibility contained in the ILC Articles as reflecting customary international law. The ICJ, for example, has stated in the *Bosnian Genocide* case that: ‘*The conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility.*’³⁶² With regard to Article 8 ILC Articles, the Court held that: ‘*Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.*’³⁶³ Moreover, the Court referred to **Article 16** ILC Articles, concerning ‘*aid or assistance in the commission of an internationally wrongful act*’, as ‘*reflecting a customary rule*’.³⁶⁴

Since the ILC Articles follow from a non-legislative project or study by the ILC (aimed at promoting the progressive development and codification of international law), they cannot in themselves be considered a (binding) source of law in the sense of Article 38(1)(a-c) ICJ Statute. Instead, they are evidence of a source of law or ‘*subsidiary means for the determination of rules*

³⁵⁶ UN General Assembly, *Report of the Secretary-General: Responsibility of States for Internationally Wrongful Acts, Compilation of Decisions of International Courts, Tribunals and Other Bodies*, 1 February 2007, UN doc. A/62/62.

³⁵⁷ UN General Assembly, *Report of the Secretary-General: Responsibility of States for Internationally Wrongful Acts, Compilation of Decisions of International Courts, Tribunals and Other Bodies*, 30 April 2010, UN doc. A/65/76.

³⁵⁸ UN General Assembly, *Report of the Secretary-General: Responsibility of States for Internationally Wrongful Acts, Compilation of Decisions of International Courts, Tribunals and Other Bodies*, 30 April 2013, UN doc. A/68/72.

³⁵⁹ UN General Assembly, *Report of the Secretary-General: Responsibility of States for Internationally Wrongful Acts, Compilation of Decisions of International Courts, Tribunals and Other Bodies*, 21 April 2016, UN doc. A/71/80.

³⁶⁰ UN General Assembly, *Resolution 71/133: Responsibility of States for Internationally Wrongful Acts*, 13 December 2016, UN doc. A/RES/71/133.

³⁶¹ UN General Assembly, *Report of the Secretary-General: Responsibility of States for Internationally Wrongful Acts, Comments and Information Received from Governments*, 9 March 2007, UN doc. A/62/63; UN General Assembly, *Report of the Secretary-General: Responsibility of States for Internationally Wrongful Acts, Comments and Information Received from Governments*, 21 April 2016, UN doc. A/71/79.

³⁶² International Court of Justice (ICJ), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (‘*Bosnian Genocide Case*’), 26 February 2007, para. 385.

³⁶³ *Ibid.*, para. 401.

³⁶⁴ *Ibid.*, para. 420.

of law' in the sense of Article 38(1)(d) ICJ Statute.³⁶⁵ However, despite being a non-legislative codification, there is a general consensus among commentators, courts and states that the ILC Articles to a large extent accurately reflect customary international law on state responsibility in a highly authoritative manner.³⁶⁶ In this regard, it has been argued that the authority of the ILC Articles, in the sense of their acceptance and endorsement as reflecting existing law, follows from the institutional features of the ILC combined with certain properties of the Articles, as well as the context of uncertainty existing at the level of the sources of international law.³⁶⁷ To start with the latter, the Articles were adopted in the context of perceived insufficiency in the available law (a legal vacuum), a situation which made them, in the absence of alternatives, more authoritative.³⁶⁸ The institutional features of the ILC from which it derives its authority include its place in the UN system and its composition, consisting of academics and governmental officials of recognized competence in international law from states spread across all continents.³⁶⁹ Furthermore, the procedure followed by the ILC leading to the adoption of the Articles allows for careful consideration and maintains a dialogue with states and other relevant stakeholders, creating consensus.³⁷⁰ Finally, the properties of the Articles reinforcing their authority include the high technical quality of the text, the clear prescriptive form which conceals disagreements in practice and in doctrine, and the extensive commentaries presenting the authorities for each provision.³⁷¹

It can thus be argued that while the ILC Articles are not a formal source of law in themselves, they do constitute a **highly authoritative statement of the content of customary international law** on state responsibility. In this sense, the rules contained in the Articles can be used to determine state responsibility under international law.

3.2 The relevant rules of the ILC Articles

The ILC Articles formulate the basic rules of customary international law concerning the responsibility of states for internationally wrongful acts. According to Article 1 ILC Articles, '*every internationally wrongful act of a State entails the international responsibility of that State*'. The establishment of an internationally wrongful act of a state requires two elements, contained in Article 2. First, the conduct in question must be attributable to the state under

³⁶⁵ Caron 2002, above n 333, p. 867.

³⁶⁶ Crawford 2013, above n 339, p. 43; F.L. Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law', *International and Comparative Law Quarterly* 2014, vol. 63, no. 3, pp. 536 and 538; Klabbers 2013, above n 332, p. 125.

³⁶⁷ Bordin 2014, above n 366, p. 538.

³⁶⁸ *Ibid.*, pp. 546-548.

³⁶⁹ *Ibid.*, pp. 549-551.

³⁷⁰ *Ibid.*, pp. 551-552.

³⁷¹ *Ibid.*, pp. 552-558.

international law. Secondly, the conduct must constitute a breach of an international obligation of the state. Such conduct may consist of an action as well as an omission.³⁷²

With regard to the first element, Article 4 makes clear that the conduct of any state organ will be attributable to that state as a matter of international law. This is so if the state organ is acting in its official capacity, with apparent authority,³⁷³ and even if it exceeds its authority or contravenes instructions,³⁷⁴ including by overtly committing unlawful acts.³⁷⁵ According to Article 8, the conduct of private actors will be attributable to a state if such conduct is carried out under the direction or control of that state.

With regard to the second element, Article 12 provides that *‘there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character’*. This implies that the question of whether a state has breached an international obligation depends on the autonomous meaning of the terms of the obligation, which may be any obligation under international law, including an obligation of conduct or result.³⁷⁶ A state has to be bound by the obligation, however, at the time the act occurs.³⁷⁷ It should also be noted that the determination of a breach is independent of the internal law of a state.³⁷⁸

State responsibility thus arises when conduct attributable to a state breaches an international obligation of that state. In this sense, state responsibility is specific to the state concerned, which is referred to as independent responsibility.³⁷⁹ However, a state may also be responsible for the internationally wrongful conduct of another state, not acting on behalf of the former state, even though the wrongfulness of the conduct primarily lies in a breach of the international obligations of the latter.³⁸⁰ Such derived responsibility may arise when a state provides aid or assistance to another state, thereby assisting the latter in the commission of a wrongful act. In this case, the act in question is still committed by the acting state and is a breach of that state’s international obligations. The implication of the second state in that breach follows from its willing assistance.³⁸¹

Article 16 ILC Articles

Article 16 ILC Articles deals with the situation of derived responsibility as a result of aiding or assisting another state in the commission of a wrongful act and reads: *‘A State which aids or assists another State in the commission of an internationally wrongful act by the latter is*

³⁷² International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Article 2.

³⁷³ *Ibid.*, Article 4, Commentary, para. 13; Article 7, Commentary, para. 8.

³⁷⁴ *Ibid.*, Article 7.

³⁷⁵ *Ibid.*, Article 7, Commentary, para. 2.

³⁷⁶ *Ibid.*, Article 12, Commentary.

³⁷⁷ *Ibid.*, Article 13.

³⁷⁸ *Ibid.*, Article 3.

³⁷⁹ *Ibid.*, Chapter IV, Commentary, para. 1.

³⁸⁰ *Ibid.*, Chapter IV, Commentary, para. 5.

³⁸¹ *Ibid.*, Chapter IV, Commentary, para. 6.

internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.' Although not explicitly contained in the wordings of the Article,³⁸² the Commentary reveals that this provision includes the requirement that the aid or assistance must be given by a state with a view to facilitating the commission of a wrongful act by another state, and must actually do so.³⁸³ It follows that in order to trigger responsibility under Article 16, the following requirements need to be fulfilled.

First of all, the assisting state must have provided **actual aid or assistance**. It has been argued that such aid or assistance must be in the form of a positive act, thereby excluding mere incitement or omission.³⁸⁴ This may be inferred from the *Bosnian Genocide* case, in which the ICJ held that complicity requires commission or positive action.³⁸⁵ On the other hand, it has been argued that it is plausible that aid or assistance, in specific situations, may also consist of an omission.³⁸⁶ This would be coherent with the definition of internationally wrongful acts under the ILC Articles, which include both acts and omissions.³⁸⁷ Article 16 does not define the type of acts constituting aid or assistance, which will depend on the facts of the specific case, taking into account the enabling function of the conduct concerned.³⁸⁸ Nevertheless, it has been argued that aid or assistance covers a broad range of activity and is not limited to acts of particular gravity.³⁸⁹ The Commentary does mention that the provision of material aid to a state that uses the aid to commit human rights violations may entail responsibility.³⁹⁰ Accordingly, the ICJ determined in the *Bosnian Genocide* case that the supply of weapons, military equipment and financial resources by Yugoslavia to the Serbian army amounted to the provision of aid and assistance.³⁹¹ Furthermore, the provision of logistical and technical support and valuable information for the commission of unlawful conduct have been qualified as aid or assistance,³⁹² as well as the training of personnel.³⁹³

³⁸² It should be noted that while the Commentaries are meant to interpret the ILC Articles, and not to introduce additional or incompatible rules, discrepancies between the text of an Article and its Commentary should not be easily asserted, as the Commentaries are necessarily more specific than the Articles and thus may formulate elements to specify the Articles. See: Gaja 2015, above n 342, pp. 10-20.

³⁸³ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Article 16, Commentary, paras. 3 and 5.

³⁸⁴ Crawford 2013, above n 339, pp. 403-405.

³⁸⁵ ICJ, *Bosnian Genocide Case*, 26 February 2007, para. 432.

³⁸⁶ H.P. Aust, *Complicity and the Law of State Responsibility*, Cambridge: Cambridge University Press 2011, pp. 225-230.

³⁸⁷ V. Lanovoy, *Complicity and Its Limits in the Law of International Responsibility*, Oxford; Portland, Oregon: Hart Publishing 2016, p. 97.

³⁸⁸ Aust 2011, above n 386, p. 230.

³⁸⁹ *Ibid.*, p. 239; Crawford 2013, above n 339, p. 402.

³⁹⁰ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Article 16, Commentary, para. 9.

³⁹¹ ICJ, *Bosnian Genocide Case*, 26 February 2007, paras. 239-241 and 422.

³⁹² Aust 2011, above n 386, p. 198.

³⁹³ J. Crawford, 'Second Report on State Responsibility', in International Law Commission, *Yearbook of the International Law Commission 1999*, vol. 2, part 1, New York and Geneva: United Nations 2008, p. 50.

Secondly, the Commentary mentions that the aid or assistance given must have ‘*contributed significantly*’ to the wrongful act, although it does not have to be essential.³⁹⁴ While a *conditio sine qua non* relationship is thus not required,³⁹⁵ it appears that some causative connection has to be established.³⁹⁶ However, the nature of this link between the aid provided by the assisting state and the wrongful conduct of the recipient state in terms of causality or proximity is not further defined and remains unclear (considering the lack of state practice and decisions by international courts and tribunals in this regard).³⁹⁷ Nevertheless, it has been argued that the nexus requirement can be considered fulfilled when ‘*a clear factual link*’ can be established,³⁹⁸ or when the aid or assistance can at least be considered ‘*a cause*’ of the harmful outcome.³⁹⁹ Aid that assists in a too remote or minimal way, however, is not considered sufficient to meet the causality threshold.⁴⁰⁰

A third requirement, following from Article 16(a), is that the assisting state must have had **knowledge** of the circumstances making the conduct of the assisted state internationally wrongful.⁴⁰¹ According to the Commentary, if a state is unaware of the circumstances in which its aid or assistance is intended to be used by the other state (to carry out an internationally wrongful act), it cannot be held responsible.⁴⁰² This also follows from the *Bosnian Genocide* case, in which the Court held that: ‘*There is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (dolus specialis) of the principal perpetrator.*’⁴⁰³ It has been argued that this mental element of awareness or knowledge of a state only includes actual knowledge, and not constructive knowledge, i.e. the assisting state ‘*should*’ have known.⁴⁰⁴ Nevertheless, actual knowledge of the assisting state of future wrongful conduct may be assumed if credible and readily-available reports of fact-finding commissions, independent monitors or international organizations indicate systemic violations of human rights law by the assisted state.⁴⁰⁵ When the

³⁹⁴ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Article 16, Commentary, para. 5.

³⁹⁵ Aust 2011, above n 386, p. 212.

³⁹⁶ H. Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, Chatham House Research Paper, November 2016, p. 8, available at:

<https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf>.

³⁹⁷ I. Plakokefalos, ‘Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity’, *European Journal of International Law* 2015, vol. 26 no. 2, pp. 471-492; E. de Wet, ‘Complicity in the Violations of Human Rights and Humanitarian Law by Incumbent Governments Through Direct Military Assistance on Request’, *International and Comparative Law Quarterly* 2018, vol. 67, no. 2, pp. 299-301.

³⁹⁸ Lanovoy 2016, above n 387, pp. 174 and 218.

³⁹⁹ Plakokefalos 2015, above n 397, p. 492.

⁴⁰⁰ Moynihan 2016, above n 396, p. 9.

⁴⁰¹ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Article 16, Commentary, paras. 3 and 4.

⁴⁰² *Ibid.*, Article 16, Commentary, Para. 4.

⁴⁰³ ICJ, *Bosnian Genocide Case*, 26 February 2007, para. 421.

⁴⁰⁴ Crawford 2013, above n 339, p. 406.

⁴⁰⁵ Moynihan 2016, above n 396, p. 14.

assisting state has such actual or near-certain knowledge that its aid or assistance will be used for unlawful purposes by the recipient state in the ordinary course of events, it will meet the knowledge requirement of Article 16.⁴⁰⁶

Besides knowledge, another mental element required under Article 16 is intent, meaning that **the assisting state must have intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct, which is actually committed by the assisted state.**⁴⁰⁷ However, the ILC does not provide a definition of such intent and there is a lack of case law and state practice on this issue.⁴⁰⁸ Defining intent as a desire to reach a particular outcome, in line with the ICJ's interpretation of complicity,⁴⁰⁹ would make Article 16 almost unworkable, as it would be very difficult to prove.⁴¹⁰ However, it has been argued that if aid or assistance is given with certain or near-certain knowledge of the wrongful outcome in the ordinary course of events, intent may also be established or imputed.⁴¹¹ This would be in line with the use of the term intent in the Rome Statute of the International Criminal Court, which states that a person has intent in relation to a consequence if that person '*means to cause that consequence or is aware that it will occur in the ordinary course of events*'.⁴¹² Thus, it can be argued that the assisting state meets the intent requirement either if it has the purpose with its aid or assistance to facilitate the recipient state's unlawful conduct, or if it has actual or near-certain knowledge that the assisted state will act unlawfully in the ordinary course of events. In this sense, fulfillment of the knowledge requirement may thus suffice to meet the intent requirement, making their distinction less relevant.⁴¹³

A final requirement, contained in Article 16(b), is that the wrongful act committed by the assisted state must be such that it **would have been wrongful if committed by the assisting state itself**, and thus would have constituted a breach of its own international obligations.⁴¹⁴ For the determination of such a breach by the assisting state, the identity of its obligations under international law is irrelevant. Thus, while the wrongful conduct of the assisted state must also be wrongful if committed by the assisting state, the breached obligations on which such wrongfulness is based could be different for both states.⁴¹⁵

When all these requirements are met, the assisting state can be held internationally responsible under Article 16, but only to the extent of the aid or assistance given. It is responsible for its own

⁴⁰⁶ Ibid., pp. 13 and 15; Aust 2011, above n 386, pp. 233-235; Lanovoy 2016, above n 387, p. 100.

⁴⁰⁷ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Article 16, Commentary, para. 5.

⁴⁰⁸ Moynihan 2016, above n 396, p. 19.

⁴⁰⁹ Lanovoy 2016, above n 387, p. 230.

⁴¹⁰ De Wet 2018, above n 397, p. 306; Aust 2011, above n 386, p. 236.

⁴¹¹ Crawford 2013, above n 339, p. 408; Lanovoy 2016, above n 387, p. 221; Moynihan 2016, above n 396, p. 20.

⁴¹² UN General Assembly, *Rome Statute of the International Criminal Court*, 1998, Article 30(2)(b).

⁴¹³ Moynihan 2016, above n 396, p. 20.

⁴¹⁴ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Article 16, Commentary, paras. 3 and 6.

⁴¹⁵ Crawford 2013, above n 339, p. 410.

act in deliberately assisting another state in the commission of a wrongful act, and not for the wrongful act of the assisted state as such.⁴¹⁶

Consequences of responsibility under the ILC Articles

The international responsibility of a state arising under the ILC Articles involves legal consequences.⁴¹⁷ These consequences primarily include the obligations of the responsible state to cease the wrongful conduct⁴¹⁸ and to make full reparation for the injury caused by the wrongful act.⁴¹⁹ However, the scope of these consequences is limited to **obligations of cessation and reparation owed to states**,⁴²⁰ and does not include obligations towards or invoked by persons or entities other than a state.⁴²¹ Thus, only states can invoke obligations arising from state responsibility under the ILC Articles, and in particular ‘*injured states*’ in the sense of Article 42 ILC Articles. A state may be qualified as an injured state if the obligation breached is owed to that state individually.⁴²² Furthermore, if the obligation breached is owed to a group of states, a state may also be considered injured in the sense of Article 42 if it is ‘*specifically affected*’ by the breach of the collective obligation.⁴²³ The term specifically affected, however, is not clearly defined, although the Commentary does mention that the term covers cases in which a wrongful act has ‘*particular adverse effects on one State*’.⁴²⁴ Besides injured states, state parties that cannot be considered as such, but still belong to the group whose collective obligation was breached, may be entitled to invoke responsibility under Article 48 ILC Articles.

The fact that persons or entities other than a state cannot invoke the obligations arising from state responsibility under the ILC Articles, however, is without prejudice to any rights, arising from the responsibility of a state, outside the ILC Articles, which may accrue directly to persons or non-state entities.⁴²⁵ In cases where the primary obligation breached is owed to individuals, procedures might be available for those affected to invoke the responsibility of a state on their own account, like the right of petition under human rights treaties. Thus, whether and to what extent persons or non-state entities are entitled to invoke responsibility will depend on the particular primary rule breached, independent of the ILC Articles.⁴²⁶

⁴¹⁶ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Article 16, Commentary, para. 10.

⁴¹⁷ *Ibid.*, Article 28.

⁴¹⁸ *Ibid.*, Article 30.

⁴¹⁹ *Ibid.*, Article 31.

⁴²⁰ *Ibid.*, Article 33(1); Crawford 2013, above n 339, p. 460.

⁴²¹ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, Article 28, Commentary, para. 3.

⁴²² *Ibid.*, Article 42(a), Commentary, para. 4.

⁴²³ *Ibid.*, Article 42(b), Commentary, paras. 11 and 12.

⁴²⁴ *Ibid.*, Article 42, Commentary, para. 12.

⁴²⁵ *Ibid.*, Article 33(2).

⁴²⁶ *Ibid.*, Article 33, Commentary, para. 4.

3.3 Italy's responsibility under the ILC Articles

In order to determine to what extent Italy can be held responsible under international law for the human rights violations of migrants intercepted at sea and returned to Libya by the Libyan coast guard through its support of the Libyan coast guard in doing so, this section applies the above-mentioned rules of the ILC Articles to Italy's conduct, thereby drawing on the findings of the previous chapters. Since the human rights violations of migrants (described in chapter 2) are committed by Libya, for which Italy might be responsible through its support, the rules to be applied concern derived responsibility. To trigger Italy's derived responsibility under the ILC Articles as a result of its support, the requirements of Article 16 must be met. This means that it must be established that Italy aided or assisted Libya in the commission of an internationally wrongful act. In addition, it has to be demonstrated that Italy has done so with knowledge of the circumstances of the wrongful act and that the act would be wrongful if committed by Italy. However, before applying the requirements following from Article 16 to Italy's conduct, it must first be determined that Libya has indeed committed an internationally wrongful act or acts.

Libya's wrongful acts

Based on Article 2 ILC Articles, the establishment of an internationally wrongful act by Libya requires that the conduct in question must be attributable to Libya under international law and must constitute a breach of its international obligations. The conduct in question relates to migrants intercepted at sea and returned to Libya by the Libyan coast guard. As described in chapter 2, these migrants face violent and reckless behavior of the Libyan coast guard and abusive treatment in detention centers, to which they are usually transferred upon arrival in Libya.

The violent and reckless behavior of the Libyan coast guard can be attributed to Libya based on Article 4. The Libyan coast guard is administered by the Libyan navy under the Ministry of Defense, which is formally accountable to the Libyan Government of National Accord (backed by the UN).⁴²⁷ As such, it can be considered a state organ of Libya within the meaning of Article 4, making its conduct attributable to Libya as a matter of international law, regardless of the lawfulness of its actions. Similarly, the abusive treatment in DCIM detention centers can be attributed to Libya as well. The DCIM, which controls the detention centers, is a division of the Libyan Ministry of Interior, and thus a state organ within the meaning of Article 4. Conduct of DCIM officials towards detained migrants can thus be attributed to Libya. However, as mentioned, while the DCIM officially controls the detention centers, some are run by private actors like local militias. Nevertheless, based on Article 8, their conduct can still be attributed to Libya as it is carried out in state institutions under the control of the Libyan government.

In order for such conduct to constitute an internationally wrongful act, it must breach Libya's obligations under international law. As described in chapter 2, Libya's conduct towards migrants amounts to various human rights violations, including violations of the right to life, the

⁴²⁷ European External Action Service 2017, above n 3, p. 16.

prohibition of torture and other ill-treatment, the right to liberty, the prohibition of sexual violence (against women), the prohibition of slavery and forced labor, the right to an adequate standard of living and the right to health, the prohibition of refoulement, and the right to an effective remedy. These breached human rights are contained in several treaties to which Libya is party, including the core international human rights treaties of the UN and the ACHPR.

It can thus be argued that, in accordance with Article 2, the violent and reckless behavior of the Libyan coast guard towards migrants and their abusive treatment in detention centers constitute internationally wrongful acts by Libya, entailing its responsibility. It can now be examined to what extent Italy can be held responsible for these acts under Article 16 by applying the requirements following from this Article to Italy's conduct, i.e. its support to the Libyan coast guard.

The provision of aid or assistance to Libya

The first requirement is that Italy must have provided actual aid or assistance to Libya. As described in chapter 1, Italy has taken a variety of concrete measures that support the Libyan coast guard (in practice) in intercepting migrants at sea and returning them to Libya. Such measures include: providing patrol boats, maintaining Libyan coast guard assets, providing training through Operation Sophia, conducting a naval operation in Libyan waters with various supportive tasks, coordinating and directing the interception of migrants by the Libyan coast guard, and supporting a Libyan SAR region. These measures are all positive acts that enable the Libyan coast guard to intercept and return to Libya significantly more migrants. As such, they can be considered acts constituting aid or assistance in the sense of Article 16.

While the provision of aid or assistance in the form of an omission under Article 16 is disputed, it should be noted that the measures taken by Italy in support of the Libyan coast guard are not accompanied by an accountability or monitoring mechanism to ensure that the support provided does not contribute to human rights violations.⁴²⁸ It can be argued that through this omission, Italy has enabled the Libyan coast guard to use its support for the commission of wrongful acts and get away with it.

The nexus requirement: a significant contribution to Libya's wrongful acts

Secondly, the aid or assistance provided by Italy must have made a significant contribution to the wrongful acts by Libya, namely the violent and reckless behavior of the Libyan coast guard towards migrants and their abusive treatment in detention centers. In this sense, there has to be a causal connection between Italy's support to the Libyan coast guard and these wrongful acts, which does not have to be essential. As described in chapter 1, as a result of Italy's support, the Libyan coast guard's operational capacity has grown considerably, enabling it to intercept and return to Libya significantly more migrants. In particular, the Libyan coast guard's only patrol boats, which are used for the interception and return of migrants to Libya, have been donated by Italy and Italy has trained their crews to use them. While the Libyan coast guard already

⁴²⁸ Amnesty International 2017, above n 128, p. 17.

possessed a number of smaller boats before the provision of such patrol vessels, these smaller boats are not considered suitable for the interception of migrant boats, especially further off shore. However, these smaller boats still can and have been used to intercept migrants, although in smaller numbers, making the larger patrol boats not strictly essential to carry out such interceptions on a smaller scale. Nevertheless, after Italy's donation, the Libyan coast guard has mainly used the patrol vessels for the interception and return of migrants to Libya, thus allowing it to do so on a larger scale. Furthermore, through Operation Sophia, Italy has trained Libyan coast guard personnel, which were largely untrained, to make them more capable to carry out interceptions at sea. During such training, only very limited attention was paid to human rights protection. Also of particular importance is Italy's coordination and direction of migrant interceptions by the Libyan coast guard, which again enabled it to carry out significantly more interceptions. In addition, through its maintenance support, Italy has ensured the continuation of such interceptions. It can be argued that these supportive measures taken by Italy have contributed significantly to Libya's wrongful acts (in a causal manner).

With regard to the violent and reckless behavior of the Libyan coast guard towards intercepted migrants, the donated patrol boats can be considered a particularly important contribution. It is a documented fact that Libyan coast guard members have used these boats to carry out such conduct. Furthermore, they have been trained by Italy to operate the patrol boats, thereby enabling them to carry out wrongful conduct with these boats. It should be noted, however, that while the training provided by Italy contained only very limited content dedicated to human rights protection, Italy does not seem to have trained Libyan coast guard personnel in acting violently and recklessly against migrants. In addition, Italy has coordinated and directed the Libyan coast guard to these migrants, thereby giving it the opportunity to carry out its wrongful behavior.

With regard to the abusive treatment of migrants in detention centers, following their interception and return to Libya by the Libyan coast guard, the causal connection seems a bit more remote. Nevertheless, it can be argued that migrants have been subjected to abusive treatment in Libyan detention centers as a result of Italy's support to the Libyan coast guard (although more indirectly). Italy's support has been used by the Libyan coast guard to intercept and return migrants to Libya, followed by their transfer to the detention centers, where they face abusive treatment. In this sense, Italy's support has contributed significantly to the abusive treatment of migrants in detention centers, as it helps to ensure that migrants get there in the first place, instead of reaching Italy. Moreover, due to Italy's support, significantly more migrants have been subjected to this trajectory of abuses. Thus, while a sufficient causal link between Italy's support and Libya's wrongful acts can be established, it can even be argued that with regard to those migrants who would not have been intercepted and returned to Libya (thereby facing abuses) without Italy's support, this support has been essential as well.

The knowledge requirement

A third requirement, following from Article 16(a), is that Italy must have had knowledge of the circumstances making the conduct of Libya internationally wrongful. In this sense, Italy must

have had actual or near-certain knowledge that its aid or assistance would be used for unlawful purposes by Libya in the ordinary course of events. Such knowledge may be assumed based on credible and readily-available reports of fact-finding commissions, independent monitors or international organizations indicating systemic human rights violations by Libya.

With regard to the abusive treatment of migrants in Libyan detention centers, it can certainly be said that Italy was well aware that such conduct was carried out systematically in violation of human rights law. Since the fall of Gaddafi's regime in 2011, many credible and readily-available reports by international organizations, governmental bodies, UN expert bodies, NGOs and the media have exposed the widespread human rights violations of migrants in Libya, including in detention centers.⁴²⁹ Italy has even acknowledged the human rights violations perpetrated against migrants in Libya. On 3 November 2017, Italy's Diplomatic Councilor to the Prime Minister wrote in response to a letter from Amnesty International, expressing concern for the human rights violations in Libya's detention centers, that such violations against migrants in detention centers in Libya *'have been well known to us for a long time'*.⁴³⁰ On 6 August 2017, Italy's Deputy Minister of Foreign Affairs stated in an interview with an Italian newspaper that *'taking [migrants] back to Libya, at this moment, means taking them back to hell'*.⁴³¹ Furthermore, Italy's knowledge of the human rights situation of migrants in Libya can be based on the *Hirsi Jamaa* judgment of 2012, in which the ECtHR responded to Italy's argument that it believed Libya to be a safe destination for migrants by stating that: *'In that regard, the Court observes that Libya's failure to comply with its international obligations was one of the facts denounced in the international reports on that country. In any event, the Court is bound to observe that the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention. [...] The Court notes again that that situation was well known and easy to verify on the basis of multiple sources. It therefore considers that when the applicants were removed, the Italian authorities knew or should have known that, as irregular migrants, they would be exposed in Libya to treatment in breach of the Convention and that they would not be given any kind of protection in that country.'*⁴³² Thus, following this judgment, Italy was certainly aware of the human rights violations against migrants in Libya. Nevertheless, it chose to support the Libyan coast guard in intercepting and returning migrants to Libya, thereby contributing to Libya's wrongful conduct.

With regard to the violent and reckless behavior of the Libyan coast guard towards intercepted migrants, it can also be said that Italy knew that its support, in particular the patrol boats, would

⁴²⁹ Amnesty International 2017, above n 196, pp. 56-58.

⁴³⁰ *Ibid.*, p. 58.

⁴³¹ *Ibid.* Original source referenced: M. Menduni, 'Giro: 'Fare rientrare quelle persone vuol dire condannarle all'inferno'', *La Stampa*, 6 August 2017, available at: <https://www.lastampa.it/2017/08/06/italia/cronache/giro-fare-rientrare-quelle-persone-vuol-dire-condannarle-allinferno-SXnGzVlzftF17fNGFCMADN/pagina.html>.

⁴³² ECtHR, *Hirsi Jamaa*, 23 February 2012, appl. no. 27765/09, paras. 128 and 131.

be used for such wrongful conduct. The wrongful behavior of the Libyan coast guard towards migrants has been frequently reported from 2016 on, in particular by NGOs but also by UN expert bodies (see chapter 2). Moreover, such readily-available reports have been backed up by video footage. Nevertheless, despite this knowledge, Italy has continued providing support to the Libyan coast guard in 2017 and 2018, including by providing and maintaining the patrol boats used to carry out the wrongful conduct against migrants.

In sum, it seems clear that, based on all the available information, Italy must have had actual or near-certain knowledge that its aid or assistance would be used for unlawful purposes by Libya in the ordinary course of events and that it nonetheless chose to provide that support. In addition, it should be recalled that Italy's support to the Libyan coast guard was not accompanied by an accountability or monitoring mechanism to ensure that it did not contribute to human rights violations, which indicates that Italy did not act on its knowledge by trying to prevent that its support would be used for unlawful purposes by Libya.

The intent requirement

Besides having knowledge, it is also required under Article 16 that Italy must have intended, by the provision of its support, to facilitate the occurrence of the wrongful acts by Libya. However, this requirement can be considered fulfilled when it can be established that Italy had actual or near-certain knowledge that Libya would use its support to act unlawfully in the ordinary course of events. This indeed has been established under the knowledge requirement mentioned above, meaning that intent can be established or imputed as well.

Nevertheless, it seems worth noting that, in its cooperation agreements with Libya, Italy has explicitly stated its aim of supporting and strengthening the capacity of the Libyan coast guard '*in order to stem the illegal migrants' fluxes*'.⁴³³ In this sense, Italy has openly expressed its intent that, in return for its support, the Libyan coast guard should intercept migrants at sea and return them to Libya. In combination with Italy's knowledge regarding the human rights violations against migrants by Libya, such openly expressed intent only adds to the argument that Italy indeed intended to facilitate Libya's wrongful conduct.

Double wrongfulness

A final requirement, contained in Article 16(b), is that the wrongful acts committed by Libya must be such that they would have been wrongful if committed by Italy itself, and thus would have constituted a breach of its own international obligations, which do not have to be the same as Libya's obligations. The human rights violated by Libya through its wrongful conduct are all contained in the core international human rights treaties of the UN, including the ICCPR, the ICESCR and the CAT, to which Italy is party as well.⁴³⁴ Furthermore, while Italy is no party to the ACHPR, it is party to the ECHR,⁴³⁵ which contains similar rights and commits Italy to respect

⁴³³ *Italy-Libya Memorandum of Understanding*, 2 February 2017, Article 1.

⁴³⁴ OHCHR, *Status of Ratification Interactive Dashboard* (website), available at: <http://indicators.ohchr.org/>.

⁴³⁵ Council of Europe, *Chart of Signatures and Ratifications of Treaty 005* (website), available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=EBtPieQi.

them.⁴³⁶ In addition, like Libya, Italy is bound by customary international law, which includes some of the rules contained in these human rights as well. Thus, the wrongful acts committed by Libya would have been wrongful if committed by Italy itself, as they would violate the same or similar obligations.

Italy's responsibility and its consequences under the ILC Articles

It thus follows that all the requirements of Article 16 ILC Articles have been met. It has been demonstrated that, through its support, Italy knowingly aided or assisted Libya in the commission of wrongful acts, namely the violent and reckless behavior of the Libyan coast guard towards migrants and their abusive treatment in detention centers, which amount to human rights violations. As a result, Italy's derived responsibility under Article 16 is triggered, meaning that it can be held internationally responsible under the ILC Articles for supporting Libya in violating the human rights of migrants intercepted at sea and returned to Libya by the Libyan coast guard.

As mentioned above, the international responsibility of a state under the ILC Articles has legal consequences, including the responsible state's obligations to cease the wrongful conduct and to make full reparation for the injury caused by the wrongful act. However, these obligations only apply towards states and can only be invoked by states, in particular injured states in the sense of Article 42. A state may be qualified as an injured state if the obligation breached is owed to that state individually, which does not seem to be the case with the regard to violations of human rights, enshrined in multilateral treaties. However, if the obligation breached is owed to a group of states, a state may also be considered injured in the sense of Article 42 if it is specifically affected by that breach. With regard to obligations under human rights treaties, it can be argued that they are owed to a group of states, namely all the state parties to a particular human rights treaty. In this sense, the UN Human Rights Committee has held that **every state party** to the ICCPR has 'a legal interest in the performance by every other State Party of its obligations'⁴³⁷ and that 'the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty'.⁴³⁸ Thus, the breached human rights obligations described in chapter 2 can be considered owed to all state parties to the human rights treaties in which they are enshrined, meaning that these state parties can be considered injured states when they suffer particular adverse effects as a result of the breaches. It might be argued that this is the case with regard to those **state parties whose nationals** have been subjected to human rights violations, like migrants from various African countries who have been intercepted and returned to Libya by the Libyan coast guard. Following this argument, these states would be entitled to invoke Italy's responsibility under Article 42 and claim cessation of the wrongful conduct and reparation for the injuries caused. In addition, non-injured state

⁴³⁶ Council of Europe, *European Convention on Human Rights and Fundamental Freedoms*, 1950, Article 1.

⁴³⁷ Thereby referring to 'the fact that the 'rules concerning the basic rights of the human person' are *erga omnes* obligations and that [...] there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms'.

⁴³⁸ UN Human Rights Committee, *General Comment No. 31*, 29 March 2004, UN doc. CCPR/C/21/Rev.1/Add.13, para. 2.

parties could perhaps invoke Italy's responsibility under Article 48 on account of the collective interest of the group or the international community as a whole.

However, while there may be possibilities for states to invoke Italy's responsibility under the ILC Articles, this seems more relevant on a theoretical level. In practice, it does not seem likely that states will invoke Italy's responsibility for human rights violations of migrants as a result of its support to the Libyan coast guard, particularly because it does not seem to affect their interests. Human rights obligations not only confer rights to states, but also on human beings themselves. They are the immediate beneficiaries of human rights and, as such, the real victims of violations.⁴³⁹ Thus, with regard to migrants whose rights have been violated, it can be argued that they are the ones suffering the actual harm and the ones with an interest to invoke Italy's responsibility to claim their rights, and not states. Moreover, since these migrants fled their countries of origin, it seems unlikely that their home states are interested in making an effort to invoke Italy's responsibility for them. Unfortunately, migrants themselves cannot invoke Italy's responsibility and claim cessation and reparation under the ILC Articles, as only states can. However, this is without prejudice to any rights migrant might have, arising from Italy's responsibility, outside the ILC Articles, like under human rights treaties.

3.4 Italy's responsibility under human rights treaties

Migrants may invoke Italy's responsibility on their own account based on the right of petition under human rights treaties. Many human rights treaties include complaint mechanisms through which individuals may bring complaints against state parties alleging their responsibility for violations of treaty rights and seek redress.⁴⁴⁰ With regard to the international human rights treaties of the UN, migrants may bring complaints against Italy alleging violations of their rights under these treaties to so-called treaty bodies or committees,⁴⁴¹ after they meet the formal requirements of admissibility.⁴⁴² Although the decisions of the committees are not legally binding, they do represent an authoritative interpretation of the respective treaties and contain recommendations to the state party in question. If a committee concludes that a violation of a treaty has taken place, it pursues a dialogue with the state concerned on the steps it has taken to implement the recommendations.⁴⁴³ Under the ECHR, migrants claiming to be the victim of

⁴³⁹ E. Klein, 'Individual Reparation Claims Under the International Covenant on Civil and Political Rights: The Practice of the Human Rights Committee', in A. Randelzhofer and C. Tomuschat (eds.), *State Responsibility and the Individual: Reparation in Instances of Grave Violation of Human Rights*, The Hague; Boston: Martinus Nijhoff Publishers 1999, pp. 28-29; UN Human Rights Committee, *General Comment No. 31*, 29 March 2004, UN doc. CCPR/C/21/Rev.1/Add.13, para. 2.

⁴⁴⁰ E.B. Weiss, 'Invoking State Responsibility in the Twenty-First Century', *American Journal of International Law* 2002, vol. 96, p. 809.

⁴⁴¹ OHCHR, *Individual Complaint Procedures Under the United Nations Human Rights Treaties, Fact Sheet No. 7/Rev.2*, 2013, available at: <https://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf>.

⁴⁴² *Ibid.*, pp. 7-9.

⁴⁴³ *Ibid.*, pp. 10-11.

violations under the Convention may bring their complaints to the ECtHR,⁴⁴⁴ in compliance with the admissibility criteria.⁴⁴⁵ If the Court finds, in its legally binding judgment,⁴⁴⁶ that there has been a violation of the Convention, it may afford just satisfaction to the injured party, taking into account any reparation the state party concerned could provide.⁴⁴⁷ However, in order for migrants to hold Italy responsible for any treaty violations and seek redress before the UN committees or the ECtHR, it has to be established that Italy's obligations under these human rights treaties indeed apply to migrants alleging such violations.⁴⁴⁸

The applicability of international human rights treaties, and thus the scope of states' responsibility under these treaties, is in principle determined by the exercise of jurisdiction, which states may exercise outside their territories as well.⁴⁴⁹ As traditionally interpreted by international human rights treaty bodies, extraterritorial jurisdiction requires the exercise of effective control over an area or persons.⁴⁵⁰ In this sense, Article 2 sub 1 ICCPR articulates the obligation of state parties '*to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant*'. According to the Human Rights Committee, this means that a state party must respect and ensure the Covenant rights '*to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party*'.⁴⁵¹ Similarly, Article 1 ECHR obliges state parties to '*secure to everyone within their jurisdiction the [Convention's] rights and freedoms*'. The ECtHR has held that a state's jurisdiction may extend outside its territory through the exercise of effective control over an area⁴⁵² or the exercise of control and authority over individuals⁴⁵³ (like in the *Hirsi Jamaa* case). As a result of this conventional approach to human rights, when a state lacks effective control and, subsequently, jurisdiction, there are no extraterritorial human rights obligations for that state.⁴⁵⁴ With regard to Italy, it can be argued that it does not exercise effective control over migrants intercepted at sea and returned to Libya by the Libyan coast guard, and thus that there are no human rights obligations of Italy applicable to these migrants, meaning that they cannot hold Italy responsible under human rights treaties.

However, states may have extraterritorial obligations under human rights treaties in situations outside their effective control or jurisdiction. This is clearly the case with regard to economic,

⁴⁴⁴ Council of Europe, *European Convention on Human Rights and Fundamental Freedoms*, 1950, Article 34; ECtHR, *Rules of Court: Institution of Proceedings*, 1 August 2018, available at: https://www.echr.coe.int/Documents/PD_institution_proceedings_ENG.pdf.

⁴⁴⁵ Council of Europe, *European Convention on Human Rights and Fundamental Freedoms*, 1950, Article 35.

⁴⁴⁶ *Ibid.*, Article 46.

⁴⁴⁷ *Ibid.*, Article 41.

⁴⁴⁸ Klein 1999, above n 439, p. 30.

⁴⁴⁹ N. Wenzel, 'Human Rights, Treaties, Extraterritorial Application and Effects', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford: Oxford University Press 2008.

⁴⁵⁰ *Ibid.*; I. Kanalan, 'Extraterritorial State Obligations Beyond the Concept of Jurisdiction', *German Law Journal* 2018, vol. 19, no. 1, pp. 44 and 46-47.

⁴⁵¹ UN Human Rights Committee, *General Comment No. 31*, 29 March 2004, para. 10.

⁴⁵² ECtHR, *Bankovic and Others v. Belgium*, 12 December 2001, appl. no. 52207/99, paras. 67-71.

⁴⁵³ ECtHR, *Al-Skeini and Others v. the United Kingdom*, 7 July 2011, appl. no. 55721/07, paras. 133-137.

⁴⁵⁴ Kanalan 2018, above n 450, p. 47.

social and cultural rights, like those under the ICESCR, which do not contain any jurisdictional limitations. Thus, in contrast to most human rights treaties (regarding civil and political rights, like the ICCPR and the ECHR), the application of the **ICESCR** is not limited to the exercise of jurisdiction.⁴⁵⁵ In this sense, with regard to the right to adequate food for example, the UN Committee on Economic, Social and Cultural Rights has stated that: ‘*States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required*’.⁴⁵⁶ Thus, migrants may bring complaints against Italy alleging violations of their rights under the ICESCR to the Committee,⁴⁵⁷ as it can be argued that Italy failed to respect and protect these rights in Libya by supporting Libya in violating these rights.

With regard to human rights treaties on civil and political rights, like the ICCPR and the ECHR, which require a state’s jurisdiction to be applicable, states may nevertheless be responsible for extraterritorial violations outside their effective control or jurisdiction when they occur as a **result** of their actions. In the *Munaf v. Romania* case, the Human Rights Committee held that: ‘*A State party may be responsible for extraterritorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction. Thus, the risk of an extraterritorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time.*’⁴⁵⁸ Similarly, the ECtHR has held that: ‘*A State’s responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.*’⁴⁵⁹ Based on these statements, one could argue that Italy may be held responsible for the foreseeable human rights violations of migrants intercepted at sea and returned to Libya by the Libyan coast guard as a result of its support to the Libyan coast guard. However, it should be noted that these statements were made with reference to situations where the state party concerned exercised jurisdiction over an individual prior to his subjection to human rights violations outside the state’s jurisdiction (namely after leaving the state’s embassy and after extradition respectively). Thus, while it follows from these statements that a state does not need to be exercising effective control or jurisdiction over an individual at the time of the violations,⁴⁶⁰ it seems unclear, given the limited case law on this issue, whether a state may also be held responsible for such violations without exercising any prior jurisdiction, which is the case with Italy regarding the violations of migrants.

⁴⁵⁵ UN Commission on Human Rights, *Report of the Special Rapporteur on the Right to Food, Jean Ziegler*, 24 January 2005, UN doc. E/CN.4/2005/47, para. 43. See also: UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 1966, Article 2(1), which does not contain any jurisdictional limitation.

⁴⁵⁶ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 12*, 12 May 1999, UN doc. E/C.12/1999/5, para. 36.

⁴⁵⁷ OHCHR 2013, above n 441, pp. 21-22.

⁴⁵⁸ UN Human Rights Committee, *Mohammad Munaf v. Romania*, 30 July 2009, comm. no. 1539/2006, para. 14.2.

⁴⁵⁹ ECtHR, *Ilascu and Others v. Moldova and Russia*, 8 July 2004, appl. no. 48787/99, para. 317.

⁴⁶⁰ O. Hathaway, E. Nielsen, A Nowlan, W. Perdue, C. Purvis, S. Solow and J. Spiegel, ‘Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?’, Yale Law School, *Faculty Scholarship Series* 2011, paper 4722, pp. 419-420.



The content of states' extraterritorial obligations under international human rights law in situations outside their effective control or jurisdiction has been further clarified by a group of experts in this field, based on more than a decade of legal research, with the adoption of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights on 28 September 2011.⁴⁶¹ While these principles are not legally binding, they arguably serve as an authoritative interpretation of international human rights law.⁴⁶² The Maastricht Principles recognize that states have extraterritorial obligations to respect, protect and fulfil economic, social and cultural rights, not only when they exercise authority or effective control, but also in '*situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory*'.⁴⁶³ This means that a state's obligations under human rights law may be triggered when it knows or should have known that its conduct will bring about substantial human rights effects in another territory,⁴⁶⁴ which is the case with regard to Italy's support to the Libyan coast guard. Although the Maastricht Principles primarily deal with economic, social and cultural rights, it can be argued that they or the legal concepts underpinning them may also be applicable to civil and political rights.⁴⁶⁵

As a critique of the conventional approach to human rights based on jurisdiction, the idea that extraterritorial obligations of states should be applied beyond the concept of jurisdiction and to all human rights (and not only to economic, social and cultural rights) has been justified based on the influence of globalization and transnationalization, as well as the universal claim of human rights.⁴⁶⁶ As a result of globalization and transnationalization, states influence human rights globally, beyond the sphere of their jurisdiction, making the notion of state jurisdiction unsuitable for determining their extraterritorial obligations.⁴⁶⁷ The universal claim of human rights entails that human rights aim to prevent and abolish all kinds of injustice, regardless of where it takes place, making the potential to affect the realization of human rights (which may be anywhere) paramount, rather than the question of exercising jurisdiction.⁴⁶⁸ Furthermore, in order to justify their extraterritorial application beyond jurisdiction, reference can be made to the object and purpose of human rights treaties. Article 31 sub 1 of the Vienna Convention on the Law of Treaties requires states to interpret a treaty '*in the light of its object and purpose*'. Accordingly, the ICJ has articulated the obligation of states to apply treaties '*in such a manner that [their]*

⁴⁶¹ ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, January 2013, available at: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23.

⁴⁶² Amnesty International 2017, above n 196, p. 55.

⁴⁶³ *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 2011, Principle 9(b); O. de Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon and I. Seiderman, 'Commentary to the Maastricht principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', *Human Rights Quarterly* 2012, vol. 34, no. 4, p. 1108.

⁴⁶⁴ De Schutter et al. 2012, above n 463, p. 1109.

⁴⁶⁵ *Ibid.*, p. 1090; Amnesty International 2017, above n 196, p. 55.

⁴⁶⁶ Kanalan 2018, above n 450.

⁴⁶⁷ *Ibid.*, pp. 53-56.

⁴⁶⁸ *Ibid.*, pp. 56-60.

purpose can be realized'.⁴⁶⁹ It can be argued that the object and purpose of the international human rights treaties of the UN, as well as human treaties in general, is the realization of '*the inherent dignity and of the equal and inalienable rights of all members of the human family*', as mentioned in their preambles.⁴⁷⁰ Based on this purpose of human rights treaties, there seems to be no justification in interpreting the human rights obligations of states in such a manner as to require states to respect the human rights of individuals within their jurisdiction, while allowing them to act in ways that disrespect the rights of those outside their jurisdiction, as in both cases the equal and inalienable rights of human beings are at stake. Allowing states under human rights treaties to disrespect the rights of those outside their jurisdiction would be contrary to the object and purpose of such treaties. In this sense, it can be argued that Italy has acted against the object and purpose of the human rights treaties to which it is party by supporting Libya in violating the human rights of migrants outside its jurisdiction.

However, despite these arguments in support of extraterritorial human rights obligations beyond jurisdiction and with regard to all human rights, it remains to be seen to what extent human rights committees and the ECtHR, in clarifying the issue, will follow this rather unconventional but (legally) justifiable approach. Nevertheless, while it remains ambiguous to what extent Italy can be held responsible under human rights treaties for violations of civil and political rights, it does seem clear that migrants can invoke its responsibility for violations of economic, social and cultural rights based on its support to Libya in committing such violations. Furthermore, it should be noted that migrants can still invoke Libya's responsibility for violating their human rights (although not under the ECHR, as Libya is not a state party).

Conclusion

Based on the rules on state responsibility set out in the ILC Articles, in particular Article 16, this chapter has demonstrated that Italy can be held internationally responsible for supporting the human rights violations of migrants intercepted at sea and returned to Libya by the Libyan coast guard. It has been established that Italy knowingly aided or assisted Libya in the commission of wrongful acts, namely the violent and reckless behavior of the Libyan coast guard towards migrants and their abusive treatment in detention centers, which amount to human rights violations. While Italy's conduct triggers its responsibility under the ILC Articles, the legal consequences of such responsibility, particularly the obligations of cessation and reparation, can only be invoked by states. And since migrants whose rights have been violated can be considered the real victims and the ones with an interest to invoke Italy's responsibility, rather than states, its responsibility under the ILC Articles seems of little value in practice. However, migrants might be able to invoke Italy's responsibility under human rights treaties, in particular with regard to

⁴⁶⁹ ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 25 September 1997, para. 142.

⁴⁷⁰ K. Nahapetian, 'Confronting State Complicity in International Law', *UCLA Journal of International Law and Foreign Affairs* 2002, vol. 7, p. 113.

violations of their economic, social and cultural rights (under the ICESCR). With regard to violations of their civil and political rights (like under the ICCPR and the ECHR), however, invoking Italy's responsibility might be difficult due to the requirement of jurisdiction, although the exact scope and limits of this requirement remain unclear. Thus, while migrants, as a result of Italy's support, have had to endure gross human rights violations instead of reaching safety, invoking Italy's responsibility for such violations seems like another challenge to overcome.

Conclusion

As mentioned in the introduction, the ECtHR ruled in its *Hirsi Jamaa* judgment of 2012 that Italy was responsible for exposing migrants to the risk of human rights violations in Libya by intercepting and returning them to this unsafe country, thereby violating the prohibition of refoulement. In order to avoid such responsibility in future cases, and still prevent migrants from reaching its shores, Italy introduced a new policy of supporting the Libyan coast guard in intercepting and returning migrants to Libya, which resulted in human rights violations nonetheless. Although in ethical terms it seems difficult to justify how Italy could be held responsible for its former conduct while remaining free from responsibility with regard to its recent practice, since both result in human rights violations, in legal terms, such reasoning appears to be less evident. In order to provide more clarity on this issue, this thesis has sought to answer the following research question: *‘To what extent can Italy be held responsible under international law for the human rights violations of migrants intercepted at sea and returned to Libya by the Libyan coast guard through its support of the Libyan coast guard in doing so?’*

In chapter 1, the content of Italy’s support of the Libyan coast guard in intercepting migrants at sea and returning them to Libya was examined. It was established that, based on its current policy of cooperation with Libya, as well as EU cooperation initiatives, Italy has taken various concrete measures in support of the Libyan coast guard, which include: providing patrol boats, maintaining Libyan coast guard assets, providing training through Operation Sophia, conducting a naval operation in Libyan waters with various supportive tasks, coordinating and directing the interception of migrants by the Libyan coast guard, and supporting a Libyan SAR region. As a result of this support, the Libyan coast guard’s operational capacity has grown considerably, enabling it to intercept and return to Libya significantly more migrants.

Chapter 2 analyzed to what extent migrants who are intercepted at sea and returned to Libya by the Libyan coast guard, with the support of Italy, are subjected to human rights violations. It was found that these migrants face violent and reckless conduct of the Libyan coast guard and abusive treatment in Libya’s detention centers, which amount to various human rights violations, including violations of the right to life, the prohibition of torture and other ill-treatment, the right to liberty, the prohibition of sexual violence (against women), the prohibition of slavery and forced labor, the right to an adequate standard of living and the right to health, the prohibition of refoulement, and the right to an effective remedy.

Chapter 3 has used these findings to answer the research question and determine to what extent Italy could be held responsible under international law for the human rights violations of migrants intercepted at sea and returned to Libya by the Libyan coast guard as a result of its support. After identifying the ILC Articles as a source for determining such responsibility, its rules were applied to Italy’s conduct, leading to the conclusion that, by knowingly assisting Libya in the commission of human rights violations of migrants, Italy’s responsibility under the Articles is indeed triggered. However, only states may invoke this responsibility and the resulting

obligations of cessation and reparation. Migrants themselves, considered the real victims and the ones with an interest to invoke Italy's responsibility, may only do so under human rights treaties, based on the right to individual petition. However, while they might be able to invoke Italy's responsibility under these treaties with regard to violations of their economic, social and cultural rights, doing so with regard to violations of their civil and political rights seems more difficult due to the requirement of jurisdiction. Although the exact scope and limits of this requirement remain ambiguous, it seems to impose a challenge for migrants in invoking Italy's responsibility for these human rights violations.

It can thus be concluded that while Italy's responsibility under the ILC Articles can be established, it seems of little value for migrants in practice, as they cannot invoke it. Based on the right of petition, however, migrants may invoke Italy's responsibility under human rights treaties, which seems most likely to succeed with regard to violations of their economic, social and cultural rights (like under the ICESCR). Whether migrants can successfully hold Italy responsible for violations of their civil and political rights (like under the ICCPR and ECHR) seems unclear due to the ambiguous scope of the jurisdiction requirement, although an interpretation in favor of migrants seems (legally) justifiable. It is hoped that human rights committees and the ECtHR will clarify the issue under their respective treaties. In this sense, it is interesting to note that, in May of this year, migrants have filed the first lawsuit against Italy with the ECtHR for violations of their rights under the Convention through Italy's support of the Libyan coast guard.⁴⁷¹ It would be interesting to see what kind of approach the ECtHR will take in addressing the issue of jurisdiction, and whether its decision will bring some hope for migrants subjected to human rights violations as a result of Italy's support to the Libyan coast guard or, deplorably, will confirm that Italy has indeed found a way to effectively circumvent its human rights obligations. For now, it seems that Italy can and will continue its policy of supporting the Libyan coast guard in intercepting and returning migrants to Libya, as it appears to achieve its aim of stemming migrants flows, unhindered by condemnatory rulings of courts or committees. For now, it seems that those in need of such rulings to enforce their human rights thus remain the victims of Italy's support in returning them to Libya, or, in the words of Italy's Deputy Minister of Foreign Affairs, '*back to hell*'.⁴⁷²

⁴⁷¹ S. Scherer, 'Nigerian Migrants Sue Italy for Aiding Libyan Coast Guard', *Reuters*, 8 May 2018, available at: <https://www.reuters.com/article/us-europe-migrants-italy/nigerian-migrants-sue-italy-for-aiding-libyan-coast-guard-idUSKBN1I9206>.

⁴⁷² Amnesty International 2017, above n 196, p. 58. Original source referenced: Menduni 2017, above n 431.

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