



Towards a Better Migrant Protection Framework Along the Central Mediterranean Route

*Human rights implications and necessary revisions of the Memorandum
of Understanding Between Italy and Libya*

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UpRights⁷

Position Paper

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This paper has been prepared by UpRights, a non-profit initiative based in The Hague, Netherlands. UpRights works in collaboration with civil society and international organisations to promote victims' rights, providing professional assistance on matters concerning international criminal law and human rights law.

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Executive Summary

This position paper considers the Memorandum of Understanding (MoU) concluded on 2 February 2017 between Italy and Libya intended to strengthen their cooperation in the areas of, *inter alia*, illegal immigration and human trafficking. Under the MoU, Italy provided Libyan authorities of the Government of National Accord, and specifically the Libyan Coast Guard (LCG), with different forms of support to strengthen its ability to perform rescue missions and intercept migrants attempting to cross the Mediterranean Sea. Following the MoU, Italy's support has enabled the LCG to intercept an increasing number of migrants trying to cross the Mediterranean Sea and return them to Libya.

This paper concludes that the empowerment of the LCG came at the expense of migrants' human rights. Migrants rescued at sea have been and are subjected to various forms of mistreatment by both the LCG and the guards of the detention centres where migrants are later transferred after disembarking in Libya. In particular, migrants are subjected to various forms of ill-treatment, including arbitrary arrest, torture, inhuman treatment and sexual violence. Furthermore, the very Libyan authorities that are supposed to counter human trafficking, including the LCG, have been directly implicated in the business of trafficking of migrants. Despite their awareness of the abuses faced by migrants rescued at sea by the LCG, the Italian authorities have not undertaken any measures to prevent further human rights violations. In fact, the MoU was tacitly renewed in February 2020.

These ongoing violations render Italy's position, and the MoU itself, untenable. Italy is currently in violation of its human rights obligations through a policy of externalisation. While the Italian Minister of Foreign Affairs has on numerous occasions committed to negotiate amendments to the MoU to strengthen the overall human rights compliance aspect of the agreement, there is no information to date concerning the progress or the outcome of such negotiations. The MoU remains unchanged.

The conduct of Libyan authorities and the mistreatment of migrants expose Italy to international responsibility based on the violation of several international conventions, including the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, and possibly the European Convention on Human Rights. The Italian Government's material support to the Libyan authorities, without due regard for the human rights of those whom their actions affect, further undermines Italy's own international obligations. Moreover, the mistreatment against migrants may qualify as war crimes and engage the individual criminal responsibility of the Italian agents who materially provided assistance to the Libyan authorities.

This paper recommends that Italy's cooperation with Libya must be reframed consistently with its human rights obligations and in light of the recommendations of different international organisations (including the Office of the High Commissioner for Human Rights, the Committee Against Torture, and the Council of Europe). Two options are outlined to ensure Italy is in compliance with its international obligations.

First, Italy may undertake to amend the current MoU to include a provision (a human rights clause) specifying that the respect of human rights, and possibly of international humanitarian law, is an essential element of the treaty. The provision must allow the parties to suspend or terminate the treaty in case of persistent violations of the clause and should incorporate, at a minimum:

1. The establishment of an independent body or organ in charge of monitoring and evaluating human rights and international humanitarian law compliance by the parties in the execution of the MoU;
2. A list of mitigating measures which parties may seek in the event of human rights violations to address such violations and ensure non-repetition;
3. The implementation of a legal framework to facilitate effective access to justice for those who suffered human rights violations connected to the support provided by Italy on the basis of the MoU;

Second, if amendments consistent with these principles cannot be introduced in the MoU, the only possibility left to ensure that Italy is not held responsible for the human rights violations committed by the Libyan authorities would be to terminate or suspend the MoU. Indeed, the Libyan authorities' involvement in human trafficking and in the blatant disrespect of migrants' human rights qualify as violations of Articles 1, 2 and 5 of the MoU. Such violations may justify the termination or suspension of the agreement pursuant to Article 60 of the Vienna Convention on the Law of Treaties. Furthermore, Italy's mere notification of its intention to terminate or suspend the MoU may create the necessary leverage to pressure or induce the Libyan authorities to agree to amendments to the MoU that would be consistent with Italy's human rights obligations.

I. Introduction

a. Overview

This report outlines Italy's international responsibility arising from potential human rights violations stemming from the execution of the Memorandum of Understanding (MoU)¹ concluded on 2 February 2017 between Italy and Libya intended to strengthen their cooperation in the areas of, *inter alia*, illegal immigration and human trafficking.

The report further outlines possible amendments to the MoU to ensure that any form of cooperation with Libya in the field of migration and countering human trafficking is carried out consistently with international human rights standards.

The analysis is divided into four sections, namely: (i) legal and factual appraisal concerning the MoU and its implementation; (ii) Italy's potential responsibility derived from Libya's human rights violations; (iii) suggestions for possible amendments to the MoU in light of the recommendations of international organisations; and (iv) suspension/termination of the MoU, particularly in case Libya's failure to abide by the obligations of the MoU could be qualified as a material breach within the scope of Article 60 of the Vienna Convention on the Law of Treaties (VCLT).

b. Background

Each year thousands of people depart from Libya and try to cross the Mediterranean to reach Europe. This is often referred to as the Central Mediterranean Route. Many of these people take this journey in order to improve their social and economic conditions (economic migrants) while others move to escape from conflict and persecution (asylum seekers).²

For years, both the migration policies and political situation of Libya have had a significant impact on the increasing number of migrants. In the early 2000s, Libya abandoned its traditional open-door policy towards migration in light of the pressure from the European countries concerned about the flow of illegal migration reaching their coasts.³ This led to the introduction of visa requirements, as well as detention/deportation policies vis-à-vis migrants arriving or transiting through Libya.⁴

Italy, as one of the countries most affected by the migrant flow, concluded several agreements with Libya between 2007 and 2009 leading to "pushback" operations, where Italian authorities,

¹ Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana, 2 February 2017 ("MoU").

² For the purpose of the present analysis economic migrants and asylum seekers will be referred comprehensively as "migrants".

³ United Nations Support Mission in Libya (UNSMIL), "Detained and Dehumanised" Report on Human Rights Abuses Against Migrants in Libya, 13 December 2016 ("2016 UNSMIL Report"), p.5.

⁴ 2016 UNSMIL Report, p.5

in coordination with the Libyan Government, intercepted migrants crossing the Mediterranean sea and returned these individuals to Libya.⁵ In 2012, the European Court of Human Rights (ECtHR) found that pushback operations were in violation of the European Convention on Human Rights (ECHR) on the basis that they were inconsistent with the prohibition of non-refoulement and collective expulsion.⁶

In 2011, following the power vacuum created by the fall of the Gaddafi regime, Libya's security situation led to an ever greater flow of migrants departing from Libyan territory.⁷ For example, between 2013 and 2014, the number of migrants who passed through the Central Mediterranean Route and reached Europe increased by 376 percent.⁸ According to the United Nations High Commissioner for Refugees (UNHCR), in 2016 the number of migrants who arrived in Italy through the Central Mediterranean Route was 181,436, 90 percent of which departed from Libya.⁹

In response to the dramatic increase in migration flows and the growing numbers of casualties due to shipwrecks, in 2013 the Italian Government launched Operation *Mare Nostrum*, a military and humanitarian operation aimed at tackling the emergency in the Strait of Sicily.¹⁰ The mandate of Operation *Mare Nostrum* was primarily of a humanitarian nature. Between 18 October 2013 and 31 October 2014, Mare Nostrum rescued around 150,000 migrants in Libyan and international waters.¹¹ Following the termination of *Mare Nostrum*, the efforts of Italy and the European Union (EU) gradually shifted from rescue activities to activities aimed at countering human smuggling and trafficking in order to reduce the arrivals along the Central Mediterranean Route.¹²

In this regard, the MoU signed by Italy and Libya in 2017 whereby Italy commits to "providing technical and financial support to Libyan institutions engaged in combatting irregular migration" in order to "stem the illegal migrants' fluxes" departing from Libya is an integral part of such efforts.¹³

⁵ UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the Case of *Hirsi and Others v. Italy* (Application no. 27765/09), European Court of Human Rights, 29 March 2011, para.2.1.1.

⁶ *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012 ("*Hirsi Jamaa and Others v. Italy*").

⁷ 2016 UNSMIL Report, p.5.

⁸ Altai Consulting, Migration Trends Across the Mediterranean: Connecting the Dots, prepared by Altai Consulting for IOM MENA Regional Office, June 2015, p.11.

⁹ UNHCR Bureau for Europe, Desperate Journeys, Refugees and migrants entering and crossing Europe via the Mediterranean and Western Balkans routes, February 2017, p.6.

¹⁰ UNSMIL, Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya 20 December 2018 ("2018 UNSMIL Report"), p.13.

¹¹ 2018 UNSMIL Report, p.13.

¹² 2018 UNSMIL Report, pp.13-16. Specifically, from November 2014, the EU launched a series of maritime and border patrol operations, including Operation Triton (2014), EUNAVFOR MED, known as Operation Sophia (2015), Themis (2018), Operation Irini (2020). See European Council, Council of European Union, Saving lives at sea and targeting criminal networks available at <https://www.consilium.europa.eu/en/policies/eu-migration-policy/saving-lives-at-sea/>; United Nations Security Council, Final Report of the Panel of Experts on Libya Established Pursuant to Resolution 1973 (2011), S/2021/229, 8 March 2021 ("2021 Report of the Panel of Experts on Libya"), Annex 17.

¹³ MoU.

II. Legal and Factual Appraisal

a. The MoU

On 2 February 2017, Italy signed a MoU with Libya to strengthen their cooperation in combatting the phenomena of illegal immigration, human trafficking, fuel smuggling and terrorism. In the preamble, the MoU clarifies Italy's and Libya's determination to address the question of clandestine migrants crossing Libya to reach Europe through the creation of temporary detention/reception camps in Libya, which are to be placed under the control of the Libyan Ministry of Home Affairs.¹⁴

According to Article 1(A) of the MoU, Italy and Libya committed to set up cooperation programs to support security and military forces to stem the flow of illegal migration and to address the consequences thereof. In this context, Italy agreed to provide technical and technological support to the particular Libyan authorities responsible for tackling illegal immigration, including the Libyan Coast Guard (LCG) and the relevant organs of the Libyan Ministry of Home Affairs (Article 1(C) of the MoU).

Under Article 2 of the MoU, Italy and Libya committed to: (i) train the Libyan authorities in charge of the reception centres accommodating migrants (Article 2(3) of the MoU); and (ii) support relevant research centres to identify the most appropriate methods to address the problem of clandestine immigration and human trafficking (Article 2(3) of the MoU).

Article 5 of the MoU requires both parties to interpret and apply the MoU consistently with the international obligations and the human rights agreements to which the two parties are bound.

b. Human rights implications of the MoU

Following the adoption of the MoU, Italy provided various forms of support to the Libyan authorities, specifically the LCG, to strengthen its ability to perform rescue missions and intercept migrants attempting to cross the Mediterranean Sea. This support has included: (i) the provision of fast patrol boats to the LCG;¹⁵ (ii) the provision of technology to set up a Joint Rescue Coordination Centre;¹⁶ (iii) training of LCG personnel in charge of such rescue missions;¹⁷ and (iv) deploying an Italian Navy vessel in charge of providing support to LCG

¹⁴ MoU, preamble.

¹⁵ See, e.g., Ambasciata d'Italia, Scambio di note concernente la cessione al Governo libico di dieci unita' navali "CLASSE 500" per il pattugliamento costiero, Nota Verbale n.1440, 16 May 2019 ("Italian Embassy Note Verbale No. 1440/2019"), para.1.

¹⁶ Presidenza del Consiglio dei Ministri, 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, DOC. CCL-bis, N. 1, 28 December 2017 ("2017 Italian Council of Ministers Analytical Report on International Missions"), Scheda 36, pp.101, 192.

¹⁷ 2017 Italian Council of Ministers Analytical Report on International Missions, Scheda 24, pp.75-76.

operations.¹⁸ The information available also indicates that Italian Navy officers based in Libya took or continue to take part in the coordination of rescue operations performed by the LCG.¹⁹

Italy's support in furtherance of the MoU has reportedly boosted the capacity of the LCG to carry out rescue missions and intercept an increasing number of migrants attempting to cross the Mediterranean Sea.²⁰ In 2015, the LCG's operations and rescue missions encompassed only around 0.5% of the total number of migrants rescued at sea (roughly 800 persons). By contrast, the figures provided by UNSMIL and the UNHCR indicate that between January 2017 and November 2020, LCG intercepted around 50,000 migrants, all of whom later disembarked in Libya.²¹

However, it has been widely reported that in the context of the LCG's operations, migrants have been subjected to various forms of mistreatment. Mistreatment has been reportedly carried out by both the LCG and the various Libyan armed groups in charge of the detention centres where they are transferred once the migrants are returned to Libya. According to UNSMIL, during rescue operations the LCG engaged in aggressive behaviour against migrants intercepted at sea, mistreating and violating the human rights of the very persons that they were supposed to rescue.²² Such mistreatment has included physical abuse, threats, use of firearms and dangerous manoeuvres during rescue operations.²³

Migrants have also been subjected to further serious human rights violations once the LCG have returned them to Libya.²⁴ Most of the detentions camps where migrants are transferred upon disembarkation (the reception centres referred to in Article 2 of the MoU) are nominally under the control of the Department Combatting Illegal Migration (DCIM), which is part of the Libyan Ministry of Interior. However, these are in fact under the control of armed groups taking active part in the ongoing hostilities in Libya.²⁵ The conditions of detention in these camps have been described as "appalling", "nightmarish" and "cruel, inhuman and degrading".²⁶

¹⁸ 2017 Italian Council of Ministers Analytical Report on International Missions, Scheda 36, pp.101.

¹⁹ Tribunale di Catania, Sezione del Giudice per le Indagini Preliminari, N.3476/18 RGNR - 2474/18 R.G.GIP, Decreto di Convalida e di Sequestro Preventivo, 27 March 2018, pp.3-4.

²⁰ 2021 Report of the Panel of Experts on Libya, para.41.

²¹ UNSMIL, Report on the human rights situation of migrants and refugees in Libya, Migration report from January 2017 to 30 September 2018, December 2018, p.1; UNHCR, Libya: Activities at Disembarkation, monthly update, December 2018, p.1; UNHCR, UNHCR Update Libya, 3 January 2020, p.1; UNHCR, UNHCR Update Libya, 6 November 2020, p.1.

²² See, e.g., 2018 UNSMIL Report, pp.36-38. See also UNHCR, UNHCR Position on the Designations of Libya as a Safe Third Country and as a place of Safety for the Purpose of Disembarkation Following Rescue at Sea, September 2020 ("2020 UNHCR Position on Libya as a Safe Third Country"), para.14.

²³ 2018 UNSMIL Report, pp.36-38; 2020 UNHCR Position on Libya as a Safe Third Country, para.14.

²⁴ 2021 Report of the Panel of Experts on Libya, para.42.

²⁵ 2018 UNSMIL Report, pp.38-39.

²⁶ UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the case of *S.S. and Others. v. Italy* (Appl. No. 21660/18) before the European Court of Human Rights, 14 November 2019 ("2019 UNHCR Submission in *S.S. v. Italy*"), para.2.5.

UNHCR has concluded that the camps to which it had access did not meet international standards.²⁷ In the Report “Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya”, UNSMIL also observed that in those detention camps migrants intercepted at sea live in dire conditions²⁸ and are subjected to systematic forms of torture and ill-treatment, arbitrary detention, sexual violence, and forced labour.²⁹ These findings have been confirmed by the UNHCR³⁰ and NGOs such as Amnesty International³¹ and Human Rights Watch.³² Additionally, migrants in such detention centres are also exposed to violence emanating from the ongoing armed conflict in Libya. On 2 July 2019, for instance, the DCIM detention centre in Tajoura was hit by two airstrikes which resulted in the killing of at least 53 migrants held there.³³

Likewise, UN bodies’ reports implicate the Libyan authorities, including the LCG and the armed groups in charge of the migrant detention camps, in the smuggling or trafficking of migrants and refugees.³⁴ On 16 June 2020, such allegations have been also confirmed by the US State Department, which stated that

There were anecdotal reports that DCIM staff at detention centers contracted armed groups and militias—some of whom likely had ties to human trafficking networks—to provide security services at individual detention centers. Anecdotal reports also suggested staff in some GNA-affiliated migrant detention centers in western Libya sold detainees to local armed groups to transport and clean weapons. [...] In western Libya, numerous armed groups, including some GNA-aligned units, continued to be involved in the trafficking of detained migrants and benefited from extortion payments sent by the migrants’ family members for the migrants’ release. In addition, some LCG units, which were under the authority of the MOD, were allegedly composed of former human traffickers and smugglers or coordinated with groups involved in human trafficking, human smuggling, and other crimes. [...] Elements of the LCG reportedly work with armed groups and other criminals, including traffickers, to exploit migrants for profit. There are financial incentives for smugglers and traffickers to prevent the

²⁷ 2019 UNHCR Submission in *S.S. v. Italy*, para.2.5.

²⁸ 2018 UNSMIL Report, pp.42-44.

²⁹ 2018 UNSMIL Report, pp.44-50.

³⁰ 2020 UNHCR Position on Libya as a Safe Third Country, para.14.

³¹ Amnesty International, “Between Life and Death”: Refugees and Migrants Trapped in Libya’s Cycle of Abuse 24 September 2020 (“2020 AI Report”), pp.27-32; Amnesty International, Libya’s Dark Web of Collusion, Abuses against Europe-bound refugees and Migrants, 2017 (“2017 AI Report”), p.27.

³² Human Rights Watch, No Escape from Hell, EU Policies Contribute to Abuse of Migrants in Libya, January 2019 (“2019 HRW Report”), pp.35-57.

³³ UNSMIL, The airstrikes on the Daman Building Complex, including the Tajoura Detention Centre, 2 July 2019, para.6.

³⁴ 2018 UNSMIL Report, p.6.

disembarkation of migrants transiting the Mediterranean and to re-transit migrants back to Libya for detention and further exploitation.³⁵

The UNHCR relied on these findings of the US State Department to conclude that Libya cannot be designated as a place of safety for the purpose of receiving migrants following their rescue at sea.³⁶

The Al-Nasr detention camp, situated in al-Zawiya on the Libyan west coast, provides an example of the involvement in human trafficking of the Libyan authorities in charge of the rescue/detention of migrants in Libya. Al-Nasr is a migrant detention centre which is nominally under the control of the DCIM, but run by an armed group, the Shuhada al-Nasr Brigade. On 28 May 2020, the Tribunale di Messina found that migrants imprisoned in this camp were subjected to numerous forms of ill-treatment, including torture, rape, extortion, physical abuses, forced labour and murder.³⁷

In various passages, the judgment of the Tribunale di Messina confirms the ties between the organisation in charge of the Al-Nasr detention camp and human traffickers. Migrants were routinely mistreated and tortured to extort money from them, which could be paid in exchange for their freedom. Those who could not afford to pay were killed or sold to other human traffickers.³⁸ In some cases, migrants were freed and then kidnapped again by the same people in charge of the Al-Nasr detention camp and sent there for another period of detention.³⁹

The UN has also confirmed the involvement of the people in charge of the Al-Nasr detention centre in human trafficking. The UN Panel of Experts on Libya reported that “[m]igrants interviewed by the Panel identified the Al-Nasr detention centre as a primary hub for trafficking in western Libya”.⁴⁰ According to the United Nations Security Council, the head of the LCG in Zawiya, Abd al Rahman al-Milad, a.k.a. Al-Bidja, colluded with Mohammed Kachlaf, the commander of Shuhada al-Nasr, to carry out illicit operations related to the trafficking and smuggling of migrants.⁴¹ According to the UN Panel of Experts on Libya, al-Milad used the

³⁵ United States of America, Department of State, Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 20th Edition*, June 2020, p.548 (pdf page numbers - the pages of the Report are not numbered).

³⁶ 2020 UNHCR Position on Libya as a Safe Third Country, paras.13, 33-34.

³⁷ Tribunale di Messina, *Sentenza n.149/2020*, 28 Maggio 2020 (“Tribunale di Messina Judgment”). The judgment confirms the numerous allegations levelled by the United Nations and various NGOs of torture and ill-treatments including extortion, sexual exploitation, violence, and starvation.

³⁸ Tribunale di Messina Judgment, para.1, p.5.

³⁹ Tribunale di Messina Judgment, para.3.1, p.20.

⁴⁰ United Nations Security Council, *Final Report of the Panel of Experts on Libya Established Pursuant to Resolution 1973 (2011)*, S/2019/914, 9 December 2019, para.57.

⁴¹ United Nations Security Council, *Security Council Committee Established pursuant to resolution 1970 (2011)*, Narrative Summary – Abd al Rahman al-Milad.

coastguard's boat to intercept migrants at sea and transport them to Al-Nasr detention camp, from where they were sold again to smugglers.⁴²

Italy tacitly renewed the MoU despite the credible information received about the human rights violations committed by LCG and DCIM.⁴³ In numerous instances between 2017 and 2020, international and non-governmental organisations put the Italian authorities on notice of the abuses committed against migrants intercepted at sea by the LCG in Libyan detention camps and of the instrumental assistance provided by Italy pursuant to the MoU in this regard.⁴⁴

Despite such awareness, the Italian authorities failed to take any steps to prevent the further commission of human rights violations by the Libyan authorities in charge of migrants rescued at sea and placed in detention. While the Italian Minister of Foreign Affairs, Luigi Di Maio, has committed on numerous instances to strengthen the compliance of the MoU with human rights law, there is no information to date concerning the progress or the outcome of such negotiations.⁴⁵

Significantly, Italy's approach is in stark contrast with the one adopted by the UN mechanisms operating in Libya. In light of the allegations of human rights violations committed by the LCG and the DCIM, the UN bodies operating in Libya conditioned their support to these entities on the implementation of a series of mitigating measures aimed at ensuring Libyan authorities' compliance with human rights standards.⁴⁶

⁴² United Nations Security Council, Final Report of the Panel of Experts on Libya Established Pursuant to Resolution 1973 (2011), S/2018/812, 5 September 2018, Annex 49, para.2; United Nations Security Council, Final Report of the Panel of Experts on Libya Established Pursuant to Resolution 1973 (2011), S/2017/466, 1 June 2017, para.30, Annex 17, paras.3-4.

⁴³ 2020 AI Report, p.19.

⁴⁴ Notice from international organisations include: (i) **Council of Europe**: CoE, Human Rights Commissioner for Human Rights, Letter to Italian Minister of Foreign Affairs Mr Luigi Di Maio, CommHR/DM/sf 006-2020, 13 February 2020 ("2020 CoE Human Rights Commissioner Letter"); CoE, Human Rights Commissioner for Human Rights, Letter to Italian Minister of the Interior Mr Marco Minniti, CommHR/INM/sf 0345-2017, 28 September 2017; and (ii) **United Nations**: 2018 UNSMIL Report, Recommendations, p.53; UN Committee against Torture, Concluding observations on the fifth and sixth periodic reports of Italy, CAT/C/ITA/CO/5-6, 17 December 2017, para.22. Notice from non-governmental organisations include: (i) **Amnesty International**: 2020 AI Report, p.12; 2017 AI Report, p.11; (ii) **Human Rights Watch**: 2019 HRW Report, p.9. The debate in the Italian Parliament concerning the Italian mission in Libya also reflects a full awareness of the condition of detention of migrants in Libya and of the role that Italy is having in this regard. *See, e.g.* Senato della Repubblica, XVIII Legislatura, 236 Seduta, Resoconto Stenografico, 7 July 2020, pp.20-21 (De Falco), 26-27 (Bonino), 40-42 (De Petris); Senato della Repubblica, XVIII Legislatura, 130 Seduta, Resoconto Stenografico, 9 July 2019, pp.36-37 (Bonino), 51-54 (Verducci), 71-72 (Petrocelli). *See also* 2017 AI Report, pp.56-59.

⁴⁵ 2020 AI Report, p.19.

⁴⁶ 2018 UNSMIL Report, pp.18-19.

III. Italy's potential responsibility derived from Libya's human rights violations

The abuses migrants are subjected to in Libya may result in violations of customary and treaty norms of international law. Specifically, the reports of international organisations and NGOs present *in situ* indicate that the abuses perpetrated against migrants meet the threshold criteria of torture under the definition of Article 1 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the corresponding provisions incorporated under Article 3 of the ECHR as well as Article 7 of the International Covenant on Civil and Political Rights (ICCPR).⁴⁷ In parallel, such abuses may also qualify as international crimes, namely torture as war crimes and crimes against humanity.

While Libyan authorities are directly responsible for the violations committed against migrants, Italy's logistical support provided on the basis of the MoU may be considered to be instrumental to the commission of such breaches. Accordingly, such support may, *at least*, entail the international responsibility of Italy for such internationally wrongful acts and the criminal responsibility of the individuals involved in those violations.

Indeed such breaches appear to give rise to, at least, four possible types or forms of responsibility: (i) State responsibility stemming from aiding or assisting Libya in the commission of an internationally wrongful act, in accordance with Article 16 of the Articles on State Responsibility (ASR); (ii) State responsibility under Article 41 of the ASR; (iii) State responsibility for direct violation of the CAT, the ECHR, and the ICCPR; and (iv) individual criminal responsibility of those Italian nationals who facilitate or contribute to the commission of an international crime, in accordance with Article 25 of the Rome Statute of the International Criminal Court (ICC Statute).

a. Aiding and assisting Libya in the commission of an international wrongful act

According to Article 16 of the ASR

“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State”.

⁴⁷ For practical purposes, the present analysis focuses on the qualification of the abuses committed against migrants as torture and the relevant breaches of the CAT, as well as the corresponding provisions of the ECHR and the ICCPR. However, the abuses to which migrants are subjected to in Libya may qualify as cruel, inhuman or degrading treatment or punishment (Article 16 of the CAT) as well as violations of different human rights conventions to which Libya and Italy are parties. These include, *inter alia*, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention for the Protection of all Persons from Enforced Disappearance (CED). If requested, an expanded analysis with respect to Italy's responsibility under the relevant provisions of these conventions can be provided.

In the present case, Italy may be held liable for the abuses committed against migrants in Libya if the following *four* conditions are met: (i) Libya is in breach of the CAT vis-à-vis the mistreatments committed against migrants; (ii) Italy's support under the MoU contributed to such violation of the CAT; (iii) Italy provided such support despite its knowledge that it may contribute to Libya's violation of the CAT; and (iv) Libya's violation of the CAT amounts to a breach of an obligation by which Italy is bound.

Libya is in breach of the CAT. The abuses suffered by migrants in Libya are inconsistent with Articles 1, 2 and 5 of the CAT ratified by Libya on 16 May 1989. Such breaches amount to an internationally wrongful act.

Under Article 2(1) of the CAT, States have an obligation to respect and protect the human right not to be subjected to torture as defined in Article 1 of the CAT.⁴⁸ While Article 2 of the CAT requires every State Party to put in place "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" (positive obligation), this provision, read together with Article 1, also covers the right of individuals not to be subjected to torture (negative obligation).⁴⁹ In addition, Article 5 of the CAT requires States Parties to establish their jurisdiction over acts of torture committed in the territories under their jurisdiction, including any forms of attempt, complicity and participation.

As noted above, available information from international and non-governmental organisations indicates that Libya is in breach of these provisions. Specifically, UNSMIL found that migrants held in a number of DCIM detention centres, including those rescued at sea by the LCG, are "systematically subjected to torture".⁵⁰ The same conclusion is reflected in several reports

⁴⁸ Article 1 of the CAT ("For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is 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, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.").

⁴⁹ See G. Zach, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Part I, Substantive Articles, Article 2 Obligation to Prevent Torture, in M. Nowak, M. Birk, and G. Monina (eds.), *The United Nations Convention Against Torture and Its Optional Protocol: A Commentary*, 2nd Ed., Oxford University Press: Oxford, 2019, p.78 ("The formulation of Article 2 (1) must be interpreted as including the obligation of States parties to respect and protect the human right not to be subjected to torture. But the main emphasis of this formulation, as in Article 16, is put on the positive obligation of States parties to fulfil."); Committee Against Torture, CAT/C/53/D/514/2012, *Déogratias Niyonzima v Burundi*, Communication No. 514/2012, para.9. In some cases, the Committee against Torture found that such negative obligation emanated directly from Article 1 of the CAT. See, e.g., Committee Against Torture, *Ali Ben Salem v. Tunisia*, Communication No. 269/2005, CAT/C/39/D/269/2005, 7 November 2007, para.16.5; Committee Against Torture, *Dmytro Slyusar v Ukraine*, Communication No. 353/2008, CAT/C/47/D/353/2008, 16 January 2011, para.9.4; and G. Zach, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Part I, Substantive Articles, Article 1 Definition of Torture, in M. Nowak, M. Birk, and G. Monina (eds.), *The United Nations Convention Against Torture and Its Optional Protocol: A Commentary*, 2nd Ed., Oxford University Press: Oxford, 2019, p.68.

⁵⁰ 2018 UNSMIL Report, p.44.

issued by Amnesty International⁵¹ and Human Rights Watch.⁵² These reports include first-hand evidence of specific acts of torture routinely inflicted on migrants. These findings are fully in line with the judgment of the Tribunale di Messina which qualified the abuses committed against migrants in the Al-Nasr detention centre as torture under Article 613 *bis* of the Italian Criminal Code.⁵³

Against this background, Libya has not adopted any comprehensive effort to tackle such practices or to ensure that victims may receive redress for the violations suffered. Accordingly, the torture inflicted against migrants in the detention centres operated by armed groups together with Libya's failure to put in place measures that can effectively prevent such treatment or to exercise its criminal jurisdiction thereto violates Articles 1, 2 and 5 of the CAT.

Notably, the fact that detention centres are run by armed groups on behalf of the Minister of Interior does not absolve Libya of its obligations under the CAT. Indeed, the Committee against Torture General Comment No. 2 stipulates that, under Article 2 of the CAT, States also bear responsibility for the acts of individuals who act on their behalf, as in the present case.⁵⁴ Likewise, in *Elmi v Australia*, the Committee Against Torture concluded that non-State actors who carry out State functions, such as personnel in privately-run detention facilities or *de facto* authorities exercising quasi-governmental functions, fall under the definition of persons acting in an official capacity.⁵⁵

Italy's support pursuant to the MoU contributed to Libya's violation of the CAT. Italy's support under the MoU qualifies as direct assistance to Libya's breach of the CAT. As noted above, the coordination, logistical support and training enabled the LCG to increase their operations and intercept migrants at sea.⁵⁶ Once migrants have disembarked in Libya, under the auspices of the LCG, they are transferred to detention camps where they are then subjected to torture.⁵⁷ Thus, Italy's support to the LCG contributes to Libya's internationally wrongful act.

Italy provided such support despite its knowledge that it may have contributed to Libya's violation of the CAT. Italy has been providing logistical support to Libyan authorities despite its knowledge that migrants intercepted at sea and returned to Libya were subjected to torture.⁵⁸

⁵¹ 2020 AI Report, pp.29-30; 2017 AI Report, pp.31-33.

⁵² 2019 HRW Report, pp.1, 3, 17, 35, 39-41, 43-44.

⁵³ Tribunale di Messina Judgment, para.6.2, pp.38-42.

⁵⁴ Committee Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No.2, CAT/C/GC/2, 24 January 2008, para.15.

⁵⁵ Committee Against Torture, *Sadiq Shek Elmi v Australia*, Communication No. 120/1998, U.N. Doc. CAT/C/22/D/120/1998, 14 May 1999, para.6.5. See also Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Nepal, E/CN.4/2006/6/Add.5, para.19.

⁵⁶ Section A, Legal and Factual Background.

⁵⁷ Section A, Legal and Factual Background.

⁵⁸ There is considerable academic debate on whether Article 16 of the ASR is satisfied by the knowledge of the other the intent of the State to commit a wrongful act or instead requires also an intention to provide aid or assistance in the commission of such act. See P. Pustorino, *Diritto Internazionale e Complicità fra Stati: Considerazioni sull'elemento soggettivo dell'illecito*, in *Rivista di Diritto Internazionale*, 2020, p.657; C. Dominicé, *Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State*, in J. Crawford,

Italy's full awareness of the circumstances of the internationally wrongful act performed by Libya cannot be disputed.⁵⁹

The relevant conducts in question would constitute a breach of an obligation by which Italy is bound if committed by Italian authorities. Italy has ratified the CAT by means of the adoption of Law No. 498/1988; as a result, the treaty entered into force on 12 January 1989. Accordingly, the obligations stemming from Articles 1, 2 and 5 of the CAT for which Libyan authorities are responsible in the present case are equally applicable to Italy.

By providing logistical support to Libyan authorities pursuant to the MoU, Italy has assisted Libya in breaching the CAT, in the knowledge of the circumstances of such breach. Italy incurs responsibility under Article 16 of the ASR. As such, Italy is required to (i) cease the wrongful act (ASR, Article 30); and (ii) provide full reparation for the injury, whether material or moral, caused by its wrongful conduct (ASR, Article 31).

b. Italy is in violation of Article 41 of the Articles on State Responsibility

The prohibition of torture is absolute – i.e., these are imperative norms in international law that no State is allowed to ignore.⁶⁰ The torture inflicted on migrants in Libya also represents a violation of a *jus cogens* norm.⁶¹ Accordingly, Italy's support to Libya is in breach of Article 41(2) of the ASR by providing assistance in maintaining a situation in breach of a peremptory norm as defined by Article 40 of the ASR. Specifically, Article 41(2) establishes that “[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.” The two obligations, non-recognition and non-assistance, have a “separate scope of application” and operate independently.⁶²

The International Law Commission clarified that the obligation not to provide aid or assistance to a situation created by a serious breach of a peremptory norm “goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act” (covered by Article 16 of the ASR), as it “extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach”.⁶³

In this regard, besides the mere assistance to the violations of the CAT, Italy's continuous support to Libyan authorities since 2017 is likely to engage its responsibility under Article 41 of

A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility*, Oxford University Press: Oxford, 2010, p.286. However, the International Court of Justice (ICJ), in the *Genocide* case, interpreted Article 16 as to requiring knowledge, rather than intent. Specifically, the ICJ concluded that a conduct can be qualified as complicity when the assisting State aided the acting State “in full awareness” of the latter's intent to use the aid to commit the wrongful act. See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, 26 February 2007, paras.420-423.

⁵⁹ Section A, Legal and Factual Background.

the ASR insofar as it maintained a situation in which migrants were subjected to treatment inconsistent with the *jus cogens* prohibition against torture.

c. Italy's support to Libyan Authorities may incur responsibility under the CAT, ECHR, and ICCPR

It cannot be excluded that Italy's support to Libyan authorities is in direct breach of its own obligations under the CAT, ECHR and ICCPR. Forms of support such as, *inter alia*, coordination of LCG rescue missions from Italy and Libya may trigger the extraterritorial application of these human rights instruments directly engaging Italy's responsibility for the human rights violations committed against migrants in Libya.

i. Extraterritorial application of the CAT

As noted above, the CAT imposes upon States two different sets of obligations: (i) positive obligations: to prevent acts of torture by taking positive measures such as legislative and administrative measures or establishing its criminal jurisdiction (for instance Articles 2(1), 5(1) and 7(1); and (ii) negative obligations: to refrain from committing torture (Articles 1 and 2).⁶⁴ While positive obligations under Articles 2(1), 5(1) and 7(1) are confined to acts of torture occurring in the territory under the control of the State, no geographical limitation is indeed provided vis-à-vis the negative obligations.⁶⁵

These considerations find support in the conclusions of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment that specified that "States' negative obligations under the Convention are not per se spatially limited or territorially defined, nor are its obligations to cooperate to end torture and other ill-treatment."⁶⁶ Likewise, according to the Committee Against Torture, the assistance provided to acts of torture committed outside the territory of a State can attract its responsibility under Article 2 as a form of complicity.⁶⁷

In line with this reasoning, even if migrants are subjected to torture in Libya by non-Italian nationals, Italy may still be in breach of Articles 1 and 2 of the CAT because of the support provided under the MoU, which has contributed to the commission of these crimes.

Assistance to the LCG to intercept migrants entitled to asylum may also be inconsistent with the principle of *non-refoulement*, and in violation of Article 3 of the CAT which provides that "[n]o

⁶⁴ M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, Oxford: Oxford University Press, 2011 ("Milanovic, *Extraterritorial Application of HR Treaties*"), pp.212, 214-215. See also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Tajikistan, A/HRC/22/53/Add.1, 28 January 2013, para.99.

⁶⁵ Milanovic, *Extraterritorial Application of HR Treaties*, p.215.

⁶⁶ Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/70/303, 7 August 2015, para.28.

⁶⁷ Committee against Torture Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, CAT/C/GBR/CO/6, 7 June 2019, para.34.

State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁶⁸ In this regard, financing and equipping the LCG as well as coordinating its activity during rescue operations, whether from Italy or Libya, suggests that Italy may be in violation of this provision where LCG rescue missions result in the mistreatment of migrants intercepted at sea once transferred back to Libyan soil.

ii. Extraterritorial Application of the ECHR

The support to the LCG may also give rise to the extraterritorial application of the ECHR. Specifically, the question of Italy’s responsibility for coordinating LCG rescue operations from Rome is now under consideration before the ECtHR in the case *S.S. and others v. Italy*.⁶⁹ In this case, the UNHCR, acting as a third-party intervener, maintained that Italy’s obligations under the non-refoulement principle extended to rescue operations carried by the LCG operated in coordination with the Italian Navy.⁷⁰ The UNHCR’s approach is in line with considerations that “border externalisation” policies are inconsistent with non-refoulement doctrine which applies also in high-seas.⁷¹

In addition, the extraterritorial applicability of the ECHR seems to cover the conduct of Italian officers deployed in Libya (on the basis of the MoU) in charge of coordinating the LCG rescue operations or performing other forms of similar support. Indeed, according to the ECtHR “where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting

⁶⁸ CAT, Article 3.

⁶⁹ ECtHR, *S.S. and Others v. Italy*, Application No. 21660/18.

⁷⁰ 2019 UNHCR Submission in *S.S. v. Italy*, paras.4.1-4.7, 6.1.

⁷¹ *Hirsi Jamaa and Others v. Italy*. There is a considerable tension between EU migratory policies and ECtHR principles with respect “border externalisation”. M.-T. Gil-Bazo, The Practice of Mediterranean States in the context of the European Union’s Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited, in *International Journal of Refugee Law*, 2006, pp.571-600. Against this background, the ‘externalisation’ of the borders adopted by a number of European countries seems to be inconsistent with the principles established by the ECtHR. M. Casas, S. Cobarrubias, J. Pickles, *Stretching Borders Beyond Sovereign Territories? Mapping EU and Spain’s Border Externalization Policies*, in *Geopoliticas*, 2011, pp.71-90; G. Papagianni, *Forging an External EU Migration Policy: From Externalisation of Border Management to a Comprehensive Policy?*, in *European Journal of Migration Law*, 2013, pp.283-299; T. Demmelhuber, *The European Union and illegal migration in the southern Mediterranean: the trap of competing policy concepts*, in *International Journal of Human Rights*, 2011, pp.813-826. See also Answer of the Federal Government to the brief question put by Members of Parliament Winkler, Beck, further delegates and the Bündnis 90/Die Grünen parliamentary group – Drs. 16/2542 –, BT-Drs. 16/2723 of 25 Sept. 2006, 6: “The rules of German and European asylum and refugee law come into effect through territorial contact, i.e., at or within a country’s borders. The same applies, according to predominant state practice, to application of the *non-refoulement* principle in the Geneva Convention” (quoted in A. Fischer-Lescano, T. Löhr, and T. Tohidipur, *Border Controls at Sea: Requirements under International Human Rights and Refugee Law*, in *International Journal of Refugee Law*, 2009, pp.256-296).

State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State.”⁷²

iii. Extraterritorial Application of the ICCPR

The Italian Government’s direct involvement in the coordination of the LCG rescue missions, including other forms of support provided from Italy (training, financing and provision of boats) or Libya (consulting and liaising with Government of National Accord (GNA) authorities), may also trigger extraterritorial application of the ICCPR. This is confirmed by the “impact approach” to jurisdiction adopted in General Comment No.36 of the Human Rights Committee (HRC).⁷³

Specifically, according to General Comment No.36 States parties’ obligations under the ICCPR extend to those persons “located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.”⁷⁴ While the General Comment No.36 specifically addresses the right to life under Article 6 of the ICCPR the above-mentioned considerations seem to also apply to the other rights listed in the ICCPR, including to Article 7 (prohibition of torture).

Such interpretation of Article 2(1) of the ICCPR was adopted in the case *S.A. and others v. Italy*, where Italy was found responsible for violating the ICCPR for the deaths resulting from the shipwreck of a vessel with hundreds of migrants that occurred in the Maltese SAR Zone.⁷⁵ According to the HRC, the facts that Italian authorities were contacted first by the vessel and that an Italian vessel was closer to the sinking vessel than any Maltese unit were sufficient to establish Italy’s jurisdiction.⁷⁶ These circumstances created a “special relation of dependency” that engaged Italy’s obligation under Articles 2(1) and 6 of the ICCPR.⁷⁷

The principles underpinning *S.A. and others v. Italy* seem, *a fortiori*, applicable to the involvement and assistance that Italy provided to Libya following the conclusion of the MoU. Against this background, it is undisputed that: (1) the specific active support provided by Italy to Libya has a direct impact on the rights of migrants intercepted by the LCG; and (2) such an impact was and is foreseeable.⁷⁸

⁷² See e.g. *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 135, ECHR 2011. See also *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 71, ECHR 2001-XII (holding that the convention applies the obligations stemming from the ECHR may apply extraterritorially when a Contracting State “through the consent, invitation or acquiescence of the local Government, exercises all or some of the public powers normally to be exercised by that Government.”).

⁷³ Human Rights Committee, CCPR/C/CG/36, General Comment No.36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018 (“HRC General Comment No.36/2018”), para.63.

⁷⁴ HRC General Comment No.36/2018, para.63.

⁷⁵ HRC, *S.A. and others v. Italy*, Communication No. 3042/2017, Un Doc. CCPR/C/130/D/3042/2017, 21 January 2021 (“*S.A. v. Italy*”), para.7.8.

⁷⁶ *S.A. v. Italy*, para.7.8.

⁷⁷ *S.A. v. Italy*, para.7.8.

⁷⁸ Section A, Legal and Factual Background.

d. Individual criminal responsibility

The violations and abuses committed in Libyan detention centres against migrants intercepted at sea by the LCG may amount to war crimes and/or crimes against humanity under Articles 7 and 8 of the ICC Statute.⁷⁹ This may trigger the personal responsibility of Italian agents that materially provided assistance to the Libyan authorities, exposing them to possible investigations and prosecutions carried out under the ICC framework.

Pursuant to the United Nations Security Council Resolution 1970 (2011), the ICC has jurisdiction over, *inter alia*, war crimes and crimes against humanity committed in Libya since 2011. As interpreted by the Pre-Trial Chamber in the *Al-Werfalli* case, the ICC's jurisdiction covers crimes connected or "sufficiently linked" to the ongoing armed conflict.⁸⁰ In this context, the then ICC Prosecutor, Fatou Bensouda, stated that her office was actively involved in the investigation of, *inter alia*, crimes and abuses committed against migrants in Libya.⁸¹

By providing support to the operations carried out by the LCG, and thus contributing to the return of the rescued migrants to detention centres in Libya, Italian agents can be considered to have assisted relevant crimes committed in such centres, within the meaning of Article 25(3)(d) of the ICC Statute. Such provision criminalises any intentional assistance to a group with a common purpose, when involving the commission of a crime falling within the jurisdiction of the ICC.

Article 25(3)(d)(ii) provides a residual form of responsibility under the ICC framework, covering the assistance provided to a group with a common criminal purpose. It encompasses *any* form of contribution that may have a connection with the material (including provision of resources/weapons) or subjective elements of the crimes (encouragement).⁸² As confirmed by the recent jurisprudence of the ICC, any level or degree of contribution engages liability under this provision.⁸³ Notably, remote or limited conduct which contributed to the crime is also captured by Article 25(3)(d).

⁷⁹ See A. Pizzuti, ICC Situation on Libya: The ICC Prosecutor Should Look into Libyan Criminal Proceedings Concerning Crimes Committed Against Migrants, in *Opinio Juris*, 20 November 2020 ([Url](#) – last visited: 7 July 2021) ("Pizzuti, Libyan Criminal Proceedings"); L. Prospero, The ICC (Symbolic) Investigation into Crimes Allegedly Committed Against Migrants in Libya, in N. Ronzitti, E. Sciso (eds.), *I conflitti in Siria e Libia, Possibili equilibri e le sfide al diritto internazionale*, Giappichelli: Torino, 2018 ("Prospero, ICC (Symbolic) Investigation"), pp.243-264.

⁸⁰ See ICC, Pre-Trial Chamber I, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, ICC-01/11-01/17, Warrant of arrest, 15 August 2017, para.23.

⁸¹ See, e.g., Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), 5 May 2020. See also Pizzuti, *Libyan Criminal Proceedings*; and Prospero, *ICC (Symbolic) Investigation*.

⁸² ICC, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436-tENG, Judgement pursuant to Article 74, 7 March 2014 ("*Katanga* Trial Judgment"), para.1635.

⁸³ ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, 24 March 2016, para.27; ICC, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, para.44.

Moreover, under Article 25(3)(d)(ii), the person that provides the contribution does not need to have intended the commission of the crime.⁸⁴ Mere knowledge of the intention of the group to commit the crime satisfies the subjective element of the provision.⁸⁵

The logistic support provided by the Italian agents under the MoU appears to meet the requirements of Article 25(3)(d)(ii). Such assistance facilitated the return of migrants rescued at sea to the very detention centres in Libya where crimes were subsequently committed by armed groups (i.e., groups with common criminal purpose). While there may be no intention on the part of Italian authorities for such crimes to be committed, their assistance was provided with the knowledge that migrants would suffer such crimes after being intercepted and returned to Libya. The common knowledge of the conditions of detention of migrants in Libya leaves little doubt in this regard.⁸⁶

In conclusion, the ICC may initiate investigations against Italian officials involved in assisting and coordinating LCG rescue operations and find them criminally responsible, under Article 25(3)(d)(ii) ICC Statute, for complicity in war crimes and/or crimes against humanity committed against migrants during rescue operations and following their return to detention centres in Libya.

⁸⁴ *Katanga* Trial Judgment, para.1638; ICC, *The Prosecutor v. Callixte Mbarushimana*, ICC-01/04-ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011 (“*Mbarushimana* Confirmation Decision”), para.289.

⁸⁵ *Mbarushimana* Confirmation Decision, para.289.

⁸⁶ Section A, Legal and Factual Background.

IV. Modification, termination or suspension of the MoU

a. Necessary modifications or amendments to the MoU

If the Government of Italy intends to continue cooperating with Libya in the area of migration on the basis of the present MoU, such cooperation needs to comport with its human rights obligations and be implemented in a manner which ensures that Italian agents will not be exposed to criminal responsibility for acts committed by Libyan authorities or associated individuals.

Notably, since the tacit renewal of the MoU in February 2020, Mr. Luigi Di Maio, the Italian Minister of Foreign Affairs, committed to negotiate amendments to improve the human rights standards applied in relation to the treatment of migrants. In particular, a letter sent by Mr. Luigi Di Maio to Amnesty International in September 2020 reflects that Italy's efforts to negotiate amendments to the MoU are aimed at the progressive closure of detention centres and the involvement of UNHCR/IOM in the management of refugees and migrants in Libya.⁸⁷

Even if included in a revised MoU, such potential amendments do not appear to be sufficient to tackle the systemic nature of the human rights violations committed against migrants in Libya as well as the possible negative consequences in terms of Italy's responsibility for such violations on the basis of such agreement.

Indeed any form of cooperation with Libya in the field of migration needs to be contingent on three main pillars: (i) continued monitoring and evaluation of the human rights compliance by Libyan authorities; (ii) the ability to review, suspend or terminate any form of cooperation in case Libya fails to fulfil its human rights obligations; and (iii) a clear commitment to provide effective access to justice to those who suffered human rights violations connected to the Italian support on the basis of the MoU.

Such an approach is in line with the views of the Council of Europe (CoE) Commissioner for Human Rights, the Office of the High Commissioner for Human Rights (OHCHR) and the Committee Against Torture. Their recommendations concerning the MoU all point towards the need to implement an *independent* monitoring system to review the conditions of migrants in Libya and to make Italy's support contingent upon Libyan authorities' effective compliance with human rights standards.⁸⁸ In addition, the CoE Commissioner for Human Rights included in her report a recommendation to establish a framework allowing for an effective redress with

⁸⁷ 2020 AI Report, p.19.

⁸⁸ Committee against Torture, Concluding observations on the fifth and sixth periodic reports of Italy, CAT/C/ITA/CO/5-6, 18 December 2017, paras.22-23; 2018 UNSMIL Report, pp.58-59; Commissioner for Human Rights of the Council of Europe, Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean, June 2019 ("2019 CoE Human Rights Commissioner Report"), pp.42, 44; 2020 CoE Human Rights Commissioner Letter, pp.1-2. See also Commissioner for Human Rights of the Council of Europe, A Distress Call for Human Rights. The widening gap in migrant protection in the Mediterranean. Follow-up Report, March 2021 ("2021 CoE Human Rights Commissioner Report"), pp.25-26.

respect to any complaint of “those who nonetheless consider that the enjoyment of their rights has been affected by the co-operation activities.”⁸⁹

Against this background, it is evident that the mere reference in Article 5 of the MoU to interpret and apply the agreement consistently with human rights obligations is insufficient to protect migrants from being abused. By contrast, a cooperation framework with Libya in the field of migration requires the inclusion of an effective **human rights clause** in a treaty that could be enforceable and executable during the entire course of the execution of the treaty.

In order to be effective, a human rights clause may be framed according to the following considerations.

The essential character of the human rights clause. First, the human rights clause needs to specify that respect of human rights, and possibly international humanitarian law, is an essential element of the treaty and that the parties can suspend or terminate the treaty in case of persistent violations of such clause.

Independent monitoring framework. An independent body in charge of monitoring the impact of the cooperation activities vis-à-vis the potential human rights violations committed by the parties needs to be established. Such independent body should be responsible for conducting an early “human rights risk assessment” of the activities encompassed by the MoU, developing risk mitigation strategies and monitoring the implementation of such activities to assess their consistency with human rights standards.

The human rights clause needs to make explicit reference to such an independent body and its mandate, specifying that: (i) the independent body shall act in full transparency and that the result of its monitoring should be public; (ii) the parties commit to assist such body supporting any request pertinent to its mandate; (iii) a timeframe for the reporting period should be established; and (iv) failure of one of the parties to assist such body may result in the termination or suspension of the treaty.

Mitigating measures. The human rights clause should incorporate a list of mitigating measures that the parties can undertake in case of human rights violations committed by the counterpart in order to address the violations and ensure non-repetition. Such measures may be applied upon recommendations of the independent monitoring body.

Access to justice. The parties should commit to the implementation of a legal framework to facilitate the access to justice for victims of human rights violations which arise as a consequence of cooperation under the MoU.

Similar mechanisms already exist in other fields *mutatis mutandis*. For instance, Article 7 of the Arms Trade Treaty, to which Italy is a party, requires the exporting state to conduct a risk assessment to monitor and determine whether the arms/items to be exported could be used,

⁸⁹ 2020 CoE Human Rights Commissioner Letter, pp.1-2. See also 2019 CoE Human Rights Commissioner Report, p.42; 2021 CoE Human Rights Commissioner Report”), pp.25-.26

inter alia, to commit and facilitate violations of human rights law and international humanitarian law.⁹⁰ If such risk exists, the exporting state shall consider implementing measures to mitigate such risk or, in case of an “overriding risk” of any of such violations, shall not authorise the export of the arms.⁹¹

More on point with respect to the present case is the UN Human Rights Due Diligence Policy on Support for Non-United Nations Security Forces (HRDDP).⁹² The HRDDP was developed in March 2013 as a mechanism to ensure that any support that the UN provides to non-United Nations forces is consistent with “its obligations to respect, promote and encourage respect for international humanitarian, human rights and refugee law.”⁹³

According to the HRDDP, any support provided to non-UN security forces is contingent on an assessment of the potential risks/benefits of such support, taking into consideration a number of factors, including the human rights record of the institution/individuals which are to receive their support and the existence of adequate procedures to address possible violations.⁹⁴ Once support is provided, the relevant UN entity involved is required to assess the impact of its support and to establish a mechanism for monitoring “the recipient’s behaviour to detect grave violations of humanitarian, human rights and refugee law”.⁹⁵ Mitigating measures have to be put in place in case the UN receives information that the recipient of the support is committing grave violations of humanitarian, human rights and/or refugee law.⁹⁶ If such violations continue, then the UN will suspend its support.⁹⁷

b. Termination or suspension of the MoU due to human rights violations

In the absence of any agreements between Italy and Libya to incorporate amendments in the MoU such as those described above, the only remaining alternative for Italy is to terminate or suspend the agreement.

As explained above, the conduct of Libyan authorities and the mistreatment of migrants expose Italy and/or its agents to international responsibility by virtue of Italy’s cooperation pursuant to

⁹⁰ Arms Trade Treaty, Article 7(1)(b)(i), (ii).

⁹¹ Arms Trade Treaty, Article 7(2), (3).

⁹² United Nations General Assembly, Identical Letters dated 25 February 2013 from the Secretary-General Addressed to the President of the General Assembly and to the President of the Security Council, A/67/775–S/2013/110, 5 March 2013 (“2013 UNSG Letters”), Annex - Human Rights Due Diligence Policy on United Nations Support to non-United Nations Security Forces.

⁹³ 2013 UNSG Letters, Annex - Human Rights Due Diligence Policy on United Nations Support to non-United Nations Security Forces, para.1.

⁹⁴ 2013 UNSG Letters, Annex - Human Rights Due Diligence Policy on United Nations Support to non-United Nations Security Forces, para.14(a)-(c).

⁹⁵ 2013 UNSG Letters, Annex - Human Rights Due Diligence Policy on United Nations Support to non-United Nations Security Forces, para.21(c). See also *ibid.*, para.21(d)-(g)

⁹⁶ 2013 UNSG Letters, Annex - Human Rights Due Diligence Policy on United Nations Support to non-United Nations Security Forces, para.26.

⁹⁷ 2013 UNSG Letters, Annex - Human Rights Due Diligence Policy on United Nations Support to non-United Nations Security Forces, para.27.

the MoU. At the same time in the current framework, Italy is still obliged to provide such assistance according to Articles 1 and 2 of such agreement, without any possibility of either reviewing or monitoring Libya's conduct.

This situation renders the position of Italy unsustainable as it is caught between two conflicting international obligations. On one side, Italy is bound by human rights obligations to prevent (and punish) acts of torture. On the other, Italy is required by the MoU to assist Libyan authorities irrespective of whether such assistance results in acts of torture. This leaves Italy vulnerable to state and individual responsibility under international law.

A solution to this problem is to terminate the MoU pursuant to Article 60 of the VCLT on the basis that Libya is violating provisions which are essential to the accomplishment of the object or purpose of the agreement. The human rights violations and abuses committed against migrants by the LCG and by those in charge of the Libyan detention centres as well as the involvement of such authorities and individuals in human trafficking violates the MoU, namely Articles 1, 2 and 5. These violations may be qualified as material breaches of the MoU pursuant to Article 60(3)(b) of the VCLT, entitling Italy to terminate or suspend the treaty.

Not every violation of a treaty justifies its termination or suspension. According to Article 60 of the VCLT, only those violations that amount to material breaches allow for such possibility. Article 60(3)(b) of the VCLT defines material breaches include "[t]he violation of a provision essential to the accomplishment of the object or purpose of the treaty".⁹⁸ In this regard, it is important to note that within the meaning of Article 60(3)(b) "not only "central" provisions but also "ancillary" provisions could be essential".⁹⁹

Accordingly, to assess whether Italy is entitled to terminate or suspend the MoU, two questions need to be addressed, namely whether: (i) Libya violated the MoU; and (ii) such violations affect provisions that are essential to the accomplishment of the object and purpose of the treaty.

In the present case, there is no doubt that the human rights violations committed by the LCG and the other entities/individuals in charge of the "reception centres" are in direct breach of Article 5 of the MoU, which, as noted above, states that Libya and Italy have to apply and interpret the MoU consistently with their human rights obligations.

⁹⁸ See also Permanent Court of Arbitration (PCA), Arbitration between the Republic of Croatia and the Republic of Slovenia, *Croatia v. Slovenia*, Partial Award, PCA Case No. 2012-04, ICGJ 509 (PCA 2016), 30 June 2016, paras.215-27; ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, paras.94-95; ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, paras.270-276. See also C. Tams, *Regulating Treaty Breaches*, in M. Bowman, D. Kritsiotis (eds.), *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, Cambridge University Press: Cambridge, 2018, pp.446-449.

⁹⁹ T. Giegerich, Article 60, in O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, Springer: Berlin, 2018, pp.1105-1106.

Likewise, the engagement or collusion in human trafficking on the part of Libyan authorities is contrary to the overall spirit of the MoU which is aimed, *inter alia*, at fighting human trafficking. Allegations raised with respect to the Al-Nasr detention camp for example indicated that the armed groups in charge of the “reception centres” and some elements of the LCG, play a key role in trafficking. This is inconsistent with Article 2(3) of the MoU, which requires Libya to train and support Libyan authorities to identify the most adequate methods to address the clandestine immigration phenomenon and human trafficking.

This gives rise to considering whether Libya’s violations of the MoU affect provisions that are essential to the accomplishment of the object or purpose of the treaty. As noted above, only violations that are essential to the accomplishment of the object or purpose of the treaty may justify its termination or suspension. The “object and purpose” of a treaty converges on the reasons the parties wish to conclude it, as well as the general result which they want to achieve through it.¹⁰⁰ A treaty may have various objects and purposes.¹⁰¹ Generally, a treaty’s “object and purpose” may be inferred from its title and preamble – the latter is generally where the parties list the purposes they want to pursue through their agreement – as well as from a reading of the treaty as a whole.¹⁰² In some cases, the preparatory works and the parties’ subsequent practice may also assist in clarifying the scope of the object and purpose of a treaty.¹⁰³

In the present case, the collusion with human traffickers by the same Libyan authorities acting pursuant to the MoU defeats the object and purpose of the MoU. The title, the preamble and the specific provisions embodied in Article 2 of the MoU all appear to confirm that the desire to fight human trafficking business in Libya is a central element of the treaty and one of the main reasons that led to its conclusion. In this regard, the fact that the Libyan authorities and entities nominally in charge of combatting human trafficking instead take an active part in such illicit business undermines one of the main aspects of the object and purpose of the MoU.

The same considerations apply to Libya’s violation of Article 5 of the MoU, which requires it to act consistently with human rights obligations which bind both parties. The fact that such a provision is an essential component of the MoU can be inferred from the reference in the preamble that Italy’s and Libya’s willingness to cooperate and implement the MoU is

¹⁰⁰ M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill: Leiden/Boston, 2009 (“Villiger, *Commentary on VCLT*”), p.271 (“What is meant by a treaty’s object and purpose? As in Article 31 (q.v., N. 11), the terms are used as a combined whole and include a treaty’s aims, its nature and its end.”). See also C. Walter, Article 19, in O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, Springer: Berlin, 2018 (“Walter, Article 19 VCLT”), p.289.

¹⁰¹ Villiger, *Commentary on VCLT*, p.271.

¹⁰² Walter, Article 19 VCLT, p.289.

¹⁰³ Walter, Article 19 VCLT, p.289; Villiger, *Commentary on VCLT*, p.272; ILC, Report of the Commission to the General Assembly on the work of its fifty-ninth session, in *Yearbook of the International Law Commission*, 2007, Vol. II, Part 2, Guideline 3.6.1, p.37 (“[t]he object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context. Recourse may also be had in particular to the title of the treaty, the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice agreed upon by the parties.”).

articulated on the basis of their obligations deriving from international customary law and agreements. A review of the MoU indicates that such reference must necessarily include customary and treaty human rights obligations incorporated in Article 5 of the MoU.

The importance of human rights compliance is also confirmed by official declarations concerning the intention of the parties and the subsequent practice of Libya and Italy in implementing the MoU.

Indeed, a reference to respect for human rights is included in the Exchange of Notes of 16 May 2019/10 June 2019 whereby, pursuant to the MoU, Italy provided Libya with 10 patrol boats to support LCG's efforts to, *inter alia*, engage in rescue missions as well as counter illegal migration and human trafficking at sea.¹⁰⁴ Paragraph 3 of the Italian *Note Verbale* specifies that Libya's authorities are expected to deploy the vessels in accordance with international human rights standards.¹⁰⁵ In reply, in the Libyan *Note Verbale*, Libya agreed to such terms of use vis-à-vis the patrol boats.¹⁰⁶ The exchange of notes confirms the pivotal role of human rights obligations as a parameter for the execution of the MoU.

This conclusion is further supported by some official declarations of the then Minister of the Interior of Italy, Marco Minniti, before the Italian Parliament and the CoE Commissioner for Human Rights. During a session before the Italian Parliament, Minniti emphasised the importance of the respect of human rights obligations, specifying that: (i) the application of the MoU had to be strictly combined with an "absolute and profound" respect of human rights obligations;¹⁰⁷ and (ii) the compliance with human rights standards is a fundamental aspect of any agreement in which Italy enters into, especially when it is specified in such agreement.¹⁰⁸

Likewise, in his letter addressing the CoE Commissioner for Human Rights' concerns regarding the human rights implications of Italy's cooperation with the Libyan authorities pursuant to the MoU, Marco Minniti replied that: (i) under the MoU, Italy considered the question of human rights compliance to be crucial and that it was an essential component of the government strategy in this regard; (ii) Italy's twofold purpose was to avoid migrants' sea-crossing that may endanger their life and to guarantee the respect of international human rights standards in Libya; and (iii) the compliance with human rights standards is an issue that is at the core of the dialogue between Libya and Italy.¹⁰⁹

¹⁰⁴ Italian Embassy Note Verbale No. 1440/2019, paras.2-3.

¹⁰⁵ Italian Embassy Note Verbale No. 1440/2019, para.3.

¹⁰⁶ Scambio di Note Concernente la Cessione al Governo Libico di Dieci Unità Navali "Classe 500" per il Pattugliamento Costiero, Governo di Accordo Nazionale – Ministero Affari Esteri – Tripoli, Nota Verbale, n. ref. 975, 10 June 2019.

¹⁰⁷ Parlamento Italiano, XVII Legislatura, Commissione parlamentare di inchiesta sul sistema di accoglienza, di identificazione ed espulsione, nonché sulle condizioni di trattenimento dei migranti e sulle risorse pubbliche impegnate, Seduta n. 76, 22 February 2017 ("22 February 2017 Session of the Italian Commission of Inquiry"), Resoconto Stenografico.

¹⁰⁸ 22 February 2017 Session of the Italian Commission of Inquiry, Resoconto Stenografico.

¹⁰⁹ Letter of the Italian Minister of Interior Marco Minniti to the CoE Commissioner for Human Rights, 11 October 2017.

Unilateral declarations and statements by Mr. Marco Minniti, Minister of the Interior of the Government that conceived and signed the agreement, indicate the importance and the centrality of Article 5 of the MoU vis-à-vis its object and purpose. Italian support to the Libyan authorities as provided by the Articles 1 and 2 of the MoU is contingent on their commitment to act consistently with human rights standards as required by Article 5 of the MoU. In other words, Article 5 of the MoU can be construed as the link between Italy's intention to provide material support to the Libyan authorities and the manner in which such support could ultimately be used.

By contrast, Libya's systematic failure to comply with human rights standards as required by Article 5 of the MoU negates one of the preconditions for Italy to enter in such agreement, defeating the object and purpose of the MoU.

In conclusion, whether considered individually or in combination, Libya's violations of Articles 1, 2 and 5 of the MoU can be qualified as material breaches of the MoU and therefore entitle Italy to act pursuant to Article 65 of the VCLT to suspend or terminate the agreement.

This would prevent Italy from bearing responsibility for the wrongful acts committed by the Libyan authorities. This is important to avoid possible consequences deriving from international state responsibility (of Italy) or individual criminal responsibility (of Italian agents acting on Italy's behalf).

V. Conclusions and Recommendations

1. Italy's support provided on the basis of the MoU to the Libyan authorities is instrumental to the human rights abuses and/or international crimes suffered by migrants rescued at sea by the LCG. This leads to Italy's international responsibility for the violation of its human rights obligations, including under the CAT, ECHR and ICCPR and exposes the Italian agents to a possible investigation by the International Criminal Court.
2. Two main courses of action are recommended to disengage Italy from such responsibility:
 - a. Negotiating an amendment to the MoU which incorporates a human rights clause ensuring that the implementation of the activities provided thereto is contingent on the respect of human rights by both parties. A revised MoU should contain an enforceable human rights clause which includes at a minimum:
 - i. A clear statement that the respect of human rights and international humanitarian law is an essential element of the MoU;
 - ii. The establishment of an independent body or organ in charge of monitoring and evaluating human rights and international humanitarian law compliance by the parties in the execution of the MoU;
 - iii. A list of mitigating measures which parties may seek in the event of human rights violations to address such violations and ensure non-repetition;
 - iv. The implementation of a legal framework to facilitate effective access to justice for those who suffered human rights violations connected to the Italian support on the basis of the MoU;
 - v. The ability for the parties to review, suspend or terminate any form of cooperation in case of persistent violations of the human rights clause.
 - b. In the alternative, suspending or terminating the MoU pursuant to Article 60 of the VCLT in light of Libya's violations of Articles 1, 2 and 5 of the MoU.

About UpRights

UpRights is a non-profit based in the city of international peace and justice, The Hague, Netherlands.

UpRights was created in response to the global expansion of actors and forums dealing with cases related to mass atrocities and human rights violations. The complexity and variety of actors working on these issues has generated a growing demand for qualified legal knowledge. UpRights addresses this demand through targeted legal support which increases victims' ability to obtain justice and amplifies local and national efforts to establish accountability of perpetrators.

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