



THE ITALY- LIBYA AGREEMENTS: CONTROVERSIAL COOPERATION

*Assessing the Human Rights Violations on matters of Refugees and
Migrants Protection*

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List of Abbreviations

AICS	Italian Agency for Cooperation and Development
ARCI	Associazione Ricreativa Culturale Italiana
ASGI	Associazione per gli Studi Giuridici sull'Immigrazione
AU	African Union
CAT	UN Convention against Torture
CRC	Convention on the Rights of the Child
DCIM	Department for Combating Illegal Migration
ECHR	European Court of Human Rights
EU	European Commission
EUBAM	European Union Border Assistance Mission
EUNAVFOR	EU Naval Force–Mediterranean
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICESCR	International Covenant on Economic, Social and Cultural Rights
IOs	International Organizations
ILC	International Law Commission
IMO	International Maritime Organization
IOM	International Organization for Migration
ISMU	Initiatives and Studies on Multi-Ethnicity
MEDU	Medici per i Diritti Umani
MENA	Middle East – North Africa
MoU	Memorandum of Understanding
NATO	North Atlantic Treaty Organization
SAR	Search and Rescue
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHC	United Nations High Commissioner for Refugees
UNICER	United Nations International Children's Emergency Fund
UNSMIL	United Nations Support Mission in Libya

Introduction

Italy and Libya have long been bound by several reasons; first and foremost, the past colonial domination exercised by the Italian state during the 20th century that subsequently brought on power the colonel Muammar Gaddafi for more than 40 years.

The second aspect shared by the two countries, has been the flow of migration that has increasingly involved the Central Mediterranean Sea. In order to stem the number of arrivals on the Italian coastline, Italy has relied on cooperation agreements signed with the leader Gaddafi, which established Libya's commitment to curb illegal migration in exchange of technical aid provided by the Italian counterpart, including the handing of patrol vessels, border surveillance system and training for conducting Search and Rescue operations.

After the breakout of the Libyan civil war in 2011, the urgency to deal with the increasing number of arrivals brought Paolo Gentiloni's government to conclude an agreement, i.e., the *Memorandum of Understanding*, with the UN-backed government based in Tripoli. This deal, followed by its renewal in 2020, inserted itself in a general trend charactering the European Union approach to the management of migration that have increasingly focused on the externalization of borders, criminalisation of migration and human rights 'negligence.

The aim of this study is to investigate Italy's approach to migration as being one of the European countries most affected by the recent migratory phenomenon. Through the analysis of the agreements stipulated by the two countries, with a special regards to the most recent Memorandum of Understanding, the author will attempt to prove Italy's responsibility under International law on the protection of human rights, in indirectly participating to the commission of wrongful acts towards migrants and refugees detained in Libya, as well as intercepted at sea by the coastguards.

In order to do so, the first chapter will be analysing the past agreements established between the two countries starting from the early 2000, in particular the two protocols of December 2007, the Treaty of Friendship of 2008 and the protocol of 2009, analysing the various articles of the individual agreements, and the specific tasks assigned to the two states. Subsequently, the effectiveness of these treaties will be observed by taking into account the results on migratory flows and therefore the number of arrivals on the Italian soil in the years in which these agreements were applied. The second chapter will be focused on the agreements concluded after the 2011 Libyan civil war, namely the 2017 Memorandum of Understanding, and its renewal in 2020. Here, the main aim and objectives of the deal will be investigated by

going through its provisions, distinguishing between the support provided by Italy and by the European Union, both in terms of practical and financial aid to Libya. This chapter will underline the change of approach that Italy had in managing the upcoming migratory flow, by assigning to the North African state the management of SAR operations as well as enhancing the borders surveillance capability of Libya on the southern frontiers with Niger and Chad.

Chapter three constitutes a key part of this study, as extensively proving the human rights violations happening in Libya at the expenses of migrants and refugees. By analysing the legal framework of Libya, both on an international and national level, the author will prove how the country is violating migrants' rights in the context of the detention centres. Furthermore, it will be shown how the lack of a functioning judicial apparatus is undermining the possibility of those subjects to present any legal complaints against the misconduct of the Libyan personnel. Finally, chapter four will investigate to what extent Italy can be held responsible under international law for the human rights violations happening both during the sea operations and the period of detention in Libya. By employing the ILC draft article on the State's responsibility on the commission of wrongful acts, an attempt will be made for proving how the supply of technical and financial support to Libya, a country responsible for the inhumane treatment of refugees and migrants, constitute a sufficient reason to held Italy internationally imputable for the human rights violations happening out of its area of effective control.

The main intention behind this study is to show how a European democratic state as Italy is actually contributing to endanger the lives of thousand of migrants, and asylum seekers; at the same time to prove how internationally recognised legal tools could give a voice to those migrants who have been victims of abuses and violence.

Furthermore, the Italy-Libya Memorandum of Understanding (MoU) fits into a wider European vision oriented to prevent migration towards Europe through the employment of border externalisation policies an agreement with third-world transit countries. It should be recalled the existence of previous agreement that has been pursued by the European Union as a whole, as well from EU member states, which have implementing preventive and restrictive migratory policies with neighbouring countries. For instance, the agreement subsisting between Spain and Morocco, Italy-Tunisia relations, as well the EU-Turkey deal constitute all clear examples of a communitarian attempt to deconstruct European borders as a way to externalise the management of the upcoming migratory flows and avoid legal constraints at the same time.

For this additional reason, I believe Italy-Libya Memorandum of Understanding a alarming current issue, insert on a wider European context, that have to be addressed.

1. A historical excursus on the agreement between Italy and Libya

1.1 The agreements during the Muammar Qaddafi regime

Over the past twenty years, and even longer, Italy has turned into a major destination country for economic migrants and asylum seekers, because of both domestic and external reasons, including the geographical accident of being a peninsula in the Central Mediterranean area¹. After a first large migration inflow during the 1990s, in particular from Albania following the Kosovo War, they have recorded a steady South-North inflow to Italy from 2000 to 2007. Surges occurred afterwards, due to the first “North African Emergency”², concomitantly with the Arab Spring break out, which contribute to the end of the Qaddafi mandate. After the 2011 NATO intervention, Libya found itself in an extremely precarious situation as lacking the socio-political institution and economic stability to re-surge after the civil war atrocities, therefore the migration flows passing through the Sicily Channel increased exponentially thus rendering the Central Mediterranean route the most travelled sea route for migrants³.

The main nationalities found among the Central Mediterranean range from Bangladeshis, Egyptians, Eritreans, Moroccan, Sudanese and Syrian⁴. Mostly in search of better living conditions, those people embark a long and dangerous journey, crossing several African states and desert areas, ultimately reaching the Libyan coast where they would attempt to cross the Mediterranean. For this reason, already in the early 2000, Italy and Libya started the first negotiation of agreements which could enable some sort of cooperation in order to reduce the migratory population disembarking on the Italian coastline.

It is worth mentioning that Libya has been an Italian colony during the years 1911–1940, therefore marking a legacy of long-lasting resentment between the two countries.

¹ Scotto A. (2017), “From Emigration to Asylum Destination, Italy Navigates Shifting Migration Tides”, Migration Policy Institute, available at: <https://www.migrationpolicy.org/article/emigration-asylum-destination-italy-navigates-shifting-migration-tides>

² Ministero dell’Interno (2011), “Emergenza Nord Africa: terminata il 31 dicembre”. Available at https://www1.interno.gov.it/mininterno/export/sites/default/it/sezioni/sala_stamp/notizie/immigrazione/2012_12_28_Fine_fase_emergenza_nord_Africa.html, accessed January 7, 2022.

³ Reliefweb (2018), “The central Mediterranean route: the deadliest migration route”. Available at: <https://reliefweb.int/report/world/central-mediterranean-route-deadliest-migration-route-infocus-2-march-2018>, accessed August 29, 2022

⁴ UNHCR Operational Data Portal (2011) “Mediterranean situation”, available at: <https://data.unhcr.org/en/situations/mediterranean>

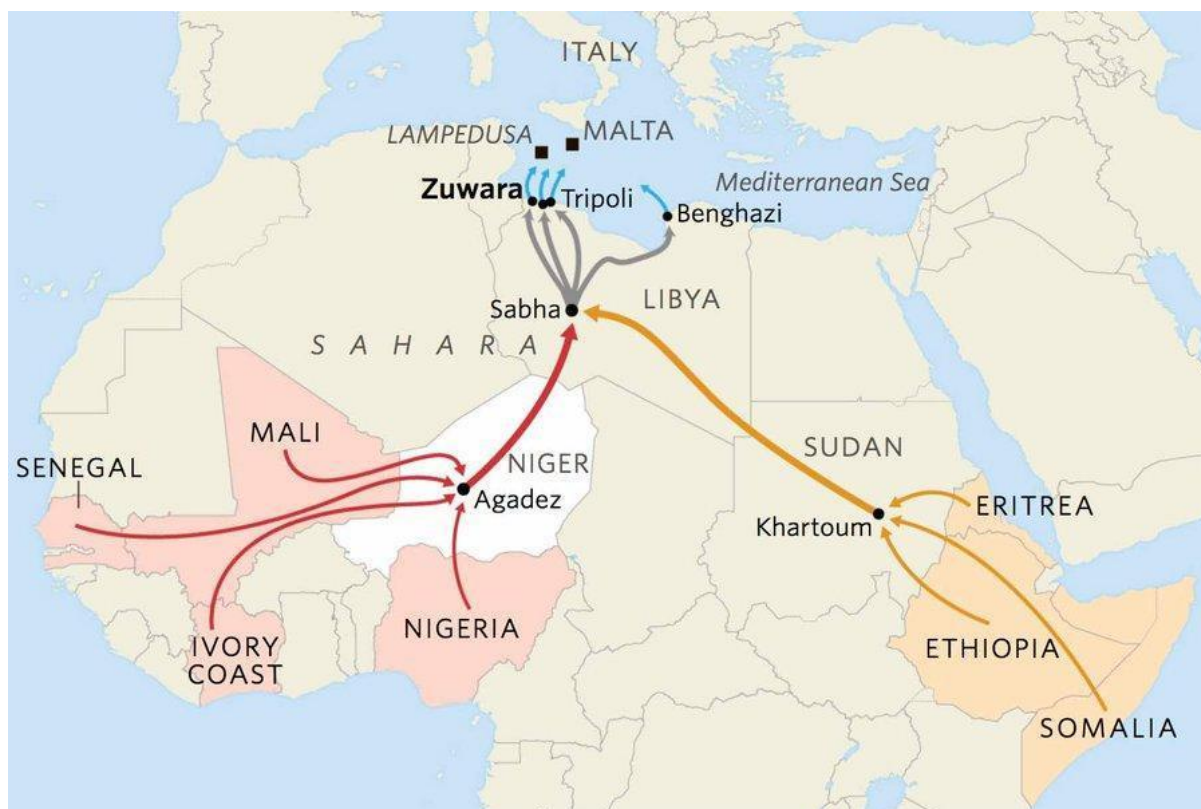
The Italian invasion in 1911 meant the total uproot of the rule of the Ottoman Turks which had governed the Libyan country for several centuries, combining harmoniously Muslim and Arabic community both on a religious and political level. Therefore, the imposition of a European system of state-ruling played a key role in shaping the country cultural identity in the next years, causing identity struggle on the Libyan side and increasing hatred between the two population, especially as Italy openly exploited the mineral resources of the country at the expenses of the local population⁵. The historical colonial past between subsisting among Libyan and Italian leaders have consequently shaped the subsequent bilateral relationship established on matter of migration management. Particularly, as Libya retaining more power on the bargaining table as the one responsible for curbing the illegal migratory flow transit on its territory, it manages to pressure Italy for obtaining formal apologies and a financial reparation for the colonisation time⁶.

The first chapter will focus on the analysis of these exact agreements concluded between Italy and Libya, during the Muammar Qaddafi regime on matters of migration control and smuggling curbing. In particular, the author will pay attention to the two Protocols of 2007, the Treaty of Friendships Italy-Libya in 2008 and the additional technical Protocol of 2009. The chapter will be concluded with a short examination of the results obtained through the adoption of the above listed agreements on the irregular migration flows.

⁵ T. Jerary (), "Damages Caused by the Italian Fascist Colonization of Libya"
Journal: Interventions, 2019, Volume 21, Number 1, Page 111 DOI: 10.1080/1369801X.2018.1487792

⁶ Ibid

Table 1. Libya map



Source: Alwasat Libya news [available at: <https://twitter.com/alwasatengnews/status/653886378531495936>]

1.2 The two Protocols of 2007

The colonial domination, lasted for over 30 years has always affected the relations between Italy and Libya to a certain degree⁷. Therefore, the colonial heritage, together with the relevance of Libya as a transit country for the Sub-Saharan migratory flow, have played a fundamental factor in defining the following agreements between the two states.

Italy was among the main promoters of the normalisation of international relations with the country in the early 2000s⁸. The uprising of the colonel Muammar Al-Gaddafi in 1969 had

⁷ Gazzini, C., & Borello, B. (2009). «SARANNO RISPETTATI COME PER IL PASSATO»: LA POLITICA COLONIALE ITALIANA E LE FONDAZIONI PIE IN LIBIA. *Quaderni Storici*, 44(132 (3)), 653–685. <http://www.jstor.org/stable/43779659>, p.658

⁸ Hein (2018), "Migratory movements to and from Libya. Italian and European policy responses, in I

marked the highest tension's point among Tripoli and Rome governments, peaking in 1970 when the last Italian settlements were dismantled, and their property confiscated⁹. This strain was detectable on a wider international level with both the United States and the European community taking distance from the Libyan actions because of the dispute on a matter of marine resources' exploitation in the Mediterranean Sea, directly connected to the rights of navigation¹⁰. The international marginalisation of the country worsened after the involvement of the Libyan secret services in the Lockerbie attack in 1988, when the European Union imposed to the country an embargo on the trade in arms and military equipment, the freezing of Libyan funds abroad and a ban on the supply of civilian goods and services related to the oil industry. Furthermore, in 1992, the United Nations imposed additional sanctions, prohibiting direct air links with Libya and freezing Libyan assets abroad¹¹.

When the Gaddafi regime started to use migration control as a bargaining chip at the negotiating table with Italy and the European Union, in order to have lifted the economic sanctions imposed since 1986¹², the Italian authorities clearly detected a surge in the arrivals; from 1724 migrants intercepted in Sicily in 2000, the number quickly rose to 14.017 in 2003¹³. Additionally, the increasing number of crossings was directly related to the strong popular resentment against African workers in Libya due to the poor living conditions in which the native population was poured into, which led to riots and dozens of deaths of Sub-Saharan Africans¹⁴. The growing hate-feeling against migrants contributed to the implementation of further restrictive immigration regulations aimed at expelling the foreigner populations from part of Libya and

conflitti in Siria e Libia. Possibili equilibri e le sfide del diritto internazionale", Giappichelli Editore, Torino, p. 265

⁹ Ronzitti (2009), "Il trattato Italia-Libia di amicizia, partenariato e cooperazione, Contributi di Istituti di ricerca specializzati, p. 126

¹⁰ Ronzitti (2009), "The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospect for Cooperation in the Mediterranean?", Bulletin of Italian Politics Vol. 1, No. 1, 2009, 125-133 p. 128

¹¹ UNSC (1992), "Security Council Resolution 748". Available at:

<https://digitallibrary.un.org/record/196976#record-files-collapse-header>

¹² Tsourapas G. (2017), "Migration diplomacy in the Global South: cooperation, coercion and issue linkage in Gaddafi's Libya", Third World Quarterly Volume 38 Issue 10 DOI:

<https://doi.org/10.1080/01436597.2017.1350102>, pp. 2376-2377

¹³ Simon J. (2006), "Irregular Transit Migration in the Mediterranean: facts, Figures, and Insights", International Centre for Migration Policy Development, p. 37

¹⁴ Abul Hajj S. (2013), "Racism and revolution: the plights of Black African in Libya", Equaltimes.org. Available at: <https://www.equaltimes.org/racism-and-revolution-the-plight?lang=en#.YyC61XZBy3A>, accessed August 29, 2022.

consequently brought seasonal workers to migrate toward Europe¹⁵. This made Italy, as a Mediterranean coastal state, reluctant toward the initial migratory flow arriving on its shore and strengthened its will to stem migrant crossings.

In this exact context, the first two Protocols were signed in Tripoli in December 2007, intending to reduce the migration flow coming from Libya, and minimising the issue through its externalisation. These Protocols were arising from a previous agreement signed on the 13th of December 2000¹⁶, which displayed the intention of the Italian political realm to

*“Establish a cooperation with Libya on matters of fight against terrorism, criminal organization, illegal drug trafficking and irregular immigration”*¹⁷, through *“the exchange of information on the illegal migration flows, as well as on the criminal organisation favouring the illegal crossing, the modus operandi of the smugglers and on the itineraries followed”*¹⁸.

However, the 2000 Agreement did not have an immediate follow-up, as in the following years none of the measures stated were actually implemented till the stipulation of the two Protocols in 2007.

The succeeding arrangements on migration control could be classified as “technical agreement”, resulting from negotiations amid the Italian Minister of Interior or the Libyan Foreign Affairs Minister. Due to their purely operational nature, they were not subject to ratification by the President of the Republic under article 80 of the Italian Constitution¹⁹, therefore they were not published in the Official Journal, thus initially leaving the content of the agreements publicly secluded.

The agreement of 2000 was just expressing the general availability of the two countries in joining the forces on matters of illegal migration, mainly through the exchange of information

¹⁵ Kos M. (2018), “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 Support of Italy”, Master thesis at Vrije Universiteit Amsterdam, Faculty of Law, Academic Year 2017-2018, p. 11

¹⁶ Agreement between the government of the Italian Republic and the Great Socialist People’s Libyan Arab Jamahiriya *“Collaborazione nella lotta al terrorismo, alla criminalità organizzata, al traffico illegale di stupefacenti e di sostanze psicotrope ed all’immigrazione clandestina”*, Rome, 13 December 2000. Available at <https://file.asgi.it/accordo.italia.libia.2000.pdf>, accessed January 7, 2022

¹⁷ Agreement *“Collaborazione nella lotta al terrorismo, alla criminalità organizzata, al traffico illegale di stupefacenti e di sostanze psicotrope ed all’immigrazione clandestina”* (2000), art. 1

¹⁸ Ibid, art 1 par. 1

¹⁹ According to article 80 of the Italian Constitution, “the Chambers allow the ratification of international treaties by law which are of a political nature, or provide for arbitration or judicial regulations, or involve changes in the territory or financial burdens or amendments to laws”. The treaty assumes legally binding power only with ratification by the competent body, i.e., the President of the Republic as defined by art. 87. (Brocardi.it, 2020: accessible at <https://www.brocardi.it/costituzione/parte-ii/titolo-i/sezione-ii/art80.html>)

and an imprecise mutual assistance and cooperation. Instead, the protocol of 2007 was intended to concretely shape and implement what stated in the previous agreement thanks to its executive power.

The first protocol 2007²⁰ was commonly signed by the Italian Interior Minister *Giuliano Amato* and the Libyan Secretary of the General People's Committee for Foreign Liaison and International Cooperation *Abdurrahman Mohamed Shalgam* composed of solely seven articles, envisaging “*a stronger cooperation in the fight against the criminal organization engaged in human trafficking and exploitation of illegal immigration*”²¹. Specifically, the two countries to achieve their objective would “*organised sea patrolling with six Italian naval units temporarily leased to Libya*”. Those naval assets which “*would embark mixed crew with Libyan personnel and Italian police forces for educational and training activities, as well as technical assistance*”, “*would carry out control, search, and rescue operations in the places of departure and transit of vessels aimed at favouring illegal crossing through the Mediterranean, both in Libyan and International waters*”²². Furthermore, both parts of the agreement clarified that above naval operations will “*operate in accordance and respect to the existing International Conventions*”²³.

The following articles established the modus operandi of Italy for reaching their common goal in curbing illegal immigration; for instance, articles 3 stated Italy’s commitment to provide an additional three permanent naval units to Libya, as well the plan to conduct a follow-up for “*assessing the results obtained and the effectiveness of the collaboration in order to schedule further improvements*”²⁴. Likewise, article 4 displayed the efforts made by Italy to provide the necessary funding for the aforementioned supplies from the EU Community budget, while assuring that a Framework Agreement between the European Union and Greater Jamahiriya will be developed soon²⁵. Finally, the remaining articles were putting forward the proposal of a possible cooperation with the EU for granting monitoring systems for land and maritime

²⁰ Protocol between the government of the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya, Tripoli 29 December 2007 [Available at <http://briguglio.asgi.it/immigrazione-e-asilo/2009/maggio/prot-italia-libia-2007.pdf>, accessed January 7 2022]

²¹ Ibid, art. 1

²² Ibid, art.2

²³ Ibid, art. 2

²⁴ Ibid, art. 3

²⁵ Ibid art 4.

Libyan borders, while promoting developing projects on Libya and its neighbouring countries through EU fundings to oppose illegal crossing and favouring migrants' repatriation²⁶.

In short, the agreement was focusing on three fundamental points: the launch of joint patrols close to the Libyan coasts, the diplomatic-political mediation with the European Union, and the establishment of garrisons at the Libyan maritime and land borders.

To the former agreement, was added the contextual "*Additional technical-operational Protocol to the Protocol between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya to deal with the phenomenon of illegal immigration*"²⁷ signed in Tripoli on December 29 by the Chief of the Italian State Police Manganelli, with which the parties intended to "*define in the technical form the operational procedures of maritime patrols*"²⁸, in the same way as Article 2 of the aforementioned Protocol. Thus, the main difference within the two Protocols was lying on the fact that the latter played an "integrating function" to the former, focusing on the agreement's operativity, delving into its actual implementation.

Six articles were forming the second Protocol, restating the Italian commitment to provide six naval units from the Italian financial police for sea patrolling in order to contrast illegal migratory flow. Italy would provide Libya with qualified personnel who will be solely in charge for ensuring routine maintenance and the efficiency of the naval units temporarily sold. The additional Protocol would clarify that the Italian police forces on matters of patrolling will take care only for instructional duties, as well as training, assistance and counselling activities in order to instruct the Libyan personnel to conduct patrolling mission independently²⁹. In term of expenditure sharing, the Italian state took charge the most of the economic burden deriving from the Protocol; in fact Rome would have sponsored "*the maintenance of the naval units*", and the "*compensation costs for any damage caused to the Italian police personnel*", while the costs "*relating to the fuel lubricants of the temporarily sold naval units*" were borne by the

²⁶ Ibid, art. 5 and 6

²⁷ Additional technical-operational Protocol to the Protocol between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya to deal with the phenomenon of illegal immigration, Tripoli 29 December 2007 [available at <https://file.asgi.it/protocollo.italia.libia.tripoli.dicembre.2007.pdf>, accessed January 7 2022]

²⁸ Ibid, Preamble p.1

²⁹ Majorino S. (2008), "Il ruolo della Libia nel Mediterraneo: politica e gestione dei flussi migratori", Università degli Studi di Palermo Facoltà di Economia, Academic year 2008/2009, p. 40

Libyan counterpart³⁰. Despite, the additional protocol aiming at implementing the first 2007 agreements, none of those measures were actually realised due to the “scarce collaboration from part of the Libyan authorities”³¹.

Although, the attempt to normalise the Italian-Libyan relations with the establishment of several agreements in the early 2000s, many questions were left unanswered: from Libyan requests for reparations for the damages caused by colonialism to the delicate matters of illegal immigration and the fight against terrorism. The approach adopted by the two parties seems more restrictive rather than humanitarian, attempting to restrict the sea passage on the Central Mediterranean. In fact, no relevance was given to any specific International Conventions, regarding human rights protections, except for the vague reference done in article 6 of the first 2007 Protocol.³²

Finally, the Protocols did not yield the result expected as any measures were implemented—that could be imputed to the lack of commitment from part of the Libyan authorities. A reason for that could be potentially attributed to the fact that those agreements were not addressing the past colonial domination of Italy in Libya, which possibly the Gaddafi regime was expecting as a form of reparation and for their contribution in tackling illegal immigration for the EU member state.

1.3 The Treaty on Friendship, Partnership and Cooperation between Italy and Libya and the additional protocol of 2009: How the pushbacks became a solution to the migration flows

On 30 August 2008, Italian Prime Minister Silvio Berlusconi flew to Benghazi to sign the Treaty on Friendship, Partnership and Cooperation³³ between Italy and Libya, concluding the long negotiation process that began in the early 2000s, that produced

³⁰ Additional technical-operational Protocol to the Protocol between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya to deal with the phenomenon of illegal immigration, Tripoli 29 December 2007, art. 3 par.7

³¹ Battista G. (2011), “La collaborazione Italo-Libica nel contrasto all’immigrazione irregolare e la politica italiana dei respingimenti in mare”, Associazione Italiana dei Costituzionalisti Rivista N° 3/2011, p. 3

³² Additional technical-operational Protocol to the Protocol between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya to deal with the phenomenon of illegal immigration, Tripoli 29 December 2007, art. 6

³³ The Treaty on Friendship, Partnership and Cooperation between Italy and Libya, Benghazi 30 August 2008. Available at

https://www.camera.it/dati/leg16/lavori/schedela/apritelecomando_wai.asp?codice=16pdl0017390, accessed January 7, 2022

unsatisfactory results. Unlike the previous agreements, the Benghazi Treaty³⁴ marked the conclusion of the past colonial heritage, providing a financial reparation, amounting to five billion to being redistribute in 250 million traces during the timeframe of 20 years for the atrocities committed by the Italian regime in the 19th century on the Libyan soil³⁵. Libya managed to receive a sort of “public condemnation” of Italian colonialism, which was not present in the previous agreements. Reporting the words of the Prime minister Berlusconi in expressing his resentment for the colonial time:

*“In the name of the Italian people, as head of the government, I feel it my duty to apologise and express my sorrow for what happened many years ago and left a scar on many of your families”*³⁶

The Treaty embodied an ambitious document emphasising the “special and privileged³⁷” relationships that the two countries intend to develop, without forgetting the roles that they pursue, respectively in the European Union and the African Union. Cooperation was envisaged in many sectors: culture, science, economy, industry, energy, defence, non-proliferation and disarmament, the fight against terrorism and illegal immigration³⁸. The treaty presents itself as divided in three distinct sections: general principles, closing with the past and ending the disputes partnerships. The deal frequently made reference to the principles and values on which relations among those countries should be developed: “respect for sovereign equality, prohibition of the threat or use of force, non-interference in the internal affairs³⁹, respect of Human rights and fundamental freedoms”. In particular, article 6 affirmed

³⁴ As mentioning the “Benghazi Treaty”, the author is referring to the “Treaty on Friendship, Partnership and Cooperation between Italy and Libya”—the terms are interchangeable

³⁵ LaStampa (2008), “Alla Libia 5 Miliardi di dollari”. Available at <https://www.lastampa.it/politica/2008/08/30/news/alla-libia-cinque-miliardi-di-dollari-1.37093653>, accessed January 7, 2022.

³⁶ Middle East Monitor (2019), “Libya gave the world a unique treaty which should be copied by all ex-colonial powers”. Available at <https://www.middleeastmonitor.com/20190829-libya-gave-the-world-a-unique-treaty-which-should-be-copied-by-all-ex-colonial-powers/>, accessed January 7, 2022.

³⁷ Ronzitti (2009) “The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospect for Cooperation in the Mediterranean?”, Bulletin of Italian Politics Vol. 1, No. 1, 2009, 125-133, p. 127

³⁸ Ibid.

³⁹ The mentioning of these specific elements triggered speculation in the media, affirming the incompatibility of the Benghazi Treaty with the Italy’s NATO memberships. In reality, this does not represent a “nonaggression” pact and it is therefore not incompatible with the NATO treaty – should Libya act outside of “international legality” as laid down in the provision (Ronzitti, 2009: 127)

*“the parties to the agreements will act in conformity to their respective legislations, and to the principle and values displayed in the UN Charter and the Universal Declarations of Human Rights”*⁴⁰. Thus, compared to the previous protocols, a more humanitarian approach on the management of illegal immigrants seemed to be adopted. The reference to the UDHR in the Treaty should entail huge responsibility, as several articles⁴¹ specifically refer to refugee’s protection or concern their safety. Foremost, article 2⁴² stating that *“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”*. The reference to the Declaration and to the UN Charter supposedly would allow Italy making a claim to Libya for human rights to be respected, even though the Declaration is not a legally binding instrument⁴³. In the area of handling irregular migration, Article 19⁴⁴ recalled the dispositions agreed on the previous Protocols; it remarked the need of patrolling operations composed of mixed personnel on board naval units provided by Italy.

Furthermore, to manage the complexity of the commitments envisaged by the Treaty, Article 14⁴⁵ establishes two committees:

- a) The Partnership Committee, at the level of the Prime Minister and the Secretariat of the General People's Committee, with meetings scheduled annually, varying the venue alternately between Rome and Tripoli and with the task of adopting “the provisions needed to implement the Treaty”⁴⁶;
- b) and the Follow-up Committee, at the level of the Ministry of Foreign Affairs in Italy and the Secretary of the General People’s Committees for foreign affairs and

⁴⁰ The Treaty on Friendship, Partnership and Cooperation between Italy and Libya, Benghazi 30 August 2008, art.6

⁴¹ Just for mentioning a few articles on matter of refugees and migrants’ protection: art 2, art. 4, art. 5, art. 9, art. 13, art. 14, and art. 15. United Nations (1948), “Universal Declaration of Human Rights”. Available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>, accessed on April 29, 2022.

⁴² Ibid., art.2

⁴³ Pascale G. (2019), “Is Italy internationally responsible for the gross human rights violations against migrants in Libya? Questions of International Law, URL: http://www.qil-qdi.org/wp-content/uploads/2019/03/03_Externalizing-migration-control_PASCALE_FIN_mod.pdf , p.37

⁴⁴ The Treaty on Friendship, Partnership and Cooperation between Italy and Libya, Benghazi 30 August 2008, art.19

⁴⁵ Ibid, art. 14

⁴⁶ Battista (2011), “La collaborazione Italo-Libica nel contrasto all’immigrazione irregolare e la politica italiana dei respingimenti in mare”, Associazione Italiana dei Costituzionalisti Rivista N° 3/2011, p. 130

international cooperation in Libya, with scheduled meetings also annually.” In this case, the Committee functions like a dispute-settlement mechanism, with the ability to induce extraordinary meetings if one party believed that the other one had infringed the commitments envisaged by the Treaty”⁴⁷.

The main novelty lies in the fact that an additional, Libyan land border control system will be created, to be entrusted to Italian companies in possession of the necessary technological skills⁴⁸. Italy committed to bear 50 percent of the implementation’s cost of the territorial surveillance system, while for the remaining 50 percent both parties would demand the European Union to take on it⁴⁹.

It should be mentioned that the financial section of the Treaty lacked actual clarity on the way the funding would have been allocated. Examining the agreement’s official document, one learns that five billion will be invested in Libya from part of Italian companies in public and infrastructural projects for the Libyan population benefit⁵⁰. Besides that, the treaty does not endeavour to clarify the cost of sensing and surveillance systems employed for the controls at the Libyan borders, as well as for the sea patrolling monetary cost. Therefore, Article 19, defining the cooperation on matters of irregular migration, is the part of the Treaty that raised the strongest human rights concerns about the fate of the immigrants turned back and left in the desert or the concrete possibility of sea push-back to happen.

While the ratification of the Treaty of Benghazi was authorised by the Italian Parliament with the law of 6 February 2009, n. 7⁵¹, the then Minister of the Interior, Roberto Maroni, was signing a new Protocol in Tripoli to implement the one of 29 December

⁴⁷ Ibid.

⁴⁸ Acito A. (2020), “Osservazioni critiche sul Mmeorandum d’intesa tra Italia e Libia Realpolitik vs. Diritti Umani?”, Osservatorio sulla Cooperazione e la Sicurezza nel Mediterraneo, Salerno, p.5

⁴⁹ Mammarella G.& P. Cacace: “La politica estera dell’Italia: dallo Stato unitario ai giorni nostri”, Editori Laterza, 2008

⁵⁰ Some example of project proposals was addressing student scholarships, programs for the rehabilitation of mine explosions’ victims, Housing projects and job creation through increasing the capital flow in Libyan companies. Ronzitti (2009: 131)

⁵¹ Normattiva.it (2009), “Ratifica ed esecuzione del Trattato di amicizia, partenariato e cooperazione tra la Repubblica italiana e la Grande Giamahiria araba libica popolare socialista, fatto a Bengasi il 30 Agosto 2008”, Law February 6th, 2009. Available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2009;7>, accessed on September 14/09/2022

2007 about collaboration in the fight against illegal immigration signed by *Giuliano Amato* and *Abdurrahman Mohamed Shalgam*⁵².

The new Protocol was understood as a “technical agreement” to define the procedures for implementing the patrols joint seafarers already provided for by the Protocol of 29 December 2007 and by the additional technical-operational protocol⁵³. It was aimed at increasing the criteria of Italian-Libyan cooperation in the sector of illegal immigration by introducing patrols with mixed crews in the territorial sea of Libya and on the high seas⁵⁴, also providing for repatriation operations of irregular migrants⁵⁵.

Ultimately, push-back operations started to be employed: Italian naval ships intercepted at sea migrants and through the collaborations of Libyan police forces, foreigners were sent back to the departure or origin countries⁵⁶.

The operations were subsequently condemned as in the historic European Court judgement *Hirsi Jamaa and Others v. Italy* in 2012, where “*the Court found that Italy violated the European Convention of Human Rights by exposing the 24 migrants from Somalia and Eritrea to the risk of being subjected to ill-treatment in Libya*”⁵⁷.

Unfortunately, the forced returns at sea as such were explicitly maintained in order to discourage migrants in their attempt to leave Libyan coast for reaching Europe.

To conclude, it can be noted that the intentions of both Italy and Libya, at that time, were to prevent and repress irregular immigration rather than guaranteeing and respecting human rights and creating a safe channel of legal admission and residence of

⁵² Although the Additional Protocol signed by Roberto Maroni in 2009, could be considered an overt act for implementing the previous 2007 Protocols that were not implemented, the text was never published officially. The only documents publicly available is the press release of this said 2009 Additional Protocol. The fact that it was never published, rendered the negotiants of the agreements extremely shady and controversial.

⁵³ These Protocols the author is referring to are the ones who were negotiated in 2007 but they were never implemented due to the Libyan scarce collaborations.

⁵⁴ By saying “high sea”, according to the UN Convention on the High Sea (1958), article 1 defines it as “all parts of the sea that are not included in the territorial sea or in the internal waters of a State”. Available at: <https://www.jus.uio.no/english/services/library/treaties/08/8-01/high-seas-convention.xml>, accessed January 7, 2022.

⁵⁵ Tramontano R. (2017), “La Cooperazione tra Italia e Libia nella Lotta all’Immigrazione Irregolare: principi giuridici, Master’s Thesis, LUISS Guido Carli Dipartimento di Scienze Politiche, Academic year 2016/2017, p.63

⁵⁶ Human Rights Watch (2009), “Pushed Back, Pushed Around Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers”, p. 30. Available at: <https://www.hrw.org/report/2009/09/21/pushed-back-pushed-around/italys-forced-return-boat-migrants-and-asylum-seekers>, accessed on January 7, 2022.

⁵⁷ Amnesty International (2012), “Italy: ‘Historic’ European Court judgment upholds migrants’ rights”, Available at: <https://www.amnesty.org/en/latest/news/2012/02/italy-historic-european-court-judgment-upholds-migrants-rights/>, accessed January 7, 2022.

foreigners for facilitating integration. The Italian government attempted to circumvent impediments and international obligations by transferring management responsibilities to Libya, thus putting at risk thousands of lives and incurring in human rights violations. This restrictive approach could be well proven by a public statement made by then Italian Interior Minister Roberto Maroni “*The new model of contrast at sea of those who attempt illegal crossing has nothing to do with asylum seeking: illegal immigrants do not reach the national territory, but they will be rejected at the border, evaluating asylum applications is therefore not the task of the Italian government*”⁵⁸.

1.4 The results obtained in terms of migration from 2007 to 2011: assessing Human Rights violations.

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 weeks⁵⁹, with the joint patrolling operations starting in the same month. During the launch ceremony for the patrolling operations, the financial police commander, Cosimo D’Arrigo, declared the beginning of the joint patrolling operation in both Libyan territorial and international waters with the participation of Libyan coast guard’s members stationed at the Italian command station on the island of Lampedusa⁶⁰.

In the first week, about 500 boat migrants were summarily returned to Libya, resulting in a dramatic curtailment in the number of arrivals. Whereas the operations, were proceeding, additional 400 precarious boats were intercepted and sent back to Libya. Irregular boat migrants to Sicily and Sardinia fell by 55 percent in the first six months of 2009 compared to the same time in the previous year⁶¹. While in 2008 Italian authorities reported 36.951 arrivals on the Sicilian islands, this number decreased to

⁵⁸ LaRepubblica.it (2009), “In Libia I migrant soccorsi in mare Maroni esulta: Risultato storico”. Available at <https://www.repubblica.it/2009/04/sezioni/cronaca/immigrati-6/barconi-a-tripoli/barconi-a-tripoli.html>, accessed January 7, 2022.

⁵⁹ BBC (2009), “Libya Given Migrant Patrol Boats”. Available at: <http://news.bbc.co.uk/2/hi/europe/8051557.stm#blq-nav>, accessed January 7, 2022.

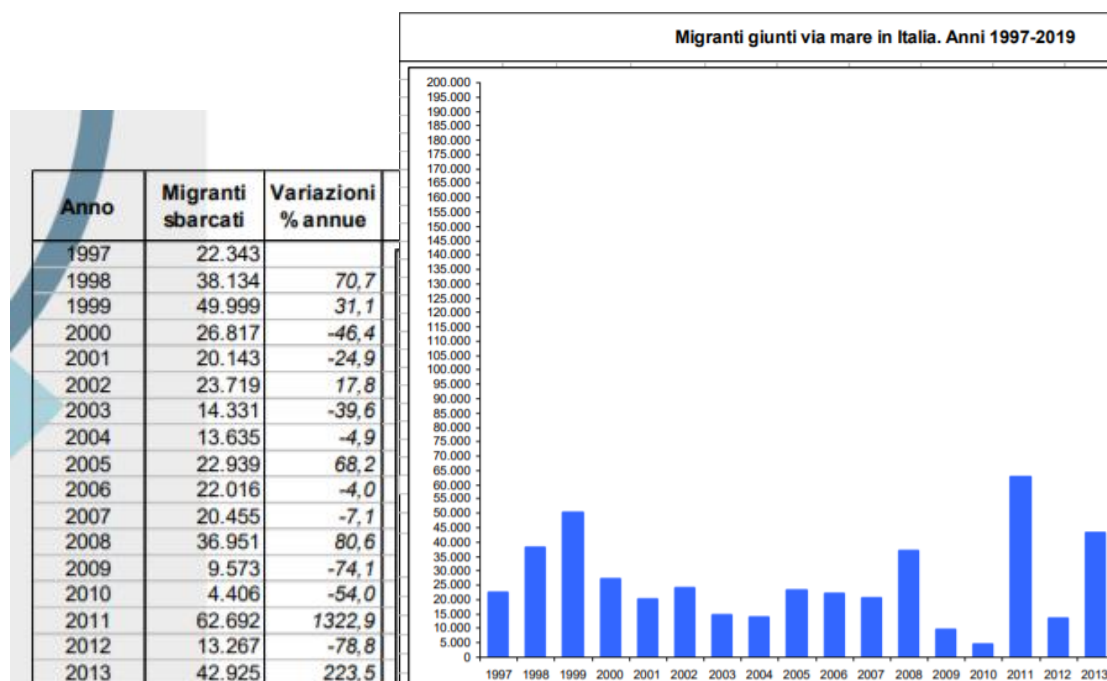
⁶⁰ Cuttitta P. (2014), “‘Borderizing’ the island setting and narratives of the Lampedusa ‘border play’”, ACME: An International Journal for Critical Geographies 13(2): 196-219, Retrieved from <https://acme-journal.org/index.php/acme/article/view/1004>

⁶¹ Human Rights Watch (2009), “Pushed Back, Pushed Around”

9.573 in 2009 and 4.406 in 2010⁶², for then recording a subsequent increase due to the Arab Spring break outs.

Looking at the table below, the number of arrivals started decreasing drastically from 2009 on, while comparing to the time of the two Protocols of 2007 adoption the same results were not obtained, proving the weak Libya commitment to the deal.

Table 2. Arrivals at sea 1997-2013.



Source: ISMU Foundation – Giorgio Papavero (2020) “Calano gli sbarchi, cambiano le provenienze” Data elaboration of the Italian Minister of Interior. Available at <https://www.ismu.org/wp-content/uploads/2019/12/Dati-SBARCHI-2014-2019.pdf>.

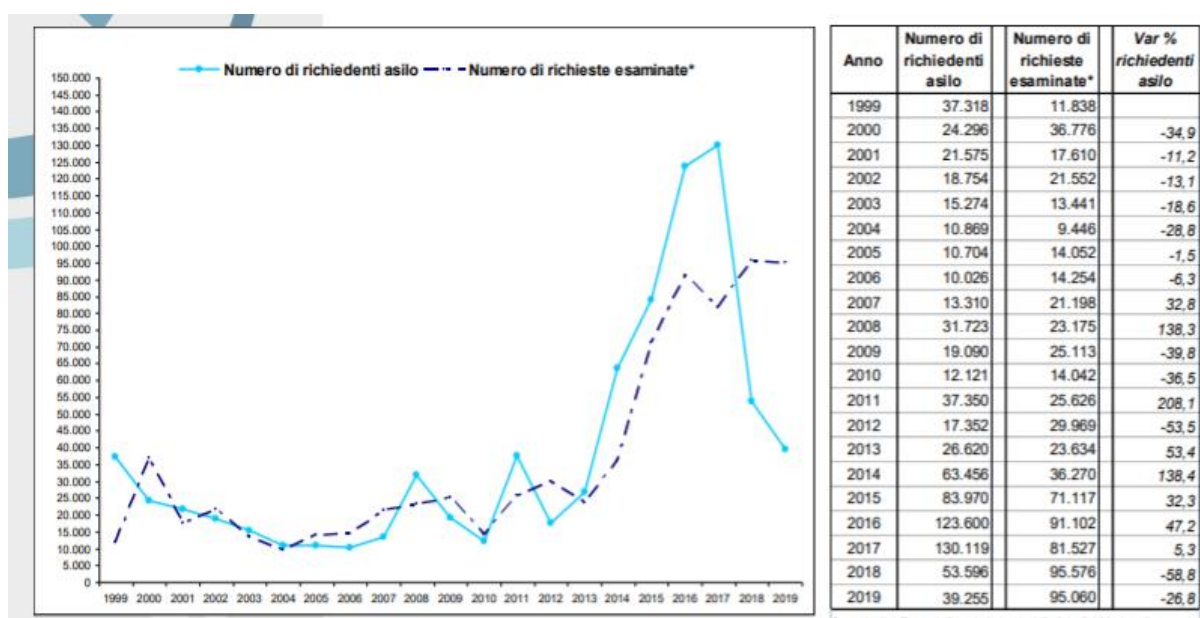
Available data clearly shows the “efficiency” of the 2009 Treaty of Benghazi, where Libya appeared to have strengthened their efforts to prevent departures, possibly at both land and sea borders. At the same time, “a new naval cordon formed by the Italian naval

⁶² Elaine B. and W. Kira (eds 2018.), Contemporary Boat Migration: Data, Geopolitics and Discourses, London: Rowman & Littlefield, table 2.

units could constitute a strong deterrent to boat departures, as embarking on a dangerous journey is only worth the risk if there is some chance of success”⁶³.

Simultaneously, a drop in migrant boat arrivals have meant a noteworthy decrease in the number of refugees status applications lodged in Italy. The data provided by the ISMU Foundation (2020), once again proved this harsh reality, with the number of asylum applications examined by the Italian authorities decreasing by -39.8% in 2009 and again in 2010 by -36.5%.

Table 3. Number of asylum request lodged 1999-2019



Source: ISMU Foundation – Giorgio Papavero (2020) “Calano gli sbarchi, cambiano le provenienze” Data elaboration of the Italian Minister of Interior [available at <https://www.ismu.org/wp-content/uploads/2019/12/Dati-SBARCHI-2014-2019.pdf>]

But what pushbacks really entails for the migrants?

The parties of the agreement seemed to deliberately ignore the complexity of the migration phenomenon affecting Libya and the resulting living conditions of irregular

⁶³ According to the International Organization for Migration, “Many illegal immigrants have been discouraged from attempting the sea voyage because of Italy’s new policy.” Quoted in “‘Outsourcing’ asylum seekers the Italian way,” NRC Handelsblad.nl (2009), “Outsourcing asylum seekers: the Italian way”, Available at: http://www.nrc.nl/international/article2309813.ece/Outsourcing_asylum_seekers_the_Italian_way, accessed July 24, 2009.

migrants in that country. There are not only so-called economic migrants but also migrants eligible for international protections, i.e., refugees' status or entitled of subsidiary protection as defined by Directive 2011/95/EC⁶⁴.

Although for many years Gaddafi welcomed sub-Saharan Africans to Libya in the name of Pan-African solidarity, as well as for the modernisation process of the country economic structure, the approach has changed. In 2008 Libya seemed to regard the influx from the south as more of a threat and this vision has been confirmed by the type of securitised speech delivered by the political elite⁶⁵. For instance, the Leader Gaddafi on a visit to Italy on August 2010, warned Europe by saying "Tomorrow Europe might no longer be European, and even black, as there are millions who want to come in" and it went on stating "We don't know if Europe will remain an advanced untied continent or if it will be destroyed, as happened with the barbarian invasions"⁶⁴.

Therefore, Libya appeared aware of the power it held on to Europe, as depicting migrants as a concrete uncontrollable threat which could undermine the "well civilised" continent, placing Libya in a position of power compared to the European community. At the same time, member states fearing an invasion, would be more condescending with the Libyan requests.

The same goes for Italy's political realm where the securitisation discourse set up by Silvio Berlusconi anti-immigrant parties, have strengthened the general perception of migration as a cultural threat. Citing one of the most well-known speeches given by the head of Forza Nuova party "*the Left's idea of a multi-ethnic Italy, it is not our idea–We are proud of our culture and of our traditions*", carrying on by saying "*Yes to push-backs, we won't open the doors to everyone*"⁶⁶

Although it is undeniable that the arrival at sea in Italy have significantly increased from 2007, thus ranking the country as the fourth highest asylum host country in the

⁶⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). Available at: <https://eur-lex.europa.eu/eli/dir/2011/95/oj>, accessed on April 29, 2022

⁶⁵ Mainwaring, C. (2012) In the face of revolution: the Libyan civil war and migration politics in Southern Europe. In: Calleya, S. and Wohlfeld, M. (eds.) Change and Opportunities in the Emerging Mediterranean. Malta University Press: Malta, pp. 431-451. ISBN 9789995701765

⁶⁶ Corriere della Sera (2009), "Berlusconi: 'Sì ai rimpatri, non apriremo le porte a tutti'" ("Berlusconi: 'Yes to push-backs, we won't open the doors to everyone'") Available at http://www.corriere.it/politica/09_maggio_09/maroni_immigrati_respinti_da84e542-3ca2-11de-a760-00144f02aabc.shtml, accessed January 7, 2022.

industrialised world⁶⁷ The negative depiction of migrants by mass media and right-wing parties together with the securitisation approach adopted by the political caste in Italy has contributed to the adoption of increasingly restrictive migration policies.

2. The 2017 Italy- Libya Memorandum of Understanding

Preamble

The year 2011 could be considered as a turning point for both countries, provoking significant changes particularly in the socio-political scenario and institutional assets of the Libyan state in the wake of the Arab Spring, involving as well most of the MENA and North African countries, claiming for better living conditions, free elections and the revision of their Constitution in a more liberal sense⁶⁸ The breakout of the civil war, and the consequently NATO authorisation on the use of forces within the country, through the approval of the 1973 UN Resolution⁶⁹, brought to the fall of the Gaddafi's administration and the formation of two separate Libyan governments, respectively based in Tripoli and Tobruk. Although the several attempts of the Italian state to maintain its partnership with the Libyan states on matter of migration and border control, the breaches of the principle of mutual non-interference between the two countries and the violation of the abstention from any violent acts set out in the 2008 Treaty of Benghazi from part of Italy represented

⁶⁷ UNHCR Asylum Levels and Trends in Globalized Countries (2008). Available at <http://www.unhcr.org/49c796572.html>, accessed January 7, 2022.

⁶⁸ Tramontano (2016), "La Cooperazione tra Italia e Libia nella Lotta all'Immigrazione Irregolare: Principi giuridici", Master's Degree Thesis, Luiss Guido Carli Libera Università Internazionale degli Studi Sociali, Roma, 2016/2017

⁶⁹ United Nations Security Council (2011), "Resolution 1973", S/RES/1973, available at: https://www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110927_110311-UNSCR-1973.pdf, accessed on September 1, 2022

a breaking point for the countries' relationship. As a matter of fact, on March 2011 Italy put at the disposal of the NATO forces, seven military bases and eight combat aircraft⁷⁰

This did not mean the total interruption of the communication between the two states; in fact, during January 2012, the Italian Prime Minister Mario Monti went to Tripoli in order to meet the head of one of the two provisional governments, i.e., Abdel Rahim Al-Kib of the Libyan National Council based in Tripoli. At that time, the *Tripoli Declaration*⁷¹ was signed by the two parties, aiming at strengthening the countries' cooperation on matter of migration control starting from the previous agreements signed, providing a solid base for the future development of new bilateral and multilateral agreements. Although the Italian breaches of the terms laid in the 2008 Treaty, the collaboration between the two countries continued, showing both a continuity with the previous agreements and introducing new elements in managing the new migratory flows.

The event of the 2012 ECHCR case “Hirsi Jamaa and Others v. Italy”, when Italy was condemned for the human rights’ violation of 24 people from Somalia and Eritrea, allegedly sent back to Libya, exposing them to the risk of being subjected to ill-treatment or repatriation, constituted one of the main reason responsible for the shift in the Italian approach towards migration. The state realised that it could not any longer rely on push-back at sea, therefore with the following agreement it entrusted Libya to tackle the roots of the migratory flow. Instead of focusing solely on sea patrolling, the Tripoli government focused on the southern territorial borders with Niger and Chad, by relying on the financial and technical support provided by the Italian government⁷². Furthermore, a weak attempt on a more comprehensive respect of the migrant’s human rights was showed by Italy, as in the Tripoli Declaration remarked “*the urgency in introducing more appropriate procedures favouring the voluntary repatriation of irregular immigrants, as well as a better coordination with International Organization for Migration (IOM) in order to maintain higher standards of human rights respect*”⁷³.

⁷⁰ Croci O.& Valigi M. (2012), “Italian Politics: From Berlusconi to Monti”, Berghahn Books, pp. 199-201

⁷¹ Quotidiano.net (2011), “Libia, Monti firma la Tripoli Declaration”, last review on 10/08/2022, available at: https://www.quotidiano.net/esteri/2012/01/21/656741-libia_monti_firma_tripoli_declaration.shtml, accessed September 1, 2022

⁷² Acito A. (2020), “Osservazioni critiche sul Memorandum d’intesa tra Italia e Libia, Realpolitik vs Diritti Umani?”, Osservatorio sulla Cooperazione e la Sicurezza nel Mediterraneo, Università degli Studi di Salerno

⁷³ Processo verbale della riunione tra il Ministero dell’Intero della Repubblica Italiana ed il Ministro dell’Interno della Libia, Tripoli, 3 Aprile 2012, Capo IV. Available at: <https://www.statewatch.org/media/documents/news/2012/sep/ita-lib-processo-verbale.pdf>, accessed September 1, 2022

It could be said that with the breakout of the Libyan civil war and the consequently precarious political situation of the country, together with the international condemnation of Italy from part of the ECHR for the violation of the principle of non-refoulement deriving from article 3 of the European Convention on Human Rights⁷⁴, marked a crucial change in the relations between the two countries. For many years, the European member states have adopted an approach towards migration centred on human rights protection and rescue operations, but the uprising in the Maghreb region, followed by the Syrian civil war, brought a steady increase in the number of disembarkation on the Mediterranean coastline, shifting the focus towards the externalisation of border control to transit countries outside of Europe⁷⁵. The 2015 “Migration crisis”, bringing as many as 153,842⁷⁶, contributes to characterised the EU debate on matter of migration control, by a feeling of fear, refusal and anger toward these inflows, therefore allowing for the adoption of extraordinary measures with third countries, employing informal “containment tools” in order to curb the migratory phenomenon, while neglecting the respect of the existing international human rights conventions.

2.1 Objectives and Obligations under the MoU

The *Memorandum of Understanding* between Italy and the Libyan Government of National Accord on *Cooperation in the Field of Development, Fight against Illegal Immigration, Trafficking in Human Beings and Smuggling and on Enhancement of Border Security*⁷⁷ was agreed on 2nd September 2016 by the then Italian Prime Minister Paolo Gentiloni- and Fayez Mustafa Al-Serraj, at the head of the Tripoli-based government named Libyan Government of National Accord, and subsequently signed on 2nd February 2017 in Rome entering into force through the employment of a simplified form process, instead of a solemn one. By deliberately choosing to adopt the memorandum through a

⁷⁴ De Segonzac M. (2017), “Non-Refoulement as a Principle of International Law and the Role of the Judiciary in its Implementation”, European Court of Human Rights. Available at:

https://www.echr.coe.int/Documents/Dialogue_2017_ENG.pdf, accessed on September 1, 2022

⁷⁵ Amnesty International (2017), “The Human Rights Risks of External Migration Policies”, p.9. Available at: <https://www.refworld.org/pdfid/593fecfe4.pdf>, accessed on September 1, 2022

⁷⁶ UNHCR (2015), “OPERATIONAL DATA PORTAL REFUGEES SITUATION-Italy”, last review 02/08/2022, available at: <https://data.unhcr.org/en/situations/mediterranean/location/5205>

⁷⁷ Odysseus Network (2017), “Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic.”. Available at: https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf, accessed September 1, 2022

simplified form, Italy had prevented any interference from part of the national Parliament⁷⁸, that it could have had a power of action only in the case the agreement would have been classified as a political agreement, instead of a technical one. In order to do so, article 4 of the Memorandum⁷⁹ clearly states that “*the MoU can be financed with the EU funds and cannot entail expenses that are not included in the national budget*”; as excluding the possibility to have additional charges on the national Treasury deriving from this agreement, the Prime Minister Gentiloni cleverly avoid any possibility of parliamentary action as the Memorandum follows under the category of technical agreement.⁸⁰

The adopted agreement, pursued by the two states also thank to the close collaboration with the Italian Interior Minister, Marco Minniti, had a set duration of three years with a tacit renewal of three years more after its expiry, unless it is denounced by one party at least three months before its termination⁸¹. Structurally speaking the Memorandum is composed of a preamble and eight articles, those last representing the actual operational section of it; the language adopted in drafting the text, both written in Arabic and Italian, is highly generic, simple and imprecise, making the agreement appears as untrustworthy, especially in the section dedicated to the founding allocation and its origin⁸².

As set out in the agreement's preamble, the Memorandum aimed at “stabilising the Libyan state”, “curbing the human trafficking”, and “cooperating on fighting terrorism”; in fact the text underlined the “intention of both states to put an end to the deaths at sea, and the journey of hope from Libya to Italy”⁸³. Already from the beginning, it appeared visible as both parties of the agreement prioritised the contrast of the migratory flow to reach the

⁷⁸ As established by the article 80 of the Italian Constitution, “the Chambers authorize the ratification of international treaties by law [cf. art. 87 c. 8] which are of a political nature, or provide for arbitration or judicial regulations, or involve changes in the territory or financial burdens or amendments to laws”. By underlining the technical features of the agreement and reassuring that the founding at the Libyan state disposal would have been of the same amount defined in the previous agreement, Italy managed to avoid any form of interference from part of the Parliament. Costituzione Italiana, article 80. Available at: <https://www.senato.it/istituzione/la-costituzione/parte-ii/titolo-i/sezione-ii/articolo-80>

⁷⁹ Memorandum of Understanding, art.4, p.4

⁸⁰ Pascale G. (2019), “Is Italy internationally responsible for the gross human rights violations against migrants in Libya?”, QIL Zoom-in N°56, p. 40

⁸¹ Mancini M. (2017), “Italy’s New Migration Control Policy: stemming the flow of migrants from Libya without regard for their human rights”, The Italian Yearbooks of International Law Volume XXVII, Leiden, P. 262

⁸² Acito A. (2020), “Osservazioni critiche sul Memorandum d’intesa tra Italia e Libia, Realpolitik vs Diritti Umani?”, Osservatorio sulla Cooperazione e la Sicurezza nel Mediterraneo, Università degli Studi di Salerno, p.9

⁸³ Memorandum of Understanding, Preamble, p.1

Mediterranean coastline, neglecting the human rights protection of migrants, as well as providing any sort of safe channel for reaching Europe. Even after Italy condemnation from part of ECHR for violating refugees' rights and the media attention involving the country, the negligence on human rights does not come as a surprised as in the same preamble it is remarked the willingness to proceed with the Italy-Libya cooperation in line with the previously signed agreements in which, scarce mentioning of the international convention were made⁸⁴.

Even before analysing the content of each article, alarming affirmations have been made already in the preamble; for instance, the exclusive control assigned to the Libyan Ministry of Interior in managing the temporary accommodation centres, excluding any intervention neither from Italy nor international actors or organisations⁸⁵. As it will be explained in the next section of this study, Libya has been in the heart of several international investigation exposing the appalling and inhumane conditions in which migrants are forced to live in Libyan accommodation centre, more comparable to detention centres⁸⁶. Furthermore, it is remarkable the fact that Libya has still not ratified the 1951 Geneva Convention, as well as lacking a comprehensive national migration system capable to recognize the legal right of asylum⁸⁷.

As going through the content of each article, the Parties firstly commit themselves to enhance cooperation on matters of security and military institutions *“in order to stem the illegal migrants' inflow by providing Libya with boats and border control system”*⁸⁸. Looking at section B of article 1, additional responsibilities are assigned to the Italian government as being accountable for financing development programmes in all those Libyan regions affected by the illegal immigration but focusing on matters of *“renewable energy, infrastructure, health, transport, human resources development, and scientific research”*⁸⁹. On a deeper level of analysis, by proceeding with the reading of the text, it

⁸⁴ Kos M. (2018), “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 Italy, Master's Thesis, Vrije Universiteit Amsterdam, p.15

⁸⁵ Memorandum of Understanding, Preamble, p.2

⁸⁶ United Nations Support Mission in Libya (2016), “Detained and Dehumanise, Report on Human Rights Abuses against Migrants in Libya”, OHCHR, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/LY/DetainedAndDehumanised_en.pdf

⁸⁷ Palm (2017), “The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?”, in Eu Immigration and Asylum Law and Policy

⁸⁸ Memorandum of Understanding, Preamble, p.2

⁸⁹ Ibid art.1 section B, p.2

appears that Italy is primarily burdened with implementing the majority of actions listed in the agreement. For instance, article 2⁹⁰ lists several measures which Italy is theoretically responsible to realize as “*to provide technical support and technological support to the Border Guard, the Libyan Coast Guard as well as all the organs belonging to the Ministry of Interior responsible in managing the migratory crossing*”. A consistent financial burden is placed on Italy since its responsibility to “*complete the Libya’s southern border control system*”, as well as “*the renovation, the financial investment in the reception centres, and the training of Libyan personnel working in those centres*”, and finally the “*elaboration of a Euro- African cooperation plan to remove the root causes of irregular migration*”⁹¹.

Article 3⁹² promotes the creation of a committee to oversee the implementation of the agreement, while Article 5⁹³ represents in the whole document the solely allusion to apply the MoU in accordance with international and human rights obligations. Instead, the last three articles primarily focused on the agreement’s enforcement mechanisms and other procedural circumstances. For instance, the settlement of disputes by diplomatic means, any changes made to the agreement, or its tacit renewal after the expiry date⁹⁴.

Contrary to the previous agreement, i.e., the 2008 Treaty of Bengasi, the 2017 Italy-Libya Memorandum of Understanding does not aim at establishing a “push-back policy”, largely employed in the period 2008-2011, instead the renewed cooperation with Libya smartly assigned to the former the whole legal responsibility to prevent the migratory flow from reaching the Italian coastline. This agreement goes hand in hand with the general European trend regarding the management of migrants; recently we have assisted to the establishment of agreements between EU countries and third countries in order to externalize borders and avoid immigration influxes, with the EU-Turkey Deal being a clear example of it together with Italy-Libya Memorandum. The intentions behind this agreement are based on the presumption that it would free the EU member states of international obligations toward the migrants stuck in those third countries.

However, the extensive support, both technical and financial, that Italy has provided to the Libyan authorities might make up enough evidence proving Italy indirect responsibility

⁹⁰ Ibid art. 2 section 2, p.3

⁹¹ Ibid art. 2 section 3 and 4, p.3

⁹² Ibid art.3, pp. 3-4

⁹³ Ibid art. 4, p.4

⁹⁴ Ibid, art. 6, 7, and 8, p. 4

under several law instruments, for the outsourcing of its migration responsibility to Libya.⁹⁵

2.2 Italian action to support the Libyan authorities: the sea patrolling and the borders surveillance

Support at the sea

In the context of contrasting irregular immigration, the Italian government got involved in several initiatives with various political actors. In fact, agreements were not signed solely bilaterally between Italy and its Libyan counterpart, but accords were signed as well with local representative of several Libyan tribes⁹⁶; it is extremely important to keep in mind that Libya after the breakout of the civil war found itself fragmented among different leaders, with the three main areas being the Tripoli UN-backed government, the Tobruk based government and the Southern area of Fezzan controlled by several tribal clans and militias groups.

One of the first operation led by Italy, involving the Libyan personnel, was the so-called operation “EUNAVFOR MED Sophia”⁹⁷; launched in 2015, by providing training to the Libyan Coast Guard and the navy, was aiming at combating smuggling and prevent migrant departures within Libya’s territorial sea. The operation Sophia during its mandate performed search and rescue operations, saving at least 44,916 migrants in the Mediterranean Sea between 2015 and 2019, showing the willingness of the Italian state to comply with the international legislation on a matter of refugee’s protection⁹⁸. Subsequently, the operation was suspended for then being replaced in 2020 with the ongoing operation of “EUNAVFOR MED Iriini”⁹⁹ focused mainly on implementing and supervising over the UN arms embargo on Libya through the use of aerial, satellite and maritime assets, but simultaneously withdrawing all naval assets for the rescue operation from the Central Mediterranean.

⁹⁵ Nakache D.& Losier J. (2017), “The European Union Immigration Agreement with Libya: Out of Sight, Out of Mind?”, E-International Relations, p.3

⁹⁶ Scavo N. (2020), “Inchiesta. Ecco i fondi segreti italiani versati ai sindaci libici”, Avvenire.it, available at: <https://www.avvenire.it/attualita/Pagine/i-fondi-segreti-ai-sindaci-libici-nello-scavo>, accessed on September 1, 2022

⁹⁷ Marina Militare Italiana (2015), “EUNAVFOR MED Operation Sophia”, available at: https://www.marina.difesa.it/cosa-facciamo/per-la-difesa-sicurezza/operazioni-concluse/Pagine/eunavformed_sophia.aspx, accessed on September 1, 2022

⁹⁸ Council of European Union, Infographic – Eu Mediterranean operations 2015-2020, latest reviewed on 02/08/2022, available at: <http://europa.eu/luk44kW>., Accessed on August 2, 2022

⁹⁹ EUNAVFOR MED operation IRINI (2019), available at: <https://www.operationirini.eu/>, accessed on August 2, 2022

Beyond the operations supported by the European Union, the Italian government launched in 2017, as a continuation of the “Ippocrate Operation”¹⁰⁰, the “Italian Bilateral Mission for Assistance and Support (Miasit)” in Libya, including a series of supportive activities to the Libyan government after the fall of Gaddafi; among them the commitment of the Italian state in providing training, mentoring, and consulting to the Libyan security forces employed for curbing the illegal migration routes. The above-mentioned mission focused on organising “training cruises”, “patrolling operations on board of naval unit temporarily ceded to Libya in 2009 and 2010”, and “ordinary maintenance of the naval units” as four of those ships were damaged during the 2011-armed conflict¹⁰¹. Practically speaking that meant that between 2017 and 2020, Italy allocated 22 million euros to Libya, providing Italian personnel for technical support siding the Libyan one during the patrolling operations, the delivery of four new Italian vessels and reparations of other two, respectively the Bigliani and Corrubia vessels, damaged during the civil war¹⁰². Additional financial plan in favour of the Libyan personnel in managing migration have been approved throughout the years, but unfortunately the Italian state has never been fairly transparent in sharing it with the public, that is to say that is quite hard to provide an exact amount of the actual fundings and material provided to Libya but it is believed to be much more extensive the assistance issue by the Italian state. According to a reported conducted by the Italian association ARCI (2021)¹⁰³, through the consultation of over 80 sources, they have estimated that up to 2020, Italy has supplied the maintenance and training for the crews of 6 or 7 Libyan patrol boats and has handed over free of charge 12 vessels previously under the control of the Financial guard, and 20 newly built vessels in addition to the 4 coastal patrol vessels available under the 2009 additional protocol. Material and support that has been provided thanks to the approval of several national and co-joint plan with the European

¹⁰⁰ Ministero della Difesa, “Operazione Ippocrate”, available at: https://www.esercito.difesa.it/operazioni/operazioni_oltremare/pagine/libia-operazione-ippocrate.aspx, accessed on August 2, 2022

¹⁰¹ Mancini M. (2017), “Italy’s New Migration Control Policy: Stemming the flow of Migrants from Libya without regard for their human rights, The Italian Yearbook of International Law Volume XXVII, p.266

¹⁰² Arci (2021), “How Italy and Europe Funded the Libyan Coast Guard: 10 years of Human rights violations, p.7. Available at: <https://www.arci.it/app/uploads/2019/11/ENG-HOW-ITALY-AND-EUROPE-FUNDED-THE-LIBYAN-COAST-GUARDS.pdf>, accessed on August 14, 2022

¹⁰³ Vita.it (2020), “Oxfam. Dall’Italia più soldi alla Libia, mentre in mare si continua a morire”, available at: <http://www.vita.it/it/article/2020/06/17/oxfam-dallitalia-piu-soldi-alla-libia-mentre-in-mare-si-continua-a-morire/155893/>, accessed on August 14, 2022

institutions, among them we find: the 2018 Patrol Boats Decree¹⁰⁴, Mare Sicuro¹⁰⁵, Operations, EUNAVFOR MED Irini, and the 2017 Memorandum.

Finally, it is noteworthy to mention that a Search and Rescue area has been assigned and approved to the full control of the Libyan state starting from the end of June by an official notification from the International Maritime Organisation (IMO)¹⁰⁶. The designated area goes up to 130 miles further north to the Gulf of Sirte; the recognition of this area from part of such international organism appeared quite controversial. Within the Libyan SAR areas solely the Libyan personnel would be allowed to conduct any form of rescue operations, undermining the work of international NGOs who might have a more human rights- approach toward migrants. For instance, between the year 2017 and 2019, several episodes of violence have been recorded at the expenses of NGOs, such as Sea-Watch and Open Arms, from part of Libyan vessels, as on the morning of the 7th of August 2017 when the Libyan vessel “Sabratha” fired threatening shots in the direction of the Spanish NGO Proactiva Open Arms who was conducting a rescue operation¹⁰⁷.

Support at the Territorial Borders

For what concern the strengthening of border control in the southern Libyan areas, in the Memorandum's framework, Italy aimed at reducing and containing the number of migrants' departure towards Italy, by sealing the frontiers of the southern Libya with the migrants' origin countries, i.e., from Central to Western African countries¹⁰⁸.

To accomplish this Italy, through the delegation of the Interior Minister Marco Minniti, signed on the 31st of March 2017 a sort of peace agreement with 60 tribal chiefs from the southern area of Libya, agreeing on collaborating with the Italian state in combating the irregular migrant

¹⁰⁴ Senato della Repubblica e Camera dei Deputati (2018), “D.L. 84/2018. Cessioni di unità navali alla Libia”, Documentazione per l'esame parlamentare”, available at: <https://www.senato.it/service/PDF/PDFServer/BGT/01069339.pdf>, accessed on August 14, 2022

¹⁰⁵ Marina Militare Italiana, “Operazione Mare Sicuro”, available at: <https://www.marina.difesa.it/cosa-facciamo/per-la-difesa-sicurezza/operazioni-in-corso/Pagine/MareSicuro.aspx>, accessed August 14, 2022

¹⁰⁶ Lösing S. (2018), “Search and Rescue Area off Libya”, European parliament Question P-003665-18 to the Commission, Last review on 02/08/2022, available at https://www.europarl.europa.eu/doceo/document/P-8-2018-003665_EN.html

¹⁰⁷ Bagnoli L. (2019), “Qual è il ruolo dell'Italia nelle operazioni della guardia costiera libica?”, Internazionale.it, last review on 02/08/2022, available at: <https://www.internazionale.it/notizie/lorenzo-bagnoli/2019/11/13/italia-libia-guardia-costiera>, accessed August 14, 2022

¹⁰⁸ Becucci S. (2020), “The Smuggling of Migrants from Libyan Shore to Italy: Changes After the End of the Gaddafi Dictatorship”, OpenEdition Journals Quaderni di Sociologia, <https://doi.org/10.4000/qds.4193>, pp. 9-10

crossing¹⁰⁹. Most of those leaders belonged to the tribes of Tebu, Awlad Suleiman and Tuareg, who monitor the Fezzan region, bordering the countries of Algeria, Chad and Niger¹¹⁰. The informal agreement that Italy had to stipulate with the tribal leaders appeared necessary to the eyes of the Italian government as it represents the area more strongly hit by the migratory phenomenon, which theoretically should be under the control of the Government of National Accord based in Tripoli, but in the reality is partially controlled by several tribal formation. The critical aspects here, is not only the fact that Italy has tried to deal with such a delicate topic as migration can be, with a country that is highly fragmented and controlled by several formal and informal actors, but it is undoubtedly the fact that the Gentiloni government had signed agreements with tribes which are directly responsible for the same human trafficking route that they are trying to curb¹¹¹. Several reports have proved how the Tebu tribes have controlled the human trafficking from Niger to the Libyan city of Sabba, where then the responsibility falls to the Awlad Suleiman tribes¹¹².

Through the agreement signed at the *Viminale* (transl. Interior Ministry), Italy obtained the reconciliation between the Tebu and Awlad Sulieman, as well as establishing the Touareg's control over the border with Algeria, while assigning the monitoring of the borders with Chad and Niger to the Tebu. In exchange, the interior minister Minniti promised the full financial covered of any activities that would be conducted at the borders of those countries in order to prevent the crossing of illegal migrants, thanks to the European Fund for Africa.

Furthermore, besides having embarked on agreements with several Libyan tribes, the Italian Interior Minister on May 2017 gathered the political representatives of Chad, Niger and the provisional Libyan government in order to establish a cooperation on matter of border control

¹⁰⁹ Sicurezza Internazionale (2017), "Immigrazione: accordo di pace tra le tribù libiche grazie all'Italia", last review on 11/08/2022, available at: <https://sicurezzainternazionale.luiss.it/2017/04/03/immigrazione-accordo-di-pace-tra-le-tribu-libiche-grazie-allitalia/>

¹¹⁰ Longo G., Stabile G. (2017), "Libia, le tribù del Sud siglano la pace e si impegnano a bloccare i migranti, in *La Stampa*", last review on 11/08/2022, available at: <https://www.lastampa.it/esteri/2017/04/02/news/libia-le-tribu-del-sud-siglano-la-pace-e-si-impegnano-a-bloccare-i-migranti-1.34610687>

¹¹¹ Fill A. & Moresco F. (2021), "Dynamics of human trafficking in Libya: analysis and critical insights", ASGI Progetto Sciabaca&Oruka, last review on 11/09/2022, available at: <https://sciabacaoruka.asgi.it/en/dynamics-of-human-trafficking-in-libya-analysis-and-critical-insights/>

¹¹² FRONTEX, Africa-Frontex intelligence Community Joint Report 2016, aprile 2017, p.17, https://data.europa.eu/euodp/data/storage/f/2017-08-03T130749/AFIC_2016.pdf, Mancini 2018, ibidem. - Horsley R. & Gerken J. (2022), "Libya Stability fuels rebound in Human smuggling" *Global Initiatives against Organize Crime*, pp. 26-31. <https://globalinitiative.net/wp-content/uploads/2022/06/Human-smuggling-and-trafficking-ecosystems-LIBYA.pdf>

on the southern frontier of Libya¹¹³. Going through the drafted document, we observed how the intention of these four countries will be focused on “*assuring safety at borders with Libya*”, “*providing training program to the frontier guard of Chad and Niger in order to prevent the illegal crossing through the creation of a contact network among the different national border forces*”, as well as “*building accommodation centres based in Niger and Chad in line with the international humanitarian standards*”¹¹⁴.

It could be said that the migration policies adopted by the Italian government within the framework of the Memorandum of Understanding pointed all in the direction of a strong externalization and militarisation approach to the control of the migratory flow, at the expenses of human rights protection. It is surprising how such a large and differentiated set of actions, to which participate a great variety of actors at all levels, contribute with substantial consistency to a common goal, i.e., reducing transit migrations in Niger and Chad and containment of arrivals in Europe. It is also surprising how much the outsourcing policies can go far from physical borders of Europe, with an increasingly close collaboration with the security industry¹¹⁵. As the Italian Minister of Interior Marco Minniti affirmed in 2017 “sealing off Libya’s southern border means sealing off Europe’s Southern border”¹¹⁶, that is also what has been pursued with the migratory agreement with Libya, starting from Berlusconi and his Treaty of Benghazi, reaching the 2017 Memorandum of Understanding.

2.3 The European Union’s support on the agreement

According to a report of the Transnational Institute, between 2004 and 2011, the EU allocated 41.6 million euros to fund 14 programmes to manage migration in Libya, despite numerous international human rights organisations having highlighted a total lack of protection and safeguards for migrants and refugees in Libya¹¹⁷. Even before the implementation of the Memorandum, the European Union was already cooperating with Libya together with the

¹¹³ Comunicato congiunto dei Ministri dell’Interno di Italia, Ciad, Niger, 21 maggio 2017. Available at: <https://www.interno.gov.it/it/stampa-e-comunicazione/comunicati-stampa/comunicati-stampa-raccolta-anni-precedenti/comunicato-congiunto-dei-ministri-dellinterno-italia-ciad-libia-niger>, accessed August 13, 2022

¹¹⁴ Ibid

¹¹⁵ Roman E. (2019), “Niger, Europa, Italia: Un’oscura gestione dei fenomeni Migratori”, p.126

¹¹⁶ La Stampa.it (2017), “Libia, le tribù del Sud siglano la pace e si impegnano a bloccare i migranti”, last review on 11/08/2022, available at: <<http://www.lastampa.it/2017/04/02/esteri/libia-le-trib-del-sud-siglano-la-pace-e-si-impegnano-a-bloccare-i-migranti-qzNs23DGe0OS dJi7G285FK/pagina.html>>.)

¹¹⁷ Akkerman M. (2018), “Expanding the Fortress: the policies, the profiteers and the people shaped by EU’s border externalisation programme”, Transnational Institute, Amsterdam

United Nations, launching the 2011 UNSMIL operation¹¹⁸, focused on political transition to democracy, institutional stability, possible resolution of the current political crisis and reaching a multilateral consensus for the elections to take place. With the signing of the Memorandum of Understanding in 2017, the European Union and its member states did not take long to show their support towards the agreement. In fact, in an informal meeting taking place in Malta on 3rd February 2017, the EU members states showed their support to the Memorandum by adopting the so-called the Malta Declaration, an official document containing concrete actions aiming at reducing the migratory flow and breaking the business model of smugglers¹¹⁹. Some of the measures adopted through the Malta Declaration could be listed as follows:

“[...] Training, equipment and support for the Libyan National Coast Guard and other relevant agencies [...]; further efforts to dismantle the smuggling business through enhanced operational action, as part of an integrated approach involving Libya, other countries along the route and relevant international partners, committed Member States, missions and operations CSDP, Europol, the border and the coastal guard; support, if possible, for the development of local communities in Libya, particularly in the coastal and land areas along migration routes, in order to improve their socio-economic situation and strengthen their resilience as a host community; a commitment to ensure, in Libya, adequate reception capacities and conditions for migrants, together with UNHCR and IOM involvement [...]”¹²⁰

Therefore, the Malta Declaration clearly showed the member state’s readiness to support Italy in its implementation, and that was concretely proved on April 2017 when the EU adopted a 90 million euro programme through the EU Trust Fund for Africa, to reinforce the protection of migrants in Libya and improve the socio-economic development of Libyan local communities in coastal areas and along migratory routes¹²¹. At the end of June in the same year, the European Council convened an additional meeting in the view of the increasing number of disembarking

¹¹⁸ UNITED NATIONS SUPPORT MISSION IN LIBYA (UNSMIL), available at: <https://unsmil.unmissions.org/>

¹¹⁹ European Council (2017), “Informal meeting of EU heads of state or government, Malta, 3 February 2017, last review on 03/08/2022, available at <https://www.consilium.europa.eu/en/meetings/european-council/2017/02/03/>

¹²⁰ Dichiarazione di Malta dei membri del Consiglio europeo sugli aspetti esterni della migrazione: affrontare la rotta del Mediterraneo centrale, Valletta, 3 febbraio 2017, <https://www.consilium.europa.eu/it/press/press-releases/2017/02/03/maltadeclaration/>, par. 6, lett. a, b, c, d, e, g

¹²¹ European Commission, “Press Release: EU Trust Fund for Africa adopts €90 Million Programme on Protection of Migrants and Improved Migration Management in Libya”, 12 April 2017, available at: http://europa.eu/rapid/press-release_IP-17-951_en.pdf., accessed August 13, 2022

on the Central Mediterranean coastline, in which it was decided to speed-up the measures adopted during the Malta Declaration. In order to concretize this decision, the 4th of July 2017, the European Commission adopted a communitarian plan, which identify the specific actions to introduce in order to support the Italian government in managing the migratory phenomenon and reducing the flow¹²². The EU Treasury released a further financial plan amounting for 46 million euro for supporting the actions undertaken by Italy¹²³.

All of this money may be interpreted as Europe's clear commitment towards African states to resolve the various root cause of the conflict, displacement, and poverty. However, these goodwill gestures have more to do with its migration externalisation agenda than what is readily apparent. Throughout its formation, the European Union has always attracted migratory flow of different range, mainly necessary skilled and cheap labour for satisfying the market needs; ultimately the breakout of the Arab springs has destabilized the Sub-Saharan regions, especially with the appearance of several terrorist group and informal government. The worsening of the situation has caused the release of increasingly restrictive migratory policies and added multiple layers of security constraints to migration, bringing so the communitarian efforts to policies aiming at externalising and securitising migration towards the Union.

2.4 The 2020 Renewal of the Memorandum of Understanding: Are any changes introduced?

Despite the sharp criticism moved by several NGOs and International organism, including the human rights commissioner of the European Council Dunja Mijatovic condemning the human rights violation happening in Libya¹²⁴, on the 2nd of February 2020 the Memorandum of Understanding was renewed for a period of 3 years thereafter¹²⁵ by the Foreign Affairs minister

¹²² Action Plan on Measures to Support Italy, Reduce Pressure along the Central Mediterranean Route and Increase Solidarity, Bruxelles, 4 luglio 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agendamigration/20170704_action_plan_on_the_central_mediterranean_route_en.pdf, accessed on August 17, 2022

¹²³ European Commission (2017), "EU Trust Fund for Africa adopts 46 million euro programme to support integrated migration and border management in Libya", last review on 03/08/2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2187, accessed on August 2022

¹²⁴ Fassini D. (2020), "Le ong: "L'Italia non firmi l'intesa con la Libia", Avvenire.it, last review on 04/08/2022, available at: <https://www.avvenire.it/attualita/Pagine/litalia-non-firmi-lintesa-libia-caos-sui-profughi>

¹²⁵ Maccanico Y. (2020), "Italy renews Memorandum with Libya, as evidence of a secret Malta-Libya deal surfaces", Statewatch.org, p.1

Luigi di Maio. Concretely, no substantial changes were proposed with the extension of the bilateral agreement with Libya, but solely vague promises were made by several Italian politicians. For instance, the then foreign vice-minister Marina Sereni during a parliamentary session affirmed that “there is still the chance to make adjustments to the previous agreement, but that would be only possible with the full cooperation of the Libyan counterparts”¹²⁶.

On 9th February 2020, the Minister of the Italian foreign affairs sent a proposal containing 8 possible amendments to the MoU of 2017; in the statement Italy showed the intention to “introduce significant changes for guaranteeing better protection to migrants, asylum seekers and vulnerable people at risk of human trafficking”, as well as “allowing the UNHCR and IOM presence in the Libyan structure employed for accommodating migrants as a guarantor for human rights”¹²⁷. Furthermore, even before the proposal’s sending, on 30th January 2020 the Foreign Minister Di Maio publicly declared to the Parliament that “Italy would have supported the closure of all the Libyan detention centres, apart from the one managed by the UNHCR agency”¹²⁸.

Commenting on these affirmations, it should be first noticed that none of these documents regarding the possible amendments and the bilateral negotiations have been up to this time share with the public, not even in draft. This occurrence has been justified by the Italian political realm by saying that the public release of the texts could have undermine the outcome of the negotiations¹²⁹. Additionally, when the Italian spokeswoman of UNHCR, Carlotta Sami, was asked to comment on Di Maio’s words, she openly exposed him by saying that UNHCR during the drafting process of the new MoU had never been consulted¹³⁰. On 30th January of 2020, UNHCR announced the willingness to close its accommodation and departure centres based in Tripoli due the increasing security concerns related to ongoing hostilities in the capital¹³¹,

¹²⁶ Scavo N. (2020), “Marina Sereni. “Memorandum Libia, si tratta. I decreti sicurezza da rifare”, *Avvenire.it*, last review 04/08/2022, available at <https://www.avvenire.it/attualita/pagine/memorandum-libia-si-tratta-i-decreti-sicurezza-da-rifare>

¹²⁷ Camilli A. (2020), “I dubbi sulle modifiche al memorandum con la Libia sui migranti”, *Internazionale.it*, last review on 04/08/2022, available at <https://www.internazionale.it/bloc-notes/annalisa-camilli/2020/02/11/memorandum-libia-italia-migranti>

¹²⁸ Human Rights Watch (2020), “Italia: Sospendere il Memorandum con la Libia. Gli abusi sono noti, continuare l’assistenza rende Roma cómplice”, available at: <https://www.hrw.org/it/news/2020/02/12/338789>

¹²⁹ Giurelli E., “Accordi Italia-Libia: tra la lotta all’immigrazione irregolare e la violazione dei diritti umani”, *Luis University Dipartimento di Scienze Politiche, Roma, 2019-2020*, pp-40-42

¹³⁰ *Ibid*

¹³¹ Human Rights Watch (2020), “Italia: Sospendere il Memorandum con la Libia – Gli abusi sono noti, continuare l’assistenza rende Roma complice”, last review on 04/08/2022, available at: <https://www.hrw.org/it/news/2020/02/12/338789>

showing the instability of the Libyan political situation and the unsafe conditions in which migrants and refugees are forced to cope with.

In response to the amendments advanced by the Italian government, the Libyan counterpart drafted a series of proposals for modifying the Memorandum, apparently accommodating the Italian's request to a better safeguard of the human rights conditions. This event was followed by the first meeting between the political leader of Tripoli and the Italian foreign minister on the 24th of June 2020, in which the Libyan authority pledged "*their commitment in assisting the migrants saved in their SAR area, as well as observing the obligations on matter of international protection defined by the International conventions*"¹³². The Italian-Libyan Joint Committee was held in Rome on 2 July starting with the first session discussing the amendments and their implementation of the Memorandum. During the course of the meeting, the Italian delegation reaffirmed the purpose "*to bring about a substantial change in cooperation with Libya in the management of irregular migratory flows*", through "*the recall and timely compliance with applicable human rights norms*", with the attribution of "a central role to be recognized by the competent United Nations agencies and the progressive overcoming of the system of centres that host migrants"¹³³. These amendments have the objective therefore, to close the existing centres and to give a strong centrality to the various UN agencies. The Libyan authorities - added by the declaration of the meeting - are willing to "*continue the negotiations with new encounters very soon*".

For what concern, the amount of funding and the material provided to Libya by Italy, with the financial support of the EU, unfortunately till now no official document has been produced in order to chronologically trace the exact monetary value attributed to this bilateral cooperation; in order to provide an indicative numbers of it, reports conducted by several journalists as Nello Scavo from the Avvenire¹³⁴ or the journalist Annalisa Camilli from the Internazionale¹³⁵ will be employed.

¹³² Mannocchi F., Memorandum Italia-Libia: l'accordo della vergogna che continua a condannare a morte, in L'Espresso, 6 luglio 2020, <https://espresso.repubblica.it/attualita/2020/07/06/news/memorandum-italia-libia-l'accordo-della-vergogna-checontinua-a-condannare-a-morte-1.350743>

¹³³ Ibid

¹³⁴ Scavo N. (2020), "Inchiesta. Ecco i fondi segreti italiani versati ai sindaci libici". Available at: <https://www.avvenire.it/attualita/Pagine/i-fondi-segreti-ai-sindaci-libici-nello-scavo>

¹³⁵ Camilli A. (2020), "Quanti soldi diamo alla Libia per fermare i migranti? Internazionale.it, last review on 04/08/2022, available at: <https://www.internazionale.it/notizie/annalisa-camilli/2020/07/27/libia-migranti-fondi-guardia-costiera-libica>

According to the Euronews report (2019)¹³⁶, between 2017 and 2019 Italy has financed for all the missions conducted in Libya at least 475 million euro, of which 100 million provided by the Brussels's coffers. It should be highlighted that these monetary supports were never given as a monetary transaction but by supplying logistic and technical support for border and coast surveillance. Additionally, Italy had received 87 million euro coming from the "EU emergency trust Fund for Africa" between 2014 and 2019; from the total financial amount, 46 million euro have been managed by the Italian Ministry of Interior who have allocated them to the Libyan Coast guards in the form of 20 inflatable boats, 30 off-road vehicles and 10 minibus¹³⁷. The remaining part of the 46 million has been divided between the Ministry of Foreign Affairs and the Italian Agency for Cooperation and Development (AICS); the latter have employed them for bettering the Libyan detention centres thanks to the collaboration of national NGOs as Cefa, Cir, CCS, Cesvi, Emergenza Sorrisi, Terres des Hommes Italia, Helpcode¹³⁸.

On top of that, from the EU Trust Fund, 30 million euro have been paid to some of the most well-known international organisations, such as OIM, UNHCR and UNICEF and according to the article of Cammilli (2020), Italy did not ask the implementers for a list of activities to be carried out, nor did it request guarantees or risk assessments. Only "synthetic partnerships" that do not allow to reconstruct the bond content of the loan.

Finally, it should include all the expenditures related to the financing of the four military and civil operations still active on the Libyan soil as their mandate was recently prolonged by the Italian prime minister together with his Cabinet in 2021. The missions could be listed as follows: European Union Border Assistance Mission in Libya (EUBAM Libya), NATO Seas Guardian mission, the EUNAVFOR MED Iriini mission, and the Mare Sicuro Operation. These provisions have costed Italy 149.871.699 million euro just for the 2021 year¹³⁹. The constant lack of transparency regarding the Italian funding provided to Libya, undermines the deep understanding of their investment on the Libyan soil and if they are actually contributing to the improvement of migrants and refugees' managements. The fact that even with the renewal and the negotiation of the MoU, no willingness has been shown to a clearer approach to the bilateral

¹³⁶ Monella L. (2019), "Quanti soldi diamo alla Libia esattamente", Euronews.it. Available at: <https://it.euronews.com/2019/11/08/quant-soldi-diamo-alla-libia-esattamente>

¹³⁷ Arci (2019), "Documento di Analisi: Sicurezza e Migrazione tra interessi economici e violazione dei diritti fondamentali i casi di Libia, Niger ed Egitto", pp. 10-13

¹³⁸ Monella L. (2019), "Quanto spendiamo sulla Libia, esattamente", Euronews.it

¹³⁹ Data relaboration and calculation conducted by the Master student herself based on the data of Senato della Repubblica Dossier (2021), "Autorizzazione e proroga missioni internazionali 2021", DOC. XXV n°4, last review on 04/08/2021, available at: <https://documenti.camera.it/Leg18/Dossier/Pdf/DI0373.Pdf>

collaboration or to the creation of an accountability mechanism is already a clear sign of the little importance paid to the improvement of the condition of migrants' lives.

2.5 The Criticalities of the Agreement

The fact that the Memorandum of Understanding has been renewed, does not necessarily mean that the agreement is neither complying with the standards of international law, nor has been exempted from criticism. Although it has been recently renovated, several criticalities remained present, and the situation does not appear to change any time soon.

The most evident fallacy of the deal is the text itself and the terminology employed; the deal has been written in an extremely simplistic way, using terms that gives a general sense of vagueness and broadness of the material obligation written within the Memorandum. Also, the use of some vocabulary, such as “clandestine”, could be seen as a rational political choice as underlying the fact that all those people trying to reach the Italian coastline do not have any rights to do so; in fact the text of the agreement, not even once, mentions the words “asylum seekers” or “refugees” making clear its nature of stopping person who is trying to cross¹⁴⁰. As the first aim of the Memorandum is to curb illegal migration coming from Libya, through territorial and at sea operation, so the externalisation of the borders comes first. This automatically translate in a grossly negligent conduct from part of both the Italian and Libyan government as not assuring compliance with the human rights convention to whom they are signatory parties; a scarce interest visible as well from the fact that “human rights” are mentioned only once in the whole agreement. Externalisation of borders means also delegating the responsibility to manage the migration to third countries, in this case Libya that does not have the actual capabilities, tools and perhaps intentions to assure the right treatment to these people.

Starting from the current socio- economic and political conditions of Libya, it should be noticed that the country remains split in two different political mandates, respectively the Tobruk-based House of Representatives and the Tripoli-based Government of National Unity, with Italy striking the deal solely with the Tripoli's government. Additionally, the southern part of the country, namely the Fezzan, is still in the hands of the various Tebu and Tuareg tribes who control the majority of the smuggling routes in these areas, as their main source of

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income¹⁴¹. In order to assure their interest, that is reducing the migratory flow toward their coastline, the Italian state has been dealing directly with the militias settled in the southern part of the country, as well as the two of the most powerful militias in the western Libya city of Sabratha, appearing then to empowering the same Libyan groups responsible for human-trafficking¹⁴². Although, the government of Rome tried repeatedly to deny these accusations, it has been requesting to response to it in front of a commission managed by the European Parliament¹⁴³, as concrete evidence was brought up by several investigations, first and foremost by the journalist Nello Scavo¹⁴⁴. In the first place, Italy has made such a delicate deal with a country which is not even close to socio-political stability, and even if aware of it, it has pursued the deal and renovated knowing that from the 2019 in Libya chaos has persisted due to the Khalifa Haftar's offensive launched on Tripoli¹⁴⁵.

The situation for asylum seekers is rendered even more precarious by the fact that Libya's is not a signatory to the 1951 Geneva Convention, meaning that Libya cannot provide them with the international protection they need¹⁴⁶, as well as lacking a functioning judicial system able to provide effective remedy to migrants in cases needed as guaranteed by art 13 of the European Convention on Human Rights. Among the migratory population sent back to Libya, there is a percentage of migrants, who could be entitled to international or subsidiary protection as forced return to their countries could put their life at risk. However, even more serious, is that Italy as one of the first signatory of that Convention, did not attempt to bound the Libyan government to sign the Convention, before contacting the Memorandum of Understanding showing the indifference from part of the Italian state in upbring human rights protection¹⁴⁷.

¹⁴¹ El Zaidy Z. (2019), "EU migration policy towards Libya, a policy of conflicting interests", Friedrich Eberts Stiftung Institute, p. 13

¹⁴² Michael M. (2017), "Backed by Italy, Libya enlists militias to stop migrants", AP News, last review on 09/08/2022, available at <https://apnews.com/article/ap-top-news-international-news-libya-italy-africa-9e808574a4d04eb38fa8c688d110a23d>

¹⁴³ Ferrara L. (2017), "Presunti accordi con le milizie di risposta scritta P-005567-17 alla Commissione, Articolo 130 del Regolamento", European Parliament, last review on 09/08/2022, available at https://www.europarl.europa.eu/doceo/document/P-8-2017-005567_IT.html#ref1

¹⁴⁴ Scavo N. (2019), "La versione di Bija; Ero in Italia per fermare i migranti. Col visto", Avvenire.it, last review on 09/08/2022, available at: <https://www.avvenire.it/attualita/Pagine/la-versione-di-bija-libya-migranti>

¹⁴⁵ Reliefweb (2019), "Briefing paper: Who is Fighting Whom in Tripoli: How the 2019 Civil War is Transforming Libya's Military Landscape". OCHA Service, last review on 10/08/2022, available at: <https://reliefweb.int/report/libya/briefing-paper-who-fighting-whom-tripoli-how-2019-civil-war-transforming-libya-s>

¹⁴⁶ Ibidem p. 12

¹⁴⁷ Oxfam Italia & Borderline Sicilia (2020), "Libia, L'Inferno senza fine", p. 4, last review 09/08/2022, available at: https://www.oxfamitalia.org/wp-content/uploads/2018/01/MediaBrief_FINAL_OK.pdf

Furthermore, Libya as a country has been repeatedly considered as a non-safe port in accordance with the standard defined Geneva Convention and international customary law when it comes to assure basic human rights and protection from any form of abuses, torture or violence by several international organism, among them we find IOM¹⁴⁸, the UNHCR Agency¹⁴⁹, and Amnesty International. The ECHR too has ruled against Italy, firstly in the famous case *Hirsi Jamaa and Others v. Italy* and in the still pending case *S.S. and Others v. Italy*, for violating the principle of non- refoulement and collective expulsion (art. 3 and 4 of the ECHR) by sending possible asylum seekers to a country as Libya that cannot assure the smooth running of asylum applications¹⁵⁰.

In addition to this, it is very controversial the fact that the reception centres on Libyan soil are under the control solely of the Libyan Ministry of the Interior, whereas Italy avoids any involvement in it, without providing any monitoring mechanism. The extensive list of reports being released by several internationally recognised NGOs and organisations were not sufficient to stop Italy to continue on this path. Thousands of witnesses have been collected from migrants who have survived atrocities, including severe overcrowding, unsanitary conditions, malnourishment, rapes, unjustified beating and violence, use of electric shock, to every possible kind of torture¹⁵¹. Furthermore, the Committee against Torture highlighted “how the management of migrants in Libya is largely in the hands of paramilitary groups ”, which is why he emphasized that the Memorandum of Understanding was signed despite" reports of systematic and generalized human rights violations "against migrants in detention centres," thus integrating a policy of systematic and illiberal rejection”¹⁵².

¹⁴⁸ IOM UN MIGRATION (2020), “Libya Considers Its Ports Unsafe for the Disembarkation of Migrants”, News-Global, last review on 09/08/2022, available at <https://www.iom.int/news/libya-considers-its-ports-unsafe-disembarkation-migrants>

¹⁴⁹ UNHCR (2021), “IOM and UNHCR condemn the return of migrants and refugees to Libya”, Joint UNHCR/IOM press release, last review 10/08/2022, available at: <https://www.unhcr.org/news/press/2021/6/60ca1d414/iom-unhcr-condemn-return-migrants-refugees-libya.html>

¹⁵⁰ Publicinternationallawandpolicygroup.org (2020) “S.S AND OTHERS V. ITALY: SHARING RESPONSIBILITY FOR MIGRANTS ABUSES IN LIBYA “. Available at: <https://www.publicinternationallawandpolicygroup.org/lawyring-justice-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya>

¹⁵¹ Human Rights Watch (2019), “No Escape from Hell: EU policies contributes to abuse of Migrants in Libya”, last review on 10/08/2022, available at: <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>

¹⁵² Pacella F. (2018), “COOPERAZIONE ITALIA-LIBIA: PROFILI DI RESPONSABILITÀ PER CRIMINI DI DIRITTO INTERNAZIONALE”. Available at: <https://archiviodpc.dirittopenaleuomo.org/d/5838-cooperazione-italia-libia-profili-di-responsabilita-per-crimini-di-diritto-internazionale>

As we could expect, the Memorandum of Understanding was contested by both members of the Libyan and Italian civil society, mainly on matters of its legality and constitutionality. Azza Maghur, a female Libyan lawyer, together with a group of five ex-politicians and jurists, have challenged the Memorandum before the Court of Appeal in 2017. The main reasons behind the dispute brought up on the Memorandum regarded the exclusion of the Libyan Parliament in the drafting process, the fact that the agreement has been signed solely by the Tripoli region, as well as for the humanitarian consequences that this deal is causing.

On the Italian side, its validity and constitutionality have been mainly called into question by the association of jurists ASGI, emphasising the fact that the deal has been closed through a “simplified form instead of a solemn one”, even if it caused financial burden on the State budget. In fact, when it is this the case of the deal, the latter should be stipulated in accordance with the article 80 of the Italian Constitution, meaning through a Parliamentary consultation obtaining its approval. Finally, the non-transparency from part of the official authority in providing detailed documents assessing the origins and the allocation of the fund, as well as the lack of a monitoring mechanism on how Libya has been investing these grants, rendered the deal even more shady and fruitless.

2.6 The results obtained in terms of the migratory flow from 2017 to 2020

In order to understand the efficacy of the Memorandum of Understanding and its renewal it seems necessary to analyse the changes occurring in terms of arrivals on the Italian coastline from the period of 2017 till the 2020.

According to the data provided by the official website of the UNHCR¹⁵³, already in 2017, a decrease in the number of arrivals was recorded, passing from 119.369 in the same year compared to 181.436 in 2016, and in 2018 dramatically decreased to 23.370 as shown in *Table 3*. In December 2019, a further decline in the number of disembarkations was recorded, with solely 11.471 arrivals on the Italian coastline.¹⁵⁴. Thus, it is noticeable a visible decline in the number of arrivals coming from the Central Mediterranean Route, just recording a slightly

¹⁵³ UNHCR (2021), “OPERATIONAL DATA PORTAL REFUGEE SITUATIONS -ITALY”, last review 04/08/2022, available at <https://data.unhcr.org/en/situations/mediterranean/location/5205>

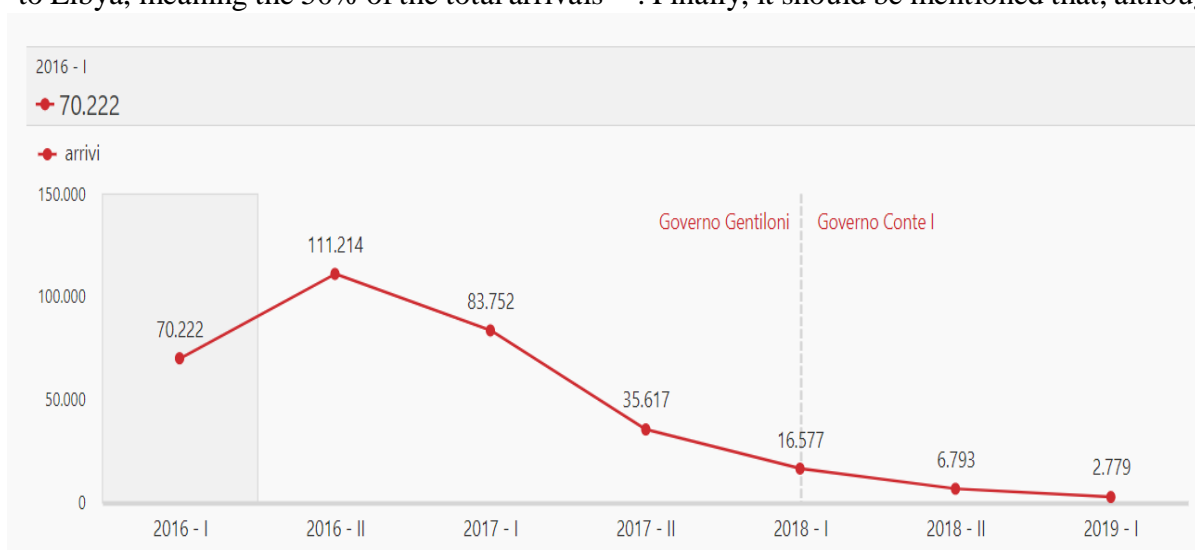
¹⁵⁴ http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/cruscotto_statistico_giornaliero_31-12-2018_0.pdf.- http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/cruscotto_statistico_giornaliero_31-12-2019.pdf.

increase in 2020 with 34.154 disembarkation but nothing comparable to the number of 2016 year¹⁵⁵.

Table 4. Number of arrivals to Italy between 2016 to 2019

Source: UNHCR (2016-2020) “OPERATIONAL DATA PORTAL REFUGEE SITUATIONS -ITALY”. Available at: <https://data.unhcr.org/en/situations/mediterranean/location/5205>

Furthermore, according to the research conducted by the Italian International Political Studies Institute (ISPI), from the enforcement of the MoU, over 38.000 migrants have been sent back to Libya, meaning the 50% of the total arrivals¹⁵⁶. Finally, it should be mentioned that, although



the number of recorded deaths and missing at sea has decreased over this 5 years period, the number should be framed in relation with the total arrivals in this time, as it has significantly decreased as well. In fact, if the year 2019 is taken as an example, it will be detected that despite the total arrivals have reached their lowest point, the mortality rate was much higher than in years in which arrivals were 10 times greater¹⁵⁷

¹⁵⁵ Blengino L.& Gambarini E. (2021), “Sbarchi e immigrazione in Itali: i dati degli ultimi 5 anni”, YouTrend.it, last review on 04/08/2022, available at: <https://www.youtrend.it/2021/02/15/sbarchi-e-immigrazione-in-italia-il-punto-della-situazione/>

¹⁵⁶ Villa M. (2021), “Vero o falso Fact-checking: migrazioni 2021”, ISPI Istituto per gli Studi della Politica Internazionale. Available at: <https://www.ispionline.it/it/pubblicazione/ispitel-fact-checking-migrazioni-2021-31027> , last review on August 4, 2022.

¹⁵⁷ UNHCR (2021), “OPERATIONAL DATA PORTAL REFUGEE SITUATIONS -ITALY”, last review 04/08/2022, available at <https://data.unhcr.org/en/situations/mediterranean/location/5205>

3. The controversial aspects of the MoU from the Libyan side

Preamble: assessing the current socio-political situation of Libya

Libya can be considered a long-time destination country for African migrants, as well as a gateway to Europe, making the country a relevant transition country in the Central Mediterranean route. Due to scarce native population, accounting for 6,8 million in 2020 in a territory that is the fourth largest in Africa¹⁵⁸, Libya has intensively relied on foreigner low-skilled workforces employed mainly in low-income jobs such as in the construction, agricultural and oil sector, in order to maintain the country's economic growth¹⁵⁹. The rapid industrialisation of the country, together with the foreign policy ambitions, explained the initial openness of the Gaddafi regime, firstly toward migrants from Arab countries and then to foreigners coming from Sub-Saharan countries. In fact, in the early 1990s, the Libyan leader, as an effort to lead a Pan-Africanism movement within the continent, supported the migration of African residing in neighbouring countries, by rendering the visa regime more accessible and advertising employment opportunities in newspapers¹⁶⁰. At the same time, Gaddafi from the early time has constantly instrumentalized the migratory flow to hold a certain degree of bargaining power with European countries; through the adoption of several cooperation agreement, he has been able to obtain millions of fundings from EU countries in exchange for a more rigid control of the country's frontiers. Consequently, this attitude has stirred up an increasingly hostile approach based on mass deportation of regular and irregular foreign workers, forcing them to rely on smugglers and human traffickers in order to carry out their migratory project¹⁶¹. The Arab uprising in 2011, with the fall of the Qaddafi showed the deep-rooted tension within the country, deriving from the unequal distribution of power and wealth, that resulted in to a current polarised country characterised by constant state of violence involving both state and no-state actors, fragile or non-existent political institutions, and the increasing

¹⁵⁸ World Bank Data (2020), Libya, last review on 25/08/2022, available at:

<https://data.worldbank.org/indicator/AG.LND.TOTL.K2?locations=LY>

¹⁵⁹ Mainwaring (2012), "In the face of Revolution: The Libyan Civil War and Migration Politics in Southern Europe", p. 432

¹⁶⁰ Kalush R. (2020), "Migration Beyond the Crisis: Libyan Policy and Practice", p.5. Available at:

https://www.brookings.edu/wp-content/uploads/2020/10/Unheard-Voice_CH1.pdf

¹⁶¹ Baldwin M. -Edwards & Derek Lutterbeck (2019) Coping with the Libyan migration crisis, Journal of Ethnic and Migration Studies, 45:12, 2241-2257, DOI: 10.1080/1369183X.2018.1468391

presence of jihadist groups, such as the Daesh, Al-Qaeda and the Salafists¹⁶². Currently, political power is mainly held by two state actors competing for legitimately governing the Libyan state; in Tripoli the government was the result of a fragile UN-backed agreement creating two official institutions, i.e. the Presidential Council (headed by Fayeze Al-Sarraj) and the Government of National Accord holding the supervisory and executive powers of the country headed by Fayeze al-Sarraj. In eastern Libya instead operate two main political entities: the House of Representatives based in Tobruk and the dissident government of al-Bayda, both opposing the leadership settled in Tripoli and headed by the anti-Islamist general Khalifa Haftar head of the Libyan National Army.

The current socio-political situation of the country has heavily affected the development of a comprehensive migration and asylum national system, that instead it appears as incoherent with the involvement of a large number of subjects resulting in competencies overlapping, of the various migration agencies¹⁶³. For instance, the Ministry of Interior, the Ministry of Defence, the Ministry of Transport, and the Ministry of Finance, together with the Libyan Intelligence Service, the Libyan Coast Guards, the General Investigation Department, are just a section of the actors involved in the supervision of the migratory flow, without considering the independent militias in charge of several detention centres¹⁶⁴

With 574,146 migrants living in Libya according to IOM Displacement Tracking Matrix (2020), in this chapter the author will display the national and international norms which regulate the migratory flow on the Libyan soil; then a section will be dedicated to assess the migrants, refugees, and asylum seekers accommodated in the detention centres and the conduct of the Libyan Coast Guards in conducting SAR operations. Finally, the last paragraph will state the human rights violations committed by the country in the above-mentioned situations, remarking the inefficiency of the international legal framework in holding Libya accountable for the atrocities committed.

¹⁶² Fitzgerald&Badi (2020), "The limits of reconciliation: assessing the revisions of the Libyan Islamic Fighting Group", Institute for Integrated Transitions, Stable URL: <https://www.jstor.org/stable/resrep29494.5>

¹⁶³ EEAS. 2017. "EUBAM-Libya Initial Mapping Report." Working document of 24/01/2017; ref. EEAS (2017) 0109. European External Action Service.

¹⁶⁴ Baldwin&Lutterbeck (2018), "Coping with the Libyan migration crisis", Journal of Ethnic and Migration Studies, VOL 45 N°12, DOI: <https://doi.org/10.1080/1369183X.2018.1468391>, P.2247

3.1 Libyan legal framework on matters of human rights and refugees' protection: Internal and External legislations

Libya's tumultuous security situation, paired with a weak institutional asset and a corrupted judicial system¹⁶⁵, has fostered a national migratory system which frequently criminalises the foreigners' entry and violates their human rights.

When it comes to migratory flow toward Libya, the country does not acknowledge any differences between the diverse type of immigration occurring, meaning the total absence of a distinction among asylum seekers, refugees, migrants, as well as possible victims of human trafficking¹⁶⁶. According to both the regulatory framework and the rhetoric employed by the Libyan authorities, refugees and asylum seekers are not present on their territory, meaning that the country lacks completely of asylum laws making refugees and asylum seekers issues falling solely under the immigration law.

For what concern the national legal framework, Libya has a total of three legislations regulating presence of foreigners within the country: "Law No. 6 of 1987 Regulating Entry, Residence and Exit of Foreign Nationals", "Law No. (2) of 2004¹⁶⁷ amending certain provisions of Law No. (6) of 1987 on organising the entry and residence of foreigners in Libya", and "Law No. (19) of 2010 on combatting illegal immigration¹⁶⁸". Since the Libyan system expressly does not recognise the refugee status, all the cases involving borders-crossing are subjected to these three legislations without considering the possible presence of asylum seekers among the migratory flow; for instance Law No. 6 (1987) provided for the imprisonment and deportation of those who entered the country irregularly or sought to exit without a proper visa. Additionally, article 17 of Law No. 6 states that foreigners would be subjected to the deportation "if he enters the country without a valid visa", and since the majority of migrants and refugees entered without a visa they are constantly subjected to this risk, even if they could be granted international protection. Finally, article 18 entitles the director of the General Directorate of Passports and Nationality to detain any foreigner that is to be deported until the

¹⁶⁵ Corruption Perception Index (2021), "Libya", <https://www.transparency.org/en/cpi/2021/index/lby>, accessed on August 25, 2022

¹⁶⁶ Hamood S. (2008), "EU-Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?", *Journal of Refugee Studies* Vol. 21 No 1., Oxford University Press, DOI: 10.1093/jrs/fem040, p. 28

¹⁶⁷ Law No. (2) of 2004 amending certain provisions of Law No. (6) of 1987 on organising the entry and residence of foreigners in Libya. Available at: https://security-legislation.ly/sites/default/files/lois/841-Law%20No.%20%282%29%20of%202004_EN.pdf

¹⁶⁸ Law No. (19) of 2010 on combatting illegal immigration Law No. (19) of 1378 FDP - 2010 AD on combatting illegal immigration. Available at: <https://security-legislation.ly/law/32174>

completion of the deportation, and articles 19 states that anyone who enters, resides in, or exits the country without a valid visa shall be sentenced to imprisonment and fined an amount of money that does not exceed LYD 200. With the enforcement of Law, No 2. In 2004 amendments were made to the 1987 Law, introducing more severe penalties for irregular crossing. Undocumented migrants currently face at least one year's imprisonment and a 1,160 euro fine if they fail to satisfy four requirements; among them proving that a Libyan could not do the job offered to him/her, registration with tax authorities, and providing valid documents proving that the foreign does not have any contagious diseases¹⁶⁹. In the view of this restrictive trend, Law No. 19 was adopted in 2010 introducing the possibility to condemn illegal migrants entering the country to forced labour for an indefinite period of time, as well as increasing the fine's amount¹⁷⁰. These deportations are done without any legal safeguards and there is no possibility for migrants to challenge their deportation. The missing appeal system makes international humanitarian agencies currently the only possibility for many foreign nationals in Libya to challenge their deportation, or to be recorded as asylum seekers¹⁷¹. Despite the repressive attitude toward migrants just outlined, there are a few national legislations, including articles acknowledging the right of asylum, and minimum standards protecting human freedom when it comes to detention. Some examples are included in the Libya's 2011 Interim Provisional Constitution¹⁷², where article 10 defined the State as a guarantor of the right to asylum, prohibiting the extradition of political refugees. Furthermore, article 14 of the Libyan Law n. 20 of 1991¹⁷³ The promotion of freedom states that "human freedom may not be taken away or restricted", "preventive isolation shall be carried out in an identified place made known to the family of the accused and it shall last the minimum period required for investigation and preservation of evidence". As well as article 21 of the same law stating that "the great Jamahiriya is the refuge of the persecuted and freedom-seekers" and article 30 affirming the right to every person to resort to court, providing all the necessary guarantees,

¹⁶⁹ Human Rights Watch (2006), "Stemming the flow: Abuses against migrants, asylum seekers and refugees". Available at: <https://www.hrw.org/report/2006/09/12/stemming-flow/abuses-against-migrants-asylum-seekers-and-refugees>

¹⁷⁰ Law No. (19) of 2010 on combatting illegal immigration Law No. (19) of 1378 FDP - 2010 AD on combatting illegal immigration Art. 4 and 7.

¹⁷¹ UNHCR Refugee Agency (2021), "UNHCR calls on Libya to urgently develop plan for asylum seekers and refugees, welcomes authorization to restart evacuations", last reviews on 25/08/2022, available at: <https://www.unhcr.org/news/press/2021/10/6171e8414/unhcr-calls-libya-urgently-develop-plan-asylum-seekers-refugees-welcomes.html>

¹⁷² Article 10 of the Interim Provisional Constitution (2011), latest reviews on 25/08/2022, available at: https://www.constituteproject.org/constitution/Libya_2011.pdf

¹⁷³ Article 14 of the Law No. (20) of 1991 on the promotion of freedom, latest reviews on 25/08/2022, available at: https://security-legislation.ly/law/3147_2

including an attorney. It can be highlighted how the few national legislations mentioning the right of asylum, providing guarantees for basic living standards, openly clash with three migration laws which instead criminalise, punish and prohibit any form of migration if a visa is not held by the foreigner who is crossing the Libyan border.

In Libya, the protection system for asylum seekers on an international level, appears quite controversial; from one side the country has ratified neither the 1951 Geneva Convention, nor the 1967 Additional Protocol, but from the other side it is part of several UN international Convention that to different degrees assure asylum seekers and refugees with basic rights and protection. Indeed, Libya has ratified the International Convention on Civil and Political Rights (1976), together with the Optional Protocol (1989), guaranteeing with article 6 the inherent right to life to every human being. It is also part of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), that with article 3 imposes the principle of *non-refoulement*, when there are substantial grounds for this person to be in danger if return to another state. The same goes for the Libya ratification in 2004 of the UN Convention against Transnational Organised Crime aiming at preventing, repressing and punishing the human traffic, with special regard to the protection of women and children and migrants involved in the smuggling. Other UN convention which has been included ratified by the Great Jamahiriya include: the International Covenant on Economic, Social and Cultural Rights in 1970, the International Convention on the Elimination of All Forms of Racial Discrimination in 1968, the Convention on the Elimination of All Forms of Discrimination against Women in 1989, the Convention on the Rights of the Child and its two Additional Protocol, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in 2004. It is worth mentioning the Libya's participation in the Hamburg Convention on Search and Rescue operations of 1979; contrary to the misconduct that Libyan Coast Guards have displayed in performing the rescue operations at sea, the country shall guarantee adequate assistance to people at sea distress and assuring the disembarking on a safe place by providing the necessary medical assistance¹⁷⁴. On matter of regional protection, Libya has ratified both the Convention on Refugee Problem in Africa adopted by the Organisation for African Unity in 1969 and the Bajul Charter in 1986, which implicitly recognised the 1951

¹⁷⁴ UNSMIL (2018), "Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya", Rapporto della Missione di supporto delle Nazioni Unite in Libia e dell'ufficio dell'Alto commissario per i diritti umani, cit., pp. 22-25. Available at: <https://reliefweb.int/report/libya/desperate-and-dangerous-report-human-rights-situation-migrants-and-refugees-libya>

Convention definition of refugees, as well as widening its conceptualisation by including people displaced from their countries of origin by external aggression or occupation¹⁷⁵, granting them international protection and banning any form of collective expulsion¹⁷⁶.

In this paragraph, it has been shown how Libya has dealt with the migratory flow coming to the country on matters of visa regime and refugees protection; from one side, the country persists in considering refugees and asylum seekers as foreigners residing in Libya, meaning that no specific measures for granting asylum have been put in place, but the country relied on few national legislations that increasingly criminalised border-crossing of both migrants and asylum seekers. On the other side, during the Qaddafi regime several significant UN conventions on refugee right's protection, as well as regional treaties, were ratified but never actually integrated within the national framework, due to a lack of adequate functioning institutions that could translate those treaties into actual policies.

Even if in 1991 Libya granted access to UNHCR as a way to enhance cooperation with Libyan authorities through the negotiations of a Memorandum of Understanding for the development of a national asylum system¹⁷⁷, this step was never accomplished. The breakout of the 2011 civil war further undermined the judicial system of the country, initiating a phase of Libya characterised by human rights violations and negligence on refugees' protection¹⁷⁸

3.2 Detention Centres: Tortures and Atrocities committed by the Libyan authorities

UNHCR defines migrant detention as “the deprivation of liberty or confinement in a closed place which an asylum seeker is not permitted to leave at will, including, though not limited to,

¹⁷⁵ UNHCR (1992), “Persons covered by the OAU Convention governing the specific aspects of refugees Problems in Africa and by the Cartagena declaration on refugees” [Online]. Available from: <http://www.unhcr.org/refworld/topic,4565c2251d,4565c25f251,3ae68cd214,0html> [Accessed 25/08/2022]

¹⁷⁶ Ibid., art. 12, par. 5. Bajul Charter

¹⁷⁷ UNHCR, 2007. Country operations plan, p. 2 [online]. Available from: <http://www.unhcr.org/home/PROTECTION/45221c0e2.pdf> [Accessed August 23, 2022].

¹⁷⁸ Tramontano R., “La Cooperazione tra Italia e Libia nella Lotta all’Immigrazione Irregolare: Principi Giuridici”, Master’s Degree Thesis, LUISS Guido Carli Department of Political Science, Academic year 2016-2017, p. 91

prisons or purpose-built detention, closed reception or holding centres of facilities”¹⁷⁹. Migrants and Asylum seekers are put at risk of detention when they either attempt to cross Libya northwards, during sea interception by the Libyan Coast Guards, or in check-points located in the main urban areas; once intercepted migrants are directly handed to the relevant department within the Ministry of Interior and detained for an arbitrary period of time without any possibility to benefit from a legal consultant or a fair trial¹⁸⁰.

According to Morgese (2020)¹⁸¹, in 2020 a range of detention centres from 17 to 35 were estimated, with approximately 5000 foreigners detained, of which 1700 under the UNHCR mandate recorded as possible candidates for international protection. Besides from the official detention centres, legally managed by the Department for Combating Illegal Migration (DCIM) established in 2012, over the years several informal detention centres managed by revolutionary militias and local criminal organisations outside the control of the Ministry of the Interior have proliferated, in order to capitalise on the migration business¹⁸². These detention centres are used by the militias and even by Libya “official” institutions, as a source of funding, whereby migrants are forced to pay bribes in order to be released¹⁸³. Due to the existence of both formal and informal detention centres, as well as the highly restricted access granted to IOM and UNHCR to these centres, the numbers of detainees reported could not be so accurate, as it has been estimated a larger number of migrants currently detained. The Un High Commissioner for Refugees in 2021, has reported the existence of 29 active “accommodation centres” present in the Libyan territory, with the majority concentrated on the Libyan shore both West and East. Thanks to the several report released by various well-established international organisations or agency, such as Amnesty International, UNHCR Agency, Human Rights Watch, Medici per i Diritti Umani (MEDU) and ASGI, thousands of testimonies have been collected among

¹⁷⁹ UN High Commissioner for Refugees (2012), “Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention. 10, available at: <https://www.refworld.org/docid/503489533b8.htm> | [accessed 29 August 2022]

¹⁸⁰ Rapporto di Medici per i diritti umani (2020), “La Fabbrica della Tortura: Rapporto sulle gravi violazioni dei diritti umani dei migranti e dei rifugiati in Libia”, Available at: https://mediciperidirittiumani.org/medu/wpcontent/uploads/2020/03/marzo_medu_2020_it_web.pdf, accessed on August 23, 2022

¹⁸¹ Morgese G. (2020), “Sfide Storiche, Politiche della Memoria ed Integrazione Europea Mezzogiorno e Area Mediterranea”, Università degli Studi di Bari Aldo Moro Dipartimento di Studi Umanistici, p.7. Available at: http://jmc.uniba.it/wp-content/uploads/2020/04/Feb2020_Morgese.pdf

¹⁸² Toaldo, M. (2015). “Migrations through and from Libya: A Mediterranean Challenge.” IAI working paper no. May 14, 2015. Rome: Istituto Affari Internazionali

¹⁸³ Michael M.& Hinnant L. (2019), “Making Misery pay: Libya militias take EU funds for migrants”, Apnews.com. Available at: <https://apnews.com/article/united-nations-tripoli-ap-top-news-international-news-immigration-9d9e8d668ae4b73a336a636a86bdf27f>, accessed on September 10, 2022

migrants and asylum seekers both still residing in Libya or accommodated in provisional sites on the Italian soil, shedding light on the actual living conditions migrants experience while in Libya. In fact, according to MEDU 2020, between 2014 and 2020, 85 percent of their respondents have faced at least once violent, degrading, and inhumane treatment; specifically 79 percent have been detained in overcrowded places with extremely poor hygiene conditions, forcing migrants to defecate and urinate in their cells increasing the spread of infection diseases like scabies, chickenpox, respiratory tract infections, as well as infestation of lice and fleas¹⁸⁴. Also, 75 percent of interviewed have endured constant food, water and medical care deprivations, and finally 65 per cent have been victims of severe and repeated beatings. In a detention centre located in Tripoli, it was discovered that on average a migrants was receiving in his/her meal solely 35 of the daily calories intake of a male adult, while the water provided, less than one litre per person, was usually dirty, undrinkable or served in petrol can¹⁸⁵. On a daily basis, detained migrants are subjected to continuous humiliations, religious and racial offences, and other type of degrading treatments aiming at annulling their force's will, including slavery and forced labour. The unbelievable findings of an investigation conducted by the American newspaper CNN in 2017, reported how smugglers held actual auctions for selling migrants as potential farm and construction workers, some for as little as 400 dollars¹⁸⁶. During the conduction of the interviews, nine out of ten migrants declared to have seen someone dying, tortured or killed. Furthermore, through the reports carried on by Human Rights Watch¹⁸⁷ over the years, it has been possible identified the different actors perpetuating violent behaviours against migrants in Libya. For instance, police officers, after detaining migrants and asylum seekers, “employ cruel, inhumane and degrading treatments and abuses while they are locked in national prisons, detention centres, or military camps”; instead the smugglers and the local criminal organisations are responsible for the frequent kidnapped of migrants aiming at extorting them money, and the civilians and Libyan businessmen, as well

¹⁸⁴ Office of the UN High Commissioner for Human Rights (2017), “UN Human Rights Chief: Suffering of Migrants in Libya Outrage to Conscience of Humanity”, , available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22393&LangID=E>.

¹⁸⁵ MSF (2017), “MSF Warns of Inhumane Detention Conditions in Libya as EU Discusses Migration”, , available at: <https://www.doctorswithoutborders.org/what-we-do/news-stories/news/msf-warns-inhumane-detention-conditions-libya-eu-discusses-migration>.

¹⁸⁶ Elbagir N. et al (2017), “People for sale: where lives are auctioned for \$400”, CNN World, last review on 29/08/2022, available at: <https://edition.cnn.com/2017/11/14/africa/libya-migrant-auctions/index.html>

¹⁸⁷ Human Rights Watch (2019), “No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya”, last review on 29/08/2022, available at: <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>; Human Rights Watch (2016), “EU/NATO: Europe's Plan Endangers Foreigners in Libya Migrants, Asylum Seekers Face Killings, Torture, and Rape”, last review on 29/08/2022, available at: <https://www.hrw.org/news/2016/07/06/eu/nato-europes-plan-endangers-foreigners-libya>

as foreigners entrepreneurs could be held accountable for the exploitation of migrants as forcing them to undertake forced labour in slave-like conditions”.

The human traffickers who plan the departure toward Europe, most of the time have some sort of connection with the “same maritime forces financed for combating the migrants smuggling at sea”. Both the border patrols and the DCIM personnel, “regularly benefit by demanding and accepting bribes in exchange of migrants’ freedom”. Whereas, in the detention centres, in order to extort money, the officers would torture detainees while on the phone with their relatives back in the origin countries, forcing them to listen to their scream and sufferings in order to extort money. In some cases, it was reported that migrants were even shot dead while talking telephonically due to the impossibility of their relatives to provide the monetary transaction¹⁸⁸. Some examples of the torture employed includes beatings with various items such as sticks, rocks and metals bars, as well as food and water deprivation, sexual abuses, burns, *falaka*¹⁸⁹, electric shock and hanging upside-down of tied for a prolonged period of time¹⁹⁰.

The extend exposure to constant status of violence within the Libyan detention centres, combine with the first-hand experience of that exact violence, have caused not only visible physical damages but also permanent psychological consequences on migrants and asylum seekers; among the most common disorders identified by Crepet A. et al. (2017)¹⁹¹, were found Post Traumatic Stress Disorder, Depression, Anxiety, Constant alert status, Panic attack, as well as somatic symptoms related to the detention trauma.

Among the people detained in Libya, we find both asylum seekers and migrants, from all ages including unaccompanied minors, as well as pregnant women and elderly people; all of them risking their life daily due to constant verbal and physical torture employed by both state and non-state-actors in a country which criminalise any form of migrations. This has been proven over the years by the work of several international organisations which brought to light the human rights violations European member states are cooperating with, first and foremost the Italian state. Even if extremely violent and inhumane the experience to which migrants

¹⁸⁸ DeutscheWelle.com (2021), “Libya: Migrants shot dead at detention centre”. Available at: <https://www.dw.com/en/libya-migrants-shot-dead-at-detention-center/a-59455474>, accessed on September 3, 2022

¹⁸⁹ Falaka in Arabic refers to repeated battery on the sole of the detainee’s feet.

¹⁹⁰ Medici per i Diritti Umani (2020), “La Fabbrica della Tortura: Rapporto sulle gravi violazioni dei diritti umani dei migranti e dei rifugiati in Libia”, Available at: https://mediciperidirittiumani.org/medu/wpcontent/uploads/2020/03/marzo_medu_2020_it_web.pdf, p.11

¹⁹¹ Crepet, A., Rita, F., Reid, A. et al. Mental health and trauma in asylum seekers landing in Sicily in 2015: a descriptive study of neglected invisible wounds. *Confl Health* 11, 1 (2017). <https://doi.org/10.1186/s13031-017-0103-3>

underwent, it is relevant for the purpose of this study to mention a few interviews conducted between 2014-2020¹⁹² assessing the Libyan abuses at the expense of their foreigners' detainees. A young mother originally from Liberia, who spent three months in a detention centre located in the city of Sabratha on the Libyan coast, west-side from Tripoli told UNSMIL:

“My sister died from medical neglect, (...), if you are sick, you just die. They beat us, shot at us and stepped on us when we were sleeping. I was pregnant with my belly showing, but it did not matter to them”

Another man, originally from Cameroon, reported to UNSMIL the deprivation of medical service within the detention centre even when it comes to his wife who was into labour.

“(...) I begged the guards to let me take her to the hospital or to bring a doctor... but I was hit and told to shut up. My wife went into labour and was helped by another Cameroonian lady... We had to cut with a dirty knife. My wife continued bleeding profusely and she died in my arms”

Finally, an asylum seeker from Eritrea who was held captive in three different centres told the UN agency how she was repeatedly victim of gang rape, beatings and starvation during her detention.

“We were 200 people in a room. Every night, I was raped by about six men: some Libyan, some Africans. I spent five months like this. My mother had to sell her house to borrow money to pay the 5000 USD they demanded... I am pregnant now (as a result of the rape)”

The storytelling just reported are just a tiny example of thousands of similar experiences collected by the IOs, while many still remain unheard, the echoes of these shocking accounts have reached from a long time the offices of the EU institutions in Brussels, as well the several Italian governments that have followed. Yet, no actions have been taken by the Italian Prime Minister to stop the innumerable human rights violations happening in Libya, instead the bilateral agreement has been renewed and financial support has been increased to support the

¹⁹² All the extracts of the interviews belongs to a long reported conducted by UN Support Mission in Libya (2018), “Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya”, United Nations Human Rights Office of the High Commissioner for Human Rights, pp. 28-32, available at: <https://www.ohchr.org/sites/default/files/Documents/Countries/LY/LibyaMigrationReport.pdf>

Libyan Coast Guards to bring back those migrants and asylum seekers in search for a better future.

“If someone escapes hell, how can you grab them and take them back to hell?”

(Bamba, a 31-year-old from Ivory Coast, Human Rights Watch, 2019, “No Escape from Hell EU Policies Contribute to Abuse of Migrants in Libya”).

3.3 Violation of human rights and international obligations by Libya

It is disheartening to realize how the European institutions are fully aware of the current inhumane situation in the Libyan detention centres, as well of the several human rights violations happening every day at the expenses of migrants and asylum seekers, but no actions addressing the issue were implemented. Instead, as it has been highlighted in the second chapter, fundings continued to be provided to Libya, growing over the years.

In November 2017, the then president of the European Commissioners for migration Dimitris Avramopoulos, affirmed how everyone was fully conscious of the events in Libya, but the matter was just ignored; also, a short after the commissioner’s announcement, the French, German and UK governments publicly acknowledged the same fact¹⁹³. Again, 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 centres where migrants are held are unacceptable and fall short of international human rights standards”*¹⁹⁴; with the breakout of the civil war in the country in 2019, Human Rights Watch released a report titled “No Escape from Hell” stating how although the efforts made by UN Agency and several NGOs, the condition and the management of the migratory phenomenon in Italy were still remaining unacceptable for human rights standards and how EU member states should have retained themselves to send migrants back to the Libyan shore¹⁹⁵.

¹⁹³ Morgese G. (2020), “Sfide Storiche, Politiche della Memoria ed Integrazione Europea, Mezzogiorno e Area Mediterranea”, Working Papers Jean Monnet programm with the Università degli Studi di Bari Aldo Moro, p.4

¹⁹⁴ European Commission and High Representative of the Union for Foreign Affairs and Security Policy (2017), “Joint Communication to the European Parliament, the European Council and the Council, Migration on the Central Mediterranean Route: Managing Flows, Saving Lives”, , 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_-_managig_flows_saving_lives_en.pdf

¹⁹⁵ Human Rights Watch (2019), “No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya”, last review on 31/08/2022, available at: https://www.hrw.org/sites/default/files/report_pdf/eu0119_web2.pdf

Although the atrocities committed from part of both Libyan militias and official personnel that remained unpunished, the country since part of several national conventions, as well national legislations, could possibly be held accountable for the human rights violations towards migrants and refugees. For what concern the national legal framework, article 10 of the Libyan Provisional Constitutional Declaration, recognised the right of asylum but as it has been mentioned before Libya has never developed a comprehensive and well-displayed system of asylum, consequently the asylum seekers and refugees in Libya who don't hold the necessary documents to reside within the country, are constantly at risk to be detained in accordance with the law n.19 of 2010¹⁹⁶. Basically, the majority of migrants and asylum seekers are automatically detained for an arbitrary period of time due to the difficulties encountered in getting a permit visa to reside in Libya, waiting to be expelled with no possibility to obtain legal consultancy¹⁹⁷.

International law guarantees the right to freedom and security of the person, no one can be arbitrarily arrested, and everyone has the right to leave any country, including their own and the right to return to their country of origin¹⁹⁸. The detention of migrants solely for reasons related to their immigration status should never be compulsory or automatic, because migrants have right to security and freedom of the person ¹⁹⁹. In fact, according to Article 9 of the International Covenant on Civil and Political Rights²⁰⁰ (ICCPR), any form of arbitrary arrest and detention is prohibited, and in case of detention enforcement, it must be justified as reasonable, necessary and proportionate in the light of the circumstances and can be re-evaluated before a judge. As can be seen from the various testimonies, migrants are constantly deprived of these rights, and subjected to arbitrary arrests, without any possibility of recourse, and this violates Article 9 of the Covenant on Civil and Political Rights which prohibits all

¹⁹⁶ United Nations Support Mission in Libya (2016), "Detained and Dehumanised: Report on Human Rights Abuses against Migrants in Libya", pp. 1-12

¹⁹⁷ UNSMIL 2016, pp. 12-24

¹⁹⁸ Office of the High Commissioner for Human Rights (OHCHR) (2019), ""No one shall be subjected to arbitrary arrest, detention or exile", Fact Sheet No. 26, The Working Group on Arbitrary Detention, last review on 31/08/2022, available at: <https://www.ohchr.org/sites/default/files/FactSheet26en.pdf>

¹⁹⁹ UNSMIL (2018), "Detained and Dehumanised. Report on Human Rights Abuses against Migrants in Libya", pp. 2-10

²⁰⁰ United Nations Human Rights Office of the High Commissioner (1969), "International Covenant on Civil and Political Rights, Part III article 9. Online version available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>; UN Human Rights Committee," General comment no. 35, Article 9 (Liberty and security of person)", Refworld.org , Available at: <https://www.refworld.org/docid/553e0f984.html>

forms of arbitrary arrest and detention. Furthermore, both the Convention against Torture²⁰¹ and the African Refugee Convention²⁰² prohibit Libya from sending any individual to countries where they could face serious risks of persecution or torture²⁰³. In addition, art. 13 of the International Covenant for Civil and Political Rights prohibits "Arbitrary expulsion and allows foreigners to make an individual decision regarding their own expulsion or their refoulement"²⁰⁴, which is not the case, as migrants have no say in this matter, and constantly live in insecurity about their fate. Illegal entry or stay within a country should not constitute a crime as the individual did not commit a crime itself against people, property or national security²⁰⁵. Asylum seekers who illegally enter the territory of a state party may be detained for a short initial period in order to document their entry, record their applications and determine their identity in case of doubt²⁰⁶. Furthermore, people undergoing detention should be entitled to procedural guarantees, including the possibility of recourse with all necessary legal services²⁰⁷.

Torture, cruel, inhuman and degrading treatment in Libyan detention centres infringe international law. "The absolute prohibition of cruel, inhuman and degrading treatment in international law is established by the UN Convention against Torture (CAT)"²⁰⁸, as well in

²⁰¹ United Nations Human Rights Office of the High Commissioner (1984), "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", General Assembly resolution 39/46, Part I article 3. Online version available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>

²⁰² Organisation of African Unity (1969), "UAU Convention Governing the Specific Aspects of Refugee Problems in Africa", Part I article 2 par 3. Online version available at: <https://www.unhcr.org/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html>

²⁰³ Human Rights Watch (2010), "Libya: Don't Send Eritreans Back to Risk of Torture. Eritrean Officials Given Access to Detention Camps". Available at: <https://www.hrw.org/news/2010/01/15/libya-dont-send-eritreans-back-risk-torture>

²⁰⁴ United Nations Human Rights Office of the High Commissioner (1969), "International Covenant on Civil and Political Rights, Article 13. Online version available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

²⁰⁵ International Covenant on Civil and Political Rights, article 12.

²⁰⁶ UNSMIL (2018), "Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya", pp.18-25.

²⁰⁷ United Nations Human Rights Office of High Commissioner (1988), "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment", General Assembly resolution 43/173, Online version available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/body-principles-protection-all-persons-under-any-form-detention>

²⁰⁸ United Nations Human Rights Office of the High Commissioner (1984), "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", General Assembly resolution 39/46. Online version available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>

the Convention on the Rights of the Child²⁰⁹, the African Charter on Human and Peoples' Rights²¹⁰ and by the International Covenant on Civil and Political Rights, treaties to which Libya is a signatory. In this view, the special rapporteur on torture considered the usage of electric shocks and beatings from part of DCIM personnel, to be a form of torture, and so did the European Commission on Human Rights²¹¹.

Children should never be detained, not even together with adults, as detention is never in the best interests of the child, and it always constitutes a violation of the rights of the child; there should be the fundamental principle according to which “the best interests of the child” should govern the actions of the state towards minors²¹².

The detention of people in situations of vulnerability, who have specific needs or who are particularly at risk of exploitation, abuse, sexual or gender-based violence, or other forms of violence should be avoided²¹³. In addition, the “Mandela Rules”, i.e. the UN obligation to treat all prisoners with respect for their inherent dignity and value as human beings, require a limit on the number of people detained in a room, adequate sleeping arrangements, facilities suitable for personal hygiene, provision of clothing and bedding, adequate food and access to medical services²¹⁴; all things that are absolutely not guaranteed within official and unofficial detention centres. Women in detention should be kept separate from men and supervised by female personnel²¹⁵. UNHCR guidelines, together with the United Nations Rules for the Treatment of Women Prisoners, stipulate that facilities should reflect the specific hygiene needs of women, including the provision of sanitary napkins, and ensure safeguards against sexual and sexual

²⁰⁹ United Nations Human Rights Office of the High Commissioner (1989), “Convention on the Rights of the Child”, General Assembly resolution 44/25. Online version available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

²¹⁰ Organization of African Unity (1981), “African Charter of Human and People’s rights. Online version available at: https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf

²¹¹ Human Rights Watch (2014), “Libya: Whipped, Beaten, and Hung from Trees. Detained Migrants, Asylum Seekers Describe Torture, Other Abuse in Detention”, last review on 04/09/2022, available at: <https://www.hrw.org/news/2014/06/22/libya-whipped-beaten-and-hung-trees>

²¹² United Nations Human Rights Office of the High Commissioner (1989), “Convention on the Rights of the Child”, General Assembly resolution 44/25. Online version available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>, articles mentioned: art. 37, art. 3.

²¹³ United Nations Human Rights & Global Migration Group (2017), “Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations”, available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>

²¹⁴ United Nations General Assembly (2017), “United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)”. Online version available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/443/41/PDF/N1544341.pdf?OpenElement>

²¹⁵ Ibid. P. 10, Rule n°11 par. A

intercourse. gender²¹⁶. Moreover, victims of sexual abuse, pregnant women, as well as nursing women, should have access to necessary medical and psychological care²¹⁷. Failure to comply with these minimum standards leads to the arbitrary detention of migrants and can take the form of torture.

The principle of non-refoulement is a fundamental principle of international law. This principle prohibits the return of a person to a place where he/she is at risk of torture or other serious violations of human rights. Thanks to this principle, applicable to any migrant at risk²¹⁸, refugees and asylum seekers should be protected from repatriation to their country of origin, where they could face persecution, directly or indirectly or be at risk of death, or be the victim of other cruel, inhuman or degrading treatment or punishment or other irreparable harm²¹⁹. However, the Libyan authorities constantly carry out collective or arbitrary expulsions²²⁰ at their borders, to the countries of origin of migrants. In fact, detention centres are places where the migrant is awaiting repatriation or voluntary return. Therefore, only two of these options are considered, not considering the possibility that the country from which the migrant comes could be a danger, and in which he could risk his life. Furthermore, no analysis of the migrant's situation is made on an individual basis, but the Libyan authorities also carry out expulsions indiscriminately. This is tantamount to non-violation only of Article 33 of the Geneva Convention on the principle of non-refoulement, but also Article 13 of the International Covenant on Civil and Political Rights²²¹, Article 12 of the African Charter on Human and

²¹⁶ Ibid p.13, Rule n° 28

²¹⁷ United Nations General Assembly (2010), "United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)". Online version available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-rules-treatment-women-prisoners-and-non-custodial>

²¹⁸ OHCHR (1984), "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", General Assembly Resolution 39/46, article 3.

²¹⁹ UNSMIL (2018), "Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya", pp. 22-25

²²⁰ OHCHR (2021), "Report highlights unsafe and undignified expulsion of migrants from Libya. Unsafe and Undignified: The forced expulsion of migrants from Libya". Available at: https://www.ohchr.org/sites/default/files/2021-12/Unsafe_and_Undignified.pdf

²²¹ OHCHR (1966), "International Covenant on Civil and Political Rights", art. 13 "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.". Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

Peoples' Rights²²² and Article 22 of the Workers Convention²²³. As for Italy, according to customary international law, the country is complicit in what is happening to migrants and refugees in official and unofficial detention centres. In fact, the Italian state and the EU institution are very aware of the degrading treatments and inhumane conditions that migrants and refugees intercepted and taken to these centres; indeed, by providing significant assistance to the Libyan coastguards to intercept people at sea and bring them back to these centres, they contribute significantly considerable to the abuses suffered by the detainees, as the next chapter will displayed to the reader.

4. Italy's Responsibility under International Law

After the 2012 ECHR condemnation of Italy in the Hirsi case, the country changed its approach toward the migratory flow; from employing itself pushbacks, it assigned this responsibility to Libya in order to avoid direct legal responsibility for the possible human rights condemnation committed. In this chapter, the aim will be to assess if Italy could be held accountable for the human rights abuses as providing significant technical and training support during the c conduction of push back, as a way to externalise the management of the migratory flow, in line with the recent European policies on that matter. Additionally, as it has been described in the previous chapter, Libya cannot be considered a safe country²²⁴ for migrants and refugees as lacking a comprehensive asylum system, functioning institutions that could enforce a national asylum legislation, and for the appalling condition characterising the detention centres that perpetuate a vicious circle of abuses and violence. Finally, in recent time, doubts have arisen on the Libyan Coast Guard's conduct when carrying on rescue

²²² Organisation of African Unity (1981), "African Charter on Human and Peoples' Rights", art. 12 par 5 "The mass-expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at nationals, racial, ethnic or religious groups". Available at: [https://au.int/sites/default/files/treaties/36390-treaty-0011 -_african_charter_on_human_and_peoples_rights_e.pdf](https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf), p.5

²²³ OHCHR (1990), "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Assembly resolution 45/158, article 22 par. 1 "Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually". Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers>

²²⁴ According to the Directive 2013/32/EU on common procedures for granting and withdrawing international protection "a country is considered as a safe country where, on the basis of the legal situation, the application of the law within a democratic system (...), it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment"
https://www.ohchr.org/sites/default/files/Documents/Issues/MHR/ReportLargeMovements/FIDH2_.pdf

operations; frequently accused of corruption, direct involvement with militias by accepting bribes, and the use of violent method during SAR operation have caused several fatalities at sea that could have been avoided if the right method would have employed²²⁵.

First, a brief paragraph will be dedicated to show which are the consequences of the Italian support at sea to the Libyan Coastguards, by delegating their responsibility in conducting SAR operations, further reinforced by the adoption of “*The Code of Conduct for the NGOs Undertaking Activities in Migrants’ Operations at Sea*”²²⁶, which has increasingly limited the NGOs power of action in the Central Mediterranean route. Proceeding with the analysis, the second part will focus on highlighting the relevance of the “Responsibility of States for Internationally Wrongful Acts (2001)”²²⁷, and how this could constitute a solid legal basis to held Italy accountable for the legal abuses committed on the Libyan soil, specifically focusing on article 16, 17, 18 and 41. Finally the chapter will be concluded by examining the country’s responsibility under human rights treaties and convention to which the country is a signatory party.

4.1 The consequences of the Italian Coast Guard’s support to Libya and the Criminalization of the NGOs

As it was comprehensively explained in the second chapter, Italy had provided increasingly support to both Libyan border and sea guards; support consisting of training programmes to the border control authorities, the grant of surveillance equipment including several Italian patrol boats, and undefined developing plans to implement in the regions most affected by the migratory flow. These actions were taken with the clear intention to outsource the southern Italian and European borders, leaving the Libyan authorities to preventively block departure from their cost. If, on the one hand this a way of avoiding violations of legal principle on matters of refugees and migrants protection , on the other hand doubts arises regarding the correctness of the Libyan law enforcement, specially the Libyan Coast Guard, and on the fact

²²⁵ Euro-Med Monitor (2021), “Complex Persecution. Complemented system of oppression and exploitation of migrants and asylum seekers in Libya”. Available at: <https://reliefweb.int/report/libya/complex-persecution-report-documents-shocking-accounts-libyan-coast-guard-s-involvement>

²²⁶ Euronews.com (2017), “Italy’s code of conduct for NGOs involved in migrant rescue: text”, last revies on 08/09/2022. Available at: <https://www.euronews.com/2017/08/03/text-of-italys-code-of-conduct-for-ngos-involved-in-migrant-rescue>

²²⁷ United Nations (2001), “Responsibility of States for Internationally Wrongful Acts”, General Assembly resolution 56/83. Online version available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

that the Italian actions could constitute a liability for having assisted a third State in the commission of an offense.

After the official recognition of a Libyan search and rescue zone in the Central Mediterranean in 2018²²⁸ extending its area of control of 130 miles, over the years the Libyan Coastguard has been responsible for intercepting and returning an increasing number of migrants back to its coastline as EU and NATO vessels were not allowed anymore to operate in Libyan territorial waters. To be exact the UN Agency reports that 26,314 people of whom 299 children were returned by Libya up until October 2021²²⁹. Since the establishment of the 2017 MoU and its renewal, a growing number of accidents have been recorded by NGOs in which Libya was caught in violent and reckless conduct against migrants, endangering the migrants' lives and accounting for fatalities.

According to a Human Rights Watch report of 2016²³⁰, four accounts of abuses from part of the Libyan coast guards were recorded. Thanks to the interviews realised, HRW was able to prove how the Libyan extensively employed violent methods when conducting SAR operations, including beating, hitting with batons, Kalashnikov, and plastic pipe, as well as pushing people into the water and blocking the way to the migrants' boats creating chaos and panic which endangered the lives of people on board.

Furthermore, attacks are not solely against migrants' boat, but the Libyan Coastguard has been responsible of a series of attack against several International NGOs involved in the rescue operations, undermining their SAR activities. For instance, on the morning of 7th August 2017, the Libyan patrol boat "classe Bigliani" named Sabratha, fired warning shots against the Spanish NGO Proactiva Open Arms in order to prevent their rescuing intervention in the Mediterranean; the same boat has already been imputed of having shot against an

²²⁸ European Parliament (2018), "Search and rescue Area off Libya", Question for written answer P-003665-18 to the Commission. Online version available at: https://www.europarl.europa.eu/doceo/document/P-8-2018-003665_EN.html

²²⁹ ECRE (2021), "Med: More Deaths and Returns to Libya, EU Funding and Cooperation with Notorious Coast Guard as Situation in Libya Deteriorates". Available at: <https://ecre.org/med-more-deaths-and-returns-to-libya-eu-funding-and-cooperation-with-notorious-coast-guard-as-situation-in-libya-deteriorates/#:~:text=The%20UN%20Agency%20reports%20that,%E2%80%9CP150%20class%E2%80%9D%20p atrol%20boats.>

²³⁰ Human Rights Watch (2020), "EU/NATO: Europe's Plan Endangers Foreigners in Libya. Migrants, Asylum Seekers Face Killings, Torture and Rape". Available at: <https://www.hrw.org/news/2016/07/06/eu/nato-europes-plan-endangers-foreigners-libya>; 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>.

Italian fishing boat, unreasonably suspected of human trafficking²³¹. However, the most known case happened on November 2017, involving the German NGO Sea-Watch and the Italian vessel Ras Jadir ceded to Libya: when the confrontational rescue operation took place a few hours from Tripoli where at least 130 people were at sea distress, more than 20 people died for Libyan negligence in conducting the SAR operation and at least 47 migrants were returned after being beaten heavily²³².

It should be underlined the fact that since breakout of the Arab Spring in 2011, the Libyan Coastguard has recorded several abusive and corrupted actions when conducting their work, according to the Amnesty International Report of 2017²³³, the fragmentation of the Libyan territory due to the civil war and high concentration of armed groups in the South of the country had increased their involvement in the management of the migratory route both at the border and at sea, as perceived as a extremely lucrative business. Members of militia groups started to join the Libyan Coast Guard, while taking control of irregular immigration routes. At present, the Libyan Coast Guard could not be considered as a unitary body but composed of several branches associated with the tribes that control the coastal cities. Thanks to this mixture, the members of the tribes have taken control of the high ranks of the local Coast Guard and the market for human traffickers has increased considerably²³⁴.

An exemplary case is that of Al-Bija, head of the Coast Guard of the city of Zawiya and one of the most important exponents of migrant smuggling in the area. Al-Bija managed to fill this official role thanks to the support of his tribe²³⁵.

Finally, the adoption of the EU- sponsored “Code of Conduct for NGOs”, by the then Ministry of Interior Matteo Salvini in 2018, has further undermine the actions of NGOs in saving human lives in the Central Mediterranean. The Code, based on 13 provisions, expect NGOs to not enter Libyan territorial waters unless without previous authorization, not indulging in any form of communications that could facilitate the departure of boat carrying

²³¹ Bagnoli L. (2019), “Qual è il ruolo dell’Italia nelle operazioni della guardia costiera libica?”, Internazionale.it, Available at: <https://www.internazionale.it/notizie/lorenzo-bagnoli/2019/11/13/italia-libiahttps://forensic-architecture.org/investigation/seawatch-vs-the-libyan-coastguard-guardia-costiera>

²³² Forensic Architecture.org (2017), “Sea Watch vs The Libyan Coastguard”. Available at: <https://forensic-architecture.org/investigation/seawatch-vs-the-libyan-coastguard>

²³³ Amnesty International (2017), “Libya’s Dark Web of Collusion. Abuses against Europe-Bound Refugees and Migrants”. Available at: <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>

²³⁴ Porsia N. (2017), “The Kingpin of Libya’s human trafficking mafia”, TRTWORLD.com. Available at: <https://www.trtworld.com/magazine/libya-human-trafficking-mafia-in-zawiya-301505>

²³⁵ Indelicato M. (2019), “Chi è Bija, Il trafficante accolto dal Governo Gentiloni”, Insideover.com. Available at: <https://it.insideover.com/guerra/chi-e-bija-il-trafficante-accolto-dal-governo-gentiloni.html>

migrants, and to receive on board judicial police officers in order to conduct investigations related to migrant smuggling²³⁶. This measure has brought to the clear criminalisation of the NGOs present in the Central Mediterranean from part of the Italian government; the state decided to adopt a narrative that impute to these organisations to be part of the smuggling market, therefore working against the State's interests. At the same time, the state limitations enforced against solidarity's action has meant the increasing delegation to the Libyan Coastguard in carrying on SAR activities, endangering the lives of migrants by subjecting them to constant abuses.

4.2 Responsibility of States for Internationally Wrongful Acts: the ILC articles

It could be affirmed that the conceptualisation of State Responsibility existed in the form of customary law for a long time, as a result of elaboration and assessment of state's legal practices, as well as deriving from judgment of courts and tribunals. After the end of the World War II, the importance paid on the state's responsibility raised and in 1947 the International Law Commission (ILC) was established by the UN General Assembly, composed of 34 members 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 and its codification"²³⁷. Finally in 2001, the ILC adopted the Draft Articles on the Responsibility of States for Internationally Wrongful Acts after more than four decades of discussion, including a set of 59 provisions supported by commentary for a clearer interpretation²³⁸. The fact the text was adopted as a draft, highlighted the disagreement raised during the negotiation process; a section of the Commission believed that the State Responsibility Articles would be more easily applicable in the form of "subsidiary means for the determination of rules of law" as displayed in Art. 38(1d) of the International Court of Justice Statute²³⁹, while the opposing section supported the idea that the Draft could best served its purpose in the form of a Convention. After its adoption as a Draft, several meetings

²³⁶ Cusumano E. (2019), "Straightjacketing migrant rescuers? The code of conduct on maritime NGOs", Mediterranean Politics Volume 24 Issue 1, DOI: <https://doi.org/10.1080/13629395.2017.1381400>, pp. 109-112

²³⁷ United Nations, Charter of the United Nations, 1945, Article 13(1)(a). Available at: <https://www.un.org/en/about-us/un-charter>

²³⁸ International Law Commission, Yearbook of the International Law Commission 2001, vol. II, part 2, New York. Available at: https://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf

²³⁹ Statute of the International Court of Justice (2001), Art. 38 section 1 par. d. Online version available at: <https://www.icj-cij.org/en/statute>

were held by the General Assembly in order to discuss the future development of this document, but the most relevant took place in 2016. With the resolution 68/104, a working group was established to “further examine the question of a convention on the topic on the basis of the articles drafted by the International Law Commission²⁴⁰”. Although a convention was not agreed in that forum, the participating States allowed the inclusion of a list of international courts and tribunals’ decision drafted by the UN Secretary General, that had referred during trial to the ILC Articles²⁴¹. For instance, by including cases from the ICJ, customary international law could be derived from relevant case law on the scale of “*Bosnia and Herzegovina v. Serbia and Montenegro*” case or “*The Republic of Nicaragua v. The United States of America*”, cases which have extensively referred to imputability of any State organs’ act as a responsibility of the State itself when it comes to international legal breaches, as reported in Article 4 of the ILC Draft Articles²⁴²

The adoption of the ILC article, even though not as a Convention, had shown the intention of the International community to adopt a more comprehensive legal framework where it comes to State Responsibility, in order to respond to a more diverse scenario when it comes to modern conflicts, state relations and the heterogeneity of the state and non-state actors involved. F.L. Bordin (2014)²⁴³, in his writings, affirmed how increasingly the ILC Articles resemble customary international law on state responsibility in an authoritative manner despite not being treaty law, also thank to the growing employment of it on national and local level court cases.

Under general international law, States may be found responsible either directly or indirectly, according to Article 2 of the ILC for the establishment of direct International State Responsibility, it must be verified that the conduct (i) is attributable to the state and (ii)

²⁴⁰ 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.

²⁴¹ UN General Assembly (2016), “Report of the Secretary-General: Responsibility of States for Internationally Wrongful Acts, Compilation of Decisions of International Courts, Tribunals and Other Bodies”, UN doc. A/62/62. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N07/203/96/PDF/N0720396.pdf?OpenElement>

²⁴² United Nations (2001), “Responsibility of States for Internationally Wrongful Acts”, General Assembly resolution 56/83, art.4

²⁴³ 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

constitutes a breach of an international obligation of the State²⁴⁴. Article 4 of the ILC underlines how the conduct of a State constitutes an action of it when this is defined by international law, which is to say when state organs are acting in “its official capacity with apparent authority”²⁴⁵. The draft goes on by clarifying which organs fall under the responsibility of the state; for instance, Article 5 underlines how the legal empowering of an institutional organ by the State in exerting governmental duties should be considered as an act of that State. Therefore, it can be seen how the ILC Draft not only shed lights on the attribution of responsibility, but it identifies as well which organs, apart from the State itself, under international law should be held accountable when it comes to law breaches. Finally, on matter of direct responsibility of a State, the ILC Draft remarks how the conduct of a person or a groups of individuals is considered bounded to the State’s actions when those are acting on the “instruction, direction or control of that State²⁴⁶”, and the same narrative apply also to insurrectional movement when it substitutes the State²⁴⁷.

Concerning indirect responsibility, Article 16 provides the main ground for analysing and determining the legal accountability of other States involved in committing the international violations. In the first place, Article 16 deals with the “aid or assistance in the commission of an internationally wrongful act” and goes on by affirming that the assistance of a third country to another States results responsible in the commission of the internationally wrongful act when: (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”. Despite the article itself not providing additional information on its applicability, the Commentary²⁴⁸ disclose some features to take into consideration when defining a third country’s responsibility. For instance, the aid or assistance provided should be regard as the State’s intention to facilitate the commission of the wrongful act by another state, as well the aid provided must be in the form of a positive action, hence excluding mere

²⁴⁴ United Nations (2001), “Responsibility of States for Internationally Wrongful Acts”, General Assembly resolution 56/83 Article 2. Available at:

https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

²⁴⁵ United Nations (2001), “Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries” Article 4, Commentary paragraph 13. Available at:

https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

²⁴⁶ United Nations (2001), “Responsibility of States for Internationally Wrongful Acts”, General Assembly resolution 56/83 Ibid, art. 8

²⁴⁷ Ibid, art 10

²⁴⁸ United Nations (2001), “Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, CHAPTER IV Responsibility of a State in connection with the act of another State, p.65

incitement or omission²⁴⁹. In this view, the additional commentary makes clear the limitation of article 16, by underlining the State's innocence when the action committed doesn't bear the intention to facilitate the wrongful act. Here, the issue lays on the fact that the ILC commentary does not provide a definition of such intention, without linking it to any concrete case laws so rendering hard to clearly define the presence of intent or not from the aiding state. This narrative applies as well even when the supposedly aiding State is unaware of the circumstances in which its aid is intended to be used by the other State²⁵⁰, making the State into question innocent in facilitating the wrongful act. The awareness of the assisting state refers solely to the actual knowledge of the action and not the constructive one, so that the aiding state "should" have known²⁵¹

Article 16 does not clarify the type of action constituting aid or assistance, making it a case-by-case situation; however, the commentary provides exemplary cases linked to concrete legal cases. Paragraph 9 of the document mentions how the assistance provided by a third State in committing the wrongful act does not limited solely to the use of force, but it may occur "if it assists another a State to circumvent sanctions imposed by the Security Council or provided material aid to a State that uses the aid to commit human rights violations". An example reported by the ILC commentary makes reference to the 1984 case when the United Kingdom supplied financial and military aid, including chemical weapons to Iraq, subsequently employed against the Iranian troops²⁵².

Finally, the last requirements that should be detectable when it comes to held legally accountable the aiding state would be, firstly, that the assistance offered must have "contributed significantly" to the wrongful act²⁵³. Secondly, as reported in Article 16(b), the wrongful act committed by the aiding state will be considered as such, if the act would have been wrongful if committed by the aiding state itself, therefore constituting a violation of its own international obligations²⁵⁴.

²⁴⁹ Ibid, Par 3 pg. 37

²⁵⁰ Ibid Par 4, pg.66

²⁵¹ Ibid.

²⁵² Douglas, R. M. (2009). Did Britain Use Chemical Weapons in Mandatory Iraq? *The Journal of Modern History*, 81(4), 859–887. <https://doi.org/10.1086/605488>

²⁵³ International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, Article 16, Commentary, para 4.

²⁵⁴ International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, Article 16, Commentary, paras. 3 and 6

In the presence, of all the six requirements just listed, a State, responsible in aiding another State in the commission of the wrongful act, could be held internationally responsible under Article 16 of the ILC, but solely for the aid supplied. Legal consequence deriving from the imputability of the aiding State, in accordance with Article 27 of the ILC Articles²⁵⁵, include the urge for the immediate cessation of the wrongful conduct, as well as provides for fully reparation for the injuries²⁵⁶ caused by the wrongful act. Furthermore, article 30 (b)²⁵⁷, mentions the necessity from the aiding state to provide appropriate assurances of non-repetition of the internationally wrongful act.

4.3 Italy's responsibility under the ILC Articles: Could Italy be held responsible for Libya's atrocities?

In order to establish to what degree Italy can be held accountable for the human rights violations happening in Libya, Article 16 of the ILC Articles shall be applied to this specific case. As it has been shown in the previous section, for proving Italy actual imputability and assistance in the commission of the wrongful act, specific conditions should be present; among them it should be proven Italy awareness of the appalling condition reserved to migrants stuck in Libya, Italian's intentions behind the cooperation with Libya aiming at facilitating the wrongful act, and the double wrongfulness of the act.

First of all, in accordance with Article 2 of the ILC²⁵⁸ regulating direct responsibility, Libya should be held liable for the human rights violations happening to its soil, as both those actions are attributable to the State under international law and constitute a breach of the international obligations to which the State is bound to. The detailed description provided in the third chapter has clearly showed how since 2017 the Libyan State has been perpetuating violent and abusive treatments towards its foreigner's population by delegating to secondary state organs the management of both sea operations and the administration of the detention centres. Article 4 of the ILC²⁵⁹ affirmed how “ *an organ includes any person or entity which has that status in accordance with the international law of the State*”, therefore that proves how the misconduct of the Libyan Coastguard, under the Ministry of Defence, in conducting

²⁵⁵ International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001. Article 27, p.7.

²⁵⁶ Injuries includes any damage, whether material or moral, cause by the internationally wrongful act.

²⁵⁷ Ibid art 30(b), p. 8.

²⁵⁸ Ibid, art.2, p. 2

²⁵⁹ Ibid, art. 4, p. 2

SAR operations, as well as the abusive treatment of the DCIM in managing the detention centres can be attributable directly to the Libyan state. Finally, after having proved those actions' imputability to Libya, it should be assessed if such conduct falls into the category of wrongful act in accordance with the ILC article. This can be easily proven by cross analysing the regional and international conventions to which the country is part and the migrants' treatment from part of the Libyan national apparatus. At this point, the human rights violations accounted are various, including breach of the right to life, the right to an effective remedy, the prohibition of slavery and sexual violence against women, the prohibition of child forced labour, the right to health, and the prohibition of torture and other ill-treatment. Hence, it can be certainly affirmed that the abusive treatment by the Libyan authorities, reserved to the foreign population temporarily residing in Libya constitute a wrongful act under the jurisdiction of article 2 of the ILC.

On the other hand, in order to held Italy internationally responsible for the aid provided to Libya in the commission of the wrongful act, five main criteria have to be fulfilled. As it has been shown, for Italy to be held responsible for the violation of its own international obligations on matter of Libyan cooperation, the assistance provided should hold the view to facilitate the commission of the wrongful act as constituting a "significant contribution" to the wrongful acts committed by Libya towards migrants. The proven existence of aid to Libya lays on the 2017 Memorandum of Understanding and its consequent renewal in 2020; on that occasion measurements enforced by the Italian institutions were defined in order to "start cooperation initiatives in conformity with programs and activities adopted by the Libyan Presidential Council, as regards the support to security and military institutions in order to stem the illegal migrants' fluxes²⁶⁰". Such provisions included: the handing of patrol boats, the technical maintenance of the Libyan Coastguard assets, the diplomatic support during the negotiation process for the establishment of a Libyan SAR regions, the training for the Libyan personnel through the EUNAVFOR MED Operation Sophia, as well as the constant role covered by the Italian Guardia di Finanza in coordinating and directing the migrants' interception at sea²⁶¹. All these actions promoted by Italian institutional apparatus embody positive acts that facilitate the Libyan effort to intercept migrants and refugees at sea in order

²⁶⁰ Odysseus Network (2017), "Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic.". Article 1 (a)

²⁶¹ Camera dei Deputati XVIII Legislatura (2019), "La partecipazione Italian alle missioni in Libia", Dossier n°67. Available at: <http://documenti.camera.it/leg18/dossier/pdf/DI0149.pdf>

to reconduct them to the detention centres, therefore in accordance with Article 16 of the ILC those measurements accounts for aid or assistance and not mere incitement or omission.

As concern the actual impact that those aiding measurements had on the operational capability of the Libyan institutions in perpetuating violent behaviour towards migrants and refugees, the change can be proven by the increasing number of migrants intercepted and return to Libya since the beginning of the cooperation. Through the Italian donation of several patrol vessels, as well as the training conducted by the Italian personnel to the Libyan on board, the number of arrivals on the Italian coastline from 2016 to 2017 recorded a decrease of 34%²⁶², in favour of a higher number of people returned, accounting for approximately 50,000 since the beginning of the cooperation in 2017²⁶³. Even if before the signing of the Memorandum of Understanding, Libya had at its disposal a smaller number of boat for conducting sea operations, but with the provision of assistance from part of Italy, the operational capability of the Libyan Coastguard has significantly increased, and this has been further enhanced by the training provided to the onboard personnel and the boats' maintenance enabling the perpetuation in time of the wrongful act. Furthermore, the lack of an accounting mechanism able to monitor the actions taken by the Libyan personnel in conducting sea operations, undermined the possibility to limit the human rights violations therefore to some degree facilitate the commission of the wrongful act.

Finally, although harder to prove the contribution that the Italian assistance had in perpetuating the brutal treatment within the detention centres, a more indirect nexus can still be identified. It could be argued that the support at sea provide by Italy in conducting interception operations had increase the chance for migrants to be returned on the Libyan soil and detained, facing so abusive treatments undermining in the first place their right to life. The Commentary of the ILC articles²⁶⁴ stated specifically how “the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful”. This means that Italy, when providing assistance, should have a certain degree of expectations that assistance will be employed for the commission of wrongful acts. Firstly, the wide availability of reports, fact-finding

²⁶² Cruscotto statistico al 31 dicembre 2017, Ministero dell'Interno.

²⁶³ Centre Suisse pour la Défense des Droits des Migrants (2020), “Request for UN Inquiry into Italy’s Role in the Systematic Torture of Migrants « Pulled Back » to Libya”. Available at: <https://centre-csdm.org/request-for-un-inquiry-into-italys-role-in-the-systematic-torture-of-migrants-pulled-back-to-libya/>

²⁶⁴ International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, Commentary, p. 66 paragraph 3

commission and monitoring organisations, methodologically reporting from the beginning of the Italy- Libya cooperation, provide reliable and credible data on the human rights violations committed by Libya, both at sea and inside the detention centres.

Secondly, the famous ECtHR case “*Hirsi Jamaa and Others v. Italy*”, constitute a clear proof of a regional human rights judicial body which have contradict the idea of Libya as a safe country; in fact by condemning Italy for the return of a group of approximately 200 people to Libya without examining their asylum cases, Italy had put those people at risk of ill-treatment amounting therefore to a collective expulsion. Additionally, the EctHR court “notes that the situation was well known and easy to verify on the basis of multiple sources” when referring to the migrants’ treatment Libya, therefore underlining the Italian awareness of the uncertain situation on matters of human rights.

An additional proof could be also found in the Italian judicial initiatives conducted over the years which have contributed to prove the current condition of migrants in Libya; for instance, the case of the Court of Cassation of Milan (10th October 2017, R.G: n° 5/17)²⁶⁵ involving the arrest of Osman Matammud, a Somali man responsible for several murders, kidnapping and sexual abuses committed in a detention centre of the city Bani Walid embodied the public acknowledgement of the migrants ‘ condition in Libya.

Finally, the last two requirements that should be satisfied in order to held Italy legally responsible for the aid provided to Libya, would be the Italian’s intention behind its support to facilitate the commission of the wrongful act and the double wrongfulness of the action, i.e. if Italy would have committed directly the wrongful act, this would have constituted a violation of its international legal framework.

For what concerns the first point, the intention behind Italian actions could be double proof by the fact that the country was aware of the current treatments reserved to migrants and refugees in the Libyan detention centres, as well of the misconduct of the Libyan coastguards, thanks to the legal cases and countless reports released on that matter. Additionally, as mentioned above, the text itself of the MoU, clearly stated that the scope of the Italy- Libya cooperation would have been centred in stemming the illegal migrants’ fluxes by providing technical and technologic support to the Libyan institutions in charge of the fights against

²⁶⁵ Morgese G. (2020), “Sfide Storiche, Politiche della Memoria ed Integrazione Europea Mezzogiorno e Area Mediterranea”, Università degli Studi di Bari Aldo Moro Dipartimento di Studi Umanistici, p.8

illegal migrants ²⁶⁶. Instead, on matter of double wrongfulness, the hypothetical commission of the Libyan wrongful act from part of Italy would have been clearly constitute a breach of the international obligations to which the State is party signatory. Besides the 1951 UN Refugee Convention to which Italy is part of, the country has signed the majority of the UN international human right treaties, including the ICCPR, the ICESCR, the CRC and the CAT, as well being part of the ECHR, proving the Italian imputability if the act was committed directly by Italy itself.

It could be affirmed that the five criteria of the Article 16 of the ILC have been fulfilled, proving that the aid provided by the Italian state, has contributed to the commission of the wrongful act from part of Libya against its migrants and refugees' population, accounting for several human rights abuses. The supply of technical support, as defined in the Memorandum of Understanding between the country, which have increased the operational capability of the Libyan Coastguards in conducting sea interception operations, have increasingly endangered the lives of migrants during the Mediterranean crossing, as well as contributing to their return to the detention centres, site of violence and abuse. As established by Article 30 of the ILC Draft Articles, the State responsible for the commission of the wrongful acts is obligated to cease the act, as well as offer appropriate compensation for the damages caused; this is achievable solely when it is invoked directly by the injured State or by a group of State, including the one who has been affected by the wrongful act. In fact, according to Article 42 of the ILC, solely the submission of a complaint involving the injured State alone could be considered valid for a future reparation or the possibility to conduct legal investigation on the wrongful act. Consequently, this fact renders rather complicated the chance to held legally accountable Libya for its direct breaches of international obligations, as such Italy to have aided the former to perpetuate those violations.

Another obstacle encountered relates to the sufficiency of the evidence gathered to prove Italy's responsibility for the Libya's fraudulent conduct. In the analysis conducted by Vari (2020)²⁶⁷, the author reports two exemplary cases, namely *Nicaragua v. US* and *Bosnia v. Serbia*. Although the ICJ did not applied the Article 16 of the Articles Draft, instead it was

²⁶⁶Odysseus Network (2017), "Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic." Art 1 (b)

²⁶⁷Vari, E. (2020). Italy-Libya memorandum of understanding Italy's international obligations. *Hastings International and Comparative Law Review*, 43(1), 105-[i], pp. 131-132. Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol43/iss1/5

enforced the “effective control” test, the court sentenced in both case that respectively the US did not own effective control of the “*contras*” paramilitary groups, as well as the armed groups involved in the *Srebrenica* genocide were completely dependent on the Serbs.

In this paragraph it has been shown how Italy could be theoretically held accountable for the human rights violations committed by Libya, as actively providing practical support which have increasingly endangered the lives of thousands of migrants and refugees. All the five requirements belonging to the Article 16 of the ILC Draft Articles have been meet, but still, it appears remote the possibility that states will call for the Italian responsibility of the Libyan human rights violations; this possibility is further restricted by Article 42 of the ILC that do not permit migrants and refugees to appeal for cessation of the violent behaviours and further reparation, as only states are allowed to do so.

4.4 Italy’s responsibility under human rights treaties and conventions

Proving Italian State’s responsibility for the human rights violations committed by Libya, in accordance with Article 16 of the ILC Draft article has been demonstrated to be achievable as satisfying all the requirements necessary to prove the imputability of the country. At the same time, complaints can be brought up solely by an injured State or a group of countries, including that State, nullifying the chance for individual complaints from part of migrants and refugees. Still, migrants and refugees retain the opportunity to bring an alleged violation of their human rights to the attention of the United Nations, as this international body offers them the possibility to vindicate their rights at the international level²⁶⁸.

In fact, within 9 of the UN human rights treaty, a complaint mechanism is present; it takes the form of a committees of independent experts elected by signatory parties to the Treaty, and they are entitled to monitor the lawful implementation of the obligations contained in the agreements. The complaint for the right’s violation can be brought only against States that are signatory party to the treaty, and that have agreed on the Monitoring Committee’s right to receive and analyse complaints from individual. The right to address allegedly human rights violations under UN Treaties is retained by all individuals, and after having fulfilled the requirements of admissibility, the specific committee will provide a set of recommendations (follow-up procedure) for the State in question, even though not legally binding²⁶⁹.

²⁶⁸ United Nations Human Rights Office of the High Commissioner (2012), “The United Nations Human Rights Treaty System”, Fact Sheet N°30/Rev. 1, P.1. Available at:

<https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet30Rev1.pdf>

²⁶⁹ *Ibid.*, P.11

UN Human Rights Treaties to which Italy is a signatory party, relevant for the protection of migrants' right, include: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child and the Convention on the Elimination of All Form of Racial Discrimination. Additionally, the country has also ratified optional protocols belonging to the above-mentioned Conventions, permitting individuals to submit complaints against the State alleging violations²⁷⁰. In this sense, an individual complaint could be moved against Italy for violating the prohibition of torture and inhuman or degrading treatment, one of the most recurrent violations recorded in Libya and an obligation includes in the totality of the above-mentioned convention.

At the same time, in order to fill an individual complaint for a possible violation, is necessary to establish the Italy's obligations under these human rights bodies, therefore determined the state's effective control over an area or person, i.e., defined the exercise of state's jurisdiction²⁷¹. The articles on matters of international protection of human rights contained in the UN treaties are considered to be part of both conventional, customary international law, as well some of these norms are defined as *jus cogens* as in the case of the *principle of non-refoulement*. In this case, if Italy violates any norms included in one of these treaties in the exercise of its territorial, quasi-territorial, or personal jurisdiction, it might be held internationally accountable for its actions.

If, the UN Covenant on Civil and Political Rights is taken as an example, it can be seen from its article 2.1 that the treaty prescribes to its signatory parties to respect and guarantee the rights" to all individuals within their territory and subject to their jurisdiction". Hence, this could be interpreted as a limitation of the UN body as assuring protection only to individuals located on the State's territory at the time of the human rights violation. Nevertheless, due to the ambiguous meaning of the article's content, General Comment 31 on the "Nature of the

²⁷⁰ International Justice Resource Centre (2020), "Italy Factsheet". Available at: <https://ijrcenter.org/country-factsheets/country-factsheets-europe/italyfactsheet/#:~:text=Italy%20has%20ratified%20the%20following,Degrading%20Treatment%20or%20OPunishment%20>

²⁷¹ Ortega Alvarez E.L (2015), "The attribution of international responsibility to a State for conduct of private individuals within the territory of another State", Master's Thesis, Universitat Pompeu Fabra Barcelona. Available at: https://indret.com/wp-content/themes/indret/pdf/1116_es.pdf

General Legal Obligation on State Parties to the Covenant²⁷²” clarified that “ State Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons subject to their jurisdiction”; by assigning a “disjunctive²⁷³” meaning to the “and” contained in the article, the General Comment underlined the duty of the state party to ensure the Covenant rights to individuals who are within the effective control of that State, even if not situated within the territory at the moment of the violations²⁷⁴. Along the line of this interpretation, the EctHR retains that jurisdiction under Article 1 of the charter can flow from mere territorial sovereignty, as well as from lesser degrees of dominance including occupation and “effective overall control”²⁷⁵. As in the well-known *Hirsi Jamaa* case, the legal jurisdiction of the European court went out of the traditional concept of territoriality, by recognising the effective control of Italy over the flag States of vessel at sea, charging them of collective expulsion. Another relevant case, where the jurisdiction of a State could be extraterritorial, regards the application and protection of the principles contained in the ICESCR, which its rights’ application are not limited by the exercise of the territorial jurisdiction²⁷⁶.

Finally, the “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” published in 2013, argues how “Extraterritorial obligations” represent a missing link in the international human rights protections system. States, when interpreting their human rights obligations, tend to limit their applicability to the state’s borders, therefore neglecting on those individuals who are currently outside the territory but are subject to violations of their human rights contain in UN treaties. Although, these principles are not legally binding regarding solely the areas of Social, Economic and Cultural rights, they constitute an attempt to assure each state’s obligations to realize

²⁷² UN Human Rights Committee, General Comment No. 31 “The nature of the general legal obligation imposed on States Parties to the Covenant”, 29 March 2004, para. 10. Available at: <https://www.refworld.org/docid/478b26ae2.html>

²⁷³ Coomans F. (2011), “The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Right”, *Human Rights Law Review* 11, Published by Oxford University Press. doi:10.1093/hrlr/ngq055 [Signifying the interpretation of the “and” as an “or”, expanding the effective jurisdiction of the article 2.1]

²⁷⁴ UN Committee on Economic, Social and Cultural Rights, General Comment No. 12, 12 May 1999, UN doc. E/C.12/1999/5, para. 36.

²⁷⁵ Mallory C. (2021), “A second coming of extraterritorial jurisdiction at the European Court of Human rights?”, *Questions of International Law*. Available at: <http://www.qil-qdi.org/a-second-coming-of-extraterritorial-jurisdiction-at-the-european-court-of-human-rights/>

²⁷⁶ UN Committee on Economic, Social and Cultural Rights, General Comment No. 12, 12 May 1999, UN doc. E/C.12/1999/5, para. 36.

economic, social and cultural rights for all persons within its territory, as well as holding responsibility to ensure respect of the same rights extraterritorially²⁷⁷.

Concluding, the extraterritorial obligations of the state to assure human rights protection and to respond of any of their violations, appears still unclear to what extent the UN human rights committees, together with the ECtHR can actually held legally accountable a state. Either way, in recent time it has emerged the intention to adapt the international human right protection system to this broader conceptualisation of territorial jurisdiction and effective state control on those matters; this change of approach has come also as a response to the necessity of assuring the protection of human rights on a transnational level²⁷⁸. In the context of Italy, and its possible imputability for the aid provided to Libya in committing human rights violations, it is undeniable that the country has acted against the purposes contained in the UN treaties to which is signatory party. Unfortunately, the possibility for migrants and refugees to appeal to the UN committee to claim Italy's violation of their rights does not appear such a clear option, due to the ambiguity around the extraterritorial jurisdiction. Still, the possibility to invoke Italy's responsibility on matter of economic, social and cultural rights violations to migrants and reclaiming Libya itself responsibility for those violations seem as the most plausible options for migrants and refugees' victims of abusive treatments from part of Libyan authorities.

Conclusion

Since the early 2000, Italy had to face an exponential increase in migratory flows; migrants mainly coming from the West African countries who, once reached Libya, they would attempt to cross the Central Mediterranean in order to disembark on the Italian southern coast. To stem the growing phenomenon of irregular immigration, the country tried to strengthen its diplomatic relationship with the North African country, signing at the end of 2007 two protocols concerning, among other things, also the fight against illegal immigration. In exchange for the sale of six Italian naval units to Libya, training of the Libyan authorities, exchange of strategic information and commitment at European level for the granting of loans, Libya would have

²⁷⁷ Ibid.

²⁷⁸ Altwicker T. (2018), "Trans nationalizing Rights: International Human Rights Law in Cross- Border Contexts", *European Journal of International Law*, Volume 29, Issue 2, May 2018, Pages 581–606, DOI: <https://doi.org/10.1093/ejil/chy004>

strengthened its efforts, together with the Italian side, in the fight against irregular immigration. As it has been shown, these agreements remained substantially not applied until the signing of the Italian-Libyan friendship treaty in 2008, with which the colonial question was put to an end with a 5 billion euros transaction sent to Libya in over 20 years. A few months later, the Protocol concluded by the Minister of the Interior Maroni with the Libyan government suddenly accelerated the collaboration between the two countries, by enforcing the promises contained in the previous agreements. This year signed the beginning of the push-backs employment, highly questionable practice as Italy is bound by both regional and international conventions assuring the protection of refugees and asylum seekers' rights. As a result, Italy was condemned in the well-known ECtHR case "Hirsi Jamaa and Others v. Italy", for having collectively expelled a group of possible asylum seekers to Libya, i.e., a non- safe country of disembarkation.

The collection of information by trusted international organizations outlined a situation that was anything but safe for migrants in Libya. In fact, in the country there is no regulatory framework for the protection of refugees and asylum seekers as not having signed the 1951 UN Geneva Convention, as well as lacking a functioning institutional apparatus able to manage the migratory flow. Furthermore, an endemic situation of racial hatred towards Sub-Saharan Africans puts migrants from these areas at serious risk of being abused, harassed and ill-treated. Furthermore, irregular migrants are detained in overcrowded centres, where individuals are at risk to be subjected to torture and inhuman and degrading treatment. In addition to this, it must be emphasized that Libya has faced a civil war and that at the moment the country is split among several state and non-state actors clashing with each other for the power of command posts. The constant violent climate present in the country has favoured the infiltration of local militias and criminals during the management of the migratory flow, both in the control of detention centres and in the conduction of sea operations by the Coast Guard.

Finally, with the establishment of the Memorandum of Understanding in 2017, with its renewal in 2020, Italy has further officialised its intention to maintain its cooperation with Libya on matters of migration management, even though aware of the frequently human rights violations committed by the Libyan authorities. In this context, the last chapter of this study has constituted an attempt to prove Italy legal responsibility under international law for the aid provided to Libya in committing human rights violations towards migrants and refugees. Through the employment of the ILC Articles drafts as a legal source for establishing state's responsibility in the commission of wrongful act, it has been ascertained the chance to held

Italy accountable for its collaboration with Libya in accordance with Article 16 of the ILC. However, in order to do so, it is necessary that a possible injured State or a group of states including that State, would invoke Italy's responsibility, as the ILC does not empower individuals to present any legal complaints.

In this sense, the only chance for migrants to invoke Italy's legal responsibility is under UN human rights treaties, which allows for individual complaints to be submitted to monitoring committees present in the treaties itself. As human rights violations committed against migrants are mainly happening outside of the territorial jurisdiction of Italy, the possibility to hold this country imputable are restricted to just some of the UN convention. For instance, the UN Covenant on economic, social and cultural rights as having a broader interpretation and application of its provisions, legally permits held accountable a state for a wrongful act out of the territorial jurisdiction of that state. Instead, under the ICCPR and in some case the ECHR, is still appear limited the legal power that those international tools can enforced when it comes human rights violations committed through the support of third countries out of their effective control.

Finally, it could be said that clearly the technical assistance provided by Italy, through the establishment of several agreements with Libya, has clearly contribute to increase the operational capability of the Libya authorities, therefore reducing the number of disembarking on the Italian coastline. At the same time, in view of fewer arrivals at sea, the number of deaths in the Central Mediterranean route have increased exponentially showing the inability of the Libyan coastguards to safely conduct SAR operation. Furthermore, the increasing criminalization of NGOs from part of the Italian government have further endangered the lives of migrants attempting to cross the Mediterranean, showing therefore a negligent approach of the Italian institutions in protecting and assuring the respect of human rights.

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