

# NAVIGATING TROUBLED WATERS:

Italy's Human  
Rights Dilemma  
in the Mediterranean

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

STRALI  
FOR STRATEGIC LITIGATION

UpRights<sup>7</sup>

## UpRights<sup>7</sup>

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StraLi - For strategic litigation is a nonprofit association that promotes the protection of fundamental rights throughout the justice system. Founded in 2018 in Turin, Italy, StraLi is the first nonprofit organization in Italy to deal exclusively with strategic litigation, a legal technique aimed at strengthening the protection of fundamental rights and freedoms through individual judicial procedures that lead to the improvement of the protection of recognized rights and freedoms, or the affirmation of new ones, when they are absent from the legal system.

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# EXECUTIVE SUMMARY

The following position paper focuses on the Memorandum of Understanding (MoU) signed on the 2nd of February 2017 by Italy and Libya with the objective of strengthening their cooperation in the areas of, inter alia, illegal immigration and human trafficking. According to the provisions of the MoU, Italy agreed to provide Libyan authorities of the Government of National Accord, and specifically the Libyan Coast Guard (LCG), with different forms of support to enhance their ability to perform rescue missions at sea and intercept migrants attempting to cross the Mediterranean Sea. Following the signing of the MoU, Italy's support has enabled the LCG to intercept an increasing number of migrants attempting to cross the Mediterranean Sea and return them to Libya.

This position paper argues that the empowerment of the LCG came at the expense of migrants' human rights. Migrants intercepted at sea have been, and currently are being, subjected to various forms of mistreatment by both the LCG and the personnel of the detention centres where they are routinely transferred after disembarking in Libya. In particular, migrants are often subjected to various forms of ill-treatment, including arbitrary arrest, torture, inhuman treatment, and sexual violence, and the very Libyan authorities that are supposed to counter human trafficking, including the LCG, have been directly implicated in the business of trafficking of migrants. Despite being aware of the abuses to which the migrants rescued at sea by the LCG are subjected, as of 2023, the Italian authori-

ties have not undertaken any measures to prevent further human rights violations. Instead, notwithstanding the numerous reports by international and non-governmental organisations detailing the aforementioned violations, the MoU was tacitly renewed one more time in February 2023.

Such violations render Italy's position, and consequently the MoU itself, untenable, and situate Italy in violation of its human rights obligations through a policy of externalization. While the Italian Government has, on numerous occasions, committed to negotiate amendments to the MoU to strengthen its compliance with human rights standards, there is no information to date concerning the progress or the outcome of such negotiations and the MoU remains unchanged. Further, although in January 2023 the Commissioner for Human Rights of the Council of Europe addressed a novel call to the Minister of Interior, Mr. Matteo Piantedosi, to "suspend cooperation with the Libyan Government on interceptions at sea, and to make any future co-operation activity with third countries in the field of migration conditional on comprehensive human rights safeguards", the current Government has not taken any step in this direction. Indeed, in late January 2023 the Prime Minister Giorgia Meloni, during an official visit in Tripoli, reiterated the willingness of Italy to intensify the cooperation with the Libyan authorities and the LCG concerning migration flows without mentioning the inclusion of human rights safeguards in the agreements.

The conduct of Libyan authorities and the mistreatment of migrants expose Italy to international responsibility for the violation of several international conventions, including the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR), and possibly the European Convention on Human Rights (ECHR). The material support provided by the Italian Government to the Libyan authorities, lacking the due regard for the human rights of those affected by such actions, further undermines Italy's own international obligations. Moreover, the mistreatment of migrants may qualify as war crimes and crimes against humanity and potentially engage individual criminal responsibility for the Italian agents who provided assistance to the Libyan authorities.

This position paper calls for a reframing of Italy's cooperation strategy with Libya in accordance with the country's human rights obligations and in light of the recommendations of different international organisations (including the Office of the High Commissioner for Human Rights, the Committee Against Torture, and the Council of Europe). Two options are outlined to ensure that Italy is finally in compliance with its international obligations:

First, Italy may undertake to amend the current MoU to include a provision (a human rights clause) specifying that the respect of human rights, and possibly of inter-

national humanitarian law, is an essential element of the treaty. The provision must allow the parties to suspend or terminate the treaty in case of persistent violations of the clause and should incorporate, at a minimum:

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

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



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## I. Introduction

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

The position paper further outlines required amendments to the MoU to ensure that any form of cooperation with Libya in the field of migration and countering human trafficking is conducted consistently with international human rights standards.

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

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<sup>1</sup> For the purpose of the present analysis economic migrants and asylum seekers will be referred comprehensively as "migrants".

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## I. Introduction

Each year thousands of people depart from Libya and try to cross the Mediterranean to reach Europe. This is often referred to as the Central Mediterranean Route. In 2022, the International Migration Organization (IOM) recorded around 163,000 attempted crossings to Europe through the aforementioned route, highlighting a prominent increase from the 125,000 attempted crossings registered in 2021.<sup>2</sup> Many of these people take on this journey in order to improve their social and economic conditions (economic migrants), while others move to escape from conflict and persecution (asylum seekers).<sup>3</sup>

For years, both the migration policies and political situation of Libya have had a significant impact on the increasing number of migrants. In the early 2000s, Libya abandoned its traditional open-door policy towards migration considering the pressure from the European countries concerned about the flow of illegal migration reaching their coasts<sup>4</sup> This led to the introduction of visa requirements, as well as detention/deportation policies vis-à-vis migrants arriving to or transiting through Libya.<sup>5</sup>

Italy, as one of the countries most affected by the migration flows, concluded several agreements with Libya between 2007 and 2009 leading to “pushback” operations, where Italian authorities, in coordination with the Libyan Government, intercepted migrants crossing the Mediterranean sea and returned these individuals to Libya.<sup>6</sup> In 2012, the European Court of Human Rights (ECtHR) found that pushback operations were in violation of the European Convention on Human Rights

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2 IOM, Missing Migrants Projects: Tracking Attempted Crossings Along the Central Mediterranean Routes, 2022, <https://missingmigrants.iom.int/region/mediterranean>.

3 For the purpose of the present analysis economic migrants and asylum seekers will be referred comprehensively as “migrants”.

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

5 2016 UNSMIL Report, p.5.

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

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(ECHR) on the basis that they were inconsistent with the prohibition of non-refoulement and collective expulsion.<sup>7</sup>

In 2011, following the power vacuum created by the fall of the Gaddafi regime, Libya's security situation led to an even greater flow of migrants departing from Libyan territory.<sup>8</sup> For example, between 2013 and 2014, the number of migrants who passed through the Central Mediterranean Route and reached Europe increased by 376 percent.<sup>9</sup> According to the United Nations High Commissioner for Refugees (UNHCR), in 2016 the number of migrants who arrived in Italy through the Central Mediterranean Route was 181,436, 90 percent of which departed from Libya.<sup>10</sup>

In response to the dramatic increase in migration flows and the growing numbers of casualties due to shipwrecks, in 2013 the Italian Government launched Operation Mare Nostrum, a military and humanitarian operation aimed at tackling the emergency in the Strait of Sicily.<sup>11</sup> The mandate of Operation Mare Nostrum was primarily of humanitarian nature. Between 18 October 2013 and 31 October 2014, Mare Nostrum rescued around 150,000 migrants in Libyan and international waters.<sup>12</sup> Following the termination of Mare Nostrum, the efforts of Italy and the European Union (EU) gradually shifted from rescue activities to activities aimed at countering human smuggling and trafficking in order to reduce the arrivals along the Central Mediterranean Route.<sup>13</sup>

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

8 2016 UNSMIL Report, p.5.

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

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

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

12 2018 UNSMIL Report, p.13.

13 2018 UNSMIL Report, pp.13-16. Specifically, from November 2014, the EU launched a series of maritime and border patrol operations, including Operation Triton (2014), EUNAVFOR MED, known as Operation Sophia (2015), Themis (2018), Operation Irini (2020).

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In this regard, the MoU signed by Italy and Libya in 2017 whereby Italy commits to “providing technical and financial support to Libyan institutions engaged in combatting irregular migration” in order to “stem the illegal migrants’ fluxes” departing from Libya is an integral part of such efforts.<sup>14</sup>

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See European Council, Council of European Union, Saving lives at sea and targeting criminal networks available at <https://www.consilium.europa.eu/en/policies/eu-migration-policy/saving-lives-at-sea/>. United Nations Security Council, Final Report of the Panel of Experts on Libya Established Pursuant to Resolution 1973 (2011), S/2021/229, 8 March 2021 (“2021 Report of the Panel of Experts on Libya”), Annex 17.

<sup>14</sup> MoU, preamble.



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## II. Legal and Factual Appraisal

### a. THE MoU

On 2 February 2017, Italy signed a MoU with Libya to strengthen their cooperation in combating the phenomena of illegal immigration, human trafficking, fuel smuggling, and terrorism.<sup>15</sup> In the preamble, the MoU clarifies Italy's and Libya's determination to address the question of clandestine migrants crossing Libya to reach Europe through the creation of temporary detention/reception camps in Libya, which are to be placed under the control of the Libyan Ministry of Home Affairs.<sup>16</sup>

According to Article 1(A) of the MoU, Italy and Libya committed to set up cooperation programs to support security and military forces to stem the flow of illegal migration and to address the consequences thereof. In this context, Italy agreed to provide technical and technological support to the particular Libyan authorities responsible for tackling illegal immigration, including the Libyan Coast Guard (LCG) and the relevant organs of the Libyan Ministry of Home Affairs.<sup>17</sup>

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

<sup>15</sup> 2018 UNSMIL Report, pp.14-15.

<sup>16</sup> MoU, preamble.

<sup>17</sup> MoU, Article 1(C).

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

Under Article 8, Italy and Libya agreed that the MoU would be “tacitly renewed on expiry for an equivalent period, unless either Contracting Party notifies the other in writing at least three months before the expiry of the period of validity”.<sup>18</sup> Although the Italian Government has expressed on several occasions the willingness to modify the text of the MoU for better compliance with human rights principles, the agreement has been automatically renewed since 2017 and most recently on 2nd February 2023 without the implementation of any substantial provisions to concretely pursue such an objective.<sup>19</sup> The current Government has not shown any willingness to take steps in this direction. Indeed, in late January 2023 the Prime Minister Giorgia Meloni, during an official visit in Tripoli, reiterated the willingness of Italy to intensify the cooperation with the Libyan authorities and the LCG concerning migration flows without mentioning the inclusion of human rights safeguards in the agreements.<sup>20</sup>

Italy currently sponsors 4 international missions in Libya: 1. the bilateral mission of assistance and support to Libya; 2. the bilateral mission of assistance towards Libyan institutions in charge of maritime border control; 3. the UNSMIL (the UN mission in Libya); and 4. the European Union Border Assistance Mission in Libya (EUBAM). The MoU is mentioned exclusively as the legal basis for the financing of mission n. 2.<sup>21</sup>

<sup>18</sup> MoU, Article 8.

<sup>19</sup> ASGI Press Release, *Accordo Italia - Libia: 4 anni di fallimenti, abusi e torture nel segno del cinismo della politica*, 2 February 2021 Available at: <https://www.asgi.it/media/comunicati-stampa/accordo-italia-libia-4-anni/>.

<sup>20</sup> Agenzia ANSA, Cappelleri, P., *Meloni a Tripoli, patto sul gas e trattativa sui migranti - Politica*.

<sup>21</sup> 29 January 2023. Available at: [https://www.ansa.it/sito/notizie/politica/2023/01/28/meloni-intesa-italia-libia-per-potenziare-guardia-costiera-\\_fc86d2f8-f92e-4c5e-b14d-d132752b17af.html](https://www.ansa.it/sito/notizie/politica/2023/01/28/meloni-intesa-italia-libia-per-potenziare-guardia-costiera-_fc86d2f8-f92e-4c5e-b14d-d132752b17af.html).

<sup>21</sup> See Senato della Repubblica, *Analytical report on ongoing international missions and on the status of development cooperation activities in support of peace and stabilisation processes*,

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From 2017 to 2021, the Italian government has allocated 32,6 million euros for international missions in support of the LCG, with 10,5 million euros allocated only in 2021.<sup>22</sup> In 2022, the support to the LCG amounted to 11,848,004 euros, with an increase of 1,368.84 euros from 2021 (from 10,479,140 euros to 11,848,004 euros).<sup>23</sup> The financial needs for the mission for 2023 have been estimated by the Italian Parliament as 10,778,926 euros (of which about 2,2 are due in 2024).<sup>24</sup>

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referring to the year 2022, also referring to the relevant continuation for the year 2023, approved by the Council of Ministers on 1 May 2023. (Doc. XXVI n.3, Scheda 47/2022), 1 May 2023.

22 OXFAM, Press release "MIGRANTI, OXFAM: 'AUMENTANO DI NUOVO I FONDI ITALIANI ALLA GUARDIA COSTIERA LIBICA", 3 July 2017. Available at: [https://www.oxfamitalia.org/wp-content/uploads/2021/07/CS\\_-MIGRANTI-OXFAM\\_AUMENTANO-DI-NUOVO-I-FONDI-I-TALIANI-ALLA-GUARDIA-COSTIERA-LIBICA\\_3\\_7\\_2021.pdf](https://www.oxfamitalia.org/wp-content/uploads/2021/07/CS_-MIGRANTI-OXFAM_AUMENTANO-DI-NUOVO-I-FONDI-I-TALIANI-ALLA-GUARDIA-COSTIERA-LIBICA_3_7_2021.pdf).

23 Camera dei deputati, Servizio Studi, XVIII Legislatura, Provvedimento Autorizzazione e proroga missioni internazionali nell'anno 2022, 8 agosto 2022, p. 8.

24 Senato della Repubblica, Servizio Studi, Ufficio politica estera e difesa, Camera dei deputati, Servizio Studi, Dipartimento Difesa, Autorizzazione e proroga missioni internazionali Esame della deliberazione del Consiglio dei ministri del 1° maggio 2023, DOC. XXV - N. 1 DOC. XXVI - N. 1, Scheda 47/2023, p. 88.

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### b. Human rights implications of the MoU

Following the adoption of the MoU, Italy provided various forms of support to the Libyan authorities, specifically the LCG, to strengthen its ability to perform rescue missions and intercept migrants attempting to cross the Mediterranean Sea. This support has included: (i) the provision of fast patrol boats to the LCG;<sup>25</sup> (ii) the provision of technology to set up a Joint Rescue Coordination Centre;<sup>26</sup> (iii) training of LCG personnel in charge of such rescue missions;<sup>27</sup> and (iv) deploying an Italian Navy vessel in charge of providing support to LCG operations.<sup>28</sup> The information available also indicates that Italian Navy officers based in Libya took and continue to take part in the coordination of rescue operations performed by the LCG.<sup>29</sup>

25 See e.g., Ambasciata d'Italia, Scambio di note concernente la cessione al Governo libico di dieci unità navali "CLASSE 500" per il pattugliamento costiero, Nota Verbale n.1440, 16 May 2019 ("Italian Embassy Note Verbale No. 1440/2019"), para.1. See also, Senato della Repubblica, Analytical report on ongoing international missions and on the status of development cooperation activities in support of peace and stabilisation processes, referring to the year 2021, also referring to the relevant continuation for the year 2022, approved by the Council of Ministers on 15 June 2022. (Doc. XXVI n.5, Scheda 16/2022 and 33/2022), 15 June 2022.

26 Presidenza del Consiglio dei Ministri, Relazione analitica sulle missioni internazionali in corso e sullo stato degli interventi di cooperazione allo sviluppo a sostegno dei processi di pace e di stabilizzazione deliberata dal Consiglio dei ministri il 28 dicembre 2017, DOC. CCL-bis, N. 1, 28 December 2017 ("2017 Italian Council of Ministers Analytical Report on International Missions"), Scheda 36, pp.101, 192. See also 2018 UNSMIL Report, pp. 14-15.

27 Senato della Repubblica, Analytical report on ongoing international missions and on the status of development cooperation activities in support of peace and stabilisation processes, referring to the year 2021, also referring to the relevant continuation for the year 2022, approved by the Council of Ministers on 15 June 2022. Doc. XXVI n.5, Scheda 16/2022 and 33/2022, 15 June 2022. See also, Senato della Repubblica, Analytical report on ongoing international missions and on the status of development cooperation activities in support of peace and stabilisation processes, covering the year 2021, also referring to the relevant continuation for the year 2021, approved by the Council of Ministers on June 30, 2021. Doc. XXVI n.4, Scheda 21/2020, p.66, 30 June 2021; See also 2018 UNSMIL Report, pp. 14-15.

28 See Senato della Repubblica, Analytical report on ongoing international missions and on the status of development cooperation activities in support of peace and stabilisation processes, referring to the year 2021, also referring to the relevant continuation for the year 2022, approved by the Council of Ministers on 15 June 2022. Doc. XXVI n.5, Scheda 33/2022, p. 250, 15 June 2022.

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



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Italy's support in furtherance of the MoU has reportedly boosted the capacity of the LCG to carry out rescue missions and intercept an increasing number of migrants attempting to cross the Mediterranean Sea.<sup>30</sup> In 2015, the LCG's operations and rescue missions encompassed only around 0.5% of the total number of migrants rescued at sea (roughly 800 persons). By contrast, the figures provided by UNSMIL and the UNHCR indicate that between January 2017 and November 2020, LCG intercepted around 50,000 migrants, all of whom later disembarked in Libya.<sup>31</sup> Further, if in 2020 an estimated 11,000 migrants were intercepted at sea by the Libyan coast guards,<sup>32</sup> in the first six months of 2021 these numbers drastically increased, with Libyan coastguards intercepting an estimated 15,000 people<sup>33</sup> and, in 2022, the numbers grew even more, reaching an estimate of at least 19,308 migrants getting intercepted and forcibly returned to Libya.<sup>34</sup>

However, it has been widely reported that in the context of the LCG's operations, migrants have been subjected to various forms of mistreatment. Mistreatment has been reportedly carried out by both the LCG and the various Libyan armed groups in charge of the detention centres where they are transferred once the migrants are returned to Libya.<sup>35</sup> According to UNSMIL, during rescue operations the LCG engaged in aggressive behaviour against

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30 2021 Report of the Panel of Experts on Libya, para.41.

31 2018 UNSMIL Report; UNHCR, Libya: Activities at Disembarkation, monthly update, December 2018, p.1; UNHCR, UNHCR Update Libya, 3 January 2020, p.1; UNHCR, UNHCR Update Libya, 6 November 2020, p.1.

32 See, International Rescue Committee, Libya: Record numbers intercepted at sea and detained. 2021. Available at: <https://www.rescue.org/press-release/libya-record-numbers-intercepted-sea-and-detained-irc-calls-their-immediate-release>.

33 Amnesty International, 'No one will look for you': Forcibly returned from sea to abusive detention in Libya, 2021, p. 26. Available at: <https://www.amnesty.org/en/documents/mde19/4439/2021/en/> ("2021 AI Report").

34 See, Amnesty International, Amnesty International Report 2022/23: The state of the world's human rights, p. 238. Available at: <https://www.amnesty.org/en/documents/pol10/5670/2023/en/>. ("2022/2023 AI Report").

35 See, UNSG Report of the Secretary-General Antonio Guterres on the United Nations Support Mission in Libya, S/2022/409, 2022, p. 11.

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migrants intercepted at sea, mistreating and violating the human rights of the very persons that they were supposed to rescue.<sup>36</sup> Such mistreatment has included physical abuse, threats, use of firearms, and dangerous manoeuvres during rescue operations.<sup>37</sup>

Migrants have also been subjected to further serious human rights violations once the LCG returned them to Libya.<sup>38</sup> Upon disembarkation, migrants are often transferred to detention camps which are nominally under the control of the Department Combating Illegal Migration (DCIM), that is in turn overseen by the Libyan Ministry of Interior. The number of DCIM detention centres has changed over time but, as of 2022, it amounted to an estimate of 24 active detention centres, as well as three formally closed but unofficially operating centres.<sup>39</sup> Although officially under the control of the DCIM, these centres are in fact under the control of armed groups taking active part in the ongoing hostilities in Libya.<sup>40</sup> The conditions of detention in these camps have been described as “appalling,” “nightmarish”, and “cruel, inhuman and degrading”.<sup>41</sup>

Despite the increase in the scope and number of the restrictions imposed by Libyan authorities on the visits to detention centres by humanitarian organisations,<sup>42</sup>

36 See, e.g., OHCHR, “Lethal Disregard”: Search and rescue and the protection of migrants in the central Mediterranean Sea, May 2021, pp.14-15. See also 2018 UNSMIL Report, pp.36-38. See also UNHCR, UNHCR Position on the Designations of Libya as a Safe Third Country and as a place of Safety for the Purpose of Disembarkation Following Rescue at Sea, September 2020 (“2020 UNHCR Position on Libya as a Safe Third Country”), para.14.

37 2021 AI Report, pp. 27-29. See also, 2018 UNSMIL Report, pp.36-38; 2020 UNHCR Position on Libya as a Safe Third Country, para.14.

38 See, 2022/2023 AI Report, p. 238; 2021 Report of the Panel of Experts on Libya, para.42.

39 UNSC, Final report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022 (“UNSC 2022 Report”), para. 47.

40 See UNSMIL, Report of the Secretary-General, Security Council of the United Nations, 2022, pp.10-11.

41 UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the case of S.S. and Others. v. Italy (Appl. No. 21660/18) before the European Court of Human Rights, 14 November 2019 (“2019 UNHCR Submission in S.S. v. Italy”), para.2.5. See also 2022/2023 AI Report, p. 238.

42 See, UNHCR, UNHCR Libya Factsheet July 2021 (“UNHCR 2021 Factsheet”), pp. 2-3. Available at: <https://data.unhcr.org/en/documents/details/87777>.

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UNHCR has concluded that the camps to which it had access did not meet international standards.<sup>43</sup> The UN Panel of Experts established pursuant to Resolution 1973 (2011), as well as UNSMIL, have observed that in those detention camps migrants intercepted at sea live in dire conditions and are routinely subjected to forms of torture and ill-treatment, arbitrary detention, sexual violence, and forced labour.<sup>44</sup>

These findings have been confirmed by the UNHCR,<sup>45</sup> the United Nations fact finding mission on Libya,<sup>46</sup> and NGOs such as Amnesty International,<sup>47</sup> Human Rights Watch,<sup>48</sup> and Médecins sans Frontières (MSF).<sup>49</sup> In a press release from October 2021 MSF particularly underlined the gravity of the violence experienced by the detainees, as well as the conditions of overcrowding and insalubrity in which they were forced to live.<sup>50</sup> Additionally, migrants in such detention centres are exposed to violence emanating from the ongoing armed conflict in Libya.<sup>51</sup> On 2 July 2019, for instance, the DCIM detention centre in Tajoura was hit by two airstrikes which resulted in the killing of at least 53 migrants held there.<sup>52</sup>

Likewise, UN bodies' reports implicate the Libyan autho-

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43 UNHCR 2021 Factsheet, pp. 2-3. See also, 2019 UNHCR Submission in S.S. v. Italy, para.2.5.

44 UNSC 2022 Report pp.44-50. 2018 UNSMIL Report, pp.44-50.

45 2020 UNHCR Position on Libya as a Safe Third Country, para.14.

46 HRC, Report of the Independent Fact-Finding Mission on Libya, A/HRC/52/83, 3 March 2023, paras. 41-53. Available at: <https://www.ohchr.org/en/hr-bodies/hrc/libya/index>. ("2023 HRC Report").

47 See, 2021 AI Report, pp. 6-7. See also, Amnesty International, "Between Life and Death": Refugees and Migrants Trapped in Libya's Cycle of Abuse, 24 September 2020 ("2020 AI Report"), pp.27-32; and Amnesty International, Libya's Dark Web of Collusion, Abuses against Europe-bound refugees and Migrants, 2017 ("2017 AI Report"), p.27.

48 See, Human Rights Watch, World Report 2023 - Events of 2022, pp.391-392. Available at: <https://www.hrw.org/world-report/2023>. See also, Human Rights Watch, No Escape from Hell, EU Policies Contribute to Abuse of Migrants in Libya, January 2019 ("2019 HRW Report"), pp.35-57.

49 See, Médecins sans Frontières, Thousands detained and people without medical care after days of arrests in Libya, 2021. Available at: <https://www.msf.org/thousands-detained-and-people-without-medical-care-after-days-arrests-libya> ("2021 MSF Statement").

50 See, 2021 MSF Statement.

51 See, UNSC, Report of the Secretary General on the Implementation of Resolution 2491 (2019), /2020/876.2020, pp.9-10.

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

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rities, including the LCG and the armed groups in charge of the migrant detention camps, in the smuggling or trafficking of migrants and refugees.<sup>53</sup> The UN Independent Fact-Finding Mission on Libya confirmed in March 2023 that “personnel and officials of the Directorate for Combating Illegal Migration, at all levels, are implicated”.<sup>54</sup> In July 2022, such allegations have been also confirmed by the US State Department, which stated that

International observers continued to report systemic and prevalent complicity of government officials in human trafficking, including Libyan Coast Guard (LCG) officials, immigration officers, security officials, Ministry of Defense (MOD) officials, members of armed groups formally integrated into state institutions, and officials from the MOI and MOI’s Department to Combat Illegal Migration (DCIM). Various armed groups, militias, and criminal networks infiltrated the administrative ranks of the government and abused their positions to engage in illicit activities, including human trafficking and alleged unlawful child soldier recruitment and use. Several credible sources continued to report that DCIM detention center guards and administrative staff forced detained migrants to work at these detention centers and at third locations, such as farms and construction sites. [...] Reports also suggested staff in some DCIM migrant detention centers in western Libya coerced detainees to clean and load weapons during active hostilities. In addition, DCIM guards and staff systematically subjected migrants detained

<sup>53</sup> See 2023 HRC Report, paras. 41-53. See also UNSC, Report of the Secretary General on the Implementation of Resolution 2491 (2019), S/2020/876, 2020 (“UNSC 2019 Report”), pp.11-12. See also, 2018 UNSMIL Report, p.6.

<sup>54</sup> See 2023 HRC Report para. 44.

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in DCIM detention centers to sex trafficking and other forms of sexual exploitation; guards and staff coerced women, girls, men, and boys to perform sexual favors in exchange for essentials such as food, clean water, and at times, their freedom.<sup>55</sup>

These concerns have been confirmed throughout the years by many other United Nations bodies. For instance, the UNHCR in September 2020 concluded that Libya cannot be designated as a place of safety for the purpose of receiving migrants following their rescue at sea.<sup>56</sup> The Al-Nasr detention camp, situated in al-Zawiya on the Libyan west coast, provides an example of the involvement in human trafficking of the Libyan authorities in charge of the rescue/detention of migrants in Libya. Al-Nasr is a migrant detention centre which is nominally under the control of the DCIM, but run by an armed group, the Shuhada al-Nasr Brigade. On 28 May 2020, the Tribunale di Messina found that migrants imprisoned in this camp were subjected to numerous forms of ill-treatment, including torture, rape, extortion, physical abuses, forced labour and murder.<sup>57</sup> In various passages, the judgement of the Tribunale di Messina confirms the ties between the organisation in charge of the Al-Nasr detention camp and human traffickers. Migrants were routinely mistreated and tortured to extort money from them, which could be paid in exchange for their freedom. Those who could not afford to pay were killed or sold to other human traffickers.<sup>58</sup> In some cases, migrants were freed and then kidnapped again by the same people in

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55 See, United States of America, Department of State, Office to Monitor and Combat Trafficking in Persons Report, July 2022, pp.601-602. Available at: <https://www.state.gov/reports/2022-trafficking-in-persons-report/>.

56 2020 UNHCR Position on Libya as a Safe Third Country, paras. 13, 33-34.

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

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

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charge of the Al-Nasr detention camp and sent there for another period of detention.<sup>59</sup>

The UN has also confirmed the involvement of those in charge of the Al-Nasr detention centre in human trafficking. Between 2019 and 2022, the Al-Nasr centre has been one of the subjects of the investigation of the UN Panel of Experts on Libya. If, in 2019, the Panel reported that “[m]igrants interviewed by the Panel identified the Al-Nasr detention centre as a primary hub for trafficking in western Libya”,<sup>60</sup> as of 2021, the Panel found that “its de facto manager, Osama al-Kuni Ibrahim, had committed several violations of international humanitarian law and international human rights law”.<sup>61</sup> According to the United Nations Security Council, the head of the LCG in Zawiya, Abd al Rahman al-Milad (a.k.a. Al-Bidja), colluded with Mohammed Kachlaf, the commander of Shuhada al-Nasr, to carry out illicit operations related to the trafficking and smuggling of migrants.<sup>62</sup> According to the UN Panel of Experts on Libya, al-Milad used the coastguard’s boat to intercept migrants at sea and transport them to Al-Nasr detention camp, from where they were sold again to smugglers.<sup>63</sup> Al-Milad was arrested on October 14, 2020, by the Tripoli Security Directorate on charges of human trafficking, but the arrest was followed by a backlash from the Military Prosecutor, who requested the transfer of the Libyan Coast Guard commander under his authority and, as March 2021, the Panel of Experts reported that the whereabouts of al-Milad were unknown.<sup>64</sup>

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

60 UNSC, Final Report of the Panel of Experts on Libya Established Pursuant to Resolution 1973 (2011), S/2019/914, 9 December 2019, para.57.

61 See UNSC, Final report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya. S/2021/229,2021 (“UNSC 2021 Report”) p.12, para. 46.

62 UNSC, Security Council Committee Established pursuant to resolution 1970 (2011), Narrative Summary – Abd al Rahman al-Milad.

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

64 UNSC 2021 Report, p. 45, para. 177.

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## II. Legal and Factual Appraisal

Italy has been tacitly renewing the MoU despite the credible information received over the years about the human rights violations committed by LCG and DCIM.<sup>65</sup> In numerous instances between 2017 and 2023, international and non-governmental organisations put the Italian authorities on notice of the abuses committed against migrants intercepted at sea by the LCG in Libyan detention camps and of the instrumental assistance provided by Italy pursuant to the MoU in this regard.<sup>66</sup>

Despite such awareness, the Italian authorities failed to take any steps to prevent the further commission of human rights violations by the Libyan authorities in charge of migrants rescued at sea and placed in detention. Indeed, while the Italian Government has committed on numerous instances to strengthen the compliance of the MoU with human rights law, the agreement was again tacitly renewed on 2nd February 2023 leaving the text substantially unchanged.<sup>67</sup>

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<sup>65</sup> 2021 AI Report, p.19.

<sup>66</sup> Notice from international organisations include: (i) Council of Europe: CoE, Human Rights Commissioner for Human Rights, Letter to Italian Minister of Foreign Affairs Matteo Piantadosi, CommHR/DM/sf 003-2023, 26 January 2023; CoE, Human Rights Commissioner for Human Rights, Letter to Italian Minister of Foreign Affairs Mr Luigi Di Maio, CommHR/DM/sf 006-2020, 13 February 2020 (“2020 CoE Human Rights Commissioner Letter”); CoE, Human Rights Commissioner for Human Rights, Letter to Italian Minister of the Interior Mr Marco Minniti, CommHR/INM/sf 0345-2017, 28 September 2017; and (ii) United Nations: UNSC, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, para. 45-51; Report on Smuggling of Migrants and Trafficking in Person, S/2021/767, September 2nd, 202, para. 44; 2018 UNSMIL Report, Recommendations, p.53; UN Committee against Torture, Concluding observations on the fifth and sixth periodic reports of Italy, CAT/C/ITA/CO/5-6, 17 December 2017, para.22. Notice from non-governmental organisations include: (i) Amnesty International: 2022 AI Report, “EU-backed Libyan coastguards and the SSA militia endangered the lives of refugees and migrants crossing the Mediterranean by shooting or otherwise deliberately damaging their boats, leading to loss of life (see Italy entry)”, pp. 237-238; 2021 AI Report, pp.12-14, 2020 AI Report, p.12; 2017 AI Report, p.11; (ii) Human Rights Watch: 2023 HRW Report, pp.391-392, “The European Union continued to collaborate with abusive Libyan Coast Guard forces, providing material and technical support and aerial surveillance to intercept and return thousands of people to Libya”, 2019 HRW Report, p.9. “The debate in the Italian Parliament concerning the Italian mission in Libya also reflects a full awareness of the condition of detention of migrants in Libya and of the role that Italy is having in this regard”. See e.g. Senato della Repubblica, XVIII Legislatura, 236 Seduta, Resoconto Stenografico, 7 July 2020, pp.20-21 (De Falco), 26-27 (Bonino), 40-42 (De Petris); Senato della Repubblica, XVIII Legislatura, 130 Seduta, Resoconto Stenografico, 9 July 2019, pp.36-37 (Bonino), 51-54 (Verducci), 71-72 (Petrocelli). See also 2017 AI Report, pp.56-59.

<sup>67</sup> ASGI, Accordo Italia - Libia: 4 anni di fallimenti, abusi e torture nel segno del cinismo della politica, 2021. Available at: <https://www.asgi.it/media/comunicati-stampa/accordo-italia-libia-4-anni/>.

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Significantly, Italy's approach is in stark contrast with the one adopted by the UN mechanisms operating in Libya. Considering the allegations of human rights violations committed by the LCG and the DCIM, the UN bodies operating in Libya conditioned their support to these entities on the implementation of a series of mitigating measures aimed at ensuring Libyan authorities' compliance with human rights standards.<sup>68</sup>

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<sup>68</sup> 2018 UNSMIL Report, pp.18-19.







# III. ITALY'S POTENTIAL RESPONSIBILITY DERIVED FROM LIBYA'S HUMAN RIGHTS VIOLATIONS

The abuses migrants are subjected to in Libya may result in violations of customary and treaty norms of international law. Specifically, the reports of international organisations and NGOs present in situ indicate that the abuses perpetrated against migrants meet the threshold criteria of torture under the definition of Article 1 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the corresponding provisions incorporated under Article 3 of the ECHR as well as Article 7 of the International Covenant on Civil and Political Rights (ICCPR).<sup>69</sup> In parallel, such abuses may also qualify as international crimes, namely war crimes and crimes against humanity.

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<sup>69</sup> For practical purposes, the present analysis focuses on the qualification of the abuses committed against migrants as torture and the relevant breaches of the CAT, as well as the corresponding provisions of the ECHR and the ICCPR. However, the abuses to which migrants are subjected to in Libya may qualify as cruel, inhuman or degrading treatment or punishment (Article 16 of the CAT) as well as violations of different human rights conventions to which Libya and Italy are parties. These include, inter alia, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention for the Protection of all Persons from Enforced Disappearance (CED).

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

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

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



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

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

According to Article 16 of the ASR

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

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

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

Under Article 2(1) of the CAT, States have an obligation to respect and protect the human right not to be subjected

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

to torture as defined in Article 1 of the CAT.<sup>70</sup> While Article 2 of the CAT requires every State Party to put in place “effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” (positive obligation), this provision, read together with Article 1, also covers the right of individuals not to be subjected to torture (negative obligation).<sup>71</sup> In addition, Article 5 of the CAT requires States Parties to establish their jurisdiction over acts of torture committed in the territories under their jurisdiction, including any forms of attempt, complicity, and participation.

As noted above, available information from international and non-governmental organisations indicates that Libya is in breach of these provisions. Specifically, the United Nations Panel of Experts found that migrants held in a number of DCIM detention centres, including those rescued at sea by the LCG, are “subjected to torture, cruel and degrading treatment”.<sup>72</sup> The same conclusion is reflected in several reports issued by Amnesty

<sup>70</sup> Article 1 of the CAT (“For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”).

<sup>71</sup> See G. Zach, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Part I, Substantive Articles, Article 2 Obligation to Prevent Torture*, in M. Nowak, M. Birk, and G. Monina (eds.), *The United Nations Convention Against Torture and Its Optional Protocol: A Commentary*, 2nd Ed., Oxford University Press: Oxford, 2019, p.78 (“The formulation of Article 2 (1) must be interpreted as including the obligation of States parties to respect and protect the human right not to be subjected to torture. But the main emphasis of this formulation, as in Article 16, is put on the positive obligation of States parties to fulfil”); Committee Against Torture, CAT/C/53/D/514/2012, *Déogratias Niyonzima v Burundi*, Communication No. 514/2012, para.9. In some cases, the Committee against Torture found that such negative obligation emanated directly from Article 1 of the CAT. See e.g., Committee Against Torture, *Ali Ben Salem v. Tunisia*, Communication No. 269/2005, CAT/C/39/D/269/2005, 7 November 2007, para.16.5; Committee Against Torture, *Dmytro Slyusar v Ukraine*, Communication No. 353/2008, CAT/C/47/D/353/2008, 16 January 2011, para.9.4; and G. Zach, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Part I, Substantive Articles, Article 1 Definition of Torture*, in M. Nowak, M. Birk, and G. Monina (eds.), *The United Nations Convention Against Torture and Its Optional Protocol: A Commentary*, 2nd Ed., Oxford University Press: Oxford, 2019, p.68.

<sup>72</sup> See UNSC. Final report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya. S/2022/970. 2022, para. 48. See also. 2018 UNSMIL Report, p.44.

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

International<sup>73</sup> and Human Rights Watch.<sup>74</sup> These reports include first-hand evidence of specific acts of torture routinely inflicted on migrants. These findings are fully in line with the judgment of the Tribunale di Messina which qualified the abuses committed against migrants in the Al-Nasr detention centre as torture under Article 613 bis of the Italian Criminal Code.<sup>75</sup>

Against this background, Libya has not adopted any comprehensive effort to tackle such practices or to ensure that victims may receive redress for the violations suffered.<sup>76</sup> Accordingly, the torture inflicted against migrants in the detention centres operated by armed groups together with Libya's failure to put in place measures that can effectively prevent such treatment or to exercise its criminal jurisdiction thereto violates Articles 1, 2, and 5 of the CAT.

Notably, the fact that detention centres are run by armed groups on behalf of the Minister of Interior does not absolve Libya of its obligations under the CAT. Indeed, the Committee against Torture General Comment No. 2 stipulates that, under Article 2 of the CAT, States also bear responsibility for the acts of individuals who act on their behalf, as in the present case.<sup>77</sup> Likewise, in *Elmi v Australia*, the Committee Against Torture concluded that non-State actors who carry out State functions, such as personnel in privately-run detention facilities or de facto authorities exercising quasi-governmental functions, fall under the definition of persons acting in an official ca-

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<sup>73</sup> See 2022/2023 AI Report, pp. 237-238; 2021 AI Report, pp.6-7; 2020 AI Report, pp.29-30; 2017 AI Report, pp.31-33.

<sup>74</sup> See Human Rights Watch. World Report 2023 - Events of 2022. 2023. pp.391-392. Available at: <https://www.hrw.org/world-report/2023>. ("2023 HRW Report") See also, 2019 HRW Report, pp.1, 3, 17, 35, 39-41, 43-44

<sup>75</sup> Tribunale di Messina Judgment, para.6.2, pp.38-42.

<sup>76</sup> See, 2023 HRC Report, para. 7.

<sup>77</sup> Committee Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No.2, CAT/C/GC/2, 24 January 2008, para.15.

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

capacity.<sup>78</sup>

Italy's support pursuant to the MoU contributed to Libya's violation of the CAT. Italy's support under the MoU qualifies as direct assistance to Libya's breach of the CAT. As noted above, the coordination, logistical support, and training enabled the LCG to increase their operations and intercept migrants at sea.<sup>79</sup> Once migrants have disembarked in Libya, under the auspices of the LCG, they are transferred to detention camps where they are then subjected to torture<sup>80</sup> Thus, Italy's support to the LCG contributes to Libya's internationally wrongful act.

Italy provided such support despite its knowledge that it may have contributed to Libya's violation of the CAT. Italy has been providing logistical support to Libyan authorities despite its knowledge that migrants intercepted at sea and returned to Libya were subjected to torture.<sup>81</sup> Italy's full awareness of the circumstances of the internationally wrongful act performed by Libya cannot be disputed.<sup>82</sup>

The relevant conducts in question would constitute a breach of an obligation by which Italy is bound if committed by Italian authorities. Italy has ratified the CAT by means of the adoption of Law No. 498/1988; as a result,

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

79 Section A, Legal and Factual Background.

80 Section A, Legal and Factual Background.

81 There is considerable academic debate on whether Article 16 of the ASR is satisfied by the knowledge of the other the intent of the State to commit a wrongful act or instead also requires an intention to provide aid or assistance in the commission of such act. See P. Pustorino, *Diritto Internazionale e Complicità fra Stati: Considerazioni sull'elemento soggettivo dell'illecito*, in *Rivista di Diritto Internazionale*, 2020, p.657; C. Dominicé, *Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State*, in J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility*, Oxford University Press: Oxford, 2010, p.286. However, the International Court of Justice (ICJ), in the *Genocide* case, interpreted Article 16 as to requiring knowledge, rather than intent. Specifically, the ICJ concluded that a conduct can be qualified as complicity when the assisting State aided the acting State "in full awareness" of the latter's intent to use the aid to commit the wrongful act. See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, 26 February 2007, paras.420-423.

82 Section A, Legal and Factual Background.

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

the treaty entered into force on 12 January 1989. Accordingly, the obligations stemming from Articles 1, 2 and 5 of the CAT for which Libyan authorities are responsible in the present case are equally applicable to Italy.

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

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

Torture is strictly prohibited in any circumstance by treaties and customary international law.<sup>83</sup> The prohibition of torture – such as that inflicted on migrants in Libya – also represents a violation of a jus cogens norm.<sup>84</sup> Accordingly, Italy's support to Libya is in violation of Article 41(2) of the ASR by providing assistance in maintaining a situa-

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83 See for instance, Universal Declaration on Human Rights, Art. 5, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Arts. 1, 2, 16, European Convention on Human Rights and Fundamental Freedoms, Arts. 3 and 15.

84 UNGA Resolution 77/209 of 15 December 2022, UN Doc A/RES/77/209 ICJ, Questions Relating to the Obligation to Prosecute or Extradite, *Belgium v. Senegal*, 20 July 2012, para. 99; ICTY, *Prosecutor v. Anto Furundzija*, IT-95-17/1-T, Judgment, 10 December 1998, paras. 144, 153, 155. See also International Law Commission, draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission*, 2001, vol. II, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 85 ('Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.');

Human Rights Committee, General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 8; Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2, 24 January 2008, paras. 1, 3.

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

tion in breach of a peremptory norm as defined by Article 40 of the ASR. Specifically, Article 41(2) establishes that “[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.” Although the prohibition of rendering assistance may seem like a natural extension of the duty of non-recognition, the two obligations have a “separate scope of application” and operate independently.<sup>85</sup>

The International Law Commission clarified that the obligation not to provide aid or assistance in maintaining a situation of a serious breach of a peremptory norm “goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act” (covered by Article 16 of the ASR), as it “extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach”.<sup>86</sup>

Since 2017, Italy's continuous support to Libyan authorities maintained a situation in which migrants were subjected to treatment inconsistent with the jus cogens prohibition against torture. Therefore, besides responsibility stemming from the assistance to the violations of the CAT, as discussed supra, Italy is in clear violation of Article 41 of the ASR.

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<sup>85</sup> See International Law Commission, Report of the International Law Commission on the work of its fifty-third session 23 April - 1 June and 2 July - 10 August 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No.10, A/56/10, 2001. [online] International Law Commission, para. 12, p. 115. Available at: [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

<sup>86</sup> See, International Law Commission, Report of the International Law Commission on the work of its fifty-third session 23 April - 1 June and 2 July - 10 August 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No.10, A/56/10, 2001. [online] International Law Commission, p. 115. Available at: [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).



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

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

Furthermore, Italy's support to Libyan authorities can be in direct breach of its own obligations under the CAT, ECHR and ICCPR. Forms of support and/or direct involvement in operations, such as – inter alia – coordination of LCG rescue missions from Italy and Libya, may trigger the extraterritorial application of the said human rights instruments. In such cases, Italy will have direct responsibility for the human rights violations committed against migrants in Libya.

#### i. Extraterritorial application of the CAT

As noted above, the CAT imposes upon States two different sets of obligations: (i) positive obligations: to prevent acts of torture by adopting positive measures such as legislative and administrative measures or establishing its criminal jurisdiction (for instance Articles 2(1), 5(1) and 7(1)); and (ii) negative obligations: to refrain from committing torture (Articles 1 and 2).<sup>87</sup>

While positive obligations under Articles 2(1), 5(1) and 7(1)

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<sup>87</sup> M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, Oxford: Oxford University Press, 2011 ("Milanovic, *Extraterritorial Application of HR Treaties*"), pp.212, 214-215. See also Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Mission to Tajikistan, A/HRC/22/53/Add.1, 28 January 2013, para.99.

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

are confined to acts of torture occurring in the territory under the control of the State, no geographical limitation is indeed provided vis-à-vis the negative obligations.<sup>88</sup>

These considerations find support in the conclusions of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment that specified that "States' negative obligations under the Convention are not per se spatially limited or territorially defined, nor are its obligations to cooperate to end torture and other ill-treatment."<sup>89</sup>

Further, the assistance provided to acts of torture could be considered complicity attracting state responsibility under the CAT. The prohibition of complicity in torture outlined in Articles 1 and 4 of the CAT is further validated by the practice of the Special Rapporteur<sup>90</sup> and of the Committee against Torture<sup>91</sup> which indicates that complicity in acts of torture occurred abroad is inconsistent with the treaty.

According to such a perspective, the CAT application concerns any State activities that impact the right of an individual not to be tortured wherever that individual is placed.<sup>92</sup> As such, even in cases where migrants are subjected to torture in Libya by non-Italian nationals, Italy may still be in breach of Articles 1 and 2 of the CAT due to the support provided to the direct perpetrators – namely under the MoU structure – that constitutes a contribution to the commission of these crimes.

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

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

90 See 2015 Report of the Special Rapporteur, paras. 20-25.

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

92 See *Opinio Juris*, Pizzuti, A. and Moran, C.F. The Memorandum of Understanding between Italy and Libya: Does It Create Human Rights Obligations on the Part of Italy? 5 August 2021 [online] Available at: <http://opiniojuris.org/2021/08/05/the-memorandum-of-understanding-between-italy-and-libya-does-it-create-human-rights-obligations-on-the-part-of-italy/> ("Pizzutti, Moran 2021").

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

Assistance to the LCG to intercept migrants entitled to asylum may also be inconsistent with the principle of non-refoulement, in violation of Article 3 of the CAT which provides that “[n]o State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>93</sup> In this regard, Italy is still financing and equipping the LCG as well as coordinating its activity during rescue operations, whether from Italy or Libya.<sup>94</sup> Therefore, Italy may be in violation of Article 3 of the CAT where LCG rescue missions result in the mistreatment of migrants intercepted at sea once transferred back to Libyan soil and, more in general, in the presence of substantial grounds for believing that this will happen. Such grounds are widely provided by the various official documents, NGO reports and court documents testifying the widespread mistreatments to which the migrants are subjected, once returned to Libyan soil.<sup>95</sup>

#### ii. Extraterritorial Application of the ECHR

The support to the LCG may also be covered by the extraterritorial application of the ECHR. Specifically, the question of Italy's responsibility for coordinating LCG rescue operations from Rome is now under consideration before the ECtHR in the case *S.S. and others v. Italy*.<sup>96</sup> In this case, the UNHCR, acting as a third-party intervener, maintained that Italy's obligations under the non-refou-

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<sup>93</sup> CAT, Article 3.

<sup>94</sup> See, Senato della Repubblica, Analytical report on ongoing international missions and on the status of development cooperation activities in support of peace and stabilisation processes, referring to the year 2021, also referring to the relevant continuation for the year 2022, approved by the Council of Ministers on 15 June 2022. (Doc. XXVI n.5, Scheda 16/2022 and 33/2022). June 15, 2022.

<sup>95</sup> See, for a general overview of the sources reporting evidence of torture and inhumane treatment, Section A, Legal and Factual Background; Uprights, StraLi, Adala for All. Article 15 Communication on War Crimes and Crimes Against Humanity Committed Against Migrants and Asylum Seekers in Libya to the Office of the Prosecutor of the International Criminal Court. 2022 (“2022 ICC Communication”), paras 503-512.

<sup>96</sup> ECtHR, *S.S. and Others v. Italy*, Application No. 21660/18.

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

lement principle extended to rescue operations carried by the LCG operated in coordination with the Italian Navy.<sup>97</sup> The UNHCR's approach is in line with considerations that "border externalisation" policies are inconsistent with non-refoulement doctrine which applies also in high-seas.<sup>98</sup>

In addition, the extraterritorial applicability of the ECHR may cover the conduct of Italian officers deployed in Libya (on the basis of the MoU) to coordinate the LCG rescue operations or perform other forms of similar support. Indeed, according to the ECtHR "where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State."<sup>99</sup> According to this rationale, in the absence of any indication that the Italian officers have been placed at the full disposal of the Libyan Government, the sup-

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97 2019 UNHCR Submission in *S.S. v. Italy*, paras.4.1-4.7, 6.1.

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

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

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

port provided by the Italian personnel in Libya amounts to executive functions directly attributable to Italy, carried out with the consent of Libya in the context of the MoU, therefore triggering the extraterritorial application of the ECHR.<sup>100</sup>

#### iii. Extraterritorial Application of the ICCPR

The Italian Government's direct support to Libyan authorities, including the provision of assets, financing and training, as well as its involvement in the maintenance and coordination of the LCG rescue missions may also trigger extraterritorial application of the ICCPR. Extraterritorial application may be established on the basis of the "impact approach" to jurisdiction expressed in the General Comment No. 36 of the Human Rights Committee.<sup>101</sup>

Under the aforementioned approach, States parties' obligations under the ICCPR extend to those persons "located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner".<sup>102</sup> While the General Comment No.36 specifically addresses the right to life under Article 6 of the ICCPR, the above-mentioned considerations seem to also apply to the other rights listed in the ICCPR including also Article 7 (prohibition of torture), especially given the comparable nature of the values underpinning these provisions.<sup>103</sup>

Such interpretation of the jurisdictional scope of the IC-

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<sup>100</sup> See, Pizzutti, Moran 2021.

<sup>101</sup> Human Rights Committee, CCPR/C/CG/36, General Comment No.36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018 ("HRC General Comment No.36/2018"), para.63

<sup>102</sup> HRC General Comment No.36/2018, para.63

<sup>103</sup> See, Pizzutti, Moran 2021.

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

CPR (Article 2(1)) was adopted in the case *S.A. and others v. Italy*, where Italy was found responsible for violating the ICCPR for the deaths resulting from the shipwreck of a vessel with hundreds of migrants that occurred in the Maltese SAR Zone.<sup>104</sup> According to the HRC, the facts that Italian authorities were contacted by the vessel first, and that an Italian vessel was closer to the sinking vessel than any Maltese unit were sufficient to establish Italy's jurisdiction.<sup>105</sup> These circumstances created a "special relation of dependency" that engaged Italy's obligation under Articles 2(1) and 6 of the ICCPR.<sup>106</sup>

In the case of Libya, the principles underpinning *S.A. and others v. Italy* seem, a fortiori, applicable to the active involvement and assistance that Italy provided to Libya following the conclusion of the MoU. Indeed, it is undisputed that: (1) the specific active support provided by Italy to Libya has a direct impact on the rights of migrants abused in the detention camps following their interception at sea by the LCG; and (2) such an impact was and is foreseeable.<sup>107</sup>

## d. Individual criminal responsibility

The violations and abuses committed in Libyan detention centres against migrants intercepted at sea by the LCG may amount to war crimes and/or crimes against humanity under Articles 7 and 8 of the ICC Statute.<sup>108</sup> In-

<sup>104</sup> HRC, *S.A. and others v. Italy*, Communication No. 3042/2017, Un Doc. CCPR/C/130/D/3042/2017, 21 January 2021 ("*S.A. v. Italy*"), para.78.

<sup>105</sup> *S.A. v. Italy*, para.78.

<sup>106</sup> *S.A. v. Italy*, para.78.

<sup>107</sup> Section A, Legal and Factual Background.

<sup>108</sup> See A. Pizzuti, ICC Situation on Libya: The ICC Prosecutor Should Look into Libyan Criminal Proceedings Concerning Crimes Committed Against Migrants, in *Opinio Juris*, 20 November 2020 ("*Pizzuti, Libyan Criminal Proceedings*"); L. Prospero, The ICC (Symbolic) Investigation into Crimes Allegedly Committed Against Migrants in Libya, in N. Ronzitti, E. Sciso (eds.), *I conflitti in Siria e Libia, Possibili equilibri e le sfide al diritto internazionale*, Giappichelli: Torino, 2018 ("*Pro-*

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

deed, the Report of the Office of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to Resolution 1970 (2011) of April 2022 stressed that "migrants and refugees in Libya have been subjected to arbitrary detention, unlawful killing, enforced disappearance, torture, sexual and gender-based violence, abduction for ransom, extortion, and forced labour", further assessing that these crimes "may constitute crimes against humanity and war crimes".<sup>109</sup>

These findings have been further confirmed by the most recent Report of the United Nations Independent Fact-Finding Mission on Libya which confirmed the systemic and widespread character of the crimes to which migrants across Libya are subjected, underlining how they are "victims of crimes against humanity and that acts of murder, torture, enslavement, sexual violence, rape and other inhumane acts are committed in connection with their arbitrary detention".<sup>110</sup>

According to such rationale, these acts may trigger the personal responsibility of Italian agents that materially provided assistance to the Libyan authorities, exposing them to possible investigations and prosecutions carried out under the ICC framework.

Pursuant to the United Nations Security Council Resolution 1970 (2011), the ICC has jurisdiction over, inter alia, war crimes and crimes against humanity committed in Libya since 2011. As interpreted by the Pre-Trial Chamber in

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speri, ICC (Symbolic) Investigation", pp.243-264.

109 See, Office of the Prosecutor of the International Criminal Court. Twenty-fourth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant Resolution 1970 (2011). 2022. para. 68. Available at: <https://www.icc-cpi.int/news/twenty-fourth-report-prosecutor-international-criminal-court-united-nations-security-council>. See also, 2022 ICC Communication, p.54-75 and 148-154. See also, See European Centre for Constitutional and Human Rights (2022), Q&A on the Communication to the International Criminal Court on crimes against migrants and refugees in the context of the Situation in Libya. pp.1-2. Available at: [https://www.ecchr.eu/fileadmin/user\\_upload/20221129\\_LibyaICC2\\_QA\\_EN\\_final\\_30\\_11.pdf](https://www.ecchr.eu/fileadmin/user_upload/20221129_LibyaICC2_QA_EN_final_30_11.pdf)

110 See UNSC. Report of the Independent Fact-Finding Mission on Libya, A/HRC/52/83, 2023, pp.9-10. Available at: <https://www.ohchr.org/en/hr-bodies/hrc/libya/index>.

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

the Al-Werfalli case, the ICC's jurisdiction covers crimes connected or "sufficiently linked" to the ongoing armed conflict.<sup>111</sup> In this context, the then ICC Prosecutor, Fatou Bensouda, stated that her office was actively involved in the investigation of, inter alia, crimes and abuses committed against migrants in Libya.<sup>112</sup>

Since the signing of the MoU, Italian authorities, including government officials, members of the Italian Parliament and military personnel, "adopted a series of measures to set up the LCG and bolster it to intercept migrants attempting to cross the Mediterranean Sea and to return them to Libya".<sup>113</sup> This was done through the provision of patrol vessels, maintenance services, training, infrastructures and equipment, assistance for the creation of the Libyan SAR zone, and direct assistance during the LCG's search and rescue operations.

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

Article 25(3)(d)(ii) provides a residual form of responsibility under the ICC framework, covering the assistance provided to a group acting with a common criminal purpose in the knowledge of the intention of the group to commit the crime. It encompasses any form of con-

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<sup>111</sup> See ICC, Pre-Trial Chamber I, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, ICC-01/11-01/17, Warrant of arrest, 15 August 2017, para.23.

<sup>112</sup> See, e.g., Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), 5 May 2020. See also Pizzuti, *Libyan Criminal Proceedings; and Proserpi*, ICC (Symbolic) Investigation.

See, 2022 ICC Communication, pp.164-166.

<sup>113</sup> See, 2022 ICC Communication, pp.164-166.



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

tribution that may have a connection with the material (including provision of resources/weapons) or subjective elements of the crimes (encouragement).<sup>114</sup> As confirmed by the recent jurisprudence of the ICC, any level or degree of contribution engages liability under this provision.<sup>115</sup> Notably, remote or limited conduct which contributed to the crime is also captured by Article 25(3)(d).

Moreover, under Article 25(3)(d)(ii), the person that provides the contribution does not need to have intended the commission of the crime.<sup>116</sup> Mere intention to aid, in the knowledge of the intention of the group to commit the crime, satisfies the subjective element of the provision.<sup>117</sup>

The logistic support provided by the Italian agents under the MoU appears to meet the requirements of Article 25(3)(d)(ii). Such assistance facilitated the return of migrants rescued at sea to the detention centres in Libya where crimes were subsequently committed by armed groups (i.e., groups with common criminal purpose).<sup>118</sup> Even without intention on the part of Italian authorities for such crimes to be committed, it is sufficient that their assistance was provided with the knowledge that migrants would suffer such crimes after being intercepted and returned to Libya. The common knowledge of the conditions of detention of migrants in Libya leaves little doubt in this regard.<sup>119</sup>

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<sup>114</sup> ICC, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436-tENG, Judgement pursuant to Article 74, 7 March 2014 ("Katanga Trial Judgment"), para.1635.

<sup>115</sup> ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, 24 March 2016, para.27; ICC, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, para.44.

<sup>116</sup> *Katanga Trial Judgment*, para.1638; ICC, *The Prosecutor v. Callixte Mbarushimana*, ICC-01/04-ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011 ("Mbarushimana Confirmation Decision"), para.289.

<sup>117</sup> *Mbarushimana Confirmation Decision*, para.289.

<sup>118</sup> See, 2022 ICC Communication, para. 19, p. 14. para. 444, p. 164. para. 455, p. 168 and paras 484-489, p.182.


<sup>119</sup> Section A, Legal and Factual Background. See also, 2022 ICC Communication, paras 503-512.

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

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





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#### IV. Modification, termination or suspension the MoU

# IV. MODIFICATION, TERMINATION OR SUSPENSION OF THE MOU

## a. Necessary modifications or amendments to the MoU

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

Notably, the MoU was tacitly renewed in February 2023,<sup>120</sup>

<sup>120</sup> See, Tranchina, G. for Human Rights Watch. L'Italia rinnova i finanziamenti per respingere i migranti in Libia. 2023. Available at: <https://www.hrw.org/it/news/2023/02/01/italy-reups-fun->

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#### IV. Modification, termination or suspension the MoU

despite the multiple instances in which, since 2020, different members of the Italian governments expressed their willingness to negotiate amendments to improve the human rights standards applied in the treatment of migrants. In particular, in September 2020 Mr. Luigi Di Maio (at that time the Italian Minister of Foreign Affairs) sent a letter to Amnesty International reflecting Italy's efforts to negotiate amendments to pursue the progressive closure of detention centres and the involvement of UNHCR/IOM in the management of refugees and migrants in Libya.<sup>121</sup> Notwithstanding that, as of 2023, the text of the MoU remains unchanged.

Nonetheless, even the amendments envisaged by Mr. Luigi di Maio in 2020 were not sufficient to tackle the systemic nature of the human rights violations committed against migrants in Libya, nor to exclude Italy's responsibility for such violations on the basis of the MoU.

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

Such an approach is in line with the views of the Council of Europe (CoE) Commissioner for Human Rights, the Office of the High Commissioner for Human Rights (OHCHR) and the Committee Against Torture. Their recommendations concerning the MoU all point towards the need to implement an independent monitoring system to review the conditions of migrants in Libya and to

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121 2020 AI Report, p.19.

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#### IV. Modification, termination or suspension the MoU

make Italy's support contingent upon Libyan authorities' effective compliance with human rights standards.<sup>122</sup> In addition, the CoE Commissioner for Human Rights included in her report a recommendation to establish a framework allowing for an effective redress with respect to any complaint of "those who nonetheless consider that the enjoyment of their rights has been affected by the co-operation activities."<sup>123</sup>

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

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

1. The essential character of the human rights clause. First, the human rights clause needs to specify that respect of human rights, and possibly international humanitarian law, is an essential element of the treaty and that the parties can suspend or terminate the treaty in case of persistent violations of such clause.
2. Independent monitoring framework. An independent body in charge of monitoring the impact of the cooperation activities vis-à-vis potential human rights violations committed by the parties needs to be established. Such an independent body should be re-

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<sup>122</sup> Committee against Torture, Concluding observations on the fifth and sixth periodic reports of Italy, CAT/C/ITA/CO/5-6, 18 December 2017, paras.22-23; 2018 UNSMIL Report, pp.58-59; Commissioner for Human Rights of the Council of Europe, Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean, June 2019 ("2019 CoE Human Rights Commissioner Report"), pp.42, 44; 2020 CoE Human Rights Commissioner Letter, pp.1-2. See also Commissioner for Human Rights of the Council of Europe, A Distress Call for Human Rights. The widening gap in migrant protection in the Mediterranean. Follow-up Report, March 2021 ("2021 CoE Human Rights Commissioner Report"), pp.25-26.

<sup>123</sup> 2020 CoE Human Rights Commissioner Letter, pp.1-2. See also 2019 CoE Human Rights Commissioner Report, p.42; 2021 CoE Human Rights Commissioner Report", pp.25-26.

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## IV. Modification, termination or suspension the MoU

sponsible for conducting an early “human rights risk assessment” of the activities encompassed by the MoU, developing risk mitigation strategies and monitoring the implementation of such activities to assess their consistency with human rights standards.

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

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

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

Mutatis mutandis, similar mechanisms already exist in other fields. For instance, Article 7 of the Arms Trade Treaty, to which Italy is a party, requires the exporting state to conduct a risk assessment to monitor and determine whether the arms/items to be exported could be used, inter alia, to commit and facilitate violations of human rights law and international humanitarian law.<sup>124</sup> If such risk exists, the exporting state shall consider implementing

<sup>124</sup> Arms Trade Treaty, Article 7(1)(b)(i), (ii).

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#### IV. Modification, termination or suspension the MoU

measures to mitigate such risk or, in case of an “overriding risk” of any of such violations, shall not authorise the export of the arms.<sup>125</sup>

More on point with respect to the present case is the UN Human Rights Due Diligence Policy on Support for Non-United Nations Security Forces (HRDDP).<sup>126</sup> The HRDDP was developed in March 2013 as a mechanism to ensure that any support that the UN provides to non-United Nations forces is consistent with “its obligations to respect, promote and encourage respect for international humanitarian, human rights and refugee law.”<sup>127</sup>

According to the HRDDP, any support provided to non-UN security forces is contingent on an assessment of the potential risks/benefits of such support. The Policy takes into consideration a number of factors, including the human rights record of the institution/individuals which are to receive their support and the existence of adequate procedures to address possible violations.<sup>128</sup> Once support is provided, the relevant UN entity involved is required to assess the impact of its support and to establish a mechanism for monitoring “the recipient’s behaviour to detect grave violations of humanitarian, human rights and refugee law”.<sup>129</sup> Mitigating measures have to be put in place in case the UN receives information that the recipient of the support is committing grave violations of humanitarian, human rights and/or refugee law.<sup>130</sup> If such violations continue, the UN will suspend its support.<sup>131</sup>

<sup>125</sup> Arms Trade Treaty, Article 7(2), (3).

<sup>126</sup> United Nations General Assembly, Identical Letters dated 25 February 2013 from the Secretary-General Addressed to the President of the General Assembly and to the President of the Security Council, A/67/775-S/2013/110, 5 March 2013 (“2013 UNSG Letters”), Annex - Human Rights Due Diligence Policy on United Nations Support to non-United Nations Security Forces.

<sup>127</sup> 2013 UNSG Letters, Annex - Human Rights Due Diligence Policy on United Nations Support to non-United Nations Security Forces, para.1.

<sup>128</sup> 2013 UNSG Letters, Annex - Human Rights Due Diligence Policy on United Nations Support to non-United Nations Security Forces, para.14(a)-(c).

<sup>129</sup> 2013 UNSG Letters, Annex - Human Rights Due Diligence Policy on United Nations Support to non-United Nations Security Forces, para.21(c). See also *ibid.*, para.21(d)-(g)

<sup>130</sup> 2013 UNSG Letters, Annex - Human Rights Due Diligence Policy on United Nations Support to non-United Nations Security Forces, para.26.

<sup>131</sup> 2013 UNSG Letters, Annex - Human Rights Due Diligence Policy on United Nations Support

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#### IV. Modification, termination or suspension the MoU

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

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

As explained above, the conduct of Libyan authorities and the mistreatment of migrants expose Italy and/or its agents to international responsibility by virtue of Italy's cooperation pursuant to the MoU. At the same time, in the current framework, Italy is still obliged to provide such cooperation, according to Articles 1 and 2 of the MoU, without any possibility of either reviewing or monitoring Libya's conduct.

This situation renders the position of Italy unsustainable, as it is caught between two conflicting international obligations. On one side, as pointed out supra, Italy is bound to prevent (and punish) human rights violations, such as acts of torture and inhumane treatment, also when they integrate international crimes. On the other, Italy is required by the MoU to assist Libyan authorities irrespective of whether such assistance results in human rights breaches. The current approach – i.e. providing continued assistance to Libyan authorities – is in violation of the former obligations and leaves Italy vulnerable to state and individual responsibility under international law.

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to non-United Nations Security Forces, para.27.



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#### IV. Modification, termination or suspension the MoU

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

Not every violation of a treaty justifies its termination or suspension. According to Article 60 of the VCLT, only those violations that amount to material breaches allow for such possibility. Article 60(3)(b) of the VCLT defines material breaches as including “[t]he violation of a provision essential to the accomplishment of the object or purpose of the treaty”.<sup>132</sup> In this regard, it is important to note that within the meaning of Article 60(3)(b) “not only ‘central’ provisions but also ‘ancillary’ provisions could be essential”.<sup>133</sup>

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

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<sup>132</sup> See also Permanent Court of Arbitration (PCA), Arbitration between the Republic of Croatia and the Republic of Slovenia, *Croatia v. Slovenia*, Partial Award, PCA Case No. 2012-04, ICGJ 509 (PCA 2016), 30 June 2016, paras.215-27; ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, paras.94-95; ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, paras.270-276. See also C. Tams, *Regulating Treaty Breaches*, in M. Bowman, D. Kritsiotis (eds.), *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, Cambridge University Press: Cambridge, 2018, pp.446-449.

<sup>133</sup> T. Giegerich, Article 60, in O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, Springer: Berlin, 2018, pp.1105-1106.

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#### IV. Modification, termination or suspension the MoU

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

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

This gives rise to considering whether Libya’s violations of the MoU affect provisions that are essential to the accomplishment of the object or purpose of the treaty. As noted above, only violations that are essential to the accomplishment of the object or purpose of the treaty may justify its termination or suspension. The “object and purpose” of a treaty converges on the reasons the parties had to conclude it, as well as the general result which they want to achieve through it.<sup>134</sup> A treaty may have various objects and purposes.<sup>135</sup> Generally, a treaty’s “object and purpose” may be inferred from its title and preamble – the latter is generally where the parties list the purposes they

<sup>134</sup> M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill: Leiden/Boston, 2009 (“Villiger, *Commentary on VCLT*”), p.271 (“What is meant by a treaty’s object and purpose? As in Article 31 (q.v., N. 11), the terms are used as a combined whole and include a treaty’s aims, its nature and its end.”). See also C. Walter, Article 19, in O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, Springer: Berlin, 2018 (“Walter, Article 19 VCLT”), p.289.

<sup>135</sup> Villiger, *Commentary on VCLT*, p.271.

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#### IV. Modification, termination or suspension the MoU

want to pursue through their agreement – as well as from a reading of the treaty as a whole.<sup>136</sup> In some cases, the preparatory works and the parties' subsequent practice may also assist in clarifying the scope of the object and purpose of a treaty.<sup>137</sup>

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

The same considerations apply to Libya's violation of Article 5 of the MoU, which requires both parties to act consistently with their human rights obligations. The fact that such a provision is an essential component of the MoU can be inferred from the reference in the preamble that Italy's and Libya's willingness to cooperate and implement the MoU is articulated based on their obligations deriving from international treaty and customary law. A review of the MoU indicates that such reference must necessarily include customary, and treaty human rights obligations incorporated in Article 5 of the MoU.

The importance of human rights compliance is also con-

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<sup>136</sup> Walter, Article 19 VCLT, p.289.

<sup>137</sup> Walter, Article 19 VCLT, p.289; Villiger, Commentary on VCLT, p.272; ILC, Report of the Commission to the General Assembly on the work of its fifty-ninth session, in Yearbook of the International Law Commission, 2007, Vol. II, Part 2, Guideline 3.6.1, p.37 ("[t]he object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context. Recourse may also be had in particular to the title of the treaty, the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice agreed upon by the parties.").

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#### IV. Modification, termination or suspension the MoU

firmed by official declarations concerning the intention of the parties and the subsequent practice of Libya and Italy in implementing the MoU.

Indeed, a reference to respect for human rights is included in the Exchange of Notes of 16 May 2019/10 June 2019 whereby, pursuant to the MoU, Italy provided Libya with 10 patrol boats to support LCG's efforts to, inter alia, engage in rescue missions as well as counter illegal migration and human trafficking at sea.<sup>138</sup> Paragraph 3 of the Italian Nota Verbale specifies that Libya's authorities are expected to deploy the vessels in accordance with international human rights standards.<sup>139</sup> In reply, in the Libyan Nota Verbale, Libya agreed to such terms of use.<sup>140</sup> The exchange of notes confirms the pivotal role of human rights obligations as a parameter for the execution of the MoU.

This conclusion is further supported by some official declarations of the then Minister of the Interior of Italy, Marco Minniti, before the Italian Parliament and the CoE Commissioner for Human Rights. During a session before the Italian Parliament, Minniti emphasised the importance of the respect of human rights obligations, specifying that: (i) the application of the MoU had to be strictly combined with an "absolute and profound" respect of human rights obligations;<sup>141</sup> and (ii) the compliance with human rights standards is a fundamental aspect of any agreement in which Italy enters into, especially when it is specified in such agreement.<sup>142</sup>

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138 Italian Embassy Nota Verbale No. 1440/2019, paras.2-3.

139 Italian Embassy Nota Verbale No. 1440/2019, para.3.

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

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

142 22 February 2017 Session of the Italian Commission of Inquiry, Resoconto Stenografico

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Likewise, in his letter addressing the CoE Commissioner for Human Rights' concerns regarding the human rights implications of Italy's cooperation with the Libyan authorities pursuant to the MoU, Marco Minniti replied that: (i) under the MoU, Italy considered the question of human rights compliance to be crucial and an essential component of the government strategy in this regard; (ii) Italy's twofold purpose was to avoid migrants' sea-crossing that may endanger their life and to guarantee the respect of international human rights standards in Libya; and (iii) the compliance with human rights standards is an issue that is at the core of the dialogue between Libya and Italy.<sup>143</sup>

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

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

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

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<sup>143</sup> Letter of the Italian Minister of Interior Marco Minniti to the CoE Commissioner for Human Rights, 11 October 2017.

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#### **IV. Modification, termination or suspension the MoU**

of the VCLT to suspend or terminate the agreement.

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





# CONCLUSIONS AND RECOMMENDATIONS

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## V. Conclusion and recommendations

1. Italy's support provided on the basis of the MoU to the Libyan authorities is instrumental to the human rights abuses and/or international crimes suffered by migrants rescued at sea by the LCG. This leads to Italy's international responsibility for the violation of its human rights obligations, including under the CAT, ECHR and ICCPR, and exposes the Italian agents to possible prosecution for complicity in international crimes, in particular in front of the International Criminal Court.
2. Two main courses of action are recommended to disengage Italy from such responsibility:
  - a. Negotiating an amendment to the MoU which incorporates a human rights clause ensuring that the implementation of the activities provided there to is contingent on the respect of

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## V. Conclusion and recommendations

human rights by both parties. A revised MoU should contain an enforceable human rights clause which includes at a minimum:

- i. A clear statement that the respect of human rights and international humanitarian law is an essential element of the MoU;
  - ii. The establishment of an independent body or organ in charge of monitoring and evaluating human rights and international humanitarian law compliance by the parties in the execution of the MoU;
  - iii. A list of mitigating measures which parties may seek in the event of human rights violations to address such violations and ensure non-repetition;
  - iv. The implementation of a legal framework to facilitate effective access to justice for those who suffered human rights violations connected to the Italian support on the basis of the MoU;
  - v. The ability for the parties to review, suspend or terminate any form of cooperation in case of persistent violations of the human rights clause.
- a. In the alternative, suspending or terminating the MoU pursuant to Article 60 of the VCLT in light of Libya's violations of Articles 1, 2 and 5 of the MoU.





