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Italy-Libya Memorandum of Understanding: Italy's International Obligations

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Introduction

In February 2017, Italy entered into an agreement with Libya, the Memorandum of Understanding (hereinafter, “MoU”), whereby the two countries committed to curbing what they referred to as “illegal immigration” from the Libyan coast to Italy.¹ While Italy is providing the North African country with investments to further economic development and stability as well as vessels and border security instruments, Libya is intercepting boats of migrants at sea and preventing people from departing its territory to reach Europe. The agreement also provides for funding for Libyan detention centers and for other organizations engaging in the forced as well as voluntary departure of migrants from the country.

The issues arising from this agreement are plenty. In recent years alone, Libya has been under the scrutiny of non-governmental international organizations due to its widespread human rights violations. Migrants in particular are discriminated against, detained in dire conditions, and fall prey to human traffickers and crime. In addition, Libya is reportedly, with Italian support, sending migrants back to their countries of origin, without any regard to their status or need for international protection, and without ensuring that they will be safe if returned. Italy, along with the rest of the international community, is well aware of these issues, yet shuts a blind eye to Libya's draconian measures in dealing with immigrants in order to avoid taking the responsibility on itself.²

1. Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic (2017), http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

2. See *EU Shifting Rescue to Libya Risks Lives: Italy Should Direct Safe Rescues*, Human rights Watch (June 19, 2017, 12:01 AM), <https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives> (It was reported that a Libyan vessel fired against an Italian vessel mistaking it for a boat of migrants, Italian authorities denied this happening).

Libya is also controlled by different forces that are fighting to gain more power and want to partake in the lucrative business provided by the agreement. Officially, the parties to the MoU are the Italian government and the UN-backed Government of National Accord (“GNA”) of Prime Minister Fayez al-Serraj. The GNA is the internationally recognized government of Libya and the entity controlling the country. In reality, however, following the 42-year-long government of Muammar Gaddafi, the country has been in a status of chaos, and several groups control different cities and regions of the country, making it difficult for the GNA to gain full control over Libya. These groups are armed militias, the Islamic State, and the General National Congress (GNC), an Islamist-led administration based in Tripoli challenging the GNA authority, though some of its members have recognized it.³ The GNA is backed by the Libyan National Army (LNA), which is supported by different units, including some militias.⁴ Libyan militias are well known for engaging in smuggling, human rights abuses and the organized crime that contributes to Libyan instability. There have been allegations of Italy paying some of them to take part to its fight against illegal immigration, which caused further criticism of Italy’s conduct in the country.

While Italy is making sure to delegate the “dirty work” of pushing away migrants to Libyan authorities and trying to prevent crossings into its waters in order to circumvent international obligations, Italy may still be held accountable under several international law instruments. Under the Convention Against Torture,⁵ of which Italy is a party, not only should a state not perpetrate the torture and degrading treatment of individuals, but it also may not return such individuals to a country where they might suffer the same abuses. The same principle, that of non-refoulement, is expressed in the 1951 UN Convention relating to the Status of Refugees⁶ and the related 1967 Protocol.⁷ While Libya is not a signatory to the 1951 Refugee Convention or the 1967 Protocol, Italy ratified both legal instruments and is thus bound by them. Both treaties forbid state parties from returning to their countries of origin those who fear persecution at home on the basis of race, religion, nationality, membership in a particular social group or

3. *Guide to key Libyan militias*, BBC NEWS (Jan. 11, 2016), <http://www.bbc.com/news/world-middle-east-19744533>.

4. *Id.*

5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (as modified by 24 I.L.M. 535 (1985)) (entered into force June, 26 1987).

6. Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

7. Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

political opinion.

Because arguably Italy is not directly engaging in this conduct under the agreement, and it is instead paying Libya (with EU support) to do that, it might be difficult to prove its direct responsibility under CAT and the Refugee Convention and Protocol. However, the International Law Committee's Articles for State Responsibility provide a legal framework, which is widely accepted, that may serve to attach responsibility for these acts to Italy due to its heavy financial and logistical contribution to Libya's international law violations.

This article will thus address, in Part 1, the relevant political and historical background, including the recent history of the relations between Italy and Libya in terms of migration control. Part 2 will then outline the content of the latest agreement on the matter, and, lastly, Part 3 will analyze Italy's international obligations and the implications emerging from the agreement that Italy should take into serious consideration while implementing it. The note will also briefly discuss alternatives and solutions that Italy should apply in order to avoid responsibility for human rights and international law violations that is likely to attach otherwise.

1. Background

The Historical Context: Libya

Libya is currently in a situation of political confusion, which is very much linked to a similarly unruly modern history. Italy colonized Libya in the early 1900s and, during the almost forty-year-long occupation, thousands of Libyans died, and indigenous populations were discriminated against and largely excluded from the economy.⁸ When Italy left the country in 1951, Libya was left in dire conditions, with high infant mortality rates and widespread illiteracy. The discovery of oil that followed brought more business into the country, but also corruption and division, which resulted in the 1969 populist revolution. It was during the revolution that Col. Moammar Gaddafi started gaining power, first leading the popular revolution, then deposing the king with a military coup and finally, once in power, restructuring the country's politics and reshaping its economy in an attempt to create a "stateless society."

Gaddafi outlawed political parties and set up revolutionary committees to repress opposition and further the regime's will; private land

8. David S. Sorenson, *A History of Modern Libya* (reviewing DIRK VANDEWALLE A HISTORY OF MODERN LIBYA 2006); see also Dirk Vandewalle, *A History of Modern Libya*, FOREIGN AFFAIRS COUNCIL, <https://www.foreignaffairs.com/reviews/capsule-review/2006-09-01/history-modern-libya>.

was confiscated, and independent media was shut down.⁹ Creating independent unions and practicing as private professionals became impossible, and doctors, lawyers and others were forced to work for the government.¹⁰ The government also gained complete control over imports, exports and also food rations, which in turn spurred the creation of an underground black market.¹¹

Gaddafi's radical agenda fueled opposition both inside and outside the country. While the Libyan population was mostly concerned with its leader's draconian actions, the rest of the world saw the country as a sponsor of terrorism. When the Arab Spring started, therefore, Gaddafi's government was not immune from popular upheaval, and, with NATO's intervention on the side of Libyans, Gaddafi's government crumbled, and he was killed shortly thereafter in 2011.¹²

Following Gaddafi's ousting, Libya remains a country without a government that has authority over its entire territory. Though elected and internationally backed, the GNA struggles to keep a hold of the country, while rival militias and the Islamist-led administration in Tripoli continue to exert influence and power in large areas and towns across Libya, and militias keep engaging in contraband, human trafficking, and smuggling of migrants and supplies.¹³

Italy's Immigration Dilemma

Italy has been the destination or way station of many migrants over the past few decades. Immigrants have come mostly from North Africa, Sub-Saharan Africa, Eastern Europe, and Asia, looking to either stay or to make their way to wealthier northern European countries.¹⁴ Following the Arab Spring, migration from North-African and Middle Eastern countries to Europe has intensified, and Italy's geographical position at the border of the EU and right on the Mediterranean have made it one of the most

9. Karim Mezran, *Libya: The Rise and Fall of Qaddafi*, MIDDLE EAST POLICY COUNCIL, <http://www.mepec.org/libya-rise-and-fall-qaddafi>.

10. *Id.*

11. *Id.*

12. Martin Asser, *The Muammar Gaddafi Story*, BBC NEWS (Oct. 21, 2011), <http://www.bbc.com/news/world-africa-12688033>.

13. Floor El Kamouni-Janssen and Kars de Bruijne, *CrisesAlert 3, Entering the Lion's Den: local militias and governance in Libya*, CLINGENDAEL REPORT (2017), <https://www.clingendael.org/sites/default/files/2017-10/crisesalert-3-entering-the-lions-den-local-militias-and-governance-in-libya.pdf>.

14. Angelo Scotto, *From Emigration to Asylum Destination, Italy Navigates Shifting Migration Tides*, MIGRATION POLICY INSTITUTE (Aug. 24, 2017), <https://www.migrationpolicy.org/article/emigration-asylum-destination-italy-navigates-shifting-migration-tides>.

attractive ports of entry to the old continent.¹⁵ During 2015 and 2016, 335,000 irregular migrants reached Italy's shores via the Mediterranean, putting a strain on the Italian immigration system and contributing to the recent European migration crisis.¹⁶

In 2013, following a shipwreck near the island of Lampedusa where 366 people died, Italy set up a Search And Rescue program, "Mare Nostrum" ("Our Sea"), whereby the Italian Coast Guard and the Navy helped and brought to its shores more than 160,000 migrants.¹⁷ The program was praised internationally, so much that the EU took it over and created Triton, a similar initiative whose primary purpose, however, is not, like Mare Nostrum, to rescue migrants, but rather to monitor irregular crossings over the Mediterranean.¹⁸

Italy has made commitments to refugees through its ratification of international instruments. Other than creating the rescue system of Mare Nostrum, Italy implemented policies and laws in accordance with international conventions related to the protection of refugees once they reach the Italian territory. Italy set up its national asylum system in 2001. Those seeking to obtain refugee status may apply upon entry or at a police station.¹⁹ The applicant is then interviewed to verify his or her identity and whether he or she was in other EU states before entering Italy.²⁰ Despite a 30-day term for a hearing to take place, applications often remain pending for over thirty days, and up to 18 months.²¹ During this time, many asylum seekers (particularly those who applied after being stopped by authorities in the country or upon entry and found to be present illegally) remain in detention for several months and receive little to no updates on the status of their case.²² Once a decision is reached, an asylum-seeker may appeal within 30 days, or 15 if he or she is in detention.²³ About 30,000 people

15. Scotto, *supra* note 14.

16. *Id.*

17. Redazione Ansa, *Da Mare Nostrum a Triton, le differenze*, ANSA.IT, (Jul. 9, 2017, 6:03 PM), http://www.ansa.it/sito/notizie/cronaca/2015/04/19/da-mare-nostrum-a-triton-le-differenze_e5692d7c-0511-411e-a819-5393560575ba.html.

18. *Id.*

19. ASGI, *Short Overview of the Asylum Procedure, Italy*, AIDA Asylum Information Database, <http://www.asylumineurope.org/reports/country/italy/asylum-procedure/general/short-overview-asylum-procedure>.

20. *Id.*

21. *Id.*

22. Corallina Lopez Curzi, *Come in Carcere, Ma Senza i Diritti dei Detenuti*, OPEN MIGRATION (June 9, 2017), <https://openmigration.org/analisi/come-in-carcere-ma-senza-i-diritti-dei-detenuti/>; *Refugee Law and Policy: Italy*, Library of Congress, <https://www.loc.gov/law/help/refugee-law/italy.php> [last updated June 21, 2016].

23. ASGI, *supra* note 19.

applied for asylum annually between 2000 and 2010.²⁴

In response to the recent European refugee crisis in 2015, the Italian public has displayed growing sentiments of xenophobia and racism, which led populist and far-right parties to gather consensus by pushing an anti-immigration agenda.²⁵ This motivated the left-wing Italian government to, on the one hand, ask the EU and other member states for more cooperation and support on migration, while, on the other hand, approving more restrictive immigration policies.²⁶ It is in this context that Italy struck a deal with Libya to curb illegal immigration through the MoU, which some argue was a way for the government to prove its strength and decisiveness on the issue.

2. The Agreement

Italian-Libyan Cooperation: A Brief History

Italy and Libya initiated cooperation agreements on migration in the early 2000s, pledging to fight terrorism, organized crime, drug-trafficking, and illegal migration. Numerous similar agreements followed, many of which are still unpublished.²⁷ The most prominent agreements are the 2000 and 2003 agreements, the 2006 Memorandum for the cooperation against illegal migration, the 2007 Protocol and Additional Protocol to the 2006 Memorandum, the 2008 Treaty on Friendship, Partnership and Cooperation, the 2009 Executive Agreement, and, lastly, the 2017 Memorandum of Understanding.

As part of their first bilateral agreement of December 2000, the two countries committed to assisting each other in the effort to curb irregular migration and exchanging information.²⁸ In 2003, Libya and Italy defined in more details how to operationalize the 2000 agreement. Neither the 2000 nor the 2003 agreement were published.²⁹

In 2006, the countries signed a Memorandum for the cooperation

24. Scotto, *supra* note 14.

25. *Id.*; see also Patrick Strickland, *How Italy's Far Right Exploits the Migration Crisis*, AL-JAZEERA (Jan. 15, 2018), <http://www.aljazeera.com/news/2018/01/italy-exploits-migration-crisis-180114200719130.html>.

26. Scotto, *supra* note 14.

27. Mariagiulia Giuffrè, *State Responsibility Beyond Borders: What Legal Basis for Italy's Push Backs to Libya?*, 24 INTL. JOURNAL OF REFUGEE LAW 692, 692-734 (2012).

28. *Accordo tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista per la Collaborazione nella Lotta al Terrorismo, alla Criminalità Organizzata, al Traffico Illegale di Stupefacenti e Sostanze Psicotrope e All'Immigrazione Clandestina* (Rome, 13 Dec 2000).

29. Giuffrè, *supra* note 27.

against illegal migration which then resulted in the 2007 Protocol and Additional Protocol.³⁰ Libya and Italy reaffirmed the commitments made in 2000 and established a joint mission whereby Libya would patrol its coastline and international waters, while Italy would supply it with vessels on a temporary basis.³¹ One year later, in 2008, the countries signed a Treaty on Friendship, Partnership and Cooperation (hereinafter “TFPC”) in Tripoli,³² and in 2009 they signed an executive agreement to enforce the 2007 Protocol.³³

The 2007 Protocol and Additional Protocol entrusted Libyan authorities with large control over maritime missions, with Italian officials joining Libyan authorities on board only to provide training and give technical support. Libyan authorities would intercept boats of migrants and take them back to its coast prior to reaching Italian territorial waters, relieving Italy from exercising legal authority over those returned to Libya.³⁴ Therefore, Italy would avoid either taking the migrants it stopped into its territory, or returning them to Libya and facing the possibility of breaching its international obligations.³⁵ What was Libya to do with those halted and returned to its territory, however, was not specified.

The 2008 TFPC reiterated the two countries' relationship generally. Italy and Libya agreed to move past old hostilities, most notably the suffering caused to Libya by Italian colonization.³⁶ They also agreed to engage in regional cooperation, and Italy committed itself to bringing investments and substantial financing to Libya.³⁷ The countries also reaffirmed principles such as respect for sovereign equality, prohibition of the threat or use of force, non-interference in internal affairs, respect for human rights (Art. 6 of the TFPC) and fundamental freedoms.³⁸

Within the TFPC chapter regarding partnership and immigration, Art. 19 committed the parties to collaborating to prevent illegal immigration in

30. *Protocollo tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista* (Tripoli, 29 Dec 2007); *Protocollo Aggiuntivo Tecnico-Operativo al Protocollo di Cooperazione tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell'immigrazione Clandestina* (Tripoli, 29 Dec 2007).

31. *Id.*; see also Natalino Ronzitti, *The Treaty of Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?*, 1 BULLETIN OF ITALIAN POLITICS, 125, 125-133 (2009).

32. *Trattato di Amicizia, Partenariato, e Cooperazione* (Bengazi, 30 Aug 2008), ratified by Italy with Law No. 2009/7 (TFPC).

33. Giuffrè, *supra* note 27.

34. *Id.*

35. *Id.*

36. Ronzitti, *supra* note 31.

37. *Id.*

38. *Id.*

the countries of origin of the migratory flows through bilateral and regional initiatives, such as the patrolling of the Libyan coast by mixed crews on boats provided by Italy, and the implementation of a satellite detection system to control Libyan land borders financed by Italy and the EU.³⁹

Through the 2009 Executive Protocol⁴⁰ enforcing the 2007 Protocol and Additional Protocol, Italy started supplying Libya with six Italian vessels on a permanent basis, making Libya's participation on illegal immigration control more proactive and paving the way for push-back practices.⁴¹ Most notably, none of these protocols and agreements made the important distinction between asylum seekers and other irregular migrants.⁴² This relationship was temporarily suspended in 2012, due to the outbreak of a civil war in Libya and the ECtHR judgement *Hirsi et al. v. Italy* condemning the interception and return of migrants to Libya by Italy (explored further below).⁴³

The 2017 Memorandum of Understanding

The current agreement, which is the object of this note, was finalized in February 2017 as the Memorandum of Understanding, and is meant to extend and incorporate the commitments made in the 2008 TFPC.⁴⁴ According to the MoU, Italy will be providing Libyan authorities with training and equipment, while also investing to help Libya improve border security and combat smuggling of people, and engage the Libyan government in smuggling hubs.⁴⁵

The document is three pages long, and includes eight articles. The first two articles iterate the two countries' commitments and encourage starting cooperation efforts in accordance with the 2008 TFPC. In Art. 1,

39. Ronzitti, *supra* note 31.

40. *Protocollo Aggiuntivo Tecnico-Operativo concernente l'aggiunta di un articolo al Protocollo firmato a Tripoli il 29/12/2007 tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell'immigrazione clandestina* (Tripoli, 4 Feb 2009).

41. Giuffrè, *supra* note 27.

42. *Id.*

43. Anja Palm, *The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?*, ISTITUTO AFFARI INTERNAZIONALI (Oct. 2, 2017), <http://www.iai.it/it/pubblicazioni/italy-libya-memorandum-understanding-baseline-policy-approach-aimed-closing-all-doors>.

44. *Memorandum of Understanding*, *supra* note 1 (The introduction to the MoU recites "In order to implement the relevant agreements undersigned by the Parties, among which the Treaty of Friendship, Partnership and Cooperation signed in Bengasi on August 30th 2008 — in particular with respect to Article 19 of the same Treaty —, and the Tripoli Declaration of January 21st 2012 as well as other agreements and memoranda on the subject.").

45. *Id.*

Italy promises financial investments in the areas affected by illegal migration for industries such as renewable energy and infrastructure so as to create new jobs and substitute smuggling as a source of revenue. Italy also promised technical support to Libyan institutions that work on curbing illegal migration. Art. 2 has the parties commit to completing the land border control satellite detection system as foreseen in Art. 19 of the TFPC. Under the same article, Italy also agrees to finance existing “hosting centers” for migrants and to supply them with medical equipment. Both parties commit to ensuring that Libyan personnel in the hosting centers is trained to “face illegal immigrants’ conditions.” They also commit to adopting a “wider and more complete Euro-African cooperation view, to eliminate the causes of irregular immigration,” supporting countries of origin and improving their life standards and employment rates. Both parties agree to support organizations in Libya that return migrants to their country of origin, “including voluntary return.”⁴⁶ Lastly, they will start development programs in Libya to create jobs and income and replace contraband and human trafficking that militias and irregular local groups largely benefit from.⁴⁷

Art. 3 encourages the creation of a committee to oversee the implementation of the agreement, Art. 4 deals with the financing, Art. 5 iterates the parties’ commitment to interpret and apply the MoU in accordance with international and human rights obligations. The last three articles deal with the agreement’s enforcement mechanisms and other procedural matters. The overall language of the MoU is broad and sometimes legally imprecise.⁴⁸ Certain issues, such as what projects exactly the agreement is meant to support and how much funds Italy is supposed to provide and where they would come from, are really unclear.⁴⁹ The MoU fails, just like its predecessors, to ever distinguish asylum seekers from economic and other irregular migrants.⁵⁰

Although the agreement does not specify whether Libyan authorities should intercept migrants already en route to Italy and at sea, this goal can be inferred from the fact that Italy will be providing Libya with boats and border control systems “in order to stem the illegal migrants’ fluxes” (Art. 1). It is equally likely that, in order for Italy to avoid any responsibility under international law, Libya will be intercepting boats before they reach

46. *Memorandum of Understanding*, *supra* note 1.

47. Declan Walsh and Jason Horowitz, *Italy, Going it Alone, Stalls the Flow of Migrants. But at What Cost?*, N.Y. TIMES (Sept. 17, 2017) <https://www.nytimes.com/2017/09/17/world/europe/italy-libya-migrant-crisis.html>.

48. Palm, *supra* note 43.

49. *Id.*

50. *Id.*

Italian territorial waters. In addition, there are already reports of Libyan authorities and border patrol agents intercepting in Libyan waters migrants' boats traveling to Italy.⁵¹ Furthermore, by mentioning funding for organizations in Libya that engage in the return (whether voluntary or forcible) of migrants to their country of origin, Art. 2 of the MoU explicitly identifies forcible returns (refoulement) as one of its main goals.⁵² Therefore, though the agreement does not speak precisely as to what Libya is to do with the migrants it intercepts, it seems clear that the ultimate goal is to detain and eventually return migrants to their countries of origin, especially given Italy's commitment to finance detention centers and support organizations that facilitate migrants' return to their country of origin.⁵³ The agreement never mentions actions to identify potential refugees among the migrants or to ensure that those returned are headed to a safe country, despite Italy being party, as previously mentioned, to several human rights conventions that oblige it to take these steps.

All in all, the MoU is focused on curbing migration flows to Italy and supporting development in Libya, and, while the operations mentioned point at efforts to stem flows of migrants from Libya to Europe, it looks like a lot of attention is directed towards securing Libya's borders to stop that phenomenon from the outset, no matter the costs.⁵⁴

In the past few years, Italy has been more and more vocal regarding its need for a solution to the heavy fluxes of migrants crossing the Mediterranean to reach its borders. As previously mentioned, the country has been praised on several occasions for its rescue operations, which have saved countless lives at sea.⁵⁵ However, Italy continued to stress that it could not bear the burden of helping and taking illegal migrants in such large numbers, and called for the EU to provide a durable solution in many occasions.⁵⁶

In response to the recent "refugee crisis" and to the "border

51. *Libya: European governments complicit in horrific abuses of refugees and migrants*, AMNESTY INTERNATIONAL, (Dec. 12, 2017, 00:01 AM[Double check the time; or delet time]), <https://www.amnesty.org/en/latest/news/2017/12/libya-european-governments-complicit-in-horrific-abuse-of-refugees-and-migrants/>; see also *More than 300 migrants intercepted in boats off Libya: coastguard*, REUTERS (Feb. 19, 2018, 9:58 AM), <https://www.reuters.com/article/us-europe-migrants-libya/more-than-300-migrants-intercepted-in-boats-off-libya-coastguard-idUSKCN1G31XJ>.

52. Palm, *supra* note 43.

53. *Id.*

54. *Id.*

55. Steve Scherer and Massimiliano di Giorgio, *Italy to end sea rescue mission that saved 100,000 migrants*, REUTERS (Oct. 31, 2014, 11:17 AM), <https://www.reuters.com/article/us-italy-migrants-eu/italy-to-end-sea-rescue-mission-that-saved-100000-migrants-idUSKBN0IK22220141031>.

56. *Id.*

countries” cry for help, the EU struck a contentious deal with Turkey, that, similar to the agreement between Italy and Libya, attempts at moving border control efforts away from the EU territory, so as to avoid the international and EU obligations that come from receiving migrants – and particularly asylum seekers.⁵⁷ Border externalization efforts have been a common phenomenon in recent years, whereby agreements are made between a state trying to avoid immigration influxes and a third state that agrees to keep migrants within its territory and “take care” of them.⁵⁸ This is due to the presumption that the former state would then be freed of all international obligations towards the people who remain in the third country.⁵⁹ However, as discussed below, this is not necessarily the case.

According to the EU-Turkey deal, asylum seekers and irregular migrants who reached Greece could be returned to Turkey, and, in exchange, Turkey received € 6 billion to assist refugees as well as travel visas for Turkish nationals.⁶⁰ This deal is problematic for several reasons. Primarily, Turkey has been accused of failing to provide adequate assistance to refugees, since, despite being party to the 1951 Refugee Convention and 1967 Protocol, it only offers temporary protection rather than full refugee status.⁶¹ In addition, in transferring asylum seekers from Greece to Turkey, the EU has been effectively engaging in the refoulement of refugees. EU law prohibits this conduct, except where refugees are returned to a “safe country.” Obviously, the EU is justifying its actions by claiming that Turkey is in fact a safe country, but the reception of migrants and refugees in Turkey seem to show that this assumption is flawed.⁶² Under the deal, the EU also promised that it would eventually provide a safe, legal way out of Turkey for refugees to come to Europe. In reality,

57. See, e.g., Bill Frelick, Iam M. Kysel, and Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, HUMAN RIGHTS WATCH (Dec. 6 2016, 12:00 AM), <https://www.hrw.org/news/2016/12/06/impact-externalization-migration-controls-rights-asylum-seekers-and-other-migrants>.

58. See Frelick, Kysel, and Podkul, *supra* note 57 (for more details of externalization of migration controls).

59. Giuffrè, *supra* note 27; see also Palm, *supra* note 43.

60. Kondylia Gogou, *The EU-Turkey Deal: Europe's Year of Shame*, AMNESTY INTERNATIONAL (Mar. 20, 2017, 10:20 AM), <https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/>.

61. *Turkey*, UNHCR Global Appeal 2008-2009, 304-307, <http://www.unhcr.org/474ac8e60.pdf>; <http://www.unhcr.org/tr/en/refugees-and-asylum-seekers-in-turkey>; see also Gogou, *supra* note 60.

62. Elizabeth Collett, *The Paradox of the EU-Turkey Refugee Deal*, MIGRATION POLICY INSTITUTE (Mar. 2016), <https://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal>; Gogou, *supra* note 60.

the number of those transferred to EU territory remained small.⁶³

Because the MoU seeks to enforce migration control mechanisms beyond the EU borders, it has been compared to the EU-Turkey deal, but it appears as a “bad replica” of it.⁶⁴ In fact, while the Turkey deal at least included resettlement operations, no such commitment made it to the MoU. As already mentioned, the MoU also does not mention the words ‘refugee’ or ‘legal migration,’ but instead uses the blanket term “illegal immigration.”⁶⁵ Further, while the EU-Turkey deal mapped funding amounts, projects and partners in detail, this clarity is lacking in the MoU, which very vaguely mentions EU funds and Italian funding for the various projects of the memorandum.⁶⁶ Lastly, the political and human rights situation in Libya, as this paper will discuss, is far worse than the one in Turkey. The agreement’s promise to uphold international and human rights obligations is no guarantee. While the UNHCR is active in Turkey, refugees in Libya cannot apply for protection with the government, which does not have an asylum system in place, nor with the UN agency, which has had troubles operating in the country.⁶⁷ The lack of a legal framework ensuring refugee protection, according to observers, will likely result in Libya engaging in chain-refoulement.⁶⁸

The existing legal framework on immigration in the country, in fact, fails to distinguish between people seeking international protection and all other migrants.⁶⁹ Instead, it categorizes every person who enters in violation of migration provisions as an illegal migrant and criminalizes such conduct.⁷⁰ The penalty for entering illegally, according to a rough translation of the relevant laws, is imprisonment and forced labor or a fine or both; after serving their sentence, illegal migrants will then be

63. Gogou, *supra* note 60 (“As of 27 February 2017, the number of Syrian refugees transferred from Turkey to EU member states was 3,565 – a number made even more negligible when contrasted against the 2.8 million Syrians currently in Turkey.”).

64. Palm, *supra* note 43; *see also* Katie Kuschminder, *Why the EU Plan to Stop Mediterranean Migration is a Human Rights Concern*, HUFFINGTON POST (Feb. 17, 2017, 09:39 PM), https://www.huffingtonpost.com/entry/libya-is-not-turkey-why-the-eu-plan-to-stop-mediterranean_us_58a7b075e4b0b0e1e0e20b0b.

65. Palm, *supra* note 43.

66. *Id.*

67. Kuschminder, *supra* note 64.

68. Palm, *supra* note 43.

69. *See Libya Immigration Detention*, GLOBAL DETENTION PROJECT (last updated: Feb. 2015), <https://www.globaldetentionproject.org/countries/africa/libya>. (In 2004, the European Commission observed that “detainees were arrested at random and issued deportation orders based on decisions made for groups of nationalities, rather than individual cases.”).

70. *Id.*

expelled.⁷¹ There seems to be no specific legal provision on administrative immigration detention for immigration reasons, so detention for conduct that is not criminal is imposed without a judicial order and legal process; observers argue that immigration detention occurs in a “legal vacuum” and, most times, arbitrarily.⁷² Moreover, the existing laws seem to imply that detention may be of indefinite length.⁷³ Technically, the country’s Ministry of Interior’s Department for Combating Illegal Immigration (DCIM) is the authority in charge of Libya’s detention facilities; however, since the ousting of Gaddafi, militias have taken control over several of these facilities.⁷⁴

Refugee International, an international NGO working on refugee and migration issues, interviewed several migrants in Tunisia and Italy who had been detained or held captive in Libya by smugglers and law enforcement.⁷⁵ The report produced by the organization shows that the people returned to Libya or who enter Libya illegally and are captured are put into detention with no legal recourse or judicial hearing, they are held for months in conditions that lead many to die out of illnesses, where sexual abuse of both women and men is widespread, and where no protection is available for those seeking asylum.⁷⁶ Migrants are usually threatened and subject to extortion, forced to pay smugglers affiliated with local militias (or police officers, but there seems to be little difference between the two categories in practice) only to be able to get to the next step to reach Europe, if they are lucky.⁷⁷ For these and other reasons that this note will analyze, the MoU between Italy and Libya raised a series of concerns.

Aftermath of the MoU

In the first ten days of August 2017 alone, experts observed a drop in migrant crossings of the Mediterranean from Libya to Italy of 76% compared to August of the previous year.⁷⁸ In November 2017, the Committee Against Torture considered the fifth and sixth periodic reports submitted by Italy regarding its implementation and compliance with the

71. GLOBAL DETENTION PROJECT, *supra* note 69.

72. *Id.*

73. *Id.*

74. *Id.*

75. Izza Leghtas, “Hell on Earth”: Abuses Against Refugees and Migrants Trying to Reach Europe from Libya, REFUGEES INTERNATIONAL (2017), <https://www.refugeesinternational.org/reports/2017/libya>.

76. *Id.*

77. *Id.*

78. *Id.*

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (“CAT”), which will be discussed below. In its discussion with Italy, the Committee asked the party to justify this significant drop in the number of migrants crossing the Mediterranean from Libya and it asked whether the drop was connected to the MoU.⁷⁹ The Italian representatives asserted that the decrease in crossings was due to the “stabilization” accomplished by Libya with Italy’s help, and also to Italy’s ongoing dialogue with countries of origin of the migratory flows.

Some experts believe, however, that there are less people willing to cross the Mediterranean from Libya, and it is unclear why.⁸⁰ For example, there has been a significant drop in individuals migrating to Libya from Niger, due, allegedly, to anti-smuggling deals that Niger entered into with neighboring countries and the EU.⁸¹ These deals prompted Niger to pass laws against migrant smuggling, and to increase arrests of smugglers and vehicle confiscations, thus reducing the number of those leaving its territory.⁸² The Libyan coastguard trained by Italy turning back 60% of ships leaving the Libyan coast, however, remains a major factor of the decrease in the number of crossings.

Following the agreement, Italy has been accused of paying Libyan militias to provide additional control over migration fluxes, negotiating with them through mayors and local leaders to secure their support.⁸³ Militias in Libya are composed of numerous armed groups organized in coalitions in order to exert influence over a given territory. Their interests vary so much over time that it is difficult to discern and divide militias based on their goals and objectives.⁸⁴ Similarly, these groups cannot be

79. OHCHR, *Committee Against Torture considers report of Italy* (Nov. 15, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22399&LangID=E>.

80. Jacopo Barigazzi, *Italy sees unexpected reduction of Mediterranean Migration Flows*, POLITICO (Aug. 3, 2017, 6:45 PM), <https://www.politico.eu/article/europe-sees-unexpected-reduction-in-mediterranean-migration-flows/>.

81. *Id.*

82. Peter Tinti, *In Niger, anti-smuggling efforts risk trading one crisis for another*, AFRICAN ARGUMENTS (Jan. 13, 2017), <http://africanarguments.org/2017/01/13/in-niger-anti-smuggling-efforts-risk-trading-one-crisis-for-another/>.

83. Matthew Herbert and Jalel Harchaoui, *Italy claims it’s found a solution to Europe’s migrant problem. Here’s why Italy’s wrong*, WASH. POST (Sept. 26, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/25/italy-claims-its-found-a-solution-to-europes-migrant-problem-heres-why-italys-wrong/?utm_term=.42e3781b8114; see also Mark Micallef and Tuesday Reitano, *The anti-human smuggling business and Libya’s political end game*, INSTITUTE FOR SECURITY STUDIES (Jan. 8, 2018), <https://issafrika.org/iss-today/human-smuggling-and-libyas-political-end-game>.

84. El Kamouni-Janssen and de Bruijne, *supra* note 13.

narrowly categorized as criminal, government allied, or irregular.⁸⁵ In fact, “many militias wear different hats at the same time,” defending different interests and siding with different parties, and ultimately “overruling any political actors.”⁸⁶

For these reasons, the sudden cooperation between different rival militias across Libya that was observed after June 2017 raised suspicions, and it was suggested that it was caused by a deal struck with the Italian Security Services.⁸⁷ If this is true, this means that the smugglers who were previously paid by migrants to cross the Mediterranean are now being paid by Italy to prevent that same conduct. While Italy denies these claims, militias have practically become part of the GNA security forces.⁸⁸ This seems to not only give irregular militant groups legitimacy, but to also hinder the GNA's efforts to integrate the country's security sector, as while some of the militias are considered part of the official security forces, they continue to pursue their agenda, smuggling subsidized fuel and other produces.⁸⁹

The number of crossings started rising again in September, and observers connected this rise with a power struggle between rival gangs and militias in Sabratha, one of Libya's main human-trafficking ports. Sabratha, located in the northwest part of the country and facing the Mediterranean, has allegedly been for years the point of departure of smugglers. Several factions operate in the area, mainly the Dabbashi gang, which has profited for years from smuggling people, as well as fuel, across the Mediterranean.⁹⁰ When boats stopped leaving the port, the gang claimed it had agreed with the GNA Interior Ministry to put off its smuggling activities in return for money.⁹¹ However, this has caused power struggles and fights between the Dabbashi Clan and rival groups that also want to take part in the profitable business provided by the Italy-Libya deal.⁹² In addition, the migrants who are prevented from leaving are instead often locked up in detention centers controlled by militias.⁹³

85. El Kamouni-Janssen and de Bruijne, *supra* note 13.

86. *Id.*

87. Micallef and Reitano, *supra* note 83.

88. *Id.*

89. Herbert and Harchaoui, *supra* note 83.

90. Walsh and Horowitz, *supra* note 47.

91. *Id.*; see also Patrick Wintour, *Italy's Deal to Stem Flow of People from Libya in Danger of Collapse*, THE GUARDIAN (Oct. 3, 2017, 12:00 AM), <https://www.theguardian.com/world/2017/oct/03/italys-deal-to-stem-flow-of-people-from-libya-in-danger-of-collapse>.

92. Wintour, *supra* at 91.

93. Aidan Lewis and Steve Scherer, *Exclusive: Armed Group Stopping Migrant Boats Leaving Libya*, REUTERS (Aug. 21, 2017, 9:22 AM), <https://www.reuters.com/article/us->

Despite the allegations that Italy is paying and making deals with militias, the Italian government has repeatedly stated that, other than offering medical supplies and other forms of assistance, it has not directly paid these groups to carry out operations to curb immigration, but solely the Libyan government.⁹⁴ Still, Italy is financing the GNA that is in turn entering into deals with irregular militias and paying them to accomplish the goals under the MoU.⁹⁵

Gen. Khalifa Haftar, leader of the Libyan National Army, claims he has been in touch with Italian authorities trying to get a piece of the pie: he could control the southern border of the country if Europe delivers money and security supplies.⁹⁶ Haftar also openly criticized Italy's engagement with these groups, because "[p]aying them means entering a vicious circle."⁹⁷ Tomorrow they will fight one another for the rewards and then ask for more money. It will lead to infinite blackmail."⁹⁸ Observers are also skeptical as to the reliability of these groups, as the GNA has very little control over them and, in the past, they have tended to adapt and find new smuggling routes to continue their activities.⁹⁹

The MoU was challenged in both Libya and Italy by different refugee rights and political groups. In Libya, the Tripoli Court of Appeal temporarily suspended the agreement due to humanitarian concerns and constitutional ones. On the one hand, the agreement was not unanimously approved by the House of Representatives and the State Council, meaning that al-Serraj did not have the authority to make this agreement.¹⁰⁰ On the other hand, there was concern over the risk of migrants staying in Libya and being detained in centers funded by Italy.¹⁰¹ The suspension, however, did not last long, and the Libyan Supreme Court reversed the lower court's ruling.¹⁰²

Last September, the Italian Radical Party brought a lawsuit to the

europa-migrants-libya-italy-exclusive/exclusive-armed-group-stopping-migrant-boats-leaving-libya-idUSKCN1B11XC.

94. Walsh and Horowitz, *supra* note 47; *see also* Wintour, *supra* at 91.

95. Walsh and Horowitz, *supra* note 47.

96. Wintour, *supra* at 91.

97. *Id.*

98. *Id.*

99. Lewis and Scherer, *supra* note 93.

100. Abdulkader Assad, Court ruling blocks Libya-Italy MoU on stemming illegal immigration, LIBYA OBSERVER (Mar. 22, 2017, 8:51 PM), <https://www.libyaobserver.ly/news/court-ruling-blocks-libya-italy-mou-stemming-illegal-immigration>; *see also* Tripoli Appeals Court suspends Libyan-Italian MoU temporarily, LIBYAN EXPRESS (Mar. 23, 2017), <http://www.libyanexpress.com/tripoli-appeals-court-suspends-libyan-italian-mou-temporarily/>.

101. Assad, *supra* note 100.

102. Palm, *supra* note 43.

Republic's Procura (the public prosecutor's office) challenging the constitutionality of the agreement, as Art. 80 of the Italian Constitution requires international agreements to be ratified by the Parliament.¹⁰³ In addition, Asgi (the Italian Association for Juridical Studies) petitioned before the Latium Administrative Tribunal to block the deal, claiming that the government is misplacing funds by providing Libyan authorities with training and equipment and enabling the violation of fundamental human rights.¹⁰⁴ In March 2017, the Libyan PM al-Serraj presented a list to Italy with all the funding and supplies he expects Libyan authorities to be provided with in accordance with the MoU. The list includes ten vessels, ten patrol boats, four helicopters, twenty-four rafts, ten ambulances, thirty jeeps, fifteen cars, thirty satellite phones, and other items, which amount to a total of 800 million euros.¹⁰⁵ The money is allocated from the Italian-government-issued African Fund,¹⁰⁶ which was meant to promote development initiatives to improve cooperation with African states that are of great importance to migration routes.¹⁰⁷ This goal, Asgi argues, is very distant from the projects that would be financed in Libya, that is border patrolling and fighting migrant trafficking.¹⁰⁸

For its part, in line with its approach in Turkey, the EU has backed Italy's efforts in Libya, but has let Italy take the lead in the accord.¹⁰⁹ The EU also expressed support for the Libyan PM al-Serraj, as well as for the militias running some of the detention centers in the country, though EU officials have denied, just as Italy did, any funding from the EU going to militias.¹¹⁰ Italy was instead strongly criticized for the agreement by the

103. Denuncia Querela, RADICALI.IT (Sept. 11, 2017), <http://www.radicali.it/wp-content/uploads/2017/09/Esposito-Libia-PDF.pdf>.

104. *Depositato il ricorso di ASGI contro lo sviamento di 2,5 milioni di euro dal c.d. Fondo Africa*, ASGI (Nov. 14, 2017), <https://www.asgi.it/asilo-e-protezione-internazionale/libia-italia-ricorso-fondi-cooperazione/>.

105. Annalisa Camilli, *Perché l'accordo tra Italia e Libia sui migranti è sotto accusa*, INTERNAZIONALE (Nov. 24, 2017, 10:18 AM), <https://www.internazionale.it/notizie/annalisa-camilli/2017/11/29/italia-libia-migranti-accordo>.

106. For the original text of the law approving the African Fund, see Legge 11 dicembre 2016, n.232, G.U. Dec. 21, 2016, n.297 (It.), <http://www.assocostieri.it/normativa/LF%202017.pdf>.

107. ASGI, *supra* note 104.

108. *Id.*; see *Fondo Africa, quelle risorse destinate progetti lontani dall'aiuto allo sviluppo*, REPUBBLICA (Dec. 8, 2017), http://www.repubblica.it/solidarieta/cooperazione/2017/12/18/news/fondo_africa-184514509/ (for more information on the African Fund and its use in Libya).

109. Gabriela Baczynska, *EU sticks to Libya strategy on migrants, despite human rights concerns*, REUTERS (Sept. 14, 2017, 9:11 AM), <https://www.reuters.com/article/us-europe-migrants-libya-italy/eu-sticks-to-libya-strategy-on-migrants-despite-human-rights-concerns-idUSKCN1BP2CQ>.

110. *Id.*

international community due to the widespread human rights violations perpetrated by Libyan authorities at sea and within the country. Most importantly, because of the large amount of assistance that Italy is giving Libya in perpetrating these actions, it seems unlikely that Italy will escape scrutiny by international observers regarding its obligations under international law.

3. Italy's International Obligations

Italy and the Convention Against Torture

Italy ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment in 1989. CAT defined torture as:

“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.”¹¹¹

Further, it established that state parties may not “expel, return, or extradite to a State where there are grounds to believe the individual returned will be subjected to torture.”¹¹² Art. 3 further states that “in determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” These provisions were finally incorporated in Italian law only last year in July in art.613-bis of the Penal Code. UN officials and observers, however, have taken the position that art.613-bis is incomplete and not fully in compliance with the Convention. Observers claim that, for example, the torture definition requires verifiable psychological damages — but how do you verify these damages when court proceedings may occur years after torture was inflicted on the victim?¹¹³ Still, Italy has been bound by CAT principles well before

111. Convention Against Torture, *supra* note 5, art. 1.

112. *Id.* art. 3.

113. Claudio Francavilla, *Italy's New Law on Torture Fails to Meet International Standards*, HUMAN RIGHTS WATCH (July 11, 2017, 12:00 AM), <https://www.hrw.org/>

enacting art.613-bis, since the prohibition of torture has the force of *jus cogens* and at the very least customary international law.¹¹⁴

In any case, the MoU obviously seems at the very least in contrast with the underlying principles of CAT, that is, protecting individuals from torture and degrading treatment. In fact, the agreement purports to fund Libyan detention centers and keep migrants within the Libyan borders, but numerous international organizations have reported over time that the detention conditions in Libya are far too appalling, and that the treatment of migrants in the country in general is degrading. According to the IOM, about 416,566 migrants were on Libyan territory by the end of September 2017, and about 20,000 were in detention around November 2017.¹¹⁵

Despite Libya ratifying CAT, Doctors Without Borders (MSF) reports that migrants in Libya are detained arbitrarily, with no recourse to the legal system, in conditions that fall well below appropriate health and safety standards.¹¹⁶ Cells are small to the point that people cannot stretch out at night, malnutrition is widespread due to food shortages, and detention conditions are generally so squalid as to cause or at least contribute to illnesses and infections.¹¹⁷ “Detainees are stripped of any human dignity, exposed to abusive treatment and lack adequate access to medical care,” asserted a medical advisor for MSF.¹¹⁸ Overcrowding, poor ventilation, and limited natural light add to the already grim conditions of detention centers.¹¹⁹ Other issues are the physical abuse perpetrated by detention centers’ staff against detainees and the endemic racism that causes further mistreatment of black migrants.¹²⁰ One woman told Amnesty International that a pregnant woman in detention was beaten to death by Libyan officials.¹²¹

news/2017/07/11/italys-new-law-torture-fails-meet-international-standards.

114. “[T]here is widespread agreement among scholars that the prohibition against official torture has achieved the status of a *jus cogens* norm.” *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992).

115. *Libya's Dark Web of Collusion: Abuses Against Europe-Bound Refugees and Migrants*, AMNESTY INTERNATIONAL (2017).

116. *Libya Must End Arbitrary Detention of Refugees, Asylum-Seekers, and Migrants*, DOCTORS WITHOUT BORDERS (Sept. 1, 2017), <http://www.doctorswithoutborders.org/article/libya-must-end-arbitrary-detention-refugees-asylum-seekers-and-migrants>.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Libya: horrific abuse driving migrants to risk lives in Mediterranean crossings*, AMNESTY INTERNATIONAL (May 11, 2015, 12:00 AM), <https://www.amnesty.org/en/press-releases/2015/05/libya-horrific-abuse-driving-migrants-to-risk-lives-in-mediterranean-crossings/>; see also Global Detention Project, *supra* note 69, <https://www.globaldetentionproject.org/countries/africa/libya>

121. AMNESTY INTERNATIONAL, *supra* note 120.

In November 2017, CNN published a video showing two migrants in Tripoli being sold as slaves for the equivalent of 800 US dollars.¹²² One of them was being auctioned to work on a farm.¹²³ CNN was told of nine different locations across Libya where slave auctions were supposedly occurring.¹²⁴ In many cases, those sold as slaves end up being forced into prostitution and sexual exploitation in order to be released by their smugglers, or die while crossing the desert en route to Europe killed either by thirst or by their captors.¹²⁵ Following the CNN report, the Libyan government initiated investigations on the matter.¹²⁶

As previously mentioned, the Committee Against Torture recently considered Italy's fifth and sixth reports on its compliance with CAT.¹²⁷ Together with other considerations related to the Convention, the Committee addressed the MoU, and reminded the state party that despite its obligations to Libya under the agreement, Italy could not disregard its international human rights obligations.¹²⁸ The Committee also highlighted the fact that the UN Support Mission to Libya showed extensively that conditions suffered by migrants in Libyan detention centers and in the country generally are extremely reprehensible and appalling.¹²⁹

In response to the Committee's concerns, the Italian representatives stressed that the agreement is a memorandum of understanding and therefore not binding, and, because the plans under the agreement were developed "hand in hand" with the European Commission, the EU could decide to end the project at any time.¹³⁰ The representatives stressed that Italy had voiced its concerns for human rights violations in Libya "in every

122. Nima Elbagir, Raja Razek, Alex Platt and Bryony Jones, *People for Sale, Where Lives are Auctioned for \$400*, CNN (Nov. 14, 2017), <https://www.cnn.com/2017/11/14/africa/libya-migrant-auctions/index.html>.

123. *Id.*

124. *Id.*

125. Ali Younes, *African refugees bought, sold and murdered in Libya*, AL-JAZEERA (Nov. 29, 2017), <http://www.aljazeera.com/news/2017/11/african-refugees-bought-sold-murdered-libya-171129103602048.html>.

126. Elbagir et al., *supra* note 122.

127. OHCHR, *supra* note 79.

128. *Id.*

129. *Id.*

130. Although it is unclear how much control the EU effectively exerts over this particular deal, "both the European Union and Italy have a history of seeking partnerships with Libya, offering millions of euros in foreign aid, equipment, and training in order to, among other things, combat illegal migration at the point of departure." Zara Rabinovitch, *Pushing Out the Boundaries of Humanitarian Screening with In-Country and Offshore Processing*, MIGRATION POLICY INSTITUTE (Oct. 16, 2014), <https://www.migrationpolicy.org/article/pushing-out-boundaries-humanitarian-screening-country-and-offshore-processing>; see also OHCHR, *supra* note 79.

forum,” and it had asked of all stakeholders to participate in developing better detention conditions in the country.¹³¹ The representatives believed that just because Libya is in a difficult situation that should not prevent Italy from carrying out initiatives in cooperation with the EU to fight smuggling and human trafficking and provide the necessary instruments for Libya to address the situation.¹³² The Italian delegation reiterated that Italy is taking a comprehensive approach to foster development in the country, which would in turn provide jobs for migrants.¹³³ It also noted that the financial support provided “ha[s] to go hand in hand with efforts to provide adequate conditions for migrants,” and that humanitarian assistance for migrants was one of the pillars of the EU efforts in the country.¹³⁴

The Committee noted, however, that in promoting Italy's plan in Libya, the EU was really trying to transfer its border control to Libya.¹³⁵ It also suggested that the drop in the number of crossings were in reality a result of Italy's effort to “farm out” the problem of illegal migration and of the increased number of migrants detained in Libya, not of the stability brought in Libya, as Italy claimed.¹³⁶ In fact, the Committee expressed its concerns over reports of smugglers being paid to keep migrants in the country. One Committee expert reminded Italy that the EU was yet to do something on the inhumane detention conditions in Libya, expressed that “[s]omething was not working in the implementation of Italy's cooperation agreement with Libya, which has assumed the role of an external border of the EU.”¹³⁷ The expert further asked if Italy was unable to demand that Libya upheld human rights in its detention centers, and if it could move from denouncing the violations to acting on them. “Italy ha[s] to review its migration and cooperation policies, and its legal responsibilities.”¹³⁸

The delegation responded that two thirds of the funding provided to Libya focused on the respect of human rights and assistance to migrants, and that a monitoring committee will observe whether conditions appear deficient. If so, the European Commission would be able to suspend the project in the country.¹³⁹ In response to the Committee's accusations that the agreement is an instrument for border externalization, the representatives noted that the “concept of moving borders [runs] counter to

131. OHCHR, *supra* note 79.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

the principle of national sovereignty,” maybe in an attempt to indicate that border externalization is not among Italy’s goals.¹⁴⁰ Further, all the operations intercepting migrant boats at sea had been conducted by Libya within its national waters, without Italy’s assistance, and were therefore outside of Italy’s control.¹⁴¹

Despite Italy’s displayed openness to dialogue on the matter and its claims before the Committee, the fact remains that nowhere in the MoU did Italy condition its funds on Libya’s compliance with human rights, and, as the expert on the Committee asserted, neither Italy nor the EU have done anything so far to ensure compliance.¹⁴² That Libyan authorities continue to engage in human rights violations is well-known, yet the agreement is still standing. Further, that Italy is not in control of what Libyan border patrol officials do in Libyan waters seems like a very weak argument when Italy is directly providing Libya with the funds to conduct its sea operations. Lastly, it is clear that the principle of national sovereignty ceases to be so pressing when a country feels it is able to surrender its international responsibilities by transferring its border control to another country.

Libya is quite clearly engaged in violations of CAT, in that it is detaining individuals under degrading conditions in violation of Art. 1 of the Convention, and returning them to their countries of origin where there is a high likelihood they will be harmed.¹⁴³ Libya could ascertain if migrants will be harmed if returned by, as prescribed under Art.3, verifying whether there is a pattern of gross, inhuman, or degrading treatment in the countries it is sending migrants back to. Instead, where it is not detaining them, Libya is returning migrants to their country of origin without first making sure that they are not going to be persecuted or harmed once they are sent back.¹⁴⁴ Libya’s conduct has already been largely criticized, and NGOs operating in the country keep reporting on the human rights abuses perpetuated by Libyan authorities.¹⁴⁵

140. OHCHR, *supra* note 79.

141. *Id.*

142. *Id.*

143. UNHCR, *UNHCR concerned over continued forcible return of potential refugees from Libya*, UNHCR (Sept. 21, 2004), <http://www.unhcr.org/414ffeb4c.html>; *see also Libya to allow emergency repatriation of refugees*, AL-JAZEERA (Nov. 30, 2017), <https://www.aljazeera.com/news/2017/11/libya-slavery-scandal-overshadows-eu-africa-summit-171130113648779.html>; *see also Libya: Stemming the Flow*, HUMAN RIGHTS WATCH (2016), <https://www.hrw.org/reports/2006/libya0906/libya0906webwcover.pdf>.

144. *Id.*

145. *Italy/Libya: Migrants Describe Forced Return, Abuse*, HUMAN RIGHTS WATCH (Sept. 21, 2009, 4:45 AM), <https://www.hrw.org/news/2009/09/21/italy/libya-migrants-describe-forced-returns-abuse>; *see also* Amnesty International, *supra* note 51.

As to Italy, while CAT alone might be insufficient to challenge Italy's conduct of aiding Libyan violations to an international forum, Amnesty International condemned the "*de facto* complicity or participation of Italian authorities in the torture and cruel, inhuman or degrading treatment of refugees and migrants in Libya as a result of its cooperation with Libyan authorities on border control."¹⁴⁶ In fact, the Convention may still serve as the basis to hold Italy responsible under the concept of state responsibility, as we will see later on.

Protection of Refugees and the Principle of Non-Refoulement

Italy is a party to both international treaties on refugees, that are the 1951 Convention on the Status of Refugees and the 1967 Protocol. These treaties established the existence of a protected category of migrants, identified as refugees, which includes those who:

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”¹⁴⁷

Refugees are entitled to special protections under international law that “economic migrants” (those seeking a better job or life based on economic reasons) and others (migrants that do not fall under the refugee definition) do not have. The principle of non-refoulement is one of the most important protections afforded to refugees, but it is also expressed in Art. 3 of CAT, and thus not limited to them. This principle was first adopted in Art. 33 of the 1951 Refugee Convention,¹⁴⁸ but is also addressed in other international instruments that bind Italy to abide by it. Under Art. 19 of the EU Charter on Fundamental Rights “[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”¹⁴⁹ Art. 3 of the European Convention

146. *Italy: submission to the united nations committee against torture, 62nd session, 6 November - 6 December 2017*, AMNESTY INTERNATIONAL (Oct. 10, 2017), <https://www.amnesty.org/en/documents/eur30/7241/2017/en/>.

147. Convention on the Status of Refugees, *supra* note 6.

148. *Id.*

149. European Union Charter on Fundamental Rights, 26 October 2012, 2012/C 326/02.

on Human Rights (ECHR) also prohibits torture and inhuman or degrading treatment.¹⁵⁰ Lastly, Art. 4 of Protocol 4 of the ECHR prohibits the collective expulsion of aliens.¹⁵¹

It is under these last two principles that in 2012, in *Hirsi et al. v. Italy*, the European Court of Human Rights (ECtHR) condemned Italy's refoulement practices.¹⁵² The claim for violations of Art. 3 and Art. 4 of Protocol 4 was brought to the ECtHR by eleven Eritreans and thirteen Somalis who were part of a larger group of people stopped at sea by the Italian Guardia Costiera while trying to reach the Italian coast.¹⁵³ After being intercepted in international waters, the three boats containing about two hundred people were returned to Tripoli.¹⁵⁴ The Italian authorities did not investigate the identity of the migrants stopped or whether they wanted to ask for asylum; instead, they took the migrants' personal belongings, including their identification documents.¹⁵⁵ Even if intercepted in international waters, the ECtHR found that Italy's jurisdiction applied to the individuals stopped the moment they engaged in the refoulement of the migrants, and thus held Italy responsible for failing to uphold the principles outlined in the ECHR.¹⁵⁶

In reaching its conclusion, the ECtHR took into consideration the fact that Italy returned the migrants to Libya, a country that it knew, thanks to the extensive amount of reports from international organizations, would expose these individuals to degrading treatment, and potentially return them to countries such as Eritrea and Somalia, where human rights violations are also widespread.¹⁵⁷ The existence of agreements between Libya and Italy that mention the respect of human rights, the Court stressed, did not on their own guarantee that Libya would comply with them, especially because it is not party to the ECHR or of the 1951 Convention.¹⁵⁸

In fact, because Libya did not ratify the 1951 Convention nor the 1967

150. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, June 1, 2010, CETS no. 194.

151. Council of Europe: European Court of Human Rights, *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights - Prohibition of collective expulsions of aliens*, 30 April 2017, <http://www.refworld.org/docid/592be3c84.html>.

152. *Hirsi et al. v. Italy*, 23 Eur. Ct. H.R. 14-17, 60, 63-64, 75, 79 (2012).

153. *Id.*

154. Bruno Nascimbene, *Condanna senza appello della "politica dei respingimenti"?* *La sentenza della Corte europea dei diritti dell'uomo Hirsi e altri c. Italia*, ISTITUTO AFFARI INTERNAZIONALI (2012), <http://www.iai.it/sites/default/files/iai1202.pdf>.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

Protocol on the Status of Refugees, the country lacks an asylum system, and even the UN High Commissioner for Refugees has had difficulties operating in the country. Despite its refusal to join these treaties, some have advanced the argument that Libya is still bound by the principle of non-refoulement because it has the force of custom and, some argue, even of *jus cogens*, meaning that the principle is so widely recognized as to apply regardless of being or not parties to the relevant treaties. On the one hand, this argument might be invalidated by the consistent objector principle, whereby a state that consistently acted in a manner not in accordance with a legal principle is not bound by customary law. The fact that Libya signed CAT and, with it, its Art. 3 prohibiting refoulement, on the other hand, might provide support to the idea that Libya is in fact bound by this principle, because it already accepted it elsewhere.

In any case, Italy is once again trying to shield itself from international obligations in delegating authority to Libya.¹⁵⁹ In fact, by having Libyan officials intercept boats and return migrants and refugees alike to the North African coast, Italy is trying to avoid another sentence like the one in *Hirsi*. At the very least, it is undeniable that the conduct of Libyan border patrols stopping migrants at sea is the exact same one condemned in the 2012 ECtHR case.

State Responsibility

The most compelling argument challenging Italy's involvement in Libyan operations at sea and in its detention and return of migrants is that the agreement may still make Italy accountable for human rights violations based on State Responsibility principles. In fact, ASGI claimed that Italy and the EU are delegating migration control practices to Libya, but are still maintaining control over its operations and *de facto* violating the principle of non-refoulement.¹⁶⁰

The International Law Commission (ILC) issued the Draft Articles on State Responsibility,¹⁶¹ which, despite not being treaty law, are widely

159. See Delphine Nakache and Jessica Losier, *The European Union Immigration Agreement with Libya: Out of Sight, Out of Mind?*, E-INTERNATIONAL RELATIONS (Jul. 25, 2017), <http://www.e-ir.info/2017/07/25/the-european-union-immigration-agreement-with-libya-out-of-sight-out-of-mind/> ("The new agreement is smarter, since pushback operations are now being transferred to Libyan authorities, which means that the Italian authorities will not bear direct responsibility for the overwhelming evidence of brutality against migrants in Libya.").

160. *ASGI: the EU and Italy de facto violate the principle of non-refoulement*, ASGI (Feb. 6, 2017), <http://www.asgi.it/english/libya-eu-italy-asylum-migration/>.

161. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, at 43 (2001).

accepted by the international community as customary law.¹⁶² In Art. 2, the ILC outlined how a state is directly responsible for its wrongful acts, and that is “when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.”

In the commentary of Chapter IV of the ILC Draft articles, it is explained that, while each state is responsible for its own wrongful acts and violations of international law, there are situations in which “internationally wrongful conduct [...] results from the collaboration of several States rather than of one State acting alone.”¹⁶³ In fact, even if not held directly accountable, Italy may still be responsible for wrongful acts when it “aids or assists” in the commission of an internationally wrongful act or exercises “direction and control” over the commission of an internationally wrongful act 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.”¹⁶⁴ Therefore, Italy could be held responsible for wrongful acts if either its own officials or government agencies are directly involved in violations of international instruments, or if it “aids or assists” Libya in committing an internationally wrongful act or it “directs or controls” the commission of an internationally wrongful act.

If the Italian Guardia Costiera or other Italian authorities engaged directly in the refoulement of migrants, Italy could be held directly responsible for those wrongful acts, because it is in violation of international instruments that it ratified. This is reinforced by the ruling of the ECtHR in *Hirsi*, and is probably the reason why Italy has been avoiding such conduct and delegating the job to Libya.

However, when Italy provides Libyan authorities with vessels and border patrol instruments to intercept migrants at sea and return them to the Libyan coast, Italy’s conduct seems to fall squarely within the language of Art. 16. Italy is in fact supplying Libya with all the necessary means to block migrants and then either detain them in conditions that violate basic human rights or return them to countries where they could be harmed, aiding and assisting Libya in perpetrating international law violations.

Italy is well aware that Libya is committing the violations, satisfying Art. 16 (a). This is particularly true given the number of reports on human rights conditions in the country that are available and given the discussion between the Committee Against Torture and Italian representatives where Italy displayed awareness of the situation. The requirement under Art. 16

162. MARY ELLEN O’CONNELL, RICHARD ET AL., *THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS* 763 (6th ed. 2010).

163. ILC Draft Articles, *supra* at 161.

164. *Id.* arts. 16-17.

(b) is also satisfied in that if Italy were to commit these acts itself, it would be violating the principles of non-refoulement expressed in CAT, in the 1951 Convention and the 1967 Protocol on Refugees, as well as human rights laws expressed in European Human Rights treaties. Therefore, even if Libya is the state directly engaging in the illegal conduct. Italy might still have to take at least a share of the blame under State Responsibility principles, even though only to the extent of the assistance given.¹⁶⁵

In addition, it can be argued that Italy's conduct rises to the level of "direction and control" identified under Art. 17 of the ILC Draft Articles; if that is the case, Italy could be held responsible for the wrongful act itself. According to the article's commentary:

"the term "controls" refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word "directs" does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind."¹⁶⁶

Italy's financial and logistical assistance to Libya in its interception, detention, and forcible return operations is likely to be more significant than oversight or "mere influence." Heavier evidence, other than the financial support, of close control or direction might be needed, however, in order to prove Italy's responsibility for Libya's wrongful conduct.

In *Nicaragua v. US*, the International Court of Justice applied the "effective control" test to decide whether to attribute the wrongful acts of a Nicaraguan paramilitary group, the *contras*, to the U.S., which was assisting them financially and equipping them with weapons.¹⁶⁷ The court held that the U.S. did not have "effective control" because it did not directly instruct the *contras* as to the specific operations in which violations occurred.¹⁶⁸ The same test was applied in *Bosnia v. Serbia*, where the International Court of Justice decided that the genocide committed in Srebrenica could not be attributed to Serbia.¹⁶⁹ None of the armed groups involved, the court held, was so completely dependent on Serbia as to warrant attribution, regardless of the financial, political, military, and

165. See Commentary to Art. 17 of the ILC Draft Articles, *supra* at 161.

166. Commentary (7) to Art.17, ILC Draft Articles, *supra* note 161.

167. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. 14 (June 27).

168. *Id.*

169. Case Concerning Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 395 (Feb. 26).

logistical relations between them.¹⁷⁰ A similar, yet less narrow test, was applied in *Prosecutor v. Tadić*.¹⁷¹ Under the “overall control” test, the state needs to wield overall control over the group, not merely by equipping and financing it, but by “coordinating or helping in the general planning” of its operations.¹⁷²

Though these tests were developed in relation to the conduct of individuals or groups to be attributed to states, they may still be relevant in the situation of a state’s conduct in connection to the wrongful acts of another state. It seems, therefore, that under both the overall control and the effective control tests Italy’s financial and logistical assistance to Libya may not be sufficient to hold the country responsible for the wrongful acts. If, however, more evidence exists as to Italy’s coordinating and planning Libya’s operations, Italy’s conduct could fall under Art. 17, meaning that it would then be directly responsible for Libya’s violations of international law.

Circumstances Precluding Wrongfulness

There are six circumstances identified under the ILC Draft articles that could justify or serve as defenses for a country’s wrongful conduct, relieving it of its responsibility under international law in a specific situation. Only two, however, could realistically come into play in Italy’s case. The first circumstance is *force majeure*, which, under Art. 23 is the “occurrence of an irresistible force or unforeseen event beyond the control of the state making it impossible for the state to avoid the wrongful act.”¹⁷³ Italy could, for example, claim that the current migratory crisis or the enormous loss of lives at sea due to the crossings present a situation of *force majeure* justifying financing Libya to keep migrants within its borders. In *New Zealand v. France*, however, the *ad-hoc* France-New Zealand Arbitration Tribunal held that this circumstance occurs when it really is “materially impossible” for a state to comply with its international obligations, and it usually refers to involuntary and unintentional conduct.¹⁷⁴ Italy cooperating with Libyan authorities to return migrants is anything but involuntary conduct, and it is unlikely that any court would find it materially impossible for Italy to avoid engaging in it.

Another justification is that of the state of necessity, which is invoked

170. *Bosn. & Herz. v. Serb. & Montenegro*, *supra* note 169.

171. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeal Judgement, ¶ 73-75, 106, 115, 290, (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

172. *Id.* ¶ 131.

173. ILC Draft Articles, *supra* note 161, art. 23.

174. *Rainbow Warrior France-New Zealand Arbitration Tribunal* (N.Z. v. Fr.), 82 I.L.R. 499, 551-64 (Fr.-Nz. Arb. Trib. 1990).

“for a state to safeguard an essential interest against a grave and imminent peril and does not seriously impair an essential interest of the state or of the international community.”¹⁷⁵ Italy could thus argue its essential interest is preserving its national security against burdensome migration flows. However, the easy counterargument to this idea is that Italy's conduct impairs the international community's interest to protect refugees and human rights, which is evidenced by the large number of international covenants to safeguard these principles.

Italy's Alternatives to Avoid Responsibility for Wrongful Acts

If Italy wants to pursue its commitments under the MoU without incurring responsibility for Libya's wrongful acts, it should then take active steps to prevent them. On the one hand, Italy could promote a counterbalancing policy by providing a legal route for people in need of international protection. These “humanitarian corridors” would ensure that those with credible claims for asylum receive the assistance they need under the 1951 Convention and 1967 Protocol and prevent their refoulement to their countries of origin. Most importantly, they would provide migrants with a not only legal but also safer alternative to paying smugglers and human traffickers to cross the Mediterranean and risk their lives.

On the other hand, Italy could condition its funds on Libya's compliance with international human rights. Even if Libya has not ratified certain international treaties, nothing prevents Italy from requiring Libya to increase its human rights standards in detention centers. Italy could also provide human rights trainings to Libyan officials and ensure that the funding it is making available to Libya for its detention centers is used to improve detention conditions rather than for their expansion. Ideally, Italy could use its economic influence over Libya also to have it sign the 1951 Refugee Convention and 1967 Protocol or at least put an asylum system in place.

Even if these projects are implemented, however, the issue remains that Libya is a politically fragmented state and that discrimination is widespread, creating dangerous conditions for migrants regardless of Italy's efforts. However, Italy's claimed development operations in the country might very well help improve this difficult situation. In any case, Italy has sufficient leverage to demand that Libya at least improves its compliance with basic human rights standards, and it has an interest in doing so to prevent being held responsible for internationally wrongful acts.

175. ILC Draft Articles, *supra* note 161, art. 25.

Conclusion

Italy is a party to numerous international human rights conventions, some of which are not mentioned in this article. It has an obligation, therefore, to engage in conduct that upholds those rights. By agreeing to support Libya in operations of refoulement and in the detention of economic migrants and refugees alike in subpar conditions, Italy risks breaching its obligations. Following *Hirsi et al. v. Italy*, it is clear that Italy may not directly engage in the forcible return of individuals without committing a violation against EU human rights treaties. In addition, despite not directly violating CAT or the Refugee Convention or Protocol and their principle of non-refoulement, Italy may still be held responsible, even if just in part, for Libya's unlawful conduct because of Italy's significant assistance and support to Libyan operations. In order to avoid being held accountable for Libya's wrongful acts, Italy needs to push for a significant shift in its cooperation with Libya. This could most effectively occur by conditioning its funds to Libya on Libya's commitment to respect human rights and stop returning individuals to countries where they may be harmed. If this shift were not to occur, Italy would fail its commitment to the respect of human rights, the prohibition against torture, and the protection of refugees which it promised decades ago, and it would do so solely to stop waves of migrants that will likely continue to arrive through other routes with or without an agreement with Libya.