

ITALY'S NEW MIGRATION CONTROL POLICY: STEMMING THE FLOW OF MIGRANTS FROM LIBYA WITHOUT REGARD FOR THEIR HUMAN RIGHTS

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Abstract

During 2017, the Italian Government adopted a series of controversial measures in order to stem the increasing flow of migrants from Libya, with the full backing of the European Union. The Memorandum of Understanding between Italy and the Libyan Government of National Accord of 2 February 2017 provided the legal basis for most of them. In actual fact, those measures rapidly led to a significant reduction in the number of migrants arriving in Italy, while increasing that of migrants intercepted at sea by the Libyan Coast Guard and transferred to the detention centres managed by the Libyan Department for Combatting Illegal Immigration. As a result, the already inhuman conditions of detention therein further worsened. This article investigates whether and to what extent Italy can be held responsible under international law for human rights violations against migrants on Libyan soil and, at the hands of the Libyan Coast Guard, at sea. It is submitted that, owing to the active support to the Libyan Coast Guard and the adoption of a code of conduct restricting NGOs' search and rescue activities, Italy is complicit in violations of the prohibition of torture and ill-treatment against migrants intercepted at sea and forcibly returned to Libya. It is also stressed that Italy would be responsible for directly violating the prohibition on torture and ill-treatment enshrined in Article 3 of the European Convention on Human Rights, if it were ascertained that Italian military personnel exercise de facto control over Libyan Coast Guard vessels transporting migrants back to Libyan territory. In the light of this, the author highlights the urgent need for the Italian Government to rethink its migration control policy, amending the said Memorandum of Understanding and modifying the aforementioned measures so as to prioritise the protection of migrants' fundamental human rights.

Keywords: migrants; refugees; search and rescue at sea; European Convention on Human Rights; State responsibility.

1. INTRODUCTION

Since the beginning of 2017, faced with a dramatic increase in the sea arrivals of migrants from Libya, the Italian Government adopted a series of con-

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troversial measures aimed at closing off the so-called Central Mediterranean route, with the full backing of the European Union (EU). The Memorandum of Understanding between Italy and the Libyan Government of National Accord on Cooperation in the Field of Development, Fight against Illegal Immigration, Trafficking in Human Beings and Smuggling and on Enhancement of Border Security of 2 February 2017 (MOU) laid down the legal foundations for most of those measures.¹

Indeed, they had the immediate effect of significantly diminishing the number of irregular migrants arriving in Italy, while boosting that of migrants intercepted at sea by the Libyan Coast Guard and transferred to the detention facilities run by the Department for Combatting Illegal Immigration, a division of the Libyan Ministry of the Interior. As a result, the conditions of detention therein, which were already far short of human rights standards, further worsened.

Against this background, the question arises whether and to what extent Italy can be held responsible under international law for human rights violations against migrants on Libyan soil and, at the hands of the Libyan Coast Guard, at sea. This article tries to answer this question by means of a multilevel analysis. Firstly, the provisions of the MOU are examined thoroughly. Secondly, the EU political and financial support for Italy's new migration control policy is considered. Thirdly, the various measures decided by the Italian Government to curtail the sea crossings are carefully scrutinised.

2. THE 2017 MEMORANDUM OF UNDERSTANDING BETWEEN ITALY AND LIBYA

The MOU at issue was signed by the Italian Prime Minister, Paolo Gentiloni, and the Prime Minister of the Government of National Accord of Libya, Fayed Mustafa Serraj, in Rome. The Libyan Government of National Accord was formed in January 2016, based on the Libyan Political Agreement that had been concluded in Skhirat (Morocco) on 17 December 2015, thanks to the mediation efforts of the United Nations (UN), in order to overcome the political and institutional chaos of the country.² It was recognised as “the sole legitimate government of Libya” by the UN, the African Union, the EU and most of states, including Italy.³ Despite the international support however, at the time of writing, this Government is far from being in full control of the Libyan territory.

¹ The Memorandum of Understanding is available at: <<http://itra.esteri.it/vwPdf/wfrm-RenderPdf.aspx?ID=50975>>.

² The Libyan Political Agreement is available at: <<https://unsmil.unmissions.org/sites/default/files/Libyan%20Political%20Agreement%20-%20ENG%20.pdf>>.

³ See the Joint Communiqué adopted at the Ministerial Meeting for Libya, held in Rome, on 13 December 2015, available at: <<https://www.diplomatie.gouv.fr/en/country-files/libya/events/2015/article/ministerial-meeting-for-libya-joint-communique-rome-italy-13-12-15>>; the Security Council Resolution No. 2259 (2015), UN Doc. S/RES/2259 (2015); the Statement on Libya issued by France, Germany, Italy, the United Kingdom, the United States and the European Union at the Ministerial Meeting held in Paris, on 13 March 2016, available at:

The Gentiloni-Serraj agreement was concluded for a period of three years and entered into force on the date of signature, on 2 February 2017. It will be extended by tacit agreement for a further three-year period, unless it is denounced in writing by one of the parties at least three months before the expiration date (Article 8). It was done in Italian and Arabic, both texts being equally authentic.

The MOU is ideally placed for continuity with the treaties that were concluded between Italy and Gaddafi's Government before the 2011 Libyan revolution. The Preamble stipulates that it aims at implementing the agreements concluded between the parties on the same subject in the past, among which the Treaty on Friendship, Partnership and Cooperation of 30 August 2008 is expressly mentioned.⁴

Nevertheless, on a first reading of the MOU, the broadness and vagueness of the material obligations undertaken by the parties, especially by Italy, appear to be inconsistent with its proclaimed nature as a mere implementing agreement. In particular, the parties commit themselves to launch cooperation initiatives concerning "the support to the security and defense institutions in order to stem the flows of illegal migrants and face the consequences of them", in conformity with the programs of the Libyan Government of National Accord (Article 1(A)).⁵ Italy also undertakes "to provide technical and technological support" to the Border Guard and Coast Guard of Libya and the organs of the Libyan Ministry of the Interior in charge of the fight against irregular immigration (Article 1(C)), and to support and finance development programs in the Libyan regions affected by the phenomenon of irregular immigration (Article 1(B)). Moreover, various actions are listed that "the Parties commit themselves to undertake" (Article 2). Actually, however, it is Italy that is primarily burdened with the implementation of such actions. They include: (1) the completion of Libya's southern border control system, as set forth in Article 19 of the 2008 Treaty on Friendship, Partnership and Cooperation; (2) the adaptation and funding of the detention centres run by the Libyan Department for Combatting Illegal Immigration, which are given a respectable veneer with the name "reception centres"; (3) the training of the Libyan staff of those centres; (4) the elaboration of a Euro-African cooperation plan to remove the root causes of irregular immigration, within three months from the signature of the Memorandum; the support to international organisations competent in the field of migration operating in Libya; and (5) the development of

<https://www.esteri.it/mae/it/sala_stampa/archivionotizie/comunicati/2016/03/ministerial-meeting-in-paris-france_0.html>.

⁴ Treaty between Italy and Libya on Friendship, Partnership and Cooperation, Benghazi, 30 August 2008, available at: <<http://itra.esteri.it/vwPdf/wfrmRenderPdf.aspx?ID=49182>>. For comment, see RONZITTI, "The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?", *Bulletin of Italian Politics*, 2009, No. 1, p. 125 ff.

⁵ The Memorandum repeatedly uses the terms "clandestine migrants", "clandestine immigration", "illegal migrants" and "illegal immigration". These terms, however, are no longer used by international organisations and many states. They have been abandoned in favour of the more neutral terms "irregular migrants" and "irregular immigration". See for example Council of Europe, Parliamentary Assembly, Resolution 1509 (2006), 27 June 2006, para. 7.

initiatives aimed at creating lawful jobs in the Libyan regions where migrant smuggling is an income source for local people (Article 2).

A mixed committee, formed of an equal number of members from Italy and Libya, is established, which is charged with identifying the priorities of action, the sources of funding and the modalities of implementation of the obligations undertaken by the Parties (Article 3).

As for Italy, however, it is specified that the activities provided for in the MOU can be financed with EU funds and cannot entail expenses that are not included in the national budget (Article 4). Since the MOU was concluded in simplified form, this clause aimed at preventing allegations of violation of Article 80 of the Italian Constitution, under which treaties entailing expenses not included in the national budget must be concluded in solemn form: the Head of State may ratify them only after being duly authorised by the Parliament.

Actually, allegations of violation of Article 80 of the Italian Constitution are not completely precluded by the above-mentioned provision. According to that Article, “treaties of political nature” must also be concluded in solemn form: their ratification by the Italian President requires authorisation by the Parliament. As the former Minister of Foreign Affairs Susanna Agnelli made clear in 1995, Article 80 refers to treaties of high political relevance, which involve fundamental foreign policy choices.⁶ Given the broadness of the material obligations undertaken by the parties, especially by Italy, the MOU in question certainly falls within this category. Therefore, it should not have been concluded in simplified form. In fact, at the end of February 2018, four members of the Parliament lodged an application with the Italian Constitutional Court, claiming a violation of Article 80. In particular, they complained that, owing to the high political relevance of the MOU, the Government should have submitted a draft law authorising the Head of State to ratify it to the Parliament. The Government omitted to do that and, as a result, it undermined the applicants’ prerogatives.⁷ At the time of writing, the Constitutional Court has not yet decided on the admissibility of the application.

2. THE SITUATION IN LIBYA

When reading the Gentiloni-Serraj MOU, one gets the impression that the parties deliberately ignored the complexity of the migration phenomenon affecting Libya and the dire living conditions of irregular migrants in that country. First of all, among the tens of thousands of people who illegally cross Libya’s southern border and set off for Italy every year, there are not only so-called economic

⁶ See Circular of the Minister of Foreign Affairs Susanna Agnelli No. 5 of 19 April 1995.

⁷ See Association for Juridical Studies on Immigration, “Technical Note on the Application Relating to the Jurisdictional Dispute between Branches of the State Lodged with the Constitutional Court by the Deputies Brignone, Civati, Maestri and Marcon”, 27 February 2018, available at: <https://www.asgi.it/wp-content/uploads/2018/02/2018_2_27_ASGI_Libia_Italia_scheda-tecnica.pdf>.

migrants, but also migrants eligible for international protection, namely refugee status or subsidiary protection as defined by EU rules.⁸ The MOU does not envisage any cooperation initiative aimed at identifying the individuals eligible for international protection and establishing an appropriate system of protection for them. Indeed, it does not even mention this category of migrants.

Libya is not a party to either the 1951 Convention relating to the status of refugees or its 1967 Protocol, and it does not recognise the right of asylum. Indeed, it is a party to the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa. This treaty contains the same definition of refugee as the 1951 Convention, as amended by the 1967 Protocol, and it stipulates that the states parties “shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality” (Article 2(1)). Under the 2011 Libyan Constitutional Declaration, “the State shall guarantee the right of asylum by virtue of the law” (Article 10).⁹ However, at the time of writing, no law on asylum has been enacted.¹⁰ This fact was totally disregarded by the parties to the MOU.

Moreover, under the Libyan legislation enacted during the Gaddafi regime and still in force, illegal entry or stay in Libya is a criminal offence punishable with imprisonment.¹¹ Migrants illegally entering Libya are held arbitrarily for indefinite periods in detention centres managed by the Department for Combatting Illegal Immigration or other places of detention run by armed groups, without any possibility to challenge the lawfulness of detention.¹² Migrants rescued or intercepted at sea by the Libyan Coast Guard, too, are routinely transferred to the detention centres run by the Department for Combatting Illegal Immigration.¹³

⁸ See PALM, “The Italy-Libya Memorandum of Understanding: The Baseline of a Policy Approach Aimed at Closing All Doors to Europe?”, EU Immigration and Asylum Law and Policy, 2 October 2017, available at: <<http://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>>.

⁹ Constitutional Declaration, Benghazi, 3 August 2011, available at: <<https://www.ndi.org/sites/default/files/Handout%20-%20Libya%20Draft%20Interim%20Constitution.pdf>>.

¹⁰ See United Nations Support Mission in Libya, Office of the United Nations High Commissioner for Human Rights, “‘Detained and Dehumanised’: Report on Human Rights Abuses against Migrants in Libya”, 13 December 2016, pp. 9 and 12, available at: <https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf>; Report of the Secretary-General pursuant to Security Council Resolution 2312 (2016), UN Doc. S/2017/761, 7 September 2017, para. 45; Amnesty International, “Libya’s Dark Web of Collusion. Abuses against Europe-bound Refugees and Migrants”, December 2017, available at: <<https://www.amnesty.org/en/documents/mde19/7561/2017/en/>>, p. 20.

¹¹ “‘Detained and Dehumanised’”, *cit. supra* note 10, p. 11; “Libya’s Dark Web of Collusion”, *cit. supra* note 10, p. 20.

¹² “‘Detained and Dehumanised’”, *cit. supra* note 10, p. 13; “Libya’s Dark Web of Collusion”, *cit. supra* note 10, pp. 20 and 24.

¹³ “‘Detained and Dehumanised’”, *cit. supra* note 10, pp. 19-20; Report of the Secretary-General pursuant to Security Council Resolution 2312 (2016), *cit. supra* note 10, para. 40; “Libya’s Dark Web of Collusion”, *cit. supra* note 10, pp. 28 and 40.

As stated in the 2016 report of the UN Support Mission in Libya and the UN Office of the High Commissioner for Human Rights, conditions of detention in such centres are “generally inhuman, falling far short of international human rights standards”.¹⁴ They are characterised by severe overcrowding, little ventilation and poor hygiene. Migrants therein constantly suffer from malnutrition and have limited or no access to medical care. They are generally subjected to torture and other ill-treatment by the guards, mostly in order to extort money from their relatives for their release. Women are often victims of rape or other forms of sexual violence.¹⁵ Similar abuses are committed against migrants held in unofficial detention facilities managed by armed groups.¹⁶

Migrants rescued or intercepted at sea are usually also victims of abuse by the Libyan Coast Guard members, who do not abstain from using firearms, physical violence and threatening language against them. Their very lives are often endangered by Libyan Coast Guard manoeuvres in flagrant disregard of basic security protocols.¹⁷ This is, *inter alia*, a plain violation of the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the 2000 UN Convention against Transnational Organized Crime, to which Libya is a party. Under that Protocol, when taking measures against a vessel suspected of being engaged in the smuggling of migrants by sea, states parties are obliged to “ensure the safety and humane treatment of the persons on board” (Article 9(1)(a)). In addition, as Amnesty International documented in its report of December 2017, some members of the Libyan Coast Guard collude with smugglers, by allowing migrant boats to depart or even escorting them during the initial part of the journey in return for payment.¹⁸

The parties to the MOU knowingly omitted to take account of the above-described situation. The Gentiloni-Serraj agreement fails to address adequately the problem of the protection of the human rights of migrants in Libya. Under Article 5, Italy and Libya simply commit themselves “to interpret and apply the [...] Memorandum in conformity with the international obligations and the human rights treaties to which they are parties”. Only an implicit referral to migrants’

¹⁴ “Detained and Dehumanised”, *cit. supra* note 10, p. 15.

¹⁵ “Detained and Dehumanised”, *cit. supra* note 10, pp. 15-17; Report of the Secretary-General pursuant to Security Council Resolution 2312 (2016), *cit. supra* note 10, paras. 41-43; “Libya’s Dark Web of Collusion”, *cit. supra* note 10, pp. 22 and 30-33.

¹⁶ “Libya’s Dark Web of Collusion”, *cit. supra* note 10, p. 20. In October 2017, the *Corte d’Assise di Milano* ascertained the horrific abuses suffered by hundreds of migrants in an unofficial detention centre in Bani Walid, between the beginning of 2015 and mid-2016. It convicted the former head of the centre, Osman Matammud, of abduction, sexual violence and abetment of illegal immigration, and sentenced him to life imprisonment. See *Corte d’Assise di Milano, Criminal proceedings against Matammud Osman*, Judgment of 10 October 2017, available at: <<https://www.penalecontemporaneo.it/upload/1875-sentenza-matammud.pdf>>.

¹⁷ See Report of the Secretary-General pursuant to Security Council Resolution 2312 (2016), *cit. supra* note 10, para. 6; “Libya’s Dark Web of Collusion”, *cit. supra* note 10, pp. 35 and 36.

¹⁸ “Libya’s Dark Web of Collusion”, *cit. supra* note 10, pp. 37-40. See also “The Kingpin of Libya’s Human Trafficking Mafia”, TRTWorld, 22 February 2017, available at: <<https://www.trtworld.com/magazine/libya-human-trafficking-mafia-in-zawiya-301505>>.

right to health is contained in Article 2(2), according to which Italy is bound to contribute medicines and medical equipment, in order to alleviate the conditions of irregular migrants suffering from severe transmissible or chronic diseases in Libya. In the light of the blatant violations of migrants' most fundamental human rights routinely committed in Libya, the aforementioned provisions are thoroughly unsatisfactory.

3. EU SUPPORT FOR ITALY'S MIGRATION CONTROL MEASURES

Despite its flaws, the Gentiloni-Serraj MOU was immediately endorsed by the EU. In the informal summit held the day after its signature, on 3 February 2017, in Malta, the EU Heads of State or Government adopted the so-called Malta Declaration, in which they welcomed the Memorandum, affirmed their readiness to support Italy in its implementation and agreed on a set of measures to stem the flow of irregular migrants from Libya to Italy. Such measures included: (1) training, equipment and support to the Libyan Coast Guard; (2) the implementation of an enhanced operational action against smugglers; (3) support for the development of Libyan local communities, particularly in coastal areas and at land borders on the migratory routes; (4) cooperation with the Government of National Accord and Libya's neighbouring states, in order to reduce migratory pressure on Libyan land borders; (5) assistance in ensuring adequate reception conditions for migrants in Libya; and (6) support to the International Organization for Migration in increasing assisted voluntary return operations.¹⁹

Following the Malta Declaration, in April 2017, the EU Trust Fund for Africa adopted a 90-million-euro programme to reinforce the protection of migrants in Libya and improve the socio-economic development of Libyan local communities in coastal areas and along migratory routes.²⁰

In June 2017, in the light of a substantial increase in the sea arrivals of migrants in Italy from Libya, the European Council decided to step up the implementation of the measures listed in the Malta Declaration.²¹ A few days later, the European Commission proposed an action plan to support Italy and accelerate EU efforts aimed at reducing the flow of migrants along the Central Mediterranean route.²²

¹⁹ Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route, 3 February 2017, available at: <<http://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/pdf>>.

²⁰ European Commission, "Press Release: EU Trust Fund for Africa adopts €90 Million Programme on Protection of Migrants and Improved Migration Management in Libya", 12 April 2017, available at: <http://europa.eu/rapid/press-release_IP-17-951_en.pdf>.

²¹ European Council Meeting (22 and 23 June 2017) – Conclusions, 23 June 2017, available at: <<http://www.consilium.europa.eu/media/23985/22-23-euco-final-conclusions.pdf>>.

²² European Commission, "Action Plan on Measures to Support Italy, Reduce Pressure along the Central Mediterranean Route and Increase Solidarity", 4 July 2017, available at: <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170704_action_plan_on_the_central_mediterranean_route_en.pdf>.

On the basis of this action plan, at the end of July 2017, the EU Trust Fund for Africa adopted a 46-million-euro programme to enhance the operational capacities of the Coast Guard and the Border Guard of Libya, which would be co-financed by Italy and implemented by its Ministry of the Interior.²³

4. ITALIAN ASSISTANCE TO THE LIBYAN COAST GUARD

Italy's action in support to the Libyan Coast Guard started at the beginning of 2017. On 14 January 2017, Gentiloni's Government decided to establish an assistance mission to the Libyan Coast Guard, on the basis of the Protocol of Cooperation between Italy and Libya and the Additional Technical-Operational Protocol to it, which had been signed in Tripoli at the end of 2007.²⁴ On 8 March 2017, the Government decision was approved by the Parliament, in accordance with Law No. 145 of 21 July 2016.²⁵ The assistance mission was entrusted to the Revenue Police (*Guardia di Finanza*) and was to last until 31 December 2017. The Revenue Police were mandated to conduct training cruises and patrolling activities on board ships that had been temporarily ceded by Italy to Libya in 2009 and 2010, and to provide ordinary maintenance of them. In fact, four of those ships, which had been damaged during the 2011 armed conflict, were repaired in Italy and returned to the Serraj Government in April and May 2017.²⁶ The mandate of the assistance mission was subsequently extended until 31 December 2018.²⁷

²³ European Commission, "Press Release: EU Trust Fund for Africa Adopts €46 Million Programme to Support Integrated Migration and Border Management in Libya", 28 July 2017, available at: <http://europa.eu/rapid/press-release_IP-17-2187_en.htm>.

²⁴ Deliberation of the Council of Ministers Relating to the Participation of Italy in International Operations, 14 January 2017, Doc. CCL No. 1, pp. 53 and 54. See Protocol of Cooperation between Italy and Libya, Tripoli, 29 December 2007, available at: <<http://briguglio.asgi.it/immigrazione-e-asilo/2009/maggio/prot-italia-libia-2007.pdf>>; Additional Technical-Operational Protocol, Tripoli, 29 December 2007, available at: <<http://www.asgi.it/wp-content/uploads/public/protocollo.italia.libia.tripoli.dicembre.2007.pdf>>.

²⁵ See Senate, Assembly, Verbatim Record, Meeting No. 780 (Afternoon), 8 March 2017, pp. 23-78; Chamber of Deputies, Verbatim Record, Meeting No. 755, 8 March 2017, pp. 16-41. Law No. 145 of 21 July 2016 (GU No. 178 of 1 August 2016) regulates the deployment of the Italian armed forces abroad. Interestingly, under its Article 1(1), the deployment of Italian forces abroad is allowed, *inter alia*, on condition that their mandate is consistent with international human rights law. On the law at issue, see RONZITTI, "La legge italiana sulle missioni internazionali", RDI, 2017, p. 474 ss.

²⁶ "Minniti ad Abu Sittah consegna altri due pattugliatori ai libici", *Analisi Difesa*, 16 May 2017, available at: <<http://www.analisedifesa.it/2017/05/minniti-ad-abu-sittah-consegna-altrui-due-pattugliatori-ai-libici/>>.

²⁷ Analytical Report on the Ongoing International Operations and Development Cooperation Actions in Support to Peacebuilding Processes, Approved by the Council of Ministers on 28 December 2017, Doc. CCL-bis No. 1, pp. 173 and 192-193. The Parliament approved the Government's decision to extend the mandate of the assistance mission in January 2018. See Senate, Commissions III (Foreign Affairs, Migration) and IV (Defence), Meeting No. 33, 15

In addition, Italy readily granted the Government of National Accord's request for further support to the Libyan Coast Guard, on the basis of the MOU of 2 February 2017. On 28 July 2017, Gentiloni's Government decided to establish a combined air and naval operation, to be conducted from 1 August to 31 December 2017, with personnel and assets detached from the ongoing operation "Mare Sicuro". The mandate of this new operation included: (1) protecting the Libyan vessels involved in activities against irregular immigration, in the territorial sea and internal waters controlled by the Government of National Accord; (2) providing advice to the Libyan Coast Guard and Navy; (3) supporting the establishment of an operational centre for maritime surveillance and coordination of joint maritime activities in Libya; (4) cooperating in the maintenance and repair of Libyan infrastructures and assets to be used in the fight against irregular immigration.²⁸ The Parliament rapidly approved the Government decision, in accordance with the above-mentioned Law No. 145 of 2016.²⁹ Hence, in the first half of August, the patrol boat "Comandante Borsini" and the workshop ship "Tremiti" arrived at the Abu Sittah Naval Base, in Tripoli.³⁰ A coordination centre was temporarily installed on board the latter. Thanks to the repair work by the Italian personnel, two Libyan patrol boats were made operational again before the end of August.³¹ In November, activities aimed at repairing the infrastructures of the Mitiga Airport, in Tripoli, and the C-130H aircraft therein started.³²

The mandate of the above-described operation was subsequently extended until 30 September 2018.³³ However, the task of cooperating in the maintenance and repair of Libyan infrastructure and assets to be used in the fight against irregular immigration was transferred to another mission in support to the Government of National Accord, which Gentiloni's Government decided to establish at the end of December 2017.³⁴ This mission was to last until 30 September 2018 and was

January 2018, p. 5 ff.; Chamber of Deputies, Verbatim Record, Meeting No. 905, 17 January 2018, p. 2 ff.

²⁸ Deliberation of the Council of Ministers Relating to the Participation of Italy in the International Operation in Support to the Libyan Coast Guard, 28 July 2017, Doc. CCL No. 2, p. 6.

²⁹ See Chamber of Deputies, Verbatim Records, Meeting No. 847, 2 August 2017, pp. 1-49; Senate, Assembly, Verbatim Records, Meeting No. 871, 2 August 2017, pp. 41-72.

³⁰ "Nave Tremiti nel porto libico di Abu Sittah", *Analisi Difesa*, 10 August 2017, available at: <<http://www.analisedifesa.it/2017/08/nave-tremiti-nel-porto-libico-di-abu-sittah/>>.

³¹ Joint Commissions III and IV of the Senate and III and IV of the Chamber of Deputies, Communication of the Government on the Operation in Support to the Libyan Coast Guard Deliberated by the Council of Ministers on 28 July 2017 (DOC. CCL No. 2), Verbatim Record, Meeting No. 30, 28 September 2017, p. 14.

³² Analytical Report, *cit. supra* note 27, p. 101.

³³ *Ibid.*, pp. 173 and 192-193. The Parliament approved the Government's decision to extend the mandate of the assistance mission in January 2018. See Senate, Commissions III (Foreign Affairs, Migration) and IV (Defence), Meeting No. 33, 15 January 2018, p. 5 ff.; Chamber of Deputies, Verbatim Record, Meeting No. 905, 17 January 2018, p. 2 ff.

³⁴ Deliberation of the Council of Ministers Relating to the Participation of Italy in International Operations to Be Established in 2018, 28 December 2017, Doc. CCL No. 3, p. 4 ff. The Government's decision to establish another mission in support of the Government of National Accord was approved by the Parliament in January 2018. See Senate, Commissions

assigned, *inter alia*, the task of training and providing mentoring to the Libyan security forces in the field of operations against irregular immigration.³⁵

In this regard, it is to be stressed that since 2016 Italy has been providing training to the Libyan Coast Guard and Navy also in the framework of the EUNAVFOR MED Operation Sophia, an EU military crisis management operation, whose primary objective is “contributing to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean”.³⁶ From September 2016 to October 2017, about one hundred members of the Libyan Coast Guard and Navy attended training courses in Rome, Taranto and on board the Italian ship “San Giorgio”.³⁷

6. THE ITALIAN CODE OF CONDUCT FOR NGOS INVOLVED IN MIGRANT RESCUE AND THE LIBYAN SEARCH AND RESCUE ZONE

As recommended by the European Commission in the above-mentioned action plan, in July 2017, the Italian Ministry of the Interior drafted a code of conduct for NGOs carrying out search and rescue activities in the Mediterranean Sea.³⁸ Such NGOs were requested to sign the code and comply with it.³⁹ The signatories commit themselves, *inter alia*, “not to enter Libyan territorial waters, except in situations of grave and imminent danger requiring immediate assistance and not to obstruct search and rescue by the Libyan Coast Guard”. In case of non-compliance or failure to subscribe to the code, the Italian authorities may adopt unspecified measures against the relevant vessels “in compliance with applicable domestic and international law and as required in the public interest of saving

III (Foreign Affairs, Migration) and IV (Defence), Meeting No. 33, 15 January 2018, p. 5 ff.; Chamber of Deputies, Verbatim Record, Meeting No. 905, 17 January 2018, p. 2 ff.

³⁵ Deliberation of the Council of Ministers, *cit. supra* note 34, p. 4 ff.

³⁶ Council Decision (CFSP) 2015/778 of 18 May 2015 (OJ EU L122 of 19 May 2015), Art. 1(1). The mandate of EUNAVFOR MED Operation Sophia was broadened to include the training of the Libyan Coast Guard and Navy, by Council Decision (CFSP) 2016/993 of 20 June 2016 (OJ EU L162 of 21 June 2016). On EUNAVFORMED Operation Sophia see among others: GESTRI, “EUNAVFORMED: Fighting Migrant Smuggling under UN Security Council Resolution 2240 (2015)”, *IYIL*, 2015, p. 21 ff.; D’ARGENT and KURITZKY, “Refoulement by Proxy? The Mediterranean Migrant Crisis and the Training of Libyan Coast Guards by EUNAVFOR MED Operation Sophia”, *Israel Yearbook on Human Rights*, 2017, p. 233 ff.

³⁷ Analytical Report, *cit. supra* note 27, p. 38.

³⁸ On the European Commission action plan, see *amplius supra* Section 4.

³⁹ Code of Conduct for NGOs Involved in Migrant Rescue at Sea, Rome, 7 August 2017, available at: <http://www.interno.gov.it/sites/default/files/codice_condotta_ong.pdf>. For comment, see: PAPANICOLOPULU, “Immigrazione irregolare via mare, tutela della vita umana e organizzazioni non governative”, *Diritto, Immigrazione e Cittadinanza*, 2017, No. 3, p. 1 ff., p. 24 ff.; FERRI, “Il Codice di condotta per le ONG e i diritti dei migranti: fra diritto internazionale e politiche europee”, *DUDI*, 2018, p. 189 ff.; GOMBEER and FINK, “Non-Governmental Organisations and Search and Rescue at Sea”, *Maritime Safety and Security Law Journal*, 2018, No. 4, p. 1 ff., p. 4 ff.; RAMACCIOTTI, “Sulla utilità di un codice di condotta per le organizzazioni non governative impegnate in attività di *search and rescue* (SAR)”, *RDI*, 2018, p. 213 ff.

human lives while guaranteeing shared and sustainable reception of migration flows".⁴⁰ Most of the NGOs involved in migrant rescue in the Mediterranean signed the code, including Migrant Offshore Aid Station (MOAS), Proactiva Open Arms, Save the Children and SOS Méditerranée.⁴¹

Soon afterwards, on 10 August 2017, the Libyan Navy announced the establishment of a Libyan search and rescue region (SAR Region) in accordance with the 1979 International Convention on Maritime Search and Rescue (SAR Convention), to which Libya is a party, and demanded that foreign vessels, in particular NGO ones, should not conduct rescue operations within it, without prior authorisation from the Libyan authorities.⁴² In fact, the would-be Libyan SAR Region was notified to the Secretary-General of the International Maritime Organization (IMO) in accordance with the SAR Convention, in July 2017. In December 2017, however, the Libyan communication was withdrawn, as it was inaccurate, and it was replaced with another.⁴³ The new communication stated that the Libyan SAR Region coincides with the Tripoli Flight Information Region (FIR), already notified to the International Civil Aviation Organization. However, it did not provide any of the information on the national search and rescue service that the SAR Convention requires (Annex, paragraph 2.1.11, as amended).⁴⁴

The adoption of the above-mentioned code of conduct and the Tripoli authorities' insistence that no rescue operation be conducted in the would-be Libyan SAR Region without their prior authorisation severely hampered NGOs search and rescue activities in the Libyan territorial sea and the high seas off the Libyan coast, while simultaneously increasing those of the Libyan Coast Guard, which – as already noted – systematically transfers rescued or intercepted migrants to the detention centres run by the Department for Combatting Illegal Immigration.⁴⁵ Apart from any other consideration, such course of conduct by the Libyan Coast Guard, as facilitated by the Italian authorities, amounts to a glaring breach of the SAR Convention, whose Annex, as amended in 1998, defines "rescue" as "an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety" (paragraph 1.3.2).⁴⁶ According to the Guidelines on the Treatment of Persons Rescued at

⁴⁰ Code of Conduct for NGOs, *cit. supra* note 39.

⁴¹ Ministry of the Interior, "Codice di condotta per il salvataggio dei migranti, arriva la firma della Ong Sos Méditerranée", 11 agosto 2017, available at: <<http://www.interno.gov.it/it/notizie/codice-condotta-salvataggio-dei-migranti-arriva-firma-ong-sos-mediterranee>>.

⁴² "Libya Navy Bars Foreign Ships from Migrant 'Search and Rescue' Zone", Daily Mail, 10 August 2017, available at: <<http://www.dailymail.co.uk/wires/afp/article-4779316/Libya-navy-bars-foreign-ships-migrant-search-rescue-zone.html>>.

⁴³ Letter of the President of Libyan Ports and Maritime Transport Authority, 14 December 2017.

⁴⁴ See also International Maritime Organization, Global Integrated Shipping Information System, available at: <<https://gis.imo.org/Public/Default.aspx>>.

⁴⁵ See *amplius supra* Section 3.

⁴⁶ Maritime Safety Committee, Resolution MSC.70(69), 18 May 1998, available at: <[http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-\(MSC\)/Documents/MS.70\(69\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-(MSC)/Documents/MS.70(69).pdf)>.

Sea, adopted by the IMO Maritime Safety Committee in 2004, “place of safety” means “a place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met” (paragraph 6.12).⁴⁷ In the light of the situation described in the preceding pages, this is certainly not Libya today.⁴⁸ As the Office of the UN High Commissioner for Refugees rightly pointed out, this country evidently does not fulfill the criteria for being considered a place of safety for the purpose of disembarkation following rescue at sea.⁴⁹

It is to be noted also that the requirement of prior authorisation from Libyan authorities for NGOs to rescue migrants in the would-be Libyan SAR Region has no legal basis in the SAR Convention. In addition, it is not consistent with the duty to assist persons in distress at sea, which is enshrined in the 1974 International Convention for the Safety of Life at Sea (Chapter V, Regulation 33(1)), the 1982 UN Convention on the Law of the Sea (Article 98(1)) and the 1989 International Convention on Salvage (Article 10(1)) and widely recognised as having customary international law status.⁵⁰ The obligation of the shipmaster to render assistance to persons in distress at sea is not geographically limited.⁵¹ In particular, the shipmaster is not released from such obligation in the SAR Region of a coastal State. The SAR Convention stipulates that states parties “shall ensure that assistance be provided to any person in distress at sea” (Annex, paragraph 2.1.10), and only requires them to co-ordinate their search and rescue organisations and, whenever necessary, search and rescue operations with those of neighbouring states (Annex, paragraph 3.1.1, as amended).⁵²

⁴⁷ Maritime Safety Committee, Resolution MSC.167(78), 20 May 2004, available at: <[http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167\(78\).pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf)>.

⁴⁸ See *supra* Section 3.

⁴⁹ United Nations High Commissioner for Refugees, “UNHCR Position on Returns to Libya, Update I”, October 2015, available at: <<http://www.refworld.org/docid/561cd8804.html>>, para. 33.

⁵⁰ See NOYES, “Ships in Distress”, Max Planck Encyclopedia of Public International Law, October 2007, available at: <<http://opil.ouplaw.com/home/epil>>, para. 6; PROELSS, “Rescue at Sea Revisited: What Obligations Exist Towards Refugees?”, Scandinavian Institute of Maritime Law Yearbook, 2008, p. 1 ff., p. 9; GALLAGHER and DAVID, *The International Law of Migrant Smuggling*, Cambridge, 2014, p. 446; PAPANICOLOPULU, *International Law and the Protection of People at Sea*, Oxford, 2018, p. 187 ff.

⁵¹ See PROELSS, *cit. supra* note 50, p. 12 ff.; KOMP, “The Duty to Assist Persons in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?”, in MORENO-LAX and PAPASTAVRIDIS (eds.), *Boat Refugees’ and Migrants at Sea: A Comprehensive Approach*, Leiden/Boston, 2017, p. 222 ff., p. 230; PAPANICOLOPULU, *International Law, cit. supra* note 50, p. 187 ff.

⁵² See CAMPÁS VELASCO, “The International Convention on Maritime Search and Rescue: Legal Mechanism of Responsibility Sharing and Cooperation in the Context of Sea Migration?”, Irish Yearbook of International Law, 2015, p. 57 ff.

7. THE ITALIAN ACTION TO REINFORCE LIBYA'S SOUTHERN BORDER CONTROL CAPACITY

Backed by the EU, Gentiloni's Government also took action in order to prevent the illegal entry into Libya of migrants headed to Italy. Every year, tens of thousands of people illegally enter Libya, through its southern border. Acting on the basis of the MOU of 2 February 2017, Italy made substantial efforts to reinforce Libya's capacity to control its southern border, in the belief expressed by the Minister of the Interior Marco Minniti that "sealing off Libya's southern border means sealing off Europe's southern border".⁵³

Most of the irregular migrants coming from Sub-Saharan Africa enter Libya through the Fezzan border. Fezzan is a region lying in southwestern Libya, which is nominally under the authority of the Government of National Accord, but is in fact controlled by local tribes, often in conflict with each other.⁵⁴ Their militias control the border areas and the smuggling routes. In particular, the Tebu tribe controls the smuggling routes from Niger up to Sabha, Fezzan's administrative capital. There migrants are transferred to the Awlad Suleiman tribe.⁵⁵

As a first step, the Italian Government acted as mediator between the Fezzan's tribes aiming at their reconciliation, with the ultimate purpose of obtaining their commitment to stop migrant smuggling activities and convert their militiamen into zealous border guards, in exchange for financial support for the region's development. A meeting was organised by the Ministry of the Interior in Rome at the end of March 2017, which was attended by the representatives of about sixty tribes. During this meeting, representatives of the Tebu and the Awlad Suleiman signed a peace deal, the text of which however has never been disclosed.⁵⁶

Afterwards, in July and August 2017, Minniti met, respectively, in Tripoli and Rome with the mayors of the Libyan towns most affected by the phenomenon of irregular immigration, in order to discuss Italy's economic assistance to Libyan local communities in exchange for their cooperation in the fight against irregular immigration and migrant smuggling. For such assistance Italy would use funds made available by the EU Trust Fund for Africa.⁵⁷ No details about it however were revealed.

⁵³ "Libia, le tribù del Sud siglano la pace e si impegnano a bloccare i migranti", *La Stampa*, 2 April 2017, available at: <<http://www.lastampa.it/2017/04/02/esteri/libia-le-trib-del-sud-siglano-la-pace-e-si-impegnano-a-bloccare-i-migranti-qzNs23DGe0OSdJi7G285FK/pagina.html>>.

⁵⁴ See International Crisis Group, "How Libya's Fezzan Became Europe's New Border", 31 July 2017, available at: <<https://d2071andvip0wj.cloudfront.net/179-how-libyas-fezzan-became-europes-new-border.pdf>>.

⁵⁵ FRONTEX, "Africa-Frontex Intelligence Community Joint Report 2016", April 2017, p. 17.

⁵⁶ "Libia, le tribù del Sud siglano la pace", *cit. supra* note 53.

⁵⁷ See "Minniti ai sindaci: aiuti in cambio di un'azione di contrasto ai migranti", *il Manifesto*, 14 July 2017, available at: <<https://ilmanifesto.it/minniti-ai-sindaci-libici-aiuti-in-cambio-di-unazione-di-contrasto-ai-migranti/>>; Ministry of the Interior, "Minniti e i sindaci delle comunità libiche: i trafficanti sono un nemico comune", 26 August 2017, available at:

Indeed, the Italian Government had no choice but to engage in direct dialogue with the Libyan local communities, since the Government of National Accord has no effective control over its territory. Nevertheless, this very circumstance raises doubts about how it can be ensured that such communities respect their commitments, as they are responsible only to the central Government. Moreover, there is no guarantee that they would make respect for migrants' human rights a priority, when trying to curb irregular immigration and smuggling activities. These concerns are aggravated by the total lack of transparency about the deals that the Italian Government struck with the aforementioned communities.⁵⁸

8. THE ITALIAN ACTION TO REINFORCE CHAD'S AND NIGER'S BORDER CONTROL CAPACITY

In spring 2017, Gentiloni's Government also began cooperation with Chad and Niger, Libya's neighbouring countries through which most of the migrants headed to Italy pass, with the aim of strengthening their border control capacity. On 21 May 2017, in Rome, at the Ministry of the Interior's premises, Minniti met with the Ministers of the Interior of Chad, Libya and Niger. In the joint communiqué issued at the end of the meeting, they stressed the necessity of cooperating in the fight against terrorism and human trafficking, with the objective of ensuring border security, and supporting the training and enhancement of border guards, through regular contact between border control forces. They also announced the decision to create a consultative forum on border security and on the fight against terrorism, human trafficking and irregular immigration.⁵⁹

The involvement of Chad and Niger in the containment of migratory flows was praised by France, Germany, Spain and the EU during the Paris Summit of 28 August 2017. The Heads of State or Government of France, Germany, Italy, Spain, Chad and Niger, the Prime Minister of the Libyan Government of National Accord and the High Representative of the EU for Foreign Affairs and Security Policy attended. In the joint declaration issued after the Summit, France, Germany, Italy, Spain and the EU expressed, *inter alia*, their readiness to further support Chad and Niger in the fight against human trafficking and irregular im-

<<http://www.interno.gov.it/it/notizie/minniti-e-i-sindaci-comunita-libiche-i-trafficienti-sono-nemico-comune>>.

⁵⁸ See "Libya's Dark Web of Collusion", *cit. supra* note 10, p. 50.

⁵⁹ Joint Communiqué of the Ministers of the Interior of Italy, Chad and Niger, 21 May 2017, available at: <<http://www.interno.gov.it/sala-stampa/comunicati-stampa/comunicato-congiunto-dei-ministri-dellinterno-italia-ciad-libia-niger>>. Subsequently, Mali joined the initiative. In this respect, see Ministry of the Interior, "Incontro al Viminale tra il Ministro Minniti e il Ministro del Mali Coulibaly. Cabina di regia con Italia, Ciad, Libia e Niger", 28 July 2017, available at: <<http://www.interno.gov.it/sala-stampa/comunicati-stampa/incontro-viminale-ministro-minniti-e-ministro-mali-coulibaly-cabina-regia-italia-ciad-libia-e-niger>>; "Immigrazione, seconda riunione della 'Cabina di Regia' dei Ministri dell'interno di Ciad, Italia, Libia, Mali e Niger", 28 August 2017, available at: <<http://www.interno.gov.it/it/notizie/immigrazione-riunione-viminale-cabina-regia-ciad-italia-libia-mali-e-niger>>.

migration, by strengthening current programmes aimed at improving control of their borders, in particular those with Libya.⁶⁰

Finally, at the end of December 2017, the Italian Government decided to establish a combined air and land operation to support Niger's authorities, at their request, on the basis of the bilateral agreement on security and defence cooperation, which had been signed in September 2017. The Italian forces were tasked with assisting the Nigerien Government in developing national security forces and concurring in territory and border surveillance. The planned duration of the operation was ten months.⁶¹ Despite some opposition, Gentiloni's Government decision received Parliament's approval.⁶² At the time of writing, however, the Italian forces have not yet been deployed in Niger.⁶³ If and when deployment takes place, they will be bound to act in accordance with Italy's human rights obligations. In this respect, participation of Italian military personnel in the surveillance of Nigerien borders might prove problematic, where it implied forcible prevention of migrants' departures from Niger.

9. ITALY'S COMPLICITY IN THE VIOLATIONS OF MIGRANTS' HUMAN RIGHTS IN LIBYA

Italy's new migration control measures, in particular the active support to the Libyan Coast Guard and the adoption of a code of conduct for NGOs involved in migrant rescue, rapidly led to a significant reduction in the number of migrants arriving in Italy (33,288 between July and November 2017, 67% less than in the same period of 2016, according to Amnesty International)⁶⁴ and, simultaneously, to a sharp increase in that of migrants intercepted at sea by the Libyan Coast Guard and transferred to the detention centres run by the Department for Combatting Illegal Immigration (19,900 migrants detained at the beginning of November 2017, according to the Department).⁶⁵ As a consequence of the growth in the number of migrants held in such centres, the already inhuman conditions of

⁶⁰ European Commission, "Press Release: Déclaration conjointe 'Relever le défi de la migration et de l'asile'", Paris, 28 August 2017, available at: <http://europa.eu/rapid/press-release_STATEMENT-17-2981_fr.htm>.

⁶¹ Deliberation of the Council of Ministers, *cit. supra* note 34, p. 6.

⁶² See Senate, Commissions III (Foreign Affairs, Migration) and IV (Defence), Meeting No. 33, 15 January 2018, p. 5 ff.; Chamber of Deputies, Verbatim Record, Meeting No. 905, 17 January 2018, p. 2 ff.

⁶³ In March 2017, the Nigerien Minister of the Interior denied that the deployment of Italian troops had been requested by the Nigerien Government. See "Ministro Interni del Niger: nessun accordo con l'Italia per una missione militare", Rainews, 9 March 2018, available at: <<http://www.rainews.it/dl/rainews/media/Niger-Ministro-Interni-nessun-accordo-con-Italia-per-missione-militare-b4e83ed6-e3a7-4e87-b59b-0ffd9a410ab3.html>>.

⁶⁴ "Libya's Dark Web of Collusion", *cit. supra* note 10, p. 43.

⁶⁵ Office of the United Nations High Commissioner for Human Rights, "UN Human Rights Chief: Suffering of Migrants in Libya Outrage to Conscience of Humanity", 14 November 2017, available at: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22393&LangID=E>>.

detention therein further worsened, as denounced by the UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein in November 2017. He affirmed that "the suffering of migrants detained in Libya is an outrage to the conscience of humanity".⁶⁶

Indeed, by providing assistance to the Libyan Coast Guard and restricting NGOs search and rescue activities by means of the said code of conduct, Italy became complicit in the grave violations of human rights against migrants intercepted at sea and transferred to the above-described detention facilities, in particular of the right not to be subjected to torture or ill-treatment.⁶⁷

The prohibition of torture and inhuman or degrading treatment is at the heart of human rights protection. In addition to the Universal Declaration of Human Rights (Article 5), it is enshrined in: the International Covenant on Civil and Political Rights (Article 7), to which both Libya and Italy are parties; the European Convention on Human Rights (ECHR) (Article 3) and the Charter of Fundamental Rights of the European Union (Article 4), by which Italy is bound; and the African Charter on Human and Peoples' Rights (Article 5), to which Libya is a party.⁶⁸ It is an absolute prohibition, from which no derogation is allowed even in time of armed conflict or other emergency threatening the life of the nation, including a large and sudden inflow of migrants, according to the International Covenant on Civil and Political Rights (Article 4) and the ECHR (Article 15).⁶⁹ The prohibition of torture is a peremptory norm of general international law. Its *jus cogens* status has been asserted by the Human Rights

⁶⁶ *Ibid.*

⁶⁷ On the complicity of Italy and the other EU member states in the violations of migrants' human rights in Libya, see "Libya's Dark Web of Collusion", *cit. supra* note 10, pp. 51 ff., 60.

⁶⁸ See also the UN Convention against Torture, to which both Libya and Italy are parties. It requires states parties to prevent in any territory under their jurisdiction acts of torture (Art. 2(1)) and other acts of inhuman or degrading treatment, when committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (Art. 16(1)). States parties are also obliged to ensure that all acts of torture are criminal offences under domestic law (Art. 4). On the prohibition of torture and inhuman or degrading treatment, see among others: NOWAK, *UN Covenant on Civil and Political Rights. CCPR Commentary*, 2nd revised ed., Kehel, 2005, p. 157 ff.; VAN BOVEN, "The Prohibition of Torture: Norm and Practice", in DUPUY, FASSBENDER, SHAW and SOMMERMANN (eds.), *Common Values in International Law. Essays in Honour of Christian Tomuschat*, Kehel, 2006, p. 91 ff.; VILJOEN and ODINKALU, *The Prohibition of Torture and Ill-treatment in the African Human Rights System*, Geneva, 2006; NOWAK and MCARTHUR, *The United Nations Convention against Torture. A Commentary*, Oxford, 2008; KRETZMER, "Torture, Prohibition of", Max Planck Encyclopedia of Public International Law, December 2010, available at: <<http://opil.ouplaw.com/home/epil>>; DELAPLACE, "Article 7", in DECAUX (ed.), *Le Pact international relatif aux droits civils et politiques. Commentaire article par article*, Paris, 2011, p. 201 ff.; SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, 2015, p. 164 ff.; VERMEULEN and BATTJES, "Prohibition of Torture and Other Inhuman or Degrading Treatment or Punishment", in VAN DIJK, VAN HOOF, VAN RIJN and ZWAAK (ed.), *Theory and Practice of the European Convention on Human Rights*, 5th ed., Cambridge-Antwerp-Portland, 2018, p. 381 ff.

⁶⁹ See among others: NOWAK, *UN Covenant*, *cit. supra* note 68, p. 83 ff.; BALGUY-GALLOIS, "Article 4", in DECAUX (ed.), *cit. supra* note 68, p. 147 ff.; SCHABAS, *cit. supra* note

Committee,⁷⁰ the International Criminal Tribunal for the former Yugoslavia,⁷¹ the International Law Commission,⁷² the Committee against Torture⁷³ and, more recently, the International Court of Justice in the *Belgium v. Senegal* case.⁷⁴ There is some uncertainty only about the peremptory character of the prohibition of inhuman and degrading treatment,⁷⁵ which however is without doubt part of customary international law, as was held by the International Court of Justice in the *Diallo* case.⁷⁶

Italy's complicity in violations of the prohibition of torture and ill-treatment against migrants intercepted at sea by the Libyan Coast Guard and transferred to the governmental detention facilities in Libya can be asserted on the basis of the principle laid down in Article 16 of the 2001 International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts. Under this Article, which the International Court of Justice deemed to reflect a customary rule in the *Genocide* case,⁷⁷ "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".⁷⁸ In the case at issue, all the aforementioned conditions are fulfilled. Firstly, it is evident that, in order to stem the inflow of irregular migrants from Libya, Italy intended to facilitate their interception by the Libyan Coast Guard and their forcible return to Libyan soil, where they are held in detention centres managed by the Department for Combatting

68, p. 587 ff.; SOTTIAUX, "Derogation in Time of Emergency", in VAN DIJK, VAN HOOF, VAN RIJN and ZWAAK (ed.), *cit. supra* note 68, p. 1063 ff.

⁷⁰ Human Rights Committee, General Comment No. 24, UN Doc. CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 10.

⁷¹ Trial Chamber, *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, para. 153.

⁷² Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, YILC, 2001, Vol. II, Part Two, p. 113, para. 5.

⁷³ Committee against Torture, General Comment No. 2, UN Doc. CAT/C/GC/2, 24 January 2008, para. 1.

⁷⁴ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, ICJ Reports, 2012, p. 422 ff., p. 457, para. 99.

⁷⁵ See FOCARELLI, *La persona umana nel diritto internazionale*, Bologna, 2013, p. 13.

⁷⁶ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, ICJ Reports, 2010, p. 639 ff., p. 671, para. 87.

⁷⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports, 2007, p. 43 ff., p. 217, para. 420.

⁷⁸ Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *cit. supra* note 72, p. 27. On complicity in an internationally wrongful act, see, among others, DOMINICÉ, "Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State", in CRAWFORD, PELLET and OLLESON (eds.) *The Law of International Responsibility*, Oxford, 2010, p. 281 ff.; JACKSON, *Complicity in International Law*, Oxford, 2015, p. 135 ss.; LANOVOY, *Complicity and Its Limits in the Law of International Responsibility*, Oxford-Portland, 2016; PUMA, *Complicità di Stati nell'illecito internazionale*, Torino, 2018.

Illegal Immigration. Secondly, there is no doubt that the Italian Government was perfectly aware of the inhuman conditions of detention of irregular migrants in Libya, in the light of the reiterated denunciations by the UN organs,⁷⁹ the International Organization for Migration⁸⁰ and human rights NGOs.⁸¹ Thirdly, acts of torture and ill-treatment against irregular migrants would constitute internationally wrongful acts even if they were committed directly by Italy.

The state of necessity, to which the Minister of the Interior Minniti implicitly referred in some declarations, could not be invoked as a ground for precluding the wrongfulness of Italy's behaviour. Under Article 26 of the above-mentioned Draft Articles on Responsibility of States for Internationally Wrongful Acts, circumstances precluding wrongfulness cannot justify a breach of a *jus cogens* rule.⁸² Therefore, necessity cannot excuse violations of the prohibition of torture.

As to the violations of the obligation not to subject anyone to inhuman or degrading treatment, they could possibly be justified by necessity, if such obligation were deemed not to have attained *jus cogens* status. However, as per Article 26 of the Draft Articles, the state of necessity could be invoked as a ground precluding the wrongfulness of the aforementioned violations, solely if they were "the only means for the State to safeguard an essential interest against a grave and imminent peril" and did not "seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole". In the case at issue, what was at stake was Italy's interest in protecting national security, which certainly qualifies as "an essential interest of the State"; however, it is questionable whether, before adopting the aforementioned measures, such interest was threatened by "a grave and imminent peril". Moreover, measures alternative to the transfer of migrants to the Libyan detention centres could be explored, in cooperation with the EU and its member states, in order to ease migratory pressure on Italy, such as the full implementation and the broadening of the relocation scheme for persons in need of international protection, which had been set up by the EU in 2015. As the International Law Commission pointed out in the comment to Article 25, "the plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less

⁷⁹ See in particular "Detained and Dehumanised", *cit. supra* note 10, p. 11 ff.; Report of the Secretary-General pursuant to Security Council Resolution 2312 (2016), *cit. supra* note 10, paras. 40-42; "UN Human Rights Chief: Suffering of Migrants", *cit. supra* note 65.

⁸⁰ See for example International Organization for Migration, "LIBYA – Migration Crisis Operational Framework 2017-2019", available at: <https://www.iom.int/sites/default/files/our_work/DOE/MCOF/MCOF-Libya-2017-2019.pdf>, p. 25.

⁸¹ See, among others, Human Rights Watch, "Italy: Navy Support for Libya May Endanger Migrants", 2 August 2017, available at: <<https://www.hrw.org/news/2017/08/02/italy-navy-support-libya-may-endanger-migrants>>; "Libya's Dark Web of Collusion", *cit. supra* note 10, p. 22 ff.

⁸² On the state of necessity as a ground for precluding the wrongfulness of an act of a state, see, among others, HEATHCOTE, "Necessity", in CRAWFORD, PELLET and OLLESON (eds.), *cit. supra* note 78, p. 491 ff.; SLOANE, "On the Use and Abuse of Necessity in the Law of State Responsibility", *AJIL*, 2012, p. 447 ff.; TANZI, "Necessity, State of", *Max Planck Encyclopedia of Public International Law*, February 2013, available at: <<http://opil.ouplaw.com/home/epil>>.

convenient"; they include unilateral actions as well as "other forms of conduct available through cooperative action with other States or through international organizations".⁸³ Finally, the inhuman or degrading treatment of thousands of migrants in the Libyan detention facilities is in stark contrast to the essential interest of the international community as a whole for the protection of human rights of all members of the human family.⁸⁴

10. ITALY'S POSSIBLE INTERNATIONAL RESPONSIBILITY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

With specific regard to the ECHR, it is worth noting that, in a letter to the Italian Minister of the Interior Minniti of 28 September 2017, the Council of Europe Commissioner for Human Rights Nils Muižnieks stressed that, in facing migration emergencies, "it is imperative that States protect and safeguard the human rights of migrants stemming from, among others, the European Convention on Human Rights".⁸⁵ In this respect, he mentioned the 2012 landmark judgment of the European Court of Human Rights in the *Hirsi* case.⁸⁶ In that case, the Grand Chamber held that, by returning twenty-four migrants intercepted on the high seas to Libya on board ships of the Italian Revenue Police in 2009, Italy violated, *inter alia*, Article 3 ECHR, which prohibits torture and inhuman or degrading treatment or punishment and, in the Court's interpretation, implies "the obligation not to remove any person who, in the receiving country, would run the real risk of being subjected to such treatment" (obligation of *non-refoulement*).⁸⁷ The Grand Chamber found a double violation of Article 3, since the transfer of the said migrants to Libya exposed them to the risk of ill-treatment in Libya, as well as to the risk of arbitrary repatriation to their respective countries of origin

⁸³ Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *cit. supra* note 72, p. 83, para. 15.

⁸⁴ See, for example, New York Declaration for Refugees and Migrants, adopted by the General Assembly on 3 October 2016, UN Doc. A/RES/71/1, paras. 6, 22 and 41; Resolution on Mass Migration, adopted by the Institute of International Law, in the Session of Hyderabad, on 9 September 2017, Art. 13(1).

⁸⁵ Letter of the Council of Europe Commissioner for Human Rights, 28 September 2017, available at: <<https://rm.coe.int/letter-to-the-minister-of-interior-of-italy-regarding-government-s-res/168075baea>>.

⁸⁶ European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Grand Chamber, Judgment of 23 February 2012. On the *Hirsi* case, see, among others, GIUFFRÉ, "Watered-Down Rights on the High Seas: *Hirsi Jamaa and Others v Italy* (2012)", ICLQ, 2012, p. 728 ff.; MORENO-LAX, "Hirsi Jamaa and Others v. Italy or the Strasbourg Court versus Extraterritorial Migration Control?", Human Rights Law Review, 2012, p. 574 ff.; PASTAVRIDIS, "European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?", in FITZMAURICE and MERKOURIS (eds.), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications*, Leiden/Boston, 2013, p. 117 ff.

⁸⁷ *Hirsi Jamaa and Others v. Italy*, *cit. supra* note 86, para. 123.

(Eritrea and Somalia), where they could be subjected to the very same treatment.⁸⁸

In his letter, Muižnieks emphasised that “handing over individuals to the Libyan authorities or other groups in Libya would expose them to a real risk of torture or inhuman or degrading treatment or punishment” and warned that “the fact that such actions would be carried out in Libyan territorial waters does not absolve Italy from its obligations under the Convention”.⁸⁹

On 11 October 2017, Minniti replied that “neither Italian ships nor ships cooperating with the Italian Coast Guard ever returned rescued migrants to Libya”. He also minimised the Italian contribution to the Libyan Coast Guard’s operations against irregular immigration, stating that “the Italian authorities’ activity aims only at providing training, equipment and logistic support to the Libyan Coast Guard, in close cooperation with the European Union organs”.⁹⁰

Indeed, for Italy to be held responsible for violating Article 3 ECHR, at the time of the violation, the victims need to have been within Italy’s jurisdiction, that is to say – according to the Court’s interpretation of Article 1 ECHR – under the effective control of the Italian authorities, although outside the Italian territory.⁹¹ In the *Hirsi* case, this condition was fulfilled, since the applicants were returned to Libya on board Italian military ships.⁹² In contrast, in the instant case, migrants rescued or intercepted at sea are returned to Libya on board Libyan Coast Guard’s ships. Minniti’s statement on the non-use of Italian ships for returning migrants to Libya aimed precisely at excluding Italian jurisdiction on returned migrants and, consequently, Italy’s potential responsibility under the ECHR.

In the framework of the operations supporting the Libyan Coast Guard, Italian military ships are involved in patrolling Libyan territorial waters and the high seas off the Libyan coast. Patrolling, however, does not seem sufficient to trigger Italy’s jurisdiction over migrants thereby intercepted, except in the case where they are transferred onto Italian military vessels.⁹³ This opinion finds support in the 2011 judgment of the European Court of Human Rights in the *Al-Skeini* case. In that judgment, the Grand Chamber stressed that, in the cases where the jurisdiction of a state party to the ECHR was affirmed over individuals outside its territory, by virtue of the conduct of its agents, such state exercised control

⁸⁸ *Ibid.*

⁸⁹ Letter of the Council of Europe Commissioner for Human Rights, *cit. supra* note 85.

⁹⁰ Letter of the Italian Minister of the Interior, 11 October 2017, available at: <<https://rm.coe.int/reply-of-the-minister-of-interior-to-the-commissioner-s-letter-regardi/168075dd2d>>.

⁹¹ On the concept of jurisdiction and the extraterritorial application of the ECHR, see among others: NIGRO, “The Notion of ‘Jurisdiction’ in Article 1: Future Scenarios for the Extra-territorial Application of the European Convention on Human Rights”, *IYIL*, 2011, p. 11 ff.; BESSON, “The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to”, *Leiden JIL*, 2012, p. 857 ff.; DA COSTA, *The Extraterritorial Application of Selected Human Rights Treaties*, Leiden, 2013, p. 93 ff.; SCHABAS, *cit. supra* note 68, p. 100 ff.

⁹² *Hirsi Jamaa and Others v. Italy*, *cit. supra* note 86, paras. 76-82.

⁹³ On this point, see PAPANASTAVRIDIS, “European Convention”, *cit. supra* note 86, p. 125; KIM, “Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context”, *Leiden JIL*, 2017, p. 49 ff., p. 62 ff.

“over the buildings, aircraft or ship in which the individuals were held”, as well as “physical power and control over the person in question”.⁹⁴

In this author's opinion, migrants rescued or intercepted at sea and transferred to Libya by the Libyan Coast Guard would fall within Italy's jurisdiction, if Italian military personnel exercised *de facto* control over the Libyan Coast Guard's vessels transporting them back to the Libyan shores. The *Medvedyev* case, decided by the European Court of Human Rights in 2010, is a leading example in this respect.⁹⁵ In that case, the Grand Chamber held that France had jurisdiction over the crew members of a Cambodian merchant ship suspected of carrying large quantities of narcotics, which was intercepted by a French frigate off Cape Verde's shores and rerouted to Brest by French military personnel, while the crew were confined to their quarters under French military guard.⁹⁶ In the light of the *Medvedyev* case, it is submitted that Italy would certainly have jurisdiction over migrants on board Libyan Coast Guard's vessels, if Italian military personnel boarded such vessels and took control of them, so as to decide their itinerary and their destination.

On the other hand, it is questionable whether Italy's jurisdiction under Article 1 ECHR can be asserted in the absence of physical control over migrants by Italian agents.⁹⁷ In particular, it is doubtful whether coordination of search and rescue activities relating to migrant boats in distress on the high seas off the Libyan coast by the Maritime Rescue Coordination Centre Rome (MRCC Rome), under the SAR Convention regime,⁹⁸ is sufficient to trigger Italy's jurisdiction over rescued migrants. With regard to such a case, at the beginning of May 2018, seventeen migrants who had been rescued in an operation coordinated by the MRCC Rome filed an application against Italy with the European Court of Human Rights.⁹⁹ On 6 November 2017, they were on board a sinking rubber dinghy with dozens of other migrants. Both the NGO vessel “Sea Watch 3” and the Libyan Coast Guard were requested by the MRCC Rome to direct themselves towards the dinghy. According to the applicants, once on the scene, the Libyan Coast Guard ship “Ras Jadir” (one of the four ships provided by Italy to the Serraj Government in spring 2017)¹⁰⁰ obstructed the rescue of migrants by “Sea Watch 3” crew. At least twenty migrants drowned. Forty-seven migrants were taken on board “Ras Jadir”

⁹⁴ European Court of Human Rights, *Al-Skeini and Others v. the United Kingdom*, Application No. 55721/07, Grand Chamber, Judgment of 7 July 2011, para. 136.

⁹⁵ European Court of Human Rights, *Medvedyev and Others v. France*, Application No. 3394/03, Grand Chamber, Judgment of 29 March 2010.

⁹⁶ *Ibid.*, paras. 66-67.

⁹⁷ See European Court of Human Rights, *Women on Waves and Others v. Portugal*, Application No. 31276/05, Second Section, Judgment of 3 February 2009.

⁹⁸ See Maritime Safety Committee, Resolution MSC.167(78), *cit. supra* note 47, Annex, para. 6.7; International Maritime Organization, International Aeronautical and Maritime Search and Rescue Manual, 2013 Edition, Vol. II, paras. 2.25, 3.6.1, 3.6.2 and 3.6.5.

⁹⁹ See “Legal Action against Italy over Its Coordination of Libyan Coast Guard Pull-backs Resulting in Migrant Deaths and Abuse”, Global Legal Action Network, 8 May 2018, available at: <<http://www.glanlaw.org/single-post/2018/05/08/Legal-action-against-Italy-over-its-coordination-of-Libyan-Coast-Guard-pull-backs-resulting-in-migrant-deaths-and-abuse>>.

¹⁰⁰ See *amplius supra* Section 5.

and brought back to Libya, where they were detained in inhuman conditions and subjected to serious abuses. The other survivors were transferred to Italy on board “Sea Watch 3”.¹⁰¹ The applicants contend that they were within Italy’s jurisdiction under Article 1, at the time of the incident, and allege that they were victims, *inter alia*, of violations of Article 2 and Article 3 ECHR.

11. CONCLUSION

Italy’s new migration control policy raises serious human rights concerns. The analysis above shows that the reduction in the number of migrants arriving from Libya has been achieved at the price of their human rights. The 2017 MOU between Italy and the Libyan Government of National Accord, which is the cornerstone of the policy, is based on a deliberately short-sighted vision of the migration phenomenon affecting Libya and the irregular migrants’ conditions in that country. In particular, Italy undertakes “to provide technical and technological support” to the Libyan Coast Guard, failing to consider that migrants rescued or intercepted at sea by the latter are routinely transferred to Libyan governmental facilities, where they are arbitrarily detained and subjected to torture and other ill-treatment, and that its members frequently commit abuses against them and collude with migrant smugglers. Indeed, the MOU conspicuously neglects the problem of the protection of migrants’ human rights in Libya.

The interception of migrants at sea and their forcible return to Libyan territory by the Libyan Coast Guard constitute typical “pull back” operations carried out by a transit state (Libya) in the interest of a destination state desiring to prevent migrant arrivals without having to engage its own border authorities in unlawful “pushback” operations (Italy).¹⁰² In 2017, such operations intensified significantly, owing to new measures decided by the Italian Government, in particular (1) the active assistance to the Libyan Coast Guard, in terms of supply, maintenance and repair of patrol boats, provision of equipment, training, sea patrolling and sharing of information, and (2) the adoption of a code of conduct restricting NGOs’ search and rescue activities in favour of those of the Libyan Coast Guard.

However, as the “pull back” operations at issue usually result in blatant violations of migrants’ most fundamental human rights, primarily their right not to be subjected to torture or ill-treatment, these measures actually make Italy complicit in those internationally wrongful acts. As illustrated above, Italy’s complicity

¹⁰¹ See a detailed reconstruction of the events in Forensic Oceanography, “Mare Clausum. Italy and the EU’s Undeclared Operation to Stem Migration Across the Mediterranean”, May 2018, available at: <<http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>>, p. 87 ff.

¹⁰² On the “pull back” operations, see Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/HRC/37/50, 26 February 2018, paras. 56-59. See also General Assembly, Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/72/335, 15 August 2017, paras. 36-40.

in violations of the prohibition of torture and ill-treatment against migrants intercepted at sea by the Libyan Coast Guard and transferred to the governmental detention centres in Libya can be asserted on the basis of the principle set forth in Article 16 of the 2001 International Law Commission's Draft Articles on State Responsibility.

Interestingly, if it were ascertained that Italian military personnel exercised *de facto* control over Libyan Coast Guard vessels transporting migrants back to the Libyan shores, Italy would be responsible also for directly violating the prohibition of torture and ill-treatment enshrined in Article 3 ECHR. Hence, migrants forcibly returned to Libya on board such vessels might successfully lodge an application with the European Court of Human Rights, claiming to be victims of a violation of Article 3 by Italy.

In addition, Italy's economic assistance to the Libyan local communities, in exchange for their cooperation in the fight against irregular immigration and migrant smuggling, is problematic in the light of the human rights obligations of the former. As noted above, there is no guarantee that those communities make respect for migrants' human rights a priority, when trying to curb irregular immigration and smuggling activities.

Obviously, EU political and financial support for all the aforementioned measures has no influence on the question of the breach of human rights obligations by Italy resulting from them. On the contrary, the European Union action raises doubts as to its consistency with international law.¹⁰³

In conclusion, the investigation above reveals an urgent need for the Italian Government to rethink its migration control policy, prioritizing the protection of migrants' fundamental human rights. The Gentiloni-Serraj MOU should be amended as a matter of urgency: any support offered to the Libyan authorities should be made conditional on the respect for human rights and a monitoring mechanism should be established to this effect, as demanded by the Committee against Torture.¹⁰⁴ Meanwhile, Italy's assistance to the Libyan Coast Guard should be suspended and the code of conduct for NGOs involved in migrant rescue modified; the Italian economic support to the Libyan local communities also should be frozen. Finally, the mandate of Italy's operation in Niger should be carefully tailored, so as to avoid human rights violations by the Italian forces.

¹⁰³ See "Libya's Dark Web of Collusion", *cit. supra* note 10, p. 60. An investigation on the possible international responsibility of the EU for its support for Italy's new migration control measures is outside the scope of this article.

¹⁰⁴ Committee against Torture, Concluding Observations on the Fifth and Sixth Combined Periodic Reports to Italy, UN Doc. CAT/C/ITA/CO/5-6, 18 December 2017, paras. 22, 23.

