



THE MALTA DECLARATION AND THE APPLICABILITY OF THE PRINCIPLE OF *NON-REFOULEMENT*: THE EU-LIBYA COOPERATION ON EXTERNAL BORDER GOVERNANCE AND IRREGULAR MIGRANT CONTROL.

Monica Obeng Gyimah, BA, MA, MSW, LLM

This thesis is submitted for the degree of Doctor of Philosophy

Lancaster University Law School
October 2025

Monica Obeng Gyimah

The Malta Declaration and the Applicability of the Principle of *Non-Refoulement*: The EU-Libya Cooperation on External Border Governance and Irregular Migrant Control

Abstract

On 03 February 2017, Members of the European Council and the Libyan government adopted the Malta Declaration, a legally non-binding instrument, to cooperate by joint measures to combat irregular migration to the EU through the Central Mediterranean. The Declaration allows the EU and its Member States to provide funds, equipment and other support to the Libyan Coast Guard and other agencies to intercept persons at sea and return them to Libya. EU States also fund the UN High Commissioner for Refugees and International Organisation for Migration to evacuate refugees, asylum seekers and vulnerable migrants to the Sahel and Lake Chad region and assist migrants to return to their countries of origin.

This thesis examined whether the Declaration provides sufficient safeguards against *refoulement*. It found that many intercepted refugees, asylum seekers and extremely vulnerable migrants are denied access to a safe territory, individualised assessments of their specific protection needs, the opportunity to claim asylum or question their forcible return to Libya. This puts intercepted persons at a real risk of persecution, torture, other ill-treatment and *refoulement*.

The study also found that EU States exercise jurisdiction despite not exercising 'direct physical control' or 'authority' over the CMR or intercepted persons. Their jurisdiction is based on their degree of control and influence over the Declaration, the actions of the Libyans, their substantial funding, equipment and other support together with the policy's effect of preventing persons from reaching EU territory and forcing them back to Libya. EU States are, thus, responsible for the violations of *non-refoulement* perpetrated against intercepted persons by the Libyans.

This study builds on existing studies on similar externalisation policies by highlighting the protection gaps in the Declaration in protecting refugees and migrants against *refoulement*. It makes a case for the development of cooperation agreements that guarantee compliance with *non-refoulement* principle. **Word count:** 300 words

Table of Contents

Abstract	i
Table of Contents	ii
List of Abbreviations.....	vii
Glossary of Key Terms	xi
List of Figures	xiv
Acknowledgement	xv
Author's Declaration	xvi
I. Introductory Chapter	1
1.1 Context to the Malta Declaration	1
1.2 Problem Statement	4
1.2.1 Gaps in the Literature and Study Contributions.....	4
1.3 Research Aims and Questions.....	7
1.4 Research Methodology	9
1.4.1 Theoretical Assumptions and Approach.....	9
1.4.2 Data Sources	13
1.4.3 Sampling Techniques, Data collection and Analysis.....	14
1.5 Organisation of the Thesis	15
1.6 Limitations of the Study	17
1.7 Concluding Remarks.....	18
II. The Principle of <i>Non-refoulement</i> under International Refugee Law	19
2.1 Introduction.....	19
2.2 <i>Non-Refoulement</i> under the 1951 Refugee Convention.....	21
2.2.1 Material Scope	23
2.2.2 Binding Status, Non-Derogability or Exceptions.....	24
2.3 <i>Non-Refoulement</i> in Other International Instruments.....	27

2.3.1 <i>Non-Refoulement</i> under the UNCAT	29
2.3.2 <i>Non Refoulement</i> under the ECHR	31
2.4 <i>Non-Refoulement</i> as Part of CIL and as a Peremptory Norm	34
2.5 Conclusion	37
3.1 Introduction.....	39
3.2 Context to Externalisation Policies	40
3.3 The Concept of Externalisation	43
3.3.1 Direct interdictions	44
3.3.2 Indirect Externalisation Measures	46
3.3.3 The Use of Bilateral and Multilateral Agreements	47
3.4 EU Externalisation Policies	48
3.5 Implications of Externalisation Policies on <i>Non-Refoulement</i>	50
3.6 Conclusion	52
IV. EU Cooperation with Libya	54
4.1 Introduction.....	54
4.2 Libya as a Country of Immigration and Transit to the EU	55
Figure 1: Libya in Relation to Neighbouring Countries.....	56
4.3 Context to EU Cooperation with Libya	58
4.4 EU Cooperation with Libya 2000s-2010	61
4.5 EU Cooperation with Libya After 2011	62
Figure 2: Map of the Central Mediterranean Route	63
Figure 3: Total Number of Illegal Border Crossings on the CMR by Year	64
4.6 The Malta Declaration.....	69
4.6.1 Content.....	69
4.6.2 Implementation	71
4.6.3 Outcome of the Declaration: Achievement of EU Stated Goals	73

4.7 Conclusion	75
V. Libya's National Framework, Access to Refugee Protection and <i>Non-Refoulement</i>	76
5.1 Introduction.....	76
5.2 Libya's International Human Rights Obligations.....	76
5.2.1 International Protection against Arbitrary Detention	78
Figure 4: UNHCR Guidelines on the Detention of Asylum Seekers and Migrants	81
5.2.2 The Prohibition of Collective Expulsions	83
5.3 Libya's Obligations: International Maritime Law and Organised Crime	84
5.4 Libya's National Asylum Framework and Practice.....	86
5.5 Lack of Asylum and International Protection in Libya	89
Figure 5: Refugee Registration in Libya: Photo of a 'Plastified' Slip of Paper	91
5.6 Political Situation, Conflict, Insecurity For Refugees and Migrants	93
5.7 The Smuggling and Trafficking Industry in Libya	95
5.8 Systematic Human Rights Violations in Libya	96
5.9 The Detention of Refugees and Migrants in Inhuman Conditions.....	98
5.10 Conclusion	104
VI. The Question of Jurisdiction: EU States Responsibilities over the Violations of <i>Non-Refoulement</i> under the Malta Declaration	105
6.1 Introduction.....	105
6.2 The Territorial Scope of <i>Non-Refoulement</i> under Article 33(1) of the Refugee Convention	109
6.2.1 <i>Non-Refoulement</i> in the Context of Interception and SAR Operations At Sea.....	114
6.2.2 Application of Jurisdiction under Article 33 of the Refugee Convention in Relation to EU States in the CMR	119
6.3 Establishing Jurisdiction under Article 3 of UNCAT	129
6.3.1 Application of Article 3 of the UNCAT to the Libya Case: Existence of Jurisdiction?	131

6.3.2 Other Basis for Jurisdiction under the UNCAT	135
6.4 The Jurisdiction Over <i>Non-Refoulement</i> under the ECHR	140
6.5 Application of Article 1 of ECHR under the Malta Declaration	145
6.6 Conclusion	149
VII. Discussion and Analysis of Study Findings: The <i>Non-Refoulement</i> Implications of the Declaration	151
7.1 Introduction	151
7.2 General Principles for Assessing Risks of Violations of <i>Non-Refoulement</i>	152
7.3 Application of <i>Non-Refoulement</i> in the Context of the Declaration	155
7.3.1 Decreased Rescues, Dangerous Interceptions and Increased Risks to Life	155
7.3.2 Lack of Procedural Safeguards and Forcible Returns to Libya	160
7.3.3 Indefinite Detention and Ill-Treatment of Intercepted Refugees and Migrants	166
7.3.4 Torture, Cruel and Other Ill-Treatment While in Libyan Detention	169
Figure 6: The Conditions of Refugee and Migrants in Libyan Detention	171
Figure 7: The Deplorable Condition of Migrants in Libyan Detention -‘an Outrage to Humanity’	172
Figure 8: A Tweet by Commissioner Al Hussein Describing the Detention Conditions of Refugees and Migrants in Libya in November 2017	173
7.3.5 Children in Libyan Detention	178
7.4 Access to Justice/Accountability	180
7.5 <i>Non-Refoulement</i> Concerns Arising from Voluntary Returns	183
7.5.1 Inadequate Safeguards in VHR and <i>Refoulement</i>	186
7.5.2 Diplomatic Assurances	189
7.6 Conclusion	190
Chapter VIII: Concluding Remarks and Recommendations	192
Final Reflections and the Way Forward	197

Appendixes	200
Appendix1: Libya’s Treaty Ratification Status	200
Appendix 2 : European Border Surveillance Vessel in the Mediterranean.....	201
Appendix 3: Sudanese Migrants, Who Returned Home from Libya, Protesting in Front of the Local Office of the IOM in Darfur to Demand Assistance in February 2020.....	202
Appendix 4: A Poster in Nigeria Warning of the Risks of Migration	203
.....	203
Appendix 5: Number of Recorded Deaths of Migrants in the Mediterranean Sea from 2014 to 2024	204
Bibliography.....	205
Cases.....	205
Primary Sources	213
Secondary.....	226

List of Abbreviations

AI	Amnesty International
ARCI	Italian Recreational and Cultural Association
ASGI	Association for Juridical Studies on Immigration
ASR	ILC Draft Articles on State Responsibility
AU	African Union
AVR	Assisted Voluntary Return
CAT	UN Committee against Torture
CCPR	UN Human Rights Committee
CEN-SAD	Community of Sahel-Saharan States
CIL	Customary International Law
CMR	Central Mediterranean Route
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CSDM	Centre Suisse pour la Défense des Droits des Migrants (Geneva)
DCIM	Directorate for Combating Illegal Migration (Libya)
DTM	The IOM's Displacement Tracking Matrix
ECA	European Court of Auditors
ECCHR	European Center for Constitutional and Human Rights
ECHR	European Convention on Human Rights
ECOSOC	UN Economic and Social Council
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights

EEAS	European External Action Service (The EU's Diplomatic Service)
EU	European Union
EUNAVFOR MED	EU Naval Force-Mediterranean in the Southern Central Mediterranean (also known as Operation SOPHIA)
EUROSUR	European Border Surveillance System
EUTFA	EU Emergency Trust Fund for Africa
EXCOM	The Executive Committee of the High Commissioner's Programme
FIDH	International Federation for Human Rights
FRA	European Union Agency for Fundamental Rights
FRONTEX	The European Border and Coast Guard Agency
GACS	Libya's General Administration for Coastal Security
GAM	Global Approach to Migration
GAMM	The Global Approach to Migration and Mobility (formerly GAM)
GLAN	Global Legal Action Network
GMDAC	IOM's Global Migration Data Analysis Centre
GNA	Libya's Government of National Accord
GNU	Government of National Unity
HoR	Tobruk-based House of Representatives
HRC	UN Human Rights Council
HRW	Human Rights Watch
IACrTHR	Inter-American Court of Human Rights
IBM	The EU's Integrated Border and Migration Management in Libya
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights

ICHR	The Irish Centre for Human Rights
ICJ	International Court of Justice
IMO	International Maritime Organization
IOM	International Organization for Migration
ISPI	Italian Institute for Political Studies
LCG	Libyan National Coast Guard
LJIL	Lawyers for Justice in Libya
LNA	Libyan National Army
LYD	Libyan Dinars (Libyan currency)
MoU	Memorandum of Understanding
MPF	Migration Partnership Framework
MRCC	Maritime Rescue Coordination Centre
MSF	Médecins Sans Frontières
NGOs	Non-Governmental Organizations
OAU	Organization of African Unity
OHCHR	Office of the UN High Commissioner for Human Rights
PCIJ	Permanent Court of International Justice (preceded the ICJ)
PNG	Papua New Guinea
SAR	Search and Rescue
SOLAS	International Convention for the Safety of Life at Sea
SSA	Sub-Saharan Africa
TFEU	Treaty on the Functioning of the European Union (Treaty of Rome)
UDHR	Universal Declaration of Human Rights

UK	United Kingdom
UN	United Nations
UNCAT	UN Convention against Torture, Inhuman or Degrading Treatment or Punishment
UNCLOS	UN Convention on the Law of the Sea
UNGA	UN General Assembly
UNHCR	The UN High Commission for Refugees, the UN Refugee Agency
UNHRC	UN Human Rights Council
UNSC	UN Security Council
UNSMIL	UN Support Mission in Libya
UNTS	UN Treaty Series
US	United States
VCLT	Vienna Convention on the Law of Treaties
VHR	Voluntary Humanitarian Return

Glossary of Key Terms

Central Mediterranean Route: The main migrant route between Libya and Italy across the Mediterranean Sea, the study area. It is one of three main migration routes by sea to the EU. The rest are Western and Eastern Mediterranean Routes.

Council of the European Union: The Council is an essential decision-maker of the EU and is responsible for coordinating EU Member States' policies in specific fields, including economic and fiscal policies, culture, foreign and security policy. It negotiates and adopts legislative acts based on proposals submitted by the European Commission, in most cases, jointly with the European Parliament through the ordinary legislative procedure, also known as 'codecision'. Codecision is used in policy areas where the EU has exclusive or shared competence with the Member States.

Emergency Transit Mechanisms (ETM) are transit facilities that were established in Rwanda in mid-2019 by the UNHCR following an agreement with the Government of Rwanda and the African Union. ETMs are funded by the EU, Austria, Denmark, Germany and the USA to provide a safe space for evacuated refugees, asylum seekers and the most vulnerable migrants to stay while durable solutions are being pursued.

European Council: The EU's political institution consisting of the heads of State or Governments of the 27 EU Member States, the European Council President and the President of the European Commission. The European Council defines the overall political direction and priorities of the EU, usually by adopting Conclusions. Unlike the Council of the EU above, the European Council neither negotiate nor adopt EU laws.

European Court of Auditors: The EU's judicial body responsible for auditing legality of the use and management of EU funds by EU institutions and the Member States.

Government of National Accord: The GNA is the Libyan authority recognised by the UN and EU but lacks full control over the entire country. The GNA's authority is challenged by competing groups and armed militias such as the Libyan National Army and the State that control different cities and regions of Libya.

Irregular migrants: for the purposes of this study, the term 'irregular migrants' encompasses all persons irregularly travelling along the study area, the Central Mediterranean Route. Unless

a distinction is otherwise made, they include refugees, asylum seekers, economic migrants and vulnerable persons such as victims of trafficking, unaccompanied minors and separated children, pregnant women, nursing mothers, persons with disabilities, the sick and injured and the elderly. The term does not include internally displaced persons who regularly reside in Libya.

Interceptions: This study adopts the definition issued by a Note issued by the UNHCR Executive Committee in 2000 which defines the term more fully as ‘encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.’

Libyan Authorities: when used in the context of rescue operations, interceptions and detention, includes the Libyan Coast Guard, naval forces, Libya’s Stabilization Support Apparatus, Port Security and other port authorities involved in the above activities.

Libyan Coast Guard: when used in this context includes the Libyan Coast Guard itself, Port Security or the General Administration for Coastal Security (GACS) which are the main Libyan agencies involved in the interceptions and returns on the CMR.

A ‘migrant’, when used separately in this context, refers to economic migrants fleeing poverty and harsh economic situations in their countries of origin to seek better economic opportunities in Libya or Europe or to join their family members through the Mediterranean Sea.

Pushbacks/interdictions: while there is no universally accepted definition for the term ‘pushbacks’, the UN Special Rapporteur on the Human Rights of migrants uses the term to include ‘all such measures, actions or policies effectively resulting in the removal of migrants, individually or in groups, without an individualized assessment, in accordance with human rights obligations and due process guarantees.’

Refugee: unless specified otherwise, the term ‘refugee’ in this context is used broadly to cover all persons fleeing persecution, wars, conflicts and human rights violations from their countries of origin and in need of international protection because their countries of origin are unable

or unwilling to protect them. They include recognised refugees, asylum seekers, vulnerable persons, including unaccompanied and separated minors/children.

Sea-Watch: Civil Search and Rescue (NGO) in the Central Mediterranean.

The Committee against Torture is charged with the responsibility for supervising State compliance with the provisions of the Convention against Torture.

UNHCR: UN mandated body entrusted with the responsibility to provide international protection to refugees, and to supervise the application of international treaties on the protection of refugees, and in cooperation with Governments, to seek permanent solutions to the problem of refugees. Its mandate, inter alia, includes promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto. The UNHCR's interpretation of the 1951 Refugee Convention is considered an authoritative view that must be taken into account when making decisions on questions of refugee law.

UNHCR-EXCOM (Executive Committee): is an intergovernmental body that currently consist of 70 Member States of the UN, including the US and the Holy See. It provides advice to the UNHCR in the exercise of its mandate on refugee protection. Although the Executive Committee's Conclusions are not legally binding on States, they are considered relevant to the interpretation and application of the international refugee protection regime. The Conclusions are also broadly representative of the views of the international community, highly respected and therefore, carry a lot of weight.

UNSMIL: is an integrated special political mission established by the UN with a mandate, including 'human rights monitoring and reporting' in Libya. The Director of the Human Rights, Transitional Justice and Rule of Law Division of UNSMIL is the representative of the High Commissioner for Human Rights in Libya.

List of Figures

Figure 1: Map of Libya in Relation to Neighbouring Countries

Figure 2: Map of the Central Mediterranean Route

Figure 3: Total Number of Illegal Border Crossings in the CMR by Year

Figure 4: UNHCR Guidelines on the Detention of Asylum Seekers and Migrants

Figure 5: Proof of Refugee Registration in Libya: Photo of a 'Plastified' Slip of Paper

Figure 6: The Horrific Conditions Refugee and Migrants' Detention

Figure 7: The Deplorable Condition of Migrants in Libyan Detention- 'An Outrage to Humanity'

Figure 8: A Tweet by the High Commissioner for Human Rights Describing the Detention Conditions of Refugees and Migrants in Libya in November 2017

Figure 9: Map of Libyan Detention Centres in June 2016

Acknowledgement

I am most grateful to my supervisors, Dr. Laura Hughes-Gerber and Dr. James Summers, as well as former supervisor, Dr. Esin Küçük and the Doctoral Director, Prof Sigrun Skogly of Lancaster University Law School, for their invaluable guidance, insight, time and constructive feedback.

I would also like to extend my gratitude to Lancaster University, the Law School and Faculty of Arts, other faculty members, administrative staff and librarians, especially Mr. Bob Frost, Dr. Rachel Heah, Ms. Tina Mckee, Ms. Shana Henriques, Ms. Sarah. Moorhouse and Ms. Anna Cooper.

A special thank you goes to all examiners during appraisals, confirmation and viva examination in and outside Lancaster University, including Prof James Sweeney, Dr Noel McGuirk, Dr Alexandra Harrington, LU Law School, and Professor Elin Palm from Linkoping University, Sweden.

Lastly, I am grateful to all my family and friends for their unwavering love, patience, encouragement and support throughout this journey. My mother, Nana Nyamekye Ampaabeng, brothers Kofi Agyemang Brafi, Dr. Paul Osei Brafi, Frank and Kwame. I also thank my sister-in-law, Angie, as well as my cherished friends Prof Henry Danso, Dr. Rasika Wijeratne, Nana Ama, Bright, Michelle Graham-Gallant, Moira Mair and Dr. De-Lawrence Lamptey who proofread the chapters, and provided encouragement and immense assistance throughout the process.

I dedicate this thesis to my children Andrea, Reggie and Stephie Gyimah, and in memory of Professor Stephen Gyimah for their unwavering support, patience, prayers and love.

Thank you all.

Author's Declaration

I, Monica Obeng Gyimah, hereby declare that this thesis is my own work and has not been submitted substantially in the same form for the award of a higher degree elsewhere.

Word count: 79,775 words

I. Introductory Chapter

1.1 Context to the Malta Declaration

In recent years, particularly in the aftermath of the migration crisis of 2015/2016,¹ the European Union (EU) and its Member States have pursued an external migration policy based on intensified cooperation with 'priority' transit countries to reduce irregular migration to Europe.² The policy has centred on taking immediate action to secure southern EU States' external borders against 'predictable' irregular migrant flows, smuggling and human trafficking networks along the Mediterranean Sea.³

The policy is justified on the assumption that cooperation with external neighbouring countries is a practical necessity and the most 'effective' strategy to address the root causes of irregular migration, human smuggling and trafficking and deaths in the Mediterranean Sea.⁴ This was mainly because EU and its Member States' traditional migration control tools became inadequate in managing the rising numbers of refugees, asylum seekers and irregular migrants into the EU through the Mediterranean Sea.⁵ The coming into force of the Single European Act

¹ UNHCR, 'Over One Million Sea Arrivals Reach Europe in 2015' 30 December 2015) <<https://tinyurl.com/yrtd9ckw>> accessed 20 November 2020; European Parliament, *EU Cooperation with Third Countries in the Field of Migration* PE 536.469 (Policy Department 2016) 15; European Commission, *Joint Communication to the Communication to the European Parliament, The European Council and the Council of 25 January 2017 on Migration on the Central Mediterranean Route Managing Flows, Saving Lives (JOIN(2017) 4 final* (2017) 2-3; In 2016 and 2016, EU States faced an unprecedented influx of refugees and migrants. Over one million refugees and migrants arrived in Europe by sea in 2015.

² European Commission, *Migration Partnership Framework: A New Approach to Better Manage Migration* (Fact Sheet) (2016); Bill Frelick, Ian M Kysel and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 JMHS 190 206; Sergio Carrera, Juan Santos Vara and Tineke Strik, 'The External Dimensions of EU Migration and Asylum Policies in Times of Crisis', *Constitutionalising the External Dimensions of EU migration Policies in Times of Crisis* (Edward Elgar Publishing 2019) 9 & 11; Martino Reviglio, 'Externalizing Migration Management through Soft Law: The Case of the Memorandum of Understanding between Libya and Italy' (2019) 20 Global Jurist 1 1; Ferruccio Pastore and Emanuela Roman, 'Migration Policies and Threat-Based Extraversion. Analysing The Impact of European Externalisation Policies on African Polities' (2020) 36 Revue Européenne des Migrations Internationales (Online) 133, 133-36.

³ European Parliament, *EU External Migration Policy and the Protection of Human Rights* (In-Depth Analysis) (2020) -PE 603.512) (EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06) 21.

⁴ European Commission, *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions COM (2015) 240 final* (2015) 6; EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) 21-22.

⁵ Christina Boswell, 'The 'External Dimension' of EU Immigration and Asylum Policy' (2003) 79 International affairs (London) 619, 621; JOIN(2017) (n 1) 1.

of 1988 and the Schengen Agreement of 1985⁶ which led to the removal of internal border controls across the EU and the Schengen countries resulted in increased internal fears about mass influx of people from central and eastern Europe.⁷ Meanwhile, EU States disagreed on the required reforms at the EU level for fear of political backlash and rising anti-immigration sentiments among EU electorates.⁸ Externalising control measures to third countries became EU States' most viable option.⁹

The above situation was worsened after the Arab Spring in 2011 when southern EU States, particularly Italy, were confronted with a drastic increase in arrivals, shipwrecks and deaths at their external borders.¹⁰ In May 2015, the European Commission launched the European Agenda on Migration to intensify their cooperation with third countries on naval and rescue missions in the Mediterranean Sea.¹¹ The Agenda sets forth a wide range of 'swift' actions using 'all [available] policies and tools', including development cooperation and other support to third countries to improve border enforcement, reduce irregular movements, save lives and to accelerate returns.¹²

In 2016, the EU launched a new Migration Partnership Framework (MPF), an implementation mechanism for the Agenda on Migration to step up cooperation between EU institutions, Member States and third countries, particularly countries of origin and transit, to better 'manage migration flows' to Europe.¹³ Since 2016, several MPFs have been concluded between

⁶ The Schengen Agreement was initially signed on 14 June 1985, Belgium, Germany, France, Luxembourg and the Netherlands to abolish controls at their internal borders. The Agreement came into force in 1995 and expanded to more EU States and was integrated into the EU legal framework.

⁷ Boswell (n 5) 621-22; The Single European Act came into force in 1992 to remove restrictions on the free movement of EU workers, capital, goods within the EU's single market.

⁸ Ian Urbina and Joe Galvin, 'EU Cooperation with Libya on Migrants Marred by 'Inhumane' Treatment' (2021) *Christian Science Monitor* 1.

⁹ *ibid.*

¹⁰ *Al, Libya's Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants* (MDE 19/7561/2017 2017) 17; OHCHR, 'Italy Failed to Rescue More than 200 Migrants, UN Committee Finds' (*Display News* (27 January 2021), <tinyurl.com/53df5f2v> accessed 09 December 2021; IOM, 'Missing Migrants Recorded in Since 2014 (06 February 2022)' (2022) <<https://tinyurl.com/4wp68w4a>> accessed 08 February 2022; UNHCR, 'Operational Portal, Mediterranean Situations' (2022) <<https://data2.unhcr.org/en/situations/mediterranean>> accessed 19 May 2022

¹¹ COM(2015 (n 4) 2-3; European Council, '*Special Meeting of the European Council, 23 April 2015-Statement*' (2015); IOM, 'IOM Counts 3,771 Migrant Fatalities in Mediterranean in 2015 (News Global)' (2016) <<https://tinyurl.com/mryx5ttc>> accessed 03 December 2021; EU, 'A European Agenda on Migration State of Play: December 2016' (December 2016) <<https://tinyurl.com/2p9ybhdv>> accessed 03 December 2021; In April 2015, 1,250 people died in two shipwrecks along the Libyan shorelines and Italy's Lampedusa Island.

¹² COM (2015) (n 4) 2-3; EU (n 11); EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) 22.

¹³ MPF (n 2) 1; EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) 23; Trocaire for the Just World, 'Development Adrift the EU Migration Partnership Framework: The Emerging Paradigm of Security and Conditionality' Migration Policy Paper 3, 1. <tinyurl.com/yckn3p7v> accessed 18 November 2021

the European Council and 'priority' countries of origin and transit, including Libya, to ensure a more effective management of irregular migration to the EU.¹⁴

Since the Arab Spring in 2011, the Central Mediterranean Route (CMR) has consistently served as the most dominant and deadliest travel route for the majority of refugees and migrants attempting to enter Europe irregularly by sea.¹⁵ Libya is the *de facto* transit or departure point for the majority of them, particularly those arriving in Italy and Malta.¹⁶ In response, the EU and its Member States stepped up their cooperation with Libya in new ways using multimodal means to enhance their capacity to stop the flows.¹⁷

On 03 February 2017, the European Council and Libya's UN-backed Government of National Accord adopted the Malta Declaration ['the Declaration'] at the end of the European Council's Informal Summit held in Malta on the 'external dimension' of migration in relation to the EU's external borders.¹⁸ The adoption of the Declaration followed a similar agreement, the EU-Turkey Statement of 2016, which was adopted by the European Council and the Republic of Turkey to control irregular migrant flows to Greece through the Eastern Mediterranean and Western Balkans route.¹⁹

The implementation of the Declaration has raised several legal concerns among UN bodies, legal experts, courts and human rights organisations.²⁰ One of the most serious legal issues

¹⁴ MPF (n 2) 1, 2; EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) (n 3) 23; Trocaire (n 13) 4; Priority countries include Ethiopia, Mali, Niger and Nigeria.

¹⁵ European Commission (n 1) 2-3; Steinhilper Elias and Rob Gruilters, 'Border Deaths in the Mediterranean: What Can We Learn from the Latest Data?' (Border Criminologies Blog, 08 March 2017) <<https://tinyurl.com/bvtrh7yw>> accessed 21 November 2020; UNSMIL, 'UN Report Urges End to Humanitarian Detention of Migrants in Libya' (2016) <tinyurl.com/595zytk7> accessed 06 Nov 2020

¹⁶ UNSMIL and OHCHR, *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya* (UNSM Tunis 2018) 10.

¹⁷ HRW, 'EU: Time to Review and Remedy Cooperation Policies Facilitating Abuse of Refugees and Migrants in Libya' (2020) 2 <<https://tinyurl.com/sb9u8czx>> accessed 29 September 2021

¹⁸ Elena Borsacchi, 'The Malta Declaration and the Italy:Libya Memorandum: A Troubled Relationship with External Partners in Migration' International Law Blog <<http://tinyurl.com/y35ptrxp>> accessed 27 Nov 2020 ;AI and ARCI and Others, 'EU: Time to Review and Remedy Cooperation Policies Facilitating Abuse of Refugees and Migrants in Libya (NGOs Joint Statement)' (2020) <<https://tinyurl.com/mr28xjph>> accessed 12 December 2021

¹⁹ European Council, EU-Turkey Statement, 18 March 2016 (Press Release) Point 3; The Malta Declaration explicitly noted that the implementation of the EU-Turkey Statement resulted in 98% reduction in arrivals in Greece through the EMR (Point 2).

²⁰ UNSC 'Report of the Secretary-General' (05 September 2019) UN Doc (S/2019/711) para 12-13; UNSMIL and OHCHR, *Detained and Dehumanised: Reports on the Human Rights Abuses Against Migrants in Libya* (13 December 2016) 12; OHCHR, 'UN Human Rights Chief: Suffering of Migrants in Libya Outrage to Conscience of Humanity' (OHCHR, 14 November 2017) <<https://tinyurl.com/4fcsj9xb>> accessed 20 October 2023; UNSMIL and OHCHR (n 13) 14; CoE Commissioner for Human Rights, *Lives Saved. Rights Protected: Bridging the Protection Gap*

surrounds the choice of Libya as a partner for EU cooperation²¹ in the context of the European Court of Human Rights' 2012 judgment in the *Hirsi* case,²² years of armed conflicts²³ an absence of a functioning government and an asylum framework.²⁴ In light of the above, critics argue that equipping Libyan authorities to intercept and return persons to Libya may be subjecting such persons to serious human rights violations, including torture, ill-treatment and *refoulement*, in violation of international refugee and human rights law.²⁵

Since the Declaration is funded by EU States who maintain overall control over its design and implementation, critics question EU States' adherence to their *non-refoulement* obligations under the international refugee and human rights treaties to which they are parties.²⁶ This raises questions of whether EU States can be held legally accountable for any possible violations of *non-refoulement* committed by Libyan authorities by virtue of the Declaration.²⁷

1.2 Problem Statement

1.2.1 Gaps in the Literature and Study Contributions

Although the Declaration has been extensively examined in the academic literature and human rights reports,²⁸ very few studies have specifically focused on its *non-refoulement*

for Refugees and migrants in the Mediterranean (June 2019) 15; HRW, *No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya* (HRW 2019) ISBN: 978-1-6231-36994; HRW (n 14); Borsacchi (n 15).

²¹ UNSMIL and OHCHR (n 20) 1; OHCHR (n 20); Borsacchi (n 18).

²² *Hirsi Jamaa and Others v Italy* Application no 27765/09 (ECtHR, 23 February 2012) [135]-[138].

²³ Final Report of the Panel of Experts in Accordance with Paragraph 13 of Resolution 2278 (2016) (1 June 2017) Security Council Doc S/2017/466; 'Report of the Independent Fact-Finding Mission on Libya' (01 October 2021) UNGA Doc A/HRC/48/83 para 1; ECCHR, FIDH and LJIL, 'No Way Out: Migrants and Refugees Trapped in Libya Face Crimes Against Humanity' (2021) <<https://tinyurl.com/mr29het7>> accessed 22 March 2023 15-16; OHCHR, *Nowhere but Back Assisted Return, Reintegration and the Human Rights Protection of Migrants in Libya*, (2022) 2; Mustafa Fetouri, 'Libya's GNA is Linked with Notorious Criminals, Including Human Traffickers' *Middle East Monitor* (Italy, Libya 24 October 2019) <<https://tinyurl.com/mwns72k4>> accessed 09 April 2023.

²⁴ *Hirsi* (n 22) [107]; Report of the Secretary General pursuant to Security Council resolution 2312 (2016) (7 September 2017) UNSC Doc S/2017/761 para 45; ECCHR, FIDH and LJIL (n 23) 14, 38.

²⁵ S/2019/711 (n 20); UNSMIL and OHCHR (n 20) 12; UNSMIL and OHCHR (n 16) 15; Elin Palm, 'Refugees and the Ethics of Forced Displacement-By Serena Parekh' (2017) 83 *Theoria* 254 254; OHCHR (n 20); CoE Commissioner (n 20) 15; HRW (n 20); HRW (n 17)..

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ UNSMIL and OHCHR (n 16) 11; European Parliament, *Human Rights Due Diligence Legislation-Options for the EU* (June 2020-PE 603.495) P/EXPO/DROI/FWC/2019-01/LOT6/1/C/05, 46; Amnesty International, *Lives Adrift. Refugees and Migrants in Peril in the Central Mediterranean* (London, UK, 2014) Index: EUR 05/006/2014; Amnesty International, *Europe's Sinking Shame: The Failure to Save Refugees and Migrants at Sea* (Amnesty International London 2015); AI and ARCI and Others (n 18); Amnesty International (n 10).

consequences.²⁹ Most studies examining the Declaration have mostly focused on its (in)compatibility with international human rights law in general.³⁰ Issues of *refoulement* are often discussed as part of the analysis of the systematic human rights violations inside Libya and during maritime interdictions.³¹

Moreover, existing data on the policy have been characterised by cover up, a lack of detail or dedicated instruments for monitoring or evaluating its human rights implications, especially in the public domain.³² Additionally, data on detention and deportations from Libya are often unavailable, incomplete and inconsistent.³³

None of the available reports has specifically focused on the actual implementation of the policy, and whether it guarantees the right of the intercepted persons against *refoulement*.³⁴ There are significant gaps in the literature on how returns are carried out, and whether such returns adequately protect the individuals involved against persecution, torture, real risks of ill-treatment, and *refoulement*.³⁵

²⁹ Jenny Poon, 'Non-Refoulement Obligations in the EU-Turkey Deal and Italy-Libya Memorandum of Understanding' (*International Law blog*, 20 June 2019) <<https://tinyurl.com/4vprfa2k>> accessed 21 November 2020 5; Lucía Salgado and others, 'Putting Migrant Reintegration Programs to the Test: A Road Map to a Monitoring System' (*Migration Policy Institute*, January 2022) <<https://tinyurl.com/3tjcvuzv>> accessed 06 June 2022

³⁰ S/2017/466 (n 23); Amnesty International, (n 10); AI and HRW, *Written Submissions to the ECtHR on Behalf of the Interveners SS and Others v Italy Application No 21660/18* (Nov 2019); UNSMIL and OHCHR (n 16) 28; European Parliament (n 3) 46; European Commission, 'Irregular Migration & Return' (No date) <<https://tinyurl.com/2782h4rd>> accessed 30 October 2020; OHCHR, *Unsafe and Undignified the Forced Expulsion of Migrants from Libya* (OHCHR Migration Unit May 2021) 34.

³¹ CoE Commissioner for Human Rights, *Third party Intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights Application No 21660/18 SS and others v Italy (CommDH(2019))* (15 November 2019); Amnesty International (n 10); Efthymios Papastavridis, 'The EU and the Obligation of Non-Refoulement at Sea' in Francesca Ippolito and Seline Trevisanut (ed), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press 2016); Monette Zar, 'Human Rights Strengthen Migration Policy Framework' (*Migration Policy Institute*, 2005) <<https://tinyurl.com/yf9e37pd>> accessed 28 January 2022; HRW, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers' 21 September 2009) <<https://tinyurl.com/2mnprek2>> accessed 10 February 2022; Poon (n 29).

³² Zar (n 31); Frelick, Kysel and Podkul (n 2) 206; Trocaire (n 13) 6; Sara Creta, 'Eritrean Migrants in Libya Claim EU-Backed Voluntary Returns Programme Isn't So Voluntary' *Euronews* (Lyon, France, 21 June 2020) <<https://tinyurl.com/2wj2rkkn>> accessed 03 March 2022

³³ Rutvica Andrijasevic, 'Deported: The Right to Asylum at EU's External Border of Italy and Libya 1' (2010) 48 *International Migration* 148, 152-153.

³⁴ Marco Caselli, Adjoua Alphonsine Kadio and Caterina Rizzo, 'Assisted Voluntary Return & Reintegration Policies and Programmes in Four EU Countries: France, Germany, Italy and Spain' (2022) 409, 410

³⁵ OHCHR 'Unsafe' (n 30) 34; Poon (n 29).

Compared to the EU-Turkey Statement on which the Declaration was modelled,³⁶ the Declaration has received relatively little attention in the academic literature.³⁷ Although the two instruments share a legal identity, authorship and effects,³⁸ they have fundamental differences in terms of content, the nature of programmes and transfer arrangements.³⁹ Moreover, the prevailing conditions in the two countries differ in terms of institutional capacity, their obligations under the 1951 Refugee Convention, access to asylum procedures and judicial remedies.⁴⁰

Under the EU-Turkey Statement, Turkey was offered a 1:1 scheme, whereby EU States agreed to settle one Syrian refugee from Turkey in the EU for each Syrian returned to Turkey after 20 March 2016 when the agreement came into force.⁴¹ The Declaration lacks such a provision, and instead, EU States promised to work with the UNHCR and the IOM to 'ensure adequate reception capacities and conditions in Libya'⁴² and to support the IOM in 'significantly stepping up assisted voluntary return[s]'.⁴³ Secondly, Turkey was presumed to be a 'safe third-country' as enshrined in the EU's Article 38 of the Asylum Procedures Directive to return all new irregular migrants intercepted between Turkey and the Greek islands for the purposes of international protection, 'in full accordance with EU and international law', including protection against collective expulsion and *refoulement*.⁴⁴ In contrast, the Declaration

³⁶ European Council, Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route (February 2017) (Press Release) Point 2; EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3); Trocaire (n 13) 1-2; Borsacchi (n 18).

³⁷ Daniel Thym, 'Why the EU-Turkey Deal Can Be Legal and a Step in the Right Direction' (11 March 2016) <<https://tinyurl.com/49tpewrs>> accessed 29 October 2021; Margaux Garcia and John Cerone, 'Legal Complications and Outcomes of the EU-Turkey Statement' (*The Fares Center For Eastern Mediterranean Studies*, No Date) <<https://tinyurl.com/3kkbx6rp>> accessed 30 May 2022

³⁸ Declaration (n 36) Borsacchi, (n 18); Trocaire (n 13) 2; Both instruments are legally non-binding and were adopted by the European Council and third countries along major migratory routes in order to outsource border control and security to stem irregular migrant flows into EU States.

³⁹ Garcia and Cerone (n 37).

⁴⁰ Katie Kuschminder, 'Libya is not Turkey: Why the EU Plan to Stop Mediterranean Migration is a Human Rights Concern' (*The Conversation*, 17 February 2017) <<https://tinyurl.com/3cvr7xya>> accessed 29 October 2021; Marit Dijkstra, 'Syrian Refugees in Turkey: Victims of the EU's Politics of Non-Entrée? Examining the impact of the EU-Turkey Statement on the Right to Work and the Principle of Non-Refoulement for Syrian Refugees in Turkey in 2014-2018', Tilburg University 2019).

⁴¹ [...] (n 19) Point 2.

⁴² Declaration (n 36) 6(d).

⁴³ *ibid* 6(e).

⁴⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60 Article 33 and 34; EU-Turkey Statement (n 19) Point 1; Under Article 38 of the above Directive, a safe country is a place that protects refugees and asylum seekers against threats to life and freedom, torture and *refoulement*.

recognised Libya's unstable political conditions,⁴⁵ '[in]adequate reception [...] conditions'⁴⁶ and the incapacity to protect refugees and migrants from systematic and widespread human rights violations and other dangers.⁴⁷

1.3 Research Aims and Questions

Against this backdrop, this study explores the protection gaps and the *non-refoulement* risks for intercepted persons returned to Libya under the Malta Declaration of 2017. It sets out to investigate whether the Declaration, both policy and in practice, provides effective safeguards against risks of persecution, torture and other ill-treatment, and ultimately *refoulement*. Secondly, the study explores whether EU States can be held accountable for any possible violations of *non-refoulement* perpetrated against intercepted persons by the LCG.

The study draws on the principle of *non-refoulement* provided in Article 33(1) of the 1951 Refugee Convention, Article 3 of the UN Convention against Torture (UNCAT), and Article 3 of the European Convention on Human Rights (ECHR). As will be explained later in Chapter Two, the principle protects individuals against a return to a place where their life or freedom would be threatened on certain prohibited grounds.⁴⁸ The study also draws on the emergent concept of externalisation to help situate the Declaration within the larger context of restrictive migration control practices progressively adopted by many countries of asylum, in recent years, to undermine their *non-refoulement* obligations. To this end, this study seeks to answer two main questions:

- *Whether the Declaration, an international agreement, and the main framework for EU States' cooperation with Libya, provides adequate protection safeguards for the rights of*

⁴⁵ Declaration (n 36) Point 5.

⁴⁶ *ibid* Point 6(d).

⁴⁷ CoE Commissioner (n 20)16, 17; Report of the Secretary-General (5 September 2019) UNSC Doc S/2019/711 (n 20) paras 45-46; ICC Prosecutor (Fatou Bensouda), 'Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011) (2 November 2018)' <tinyurl.com/yc2yfe32> accessed 28 January 2022; Alice Fill and Francesco Moresco, 'Voluntary Returns from Libya in the EU externalisation Strategy: a Critical Analysis in the Light of ASGI's Strategic Litigation (2 February 2021)' (ASGI *Scabiaca and Oruka*, 2021) <<https://tinyurl.com/4zv8rs2t>> accessed 06 Oct 2021

⁴⁸ Convention Relating to the Status of Refugees (adopted Geneva 28 July 1951, entry into force on 22 April 1954) 189 UNTS 150 (Refugee Convention) Articles 1 2(A) & 33(1); UNHCR 'Note on Non-Refoulement' Submitted by the High Commissioner' (23 August 1977) UN Doc EC/SCP/2, para 1; *R (on the application of AAA and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department (Appellant/Cross Respondent)* [2023] UKSC 42 [5], [19]-[22].

intercepted refugees, asylum seekers and migrants returned to Libya by the LCG against direct and indirect refoulement?

- *In the case of violations of the principle of non-refoulement against such persons, can the EU States be held responsible under international refugee and human rights law?*
- *To answer the above questions, the study will attempt to answer the following sub questions:*
 1. Considering Libya's unsafe conditions and the absence of an asylum framework, how are the life and liberty of rescued and intercepted persons safeguarded in the Declaration?
 2. Since Libya is a non-signatory to the 1951 Refugee Convention and non-compliant with human rights law, how is the principle of *non-refoulement* operationalised under the Declaration? What are the opportunities for individuals to request asylum and other international protection during interceptions and after their return to Libya?
 3. What protection and procedural guarantees, if any, are provided under the Declaration to protect rescued and intercepted persons against risks of torture, cruel, inhuman or degrading and other ill-treatment, and *refoulement* as laid down in the UNCAT and the ECHR?
 4. Do the EU Member States' control, influence and extensive provision of funds, equipment, training and other material support, for Libyan authorities to interdict and return persons to Libya amount to jurisdiction in relation to their *non-refoulement* obligations?

Due to limited time, space and resource constraints, this study does not analyse EU and its Members' *non-refoulement* obligations under EU law, the obligations of the EU as an international organisation under international law or the doctrine of State responsibility for internationally wrongful acts. It only covers the *non-refoulement* implications of the Declaration under international refugee and human rights law. The analysis will be confined to EU States' obligations under the Refugee Convention, UNCAT and the ECHR.

This study seeks to enhance scholarship on international refugee protection by identifying and documenting possible refugee protection gaps, in particular the risk of *refoulement* in the EU's external migration policy. The study builds on previous studies on human rights violations emanating from restrictive external migration policies. It aims at providing a critical perspective

on potential policy failures and to formulate recommendations for governments and other relevant stakeholders, promote State compliance with the obligations of *non-refoulement*. It makes a case for the development of rights-based-migration control policies to ensure respect for the protection of the rights of refugees, asylum seekers and migrants against *refoulement* during extraterritorial border management.

1.4 Research Methodology

1.4.1 Theoretical Assumptions and Approach

This study adopts a socio-legal methodological approach as the primary method of enquiry.⁴⁹ This choice is based on the study's policy orientation and exploratory aims to critically evaluate the effectiveness of a soft bilateral instrument in safeguarding the rights of refugees, asylum seekers and migrants against an international legal principle and law.⁵⁰ This is a critical legal research exercise that examines the operation of a policy within the broader context of international refugee law and socio-political contexts, including its underlying aims, context of implementation and *non-refoulement* consequences, with the intent to make recommendations for improvement.⁵¹

Legal academic research is dominated by two main methodological traditions.⁵² The most common approach which forms the basis of most, if not all, legal academic scholarship is referred to as 'black letter law', normative or doctrinal methodology.⁵³ Doctrinal research relies extensively on the internal materials of the law such as statutes, regulations and court judgments, without regard to the societal factors outside the law, to explain the law.⁵⁴

⁴⁹ Paul Chynoweth, 'Chapter 3—Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (John Wiley & Sons 2009) 29; McConville M and Chui WH, *Research Methods for Law* (Edinburgh University Press 2017) 1, 5-6; Peck T, 'Interdisciplinary Methodological Approaches to Desk-Based Socio-Legal Human Rights Research' (2023) LaM 3 <<https://tinyurl.com/5dkduesn>> accessed 01 July 2024

⁵⁰ McConville and Chui (n 49) 1, 4 and 6.

⁵¹ Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Taylor and Francis 2017) 15.

⁵² Steven M Barkan, Barbara Bintliff and Mary Whisner, *Fundamentals of Legal Research* (Legal Studies Research Paper No 2015-09, 10th edn, University of Washington School of Law 2015) 15; McConville and Chui (n 49) 1.

⁵³ Nasir Majeed, Amjad Hilal and Arshad Nawaz Khan, 'Doctrinal Research in Law: Meaning, Scope and Methodology' (2023) 12 Bulletin of Business and Economics 559, 559.

⁵⁴ Wing Hong Chui and Mike McConville, 'Introduction and Overview' in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law*, vol 104 (2 edn, Edinburgh University Press 2007) 1; Agus Budianto, 'Legal Research Methodology Reposition in Research on Social Science' (2020) 9 International Journal of Criminology and Sociology 1339 1340-41.

The second tradition is the socio-legal methodology, also referred to as the 'law in context', 'law-in-action' or 'law reform research', emerged in the 1960s as a response to a perceived dissatisfaction with traditional legal methodologies, particularly pure doctrinal research.⁵⁵ Socio-legal researchers examine the law within the broader social, historical, political and economic contexts in which the law operates.⁵⁶ Socio-legal researchers draw on both legal and sociological research methodologies, techniques and sources to explain the interactions between a particular law and a social problem.⁵⁷ Unlike doctrinal research that relies exclusively on legal concepts and sources,⁵⁸ the socio-legal tradition is focused on the collection of empirical data in addition to the examination of legal texts.⁵⁹

Socio-legal approach adopts a critical legal approach to unearth the underlying assumptions, including the socio-political motivations that influence its practice and effectiveness. It focuses on the effectiveness of a particular law in achieving specific social purposes, its shortcomings or contributions in the production of a social problem or the extent to which the law is being observed, and to make recommendations for appropriate legal and policy reforms.⁶⁰

Social legal approach is considered the most suitable for human rights research because international human rights law has a practical orientation and presents a range of complex issues that cannot be resolved within the traditional limits of black letter law.⁶¹ The policy orientation is derived from the idea that human rights law is inseparable from human nature, human condition, context and lived experiences.⁶² Research on refugees, for instance, is derived from the lived experience of refugees and asylum seekers with violent conflicts, human rights violations and other vulnerabilities that prevent them from being treated as objects of

⁵⁵ Shazia Qureshi, 'Research Methodology in Law and Its Application to Women's Human Rights Law' (2015) 22 J Pol Stud 629, 633; McConville and Chui (n 49) 1, 5-6; Peck (n 49) 3.

⁵⁶ Ibid

⁵⁷ Chui and McConville (n 54) 1,5-6; Hutchinson (n 51) 21; Budianto (n 54)1340-41.

⁵⁸ Hutchinson (n 51) 29;Qureshi (n 55) 634.

⁵⁹ Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (1st edn, Hart Publishing Ltd 2011) 2; Chynoweth (n 49) 30.

⁶⁰ Chynoweth (n 49) 30; Mike McConville and Wing Hong CHUI, 'Preface and acknowledgements to Second Edition', *Research Methods for Law* (Edinburgh University Press 2017) 6; Peck (n 49) 3.

⁶¹ McInerney-Lankford Siobhán, 'Legal Methodologies and Human Rights Research: Challenges and Opportunities' in Hans-Otto Sano Bård A Andreassen, and Siobhán McInerney-Lankford, (ed), (Handbooks of Research Methods in Law series, Edward Elgar Publishing 2017) 7-9; Peck (n 49) 3.

⁶² ibid 3

research.⁶³ Addressing the real-life impacts of human rights regimes from socio-legal perspective corresponds with the monitoring compliance, advocating for change on the part of governments and UN agencies, NGOs to improve refugee protection.⁶⁴

Human rights norms are also Western concepts, treaties and policy statements which are produced in the West or in transnational sites such as UN Conferences⁶⁵ and are transmitted globally by international organisations, NGOs, movement groups acting as intermediaries and translators.⁶⁶ These contexts are not neutral but sites of substantial inequalities in terms of power and wealth,⁶⁷ and produce a socio-legal space in research to address the variations in how human rights are implemented, interpreted and experienced in different socio-cultural and political contexts.⁶⁸ Socio-legal research helps to effectively investigate the variations between the ideals of human rights promised in international conventions and how these norms are translated into actual policy and actions, challenges to enforcement, and actual access to rights in different social-political contexts, particularly for refugees and irregular migrants.⁶⁹

Human rights are inherently interdisciplinary in nature and calls for scientific approaches beyond the discipline of law to address research questions.⁷⁰ Besides being subjects of international legal obligations, human rights are also moral norms with political and socio-economic dimensions which can be more adequately addressed within the broader social contexts using a range of social scientific tools.⁷¹ The Declaration under examination here is a bilateral soft instrument that is characterised by a range of extra-legal or non-legal norms.⁷²

⁶³ Karen Jacobsen and Loren Brett Landau, *Researching Refugees: Some Methodological and Ethical Considerations in Social Science and Forced Migration* (UNHCR Geneva 2003) 1; Hutchinson (n 51) 23.

⁶⁴ Jacobsen and Landau (n 63) ; Siobhán (n 61) 7-9; Peck (n 49) 3.

⁶⁵ Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108 *American Anthropologist* 38, 38; Peck (n 49) 3.3.

⁶⁶ Merry (n 65) 38.

⁶⁷ *ibid* 43; Sally Engle Merry, 'Human Rights and Transnational Culture: Regulating Gender Violence Through Global Law' (2006) 44 *Osgoode Hall LJ* 53

⁶⁸ Merry (n 65) 8-39; Siobhán (n 61) 3-4; Peck (n 49) 3.

⁶⁹ Qureshi (n 55) 632, 635; Siobhán (n 61) 4-6.

⁷⁰ *ibid*; Peck (n 49) 3.

⁷¹ Qureshi (n 55) 634; Siobhán (n 61) 3,5.

⁷² Mary E Footer, *Researching the Role of Soft Law in International Economic Relations: Some Lessons from Applying a Socio-Legal Approach* (2010) 3.

Like other soft laws, it is informal, fluid and was adopted outside EU's legislative framework and accountability mechanisms,⁷³ justifying the choice of socio-legal approach for this study.

Research on refugees often raises many ethical issues because of their marginality and particular risk of harm and abuse,⁷⁴ including arbitrary treatment from State authorities and private actors, including relief agencies and researchers.⁷⁵ Social-legal approach underscores ethical and reflexive research practices, including trauma-informed interviewing, and ensures ethically beneficial interactions with the research participants and research quality.⁷⁶ The application of ethical research safeguards ensures accountability and mitigates possible risk of harm and the negative consequences for refugees and asylum seekers.⁷⁷ Approaching research from ethical and reflexive perspectives allows the researcher to situate themselves within the wider contexts within which human rights violations occur. Ethical research standards also conform with the principle of 'do no harm', research accountability and human rights practice.⁷⁸

Using socio-legal approach, this study examines the protection gaps between the ideals of the international protection system and the real-life experience of the intercepted refugees and vulnerable migrants under the Declaration, a true illustration of the law-in-action.

This is a qualitative interpretive case study based on a review of existing legal texts, policy documents, international conventions and instruments, legislation, case law and other court documents, academic literature, human rights and media reports.⁷⁹ This choice is based on the

⁷³ Martino Reviglio, 'The Shift to Soft Law at Europe Borders: Between Legal Efficiency and Legal Validity' (2023) 23 23 27.

⁷⁴ Jacobsen and Landau (n 63); Siobhán (n 61) 410; European Commission, 'Guidance Note: Research on Refugees, Asylum Seekers and Migrants-V1.1' (*Directorate-General for Research and Innovation*, 07 January 2020) 1 & 4 <<https://tinyurl.com/2hrrxs45>> accessed 15 April 2022 1

⁷⁵ Jacobsen and Landau (n 63) 2.

⁷⁶ Siobhán (n 61) 10; 10; Peck (n 49) 6.

⁷⁷ European Commission (74) 1 & 4.

⁷⁸ Siobhán (n 61) 10.

⁷⁹ Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 932; Georg Menz, 'The Promise of the Principal-Agent Approach for Studying EU Migration Policy: The Case of External Migration Control' (2015) 13 *Comparative European Politics* 307, 308.

study's exploratory aims⁸⁰ and reliance mainly on texts and images, instead of numbers, to explain the policy.⁸¹

1.4.2 Data Sources

Due to time and resource constraints, unsafe conditions and the difficulty in conducting research in Libya, this researcher did not conduct a field study, interviews or other direct engagement with the main actors or the affected individuals.⁸² Data was generated through an in-depth analysis of existing documents and reports from a variety of complementary primary and secondary sources.⁸³

Primary sources examined included the text of the Declaration, the Refugee Convention, the UNCAT, the ECHR and official documents of the EU and its Member States, and the Council of Europe. In addition, the case law of the ECtHR, the decisions and official communication of UN treaty bodies.⁸⁴ Libyan national laws, official documents and statements were also examined to help contextualise the implementation of the policy and procedural framework.⁸⁵

The primary data was supplemented and triangulated with a variety of secondary sources, including human rights reports produced by the UNHCR, the IOM, the European Parliament and the Council of Europe's human rights agencies.⁸⁶ The researcher also reviewed publications and reports from NGOs and other independent human rights organisations known for their direct involvement, monitoring role and extensive history of documenting the human rights implications of the policy.⁸⁷ Other secondary sources included academic reports, journalistic sources, social media websites and blogs, personal statements and published

⁸⁰ Catherine Marshall and Gretchen B Rossman, *Designing Qualitative Research* (Sage Publications 1999) 13

⁸¹ Glenn A Bowen, 'Document Analysis as A Qualitative Research Method' (2009) 9(2) *Qualitative Research Journal* 27, 27.

⁸² *ibid* (n 79) 932; Rhuks Ako and Damiola S Olawuyi, 'Methodology, Theoretical Framework and Scholarly Significance: An Overview of International Best Practices in Legal Research' (2017) 8 *Journal of Sustainable Development Law and Policy* 225, 236; OHCHR (n 30) 11.

⁸³ Webley (n 79) 932; Menz (n 79) 308.

⁸⁴ *ibid*; UN bodies and agencies that monitor and publish on the human situation in Libya include IOM, UNCHR, UNSMIL.

⁸⁵ Andrijasevic (n 33) 153-55.

⁸⁶ UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers* (Lisbon Expert Roundtable, 9-10 December 2002) (UNCHR February 2003) para 1; A/HRC/48/83 (n 20) para 27.

⁸⁷ Amnesty International (n 10); Amnesty International, 'Between Life and Death: Refugees and Migrants Trapped in Libya's Cycle of Abuse' 24 September 2020) <<https://tinyurl.com/4s4ft6ch>> accessed 11; International NGOs documenting on Libya include the HRW and Amnesty International.

interviews.⁸⁸ The researcher also examined and analysed charts, maps, audiovisual material including videos and photographs pertaining to the treatment of refugees and migrants.⁸⁹

Documents were examined within the context of the purpose and period for which they were written.⁹⁰ Specific attention was given to access to asylum and international protection in Libya, trafficking and smuggling, human rights violations against refugees and migrants, particularly the risks of exposure to arbitrary and prolonged detention, torture, ill-treatment and expulsions to countries of origin. The researcher examined the results of the Declaration after its implementation in 2017, focusing on access to asylum, international protection and guarantees against *refoulement*.

1.4.3 Sampling Techniques, Data collection and Analysis

Data was gathered using a systematic review of existing academic literature covering externalisation policies, including the EU and its Members' externalisation policy framework, cooperation with Libya on irregular migration, the human rights situation and asylum protection in Libya.⁹¹ A systematic review is one of the most highly ranked interdisciplinary research methodologies that provides a complete picture of existing studies on a particular research topic.⁹² Given the vast and complex nature of the research topic and the literature, the researcher initially employed a 'scoping' technique to map out the existing studies, key concepts, current debate and gaps in knowledge on the topic.⁹³ This was followed by a more in-depth systematic review process for further exploration of the literature to examine the scope and depth of the relevant materials, methodological approaches, and to enable the researcher to situate this study in the broader debate.⁹⁴

⁸⁸ Kristin Reed and Ausra Padskocimaite, *The Right Toolkit: Applying Research Methods in the Service of Human Rights* (Human Rights Center, University of California, Berkeley, School of Law April 2012) 9; Georg Menz (n 79) 307, 308; Ian Dobinson and Francis John, 'Legal Research as Qualitative Research' In Mike McConville WH Chui (eds) *In Research Methods for Law (2edn)* (Edinburgh University Press, 2017) 27-28.

⁸⁹ Menz (n 79) 307, 308; A/HRC/48/83 (n 23) para 27; AI (n 87) 11, 12; AI, *No One Will Look for You. Forcibly Returned from Sea to Abusive Detention in Libya* (2021) MDE 19/4439/2021.

⁹⁰ Webley (n 79) 938.

⁹¹ Eirwen-Jane Pierrot, 'A Responsibility to Protect: UNHCR and Statelessness in Egypt' (2013) New Issues in Refugee Research Research Paper No 250 1; Jessica Peterson and others, 'Understanding Scoping Reviews: Definition, Purpose, and Process' (2017) 29 *Journal of the American Association of Nurse Practitioners* 12.

⁹² Nusrat Jahan and others, 'How to Conduct a Systematic Review: a Narrative Literature Review' (2016) 8(11) *Cureus* 1, 1.

⁹³ Peterson and others (n 91) 13.

⁹⁴ Omar Martinez and others, 'Evaluating the Impact of Immigration Policies on Health Status Among Undocumented Immigrants: A Systematic Review' (2015) 17 *Journal of Immigrant and Minority Health* 947; Peterson and others (n (n 91) 13.

Using Lancaster University library's search engine 'One search' and Google Scholar, document searches were performed using a combination of keywords, including *externalisation policies, migration governance, irregular migration, asylum seekers OR refugee protection*. The research used search terms such as: *UN Human Rights Reports on Libya after 2017, UN Documents on Libya, Migrant expulsions in Libya, Human Rights Abuses against Refugees and Migrants in Libya, the Impact of the 2017 Malta Declaration in Libya, Reports on EU cooperation with Libya, human impacts of EU cooperation with Libya*. The researcher also employed snowballing techniques by using footnotes and lists of references in documents, articles or books to select other relevant materials.

Legal materials were located through Lancaster University Library, databases and websites such as Lexis+, InfoCuria, HUDOC, Refworld, EUR-lex and UN digital library. Books, journal articles, official documents, case reports and other secondary materials were located from Lancaster University Library, academic databases and reputable institutional websites, including the Council of Europe, the EU, NGOs, Heinonline and news organisations.

The standards of proof to determine possible violations were the standards set in Article 33 of the Refugee Convention, Article 3 of the UNCAT and Article 3 of the ECHR.

1.5 Organisation of the Thesis

The study is organised into eight chapters with each chapter focusing on a specific issue or concept. Chapter One is introductory and consists of literature review, the context to the adoption of the Declaration, the study aims, research questions, methodology, thesis structure and research relevance.

Chapter Two covers of the principle of *non-refoulement* as a fundamental rule of the international protection regime, its foundational development in the 1951 UN Refugee Convention, core concepts, scope of application, the rights and obligations of States and persons. The chapter discusses the codification of the *non-refoulement* principle in subsequent international human rights treaties and soft instruments, particularly the UNCAT and the ECHR. It concludes with an overview of the customary legal status of *non-refoulement* and its binding force on all States and the varying interpretations of the norm by States.

Chapter Three examines the concept of externalisation and States' practices to control irregular migration to their territories and access to asylum procedures. The chapter begins with an explanation of the concept, State practices, including extraterritorial interceptions to circumvent their *non-refoulement* obligations. The chapter concludes with the implications of externalisation practices in undermining *non-refoulement*.

Chapter Four provides a historical context to EU States' cooperation, increased actions and intensified cooperation with Libya after the Arab Spring in 2011. A major section of the chapter is devoted to the main elements of the Malta Declaration, its purpose, legal status and the obligations of the EU, Member States and those of Libya. The rest of Chapter Four discusses the operationalisation of the Declaration, specific programmes and a brief overview of its outcomes.

Chapter Five examines on the political and social conditions, smuggling and the widespread and systematic human rights violations against refugees and migrants. Sections of the chapter were dedicated to Libya's international human rights obligations and the absence of a national asylum framework and the implications on refugee and other international protection in Libya.

Chapter Six addresses the question of whether EU States exercise extraterritorial jurisdiction over refugees and migrants rescued and/or intercepted and returned to Libyan detention and countries of origin by the LCG under the framework of the Declaration. It examines the concept of jurisdiction and the criteria for establishing it in extraterritorial migration control contexts. The analysis is based on the extraterritorial application of *non-refoulement* set forth in Article 33(1) of the Refugee Convention and its Protocol, Article 3(1) of the UNCAT and Article 3 of the ECHR. The Chapter argues that EU States exercise jurisdiction over any acts of *refoulement* perpetrated against the intercepted persons sent to Libya. EU States' jurisdiction is based their substantial funding, training, equipment, overall control the Declaration and the Libyan authorities who act on their behalf.

Chapter Seven examines the application of *non-refoulement* within the context of the Declaration. It answers the research question of whether the Declaration provides adequate safeguards for refugees and asylum seekers returned to Libya and their countries of origin against the risk of exposure to persecution, torture, ill-treatment and *refoulement*. It discusses specific breaches of *non-refoulement* as set out under the above legal regimes.

Chapter eight is the final and concluding chapter. It highlights the key findings of the study, contributions, concluding remarks and recommendations for forward progress and better policy development to enhance the protection of the rights of persons during cooperations and interceptions along the CMR.

1.6 Limitations of the Study

One of the limitations of this study is the researcher's inability to collect field data.⁹⁵ This deprived the researcher of the opportunity to obtain first-hand account and the perspectives of the intercepted persons.⁹⁶ Existing data may have excluded unfavourable views or the concerns of refugees and migrants⁹⁷ or lacked sufficient detail.⁹⁸ This could have undermined the data quality and representativeness.⁹⁹

Data quality, representation and validity may also be limited by the lack of systematic data collection and public reporting by Libyan authorities on policy outcomes, particularly the human rights impact of the policy on refugees and migrants.¹⁰⁰ Data on Libya is limited by a lack of transparency and oversight on the return process and poor reporting, corruption, violence and insecurity.¹⁰¹ Research in Libya, including access to migrant detention centres is hampered by a requirement for special authorisation from Libyan authorities.¹⁰²

Notwithstanding the above factors, the researcher believes that drawing on a wide variety of primary and secondary data sources would provide a rich amount of information required for ensuring data credibility, representation and validity.¹⁰³ Moreover, given the insecurity and unsafe political conditions in Libya and the restrictions on access to detention facilities, this researcher doubts whether a field work would have been safe, possible and/or made a

⁹⁵ Alan Bryman, *Social Research Methods* (4th edn) (OUP 2012) 551; Bowen (n 58) 27.

⁹⁶ Bowen (n 81) 27.

⁹⁷ OHCHR, '*Lethal Disregard*' Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea (May 2021) 11.

⁹⁸ Bowen (n 81) 192.

⁹⁹ Ibid 27; Bryman (n 95) 551.

¹⁰⁰ Ibid; S/2019/711 (n 20) para 1; OHCHR (n 32) 11.

¹⁰¹ UNGA 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (23 November 2018) UN Doc A/HRC/37/50 para 8.

¹⁰² A/HRC/48/83 (n 23) para 9.

¹⁰³ Bowen (n 81) 27; Webley (n 79) 937.

significant difference to data quality.¹⁰⁴ In March 2023, a UN Fact-Finding Mission found that research subjects in Libya, including NGOs, face risk of reprisal from Libyan authorities. The Mission also noted that data collection in Libya is 'unfeasible' due to delays and unpredictable cooperation from Libyan authorities and 'hindered' access to 'all parts of the Libyan territory'.¹⁰⁵

According to multiple UN agencies, data on Libya obtained from reports authored by UN bodies, NGOs and other international organisations are 'collected ethically' and meets the standards for 'informed consent', often corroborated by one or more independent sources, and are therefore, considered 'credible and reliable'.¹⁰⁶ The UNHCR has also noted that international organisations and NGOs such as Amnesty International and HRW constitute very important sources of the literature on refugee protection, particularly human rights abuses with the intention to influence governments to improve refugee protection.¹⁰⁷

1.7 Concluding Remarks

This chapter sets the stage for this research. It also covered study objectives, methodology, structure and limitations of this thesis. It also outlined study aims and contribution to the understanding of *non-refoulement* internationally by highlighting the gaps between the statement of the law and the policy.

¹⁰⁴ S/2019/711 (n 20) para 31; 'UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea' (September 2020) para 31; UNHCR, 'Libya: Registration is a Right for Asylum Seekers and Refugees Wherever They Are' (*Blog/Interview*, 09 Nov 2018) <<https://tinyurl.com/2p8msnue>> accessed 02 October 2021; Elin Palm, 'Externalized Migration Governance and the Limits of Sovereignty: The Case of Partnership Agreements between EU and Libya' (2020) 86 *Theoria* (Lund, Sweden) 9 14.

¹⁰⁵ A/HRC/52/83 (n 23) paras 8-13, 20-21.

¹⁰⁶ CAT, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Italy (18 December 2017) CAT/C/ITA/CO/5-6 para 29; A/HRC/48/83 (n 23) para 29; 'Report of the Independent Fact-Finding Mission on Libya' (3 March 2023) UN Doc A/HRC/52/83 para 15.

¹⁰⁷ Jacobsen and Landau (n 67) 1.

II. The Principle of *Non-refoulement* under International Refugee Law

2.1 Introduction

As a general rule of international law, States have a sovereign right to protect their borders from irregular migration, smuggling, trafficking and other transborder activities.¹⁰⁸ The exercise of this right, however, is subject to the treaty obligations of the States concerned and other relevant principles of customary international law.¹⁰⁹ One such limitation is the obligation to comply with the principle of *non-refoulement* [*'non-refoulement'*].¹¹⁰

Non-refoulement is a fundamental rule of international law, particularly international refugee and human rights law.¹¹¹ The principle is enshrined in the 1951 UN Refugee Convention which currently has 146 parties,¹¹² including all 27 EU Member States.¹¹³ The principle has also found explicit expressions in the 1984 UNCAT¹¹⁴ with 173 parties¹¹⁵ and many other international refugee and human rights instruments at the universal and regional levels.¹¹⁶

¹⁰⁸ UNHCR-EXCOM Conclusion on No 97 (LIV) 'Protection Safeguards in Interception Measures' (2003) Preambular paras 3 & 4; Joint Public Communication from UN Special Rapporteurs to the Government of Malta (20 July 2020) Reference: AL MLT 1/2020 20 July 2020 (20 July 2020); *AAA and Others* (n 48) [19].

¹⁰⁹ *AAA and Others* (n 48) [19].

¹¹⁰ Refugee Convention (n 48) Article 33(1); International Covenant on Civil and Political Rights (Adopted 16 December 1966, entry into force 23 March 1976) UNGA Res 2200A (XXI) (ICCPR) Articles 6 & 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entry into force 26 June 1987) 1465 UNTS 85 (UNCAT) Article 3; *AAA and Others* (n 48) [19]; Conclusion No 97 (LIV) (n108) para (a).

¹¹¹ Refugee Convention (n 48) Article 42(1); UNHCR 'Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2' (31 January 1994) 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93 para 8; CCPR 'General Comment No 31 [80]': 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (adopted 26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 12; UNHCR 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (Geneva, 2007) para 15; A/HRC/37/50 (n 79) para 36.

¹¹² States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol (States Parties (as of April 2015); *AAA and Others* (n 48) [19]; Currently, there are 19 signatories and 146 parties to the Refugee Convention and 147 to the 1967 Protocol.

¹¹³ EU, 'Easy to Read-The European Union' (27 EU Members) (*EU Directorate-General for Communication*, Jan 2020) <https://european-union.europa.eu/easy-read_en> accessed 21 March 2024

¹¹⁴ UNCAT (n 110) Article 3.

¹¹⁵ State Parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) UNTS <<https://tinyurl.com/yc5hh975>> accessed 22 March 2024

¹¹⁶ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 23 December 2010, entry into force 23 December 2010) UNGA Res 47/133 (ICPPED) Article 16; CCPR 'General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) para 9; OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (Addis-Ababa, (adopted 10 September 1969, entry into force 24 June 1974) UNTS No 14691 (OAU Refugee

Non-refoulement also forms part of customary international law (CIL), if not *jus cogens*, and is therefore, binding on all States irrespective of their treaty obligations under the Refugee Convention and/or its Protocol or other international treaties that contain it.¹¹⁷

Despite its universal recognition and centrality in international refugee protection, many States, including EU Members, have progressively adopted migration policies that undermine their *non-refoulement* obligations.¹¹⁸ The policies have led to the denial of entry, rejection at the borders or the interdiction of thousands of refugees and asylum seekers on the high seas by States and their organs in cooperation with third States and/or private actors.¹¹⁹ Some interdicted persons have also been subject to expulsions or forcible returns to countries of origin and/or other extraterritorial locations where they may be exposed to serious dangers, particularly persecution, torture or other forms of ill-treatment and *refoulement*.¹²⁰

This chapter examines the meaning and scope of *non-refoulement*, its core concepts and application under the Refugee Convention, the UNCAT and the ECHR. It also discusses the norm's customary international law status and centrality in the international protection system.

Convention) Article II (3); American Convention on Human Rights, "Pact of San Jose", Costa Rica (22 November 1969, entry into force 18 July 1978) (1970) OASTS No 36 9 ILM 99 (OAS 1969 ACHR) Article 22 (8).

¹¹⁷ EC/SCP/2 (n 48) para 5; General Conclusion No 25 (XXXIII) 'International Protection' (1982) para (b); UNHCR 'Response' (n 111) paras 1, 8 & 10; European Parliamentary Research Service, 'Non-Refoulement, Push-Backs and the EU Response to Irregular Migration' (Members' Research Service, 13 May 2015) <<https://tinyurl.com/y3djdece>> accessed 07 Nov 2020

¹¹⁸ Annalisa Camilli, 'Why the Agreement between Italy and Libya on Migrants Could be Illegal (English version)' <<https://tinyurl.com/bdd9x2dz>> accessed 26 December 2020; Amnesty International, 'Between the Devil and the Blue Sea: Europe Fails Migrants and Refugees in the Central Mediterranean' (2018) <<https://tinyurl.com/y74dydpp>> accessed 29 June 2021; Daniel Ghezelbash, 'Hyper-Legalism and Obfuscation: How states Evade their International Obligations Towards Refugees' (2020) 68 AmJCompL 479, 479; Itamar Mann and Niamh Keady-Tabbal, 'Torture by Rescue: Asylum-Seeker Pushbacks in the Aegean. How Summary Expulsions from Greece have Continued with Impunity' Just Security <<https://tinyurl.com/jzbu3hvf>> accessed 26 June 2021; Nicole Narea, 'The US has Abandoned Asylum Seekers in Mexico During the Pandemic' (Vox, (13 May 2020) <<https://tinyurl.com/ysh4jep8>> accessed 29 June 2021

¹¹⁹ *Chris Sale, Acting Commissioner, Immigration and Naturalization Service et al v Haitian Centers Council Inc et al* 509 US 155 113 S Ct 2549 (1993); UNHCR-EXCOM 'Note on International Protection' Submitted by the High Commissioner (31 August 1993) UN Doc A/AC.96/815 para 12; UNCHR, 'Beware Long-term Damage to Human Rights and Refugee Rights from the Coronavirus Pandemic: UNHCR' (UNHCR, 22 April 2020) <<https://tinyurl.com/3we5bsue>> accessed 18 June 2021; Oona A Hathaway, Mark Stevens and Preston Lim, 'COVID-19 and International Law: Refugee Law—The Principle of Non-Refoulement' <<https://tinyurl.com/25fzxua6>> accessed 06 March 2020

¹²⁰ *Sale* (n 119); A/AC.96/815 (n 119); UNHCR, 'Intervention Before the ECtHR in the Case of Hirsi and Others v Italy Application No 27765/09' (March 2010) para 8; *Namah v Pato* PGSC 13; SC1497 [36]-[37]; UNCHR (n 119) 'Beware'; UNHCR 'Note on the "Externalization" of International Protection' paras 3-4, 6.

2.2 *Non-Refoulement* under the 1951 Refugee Convention

Non-refoulement is the cornerstone of international refugee law.¹²¹ It derives from Article 14 of the 1948 UDHR which grants 'everyone ... the right to seek and to enjoy in other countries asylum from persecution'.¹²² The principle was first developed by the drafters of the 1951 Refugee Convention in response to the worsening death tolls during the Holocaust due to the unwillingness of many States to accept refugees fleeing persecution and death in Europe.¹²³ The Refugee Convention sets forth the conditions under which States must grant refugee status, rights and responsibilities to individuals who request asylum or are in need of international protection.¹²⁴

Under the Refugee Convention, *non-refoulement* explicitly protects refugees and asylum seekers from being returned to places where they would be directly or indirectly subjected to persecution, similar dangers or other serious human rights violations that would also constitute a threat to their fundamental human rights and freedoms.¹²⁵ Article 33(1) of the Convention provides that:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

In accordance with Article 1A(2) of the Refugee Convention and Article 1(2) of the 1967 Protocol, the term 'refugee' is defined as:

¹²¹ UNHCR 'Response' (n 111) para 2; UNHCR 'Note on the Principle of Non-Refoulement' (November 1997) (Section A) para 1; UNCHR, 'Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response' 16 March 2020) para 2 <<https://tinyurl.com/5yc6dt7d>> accessed 20 August 2022; Paul Weis, *The Draft United Nations Convention on Territorial Asylum, 1979* *British Yearbook of International Law* (1979 BRr YB INT'L L 151,152 1980) 151, 166; Violeta Moreno-Lax, *Accessing Asylum in Europe* (Oxford Studies in European Law), Oxford University Press 2017) 249; UNSMIL and OHCHR 'Detained' (n 20)10; UNSMIL and OHCHR (n 16) 24.

¹²² UDHR (n 26) Article 14; ICCPR (n 110) Article 12(2); UNHCR-EXCOM 'Note on International Protection' (13 September 2001) A/AC.96/951 para 16; UNSMIL and OHCHR, 'Detained' (n 20) 10; According to the UNHCR, the principle of *non-refoulement* laid down in Article 33 is 'the logical complement to the right to seek asylum'.

¹²³ *Non-Refoulement* (n 121); 'Advisory Opinion' (n 111); Hathaway, Stevens and Lim (n 119); Oona A Hathaway, 'The Trump Administration's Indefensible Legal Defense of Its Asylum Ban: Taking a Wrecking Ball to International Law' (*Just Security*, 15 May 2020) <<https://tinyurl.com/wnc8cjh3>> accessed 06 March 2021; *Non-refoulement* flows from the State obligations to respect, protect and fulfil human rights.

¹²⁴ *Hirsi* (n 22) [22].

¹²⁵ Refugee Convention (n 48) Article 33(1); UNSMIL and OHCHR (n 20) 10; UNSMIL and OHCHR (n 16) 24; Under the Refugee Convention, *non-refoulement* also covers vulnerable migrants at risk.

[Any person] owing to [a] 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.

Article 1(2) provides:

[T]he term “refugee” shall, ... mean any person within the definition of article 1 of the Convention as if the words “As a result of events occurring before 1 January 1951 and ...” and the words “... as a result of such events ”, in article 1 A (2) were omitted.¹²⁶

Article 1(2) of the 1967 Protocol implies that *non-refoulement* in Article 33(1) benefits all refugees irrespective of their origin or physical location and date of displacement, as long as they meet the criteria set in Article 1A(2) of the Refugee Convention.¹²⁷

Unlike other provisions of the Convention that are conditional upon a refugee’s physical or legal attachment to the territory of a Contracting State, the benefits of Article 33(1) are based on the material reality of the person.¹²⁸ It presupposes a need for protection and operates under the assumption that every asylum seeker is a refugee until his/her status has been decided.¹²⁹ Article 33(1) therefore, applies irrespective of the degree of physical presence, lawful presence or legal situation of the refugee under domestic law.¹³⁰

Article 33(1) covers persons fleeing persecutions or dangers based on one or more of the Convention grounds listed in Article 1A(2), during ‘wartime’ or ‘peacetime’, international or internal armed conflicts, cumulative human rights violations amounting to persecution, genocide, ethnic cleansing, arbitrary arrest and detention, forced recruitment particularly of

¹²⁶ Protocol Relating to the Status of Refugees (adopted 31 January 196, entry into force 04 October 1967) 606 UNTS 267 (1967 Protocol); Preamble para 4.

¹²⁷ UNHCR ‘Note’ (n 99) para 4; Prior to the adoption of the 1967 Protocol, the benefits of the Refugee Convention applied to refugees in relations to ‘events occurring [in Europe] before 1 January 1951’ (Article 1A(2)).

¹²⁸ UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis* (CUP, 1995 1990) para 23; UNHCR-EXCOM ‘Note on International Protection (Submitted by the High Commissioner) (03 August 1987) A/AC.96/694; UNCHR ‘Note’ (n 121 para 13; Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion (2.1)’ in Volker Türk and Frances Nicholson Erika Feller (ed), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press 2003) 93.

¹²⁹ A/AC.96/815 (n 119) para 11; Moreno-Lax (n 121) 250; ‘[A]sylum-seekers must be treated on the assumption that they may be refugees until their status has been determined.

¹³⁰ Lauterpacht and Bethlehem (n 128) 93; Moreno-Lax (n 121) 250.

children, enforced or arbitrary disappearances and/or irreparable harm emanating from these violations.¹³¹

2.2.1 Material Scope

The material scope of Article 33(1) encompasses any measures attributable to a State that could have effectively caused the forcible return of a refugee or asylum seeker to the frontiers of territories where such persons would face a danger of persecution, threats to life or freedom based on the above prohibited grounds.¹³² Such measures include deportation, expulsion, non-admission or a rejection at the border, interception and *refoulement*, of a refugee, asylum seeker or individuals in situations of mass influx.¹³³

In its authoritative *Handbook on Procedures and Criteria for Determining Status and Guidelines for International Protection*, the UNHCR explained that although ‘persecution’ is not defined in the Refugee Convention, its meaning can be inferred from the wording in Article 33(1). The Agency reasoned that ‘a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution, and for the same reasons, ... other serious violations of human rights ... would also constitute persecution.’¹³⁴

While parties of the Refugee Convention do not have a positive obligation to grant asylum to individuals seeking asylum or other international protection in their territories, they cannot refuse admittance, reject or return persons to places of persecution.¹³⁵ Paul Weis, the former Director of the Legal Division of the UNCHR also iterated that the grant of asylum entails admission, residence and protection whilst *non-refoulement* entails a negative duty on States ‘not to compel’ a person back into where he/she fears persecution.¹³⁶

¹³¹ UNCHR ‘Guidelines on International Protection No 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions’ (02 December 2016) HCR/GIP/16/12 paras 11-13.

¹³² UNCHR ‘Response’ (n 111) para 2; A/AC.96/951 (n 122) para 16; *Hirsi* (n 22) [23].

¹³³ *ibid.*

¹³⁴ UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’ (January 1992) HCR/IP/4/Eng/REV.1 para 51.

¹³⁵ OAU Refugee Convention (n 116) Article II (3); UNHCR-EXCOM Conclusion No 6 (XXVIII) ‘Non-Refoulement’ (1977) para (c); UNCHR-EXCOM Conclusion No 15 (XXX) ‘Refugees Without an Asylum Country’ (1979) para (b); Weis (n 99) 151, 166; UNCHR EXCOM, General Conclusion No 99 (LV) ‘International Protection’ (2004) para (I); UNHCR ‘Asylum Processes (Fair and Efficient Asylum Procedures)’ (31 May 2001) UN Doc EC/GC/01/12 paras 4-5; ‘Advisory Opinion’ (n 111) para 8.

¹³⁶ Weis (n 121) 166.

Where States are unable or unwilling to grant asylum protection to persons with a well-founded fear of persecution, they must refrain from taking any actions that would, directly or indirectly, cause the removal or transfer of such persons to places where they would be in danger of being persecuted.¹³⁷ They may, however, remove persons to 'a safe third country' or providing temporary protection, solution or refuge under certain conditions.¹³⁸ This means an asylum seeker may still be transferred to another country where he/she does not fear persecution after he/she has been granted temporary asylum or admission into a State.¹³⁹

As a general rule, parties to the Refugee Convention and/or its Protocol are obligated to grant access to territory, even if temporarily, provide fair and efficient asylum procedures to all persons seeking asylum or international protection.¹⁴⁰ States must also prevent the collective expulsion and arbitrary detention of refugees and other persons seeking international protection.¹⁴¹

2.2.2 Binding Status, Non-Derogability or Exceptions

Article 33(1) constitutes a binding obligation for all 146 States parties to the Refugee Convention and/or 147 parties to its Protocol,¹⁴² their organs, persons or entities acting on their behalf.¹⁴³ This applies to all 27 EU Members which are parties to the Convention and its Protocol.¹⁴⁴

Article 33(1) is an essential principle to the Convention and does not permit derogations or reservations.¹⁴⁵ The only exception is expressly found in Article 33(2) which provides that:

¹³⁷ EC/GC/01/12 (n 135) paras 4-5; 'Advisory Opinion' (n 111) para 8.

¹³⁸ Lauterpacht and Bethlehem (n 128) 113; 'Advisory Opinion' (n 111) para 8.

¹³⁹ UNHCR 'Weis' (n 128) 233.

¹⁴⁰ 'Public Communication' (n 108) 2; UNCHR 'Considerations' (n 121).

¹⁴¹ *ibid*

¹⁴² 'States Parties' (n 112) (n 133); *AAA and Others* (n 48) para 19.

¹⁴³ Refugee Convention (n 48) Article 40(1); 1967 Protocol (n 126) Article I(1) and (3) provides: 'States Parties ... undertake to apply Articles 2 to 34 inclusive of the Convention'; EC/SCP/2 (n 48) para 3, 4; 'Advisory Opinion' (n 111) paras 5, 9.

¹⁴⁴ 'States Parties' (n 112); UNHCR, *Manual on the Case Law of the European Regional Courts: The Court of Justice of the European Union and the European Court of Human Rights (Refugees, Asylum-Seekers, and Stateless Persons)* (June 2015) (1st edn edn, June 2015) 5; EU (n 113).

¹⁴⁵ Refugee Convention (n 48) Article 42(1); 1967 Protocol (n 126) Article I(1) & VII: Article 33(1) is one of the most fundamental provisions of the Refugee Convention to which no reservations are permitted; The rest are Articles 3, 4, 16(1), 36-46; UNHCR-EXCOM General Conclusion No 79 (XLVII) 'International Protection' (1996) paras (i) and (j); UNHCR-EXCOM, General Conclusion No 81 (XLVIII) 'International Protection' (1997) para (i); UNHCR-EXCOM Conclusion No 17 (XXXI) 'Problems of Extradition Affecting Refugees' (1980) para (b); *Saadi v Italy*

The benefit of [Article 33(1)] may not [...] be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

This exception is to be applied narrowly and only when the refugee in question is physically present in a State's territory and after he/she has been convicted of a serious crime by final judgement and poses a national security threat and/or a serious danger to the local community.¹⁴⁶ Article 33(2) is also linked to the exception in Article 1(F)¹⁴⁷ of the Refugee Convention and must be read in conjunction with Articles 31 and 32.¹⁴⁸ According to the UNHCR, Article 33(2) 'should be applied with the greatest caution' taking into consideration 'any mitigating factors and the possibilities of rehabilitation and reintegration within society.'¹⁴⁹

Before carrying out expulsions, States are required to conduct individualised assessments of each application, taking 'fully into account all the circumstances' of each refugee who becomes subject to one of the two circumstances specified in Article 33(2).¹⁵⁰ They must conduct a full assessment of any potential threats to life, personal integrity and liberty, and in the case of a negative decision, guaranteeing appropriate and individual access to a 'proper evaluation' by their domestic authorities.¹⁵¹ States must also conduct a full examination of the danger posed to national security or the local community by the refugee, 'in accordance with due process of law'.¹⁵²

States must ensure the asylum seeker being expelled can have 'access to appropriate international protection by means of fair and efficient asylum proceedings' in the destination

Application no 37201/06 (ECtHR, 28 February 2008) [127]; UNHCR, 'Written Submission in the Case of Sharifi and others v Italy and Greece' (Application No 16643/09) para 2.1.

¹⁴⁶ EC/SCP/2 (n 48); A/HRC/37/50 (n 101) para 37.

¹⁴⁷ Refugee Convention (n 48) Article 1(F) states, the Convention shall not apply to any person who 'has committed a crime against peace, a war crime, or a crime against humanity ... a serious non-political crime ... [or is] guilty of acts contrary to the purposes' of the UN.

¹⁴⁸ Ibid, Article 31 (non-penalisation of refugees for illegal entry); Article 32 (prohibition of expulsion for illegal entry except on grounds of national security or public order).

¹⁴⁹ EC/SCP/2 (n 48) para 14.

¹⁵⁰ Ibid; Lauterpacht and Bethlehem (n 128); paras 145–192; 'Advisory Opinion' (n 111) para 10.

¹⁵¹ EC/SCP/2 (n 48) para 14; UNHCR-EXCOM 'Note on the Exclusion Clauses' (30 May 1997) UN Doc EC/47/SC/CRP.29 para 4; *Case of the Pacheco Tineo Family v Plurinational State of Bolivia* (Inter-American Court of Human Rights, 25 November 2013) para 156.

¹⁵² Refugee Convention (n 48) Article 32(2); EC/47/SC/CRP.29 (n 151) para 4.

country. Expulsion decisions must be clear, fair, reasoned and ‘properly be made only in the context of a full examination of the grounds for a refugee claim’.¹⁵³ States cannot reject, return or expel a refugee, based on Article 33(2), without conducting an individualised assessment of the danger he/she pose to national security of the host State or population.¹⁵⁴ States cannot also expel a refugee until he/she has been given ‘a reasonable period and all the necessary facilities’ to arrange his/her admission into another territory.¹⁵⁵ The application of Article 33(2) is also limited by States’ obligations under international human rights law, where, as explained below, exceptions to the principle are not permissible under any circumstances.¹⁵⁶

Article 33(1) prohibits the removal or transfer of persons to places or third States where such persons would be subjected to subsequent removals or transfers, or indirect *refoulement*.¹⁵⁷ The prohibition of indirect *refoulement* has been affirmed in other refugee instruments,¹⁵⁸ particularly the 1969 OAU Refugee Convention quoted below.¹⁵⁹ Many human rights bodies, including the UNHCR, and courts have consistently stated that Article 33(1) must be interpreted to include returns or transfers of persons to third States where they fear persecution or real risks of serious human rights violations.¹⁶⁰

Notwithstanding the safeguards above, Article 33(1) is often weakened by the absence of a duty of States to grant asylum and a lack of prohibition to transfer persons to another place.¹⁶¹ As will be shown in Chapter Three, many States, including EU Members, have often capitalised on the aforementioned exception and loopholes to deny entry, access to asylum and *non-refoulement* protections to refugees and asylum seekers whose admittance or presence is perceived to be a threat to national security, community safety and public health.¹⁶² In some

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ Refugee Convention (n 48) Article 32(2 & 3).

¹⁵⁶ EC/SCP/2 (n 48) para 13; 'Advisory Opinion' (n 111) para 11.

¹⁵⁷ 'Advisory Opinion' (n 111) para 20; General Comment No 31 (n 111) *supra* footnote 41, para. 12; *TI v The United Kingdom*, Application no 43844/98 (ECtHR, 7 March 2000) para 14.

¹⁵⁸ Declaration on Territorial Asylum (adopted 14 December 1967) (GAOR, 22nd Sess., Suppl. No. 16) (A/RES/2312(XXII)) Article 3(1); OAU Refugee Convention (n 116) Article II(3) (1 & 2).

¹⁵⁹ OAU Refugee Convention (n 111) Article II(3) (1 & 2).

¹⁶⁰ A/AC.96/951 (n 122) para 16; *Hirsi* (n 22) [22]-[143]; Report of the Special Rapporteur on the Human Rights of Migrants: Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea- (2 May 2021) UNGA Doc A/HRC/47/30 para 41; *AAA and Others* (n 48) [20]

¹⁶¹ UNHCR 'Commentary' (n 128) 233; Weis (n 121) 151, 166; Roman Boed, 'The State of the Right of Asylum in International Law' (1994) 5 *Duke J Comp & Int'l L* 1 22.

¹⁶² *Sale* (n 119); A/AC.96/815 (n 119) para 12; Boed (n 161) 22; UNCHR, 'Beware' (n 119); UNHCR, 'Statement Attributable to UN High Commissioner for Refugees Filippo Grandi on the Need to End US COVID-19 Asylum Restrictions' 20 May 2021) <<https://tinyurl.com/2p84t3t3>> accessed 18 June 2021.

cases, certain States have restricted the extraterritorial scope of the *non-refoulement* to their national territories only, by legislating around aspects of their international obligations that are perceived to be inimical to their national interests in order to stop or return refugees before they reach or cross their national borders.¹⁶³

During the coronavirus pandemic, many States¹⁶⁴ suspended the observance of fundamental refugee and human right norms, including *non-refoulement*.¹⁶⁵ The UNHCR insists that such measures cannot be used to deny people of the right to seek asylum or protection against *refoulement* to a place of persecution.¹⁶⁶

2.3 Non-Refoulement in Other International Instruments

As mentioned above, *non-refoulement* has found expressions in many other international refugee and human rights instruments that were adopted after 1951.¹⁶⁷ At the universal level, *non-refoulement* has been found in many UN General Assembly (GA) resolutions, including the 1969 non-binding but unanimously adopted Declaration on Territorial Asylum, and reaffirmed systematically by the UNHCR Executive Committee.¹⁶⁸

The principle has been established as an essential component of the absolute prohibition on torture, cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life as enshrined in Article 7 of the ICCPR and Article 1 of the 1984 UNCAT.¹⁶⁹ The UN Human Rights Committee (CCPR), the main treaty body responsible for monitoring and the implementation of the ICCPR, has stated that Article 7 of the ICCPR inherently prohibits the 'extradition,

¹⁶³ A/AC.96/815 (n 119) para 13; Ghezelbash (n 118) 481.

¹⁶⁴ ECRE, 'Belgium and the Netherlands: Suspension of the Right to Seek Asylum' 19 March 2020) <<https://tinyurl.com/usfv8ju9>> accessed 09 June 2021; Gabriela Galindo, 'Coronavirus: Belgium Begins Shutting Down Services for Asylum Seekers' (*The Brussels Times*, 07 March 2020) <<https://tinyurl.com/aucdnn43>> accessed 26 June 2021; The Brussels Times, 'Belgium Condemned by Court over Failure to Receive Asylum Seekers' (Brussels, Belgium 06 October 2020) <<https://tinyurl.com/ym53te9z>> accessed 26 June 2021

¹⁶⁵ UNCHR 'Beware' (n 119); At the beginning of the Covid-19 pandemic, the UNCHR expressed concerns about the closure of borders by 167 States and of these, 57 States made no exception to asylum seekers.

¹⁶⁶ UNCHR 'Considerations' (n 121) para 1.

¹⁶⁷ ICCPR (n 110) The UN Human Rights Committee has also interpreted Articles 6 and 7 of the ICCPR to include the principle of non-refoulement; ICCPR (n 116) Article 16; CCPR General Comment 20 (n 116) (n 137) para 9; OAU Refugee Convention (n 116) Article II (3); ACHR (n 116) Article 22 (8); 'Advisory Opinion' (n 111) para 13.

¹⁶⁸ 'Response' (n 111) para 3.

¹⁶⁹ General Comment 20 (n 116) para 9; 'Note' (n 121) Section. B; *Soering v the United Kingdom* Application no 14038/88 (ECtHR, 07 July 1989) para 88; Tilman Rodenhäuser, 'The Principle of Non-Refoulement in the Migration Context: 5 Key Points' (*International Committee of the Red Cross*, 30 March 2018) <<https://tinyurl.com/bdhfv4cs>> accessed 04 April 2021

expulsion or *refoulement* of individuals to places where such persons would be exposed to 'danger of torture or cruel, inhuman or degrading treatment or punishment'.¹⁷⁰

Non-refoulement prohibiting torture is explicitly provided in the UNCAT which has 173 parties,¹⁷¹ the International Convention for the Protection of All Persons from Enforced Disappearance¹⁷² and standard setting treaties relating to extradition and anti-terrorism.¹⁷³

At the regional level, *non-refoulement* can be found in the OAU Refugee Convention, a legally binding instrument, defines the *non-refoulement* obligations of its 45 State parties more expansively. Article II(3) of this Convention provides that no refugee or asylum seeker 'shall be subjected ... to measures ... which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened'. Other major regional instruments,¹⁷⁴ including the AU's Kampala Convention¹⁷⁵ the Inter-American¹⁷⁶ Asian¹⁷⁷ and many European instruments¹⁷⁸ contain expressions of *non-refoulement*, in some cases, more expansively in meaning and scope than expressed in the UN Refugee Convention.¹⁷⁹

¹⁷⁰ General Comment No 20 (n 116) para 9; The view and the jurisprudence of the CCPR has been upheld by regional human rights courts particularly the ECtHRs.

¹⁷¹ UNCAT-parties (n 115); *AAA and Others* (n 48) para 21.

¹⁷² Article 16; ICPPED has 98 signatories and 62 Parties.

¹⁷³ Council of Europe, European Convention on Extradition (adopted 13 December 1957, entry into force 18 April 1960) 359 UNTS 273; International Convention Against the Taking of Hostages (adopted 16 February 1979, entry into force 03 June 1983) UN Doc A/34/46; Inter-American Convention on Extradition (Caracas) (adopted 25 February 1981, registered 07 December 1993) 1752 UNTS 30597.

¹⁷⁴ *Pacheco v Bolivia* (n 151) [151]; Rodolfo Marques, 'Non-Refoulement Under the Inter-American Human Rights System' The Future of Refugee Law, Special Edition of the Refugee Law Initiative Working Paper No 20 (27 Jun 2017) <<https://ssrn.com/abstract=2992709> or <http://dx.doi.org/10.2139/ssrn.2992709> > accessed 14 April 2021 59, 62; Hathaway, Stevens and Lim (n 119).

¹⁷⁵ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted Kampala, Uganda 23 October 2009, entry into force 06 December 2012) (2010) 49 ILM 86 (Kampala Convention); 15 African States are signatories to the Convention.

¹⁷⁶ Cartagena Declaration on Refugees adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (Colombia from 19-22 November 1984) OAS Doc OEA/Ser.L/V/II.66/Doc 10 Rev 1 Section III, paragraphs 3 and 5; *Pacheco* (n 151) 141.

¹⁷⁷ Asian-African Legal Consultative Organization (AALCO), Bangkok Principles on the Status and Treatment of Refugees (adopted 31 December 1966) (Bangkok Principles) Article III(3); Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees (adopted on 24 June 2001) AALCO's 40th Session (New Delhi) Article III(1).

¹⁷⁸ ECHR Article 3; Protocol No 4 to the European Convention on Human Rights 16 IX ETS 5 (1963); *Saadi v Italy* (n 145) [124]-[125]; *MSS v Belgium and Greece* Application no 30696/09 (ECtHR, 21 January 2011) [286]; *Hirsi* (n 22) [74], [204-205]; *FG v Sweden* Application no 43611/11 (ECtHR, 23 March 2016) [113]; *Ilias and Ahmad v Hungary* Application no 47287/15 (ECtHR, 21 November 2019) [112]; EASO, *Judicial analysis: Asylum Procedures and the Principle of Non-Refoulement* (IARLJ-Europe under Contract to EASO 2018) 33-35.

¹⁷⁹ *Pacheco* (n 151) [151]; Marques (n 174) 59, 62; Hathaway, Stevens and Lim (n 119).

Several States have also become parties to many of the universal and regional treaties that contain the *non-refoulement* principle.¹⁸⁰ *Non-refoulement* has also been incorporated into the constitutions and national legislations of many States.¹⁸¹ Additionally, *non-refoulement* is a well recognised and an accepted principle of international law, jurisprudence and in the works of many jurists.¹⁸²

Most States are, thus, bound by the *non-refoulement* principle in one way or another through their commitment to different instruments that contain a *non-refoulement* provision. The following sections examine the meaning and scope of the *non-refoulement* provision in the UNCAT, and its conceptualisation in Article 3 of the ECHR.

2.3.1 *Non-Refoulement* under the UNCAT

International human rights treaties provide for the most robust benefits of the principle of *non-refoulement*.¹⁸³ Under the UNCAT, the meaning and scope of the principle of *non-refoulement* is broader than is provided for under the Refugee Convention.¹⁸⁴ Article 3(1) provides that:

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Article 3, therefore, prohibits all 173 parties to the UNCAT, including all EU States,¹⁸⁵ from extraditing, deporting, expelling or removing any person where there are substantial grounds to believe that such a removal or transfer would directly or indirectly subject that person to the risk of torture, ill-treatment and irreparable harm as contemplated under Article 1 of the UNCAT.¹⁸⁶ The Human Rights Committee has also decided that each of the 173 parties of the ICCPR, including all EU States, are bound by a similar obligation prohibiting the extradition,

¹⁸⁰ UNHCR 'Note' (n 121) para 9; A/AC.96/815 (n 119) para 17; *Attorney-General v Zaoui and Others* (No 2), 1 NZLR 690 (New Zealand: Court of Appeal) para 34; Most States are parties to the Refugee Convention and its 1967 Protocol; ICCPR and the UNCAT representing the majority States bound by other treaties that also recognise *non-refoulement*.

¹⁸¹ A/AC.96/951 (n 122) para 17; Regional and national policies uphold the principle. Many countries, including many which have seen significant increases in the arrivals of refugees and asylum seekers ... continue to respect the principle'.

¹⁸² EC/SCP/2 (n 48) para 11.

¹⁸³ *Chahal v the UK* Application no 22414/93 (ECtHR, 15 November 1996) para 80; UNHCR 'Note' (n 121) para 25; CCPR General Comment 20 (n 116) para 9; *Jama Warsame v Canada*, Communication No 1959/2010 (01 September 2011) UN Doc CCPR/C/102/D/1959/2010 para 8.3; *Pacheco* (n 129) [134], [135] (beneficiaries include all aliens regardless of country of origin); *AAA and Others* (n 48) [19].

¹⁸⁴ *Boed* (n 161) 18.

¹⁸⁵ UNCAT-parties (n 115) para 21; *AAA and Others* (n 48) [19].

¹⁸⁶ General Comment No 31 (n 111) para 12; *Ahmed Hussein Mustafa Kamil Agiza v Sweden* Communication No 233/2003 (24 May 2005) UN Doc CAT/C/34/D/233/2003.

deportation, expulsion or removal of a person to a place that the person would be exposed to a real risk of irreparable harm, such as that contemplated in Articles 6 and 7 of the ICCPR.¹⁸⁷

Unlike Article 33(1) of the Refugee Convention that only protects persons who have a well-founded fear of persecution, Article 3 of the UNCAT covers all persons at risk of being subjected to torture as in Article 1(1) of the UNCAT.¹⁸⁸ In international human rights treaties and customary international law, torture could constitute 'serious violations of human rights', 'a threat to life or freedom' and 'persecution' within the context of the Refugee Convention.¹⁸⁹ According to the UNHCR, torture may constitute a 'well-founded fear of persecution' under the Refugee Convention.¹⁹⁰ Therefore, persons at risk of torture are protected by both Article 3 of the UNCAT and Article 33(1) of the Refugee Convention.¹⁹¹

The *non-refoulement* clause in Article 3 of the UNCAT is absolute in character and non-derogable under any circumstances.¹⁹² It does not also permit any exceptions, reservations or limitations whatsoever.¹⁹³ This is in sharp contrast to Article 33(1) of the Refugee Convention that makes an exception on security grounds.¹⁹⁴ Article 3, thus, applies without any exception whatsoever to 'nationality or statelessness or the legal, administrative or judicial status of the person concerned under ordinary or emergency law', including war times or states of emergency.¹⁹⁵ It is also not subject to territorial restrictions¹⁹⁶ and as will be discussed in detail

¹⁸⁷ UNHCR 'Note' (n 121) para 11; General Comment 20 (n 116) para 9; General Comment No 31 (n 111) para 12; *AAA and Others* (n 48) [22].

¹⁸⁸ CAT 'General Comment No 4 (2017) on the Implementation of article 3 of the Convention in the Context of Article 22' (9 February 2018) UN Doc CAT/C/GC/4 paras 9-12; Boed (n 161) 18.

¹⁸⁹ UDHR (n 26) Article 3 protects everyone's 'right to life, liberty and the security of person.' Article 4 prohibits (Slavery and Servitude); 5 (Torture and other Ill-Treatment or Punishment); 7 (Discrimination); 9 (Arbitrary Arrest and Detention); See also, Articles 6, 7 and 8 of the ICCPR; Article 6 of the CRC; Convention on the Rights of Persons with Disabilities (adopted 12 December 2006, entry into force 03 May 2008) UNGA Doc A/RES/61/106, Article 10; ECHR (n 199) Articles 2 and 3; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into Force 21 October 1986) (1982) OAU Doc Cab/Leg/67/3 Rev 5 21 ILM 58 (African Charter) Article 4,5, 6 ; 1969 ACHR (n 116).

¹⁹⁰ HCR/IP/4/Eng/REV.1 (n 134) para 51; Boed (n 161).

¹⁹¹ *ibid*

¹⁹² UNCAT (n 110) Articles 2 and 3; A/HRC/37/50 (n 101) para 37; A/HRC/47/30 (n 160) para 41.

¹⁹³ 'Advisory Opinion' (n 111) paras 20-21.

¹⁹⁴ Refugee Convention (n 48) Article 33(2)

¹⁹⁵ HCR/IP/4/Eng/REV.1 (n 134) paras 51-53; CAT/C/GC/4 (n 188) paras 9-12; A/HRC/37/50 (n 101) para 37; A/HRC/47/30 (n 160) para 41.

¹⁹⁶ CAT 'General Comment No 2: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (24 January 2008) UN Doc CAT/C/GC/2 para 16; CAT/C/GC/4 (n 188) para 10.

in Chapter Six, applies wherever a State exercises control, authority or jurisdiction, including on board of a ship, an aircraft registered to a State and on the high seas.¹⁹⁷

The absolutism and non-derogability of *non-refoulement* in Article 3 have been affirmed by the Committee Against Torture ['CAT'] and other human rights bodies,¹⁹⁸ including the CCPR and courts.¹⁹⁹ It has consistently decided that whenever substantial grounds exist to show that the expulsion of a person would subject him/her to torture, 'the test of article 3 [...] is absolute.'²⁰⁰ In *Sogi v Canada*, the CAT decided that Article 3 'affords absolute protection to anyone [...], regardless of the person's character or the danger the person may pose to society.'²⁰¹ Article 3 applies to all situations, including during armed conflicts.²⁰² In the case of *Chipana v Venezuela*, the CAT adopted the view that a person cannot be extradited to a State where his/her 'life, liberty and integrity are threatened'.²⁰³ The Committee on the Rights of the Child, the treaty body for the CRC, in its General Comment No 6 also stated that parties to the CRC 'shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, ... articles 6 and 37 of the Convention'.²⁰⁴

2.3.2 Non Refoulement under the ECHR

The ECHR of 1950 has 46 State parties, including the 27 EU States.²⁰⁵ While the ECHR does not explicitly contain the *non-refoulement* clause, the ECtHR, like the CCPR, has also interpreted the prohibition of torture in Article 3 of the ECHR,²⁰⁶ as automatically imposing an implicit

¹⁹⁷ CAT/C/GC/4 (n 188) para 10.

¹⁹⁸ EC/SCP/2 (n 48) para 13; General Comment 20 (n 116) para 9; CAT/C/GC/4 (n 188) para 12.

¹⁹⁹ *Soering* (n 169) [88]-[89]; General Comment No 31 (n 111) para 12.

²⁰⁰ *Tapia Páez v Sweden* Communication No 39/1996 (28 April 1997) CAT/C/18/D/39/1996 para 14.5.

²⁰¹ *Bachan Singh Sogi v Canada* Communication No 297/2006 (16 November 2007) UN Doc CAT/C/39/D/297/2006 [10.2].

²⁰² *Paez* (n 200) paras 14.4, 14.5 and 15; *Chahal* (n 183) [74] [78] [80] [96]; CCPR 'General Comment No 29: Article 4: 'Derogations During a State of Emergency' (31 August 2001) para 11; UNHCR 'Advisory Opinion' (n 111) paras 20-21; The non-derogability of the non-refoulement is well established in many international and regional human rights treaties and case law.

²⁰³ *Cecilia Rosana Núñez Chipana v Venezuela* (Communication No 110/1998, CAT/C/21/D/110/1998) (CAT, 16 December 1998) paras 6.2-6.4.

²⁰⁴ Committee on the Rights of the Child, General comment No 6 (2005): 'Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (1 September 2005) CRC/GC/2005/6 para 27; Article 37 of the CRC prohibits the expulsion of children to risk of torture.

²⁰⁵ *Soering* (n 169) [88]; AAA (n 48) [23]; CoE, 'The European Convention on Human Rights' (2024) <<https://www.coe.int/en/web/human-rights-convention/>> accessed 06 April 2024

²⁰⁶ ECHR (n 199); Article 3 provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

prohibition not to deport or return persons to places where they would be subjected to substantial and a 'real risk' of ill-treatment as contemplated in Article 3.²⁰⁷ In *Soering* (1989), the ECtHR ruled:

That the abhorrence of torture has such implications is recognised in Article 3 of the [UNCAT] [...], which provides that "no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture."²⁰⁸

The ECtHR's interpretation of Article 3 of the ECHR is consistent with the approach adopted by the CAT in relation to Article 3 of the UNCAT discussed above.²⁰⁹ This interpretation also corresponds with the criteria often used by national courts to assess whether a 'real risk' of ill-treatment exists in a destination State or if it is a 'safe third country'.²¹⁰

Article 3 of the ECHR, thus, prohibits the deportation, expulsion or removal of persons, including those who present a danger to national security, to countries, including their own, where there are substantial grounds for believing that their deportation 'would entail a real and concrete risk' of ill-treatment, direct or indirect *refoulement*.²¹¹

Article XII(2) of the Committee of Ministers' Guidelines of 2002 also requires of States to ensure that the possible return or expulsion of an asylum claimant 'to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment.'²¹² Similarly, Article 3(2) of the 1957 European Convention on Extradition prohibits its 50 State parties from granting an extradition request if they have:

[S]ubstantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

²⁰⁷ *Soering* (n 169) [88]; *Chahal* (n 183) [80]; 'Displaced Persons' (n 135); *Saadi v Italy* (n 145) [125] [127].

²⁰⁸ *Soering* (n 169) [88]; Although the *Soering* case in 1989 related an extradition, the principle adopted by the ECtHR was applied in all subsequent removal cases, including those involving asylum seekers. *See also*, *Chahal* (n 161) [80]; *MSS* (n 178); *Ilias and Ahmad* (n 178) [131]; *AAA and Others* (n 48) [24].

²⁰⁹ *AAA and Others* (n 48) [23].

²¹⁰ *ibid.*

²¹¹ *Chahal* (n 183) [75]-[77]; *MSS* (n 156); *Ilias and Ahmad* (n 178) [116]; *AAA* (n 48) [24].

²¹² Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism (Strasbourg, adopted 11 July 2002) Committee of Ministers at its 804th meeting of the Ministers' Deputies.

In assessing a real risk of ill-treatment, the ECtHR opined that the ‘main concern is whether effective guarantees exist’ in the destination country to provide the necessary protection against ‘arbitrary *refoulement*, be it direct or indirect.’²¹³ A lack of access to effective guarantees for asylum seekers, for example, would expose refugees and other persons in need of international protection to a real risk of being subjected to inhuman or degrading treatment, and in breach of Article 3, read alone or in conjunction with Article 13 of the Convention of the ECHR.²¹⁴ This includes denying asylum seekers the opportunity to have their asylum claims effectively assessed,²¹⁵ a central issue of this thesis.

As with the CAT, the ECtHR has consistently held that the prohibition provided in Article 3 of the ECHR ‘against ill-treatment is equally absolute in expulsion cases’.²¹⁶ In the case of *Saadi v Italy*,²¹⁷ the Court ruled that Article 3 does not make any exceptions or permit derogation even in the event of a public emergency threatening the life of the nation.²¹⁸

States cannot return persons to a territory or jurisdiction where such a return would subject the persons to serious violations of their economic, social and cultural rights in a way that amounts to severe arbitrary deprivation of life, torture or other cruel and ill-treatment in the receiving State.²¹⁹ They may also not transfer persons who are likely to be subjected to degrading living conditions, or lead to a denial of appropriate medical treatment or a deterioration in the person’s health, death or a condition that ‘triggers’ inhuman and degrading treatment.²²⁰ Additionally, the transfer of persons to a third State ‘without a reliable assessment’ of an availability of ‘effective protection and guarantees against *refoulement*’ would constitute a violation of *non-refoulement* under Article 3.²²¹

²¹³ *MSS* (n 199) [286]; *Ahmad* (n 178) [113] [123]-[126]; *AAA and Others* (n 48) [24].

²¹⁴ *Chahal* (n 183) [75]-[77]; *MSS* (n 178) [86] [231] [299]; *Ahmad* (n 178) [123]-[125]; *AAA and Others* (n 48) [24].

²¹⁵ *AAA and Others* (n 48) [24].

²¹⁶ *Chahal* (n 183) [80].

²¹⁷ *Saadi v Italy* (n 45) [127]; See also, *Chahal* (n 183) [79]; *Selmouni v France* Application no 25803/94 (ECtHR, 28 July 1999) [95].

²¹⁸ ECHR (n 199) Article 15.

²¹⁹ ‘Advisory Opinion’ (n 111) paras 21-22.

²²⁰ *N v The UK* Application no 26565/05 (ECtHR, 27 May 2008) [42]; *Paposhvili v Belgium*, Application no 41738/10 (ECtHR, 13 December 2016) [192]; *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (Advisory Opinion OC-21/14) IACrHR (19 August 2014) [229].

²²¹ *TI v The UK* (n 157) [14].

2.4 *Non-Refoulement* as Part of CIL and as a Peremptory Norm

The *non-refoulement* principle is widely recognised as part of customary international law (CIL) and even peremptory in character.²²² According to the ICJ, for a rule to qualify as CIL, it must possess two essential elements, including (a) consistent State practice backed by (b) States' belief that the practice of the norm 'is rendered obligatory by the existence of a rule of law requiring it', *opinio juris*.²²³ The above conditions are met when a State holds 'itself out as so assuming, accepting or recognizing [that rule as generally applicable], in such a manner as to cause other States, ... to rely on the attitude thus taken up.'²²⁴

The UNHCR is of the view that *non-refoulement* under the Refugee Convention and international human rights law satisfies the two conditions required to qualify as a rule of CIL based on its wide acceptance and recognition by States as being normative in character.²²⁵ It also maintains that the large number of parties to the Refugee Convention and/or its Protocol²²⁶ and several international refugee and human rights treaties containing *non-refoulement* corresponds with general State practice and relevant evidence of *opinio juris*.²²⁷ The UNHCR also considers that the systematic affirmation of *non-refoulement* in many of its Executive Committee's Conclusions and GA resolutions constitutes further evidence of the norm's customary character.²²⁸

Furthermore, many States, including non-parties to the Refugee Convention and/or its Protocol, have 'overwhelmingly' reaffirmed their acceptance of the *non-refoulement* principle in their 'numerous' interactions with the UNHCR on matters concerning the protection of refugee rights, as legally binding.²²⁹ According to the UNHCR, States often justify their 'actual

²²² A/AC.96/694 (n 128) para 2; *AAA and Others* (n 48) [25]; 'Response' (n 111) paras 3, 8, 10.

²²³ *North Sea Continental Shelf* [1969] ICJ (Judgement) Rep 1969 3 [77]; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA)* (Merits) General List No 70 [1986] ICJ Judgement [183]; UNHCR 'Advisory Opinion' (n 111) para 14.

²²⁴ *Continental Shelf* (n 223) [27]-[28].

²²⁵ UNHCR 'Response' (n 111) para 7; UNHCR 'Note' (n 121) Section (B).

²²⁶ EC/SCP/2 (n 48) para 5; 'State Parties' (n 112) 1.

²²⁷ UNHCR 'Response' (n 111) para 7, 8.

²²⁸ *ibid* para 3; UNCHR 'Note' (n 121) Section (B); Conclusion No 25 (XXXIII) (n 95) para (b); A/AC.96/694 (n 128) para 21.

²²⁹ UNHCR 'Response' (n 111) para 7; 'Advisory Opinion' (n 111) para 15; According to the UNCHR, a State's incorporation of *non-refoulement* into national legislation can be 'regarded as ratified'.

or intended *refoulement* by providing explanations and/or by claiming that the person in question was not to be considered a refugee', indicating their acceptance of the principle.²³⁰

In the Declaration adopted at the Ministerial Meeting in December 2001, parties to the Refugee Convention and/or its Protocol acknowledged that 'the continuing relevance and resilience of this international regime [...], including at its core the principle of *non-refoulement*, [...] is embedded in customary international law'.²³¹

According to the UNHCR, States' responses to its functions in relation to their *non-refoulement* obligations are indicative of their implicit recognition and acceptance of the principle 'as a guide for their action'.²³² The Agency interprets such actions as a confirmation of 'either an express or tacit understanding on the part of Governments that the principle has a normative character.'²³³

The above position of the UNHCR is supported by the jurisprudence and the work of jurists,²³⁴ including the ICJ's decisions in the *Continental Shelf cases*, *Nicaragua v USA*, and the Advisory Opinion concerning the use of *Nuclear Weapons*.²³⁵ In its judgement on the *Nicaragua* case of 1986, the ICJ stated that 'in order to deduce the existence of customary rules, the ICJ deems it sufficient that the conduct of States should, in general, be consistent with such rules.'²³⁶ The Court has also expressly linked GA resolutions to *opinio juris*, which it observes, can be inferred from the attitude of States towards the relevant treaty and certain GA resolutions.²³⁷ In the ICJ's opinion, a State manifests a clear and definite acceptance of a rule as binding through its past and present conduct, ... public statements and proclamations', and the acceptance of a conventional regime or a general rule.²³⁸

²³⁰ *ibid*

²³¹ Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees (16 January 2002) UN Doc HCR/MMSP/2001/09 Preambular para 4; *AAA and Others* (n 48) [25].

²³² UNHCR 'Response' (n 111) para 5.

²³³ *ibid* para 6.

²³⁴ 'Advisory Opinion' (n 111) Section (B); A/AC.96/694 (n 128) para 21; *AAA* (n 48) [25].

²³⁵ *Continental Shelf* (n 223) [27]-[30], [61]-[63]; *Nicaragua* (n 223) [182]-[186]; *Legality of the Threat or the Use of Nuclear Weapons* [1996] ICJ (Advisory Opinion) General List No 95 [71]-[78].

²³⁶ *Nicaragua* (n 223) [186].

²³⁷ *ibid* [188]-[189]; *Nuclear Weapons* (n 235) [70]-[72]; In the view of the ICJ, the GA's resolutions, despite not being binding, may sometimes have 'normative value' and are very broadly representative of the existing states and their points of view.

²³⁸ *Continental Shelf* (n 223) [27]-[28]; *Nicaragua* (n 223) [186]-[188].

The customary character of *non-refoulement* is also evidenced by the non-permissibility of reservations to Article 33 of the Refugee Convention.²³⁹ This view is also supported by the jurisprudence of the ICJ,²⁴⁰ human rights bodies²⁴¹ and regional courts.²⁴² In the *Continental Shelf* cases, the ICJ stated, unlike 'purely conventional rules and obligations' that permit reservations,

this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.²⁴³

The UNHCR is of the opinion that *non-refoulement* is 'progressively acquiring the character of a peremptory rule of international law'.²⁴⁴ It argues that the norm 'remains generally recognised,' and complied with by 'most States, even when faced with a variety of difficulties, including massive numbers of arrivals and fragile political relations with countries of origin'.²⁴⁵ This view is also supported in many GA resolutions, the Conclusions of the UNHCR's Executive Committee, jurisprudence and legal scholarship.²⁴⁶ The CCPR, for instance, decided that '[t]he proclamation of certain provisions [...] as being of a non-derogable nature, in Article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature'.²⁴⁷ The principle's peremptory character has been affirmed in some regional instruments²⁴⁸ and by several courts.²⁴⁹

²³⁹ Refugee Convention (n 48) Article 42(1); UNHCR 'Response' (n 111) para 8; UNHCR 'Advisory Opinion' (n 111) para 15

²⁴⁰ *Continental Shelf* (n 223) [63]; UNHCR 'Response' (n 111) para 8.

²⁴¹ *Paez* (n 200) paras 14.4, 14.5 and 5, 15 ; General Comment 29 (n 202) para 11; 'Advisory Opinion' (n 111) paras 20-21.

²⁴² *Saadi v Italy* (n 145) [127]; See also, *Chahal* (n 183) [79]; *Selmouni* (n 217) [95].

²⁴³ *Continental Shelf* (n 223) [63].

²⁴⁴ Conclusion No 25 (XXXIII) (n 117) para (b); A/AC.96/694 (n 128) para 21; 'Response' (n 111) para 1; *Zaoui* (n 180) [35].

²⁴⁵ A/AC.96/694 (n 128) para 21.

²⁴⁶ *ibid* para 21; UNHCR 'Response' (n 111) para 3; Conclusion No 25 (n 117) para (b); *Zaoui* (n 180) [34].

²⁴⁷ General Comment 29 (n 202), para 11; ICCPR (n 110) Article 4(2) provides that 'No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.'

²⁴⁸ 'Advisory Opinion' (n 111) para 16; Preambular para 7 of the OAS' Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (Mexico City) 16 November 2004; Cartagena Declaration (n 176) Section III (5); See also, footnotes 94 & 145 above.

²⁴⁹ *Prosecutor v Anto Furundzija* (Yugoslavia International Tribunal) Judgement of 10 December 1998 [34]-[164]; *Prosecutor v Kunarac and Others* (Yugoslavia International Tribunal) (Judgement of 22 February 2001) [466]; *Filartiga v Pena Irala* 630 F2d 876 (2d Cir EDNY 1980) [882]-[885].

As a CIL rule, *non-refoulement* is binding on all States irrespective of their treaty obligations under the Refugee Convention and/or its Protocol or other human rights treaties containing it.²⁵⁰ Besides being bound by the *non-refoulement* obligations under the Refugee Convention,²⁵¹ and the UNCAT,²⁵² EU Members are also bound by the principle by virtue of the ECHR,²⁵³ EU treaty law, EU Charter provisions, and the general principles of EU law.²⁵⁴ They also continue to officially proclaim their adherence to their obligations under the Refugee Convention and other international human rights treaties,²⁵⁵ including the right to asylum and *non-refoulement* as a core principle of international law.²⁵⁶

Although the Refugee Convention is not formally part of EU law, it has had a significant influence in determining the content of *non-refoulement* within the EU Legal regime.²⁵⁷ EU States, at the European Council special meeting held on 15 and 16 October in 1999 at Tampere, affirmed that they were fully committed to the ‘obligations of the [...] Convention and other relevant human rights instruments’ ... [and the] ... ‘absolute ... right to seek asylum’ to address the humanitarian concerns within the bloc.²⁵⁸

2.5 Conclusion

This chapter examined the main elements of the *non-refoulement* principle, scope of application and legal status. It examined its foundational basis and codification in the Refugee Convention, the UNCAT and several other refugee and international human rights treaties,

²⁵⁰ 'Advisory Opinion' (n 111) para 16; Cartagena Declaration (n 176) Section III (5).

²⁵¹ EC/SCP/2 (n 48) para 5; Conclusion No 25 (n 117) para (b); 'Response' (n 111) paras 1, 8 & 10; 'Advisory Opinion' (n 111) para 15; AAA (n 48) [25].

²⁵² UNCAT-parties (n 115)

²⁵³ *Soering* (n 169) [88]; *Hirsi* (n 22) [7]; *AAA and Others* (n 48) [23]; Council of Europe (n 205).

²⁵⁴ Consolidated version of the Treaty on European Union [2008] OJ C115/15 Article 6(3); The Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47, Article 78(1); Under Article 78(1), The EU's Common Asylum System must comply with 'principle of non-refoulement ... [and] in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967'; Charter of the Fundamental Rights of the European Union [2012] OJ C326/02 Article 19(2); *Hirsi* (n 22) [7].

²⁵⁵ Declaration (n 36) Point 1; UNHCR 'Hirsi' (n 120) paras 2.1.1-2.1.5; *Hirsi* (n 22); Iris Goldner Lang and Boldizsár Nagy, 'External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement' (2021) 17 European Constitutional Law Review 94, 122-138.

²⁵⁶ CoE Commissioner (n 47) 1 6, 17; ICC Prosecutor (n 47); Thomas Gammeltoft-Hansen, 'Extraterritorial Migration Control and the Reach of Human Rights' in V Chetail and C Bauloz (ed), *Research Handbook on International Law and Migration* (Edward Elgar Publishing Limited 2014) 113; Fill and Moresco (n 47).

²⁵⁷ *Hirsi* (n 22) [22]; UNHCR (n 144) 5-6; Papastavridis (n 31) 281; *Non-refoulement* is contained in both EU primary and secondary laws as the EU Charter (Article 18); (Article 78(1) of the TFEU.

²⁵⁸ Tampere European Council 16 and 16 October 1999: Presidency Conclusions paras 4 and 13; UNHCR (n 144) (Preface (ii)).

including the ECHR. The aim was to demonstrate the norm's centrality in the international protection regime, while setting the scene for the focus of the thesis. Understanding these concepts is essential for the examination of the Declaration and whether it complies with EU States' obligation of *non-refoulement* under the above treaties.

The conclusion of the chapter clearly demonstrated that *non-refoulement* is a core principle of the international refugee law, part of CIL and *jus cogens*. The analysis also showed that although the *non-refoulement* provisions in the above treaties are unidentical, they overlap in many cases. Regardless of the instrument, *non-refoulement*, as a matter of law, is conditional upon some form of protection claim being made and must be interpreted broadly.²⁵⁹ With its CIL status, *non-refoulement* binds States regardless of whether they are parties to the Refugee Convention, UNCAT or ECHR.

Despite that, *non-refoulement* has not always been observed by States.²⁶⁰ The norm's enforceability is often constrained by the supremacy of States' interests and self-preservation, the absence of a duty to grant asylum, or transfer persons to another State and a lack of binding enforcement mechanisms²⁶¹

As will be demonstrated in the next chapter, many parties to the Refugee Convention, UNCAT and ECHR, including EU Members, in recent decades, have capitalised on the above loopholes and adopted a range policies and practices to evade or minimise the extraterritorial effects of their *non-refoulement* obligations.²⁶² The Declaration, the instrument at issue in this study, is a typical example of such policies.²⁶³

²⁵⁹ Ned Hirst, 'The Extra-Territorial Scope of Non-Refoulement' (2023) 55 Cornell Int'l LJ 351 352.

²⁶⁰ A/AC.96/815 (n 119) para 12; Ghezelbash (n 118) 480-481.

²⁶¹ CoE Resolution 1821 (2011), The Interception and Rescue at Sea of Asylum Seekers, Refugees and Irregular Migrants (01 June 2011) Doc 12628 para 5.1; Anja Klug and Tim Howe, 'Extraterritorial Immigration Control: What Role For Legal Guarantees?' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, vol 21 (Immigration and Asylum Law and Policy in Europe, Brill 2010) 1; Seunghwan Kim, 'Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context' (2017) 30 Leiden Journal of International Law 49 50; Thomas Gammeltoft-Hansen and Nikolas Feith Tan, 'Extraterritorial Migration Control and Deterrence' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (2021) 506.

²⁶² A/AC.96/815 (n 119) para 12; Boed (n 161) 22; Ghezelbash (n 118) 480-481.

²⁶³ Ibid.

III. Conceptual Framework: Externalisation of Migration Control Policies

3.1 Introduction

The prohibition of *refoulement* is constrained by the legitimate interests of States to control migration and national security.²⁶⁴ Under international law, States have the exclusive right and authority to control persons who can enter, stay or claim asylum in their territories.²⁶⁵ In recent years, many countries of asylum, including parties to the Refugee Convention, have increasingly adopted a range of migration control policies to prevent refugees, asylum seekers and irregular migrants from reaching their national borders.²⁶⁶ The policies are in response to the growing influx of refugees and migrants crossing international borders irregularly to seek asylum or better economic opportunities.²⁶⁷

In some cases, States have pushed or compelled refugees and asylum seekers at their frontiers back into extraterritorial locations or countries of origin, where the persons' lives and freedoms are put at risk.²⁶⁸ In other cases, some refugees and asylum seekers have been coerced, pushed or forced into dangerous conditions in countries of origin or other third States after entry.²⁶⁹ Some States have also eroded the minimum requirements of what constitutes a 'third safe country' to enable them to transfer refugees and legal responsibilities to third and usually poorer neighbouring countries.²⁷⁰ Others have also resorted to interception on the high seas

²⁶⁴ Conclusion No 97 (n 108); Klug and Howe (n 261) 69; David Scott Fitzgerald, 'Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers' (2020) 99 Social Forces e2 1

²⁶⁵ Conclusion No 81 (n 145); Resolution 1821 (n 261) para 5.1; Klug and Howe (n 261) 1; Kim (n 261) 50.

²⁶⁶ UNHCR, 'Considerations on the "Safe Third Country" Concept: EU Seminar on the Associated States as Safe Third Countries in Asylum Legislation Vienna, 8-11 July 1996' (1996) 1; Conclusion on No 97 (n 108); Stephen H Legomsky, 'The Removal of Irregular Migrants in Europe and America', *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 678; Frelick, Kysel and Podkul (n 2) 190, 199-209; Asher Lazarus Hirsch, 'The Borders Beyond the Border: Australia's Extraterritorial Migration Controls' (2017) 36 Refugee Survey Quarterly 48 49 and 51; Reviglio (n 2) 1.

²⁶⁷ UNHCR 'Safe' (n 266) 1; UNHCR, 'Global Trends: Forced Displacement Trends 2021' (*Global Data Service*, 2022) 18-19 <<https://www.unhcr.org/62a9d1494/global-trends-report-2021>> accessed 17 July 2022; Frelick, Kysel and Podkul (n 2) 191.

²⁶⁸ A/AC.96/951 (n 122) para 12; Moreno-Lax (n 121) 255; UNCHR 'Beware' (n 119); Ghezelbash (n 118) 479-481.

²⁶⁹ A/AC.96/815 (n 119) para 12.

²⁷⁰ Ghezelbash (n 118) 481.

or declared airports, harbours, coastlines, and islands as non-territory for the sole purpose of evading their protection responsibilities.²⁷¹

Court decisions and human rights reports show that these obstructive measures significantly threaten the international protection regime by preventing individuals from exercising their right to seek asylum, and put refugees, asylum seekers and vulnerable migrants at increased risk of being exposed to persecution, torture and *refoulement*.²⁷²

To this end, this chapter examines the concept of externalisation, practices, underlying motivations and their implications for international protection, particularly the right to *non-refoulement*. The objective is to highlight the growing trend of externalisation as the main policy framework of many countries of asylum to control refugee and migrant flows into territories.

The chapter demonstrates externalisation practices subject a significant number of refugees, asylum seekers and migrants to situations or places where they may face a risk of persecution, torture and other ill-treatment, and *refoulement*.²⁷³ This chapter is essential in establishing a context for the adoption of the Declaration.

3.2 Context to Externalisation Policies

While externalisation policies are not entirely new, they have increasingly become the most dominant framework for controlling irregular migration and asylum applications in many countries of asylum in recent decades.²⁷⁴ The growing use of externalisation policies are largely in response to a significant rise in irregular migration and asylum applications in many countries

²⁷¹ HCR/MMSP/2001/09 (n 231) 241; Thomas Gammeltoft-Hansen and James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 J Transnat'l L 235, 242.

²⁷² Katharina Röhl, *UNHCR Fleeing Violence and Poverty :Non-Refoulement Obligations under the European Convention of Human Rights* (UNHCR January 2005) 7 and 8; UNHCR 'Hirsi' (n 120) para 8; 'Externalization' (n 120) paras 3-4, 6; See also; *Namah* (n 120) [36]-[37]; Hirsch (n 266) 49.

²⁷³ Weis (n 121) 151, 166; UNHCR 'Commentary' (n 128) 233; Boed (n 161) 22; UNHCR, 'Submission by the UNHCR For the Office of the High Commissioner for Human Rights' *Compilation Report* (Universal Periodic Review: Republic of Nauru) 2nd Cycle, 23rd Session (March 2015) 1; UNHCR 'Submission in Sharifi' (n 123) [18]-[22]; UNCHR 'Considerations' (n 121); Ghezelbash (n 118) 492; Only 1% of asylum seekers intercepted and transferred to Manus Island by Australian authorities are provided with the opportunity to have their asylum applications assessed.

²⁷⁴ Frelick, Kysel and Podkul (n 2) 190-91; Reviglio (n 2) 1-2; Gammeltoft-Hansen and Feith Tan (n 261) 1-2; Denmark introduced fines for ship masters who brought in Jewish refugees leading to control at the time of boarding; the USA also introduced overseas visas in 1924.

of asylum, including EU States.²⁷⁵ In recent decades, the world has witnessed an unprecedented number of persons fleeing their home countries due to persecution, war, conflicts, effects of climate change, violence, human rights abuses and other internal disturbances to public peace and security.²⁷⁶ According to the UNHCR, the number of conflict-affected countries and forcibly displaced persons, including refugees, has more than doubled in the last decade.²⁷⁷ The number of forcibly displaced persons fleeing their home countries due to new and ongoing conflicts, violence, human rights violations, disasters, the effects of climate and economic hardships is at 'its highest levels' in decades.²⁷⁸ Between 2021 and 2022 alone, the number of internally displaced persons increased by 21%, from 89.3 million to 108.2 million.²⁷⁹ The global refugee population, asylum seekers and other persons in need of international protection have also increased exponentially.²⁸⁰

While most of refugees and other displaced persons are hosted in neighbouring countries in the Global South, increasing numbers have also been seeking protection in distant places outside the conflict-ridden zones.²⁸¹ Most of them travel irregularly along dangerous routes through transit countries across international borders and in overcrowded unseaworthy boats to seek asylum in developed countries of the Global North, particularly in Europe and North America.²⁸²

The externalisation policies intended to minimise or circumvent States' voluntarily accepted obligations under the Refugee Convention and other relevant international human rights

²⁷⁵ UNHCR (n 266) 1; Hirsch (n 266) 49 and 51; Reviglio (n 2) 1.

²⁷⁶ UNHCR 'Trends' (n 267) 5, 8, 12; UNGA 'Global Compact on Refugees (adopted 17 December 2018) GAOR 73rd Session Suppl No 12 UN Doc A/RES/73/151 para 1-2; IOM, 'A Framework for Assisted Voluntary Return and Reintegration' (IOM, *Migrant Protection and Assistance Division*, 2018) <<https://tinyurl.com/k43x84vs>> accessed 07 Oct 2021 1; Frelick, Kysel and Podkul (n 2) 190; The mix of refugees and migrants also includes trafficked persons, unaccompanied or separated children who travel together in an irregular fashion using the same means of transport.

²⁷⁷ UNHCR 'Trends' (n 267) 5, 8, 12; Frelick, Kysel and Podkul (n 2) 190.

²⁷⁸ UNHCR, 'Forced Displacement Worldwide at Its Highest in Decades' 19 June 2017) <<https://tinyurl.com/3sx9upd9>> accessed 23 November 2023; UNHCR 'Global Trends' (n 240) 4; UNHCR, 'Global Trends: Forced Displacement in 2022' (2023) 2 <<https://tinyurl.com/3sx9upd9>> accessed 23 November 2023

²⁷⁹ UNHCR 'Trends' (n 267) 4; UNHCR 'Forced Displacement' (n 278) 7.

²⁸⁰ *ibid* (n 278) 7-9; Between 2021 and 2022, the number of refugees increased from 21.3 million to 35.3 million refugees; In addition, there are 5.4 million asylum seekers across the globe.

²⁸¹ UNHCR (n 266) 1; UNHCR 'Trends' (n 267) 18-19; Frelick, Kysel and Podkul (n 2) 191; According to the UNHCR, 72% of globally displaced persons are hosted in nearby countries to the source of displacement and 83% in low-middle income countries..

²⁸² UNHCR 'Trends' (n 267) 18-19; Frelick, Kysel and Podkul (n 2) 191.

treaties.²⁸³ They allow States to manipulate territoriality by shifting their borders far beyond their territories²⁸⁴ or transfer migration control and international protection responsibilities to third States without asylum procedures and/or sufficient capacity to process asylum or to uphold the rights of refugees and migrants.²⁸⁵

Irregular migration, particularly from certain countries of origin, is framed as a security threat and a burden on the protection and welfare systems in many countries of asylum.²⁸⁶ Citizens of many destination States are concerned that terrorists may pose as refugees or asylum seekers.²⁸⁷ Others also argue that many of the people seeking asylum may not be genuine refugees or asylum seekers in need of international protection but are rather believed to be economic migrants seeking better economic opportunities.²⁸⁸ European States, in particular, maintain that even the genuine refugees and asylum seekers fleeing persecution and conflicts could and should be seeking protection in places near their countries or regions of origin.²⁸⁹

Externalisation policies are also framed by governments as a fight against irregular migration, human trafficking and smuggling networks, and a life-saving humanitarian exercise.²⁹⁰ The governments argue that irregular migration is fuelled by a network of human smugglers and traffickers who encourage, assist, facilitate or even force asylum seekers and migrants to embark on perilous journeys.²⁹¹ In recent decades, human smuggling, trafficking and other criminal networks have become multi-billion dollar businesses and the primary means through which the majority of refugees and irregular migrants enter countries of asylum.²⁹² States argue that combatting these criminal networks will reduce illegal migration and stop asylum seekers and vulnerable persons from embarking on perilous journeys and from being subjected to human rights abuses at the hands of smugglers and traffickers.²⁹³ Externalisation policies,

²⁸³ UNHCR 'Externalization' (n 120) para 3-5; Hirsi (n 22) [93], [94]; Hirsch (n 266) 53; Reviglio (n 2) 2.

²⁸⁴ Fitzgerald (n 264) 1.

²⁸⁵ *ibid.*

²⁸⁶ Report of the Special Rapporteur on the Human Rights of Migrants (4 May 2018) UN Doc A/HRC/38/41 para 9; Frelick, Kysel and Podkul (n 2) 192; Inka Stock, Ayşen Üstübici and Susanne U Schultz, 'Externalization at Work: Responses to Migration Policies from the Global South' (2019) 7 (48) *Comparative Migration Studies* 1 3.

²⁸⁷ Frelick, Kysel and Podkul (n 2) 192.

²⁸⁸ *ibid.*

²⁸⁹ *ibid.*

²⁹⁰ *ibid.* 193-194.

²⁹¹ *ibid.* 192; Thomas Gammeltoft-Hansen and Nikolas F Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5 *Journal on Migration and Human Security* 28, 37.

²⁹² Gammeltoft-Hansen and Tan (n 263) 37.

²⁹³ Frelick, Kysel and Podkul (n 2) 193-94; Gammeltoft-Hansen and Tan (n 291) 37.

thus, target human smugglers and traffickers who assist refugees and migrants along dangerous travel routes on overcrowded boats.²⁹⁴

The Bali Process, for instance, aims at strengthening cooperation between parties and partners to address 'human trafficking and smuggling, and [...] migration management in the [Asian-Pacific] region'.²⁹⁵ Similarly, the US-led Merida Initiative, 'bilateral security cooperation' between the US and Mexico, is intended to 'create a 21st Century Border Structure' to tackle organised crimes, including the 'illicit flow of drugs, people, arms, and cash'.²⁹⁶ The EU's military operation in the Southern Central Mediterranean, EUNAVFOR MED, was launched in 2015 to disrupt business model of smugglers and traffickers.²⁹⁷ The EU's cooperation agreements with Morocco, Algeria, Tunisia, Libya and Turkey, criminalise irregular migrant departures from those countries.²⁹⁸ Persons who irregularly depart from the shores of the above EU partner States face a financial fine and/or imprisonment.²⁹⁹

3.3 The Concept of Externalisation

The term externalisation refers to a set of laws, restrictive and obstructive migration control policies and practices implemented by States to directly or indirectly stop, intercept or prevent refugees, asylum seekers and irregular migrants from reaching their territories to access international protection and/or economic benefits.³⁰⁰ The UNHCR defines the externalisation of international protections as:

[M]easures taken by States—unilaterally or in cooperation with other States—which are implemented or have effects outside their own territories, and which directly or indirectly

²⁹⁴ Reviglio (n 2) 1.

²⁹⁵ Bali Process Ministerial Conference, 'The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime' 2002) <<https://www.baliprocess.net/>> accessed 12 Aug 2022

²⁹⁶ US Embassy and Consulates in Mexico, 'The Merida Initiative (Pillar Three)' (*US State Department*, 7 September 2021) <<https://mx.usembassy.gov/the-merida-initiative/>> accessed 30 July 2021

²⁹⁷ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L122/31; EEAS, 'European Union Naval Force-Mediterranean (Council Decision 2015/778 18 May 2015)' <<https://tinyurl.com/28a87pxz>> accessed 03 December 2021

²⁹⁸ Gammeltoft-Hansen and Tan (n 291) 37.

²⁹⁹ *ibid.*

³⁰⁰ Conclusion No 97 (LIV) (n 108); Legomsky (n 266) 678; Reviglio (n 2) 1; David Scott FitzGerald, 'Remote Control of Migration: Theorising Territoriality, Shared Coercion, and Deterrence' (2020) 46 *Journal of Ethnic and Migration Studies* 4 (n 272) 5-6.

prevent asylum-seekers and refugees from reaching a particular 'destination' country or region, and/or from being able to claim or enjoy protection there.³⁰¹

Externalisation practices encompass a combination of direct border enforcement, extraterritorial maritime interdictions, push backs and prolonged detention of interdicted persons to serve as a deterrence.³⁰² Other externalisation policies include preventive and indirect measures such as political, financial, and technical support to security and immigration agencies of third countries to enhance their capacity to control and deter irregular migrant movements.³⁰³ Developed States have also incentivised poorer neighbouring, transit and countries of origin with development aid, financial assistance and other favours in exchange for their cooperation incentives to control the onward mobility of would-be asylum seekers and migrants.³⁰⁴

Externalisation strategies are thus intended to prevent, deter or block access to territory, asylum procedures, decent reception conditions and social support.³⁰⁵ They are purposefully implemented extraterritorially to have legal effects outside the national territory or the jurisdiction of the sponsoring States.³⁰⁶ They are designed to avoid direct contact and jurisdictional links between the persons being controlled and agents of the countries of asylum.³⁰⁷ The actual implementation of externalised control measures is executed by the authorities of partner countries on behalf of the sponsoring countries of asylum.³⁰⁸ The following section will provide a brief overview of common practices and policies.

3.3.1 Direct interdictions

Direct interdictions are the most common externalisation strategies to keep refugees and irregular migrants away from States' national borders.³⁰⁹ They are often carried out by countries of asylum in cooperation with third States and/or private actors, including

³⁰¹ UNHCR 'Externalization' (n 120) para 5.

³⁰² *The Haitian Centre for Human Rights et al v the US* (Merits) IACHR Case 10675 Report No 51/96 (13 March 1997); UNHCR 'Externalization' (n 120) para 3; Reviglio (n 2) 2; Damilola O Awotula, 'The Global Compact on Refugee: Crystalizing Global North Externalization Policy?' (2021) (SSRN 4146444) 1, 5.

³⁰³ UNHCR 'Externalization' (n 120) para 3; Gammeltoft-Hansen and Tan (n 291) 30; Reviglio (n 2) 2.

³⁰⁴ Jeff Crisp, 'What is Externalization and Why is it a Threat to Refugees' (*Chatham House*, 14 October 2020) <<https://tinyurl.com/mr2btbby>> accessed 11 September 2022

³⁰⁵ Gammeltoft-Hansen and Tan (n 291) 34; Reviglio (n 2) 2; Fitzgerald (n 264).

³⁰⁶ UNHCR 'Externalization' (n 120) (n 98) paras 3 & 5.

³⁰⁷ Gammeltoft-Hansen and Tan (n 261) 3.

³⁰⁸ *Ibid*; Reviglio (n 2) 3.

³⁰⁹ Gammeltoft-Hansen and Tan (n 291) 35.

international organisations.³¹⁰ Examples include departure preventions, maritime interception of boat migrants on the high seas, pushbacks, pullbacks, shipboard screening, detentions, and summary returns of interdicted persons.³¹¹ Direct interdictions have been implemented by Australia, the US, and several EU States.³¹²

Since the 1980s, the US, under successive governments, has systematically adopted a policy of interdiction to prevent migrant vessels on the high seas from reaching US soil.³¹³ The policy has resulted in the maritime interception and summary return of thousands of refugees, without individualised assessments of asylum claims, and due regard to *non-refoulement*.³¹⁴ In *Sale*, the US Supreme Court decided by a majority of 8 to 1 that the obligations of the US under Article 33(1) of the Refugee Convention 'do not extend to persons located outside [US] territory'.³¹⁵ This ruling has since been denounced by many human rights bodies, including the UNHCR and the inter-American Court of Human Rights, arguing that the policy violates international law.³¹⁶

In 2001, the UK signed an agreement with the Czech Republic, to station British immigration officials at Prague Airport to pre-screen passengers attempting to enter the UK in order to refuse entry to prospective Roma asylum seekers.³¹⁷ Adopting a literal interpretation of the Refugee Convention, the House of Lords like the US Supreme Court, decided that 'the

³¹⁰ *ibid.*

³¹¹ *Haitian Refugee Center Inc v Baker* 789 F Supp 1552 (SD Fla 1991; Gammeltoft-Hansen and Tan (n 291) 30-31.

³¹² Frelick, Kysel and Podkul (n 2) 192; Gammeltoft-Hansen and Tan (n 291) 35.

³¹³ Austin E Carter, 'Immigration, Repatriation, Asylum-The President Can Order the Repatriation of Haitian Aliens Picked up in International Waters without a Determination as to Their Status as Refugees' (1993) 23 GA J Int'l & Comp L 581-82; Frelick, Kysel and Podkul (n 2) 199; Gammeltoft-Hansen and Tan (n 291) 31.

³¹⁴ Katrina Martin, 'Duvalierism, With and Without Duvalier: Radio Haiti Commemorates the Massacres of April 26, 1963 and 1986' *Blog Roll* (26 April 2016) <<https://tinyurl.com/ytjt8ak3>> accessed 02 Sept 2022; Mary Frances Nevans, 'The Repatriation of the Haitian Boat People: Its Legal Justification under the Anterdiction Agreement Between the United States and Haiti' (1991) 5 Temp Int'l & Comp LJ 273 282-84; Carter (n 313) 581-82; Gammeltoft-Hansen and Tan (n 291) 31; Between 1981 and 1990 a mere 22,651 interdicted Haitians were granted access to US territory to claim asylum. In the 1990s, 65, 000 boat passengers, including *defacto* refugees, were intercepted and summarily returned to Haiti.

³¹⁵ *Sale* (n 119) (b)(c)(d); Justice AM North, International Association of Refugee Law Judges World Conference 7-9 September 2011, Bled, Slovenia, 2.

³¹⁶ *Haitian Centre* (n 302) [156]-[157]; UNHCR, Written 'Submission on Saadi v the UK (Application no. 13229/03 in the Grand Chamber of the ECtHR) (30 March 2007); Jan Arno Hessbruegge, 'European Court of Human Rights Protects Migrants Against "push Back" Operations by High Seas' (2012) 16 American Society of International Law.

³¹⁷ Race Relations Act 1976, s. 19 D (as amended 02 April 2001) Point 7; *Regina v Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2005] UKHL 55 [1]-[4].

application of the [Refugee] Convention was essentially territorial’ and did not cover Roma asylum claimants who had not yet left their home country.³¹⁸

Since 2001, Australia has pursued an interdiction policy similar to the US to interdict asylum seekers and migrants arriving on Australia’s Christmas Island and other remote territories to prevent them from claiming asylum under the Australian constitution and immigration laws.³¹⁹

As will be discussed in detail below, EU States have also, in recent decades, implemented maritime interdiction policies on the high seas to intercept or push back asylum seekers and migrants attempting to enter Europe via the Mediterranean Sea.³²⁰ Indonesia, Malaysia and Thailand have also pushed back Rohingya and Bangladeshi asylum seekers attempting to reach their territories through the Bay of Bengal and the Andaman Sea.³²¹

3.3.2 Indirect Externalisation Measures

Externalisation policies are sometimes framed as an exercise of capacity-building to assist countries of origin, transit and first arrival to control irregular flows, address the ‘root causes’ of irregular migration and to improve human rights protections.³²² Examples of indirect policies and practices include the use of political support, the provision of financial assistance, equipment, training, and cooperative measures to build the capacity of security and immigration agencies of third countries to carry out migration control activities on behalf of the countries of asylum.³²³

Indirect externalisation measures are at times instrumentalised through development aid and assistance to incentivise poorer neighbouring States, transit and source countries to enhance their capacity deter or stop irregular migration.³²⁴ In this regard, third countries receive funds, technical support or development aid to facilitate migration policy making to help build their immigration and asylum systems, and to improve the conditions of detention centres.³²⁵ In recent years, the US has cooperated with Mexico and other Central American governments to

³¹⁸ *Regina* (n 317) [18] [21] [26-28].

³¹⁹ Migration Act 1958 (Act No. 62 of 1958 as amended) (09 Dec 2017) Section 189; Ghezelbash (n 118) 491-492.

³²⁰ *Hirsi* (n 22) [93]-[94]; Frelick, Kysel and Podkul (n 2) 26; Gammeltoft-Hansen and Tan (n 291) 35.

³²¹ *ibid*

³²² Frelick, Kysel and Podkul (n 2) 194-5.

³²³ *Refugee Center* (n 311); Frelick, Kysel and Podkul (n 2) 193-94, 200-203; Reviglio (n 2) 2.

³²⁴ Stock, Üstübcici and Schultz (n 286) 3; Crisp (n 304).

³²⁵ Frelick, Kysel and Podkul (n 2) 195; Gammeltoft-Hansen and Tan (n 291) 36; Stock, Üstübcici and Schultz (n 286) 3.

enhance their capacity to control irregular migration flows into the US.³²⁶ Mexico, Guatemala, Honduras receive funds, training and equipment through the Mérida Initiative,³²⁷ Operation Cayote,³²⁸ and Migrant Protection Protocols.³²⁹

3.3.3 The Use of Bilateral and Multilateral Agreements

States have used non-binding bilateral and multilateral agreements to cooperate and establish partnerships with third countries and/or private actors such as international organisations, NGOs and civil society groups.³³⁰ Such agreements are achieved through the use of political pressures, development assistance, incentives including trade privileges, immigration quotas and visa facilitation.³³¹ In recent years, there has been a significant increase in the use of bilateral and regional agreements to counter the onward mobility of refugees and migrants.³³²

Examples of cooperative arrangements on migration management include *The Bali Process* which is co-chaired by Australia and Indonesia,³³³ the EU's Global Approach to Migration and Mobility, and the US-led Merida Initiative mentioned above.³³⁴ Australia has concluded formal and informal bilateral agreements with key States in the Asia Pacific region, including Sri Lanka, Malaysia, and Indonesia.³³⁵

By virtue of the Merida Initiative, the US government provides assistance and training to build the capacity of the law enforcement of Mexico, Guatemala and other Central American countries to 'eliminate the threat of organized crime' in the region.³³⁶ EU States, unilaterally or as a Union, have concluded several bilateral and multilateral agreements to establish cooperation and intensified partnerships with neighbouring third countries along migrant

³²⁶ US Department of State, 'The Merida Initiative: Expanding the U.S./Mexico Partnership' 25 April 2013) <<https://2009-2017.state.gov/documents/organization/208786.pdf>> accessed 02 September 2022; Embassy in Mexico; ICE, 'Statement of Lev J Kubiak (Assistant Director US Immigration and Customs) before The House Committee on Foreign Affairs (22 March 2016) 2 & 4 <<https://tinyurl.com/rym2k88f>> accessed 03 Sept 2022

³²⁷ Embassy in Mexico (n 268); Gammeltoft-Hansen and Tan (n 291) 36.

³²⁸ ICE (n 326).

³²⁹ US Homeland Security, 'Migrant Protection Protocols (n 301)' <<https://tinyurl.com/2mby9hpbz>> accessed 12 October 2022

³³⁰ Hirsi (n 22) [94]; Frelick, Kysel and Podkul (n 2) 194; Reviglio (n 2) 2; Stock, Üstübcici and Schultz (n 286) 3.

³³¹ Gammeltoft-Hansen and Tan (n 291) 31.

³³² *ibid* 31, 36; Martino Reviglio (n 2) 2.

³³³ Bali Process (n 295).

³³⁴ Embassy in Mexico (n 326).

³³⁵ Gammeltoft-Hansen and Tan (n 291) 36.

³³⁶ Embassy in Mexico (n 268); Gammeltoft-Hansen and Tan (n 291) 36.

routes to control irregular flows into the EU.³³⁷ Notable examples include the EU-Turkey Statement, the Malta Declaration, Italy and Libya's Treaty of Friendship, Partnership, and Cooperation of 2008, the MoU of 2017 and the Morocco-Spain agreement of 2019.³³⁸

3.4 EU Externalisation Policies

While most EU States still observe their obligations under the international legal protection regime, they are among the leading countries of current externalisation policies restricting access to territory and asylum.³³⁹ Since the 1990s, the EU and its Member States have increasingly pursued a range of strategies to cooperate with third countries outside the EU bloc to control irregular migration and refugee flows into the EU.³⁴⁰ As mentioned in chapter One, the policy was inspired by the failure of their domestic migration control policies to cope with the rising refugee and migrant flows from conflict-ridden countries into the EU.³⁴¹ The rationale of EU externalisation was articulated by the President of the European Council, Donald Tusk, in 2017.³⁴² According to Tusk, the policy aims at 'protecting [EU] territory, ... external borders as well as stemming illegal migration'.³⁴³

Throughout the 1990s, calls for EU cooperation with third countries were expressed in many EU documents, including the European Council Conclusions and European Commission's communications.³⁴⁴ At the Tampere European Council in 1999, the EU officially endorsed externalisation policies and called for 'close co-operation with countries of origin and transit' for a 'more efficient management of migration flows' into the EU.³⁴⁵ The EU also adopted a

³³⁷ Hirsi (n 19) [93]-[94]; Anja Palm, *Did 2016 Mark a New Start for EU External Migration Policy, or was it Business as Usual?* (Istituto Affari Internazionali (IAI) November 2016) 3; Frelick, Kysel and Podkul (n 2) 206.

³³⁸ EU-Turkey Statement (n 19); Declaration (n 36); 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 (02 February 2017); Gammeltoft-Hansen and Tan (n 291) 36; Reviglio (n 2) 4.

³³⁹ Frelick, Kysel and Podkul (n 2) 191; Gammeltoft-Hansen and Tan (n 291) 28.

³⁴⁰ Tampere Conclusion (n 2258) Points 3, 22-24 (section IV); European Commission (n 2); Reviglio (n 2) 1; Pastore and Roman (n 2) 133-36.

³⁴¹ European Parliament (n 1) 15; Boswell (n 5) 621.

³⁴² European Council, 'Remarks by President Donald Tusk following the European Council meetings on 14 and 15 December 2017' <<https://tinyurl.com/5n6mm5at>> accessed 30 August 2022

³⁴³ *ibid*

³⁴⁴ Tampere Conclusion (n 258) paras 3, 18-27; P residency Conclusions, *European Council Meeting in Laeken, 14-15 December 2001* (SN 300/1/01 REV 1 2001) paras 40,42; European Council, Presidency Conclusions, Seville, 21-22 June 2002 (SN 200/1/02 REV 1) paras 26-39.

³⁴⁵ Tampere Conclusions (n 258) (IV) para 22; European Commission, *Technical Mission to Libya On Illegal immigration* 27 Nov-6 December 2004, (7753/05) 8; The 1999 European Council recognised the need to establish

series of treaties and policy instruments to bring, *inter alia*, asylum and migration management under a common legal framework.³⁴⁶ The Treaty of Amsterdam came into force in 1999 to lay the foundation towards the establishment of a common asylum and migration policy and the harmonisation of external border and migration controls in the EU.³⁴⁷

Policies and practices are focused on enhancing the capacities of third countries to prevent and combat illegal immigration, provide 'better access to durable solutions', secure borders and to 'tackle the problem of return.'³⁴⁸ This includes enhancing the capacities of countries and regions of origin or transit to host, detain, and process refugees, asylum seekers and migrants.³⁴⁹ EU States have also outsourced their traditional migration management and asylum processing tools and responsibilities to countries and regions of origin or transit to combat irregular movement, smuggling and trafficking to the EU.³⁵⁰ Additionally, the financial, logistical and procedural responsibilities for migrant and asylum identification, apprehension, the hosting of migrants and asylum seekers, and examination of asylum claims have also been transferred to countries of origin and transit.³⁵¹

Over the years, EU States and institutions have also routinely engaged in the maritime interdictions of refugees and migrants, extra-territorial detentions, joint operations and other deterrence measures with third countries to keep irregular flows away from their national borders.³⁵² In 2009 alone, Italy interdicted and summarily returned 850 boat passengers, including *de facto* refugees and asylum seekers to Libya under the Treaty of Friendship, Partnership and Cooperation of 2008.³⁵³ The EU-Turkey Statement of 2016 and the Declaration

a comprehensive approach in addressing political, development and human rights issues in countries of origin and transit.

³⁴⁶ Tampere Conclusions (n 235); EU, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2004] 2005/C 53/01, 1.

³⁴⁷ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts [1997] OJ C 340/01 Article 1(3); Hague Programme (n 346); Sara Hamood, 'African Transit Migration Through Libya to Europe: The Human Cost' In *Forced Migration and Refugee Studies* (American University in Cairo, 2006) 70.

³⁴⁸ Hague Programme (n 346); 1.6.1; European Parliament, (n 1) 9.

³⁴⁹ Boswell (n 5) 619-622; HRW, 'European Union Managing Migration Means Potential EU Complicity in Neighboring States' Abuse of Migrants and Refugees' 17 October 2006) 3 <<https://tinyurl.com/3tfyu253>> accessed 31 July 2022

³⁵⁰ Boswell (n 5) 619, 622; HRW (n 349) 3; Palm (n 337) 2-3.

³⁵¹ HRW (n 349) 7.

³⁵² Boswell (n 5) 619-20; Palm (n 337) 3; Gammeltoft-Hansen and Tan (n 291) 33-34.

³⁵³ *Hirsi* (n 22) [13]; Natalino Ronzitti, 'The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?' (2009) 1 *Bulletin of Italian Politics* 125; Migration

explained in Chapters Four provide a basis for EU States' significant financial and other material support to enable Turkey³⁵⁴ and Libya to intercept and summarily return irregular asylum seekers and migrants attempting to reach the EU.³⁵⁵

3.5 Implications of Externalisation Policies on *Non-Refoulement*

While externalisation policies are not necessarily based on a rejection of international law, they significantly threaten the international protection regime, and put refugees, asylum seekers and vulnerable migrants at increased risk of exposure to persecution, torture and *refoulement*.³⁵⁶ As demonstrated throughout this chapter, externalisation policies effectively prevent refugees and asylum seekers from coming within the jurisdiction of States to access asylum procedures and other protection guarantees.³⁵⁷ Firstly, deterrence measures confine most refugees and prospective asylum seekers to countries of origin or divert them to other third countries.³⁵⁸ As a result, would-be asylum seekers who could have accessed safe territories, international protection, social benefits, and appropriate reception conditions in States with well-developed asylum procedures, are effectively restricted to less developed countries without sufficient safeguards and guarantees.³⁵⁹

One of the issues with the EU's externalisation policy concerns the third countries often chosen for cooperation.³⁶⁰ Partner countries are often lower income countries which are not signatories to the Refugee Convention and are not legally bound to protect refugees.³⁶¹ Even partner States that are bound by the Refugee Convention often lack well-developed asylum procedures or sufficient capacities to process asylum requests or to effectively uphold the rights of asylum seekers and migrants, in accordance with international standards.³⁶² Many partner countries also lack prior experience in migration management, functional asylum

Policy Centre (MPC), 'Libya: The Demographic-Economic Framework of Migration, the Legal Framework of Migration, The Socio-Political Framework of Migration' (*European University Institute*, 2013) <<https://tinyurl.com/4uhw3r4r>> accessed 19 Nov 2022 7; The treaty was signed between Italy and Libya to combat irregular migration and other transborder crimes across the Mediterranean Sea.

³⁵⁴ EU-Turkey Statement (n 19) Point 1.

³⁵⁵ *Hirsi* (n 22) [93]-[94]; Gammeltoft-Hansen and Tan (n 291) 35.

³⁵⁶ *Namah v Pato* (n 120) [36]-[37]; 'Externalization' (n 120) paras 3-4, 6; Röhl (n 272) 7 and 8; UNHCR 'Hirsi' (n 120) para 8.

³⁵⁷ Frelick, Kysel and Podkul (n 2) 191; Gammeltoft-Hansen and Tan (n 291) 28; Hirsch (n 266) 54..

³⁵⁸ *ibid*

³⁵⁹ *ibid*

³⁶⁰ HRW (n 349) 7.

³⁶¹ Gammeltoft-Hansen and Hathaway (n 271) 256.

³⁶² *ibid* (n 349) 7; Frelick, Kysel and Podkul (n 2) 191; Hirsch (n 266) 49, 54.

systems, human rights culture, adequate and developed administrative, institutional and judicial structures, and the required resources to provide much needed social support and integration.³⁶³ In the case of PNG and Nauru, the UNHCR and the Supreme Court of Papua New Guinea (PNG) found that both PNG and Nauru lacked sufficient legal framework and asylum procedures to effectively protect the rights of refugees and asylum seekers sent there under Australian externalisation policy.³⁶⁴

The diversion of asylum seekers and migrants to countries of asylum and transit places a significant burden on the limited resources and protection capacities of partner countries.³⁶⁵ Many countries of origin, transit and first arrival are already overburdened by significant human displacements, refugee and migrant flows.³⁶⁶ According to the UNHCR, 76% of the world's 35.3 million refugees and other persons in need of international protection are hosted in low and middle-income countries.³⁶⁷

Critics have asserted that externalisation policies are used as pretexts to designate target countries of origin or transit with poor human rights records and insufficient safeguards as 'safe' (third countries) in order to transfer or return asylum seekers and migrants.³⁶⁸ According to HRW, many EU partner countries cannot be considered as 'safe' under international law.³⁶⁹ Nonetheless, they are intentionally designated as 'safe' third countries' to expedite the transfer of rejected asylum seekers and migrants.³⁷⁰

Asylum seekers and migrants sent to third countries without sufficient protection capacities and resources to host and process face indefinite detentions ('warehousing') in remote locations, inhumane treatment, and the risk of direct and onward *refoulement*.³⁷¹ Refugees and migrants in detention in partner countries are often denied procedural rights, such as access to a lawyer, interpreters, the right to effectively challenge the legality of their detention,

³⁶³ HRW (n 349) 7.

³⁶⁴ UNHCR 'Nauru' (n 273) 1; *Namah* (n 120) [18], [24]; Frelick, Kysel and Podkul (n 2) 204; Nauru only acceded to the 1951 Convention and its Protocol on 28 June 2011. It is neither a party to the 1954 Convention relating to the Status of Stateless Persons or the 1961 Convention on the Reduction of Statelessness.

³⁶⁵ HRW (n 349) 7; Boswell (n 5) 619; Frelick, Kysel and Podkul (n 2) 204-5.

³⁶⁶ UNHCR 'Trends' (n 267) 5; Gammeltoft-Hansen and Tan (n 291) 28; Hirsch (n 266) 54.

³⁶⁷ UNHCR 'Trends 2023' (n 267) 2.

³⁶⁸ *ibid* (n 349); Frelick, Kysel and Podkul (n 2) 209.

³⁶⁹ HRW (n 349) 9.

³⁷⁰ *ibid* 4,7.

³⁷¹ UNHCR 'Externalization' (n 120) para 7; HRW (n 349) 4.

or communicate with their families, friends and the outside world.³⁷² According to the UNHCR, ‘all asylum-seekers’ who are transferred to PNG and Nauru under Australia’s externalisation policy are systematically detained ‘on a mandatory and indefinite basis without an assessment’ or timely access to lawyers or an administrative or judicial review of their case or detention.³⁷³

HRW has documented that in order to gain favours and relations with the EU, partner countries ‘not only seek to comply with [the EU’s] “external” policy initiatives on migration and asylum, but also to emulate the worst of [the EU’s] internal approaches, ... particularly with regard to detention and expulsion.’³⁷⁴

The prolonged detention and harsh conditions faced by asylum seekers and migrants in third countries coupled with the absence of procedural guarantees, may amount to cruel, inhuman, or degrading treatment, and *refoulement*.³⁷⁵ As was discussed in Chapter Two, during interceptions, asylum seekers being transferred between States must, at least, be guaranteed access to territory, fair, efficient and timely assessments, durable solutions and ultimately, protection against *refoulement*.³⁷⁶

3.6 Conclusion

This chapter highlighted the weaknesses in the international protection system.³⁷⁷ It showed that despite remaining officially committed to the letter of the Refugee Convention and other human rights treaties containing the *non-refoulement* principle,³⁷⁸ many State parties, including EU Members have also adopted control policies to undermine the principle.³⁷⁹ These practices prevent refugees and asylum seekers from accessing safe territories and international protection, putting such persons at risk of ill-treatment and *refoulement* and in breach of the Refugee Convention.³⁸⁰ Consequently, individuals who could have accessed to safe territories, international protection, and asylum procedures are restricted or forcibly

³⁷² HRW (n 349) 8.

³⁷³ UNHCR Mission to Manus Island, Papua New Guinea 15-17 January 2013 paras 1-2, 36-40; *Namah* (n 120 [22] [25].

³⁷⁴ HRW (n 349) 11.

³⁷⁵ *ibid* 9.

³⁷⁶ Mission to Manus (n 373) para 35.

³⁷⁷ A/AC.96/815 (n 119) para 12.

³⁷⁸ Klug and Howe (n 261) 69; Fitzgerald (n 264)1; Crisp (n 304).

³⁷⁹ UNHCR ‘Externalization’ (n 120) paras 2-5; Hirsch (n 266) 49; Gammeltoft-Hansen and Tan (n 247) 3.

³⁸⁰ UNHCR ‘Externalization’ (n 120) paras 2-5.

returned to countries without sufficient procedural and protection guarantees.³⁸¹ This puts such persons at increased risks of being subjected to grave dangers such as torture and other ill treatment, persecution and *refoulement*.

The UNHCR maintains that States cannot evade their obligations under international refugee and human rights law simply through externalisation arrangements.³⁸² They must ensure that all migration control measures taken individually or in cooperation with States protects all persons, including refugees, asylum seekers and vulnerable persons such as children and victims of human trafficking.³⁸³

³⁸¹ UNHCR, 'Manus' (n 373) 35; UDHR (n 26) Article 14; Refugee Convention (n 48) Articles 32 and 33; 'Externalization' (n 120) paras 2-6; UNHCR 'Trends' (n 267) 5; Hirsch (n 266) 49, 54

³⁸² UNHCR 'Externalization' (n 120) para 9(c).

³⁸³ *ibid.*

IV. EU Cooperation with Libya

4.1 Introduction

In recent decades, Libya has become one of the top countries in the Southern Mediterranean for EU cooperation on illegal migration.³⁸⁴ Libya has acted as a major transit or departure point for the majority of refugees and migrants irregularly crossing the Mediterranean sea to reach Europe.³⁸⁵ Since the early 2000s, the EU and its Members, particularly Italy, have had several engagements³⁸⁶ with Libyan authorities on irregular migration, trafficking, smuggling, and border management.³⁸⁷

Since the Arab Spring in 2011, the EU and its Members actions have significantly intensified³⁸⁸ to enhance the capacity of Libya to stop a 'heavy influx' of irregular migrants into the EU.³⁸⁹ Between 2013 and 2017, a series of joint actions and partnership agreements were concluded between EU institutions, Member States and Libya.³⁹⁰ These were consolidated with the adoption of the Declaration on 03 February 2017.³⁹¹

This chapter provides an overview of EU States' cooperation from the late 1990s until the conclusion of the Declaration. The chapter demonstrates the strategic importance of Libya in the EU's externalisation and cooperation with third countries to combat irregular migration into the EU territories. The second part of this chapter focuses on the events that led to the adoption of the Declaration, underlying motivations, and its main elements, including the

³⁸⁴ European Commission (n 345) 8; Peter Seeberg, 'EU Strategic Interests in Post- Qadhafi Libya: Perspectives for Cooperation' (2014) 21 Middle East Policy 122 (n 354) 125; EU and Libya had shared interests in establishing cooperation to tackle security in relation to illegal migration. EU States were also concerned about energy security and a reliable supply of light sweet crude oil.

³⁸⁵ European Commission (n 345) 5, 16; UNSMIL and OHCHR (n 16) 10; A/HRC/48/83 (n 23) para 66; Hamood (n 347) 43; Peter Seeberg, 'The Arab Uprisings and the EU's Migration Policies-The Cases of Egypt, Libya, and Syria' (2013) 9 Democracy and Security 157 167.

³⁸⁶ Ronzitti (n 353) 126; MPC (n 353)

³⁸⁷ Law No (2) of 2009 on Ratifying the Treaty of Friendship and Cooperation between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Italy Article 19; Sara Hamood, 'EU-Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?' (2008) 21 Journal of Refugee Studies 19 23; Ronzitti (n 353) 126; MPC (n 353) 11.

³⁸⁸ AI and ARCI and Others (n 18) para 2.

³⁸⁹ JOIN(2017) (n 1) 2-3.

³⁹⁰ *ibid* 2-3; European Union, *Valletta Summit, 11-12 November 2015 Action Plan (2015) 2015 Valetta Summit on Migration*

³⁹¹ Borsacchi (n 18); HRW (n 17).

responsibilities of EU actors and Libya. It sets the stage for the analysis of the policy in subsequent chapters.

4.2 Libya as a Country of Immigration and Transit to the EU

For several decades Libya has served as a country of immigration for large numbers of refugees and migrants from Northern Africa, the Sahel region and Sub-Saharan Africa (SSA).³⁹² Libya's attraction for refugees and migrants stems from its proximity to Europe, vast unmarked remote desert land borders,³⁹³ and decades of open-door immigration policies towards African nationals.³⁹⁴

Geographically, Libya is a vast country covering an area of 1,759,540 square kilometers with a small population.³⁹⁵ Libya's northern coast is just about 300 kilometers away from the shoreline of Italy's island of Lampedusa.³⁹⁶ As shown on figure 1.1 below, the country's vast unmarked land borders stretching along the Sahara Desert are shared with six countries.³⁹⁷

³⁹² European Commission (n 345) 16; UNSMIL and OHCHR 'Desperate' (n 16) 10; Tiziana Torresi, 'An Emerging Regulatory Framework for Migration: The Libya-Italy Agreement and the Right of Exit' (2013) 22 Griffith Law Review 648,651; MPC (n 353) 1; Seeberg" (n 384)126; ECCHR, FIDH and LJIL (n 23) 14.

³⁹³ UNSMIL and OHCHR (n 16) 10; HRW, *Stemming the Flow:Abuses Against Migrants, Asylum Seekers and Refugees* (Part III Vol 18 No 5(E), 2006) 1,14; Hamood (n 347) 43.

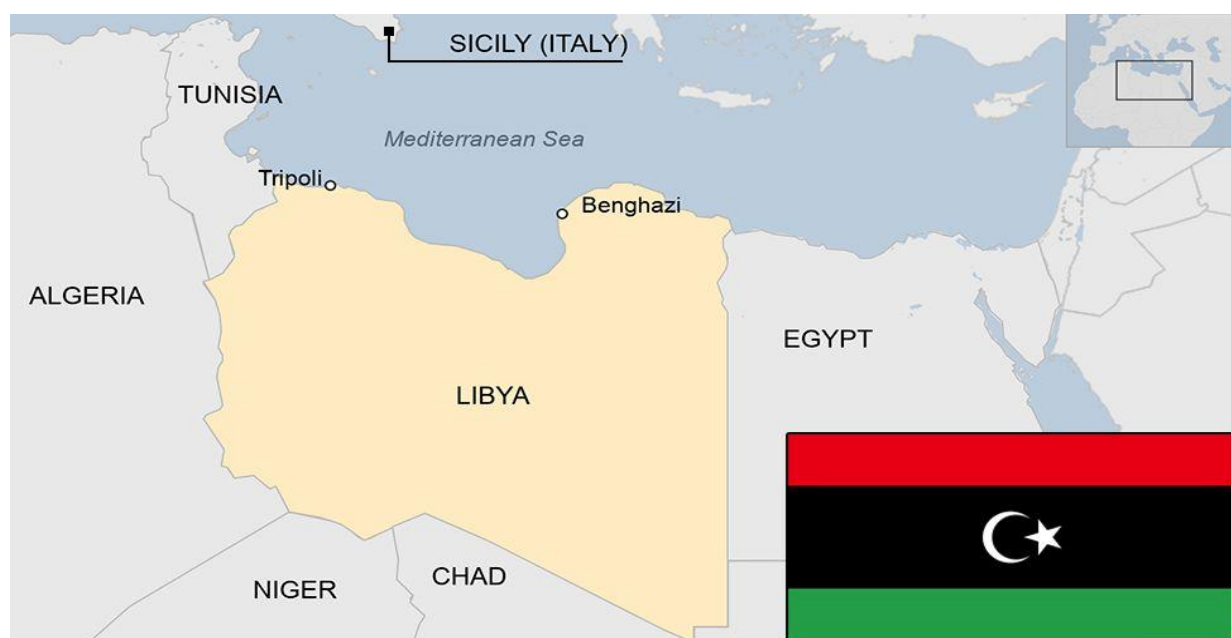
³⁹⁴ MPC (n 353) 1, 11; ECCHR, FIDH and LJIL (n 23) 14.

³⁹⁵ European Commission (n 345) 16; HRW (n 393) 10; The Libyan population was estimated at 5.5 million in the early 2000s and 7.3 million in mid 2023 by the US government; 90% of Libyan land mass is part of the Sahara Desert.

³⁹⁶ HRW (n 393) 10.

³⁹⁷ European Commission (n 345) 6; HRW (n 393) 10; Libya shares a 4,400 km unmarked remote desert land borders with Tunisia, Algeria, Niger, Chad, Algeria, Chad, Sudan and Egypt.

Figure 1: Libya in Relation to Neighbouring Countries³⁹⁸



Following the discovery of oil and hydro bicarbonates in the 1960s, Libya enjoyed many years of continuous economic growth, rising oil revenues and relatively speaking, better socio-economic conditions than other countries in the region.³⁹⁹ At the time, Libya lacked sufficient native labour force to develop its oil production industry, including its massive Great Man-Made River project, and was eager for cheap foreign labour.⁴⁰⁰ Initially, Colonel Gaddafi pursued a policy of pro-Arabism to attract foreigners workers from poorer neighbouring Arab countries, particularly Egypt and Tunisia.⁴⁰¹ Libyan law offered guest workers residency and employment rights that were similar to those enjoyed by Libyan nationals.⁴⁰² The policy succeeded and attracted large numbers of guest workers from Egypt, Tunisia and other poorer neighbouring countries to work in Libya's oil production industry.⁴⁰³

³⁹⁸ BBC News World, 'Libya Country Profile' *BBC News* (London 22 February 2023) <<https://www.bbc.com/news/world-africa-13754897>> accessed 31 May 2023

³⁹⁹ HRW (n 393) 11; MPC (n 353) 1; Amnesty International (n 10) 12; ECCHR, FIDH and LJIL (n 23) 14; Libya was the second largest economy after South Africa and one of the most developed countries in the region.

⁴⁰⁰ HRW (n 393) 1, 13; MPC (n 353) 1; Amnesty International (n 10) 12; Libya's River project pumps water from the desert to Libya's coastal areas.

⁴⁰¹ Amnesty International, (n 10) 12; HRW (n 393) 1.

⁴⁰² MPC (n 353) 1; Amnesty International (n 10) 12.

⁴⁰³ HRW (n 293) 1, 13-14; MPC (n 353) 1; International Detention Coalition, 'Libya Immigration Detention Profile' (*Global Detention Project*, February 2015) 1 <<https://tinyurl.com/3wdfcjd>> accessed 27 December 2022; Amnesty International (n 10) 12; Libya is the least populated country in North Africa and relies heavily on foreign workers for its major economic sectors, particularly in agriculture and construction. Egyptians still constitute the largest foreign nationals in Libya.

In the 1990s, Gaddafi changed Libya's foreign policy to Pan-Africanism and adopted an 'open door' immigration policy towards SSAs.⁴⁰⁴ The policy change was in response to the explicit support that Gaddafi received from the Organisation of African Unity (OAU) and SSA countries after Gaddafi failed to secure support from his Arab counterparts after Libya was hit with international sanctions.⁴⁰⁵ In 1992, the UN Security Council (UNSC) imposed an air and arms embargo on Libya for its role in the bombing of Pan Am flight 103 over Lockerbie, Scotland in 1988 and France's (UTA) flight 772 over Niger in 1989.⁴⁰⁶ In 1993, additional sanctions were imposed on some oil equipment and a seizure of Libyan assets ensued.⁴⁰⁷

Following the sanctions, Gaddafi signed a series of bilateral and multilateral agreements with many SSA countries to facilitate the free movement of African citizens across the national borders within the region.⁴⁰⁸ Libya also adopted domestic legislation and policy⁴⁰⁹ to grant African nationals free entry, the right of stay, access to employment and free movement across Libyan borders.⁴¹⁰ Gaddafi promoted⁴¹¹ and explicitly campaigned for his Pan-African immigration policy through daily advertisements in newspapers to welcome large numbers of African migrants into Libya.⁴¹² Large numbers of SSA nationals arrived in Libya for better economic opportunities.⁴¹³ As of 2003, Libya was host to 2 million foreign nationals (constituting a third of Libyan population).⁴¹⁴ Of those, between 750,000 and 1.2 million were

⁴⁰⁴ MPC (n 353) 1, 11; ECCHR, FIDH and LJIL (n 23) 14.

⁴⁰⁵ UNSC Resolution 1506 (2003) (2 September 2003) S/RES/1506 (2003); Security Council Lifts Sanctions Imposed on Libya After Terrorist Bombings of Pan AM 103, UTA 772 (SC/7868); AU, 'Community of Sahel-Saharan States (CEN-SAD)' 1998 <<https://au.int/en/recs/censad>> accessed 11 Dec 2022; European Commission (n 345) 5; HRW (n 393) 1, 13; MPC (n 353) 1; Amnesty International (n 10) 12.

⁴⁰⁶ S/RES/1506 (2003) (n 405) Preamble; European Commission (n 345) 5; Hamood (n 347) 72; Ronzitti (n 353) 126; MPC (n 353) 1; Seeberg (n 384) 125; Libya faced international sanctions from the EU (1986) and the UNSC in 1992 for pursuing a nuclear weapons programme and Gaddafi's involvement in international terrorism.

⁴⁰⁷ SC/7868 (n 405); HRW (n 393) 13.

⁴⁰⁸ 'CEN-SAD' (n 405); Pan African Chamber of Commerce and Industry (PACCI), 'The Community of Sahel-Saharan States-CEN-SAD' <<https://tinyurl.com/35xwmmwr>> accessed 12 December 2022; HRW (n 393) 14; Amnesty International (n 10) 12-13; ECCHR, FIDH and LJIL (n 23) 14.

⁴⁰⁹ 'CEN-SAD' (n 405); MPC (n 353) 1,7; Amnesty International (n 10) 12; Amnesty International, *Impunity: Malta's Human Rights Violations and Europe's Responsibilities in the Central Mediterranean* (2020) (EUR 33/2967/2020) 11.

⁴¹⁰ 'CEN-SAD' (n 375); PACCI CEN-SAD (n 408) (b); HRW (n 393) 14; Amnesty International (n 10) 12; African nationals were given access to the employment labour market in both the public and private sectors, in areas including, agriculture, construction and cleaning.

⁴¹¹ Sirte Declaration (Sirte, Libya 8-9 September 1999) (4th extraordinary session) OAU EAHG/Draft/Decl. (IV) Rev.1 points 3 and 7; HRW (n 293) 14.

⁴¹² Hamood (n 347) 18; HRW (n 393) 14; MPC (n 353) 7; ECCHR, FIDH and LJIL (n 23) 14.

⁴¹³ HRW (n 393) 14; MPC (n 353) 1; Amnesty International (n 10) 12.

⁴¹⁴ European Commission (n 345) 5; Detention Coalition (n 403) 1.

believed to be undocumented.⁴¹⁵ In addition, between 75,000 to 100,000 new migrants were entering Libya each year.⁴¹⁶

In the 2000s, Gaddafi began to reverse Libya's Pan-Africanism and open-door immigration policy to adopt bilateral agreements and restrictive policies as Libya's relations with the international community started to normalise.⁴¹⁷ In 2004, Libya started to adopt legislative and policy decisions to restrict the entry, stay, health and employment rights of foreign nationals, including Arab and African migrants, apart from people from the Maghreb.⁴¹⁸ Suddenly, thousands of refugees and migrants, including Arab and SSA nationals, became 'illegal' migrants and without legal protections.⁴¹⁹

4.3 Context to EU Cooperation with Libya

Between the late 1990s and early 2000s, Libya faced pressure from the international community, particularly the EU and Italy, to commit to global efforts on combating illegal migration, particularly to the EU, in exchange for the removal of international sanctions and the return of seized Libyan assets and foreign investments.⁴²⁰ EU States, particularly Italy, pushed for the removal of the sanctions against Libya to allow Libya to become a 'full member' of the Barcelona Process, the EU's framework for its external cooperation and partnerships with Southern Mediterranean countries.⁴²¹ Italy wanted the arms embargo lifted so it could purchase border enforcement equipment for Libya for the purposes of migration control.⁴²²

In the late 1990s and early 2000s, the EU's southern States, particularly Italy, and to a lesser extent Malta, were confronted with an influx of large numbers of refugees, asylum seekers and migrants at their external borders through Italy's Sicily Channel in the Mediterranean Sea.⁴²³

⁴¹⁵ European Commission (n 345) 5.

⁴¹⁶ *ibid*; HRW (n 393) 3; The new arrivals included legal and illegal migrants..

⁴¹⁷ MPC (n 373) 11; Amnesty International (n 108) 11; ECCHR, FIDH and LJIL (n 24) 14.

⁴¹⁸ Sylvie Bredeloup and Olivier Pliez, 'The Libyan Migration Corridor', European University Institute 2011) 8; MPC (n 353) 1, 7; ECCHR, FIDH and LJIL (n 23) 14.

⁴¹⁹ MPC (n 353) 1; Detention Coalition (n 403) 2.

⁴²⁰ S/RES/1506 (n 405); European Commission (n 345) 5; Ronzitti (n 353) 126; MPC (n 353) 1; Seeberg (n 384) 125.

⁴²¹ Council of the EU, *Intensified Cooperation on the Management of Migration Flows with Third Countries* (Brussels, 09 July 2003) 11450/03, 6-7; Hamood (n 347) 73.

⁴²² Council of the EU (n 421) 7.

⁴²³ European Commission (n 345) 5; European Parliament, *Report from the LIBE Committee Delegation on the Visit to Ceuta and Melilla (ES) Rapporteur: Ms Ewa KLAMT (Brussels, 24 January 2006) PE 367.858v02-00 (2006) 2*; HRW (n 393) 15; Andrijasevic (n 33) 151-52; Amnesty International (n 10) 13.

Italian Prime Minister Massimo D'Alema's centre-left government, at the time, faced significant pressure from the Italian media and the public to control the large migrant inflows.⁴²⁴

Libya had emerged as a major migrant transit and departure point for the large numbers of refugees and migrants irregularly arriving by boat on the coast of Italy's small Lampedusa Island and Malta through the Sicily Channel.⁴²⁵ In the early 2000s, about 80,000 refugees and migrants were reaching southern Italy and Malta from Libya every year by sea.⁴²⁶ Most of them were a mixture of refugees and migrants originating from Egypt and SSA countries in search of safety, international protection and better economic opportunities in Europe.⁴²⁷ Many of the migrants successfully completed their journeys to the Italian shores, while others arrived after an interception or rescue at sea by Italian authorities.⁴²⁸

Many refugees and migrants entered Libya through common migration routes in the desert in the south and through Mali and Niger from West Africa.⁴²⁹ The route was strengthened in the 1990s after Libya adopted its pan-African immigration policy.⁴³⁰ In recent years, migrants from distant countries such as Bangladesh, China, India and Pakistan have also used Libya as their main route to Europe.⁴³¹

Libya also became a major smuggling hub for smugglers, trafficking networks and other illicit activities, involving Libyan officials, southern tribesman and criminal networks who often transport people and illicit goods to Europe.⁴³² Over time, smuggling networks developed into a multi-billion dollar alternate economy largely operated by Libya's southern tribal warlords

⁴²⁴ European Parliament (n 1) 15; JOIN(2017) (n 1) 2-3; Hamood (n 387) 23; Bredeloup and Pliez (n 418)12; MPC (n 353) 11.

⁴²⁵ European Commission (n 345) 5-6, 16; JOIN(2017) (n 1) 1-2; Hamood (n 387) 19; MPC (n 353) 7; Amnesty International (n 10) 13; Amnesty International, *Waves of Impunity: Malta's Human Rights Violations and Europe's Responsibilities in the Central Mediterranean* (2020) EUR 33/2967/202011; The island of Lampedusa is only 20 km wide with a population of 5,500.

⁴²⁶ Torresi (n 392) 650.

⁴²⁷ HRW (n 393) 14 & 15; Hamood (n 387) 19; Torresi (n 392) 650-51; IOM, 'Libya Migrant Report, Round 54 (November-December 2022)' <<https://tinyurl.com/9fkb3ert>> accessed 10 April 2023 20.

⁴²⁸ Hamood (n 387) 19.

⁴²⁹ HRW (n 393) 16; Anja Palm, 'The Italy-Libya Memorandum of Understanding: The Baseline of a Policy Approach Aimed at Closing All Doors to Europe?' (*Istituto Affari Internazionali*, 2017) <<https://tinyurl.com/2p9ybd6f>> accessed 09 Feb 2023.

⁴³⁰ European Commission (n 345) 5; HRW (n 393) 15; Torresi (n 392) 650.

⁴³¹ Torresi (n 392) 650; IOM, 'Libya Migrant Report, Round 54 (November-December 2022)' Report Round 54 (n 427) 20-23.

⁴³² European Commission (n 345) 6; Amnesty International (n 10) 12, 14.

without any management strategy from Gaddafi's government.⁴³³ Smugglers transported irregular migrants into Libya through remote desert routes and to Europe using unseaworthy boats.⁴³⁴ They include refugees, asylum seekers and migrants fleeing conflict and economic hardship in their countries of origin and without safe alternate migratory access to Europe.⁴³⁵

The EU became 'very serious[ly] concern[ed]' about the large migrant population in Libya, the country's open-door immigration policy towards Africans, 'poorly controlled' external borders and their 'negative effects' on the security of the EU's external borders in the Southern Mediterranean.⁴³⁶

In the early 2000s, Libya was keen to cooperate with the EU on migration partly because Libyan officials had also become concerned about the presence of large numbers of migrants, particularly SSAs, and the negative implications on Libya's labour market, public security and health system.⁴³⁷ Libya faced rising unemployment, escalating hostility and social tensions between Libyan natives and migrants, with a spate of xenophobic attacks against migrants.⁴³⁸ Migrants were blamed for the above problems, including rising crime and disease.⁴³⁹

The sanctions against Libya were eventually removed in 2003 after Gaddafi accepted 'responsibility for the actions of Libyan officials' in the airplane bombings over Lockerbie and Niger.⁴⁴⁰ The removal of the sanctions paved the way for EU negotiations with Libyan authorities to make Libya a 'full' partner in the Euro-Mediterranean Partnership to tackle migratory flows into the EU.⁴⁴¹ In November 2002, the Conclusions of the Council considered

⁴³³ European Commission (n 345) 6; MPC (n 353) 7; Seeberg (n 384) 125; Amnesty International (n 10) 12; Gaddafi's government was accused of turning a blind eye to the smuggling networks in exchange for the political support the warlords.

⁴³⁴ HRW (n 393) 14; Amnesty International (n 10) 12, 13.

⁴³⁵ *ibid*

⁴³⁶ European Commission (n 345) 5-6; HRW (n 393) 13; Detention Coalition (n 403) 1; ECCHR, FIDH and LJIL (n 23) 14; Libya lacked a coherent regulatory framework to manage the influx of migrants across its borders.

⁴³⁷ European Commission (n 345) 6; BBC, 'Libya Tightens Security' *BBC News* (London, UK 27 September 2000) <<http://news.bbc.co.uk/2/hi/africa/943863.stm>> accessed 12 January 2023; HRW (n 363) 1, 17-18; Bredeloup and Pliez (n 418) 11.

⁴³⁸ European Commission (n 345) 16; BBC (n 437); HRW (n 393) 1, 17-19; The presence of SSA migrants in the coastal cities, for instance, generated hostility and violence from the local people towards migrants.

⁴³⁹ HRW (n 293) 1.

⁴⁴⁰ S/RES/1506 (n 405) preambular para 2; SC/7868 (n 405); Hamood (n 347) 70; Seeberg (n 384) 124; The UN sanctions were removed after Libya agreed to abandon its nuclear programme and denounced international terrorism in a letter to the UNSC; Normal US diplomatic relations with Libya resumed in 2005.

⁴⁴¹ European Commission, 'The EU's Relations with Libya' (20 January 2005) <<https://tinyurl.com/228wy9rc>> accessed 26 January 2023; Hamood (n 347) 71-73; Seeberg (n 384) 125; Libya was not part of the Euro-Mediterranean Partnership until much later.

it 'essential' and 'urgent' to initiate cooperation with Libya on migration.⁴⁴² The Council's Conclusions of 11 October 2004 reiterated that Libya's 'full integration into the Barcelona Process' was the EU's 'overall objective of [its] engagement' with Libya.⁴⁴³

4.4 EU Cooperation with Libya 2000s-2010

Since the late 1990s, the EU and its Members, particularly Italy, have had several joint partnerships and action plans with Libyan authorities on combatting irregular migration, terrorism, human trafficking and smuggling, and border management.⁴⁴⁴ Several bilateral agreements were signed with former leader Gaddafi to tackle terrorism, drug trafficking and irregular migration to Europe.⁴⁴⁵ One bilateral agreement that was signed by Italy and Libya in December 2000 led to the removal of 3,000 irregular migrants from Lampedusa to Libya between 2006 and 2008.⁴⁴⁶ Between 2003 and 2004, Italy and Libya signed more agreements to strengthen their cooperation on illegal migration.⁴⁴⁷

In 2007, Italy and Libya concluded a bilateral agreement to carry out joint patrols,⁴⁴⁸ interceptions and the repatriation of irregular migrants by Italian authorities from Italy to Libya.⁴⁴⁹ Through this framework, Italy financed three detention centres and the repatriation cost of migrants from Libya to their countries of origin.⁴⁵⁰ This agreement also resulted in the summary return of 900 people to Libya.⁴⁵¹

In 2007, France and Libya adopted another bilateral agreement, the *Framework Agreement of a Global Partnership* to cooperate on illegal immigration and border management, including the establishment of readmission agreements.⁴⁵²

In August 2008, the Italian Prime Minister Silvio Berlusconi and Colonel Gaddafi signed the Treaty of Friendship to intensify cooperation between Italy and Libya to counter illegal

⁴⁴² Council of the EU (n 421) 6; European Commission (n 441) 1.

⁴⁴³ European Commission (n 441) 2.

⁴⁴⁴ Law No (2) (n 387) Article 19; Hamood (n 387) 23; Ronzitti (n 353) 126; Bredeloup and Pliez (n 418) 12; MPC (n 353) 11; Torresi (n 392) 652.

⁴⁴⁵ Ronzitti (n 353) 126; MPC (n 353) 7; Palm (n 104) 13.

⁴⁴⁶ MPC (n 353) 8, 11.

⁴⁴⁷ Andrijasevic (n 33) 153.

⁴⁴⁸ MPC (n 353) 11; Torresi (n 392) 652; Amnesty International (n 89) 11.

⁴⁴⁹ *ibid*

⁴⁵⁰ Andrijasevic (n 33); Torresi (n 392) 652.

⁴⁵¹ MPC (n 353) 11.

⁴⁵² *ibid* 8.

migration to Europe by sea.⁴⁵³ Under this framework, Italy paid Libya five billion dollars to return refugees and migrants intercepted on the high seas to Libya.⁴⁵⁴ The Treaty of Friendship led to the interception and summary return of large numbers of refugees and migrants, including pregnant women, unaccompanied children and victims of human trafficking, across the Mediterranean Sea, by Libyan authorities to Libya where they were immediately detained.⁴⁵⁵ Several migrant boats were also intercepted at sea by Italian authorities and sent to Libyan detention.⁴⁵⁶ These 'pushbacks'⁴⁵⁷ were deemed unlawful by the ECtHR in its ground-breaking decision in the *Hirsi* case.⁴⁵⁸ The Court decided that arbitrarily returning refugees and migrants from international waters to Libya exposed them to the risk of ill-treatment in Libya, torture and therefore, violated Italy's *non-refoulement* obligations under the ECHR and other international human rights treaties.⁴⁵⁹

Nonetheless, the combined efforts and cooperation between EU States and Libya, particularly the joint naval patrols and border controls with Italy, led to a significant reduction in irregular flows across the Mediterranean Sea to Europe until 2011.⁴⁶⁰

4.5 EU Cooperation with Libya After 2011

The onset of the Arab Spring in 2011 led to what the EU considered as the 'largest' migration crisis 'since the first Gulf War'.⁴⁶¹ Between 2013 and 2016, southern EU States, especially Italy's Lampedusa Island⁴⁶² and Malta witnessed a significant rise in irregular migration, smuggling

⁴⁵³ Treaty of Friendship, Partnership, and Cooperation between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya (adopted 30 August 2008) (Benghazi, Libya); Libyan Law No (2) Article 19; *Hirsi* (n 22) [13]; MPC (n 353) 7.

⁴⁵⁴ Libyan Law No (2) (n 387) Article 19; Amnesty International (n 10) 14; Amnesty International (n 89) 11.

⁴⁵⁵ HRW, 'Italy-Libya Connection' 2007) <<https://www.hrw.org/news/2009/09/23/italy-libya-connection>> accessed 04 Dec 2022 14; ECCHR, FIDH and LJIL (n 23) 14.

⁴⁵⁶ Amnesty International (n 10) 14.

⁴⁵⁷ A/HRC/47/30 (n 160) paras 34-38; ECCHR, FIDH and LJIL (n 23) 14.

⁴⁵⁸ *Hirsi* (n 22) [134]-[138]; FIDH, 'Libya: The Hounding of Migrants Must Stop' 2012) <<https://www.fidh.org/IMG/pdf/libyemigrantsuk-ld.pdf>> accessed 29 March 2023 15; AI 'Waves' (n 425) 11.

⁴⁵⁹ *Hirsi* (n 22); UNSMIL and OHCHR (n 20) 5, fn 12; AI 'Waves' (n 425) 11.

⁴⁶⁰ Seeberg (n 384) 126; Palm' (n 25) 254.

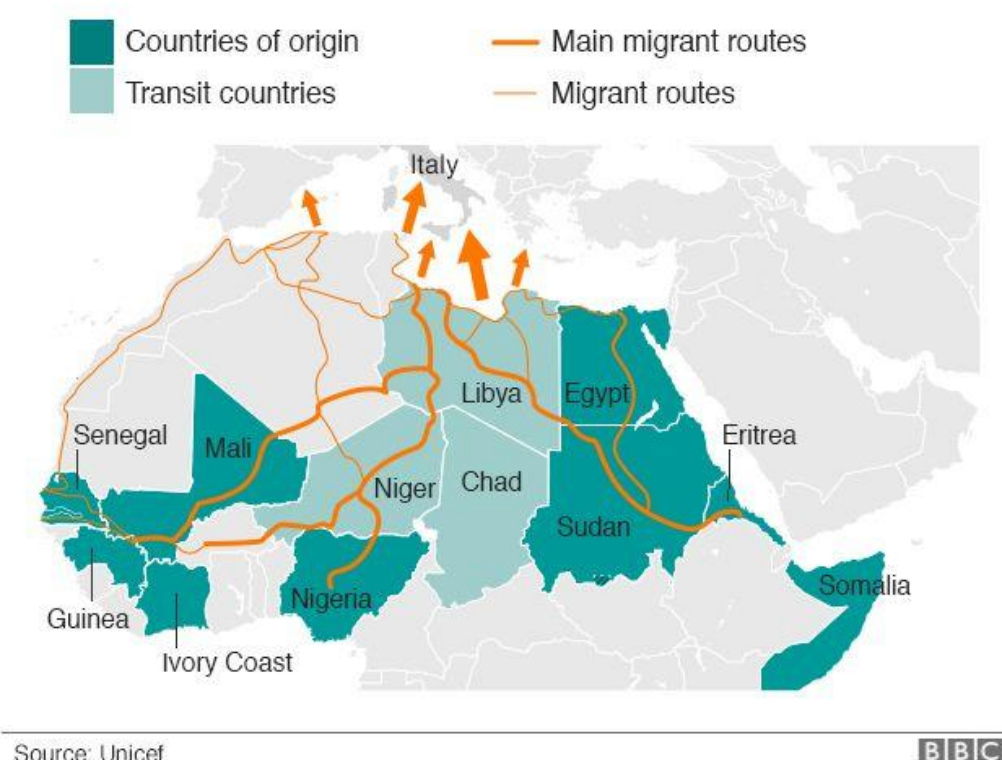
⁴⁶¹ MPC n 353) 2; Seeberg (n 385) 168; Seeberg (n 384) 126; Andrea De Guttry, Francesca Capone and Emanuele Sommaro, 'Dealing with Migrants in the Central Mediterranean Route: A Legal Analysis of Recent Bilateral Agreements Between Italy and Libya' (2018) 56 International Migration 44, 44; By November 2011, about one million migrant workers had left Libya; Before the political crisis in 2011, outward movement was not very common; only a fraction (1.6%) of Libyans emigrated.

⁴⁶² EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06) (n 3) 21; OHCHR (n 10); Matthew Chance, Livia Borghese and Laura Smith-Spark, 'Survivors Mourn Victims of Italy Shipwreck; at Least 194 Killed' *CNNcom* (Atlanta, Georgia 6 October 2013) <<https://tinyurl.com/4ch6z9zk>> accessed 02 December 2021; Lampedusa Island is the closest

and trafficking across the Mediterranean Sea.⁴⁶³ Since 2014, except for the period between late 2015 and early 2016,⁴⁶⁴ the CMR has remained the principal route for the majority of refugees and migrants irregularly arriving in Europe, particularly on Italy's Island of Lampedusa and Malta.⁴⁶⁵ As shown in Figure 3 below, the number of irregular migrants entering Europe through the CMR between 2014 and the first half of 2017 increased steadily with each year surpassing the year before.⁴⁶⁶ At least 181,436 irregular migrants arrived in Italy in 2016 through the CMR, an 18% increase from 153,842 in 2015.⁴⁶⁷

Figure 2: Map of the Central Mediterranean Route⁴⁶⁸

Central Mediterranean migrant routes



Italian territory to Africa and the main destination point for irregular migrants attempting to reach Europe from Libya and known for several shipwrecks.

⁴⁶³ CoE Resolution 1821 (n 261) para 2; *Hirsi* (n 22) [27]; JOIN(2017) (n 1) 1.

⁴⁶⁴ JOIN(2017) (n 1) 2-3.

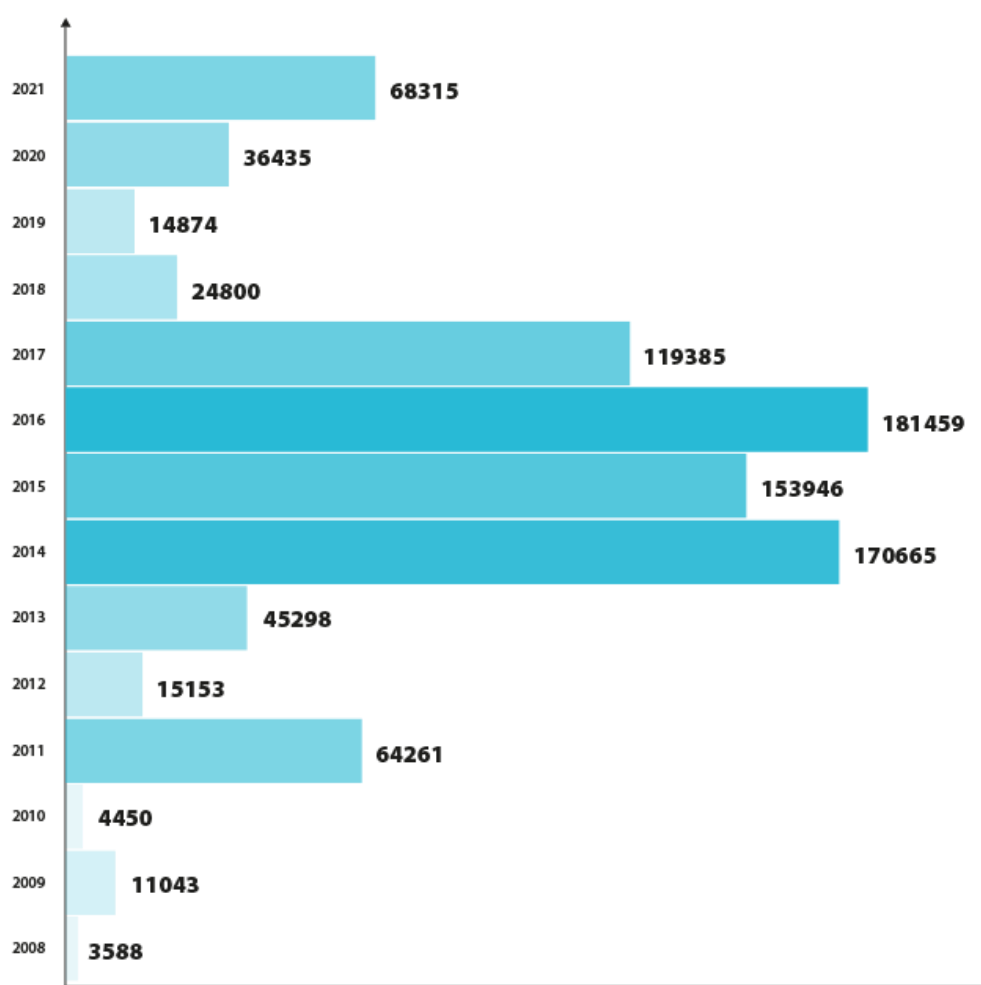
⁴⁶⁵ *ibid*; S/2017/761 (n 21) para 3; UNCHR, 'Libya' (Quick Impact Projects) (*UNHCR Libya*, 23 October 2017) <<https://www.unhcr.org/libya.html>> accessed 21 October 2021; Ellias and Gruilters (n 12); UNSMIL (n 12).

⁴⁶⁶ JOIN(2017) (n 1) 3,4; Frontex, 'Migratory Routes' (2021) <<https://tinyurl.com/3nj8477z>> accessed 03 March 2024.

⁴⁶⁷ JOIN(2017) (n 1) 3, 4; UNSMIL (n 15); Frontex (n 466); In 2016, 276,957 people actually attempted to reach Italy through the Central Mediterranean Route.

⁴⁶⁸ BBC, 'Migrant Crisis: Mediterranean Rescue as 34 Drown' *BBC News* (London, UK 24 May 2017) <<https://www.bbc.co.uk/news/world-europe-40027109>> accessed 03 March 2020

Figure 3: Total Number of Illegal Border Crossings on the CMR by Year⁴⁶⁹



The CMR accounted for most of the shipwrecks and over 80% of the sea deaths and disappearances between 2013 and 2016.⁴⁷⁰ Even in 2015 when the Eastern Mediterranean Route accounted for the largest number of irregular arrivals in Europe, the CMR was 19 times more deadly than the Eastern route.⁴⁷¹ In 2016, the CMR accounted for over 4,500 of the 5,136 dead and missing persons in the Mediterranean Sea.⁴⁷²

Libya has served as the *de facto* point of departure or transit for the majority (90%) of refugees and migrants attempting to enter Europe, particularly Italy and Malta, through the CMR.⁴⁷³

⁴⁶⁹ Frontex (n 466).

⁴⁷⁰ Declaration (n 36), Point 3; JOIN(2017) (n 1) 2; Amnesty International (n 10) 17; IOM (n 7).

⁴⁷¹ Ellias and Gruilters (n 12).

⁴⁷² UNSMIL (n 15); Declaration (n 36) Point 4; JOIN(2017) (n 1) 2.

⁴⁷³ S/2017/761 (n 24) para 43;; JOIN(2017) (n 1) 3-4; UNSMIL and OHCHR (n 16) 10.

Most of the refugees and migrants originated from war-torn and oppressive countries, including Eritrea, Sudan, Somalia and Syria.⁴⁷⁴ The economic migrants mostly originate from Western, Central and Northern African countries, including Niger, Chad and Sudan.⁴⁷⁵

The sharp rise in irregular migrant arrivals in Italy and Malta was due to deteriorating political, social and economic conditions, insecurity and human rights violations in Libya.⁴⁷⁶ Following the fall of Gaddafi in 2011, Libya plunged into chaos, economic decline, violent armed conflicts⁴⁷⁷ a collapse of national institutions, including the judiciary and the rule of law.⁴⁷⁸

Since 2014, Libya has mainly been controlled by three main political factions⁴⁷⁹ who competed for political and military power, legitimacy, resources and territorial control of the country.⁴⁸⁰ Between 2014 and 2021, a Tripoli-based GNA led in the West of Libya was the 'sole legitimate government' recognised by the UNSC and the EU.⁴⁸¹ The GNA, like other successive governments,⁴⁸² has not been able to exercise control over the entire Libyan territory,⁴⁸³ and security forces, including the national police and armed groups.⁴⁸⁴

Law enforcement and the administration of justice have also been weakened by a lack of an effective judicial service as many lawyers and judges have been threatened and intimidated by

⁴⁷⁴ *ibid*; De Guttry, Capone and Sommario (n 431) 45.

⁴⁷⁵ UNHCR, 'Mixed Migration Trends in Libya: Changing Dynamics and Protection Challenges: Evolution of the Journey and Situations of Refugees and Migrants in Southern Libya' (date unknown) <<https://www.unhcr.org/595a02b44.pdf>> accessed 27 Nov 2021 3; Amnesty International (n 10) 6.

⁴⁷⁶ MPC (n 353) 1, 8; Seeberg (n 384) 126; JOIN(2017) (n 1) 1; UNSMIL and OHCHR (n 16) 10.

⁴⁷⁷ S/2017/466 (n 23); A/HRC/48/83 (n 23) para 1; HRW (n 20) 11; Amnesty International (n 89) 14; Amnesty International, 'Libya: Ten Years after Uprising Abusive Militias Evade Justice and Instead Reap Rewards' 10 April 2023) <<https://tinyurl.com/2p9camex>> accessed 10 April 2023 14; OHCHR (n 23) 2.

⁴⁷⁸ *Hirsi* (n 22) [99]; UNSMIL and OHCHR (n 16) 10; Amnesty International (n 87) 13; Amnesty International (n 10) 15.

⁴⁷⁹ UNSC Res 2323 (2016) UN Doc S/RES/2323 Preamble paras 5 & 6; HRW (n 20) 11-12; US Department of State, *Libya 2020 Human Rights Reports* (2020) 1; Ferhat Polat, 'Libya's Government of National Unity: Priorities and Challenges' (*TRT World Research Centre*, 15 March 2021) <<https://tinyurl.com/3rmx728k>> accessed 31 May 2023; From 2014-2021, Western Libya was controlled by the GNA led by Prime Minister Fayez al-Sarraj, Libyan National Army controlled Eastern Libya whilst other parts of Libya was controlled by GNA linked armed militias.

⁴⁸⁰ Amnesty International (n 10) 15; Netherlands, *Libya: Militias, Tribes and Islamists*, 19 December 2014) 7; HRW (n 20) 12; Amnesty International (n 477); Ferhat Polat (n 479); ECCHR, FIDH and LJIL (n 23) 16; Shortly after the revolution, the National Transitional became Libya's de facto government; From 2011 to 2014, between 1,300 to 1,600 armed groups were operating in Libya; Some were autonomous civilians, self-trained and self-trained.

⁴⁸¹ S/RES/2323 (n 479) Preamble paras 5 & 6; UNSMIL and OHCHR (n 16) 10; HRW (n 20) 11-12; State Department (n 479) 1.

⁴⁸² Amnesty International (n 477) 14; Amnesty International (n 89) 14.

⁴⁸³ UNSMIL and OHCHR (n 16) 10.

⁴⁸⁴ State Department (n 479) 2; Although the above security forces, including civilian volunteers, received salaries from the Libyan government and exercised law enforcement functions, most lacked formal training, supervision and consistent levels of accountability.

armed groups, criminals and militias, many of who are affiliated with the government and/or have been incorporated into Libya's security forces with minimal or no background checks.⁴⁸⁵ The situation created a conducive environment for a proliferation of criminal activities and serious human rights abuses and a lack of basic services, security and protection within Libya.⁴⁸⁶

Criminals, armed groups, traffickers and smugglers capitalised on the breakdown of governance structures and the justice system to smuggle refugees and migrants seeking to escape to Europe.⁴⁸⁷ The situation is exacerbated by large influxes of refugees fleeing war and persecution in Syria, Eritrea, Somalia, Sudan and Palestine where safer routes for accessing Europe and protection are unavailable.⁴⁸⁸

Refugees, asylum seekers and migrants are usually transported to Europe illegally on flagless vessels by smugglers and traffickers where they endure 'unimaginable atrocities' and human rights abuses.⁴⁸⁹ Although refugees and migrants pay for their journey, most of those departing from Libya are typically transported together with fuel, arms and illicit drugs in hazardous and overcrowded conditions in unseaworthy wooden boats or rubber dinghies without sufficient fuel, navigation systems, lifejackets, trained seafarers, escorts or an emergency distress call service.⁴⁹⁰

Thousands of refugees and migrants who embark on the perilous journey are often exposed to exploitation, human rights violations and even death at sea at the hands of smugglers and traffickers.⁴⁹¹ Many scholars have consistently argued that the use of smugglers, traffickers and

⁴⁸⁵ European Council, *Council Working Document of the European External Action Service of 24/01/2017* (Brussels) (25 January 2017) EEAS(2017) 0109) (2017) 17; Amnesty International (n 10) 15.

⁴⁸⁶ UNSMIL and OHCHR (n 16) 10; Amnesty International (n 87) 13.

⁴⁸⁷ JOIN(2017 (n 1) 1; UNSMIL and OHCHR (n 16) 10.

⁴⁸⁸ UNHCR (n 475) 3; UNHCR, 'Mediterranean Crossings Deadlier than Ever, New UNHCR Report Shows' <tinyurl.com/mw44uebx> accessed 09 December 2021.

⁴⁸⁹ CoE Resolution 1821 (n 261) 2; Hirsi (n 22) [27]; CoE Parliamentary Assembly, *The Interception and Rescue at Sea of Asylum Seekers, Refugees and Irregular Migrants* (29 April 2009) Doc 11880; UNSMIL and OHCHR (n 16) 34.

⁴⁹⁰ JOIN(2017 (n 1) 1; S/2017/466 (n 23) paras 255-58; EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) 23; UNSMIL and OHCHR (n 16) 10; Amnesty International (n 10) 17.

⁴⁹¹ ICC Prosecutor Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011) (Statement)' (14 November 2013) <<https://tinyurl.com/5v22cjfn>> accessed 28 May 2022 para 16.

dangerous means of transport is reflective of the desperation of the refugees, asylum seekers and migrants, due to a lack of legal and safer alternative routes to enter Europe.⁴⁹²

Since 2013, there has been a dramatic increase in sea crossings, incidents of shipwrecks and sea deaths, particularly near Italy's Lampedusa Island.⁴⁹³ These tragic accidents are due to factors such as bad weather, overcrowded boats and other hazardous travelling conditions.⁴⁹⁴ Two major shipwrecks in October 2013 near Italy's Lampedusa Island led to the death of 560 refugees and migrants, including a pregnant woman and a toddler, largely from Eritrea and Somalia.⁴⁹⁵ The high death rates in the above shipwrecks were largely attributed to a delay caused by a disagreement between Italy and Malta over which of them was responsible for carrying out the rescue operation.⁴⁹⁶

The 2013 Lampedusa incidents, which at the time were recorded as the deadliest Europe-bound migrant boat accident,⁴⁹⁷ provided an impetus to the already evolving EU and Member States' policy response to irregular migration into the EU through the Mediterranean Sea.⁴⁹⁸ Subsequent shipwrecks involving Europe-bound migrants claimed many more lives,⁴⁹⁹ and led to a widespread condemnation by European and international community.⁵⁰⁰

The shipwrecks also changed both the direction of public discourse on the EU's external migration and border management policies in the Mediterranean Sea from search and rescue operations towards border control and enforcement.⁵⁰¹ EU priorities and measures also began

⁴⁹² Resolution 1821 (n 261) para 2; *Hirsi* (n 22) [27].

⁴⁹³ Amnesty International (n 10) 17; IOM, 'Migrant Deaths and Disappearances (Migration Data Portal) (7 May 2021)' 2021 <<https://tinyurl.com/3ejcsbwb>> accessed 26 November; OHCHR (n 10); IOM (n 10).

⁴⁹⁴ Amnesty International (n 10) 17; UNHCR (n 10); IOM (n 10).

⁴⁹⁵ EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) 21; OHCHR (n 10); Matthew Chance, Livia Borghese and Laura Smith-Spark, 'Survivors Mourn Victims of Italy Shipwreck; at Least 194 Killed' CNNcom (Atlanta, Georgia 6 October 2013) <<https://tinyurl.com/4ch6z9zk>> accessed 02 December 2021

⁴⁹⁶ Amnesty International (n 10) 8, 17; OHCHR (n 10); EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) 21.

⁴⁹⁷ CoE Commissioner (n 20) 15; Sabrina Ellebrecht, *Mediated Bordering: Eurosur, the Refugee Boat, and the Construction of an External EU Border* (transcript Verlag 2020) 9-10.

⁴⁹⁸ EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) 21; Ellebrecht (n 497) 9-10; Amnesty International (n 89) 16.

⁴⁹⁹ JOIN(2017 (n 1) 5; OHCHR (n 10).

⁵⁰⁰ Barbie Latza Nadeau, 'Pope Prays for Lost Refugees on Visit to Mediterranean Island CNN' CNN (Atlanta, Georgia 08 July 2013) <<https://tinyurl.com/35t9axan>> accessed 09 Dec 2021; Chance, Borghese and Laura Smith-Spark; Dimitris Avramopoulos-Speech, Commissioner for Migration, Home Affairs and Citizenship, Recent human smuggling incidents in the Mediterranean (European Parliament Plenary Debate) (Strasbourg) (13 January 2015) SPEECH/15/3262; Amnesty International (n 10) 18; Corin Ranson, 'Debunking the 'Pull Factor': How Many Deaths Will It Take for a Humanitarian Migration Policy?' *Conversation Over Borders* (21 Feb 2021) <<https://tinyurl.com/2p8p4c9k>> accessed 09 December 2021.

⁵⁰¹ Ellebrecht (n 497) 9-10.

to focus on greater cooperation between its institutions, Members and third countries to effectively fight human smugglers and traffickers, their assistance and ‘facilitation’ of illegal migration and sea deaths.⁵⁰² Following the 2013 shipwrecks and similar incidents near Lampedusa in April 2015, the European Council pledged to ‘mobilise all efforts at its disposal’ to ensure the EU’s stronger presence on the Mediterranean Sea to prevent further tragedies and irregular flows to the EU.⁵⁰³

Since 2013, EU cooperation with Libya on external border management and migrant mobility control have significantly intensified to enhance Libya’s capacity to stop, deter, intercept and control irregular movements along the CMR.⁵⁰⁴ In May 2013, the EU Border Assistance Mission in Libya (EUBAM) was launched by the Council of the EU to assist Libyan authorities on the development of a national Integrated Border Management (IBM) strategy to manage and secure land, sea and air borders.⁵⁰⁵ In October 2013, the EU’s Parliament and Council adopted the Regulation on Border Surveillance System to intensify information exchange and cooperation, border surveillance and integrated policing between Member States and the EU Coast Guard Agency [‘FRONTEX’] to prevent and combat irregular migration, smuggling and trafficking at the EU’s external borders.⁵⁰⁶

Between April and June 2015, EU Member States increased the financial resources and assets of the EU’s joint naval Operation, *Triton* and FRONTEX, to enhance their capacity to conduct search and rescues, and border enforcement and to disrupt smugglers and traffickers and save lives in the Mediterranean Sea.⁵⁰⁷

⁵⁰² Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L122/31 Recitals 1-2; Special Meeting of the European Council, 23 April 2015-Statement’; EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) 21; Amnesty International (n 87) 16.

⁵⁰³ JOIN(2017) (n 1) 2.

⁵⁰⁴ EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) 44-45; Borsacchi (n 18); Amnesty International (n 87) 16; School of Social and Political Sciences, ‘Externalization and the Erosion of Refugee Protection: Comparative Network on Refugee Externalisation Policies (CONREP)’ (29 Nov 2019) <<https://tinyurl.com/2p9penn4>> accessed 11 December 2021.

⁵⁰⁵ EEAS, ‘About EU Border Assistance Mission in Libya (EUBAM)’ (EEAS,, 20 June 2016) <<https://tinyurl.com/yckwksry>> accessed 10 October 2021; HRW (n 17) 2.

⁵⁰⁶ Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur) [2013] OJ L295/11 Recital 1; European Commission, ‘EUROSUR’ (No date) <<https://tinyurl.com/4kbue43z>> accessed 16 January 2022.

⁵⁰⁷ COM(2015) (n 4) 2,6; Amnesty International (n 10) 18; European Parliament resolution of 29 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies (2015/2660(RSP); Regulation (EU) No

From December 2016 and early 2017, the European Council undertook a series of joint actions and measures, to enhance the capacity of the Libyan government and Coast Guard to stop the 'heavy influx of migrants' through the CMR to Malta and Italy.⁵⁰⁸ On 02 February 2017, Italy signed a bilateral Memorandum of Understanding ['Italy-Libya MoU of 2017'] with the GNA to cooperate on combatting illegal migration, smuggling, human trafficking and border security. EU States' partnership and policy of cooperation with Libya on migration control were consolidated with the adoption of the Declaration on 03 February 2017.⁵⁰⁹

4.6 The Malta Declaration

4.6.1 Content

The Declaration is a legally non-binding bilateral agreement between EU States and Libya to cooperate by joint measures to combat irregular migration, human trafficking and smuggling along the CMR.⁵¹⁰ The Declaration is an externalisation policy, encompassing a range of measures based on intensified cooperation between EU institutions, Member States and Libya to prevent irregular migrants from accessing EU territories and asylum procedures.⁵¹¹ It also forms part of the EU's broader multilateral engagement with the UN and the AU to address the root causes of irregular migration, accelerated returns and to promote reception conditions.⁵¹² According to the text of the Declaration, it constitutes an 'additional action' to enhance Libya's capacity to ensure effective control of the EU's external border in order to:⁵¹³

1. 'Significantly reduce migratory flows' along the CMR into the EU;⁵¹⁴
2. 'Break the business model of smugglers' and;⁵¹⁵

1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosir) [2013] OJ L 295/11; UKHL, EU Action Plan against Migrant Smuggling 4th Report of Session (HI 2015-16, 46) (Chapter 4).

⁵⁰⁸ COM(2015) 240 (n 4) 2-3.

⁵⁰⁹ Borsacchi, (n 18); HRW (n 17).

⁵¹⁰ Declaration (n 36) Points 3-5 and 6(b) (c) (d); European Commission, 'EU Action in Libya on Migration: The Commission's Contribution to the Leaders' Agenda' 07 Dec 2017) <<https://tinyurl.com/ywt27tha>> accessed 21 Nov 2020; Peter Slominski and Florian Trauner, 'How Do Member States Return Unwanted Migrants? The Strategic (Non-)use of 'Europe' During the Migration Crisis' (2018) 56 JCMS: Journal of Common Market Studies 101 102-103; HRW (n 17) 12; Palm (n 104) 13.

⁵¹¹ JOIN(2017) (n 1); Borsacchi (n 18); Slominski and Trauner (n 510) 102-103; HRW (n 17); European Council, 'Central Mediterranean Route' <<https://tinyurl.com/4bzaa4dw>> accessed 22 September 2021.

⁵¹² Declaration (n 36) Point 4; European Commission (n 510); Palm (n 104) 13.

⁵¹³ Declaration (n 36) Points 1 and 3.

⁵¹⁴ *ibid* Point 3.

⁵¹⁵ *ibid*

3. To save lives at sea;⁵¹⁶

To these ends, the EU and its Members agreed to provide training, equipment and logistical support to build the capacity of the Libyan national Coast Guard (LCG) and ‘other relevant agencies’ to effectively control Libya’s ‘land and sea borders and to combat transit and smuggling activities’.⁵¹⁷

The Declaration ‘welcome[d]’ the Italy-Libya MoU of 2017⁵¹⁸ and expressly declared the EU’s readiness ‘to support Italy in [the] implementation’ of the MoU and to enhance cooperation between EU Members, Frontex and Libyan authorities ‘on preventing departures and managing returns’.⁵¹⁹ Under the MoU, Italy agreed to provide technical training, equipment and financial support to ‘key Libyan institutions’, including the Ministry of Interior, Directorate for Combating Illegal Migration (DCIM) and the LCG.⁵²⁰

Additionally, EU States pledged to ‘rapidly step up, both in intensity and numbers’, complementary EU training programmes that were already being provided by the EU’s naval agencies such as Operation SOPHIA and the Seahorse Mediterranean Network.⁵²¹ The LCG and naval forces also receive reinforcement from the integrated actions involving EU States, the EU’s Common Security and Defence Policy missions and operations, Europol and FRONTEX to enhance Libya’s capacity to ‘disrupt the business model of smugglers’.⁵²²

Pursuant to the bilateral agreements between the EU and Libya, FRONTEX was previously providing reinforcement, training and equipment to the LCG and naval forces to intercept migrant boats.⁵²³ As of 20 June 2016, the mandate of the EUNAVFOR MED or Operation SOPHIA had already been expanded by the EU’s Foreign Affairs Council to enable Sophia to provide training and capacity building to the LCG and navy to disrupt traffickers and

⁵¹⁶ *ibid*, Points 2-3.

⁵¹⁷ *ibid* Points 5, 6(a), (b)(c) and (g); JOIN(2017) (n 1) 10; Yasha Maccanico, ‘Analysis Anti-Migration Cooperation Between the EU, Italy and Libya: Some Truths’ (*Statewatch*, March 2020) <<https://tinyurl.com/5c8nwra6>> accessed 19 Nov 2022; Palm (n 104) 13.

⁵¹⁸ Declaration (n 36) Points 6(i); CAT/C/ITA/CO/5-6 (n 106) para 22; UNSMIL and OHCHR (n 16) 14-15.

⁵¹⁹ Declaration (n 36) Point 6(i)(j); Italy-Libya MoU (n 338) Preamble paras 9 and 11; Zakariya El Zaidy, *EU Migration Policy Towards Libya* (Friedrich Ebert Stiftung, 2019) 4 <<https://tinyurl.com/2m4bnmza>> accessed 07 February 2021

⁵²⁰ Italy-Libya MoU (n 338) Article 1(A)(C).

⁵²¹ Declaration (n 36) Points 6(a), (b); JOIN(2017) (n 1) 10.

⁵²² Declaration (n 36) Points 5 and 6(b); Palm (n 104) 13.

⁵²³ *ibid*

smugglers.⁵²⁴ The training package ranged from basic seamanship, to 'more advanced specialist skills and includes [...] human rights and international law'.⁵²⁵

As the main departure point, EU States committed to provide support and funding to Libya to build Libya's capacity and institutions to enable them to host rescued and intercepted persons returned to Libya.⁵²⁶ The EU provides funds to the UNHCR and the International Organisation for Migration (IOM) to collaborate with Libya to evacuate refugees and migrants to their countries of origin and other third countries.⁵²⁷

4.6.2 Implementation

The implementation of the policy is led by Italy with full support from EU states and institutions.⁵²⁸ Many of the EU's cooperative activities are funded through the EU Trust Fund for Africa (EUTFA).⁵²⁹ Since the adoption of the Declaration, EU States, particularly Italy, have launched multiple financial programmes to enhance border enforcement, assistance and protection for refugees, asylum seekers and vulnerable migrants, and accelerate their returns from Libya.⁵³⁰ The EU and its Member States have also provided significant financial assistance, training, speedboats, equipment and other support to the LCG and General Administration for Coastal Security to enhance their capacity to prevent migrant departures, intercept and to disembark rescued and intercepted persons in Libya.⁵³¹

The EU and its Members have also provided support and additional funding to assist Libya in establishing a Maritime Rescue Coordination Centre (MRCC) and an integrated border

⁵²⁴ EEAS, 'EUNAVFOR MED Operation Sophia Starts Training of Libyan Navy Coast Guard and Libyan (27 Oct 2016) (Press Release)' <<https://tinyurl.com/y2v53zmm>> accessed 06 January 2021 ; Amnesty International, *A Perfect Storm: The Failure of European Policies in Central Mediterranean* (6 July 2017) (EUR 03/6655/2017) 20; EUNAVFOR MED started operating actively in October 2015. Its mandate includes the identification, capture and the disposal vessels used or suspected of being used by smugglers and traffickers

⁵²⁵ EEAS (n 524).

⁵²⁶ Declaration (n 36) Points 6(d & e); UNSMIL and OHCHR (n 16) 19; Palm (n 25) 254.

⁵²⁷ *ibid*

⁵²⁸ European Commission, 'EU Trust Fund for Africa adopts €46 Million Programme to Support Integrated Migration and Border Management in Libya' (28 July 2017) <<https://tinyurl.com/286kmfm9>> accessed 12 May 2023; Amnesty International, 'Waves' (n 425) 19; Amnesty International (n 87) 16; footnote 30.

⁵²⁹ European Commission (n (n 528); Amnesty International, 'Waves' (n 87) 16; Amnesty International (n 425) 20.

⁵³⁰ European Council, 'Migration Flows in the Central Mediterranean Route' 11 April 2023) <<https://tinyurl.com/3ud984cm>> accessed 30 October 2020; UNSMIL and OHCHR (n 16) 19 ;HRW (n 20);European Council (n 511).

⁵³¹ European Commission (n 510); EEAS, 'Central Mediterranean Route: Protecting Migrants and Managing Irregular Migrant Flows (October 2019)' <<https://tinyurl.com/mwvv3pda>> accessed 25 September 2021; Fetouri (n 23); European Council (n 530); HRW (n 17); Amnesty International (n 425) 19.

management along Libya's southern border.⁵³² The EU supported Libya to declare its own Search and Rescue region in Libya's territorial waters in December 2017⁵³³ although it was not acknowledged by the International Maritime Organization in June 2018.⁵³⁴

The EU adopted significant financial resources to improve the living conditions of migrants at reception centres, including primary health care, psychological support, food, protection and other basic assistance for refugees and vulnerable persons at disembarkation points and detention centres.⁵³⁵ Millions of euros were provided to the UNHCR for the protection and assistance of refugees, asylum seekers and vulnerable migrants at 12 disembarkation points, Libya's southern desert and other remote locations.⁵³⁶

The EU, Germany and Italy have funded the establishment of Assisted Voluntary Return schemes (AVRs) to assist stranded migrants in Libyan detention centres and urban locations to 'voluntarily' return to their countries of origin, including Chad, Eritrea, Mali, Niger and Sudan.⁵³⁷ The European Commission also provided millions of euros for the establishment of the Emergency Evacuation Transit Mechanism (ETM) under the UNHCR to process and evacuate refugees, asylum seekers and vulnerable migrants from Libya's detention centres to Niger, Turkey, Jordan and Lebanon.⁵³⁸

⁵³² European Council (n 511); Amnesty International (n 425) 19; Amnesty International (n 87) 16; Between August 2017 and December 2018, EU and States provided additional €45 million towards Libya's MRCC.

⁵³³ Amnesty International (n 87) 16; Amnesty International (n 425) 19; Patrick Müller and Peter Slominski, 'Breaking the Legal Link but Not the Law? The Externalization of EU Migration Control Through Orchestration in the Central Mediterranean' (2021) 28 *Journal of European Public Policy* 10-11; The declaration of the Libyan SAR region was completed in December 2018 and acknowledged by the International Maritime Organization in June 2018.

⁵³⁴ UNSMIL and OHCHR (n 16) 34; AI and ARCI and Others (n 18) 3; Amnesty International (n 87) 16; In August 2017, Libya's SAR zone was extended to 94 nautical miles off the Libyan coast.

⁵³⁵ European Council (n 530); HRW (n 17) 2.

⁵³⁶ European Commission, 'EU Trust Fund for Africa: New Migration-Related Actions to Protect Vulnerable People and Foster Resilience of Host Communities in North of Africa' (03 July 2019) <<https://tinyurl.com/bdakbn4x>> accessed 25 September 2021; HRW (n 20); European Council (530); Over €90 million was provided by the EU between July 2018 and July 2019 for the protection of refugees and migrants at disembarkation points and detention centres.

⁵³⁷ IOM (n 276) 1; European Commission-Fact Sheet, 'EU-IOM Joint Initiative for Migrant Protection and Reintegration: One Year On' (*European Commission*, 15 December 2017) <<https://tinyurl.com/bddj38tn>> accessed 19 June 2023 2; IOM (Dakar Office), 'EU-IOM Joint Initiative for Migrant Protection and Reintegration' (28 July 2021) <<https://tinyurl.com/y778khdd>> accessed 28 September 2021; UNHRC, 'Report of the Special Rapporteur on the Situation of Human Rights in Eritrea' 16 May 2019) A/HRC/41/53; Fill and Moresco (n 47).

⁵³⁸ EEAS, 'EU-Libya Relations (Factsheet) (25 January 2017) 2-3' (2017) <<https://tinyurl.com/2p93ausw>> accessed 20 November 2021; EEAS 'EU-Libya Relations' (n 74); European Council (n 530).

4.6.3 Outcome of the Declaration: Achievement of EU Stated Goals

The Declaration and its operational measures have been deemed as a success by the EU and its Member States because of the drastic reductions in arrivals in Italy and Malta, the stated aims of the EU and its Members.⁵³⁹ The total number of irregular arrivals in Europe through the CMR fell by 86% between 2017 and 2018.⁵⁴⁰ The proportion of those arriving in Italy from Libya represented just 11% of all arrivals in Italy in 2018, a significant drop from 59% in 2017.⁵⁴¹

The policy was also credited for the significant decline in the number of shipwrecks, drownings and in the absolute number of sea deaths at least immediately after implementation.⁵⁴² The number of dead or missing persons recorded across the CMR decreased from 4,581 in 2016 to 1,262 in 2019 and just 359 during the first eight months of 2020.⁵⁴³

According to the EU, hundreds of thousands of persons have been rescued through the direct support of EU States, FRONTEX and Operation Sophia.⁵⁴⁴ The UNHCR also noted that reception conditions have been 'upgraded'... to meet the immediate basic needs of refugees and migrants' through the provision of 'health posts, water and sanitation facilities and shaded areas' to protect refugees and migrants from weather elements.⁵⁴⁵ According to the EU's External Action Service (EEAS), twenty-five migrant detention centres in Libya have been closed down in order to find alternate solutions.⁵⁴⁶ It was in light of this that the Gathering and Departure Facility in Tripoli was established by the UNHCR as a safer alternative.⁵⁴⁷

The EEAS reported on its website that thousands of refugees and vulnerable migrants at disembarkation points in Libya have received 'emergency humanitarian assistance', including primary medical care, social and psychological assistance from EU funded programmes run by the IOM and UNHCR.⁵⁴⁸

⁵³⁹ European Commission (n 510); S/2019/711 (n 20); Conclusions of 28 June 2018 (Press Release) Point 1; EEAS (n 531) 1; ; Amnesty International (n 425) 19.

⁵⁴⁰ S/2019/711 (n 20) para 6; EEAS (n 531).

⁵⁴¹ S/2019/711 (n 20) para 3.

⁵⁴² UNSMIL and OHCHR (n 20) 3; Amnesty International (n 425) 19.

⁵⁴³ IOM, 'Libya's Migrant Report, Mobility and Tracking, Round 32 (July-Aug 2020)' 2020) <<https://tinyurl.com/2p8ktf5w>> accessed; Amnesty International (n 425) 19.

⁵⁴⁴ EEAS (n 74).

⁵⁴⁵ UNCHR, 'Libya (Quick Impact Projects)' (23 October 2017) <<https://www.unhcr.org/libya.html>> accessed 21 October 2021

⁵⁴⁶ EEAS (n 531).

⁵⁴⁷ *ibid* 2.

⁵⁴⁸ *ibid*

In spite of the EU and its Member States' large expenditures and their claims of success, the Declaration has been criticised heavily by many UN bodies, including the UNHCR, the CAT, courts, academics and NGOs.⁵⁴⁹ Critics argue that the Declaration has facilitated and perpetuated containment, subjected rescued and intercepted persons to widespread and systematic human rights violations, including arbitrary arrest, and prolonged detentions in horrible conditions, torture and other ill-treatment with impunity.⁵⁵⁰ According to the UNHCR, the policy has not improved the conditions of refugees and migrants in Libya but has led to an increase in returns, a deterioration of conditions and human rights abuses.⁵⁵¹ Many NGOs, law clinics and individual lawyers have taken a number of legal actions in various judicial forums in hopes of getting the EU and its States to review the policy or to remedy its human rights impacts.⁵⁵²

One of the most serious legal issues concerns EU States' choice of Libya as a proxy for their management of migration and asylum.⁵⁵³ As will be discussed in detail Chapter Five below, Libya faces political instability, years of violent conflict, lacks a central authority,⁵⁵⁴ an appropriate legal framework and the capacity to protect persons from systematic human rights abuses.⁵⁵⁵ Critics argue that the implementation of the Declaration ignored plenty of evidence of about the human rights situations in Libya, including several reports of blatant human rights abuses against migrants,⁵⁵⁶ the Libyan government's insufficient control over the entire Libyan territory, and the incapacity to combat irregular migration and organised human trafficking.⁵⁵⁷

⁵⁴⁹ CAT/C/ITA/CO/5-6 (n 106) para 22; UNSMIL and OHCHR (n 20); EEAS (n 531); European Council (n 530); OHCHR, 'Libya: UN Human Rights Report Details Violations of Migrants' Rights Amid 'Assisted Return' Programmes' (OHCHR, <<https://tinyurl.com/dk995xt6>> accessed 13 June 2023).

⁵⁵⁰ S/2019/711 (n 20); Palm (n 25) 254; UNSMIL and OHCHR (n 16) 15; OHCHR (n 20) 15; HRW (n 20); HRW (n 17).

⁵⁵¹ OHCHR (n 20); AI and ARCI and Others (n 18) 3.

⁵⁵² GLAN, ASGI and ARCI, *Complaint to the European Court of Auditors Concerning the Mismanagement of EU Funds by the EU Trust Fund for Africa's 'Support to Integrated Border and Migration Management in Libya' (IBM) Programme* (2020); AI and ARCI and Others (n 18) 4; AI and HRW (n 20); Annick Pijnenburg and Kris van der Pas, 'Strategic Litigation against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Migration Route' (2022) 24 EJML 401, 402.

⁵⁵³ *Hirsi* (n 22) [107]; S/2017/761 (n 24) para 45; ECCHR, FIDH and LJIL (n 23) 14, 38.

⁵⁵⁴ S/2017/466 (n 23); A/HRC/48/83 (n 23) para 1; Amnesty International (n 477) 14; OHCHR (n 23) 2;

⁵⁵⁵ *Hirsi* (n 22) [107]; S/2017/761 (n 24) para 45; ECCHR, FIDH and LJIL (n 23) 14, 38.

⁵⁵⁶ UNSC 'Report of the Secretary-General on the United Nations Support Mission in Libya' (22 August 2017) UN Doc S/2017/726, paras 34-35; CAT/C/ITA/CO/5-6 (n 106) para 22; Palm (n 104) 13; ECCHR, FIDH and LJIL (n 23) 10.

⁵⁵⁷ Palm (n 25) 254; Palm (n 104) 13.

4.7 Conclusion

This chapter highlighted the significance of Libya as one of the EU's priority countries for cooperation on illegal migration in the southern Mediterranean and Northern Africa. It demonstrated that Libya has been a major migration corridor, a major transit and departure point for majority of persons attempting to enter Europe irregularly by sea. The situation has worsened since the fall of the former leader Gaddafi leading to rising numbers of arrivals and sea tragedies. The adoption of the Declaration is one of several measures implemented by the EU and its Members to reduce inflows into their territory.

While the Declaration has succeeded in significantly reducing arrivals in Europe, critics question its compliance with EU States' *non-refoulement* obligations, in light of Libya's non-compliance with international refugee and human rights law. The concerns stem from the Declaration's non-binding nature and the use of Libya as EU States' proxy for migration control, given its unstable political conditions, a lack of functional governance structures and blatant human rights violations in Libya. The following chapter examines socio-political conditions, legal framework, and their human rights implications for refugees, asylum seekers and migrants in Libya.

V. Libya's National Framework, Access to Refugee Protection and *Non-Refoulement*

5.1 Introduction

This chapter focuses on the political and social situation, legal framework, smuggling, trafficking and the widespread human rights abuses in Libya. It demonstrates that although Libya is party to several international human rights treaties, years of conflict, insecurity, a lack of an appropriate legal framework put refugees and irregular migrants at particular risk of precarity and vulnerability. From the moment they set foot in Libya, refugees and migrants face widespread and systematic human rights violations, including murder, arbitrary detention, trafficking, torture and other forms of ill-treatment at the hands of both State and non-State actors with impunity. The chapter demonstrates a lack of adequate protection and effective remedy for refugees, asylum seekers and migrants against human rights violations, including torture and *refoulement*.

5.2 Libya's International Human Rights Obligations

Libya is a party to several core international human rights treaties, including the ICCPR and its first Optional Protocol, the UNCAT, the Convention on the Rights of the Child and its Optional Protocols (see Annex 1).⁵⁵⁸ Libya has also ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ['Convention on Migrants Workers'] but according to the UN, it has not submitted a single report to the Committee on Migrant Workers since Libya ratified it in June 2004.⁵⁵⁹

⁵⁵⁸ UN Human Rights Treaty Bodies, 'UN Treaty Body Database, Ratification Status by Country' (OHCHR, <<https://tinyurl.com/ymt5tdtt>> accessed 18 December 2023; *Hirsi* (n 22) [97]; UNSMIL and OHCHR (n 20) 8; S/2017/761 (n 24) para 45; OHCHR, 'Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya' (OHCHR, April 2018) <<https://tinyurl.com/5yk74ezp>> accessed 16 March 2023 12; UNSMIL and OHCHR (n 16) 22, footnote 71; Libya has ratified the CRC Optional protocols on Involvement of Children in Armed Conflict, and on the Sale of Children, Child Prostitution and Child Pornography.

⁵⁵⁹ S/2019/711 (n 20) para 45; UNSMIL and OHCHR (n 20) 9; Report of the Secretary-General: Implementation of resolution 2380 (2017)' (31 August 2018) UN Doc S/2018/807) para 44; Libya ratified the Convention on Migrants Workers in June 2004; its first report to the Committee was due in 2005.

Libya is a party to the OAU Refugee Convention,⁵⁶⁰ a legally binding instrument which recognises the provisions of the 1951 Refugee Convention, including the definition of the term 'refugee', the right to asylum and *non-refoulement*.⁵⁶¹ However, Libya has not yet implemented the provisions of the OAU Refugee Convention, including the adoption of asylum legislation.⁵⁶² Libya also does not comply with any rules concerning the protection of refugees, including the recognition of access to asylum, non-penalisation for irregular entry, protection against collective expulsion and *refoulement*.⁵⁶³

The above human rights treaties contain relevant protection for the fundamental rights of all persons regardless of their immigration or asylum status.⁵⁶⁴ Under these provisions, all persons, including refugees and migrants, are guaranteed the right to liberty, security and absolute protection from the real risk of torture and other ill-treatment, arbitrary deprivation of life, detention and slavery.⁵⁶⁵ Everyone is also guaranteed the right to leave any country, including his/her own.⁵⁶⁶

As a State party to the above international human rights treaties, Libya is under a legal obligation to 'respect, protect and fulfil the human rights of every person' on its territory, within its jurisdiction or effective control, without any discrimination whatsoever and regardless of immigration status.⁵⁶⁷ State parties are also obligated to place human rights at the centre of all their migration control efforts 'in all its phases, including in their responses to large and mixed movements' to ensure 'full' protection of the fundamental rights and freedoms of all migrants.⁵⁶⁸ States must ensure that their border control measures respect,

⁵⁶⁰ AU, 'List of countries Which have signed, Ratified/Acceded to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2019) While Libya is not signatory to the UN Refugee Convention, it ratified the OAU Convention in July 1981.

⁵⁶¹ OAU Refugee Convention (n 116) Articles 1 and 2; UNSMIL and OHCHR (n 20) 9; S/2018/807 (n 559) para 44; 'UNHCR Position' (n 104) para 4, footnote 17; OHCHR (n 23) 14; Libya has also ratified the 1981 African Charter on Human and Peoples' Rights, Article 12(3) of which also recognises the right to asylum.

⁵⁶² UNSMIL and OHCHR (n 20) 9, 11; UNSMIL and OHCHR (n 16) 5, 22.

⁵⁶³ OAU Refugee Convention (n 116) Articles 1 and 2; 'UNHCR Position' (n 104) para 31; Hirsi (n 22) [107], [125]; UNSMIL and OHCHR (n 20) 11; UNSMIL and OHCHR (n 16) 5.

⁵⁶⁴ Principles and Practical Guidance on the Protection of the Human Rights of Migrants in Vulnerable Situations- Report of the United Nations High Commissioner for Human Rights (03 January 2018) A/HRC/37/34 para 17; UNSMIL and OHCHR (n 16) 22; OHCHR (n 23) 14.

⁵⁶⁵ ICCPR (n 110) Articles 6, 7, 8 and 9, 12(2); UNCAT (n 110) Articles 1 and 16; UNSMIL and OHCHR (n 16) 22.

⁵⁶⁶ UDHR (n 26) Article 14; ICCPR (n 110) Articles 9 and 12(2); UNSMIL and OHCHR (n 20) 9; UNSMIL and OHCHR (n 16) 22; ECCHR, FIDH and LJIL (n 23) 39.

⁵⁶⁷ OHCHR 'Abuse' (n 558) 12; A/HRC/47/30 (n 160) para 39.

⁵⁶⁸ OHCHR and Global Migration Group, Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations (03 April 2018) Principle 1; A/HRC/47/30 (n 160) para 39.

inter alia, the prohibition of collective expulsions, *non-refoulement*, the right to seek asylum, the prohibition of torture, threats to life, and the best interests of the child.⁵⁶⁹ In addition, States must observe their search and rescue obligations under international maritime law, and provide every person with equal access to effective remedies, including the right of migrants to challenge expulsion orders and access to justice for victims of human rights violations.⁵⁷⁰

5.2.1 International Protection against Arbitrary Detention

International law prohibits the detention of persons based on race, colour, sex, language, religion, political or other opinion, national or social origin or other status, including asylum or refugee status.⁵⁷¹ Pursuant to Article 9 of the ICCPR, all persons, including refugees, asylum seekers, migrants and their families are protected against arbitrary detention.⁵⁷² Article 16 of the Convention on Migrant Workers also provides migrant workers and their families with the 'right to liberty and security of person',⁵⁷³ the right not to be 'subjected ... to arbitrary arrest or detention' and the deprivation of liberty except on lawful grounds.⁵⁷⁴ Its Committee has also emphasised that the irregular migrants crossing into the territory of a State or overstay without authorisation, appropriate documentation or permit per se 'does not constitute a crime'.⁵⁷⁵ This is because such persons have not committed any crime against another person, property or State.⁵⁷⁶

Under international human rights law, the automatic and mandatory detention of migrants just for the purposes of immigration is considered arbitrary, and inconsistent with international human rights standards.⁵⁷⁷ According to the CCPR's General Comment 35, detention would be considered arbitrary when it is carried out as 'as punishment for the legitimate exercise of the

⁵⁶⁹ A/HRC/47/30 (n 160) para 39; UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation XXX (No 30) on Discrimination Against Non Citizens (5 August 2004) para 25.

⁵⁷⁰ *ibid*; A/HRC/47/30 (n 160) para 39.

⁵⁷¹ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) Guideline 5.

⁵⁷² UNSMIL and OHCHR (n 20) 9; OHCHR 'Abuse' (n 558) 12.

⁵⁷³ Convention on Migrants Workers (adopted 18 December 1990, entry into force 1 July 2003) UNGA Res 45/158 (ICMWF) Article 16(1).

⁵⁷⁴ *ibid* Article 16 (4).

⁵⁷⁵ UN Committee on Migrant Workers, General comment No 2 (28 August 2013) CMW/C/GC/2 para 24; UNSMIL and OHCHR (n 20) 9; UNSMIL and OHCHR (n 16) 23.

⁵⁷⁶ CMW/C/GC/2 (n 575) para 24; UNSMIL and OHCHR (n 20) 9; The irregular entry and stay in a State may only constitute an administrative offence.

⁵⁷⁷ UNGA Res 45/158 (n 573) Article 16; CMW/C/GC/2 (n 575) paras 23-26; Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau (2 April 2012) A/HRC/20/24, para 68; UNSMIL and OHCHR (n 16) 23.

rights' guaranteed in the ICCPR, including the right of 'everyone ... to leave any country, including his own'.⁵⁷⁸

State may detain persons who enter their territory without authorisation 'for a brief initial period' in order to document and verify such persons' entry, claims and identity in case of doubt.⁵⁷⁹ Detention should only last for 'the shortest period of time', occur under humane conditions and under judicial supervision.⁵⁸⁰ The length of detention 'should not continue beyond the period for which the State party can provide appropriate justification'.⁵⁸¹

The Special Rapporteur on Torture has articulated that detention may amount to torture if irregular migrants and their families are held for prolonged periods solely based on their irregular immigration status with the intention of 'deterring, intimidating or punishing ... coercing them into withdrawing their requests for asylum, subsidiary protection or other stay, [and] agreeing to voluntary repatriation' to countries of origin where they may be exposed to risks to torture, other cruel, ill treatment or punishment.⁵⁸²

The detention of asylum seekers and migrants must be justified only on lawful grounds, including situations of national security concerns, public health and verification of identity.⁵⁸³ Decisions must be determined on a case-by-case basis, considering the relevant individualised factors, including an individual's likelihood of absconding, risk of committing crimes against others, be proportionate and necessarily restrictive.⁵⁸⁴

⁵⁷⁸ ICCPR (n 110) Article 12 (1 & 2); 'General comment No 35 on Article 9, Liberty and Security of Person' (16 December 2014) UN Doc CCPR/C/GC/35 para 17 ; OHCHR (n 558) 12.

⁵⁷⁹ *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v Australia* Communication No 1069/2002, CCPR/C/79/D/1069/2002 (CCPR, 6 November 2003) para 9.3; CCPR/C/GC/35 (n 578) para 18; A/HRC/37/50 (n 101) para 21; UNSMIL and OHCHR (n 16) 22.

⁵⁸⁰ *A v Australia* Communication No 560/1993 'Decision of the CCPR' (30 April 1997) UN Doc CCPR/C/59/D/560/1993 (CCPR) para 9.4; A/HRC/20/24 (n 577) para 68; *Mansour Ahani v Canada* Communication No 1051/2002 Decision of the CCPR' (15 June 2004) CCPR/C/80/D/1051/2002, para 10.2; *Shafiq v Australia* Communication No 1324/2004 (13 November 2006) CCPR/C/88/D/1324/2004, para 7.2; CAT, Concluding Observations on the Seventh Periodic Report of Greece (02 September 2019) CAT/C/GRC/CO/7 para 21; UNSMIL and OHCHR (n 20) 9.

⁵⁸¹ *Omar Sharif Baban v Australia*, Communication No 1014/2001, CCPR/C/78/D/1014/2001 (CCPR, 18 September 2003) 7.2; *Bakhtiyari v Australia* (n 579) 9.2.

⁵⁸² A/HRC/20/24 (n 577) para 70; A/HRC/37/50 (n 101) para 28; CAT/C/GRC/CO/7 (n 580) para 21.

⁵⁸³ CMW/C/GC/2 (n 575) para 23; *Jalloh v The Netherlands* Communication 794/1998, UN Doc A/57/40, Vol II, at 144 (HRC 2002) (CCPR, 26 March 2002) 8.2; A/HRC/20/24 (n 577) para 68; *Shafiq* (n 580); UNSMIL and OHCHR (n 20) 9.

⁵⁸⁴ CMW/C/GC/2 (n 575) para 23; UNSMIL and OHCHR 'Detained' (n 20) 9; UNSMIL and OHCHR (n 16) 22.

The Rapporteur on the Rights of Migrants has noted that the detention of persons for migration purposes should only be used as a ‘measure of last resort’, in humane conditions, and only in situations where lesser restrictive measures for achieving a State’s legitimate purposes are unavailable.⁵⁸⁵ The Committee on Migrant Workers has emphasised that criminalising irregular entry ‘exceeds’ the States’ ‘legitimate interest to control irregular migration, and ‘leads to unnecessary detention’.⁵⁸⁶ Persons cannot be deprived of their liberty unless their detention is proportionate to the legitimate aims pursued and/or a consideration of their specific circumstances, such as their risk of absconding or committing acts against national security.⁵⁸⁷

As demonstrated in Figure 4 below, States are required to consider the use of less invasive or coercive alternative measures such as the imposition of periodic reporting requirements, community supervision, surrender of documents and other conditionalities, to prevent persons from absconding or interference with evidence.⁵⁸⁸ Continued detention must also be subject to periodic re-evaluations of its necessity and judicial review of its lawfulness in accordance with both domestic and international human rights laws.⁵⁸⁹ To justify a continual detention of persons, States must demonstrate that no ‘less invasive means of achieving the same ends’ are available.⁵⁹⁰

According to the CCPR, prolonged immigration detentions of persons without a consideration of the individuals’ particular circumstances, appropriate justification or the opportunity of ‘substantive judicial review’ of the detention would be ‘arbitrary’ and inconsistent with Article 9(1) of the ICCPR.⁵⁹¹

⁵⁸⁵ *A v Australia* (n 580) para 9.3-9.4; A/HRC/20/24 (n 577) para 68; UNHCR Guidelines (n 571) 4.3; UNSMIL and OHCHR (n 20) 9; States may use detentions for immigration purposes in situations where the persons in question have a likelihood of absconding, are uncooperative or pose risks to national security.

⁵⁸⁶ CMW/C/GC/2 (n 575) para 24.

⁵⁸⁷ *Moses Solo Tarlue v Canada*, Communications No 1551/2007, UN Doc CCPR/C/95/D/1551/2007 (CCPR, 28 April 2009) paras 3.3 and 7.5-7.6; CMW/C/GC/2 (n 575) para 23; *Mansour* (n 580) para 10.2; UNSMIL and OHCHR (n 16) 22.

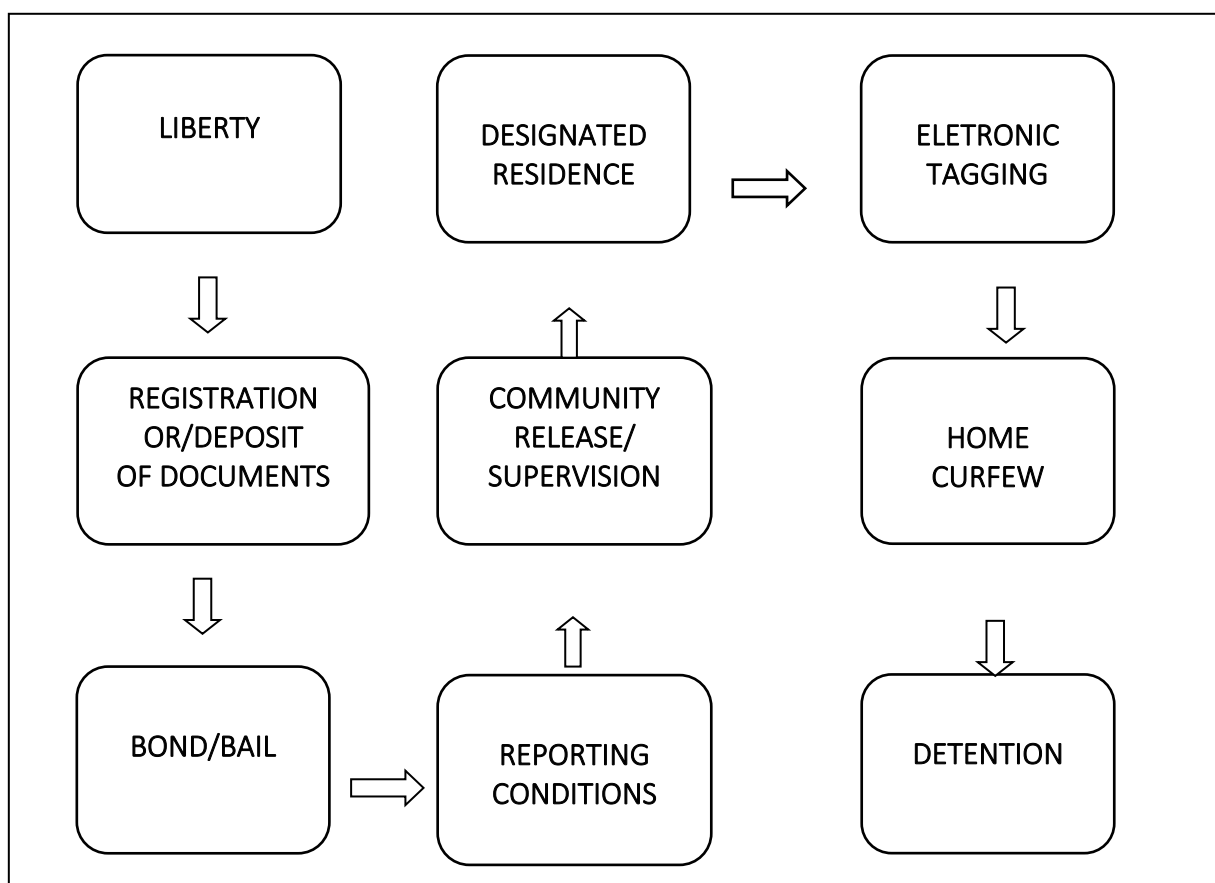
⁵⁸⁸ UNHCR ‘Guideline’ (n 571) 4.3; *Baban* (n 581) para 7.2; *Shafiq* (n 580) para 7.2; UNSMIL and OHCHR (n 16) 22.

⁵⁸⁹ *Baban* (n 581) para 7.2; UNHCR ‘Guideline’ (n 571) section 4.3; CCPR/C/GC/35 (n 578); A/HRC/37/50 (n 101) para 21

⁵⁹⁰ UNHCR ‘Guideline’ (n 571); *Baban* (n 581) para 7.2; Human Rights Committee *C v Australia*, Communication No 900/1999, CCPR/C/76/D/900/1999 (CCPR, 13 November 2002) para 8.2.

⁵⁹¹ *C v Australia* (n 590) paras 8.2-8.3; *Tarlue* (n 587) paras 3.3 and 7.5-7.6; CMW/C/GC/2 (n 575) para 23; *Baban* (n 581) para 7.2; *Mansour* (n 580) para 10.2; UNSMIL and OHCHR (n 16) 22.

Figure 4: UNHCR Guidelines on the Detention of Asylum Seekers and Migrants⁵⁹²



Detention must also be accompanied by adequate procedural and substantive protections established by law⁵⁹³ to reduce asylum seekers and migrants' risk of being subjected to arbitrary detentions, which may amount to torture.⁵⁹⁴ They must occur in appropriate, sanitary, and in 'non-punitive facilities', not in prisons.⁵⁹⁵ States should avoid the detention of persons with special needs or in particular situations of vulnerability or at risk of exploitation, abuse, sexual or gender-based or other forms of violence.⁵⁹⁶ Women should be kept in separate facilities from men and be guarded by female guards.⁵⁹⁷

⁵⁹² UNHCR (n 571) s 4.3.

⁵⁹³ CCPR/C/GC/35 (n 578) para 19.

⁵⁹⁴ CAT/C/GC/4 (n 188) para 14; CAT/C/GRC/CO/7 (n 580) para 21; A/HRC/37/50 (n 101) para 28; UNSMIL and OHCHR (n 16) 23.

⁵⁹⁵ *Shafiq* (n 580) para 7.3; CCPR/C/GC/35 (n 578) para 18; CAT/C/GC/4 (n 188) 14; UNSMIL and OHCHR (n 16) 22.

⁵⁹⁶ A/HRC/37/34 (n 564) para 17; A/HRC/37/50 (n 101) para 27; UNSMIL and OHCHR (n 16) 23; Vulnerable persons include pregnant and nursing women, victims of torture, and migrants with specific physical or mental health needs and ethnic minorities.

⁵⁹⁷ UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) (21 December 2010) UNGA Res 65/229, Annex, Rule 19; The UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (adopted on 17 December 2015) UNGA Res 70/175, Annex, 11(a); UNSMIL and OHCHR (n 20) 9; UNSMIL and OHCHR (n 16) 23.

Children should only be detained as a measure of last resort and for the shortest possible amount of time.⁵⁹⁸ If it is necessary for children to be detained, their best interests must be given a primary consideration when determining the duration and the conditions of the detention.⁵⁹⁹ Decisions must take the vulnerability of children and the need for care for unaccompanied minors into account,⁶⁰⁰ keep children and their family together, and choose alternative measures, instead of detention.⁶⁰¹ Children should be held in facilities equipped with the necessary conditions to ensure care, support and adequate safeguards to protect them from being exposed to risks of ill-treatment and torture.⁶⁰²

Children and unaccompanied minors 'must never' be detained merely on the basis of their immigration status or that of their parents because such a measure is 'never' in their best interests,⁶⁰³ and 'always constitutes a violation of [...] the rights of the child'.⁶⁰⁴ Rapporteur Méndez, for instance, emphasised that detaining migrant children solely based on their immigration status or that of their parents, even for a short period of time, 'exceeds the requirements of necessity and proportionality', and 'may constitute cruel, inhuman or degrading treatment'.⁶⁰⁵ Moreover, Méndez stated that detaining children solely for immigration related reasons is 'not absolutely essential to ensure the appearance of children at immigration proceedings or to implement a deportation order'.⁶⁰⁶

⁵⁹⁸ CCPR/C/GC/35 (n 578) para 18.

⁵⁹⁹ *ibid.*

⁶⁰⁰ 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', Juan E Méndez (15 March 2015) A/HRC/28/68 para 80; CCPR/C/GC/35 (n 578) para 18; States are required to implement measures that promote the physical and mental wellbeing and care needs of children rather than measures that deprive their liberty.

⁶⁰¹ A/HRC/28/68 (n 600) para 80.

⁶⁰² *ibid.*; Children should not be held in facilities with adults who have been accused or convicted of criminal offences.

⁶⁰³ GA Res 65/229 (n 597) Rule 2(2); A/HRC/28/68 (n 600) para 80; UNGA Res 71/1, New York Declaration for Refugees and Migrants (3 October 2016) UN Doc A/RES/71/1 para 56; Joint General Comment No 3 of the CMW and No 22 of the CRC in the context of International Migration: General principles (16 November 2017) CRC/C/GC/22-CMW/C/GC/3 para 11; UNSMIL and OHCHR (n 20) 9.

⁶⁰⁴ Convention on the Rights of the Child (adopted 20 November 1989, entry into force 02 September 1990) 1577 UNTS 3 (CRC) Article 3; GARes 65/229 (n 597) Rule 2(2); New York Declaration (n 603) para 56; 'Report of the Special Rapporteur on the Human Rights of Migrants on a 2035 Agenda for Facilitating Human Mobility' (28 April 2017) UN Doc A/HRC/35/25 para 61; A/HRC/38/41 (n 286) para 41; UNSMIL and OHCHR (n 20) 9.

⁶⁰⁵ A/HRC/28/68 (n 600) para 80; A/HRC/37/50 (n 101) para 27.

⁶⁰⁶ A/HRC/28/68 (n 600) para 80.

5.2.2 The Prohibition of Collective Expulsions

The prohibition of collective expulsions of foreign nationals at the borders and the territories of States is a well recognised legal principle under general international law, and in international human rights law, in particular.⁶⁰⁷ Article 13 of the ICCPR states that the expulsions of undocumented migrants may only be carried out ‘in pursuance of a decision reached in accordance with law’ and in all cases except where there are compelling reasons of national security, such a person ‘shall ... be allowed to submit the reasons against his expulsion’, have his/her case reviewed, be provided with legal representation before a competent authority or an appropriate designated person. Article 22(1) of the Convention on Migrant Workers provides that ‘migrant workers and members of their families shall not be subject to measures of collective expulsion’.⁶⁰⁸ The prohibition of collective expulsion is also explicitly expressed in many of the CCPR’s General Comments and regional human rights treaties, including the African Charter and the ECHR.⁶⁰⁹

The prohibition of collective expulsion protects asylum seekers, victims of trafficking and irregular migrants against arbitrary expulsions to places where they would be exposed to risks of torture and other dangers such as trafficking.⁶¹⁰ The UNHCR has set forth guidelines on the interpretation of the meaning, scope and procedural requirements of the prohibition of collective expulsion.⁶¹¹ States have a duty to conduct a ‘reasonable and objective examination’ of the people’s particular circumstances and their protection needs to minimise the risk of expulsion of such persons.⁶¹² They must comply with Article 32(2) of the Refugee Convention which permits the expulsion of refugees ‘only in pursuance of a decision reached in accordance with due process of law’ (see section 2.2.2).⁶¹³

⁶⁰⁷ CCPR General Comment No15: The Position of Aliens Under the Covenant para 10; Concluding Observations of the Human Rights Committee on Dominican Republic (26 April 2001) CCPR/CO/71/DOM para 16; OHCHR, *Expulsions of Aliens in International Human Rights Law (Discussion Paper)* (OHCHR Geneva September 2006) 15.

⁶⁰⁸ Ibid; African Charter (n 189) Article 12(5); Protocol No 4 ECHR (n 199) Article 4.

⁶⁰⁹ UNHCR, *Submission by the UNHCR in the cases of ND and NT v Spain (Application Nos 8675/15 and 8697/15) before the ECtHR*, 15 November 2015) para 7-12; ECHR (n 199) Article 4 of Protocol No 4; ACHR (n 116) Article 22(9); African Charter (n 189) Article 12(5); Regional Treaties, Agreements, Declarations and Related, Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (adopted in Minsk on 26 May 1995, published 26 May 1995) Article 25(4); EU Charter (n 254) Article 19 (1); OHCHR (n 607) 16.

⁶¹⁰ OHCHR (n 607) 15-16; *Hirsi* (n 22) [174].

⁶¹¹ UNHCR (n 609); A/HRC/47/30 (n 160) para 40.

⁶¹² Ibid

⁶¹³ UNHCR, ‘Note on Expulsion of Refugees’ (4 August 1977) EC/SCP/3 para 4.

Refugees must be provided with the opportunity to ‘submit evidence to clear’ themselves, be afforded the right to appeal, be represented before a competent authority or a designated alternative.⁶¹⁴ The UNHCR has reasoned that the prohibition of collective expulsion under Article 32(1) of the Refugee Convention should have a ‘restrictive interpretation’ to ensure expulsions occur as a measure of ‘last resort and as the ‘only practicable means of protecting the legitimate interests of the State’.⁶¹⁵

The scope and standards of collective expulsion are also reiterated in the case law of the ECtHR.⁶¹⁶ The ECtHR has repeatedly stated that the core purpose of Article 4 of Protocol No 4 is to prevent the removal of ‘certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority’.⁶¹⁷ According to the Court, the term ‘expulsion’ should be interpreted ‘in the generic meaning, [...] and should therefore ‘not preclude extraterritorial application’.⁶¹⁸ This includes interceptions and summary returns of asylum seekers and migrants on the high seas and their removal to countries of transit within the context of migration control.⁶¹⁹ The CCPR has observed that laws and practices that permit ‘collective or mass expulsions’ are incompatible with Article 13 of the ICCPR.⁶²⁰

5.3 Libya’s Obligations: International Maritime Law and Organised Crime

Libya is a party to the 1979 International Convention on Maritime Search and Rescue [‘SAR Convention’].⁶²¹ Parties to this Convention are required to establish Maritime Rescue Coordination Centres (MRCC) within their search and rescue (SAR) area to ensure timely and predictable search and rescue operations, provide basic protection, critical emergency and humanitarian assistance to any persons found in distress at sea, regardless of their nationality,

⁶¹⁴ Refugee Convention (n 48) Article 32(2); EC/SCP/3 (n 613)

⁶¹⁵ EC/SCP/3 (n 613) paras 4 & 8; Expulsions should only be permitted in exceptional cases where there are ‘compelling reasons’ on grounds of national security concerns or public order.

⁶¹⁶ *Čonka v Belgium* (Application No 51564/99) (ECtHR, 5 February 2002) [59]; *ECtHR, Guide on Article 4 of Protocol No 4 to the European Convention on Human Rights-Prohibition of Collective Expulsions of Aliens* (30 April 2022) 5.

⁶¹⁷ *Hirsi* (n 22) [177]; *Khlaifia and Others v Italy* Application no 16483/12 (ECtHR, 15 December 2016) [238].

⁶¹⁸ *Hirsi* (n 22) [174]; ECtHR (n 616) 6.

⁶¹⁹ *Ibid*

⁶²⁰ General Comment No15 (n 607) para 10; A/HRC/47/30 (n 160) para 40.

⁶²¹ UNSMIL and OHCHR (n 16) 24; WhatConvention.Org, ‘Parties to the SAR Convention’ <<https://tinyurl.com/y9ab6mc3>> accessed 26 February 2025; Libya acceded to the SAR Convention on 28 April 2005.

status or circumstances, and to deliver such persons to a 'place of safety'.⁶²² Under international law, a 'place of safety' is a location where SARs terminate and rescued persons at sea can be safely disembarked.⁶²³ A place of safety must have the capacity to provide basic protection, and for basic needs and services, including food, medical care, shelter and transport facilities to enable rescued persons to continue their journeys to their intended destinations.⁶²⁴ For refugees, asylum seekers and migrants, a place of safety must also guarantee the protection of their fundamental human rights provided under the Refugee Convention.⁶²⁵

Several UN agencies, including the UNHCR, have consistently maintained that Libya is not 'a place of safety' for the purposes of disembarking refugees and migrants rescued at sea under international law.⁶²⁶ At the time of the implementation of the Declaration, Libya lacked its own MRCC and other necessary institutional structures to undertake safe search and rescues and to protect the lives and safety of disembarked refugees and migrants.⁶²⁷

Libya is party to the UN Convention against Transnational Organized Crime and its supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Protocol Against the Smuggling of Migrants by Land, Sea and Air.⁶²⁸ Although these instruments do not fall within the scope of international human rights law, they are relevant in the context of Libya where human smuggling, trafficking and other criminal networks play a significant role in irregular migration to Europe.⁶²⁹

State parties to the above Convention and its Protocols are required to adopt measures to 'prevent and combat' the trafficking and smuggling of persons, and to 'protect and assist' the

⁶²² SAR Convention (as amended) (adopted 27 April 1979, entry into force 22 June 1985) 1403 UNTS IMO (092)/S439 (Chapter six, 6.1; Paragraph 1.3.2 of the Annex ; UNSMIL and OHCHR (n 20) 10; UNSMIL and OHCHR (n 16) 24; Maccanico (n 517) 10; SOS Mediterranée, 'Government and Rescue Coordination Centres: Place of Safety' <<https://tinyurl.com/mrh7v45u>> accessed 29 October 2021

⁶²³ SAR Convention (n 622) para 1.3.2 of the Annex; SOS (n 622).

⁶²⁴ UN, 'Legal Brief on International Law and Rescue at Sea' (undated) Point 6 (Place of safety) <<https://tinyurl.com/395yzt5p>> accessed 29 October 2021

⁶²⁵ Maccanico (n 517) 10.

⁶²⁶ SAR Convention (n 622) para 1.3.2 of the Annex; UN (n 624); S/2017/761 (n 24) para 46; UNSMIL and OHCHR (n 16) 24; 'UNHCR Position' (n 104); OHCHR (n 97) 3; OHCHR (n 23) 2.

⁶²⁷ SAR Convention (n 622) para 1.3.2 of the Annex; Amnesty International (n 524) 26.

⁶²⁸ [...] (adopted 15 November 2000, entry into force 29 September 2003) GA Res 55/25; The Convention has 191 State Parties and 147 signatories; UNSMIL and OHCHR (n 16) 24.

⁶²⁹ *ibid.*

victims of smuggling and trafficking networks ‘with full respect for their human rights’.⁶³⁰ States also have a duty to ‘adopt such legislative and other measures’, prevent smuggling and trafficking networks operating within their territories from committing human rights abuses, investigate and prosecute the perpetrators, and provide a remedy to victims.⁶³¹ Although an anti-trafficking bill was drafted by Libya’s Ministry of Justice in 2013 to protect victims of human trafficking, it has not yet been passed into law.⁶³²

5.4 Libya’s National Asylum Framework and Practice

Libya lacks a cohesive immigration or appropriate legal framework on migration management, including human smuggling and trafficking.⁶³³ Existing laws and regulations for migration governance date back to the 1950s, reflecting Libya’s need for foreign guest workers and Gaddafi’s foreign policy objectives at that time.⁶³⁴ The laws contain significant gaps and do not meet international standards to adequately manage migration in Libya.⁶³⁵

Libya’s Law No 6 of 1987 criminalises the irregular entry, stay and exit of persons to and from Libya without any regard to their specific protection needs.⁶³⁶ It does not differentiate between refugees, asylum seekers, migrants in vulnerable situations, including victims of trafficking, migrant children and other persons in need of international protection.⁶³⁷

In 2004, Law No 6 was amended to impose stricter entry visa requirements on all foreign nationals, except Arabs.⁶³⁸ The amended law penalises the irregular entry to, stay in or exit from Libya with a fine of at least 2000 LYD (Libyan Dinar) and in some cases, mandatory

⁶³⁰ GA Res 55/25 (n 628) preambular para 1, 9 Annex II, Articles 2, 6-9, 25; Annex III, Article 2; UNSMIL and OHCHR (n 16) 24.

⁶³¹ *ibid.*

⁶³² State Department, *Trafficking in Persons Report-Libya* (19 June 2012); UNSMIL and OHCHR (n 20) 11, footnote 41; UNSMIL and OHCHR (n 16) 24.

⁶³³ *Hirsi* (n 22) [107]; S/2017/761 (n 24) para 45; ECCHR, FIDH and LJIL (n 23) 14, 38; Migration is managed with a series of laws and decrees.

⁶³⁴ UNSMIL and OHCHR (n 20) 11; UNSMIL and OHCHR (n 16) 24; ECCHR, FIDH and LJIL (n 23) 38.

⁶³⁵ UNSMIL and OHCHR (n 20) 11; S/2017/761 (n 24) para 45.

⁶³⁶ Law No (6) of 1987 on Organising the Entry, Residence, and Exit of Foreigners in Libya (02 March 1987) 1396 FDP Articles 17-20; UNSMIL and OHCHR (n 20) 11; UNSMIL and OHCHR (n 16) 24; Law No 6 was reflective of Gaddafi’s pro-Arab policy goals at the time.

⁶³⁷ Law No 6 (n 636) Articles 2 and 3; UNSMIL and OHCHR (n 20) 11; State Department (n 632); UNSMIL and OHCHR, (n 16) 24; ECCHR, FIDH and LJIL (n 23) 38; Entry visa requirements and permits applied to all foreign nationals except nationals of Arab states, Ethiopia and Eritrea.

⁶³⁸ Law No (2) of 2004 amending Certain Provisions of Law No (6) of 1987 on Organising the Entry and Residence of Foreigners in Libya, 1372 FDP, Article 1; UNSMIL and OHCHR (n 20) 11; ECCHR, FIDH and LJIL (n 23) 38.

detention while awaiting deportation from Libya.⁶³⁹ The law also imposes an automatic re-entry ban on refugees and irregular migrants,⁶⁴⁰ and penalises the smuggling of 'immigrants by any means'.⁶⁴¹

In 2010, Libya adopted Law No 19 on Combatting Irregular Migration on the admission, removal, assistance, and employment of irregular migrants in response to the change in its relations with the EU.⁶⁴² Law No 19 repealed any previous provisions on immigration that were found to be contradictory with it.⁶⁴³ Article 10 of Law No 19 provides that the arrest of irregular migrants will be done in 'a humanitarian manner that preserves their dignity and rights'. Even so, Law 19 still criminalises and penalises the irregular entry, stay and exit with automatic detention, hard labour or by a fine of up to 1,000 LYDs and expulsion from Libya.⁶⁴⁴ The law also punishes persons for other 'acts of illegal immigration', such as 'smuggling', the 'transportation', facilitation and 'harbouring' of illegal immigrants in Libya with mandatory detention while awaiting their deportation.⁶⁴⁵ According to Libya's Penal Code, persons convicted of immigration offences could face up to three years imprisonment.⁶⁴⁶

Article 6 of Law 19 provides that 'in all cases, a foreigner convicted of any of the crimes set forth in this law shall be expelled from [Libyan] territory ... immediately upon execution of the sentence'. This implies that all irregular migrants in Libya could be expelled upon their release from detention, irrespective of their specific need for international protection.⁶⁴⁷ Like Law No 6, Law 19 does not take into account the specific protection needs of refugees, asylum seekers, vulnerable migrants, victims of trafficking, stateless persons or children as provided under international law.⁶⁴⁸ Consequently, all rescued and intercepted refugees, asylum seekers and

⁶³⁹ Law No 6 (n 636) Article 18-19; Libya Law No 2 (n 638) Article 2; UNSMIL and OHCHR (n 20) 11; UNSMIL and OHCHR (n 16) 24-25; OHCHR (n 23) 7.

⁶⁴⁰ Libyan Law No 6 (n 636) Article 18; OHCHR (n 23) 2.

⁶⁴¹ Libya Law No 2 (n 638) Article 2; UNSMIL and OHCHR (n 16) 25; ECCHR, FIDH and LJIL (n 23) 38, footnote 164.

⁶⁴² Law No (19) of 1378 FDP-2010 AD on Combatting Illegal Immigration (The General People's Congress (Libya) Articles 2-3, 11; ECCHR, FIDH and LJIL (n 23) 38.

⁶⁴³ Law No 19 (n 642) Article 13.

⁶⁴⁴ *ibid* Articles 1-6 and 11; ECCHR, FIDH and LJIL (n 23) 38; OHCHR ' (n 23) 7; Law 19 legitimises forced labour.

⁶⁴⁵ Law No 19 (n 642) Article 2; ECCHR, FIDH and LJIL (n 23) 38; OHCHR (n 23) 7.

⁶⁴⁶ Law No 5 of 2014 amending Article 195 of the Penal Code (adopted 1953) (LBY-2014-L-98869) Article 22; UNSMIL and OHCHR (n 20) 11.

⁶⁴⁷ ECCHR, FIDH and LJIL (n 23) 38.

⁶⁴⁸ UNGA Res 55/22 Protocol against the Smuggling of Migrants by Land, Sea and Air (adopted 15 November 2000) Article 7; UNHCR 'Hirsi' (n 120) para 2.1.2; OHCHR (n 23) 7.

vulnerable migrants returned to Libya face automatic and arbitrary detention and other criminal penalties for prolonged periods, while awaiting their deportation from Libya.⁶⁴⁹

As noted in Chapter Four, irregular migrants in Libya includes persons who have fled their own countries for fear of persecution and situations of generalised violence that constitute serious and indiscriminate threats to life, physical integrity or freedom and are in need of international protection.⁶⁵⁰

Article 7 of the UNGA's Protocol against the Smuggling of Migrants by Land, Sea and Air, requires all its 151 State parties, including Libya, to ensure that all their cooperative measures 'to prevent and suppress the smuggling of migrants by sea' comply with the international law of the sea. The UNHCR has also affirmed that, '[n]either the general principle of "co-operation between states" nor the ... Protocol against the Smuggling of Migrants ... exempt[s] states from complying with other international standards or treaty obligations.'⁶⁵¹

Article 8 of Law No 19 provides that convicted persons could be exempted from penalties if they provide authorities with information that leads to the detection, arrest and prosecution of other offenders, especially human smugglers.⁶⁵² Article 10 also provides for those arrested for immigration related offences to be referred to competent judicial authorities but it does not provide any additional procedural safeguards.⁶⁵³ There are no legal provisions to regulate the administrative detention of irregular migrants in Libya.⁶⁵⁴ Furthermore, the law does not provide any opportunities for detainees to challenge decisions concerning their detention or deportation.⁶⁵⁵ The public prosecutor can suspend criminal proceedings against any defendants, including persons held in detention for immigration related offences.⁶⁵⁶ Therefore,

⁶⁴⁹ UNSMIL and OHCHR (n 20) 11; UNSMIL and OHCHR (n 16) 25; Amnesty International, 'Libya: Rule of Law and Rule of Militias?' 2012) <<https://www.amnesty.org.uk/files/libyareport.pdf>> accessed 27 April 2023 37; ECCHR, FIDH and LJIL (n 23) 7, 38.

⁶⁵⁰ UNHCR UNHCR 'Hirsi' (n 120) para 3.2.1.

⁶⁵¹ GA Res 55/22 (n 646) Article 7; UNHCR 'Hirsi' (n 120) para 2.1.2; OHCHR (n 23) 7.

⁶⁵² UNSMIL and OHCHR (n 16) 25.

⁶⁵³ Law No 19 (n 642) Article 10; ECCHR, FIDH and LJIL (n 23) 38.

⁶⁵⁴ UNSMIL and OHCHR (n 20) 11; Global Detention Project (GDP), 'Immigration Detention in Libya' (*Global Detention Project*, February 2015) 4 <<https://www.refworld.org/docid/5567387e4.html>> accessed 13 February 2023

⁶⁵⁵ ECCHR, FIDH and LJIL (n 23) 38.

⁶⁵⁶ UNSMIL and OHCHR (n 20) 11; UNSMIL and OHCHR (n 16) 24-25.

administrative actions, including the deportation of migrants, foreseen in other laws, can still be executed.⁶⁵⁷

Available evidence shows that Laws No 6 and 19 continue to serve as Libya's main legal framework for migration management.⁶⁵⁸ Systematic and widespread detention also remain the main containment strategy to deter individuals attempting to reach Europe across the Mediterranean Sea.⁶⁵⁹ Credible reports have shown that the vast majority of refugees and migrants are subjected to prolonged detention without a charge, trial or conviction under Libyan laws.⁶⁶⁰ As was explained under section 5.2 above, subjecting refugees, asylum seekers and migrants to automatic detention solely for the purposes of migration control is inconsistent with international human rights law.⁶⁶¹

5.5 Lack of Asylum and International Protection in Libya

Besides having an inadequate immigration framework, Libya lacks a national asylum framework, institutions or established procedures for recognising refugees and asylum seekers.⁶⁶² Refugees and asylum seekers lack access to a formal registration or legal process, lawyers or judicial authorities.⁶⁶³ Libya drafted an asylum bill in 2007 with a lot of input from the UNHCR⁶⁶⁴ but failed to pass it into legislation.⁶⁶⁵

Libya's Constitutional Declaration of 2011 provides for the exercise of civil and judicial rights⁶⁶⁶ and 'guarantee[s] the right of asylum by virtue of the law'.⁶⁶⁷ Article 10 of the Constitutional Declaration also recognises the right of political refugees' and prohibits their 'extradition' from Libya.⁶⁶⁸ However, Libya has still not incorporated the general principle of asylum and the

⁶⁵⁷ *ibid*

⁶⁵⁸ ECCHR, FIDH and LJIL (n 23) 39.

⁶⁵⁹ *ibid*.

⁶⁶⁰ UNSMIL and OHCHR (n 16) 25; ECCHR, FIDH and LJIL (n 23) 7.

⁶⁶¹ UNGA Res45/158 (n 573) Article 16; CMW/C/GC/2 (n 575) paras 23-26; UNSMIL and OHCHR (n 20) 9; UNSMIL and OHCHR (n 16) 23; ECCHR, FIDH and LJIL (n 23) 38.

⁶⁶² *Hirsi* (n 22) [153]; 'UNHCR Position' (n 104)) para 31; UNSMIL and OHCHR (n 20) 9, 11; S/2018/807 (n 559) para 44; UNSMIL and OHCHR (n 16) 22; Amnesty International (n 10) 20; ECCHR, FIDH and LJIL (n 23) 39.

⁶⁶³ UNHCR 'Hirsi' (n 120) para 3.1.3; UNSMIL and OHCHR (n 20) 12; UNSMIL and OHCHR (n 16) 25; ECCHR, FIDH and LJIL (n 23) 39.

⁶⁶⁴ UNHCR 'Hirsi' (n 120) para 3.1.2.

⁶⁶⁵ *ibid*

⁶⁶⁶ The Constitutional Declaration (03 August 2011) as amended in 2016 (The Interim National Transitional Council, Libya) Articles 7, 8 and 12; UNSMIL and OHCHR (n 16) 25; State Department (n 479) 1.

⁶⁶⁷ Constitutional Declaration (n 666) Article 10; UNHCR 'Hirsi' (n 120) para 3.1.2; UNSMIL and OHCHR (n 16) 25.

⁶⁶⁸ See also, UNHCR 'Hirsi' (n 120) para 3.1.2; UNSMIL and OHCHR (n 16) 25; ECCHR, FIDH and LJIL (n 23) 39.

provisions of international protection into a national legislation.⁶⁶⁹ Moreover, Libya does not provide any regular migration pathways to ensure regular entry and stay of persons based on compassionate, humanitarian or other grounds, in accordance with international human rights law.⁶⁷⁰

The UNHCR is responsible for registering and the examining all asylum claims and international protection,⁶⁷¹ providing documentation and humanitarian assistance to other persons of international concern in Libyan territory.⁶⁷² Despite this, Libyan authorities have 'never recognised' the UNHCR's official mandate and operations 'in any way'.⁶⁷³ Libyan authorities have refused to sign a cooperation agreement with the UNHCR to formally recognise its presence and operations in Libya.⁶⁷⁴ Furthermore, the UNHCR's activities are impeded by constant legal, administrative and operational bottlenecks imposed by Libyan authorities.⁶⁷⁵

Libyan authorities restrict the UNHCR's access to detention centres and access to their assistance, international protection and asylum registration to only nine designated nationalities held in 'official' detention centres.⁶⁷⁶ The UNHCR is prevented by Libyan authorities from issuing 'proper documentation' to registered refugees and asylum seekers to prevent them from having any proof of their claims for asylum or international protection.⁶⁷⁷ Figure 5 below shows a photo of a proof of registration for refugees in Libya.

⁶⁶⁹ UNHCR 'Hirsi' (n 120) para 3.1.2; UNSMIL and OHCHR (n 16) 25; ECCHR, FIDH and LJIL (n 20) 39.

⁶⁷⁰ UNHCR 'Hirsi' (n 120) para 3.1.2; OHCHR (n 20) 14.

⁶⁷¹ UNHCR 'Hirsi' (n 120) para 3.1.3; S/2018/807 (n 531).

⁶⁷² S/2018/807 (n 559) 24.

⁶⁷³ *Hirsi* (n 22) [130]; 'UNHCR Position' (n 104) para 31, footnote 25; OHCHR (n 23) 14.

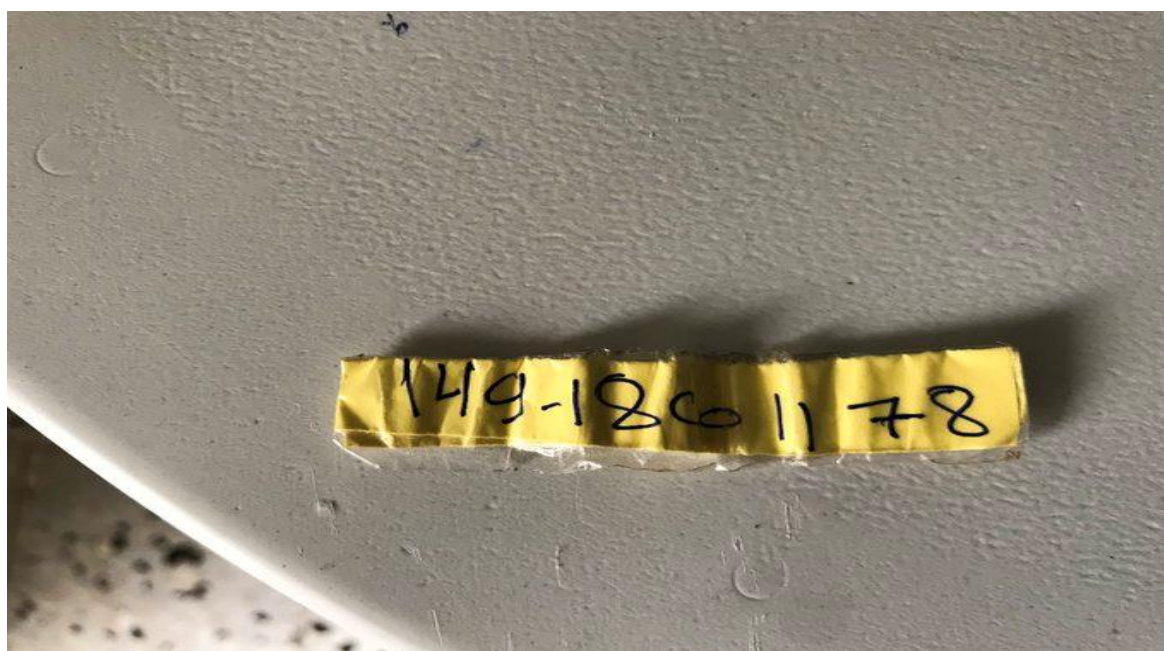
⁶⁷⁴ *Hirsi* (n 22) [30]; UNHCR 'Hirsi' (n 120) para 3.1.3

⁶⁷⁵ *Ibid* (n 98) paras 3.1.2-3.1.3; UNSMIL and OHCHR (n 20) 12; OHCHR (n 23) 14.

⁶⁷⁶ UNSMIL and OHCHR (n 16) 22; 'UNHCR Position' (n 104) para 31; S/2018/807 (n 559) 'Libya: OHCHR (n 30) 7; The nationalities (with a few exceptions) who are permitted by Libya to apply for international protection include Ethiopia, Eritrea, Iraq, Palestine, Somalia, Sudan, South Sudan, Syria and Yemen.

⁶⁷⁷ UNHCR 'Registration' (n 104).

Figure 5: Refugee Registration in Libya: Photo of a 'Plastified' Slip of Paper⁶⁷⁸



Furthermore, the capacity of the UNHCRs to provide services and international protection is also limited by ongoing conflicts, insecurity, violence, institutional incapacity and persistent human rights violations against refugees and migrants, particularly in Tripoli where detention centres are routinely bombed.⁶⁷⁹

In the absence of documentation, registered refugees and asylum seekers are all lumped together as 'migrants' rendering them susceptible to arbitrary return to countries where they could face a serious risk of harm or ill-treatment and subsequent *refoulement* to countries of origin.⁶⁸⁰ The UNHCR has observed that many of the people recorded as 'migrants' by the IOM could in fact be refugees, asylum seekers and stateless persons in need of international protection.⁶⁸¹ As of December 2022, there were about 694,398 migrants in Libya, representing over 42 nationalities.⁶⁸² That included 45,915 registered refugees and asylum seekers under the UNHCR.⁶⁸³

⁶⁷⁸ *ibid*

⁶⁷⁹ *Hirsi* (n 22) [130], [153]; 'UNHCR Position' (n 104) para 31.

⁶⁸⁰ *ibid*.

⁶⁸¹ *Ibid* para 5.

⁶⁸² IOM (n 427) 5; OHCHR (n 23) 2; Accurate data is difficult to obtain because a lack of publicly available official government data.

⁶⁸³ UNHCR, 'Operational Data Portal: Refugee Situations (Libya)' <<https://data.unhcr.org/en/country/lby>> accessed 24 March 2023; OHCHR (n 23) 2; Over 800,000 people in Libya are in need of humanitarian assistance and of these, asylum seekers, refugees and migrants are amongst the most vulnerable persons.

A lack of asylum framework means that refugees, asylum seekers and migrants are practically denied access to safe admission, stay, asylum and international protection in Libya.⁶⁸⁴ The absence of procedures for processing asylum claims and recognising refugee status put refugees and migrants in situations of vulnerability and precariousness,⁶⁸⁵ giving rise to particular protection needs.⁶⁸⁶

Multiple reports show that refugees and migrants, particularly of SSA nationals faced discrimination, increased vulnerability and a lack of basic needs, protection and services, including employment.⁶⁸⁷ Refugees and migrants in Libya are systematically arrested, criminalised, arbitrarily held for long periods in horrific, degrading and inhuman conditions in detention facilities controlled by either government officials, armed militias and criminals, depending on who controls a particular territory at any given time.⁶⁸⁸

Outside the detention centres, refugees and migrants in many parts of Libya face exploitation, abduction, trafficking, extortion, torture, violence and death.⁶⁸⁹ The situation is worse for African nationals who are often abducted, detained and sold to traffickers.⁶⁹⁰

The ECtHR and other reliable sources have observed the absence of a national asylum system, combined with the lack of compliance with its international obligations, as well as certain practices of Libya violate Libyan law and are 'manifestly contrary to the principles' of international law, including Libya's own international obligations.⁶⁹¹

⁶⁸⁴ OHCHR (n 23) 2.

⁶⁸⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entry into force 1 July 2003) UNGA Doc A/RES/45/158 Article 16; CMW/C/GC/2 (n 575) paras 23-26; OHCHR (n 23) 14; ECCHR, FIDH and LJIL (n 23) 38, 39.

⁶⁸⁶ A/HRC/48/83 (n 23) para 66; OHCHR (n 23) 7.

⁶⁸⁷ 'UNHCR Position' (n 104) para 6.

⁶⁸⁸ *Hirsi* (n 22) [145]; UNSMIL (n 15) para 41; 'UNHCR Position' (n 104) para 6; S/2017/761 (n 24) para 41; UNHCR (n 104); Amnesty International (n 10) 21-22; Mat Nashed, 'What Happens to Migrants Forcibly Returned to Libya?' (*The New Humanitarian*, 5 August 2020), <<https://tinyurl.com/3erykyx>> accessed 07 Nov 2020

⁶⁸⁹ S/2017/761 (n 24) para 43; HRW (n 17); Nikolaj Nieslsen, 'Internal EU Report Exposes Libya Turmoil' (*EU Observer*, 20 February 2017) <<https://euobserver.com/migration/136973>> accessed 20 November 2021

⁶⁹⁰ S/2017/761 (n 24) para 43.

⁶⁹¹ *Hirsi* (n 22) [107], [128]; UNSMIL and OHCHR (n 20) 11; S/2017/761 (n 24) para 46; ECCHR, FIDH and LJIL (n 23) 38-39.

5.6 Political Situation, Conflict, Insecurity For Refugees and Migrants

As mentioned in Chapter Four, Libya has been in violent armed conflict since the fall of the Gaddafi government in 2011.⁶⁹² To date, several efforts to end the conflict and to achieve political unity have failed.⁶⁹³ From 2019 to 2020, two years after the implementation of the Declaration, the conflict escalated between the GNA and its affiliated militias and the Libyan National Army over the control of western Libya, including Tripoli.⁶⁹⁴ This resulted in several deaths and the displacement of over 400, 000 people.⁶⁹⁵ In March 2021, a 'unified' Government of National Unity (GNU)⁶⁹⁶ was formed 'for the first time in seven years'⁶⁹⁷ but that also collapsed in March 2022.⁶⁹⁸

The persistent armed conflict and political disunity have prevented the establishment of a central and effective government with the capacity to maintain security and the rule of law in Libya.⁶⁹⁹ Consequently, the responsibility over Libyan security and civilian administration fell to different local political leaders, including tribal leaders, militias and Islamist groups which have grown in strength and influence over time.⁷⁰⁰ Elected governments have failed to keep the armed groups under control and to maintain stability.⁷⁰¹ This has resulted in constant waves of instability, extreme violence, lawlessness and serious crimes perpetrated by armed groups and militias to influence the political process and to strengthen their political power bases.⁷⁰²

⁶⁹² S/2017/466 (n 23); A/HRC/48/83 (n 23) para 1; HRW (n 17) 11; Amnesty International (n 89) 14; Amnesty International (n 477) 14; OHCHR (n 23) Sami Zaptia, 'PFG Western Division Nasr Brigade Withdraws from Zawia Refinery After Sanalla Public Accusation of Fuel Smuggling Collusion' (*Libya Herald*, 05 January 2017) <<https://tinyurl.com/fhpmu6ej>> accessed 09 April 2023; See section 4.5 above.

⁶⁹³ OHCHR (n 23) 2; USCIRF, 'Religious Freedom Conditions in Libya' (*USCIRF*, December 2023) <<https://tinyurl.com/bddpmv77>> accessed 19 May 2024; BBC (n 398).

⁶⁹⁴ Amnesty International (n 87) 13; HRW (n 17).

⁶⁹⁵ Amnesty International (n 87) 13.

⁶⁹⁶ State Department, 'Libya 2022 Human Rights Report' (20 March 2023) <<https://tinyurl.com/ywm9xn3t>> accessed 12 June 2023; The GNU was an interim government formed by a 75-member UN-facilitated Libyan Political Dialogue Forum established in 2019 and later endorsed by the Libyan House of Representatives.

⁶⁹⁷ Polat (n 479); BBC News (n 398); The GNU was an internationally recognised government based in Tripoli, and led by Prime Minister Abdul Hamid Dbeibeh although it was shortlived.

⁶⁹⁸ BBC News (n 398).

⁶⁹⁹ LFJL, 'How Did We Get Here? (Timeline)' 2013) <<https://www.reportinglibya.org/>> accessed 02 March 2023; Netherlands (n 480) 6; IRC, 'These Illustrations Reveal the Human Stories of the World's most Dangerous Migration Route' <<https://tinyurl.com/3z4fe44h>> accessed 02 April 2023; ECCHR, FIDH and LJIL (n 23) 15; OHCHR (n 23) 2; At some point, almost all foreign entities, including UN bodies and embassies, evacuated to Tunisia because of the conflict and insecurity concerns.

⁷⁰⁰ Netherlands (n 480) 6-7.

⁷⁰¹ *ibid* 6.

⁷⁰² *ibid*; Amnesty International (n 477).

The spread of conflicts and insecurity in Libya also threatened the lives and safety of the refugees and migrants throughout Libya.⁷⁰³ Refugees and migrants have been subjected to systematic human rights abuses and violations, including forced labour, torture and ill-treatment by both State and members of armed groups.⁷⁰⁴

Although successive governments have promised to uphold the rule of law and human rights, they have consistently failed to hold powerful militias, armed groups and other perpetrators to account for their horrific human rights violations, including war crimes in the country.⁷⁰⁵ According to Amnesty international, Libyan authorities have instead legitimised, promoted and even treated the leaders of militias and armed groups with deference.⁷⁰⁶

Numerous reports have also shown that Libyan authorities have incorporated many of the militias and armed groups, including those responsible for perpetrating human rights violations, into national institutions, including the DCIM, law enforcement and national security on a payroll.⁷⁰⁷ A Tripoli based militia group, Special Deterrence Forces (al-Radaa) was incorporated into the Ministry of Interior in 2018 and the Presidential Council of the GNA in September 2020 despite several documented allegations of kidnappings, enforced disappearances, torture, unlawful killings and forced labour from the UN, Amnesty International and other international bodies.⁷⁰⁸ In January 2021, the Presidential Council of the GNA appointed Abdel Ghani al-Kikli, the leader of one of the most powerful militia groups, the Abu Salim Central Security Force as the head of the newly created 'Stability Support Authority', a law enforcement agency that reports directly to the presidency.⁷⁰⁹ The appointment also came despite allegations of war crimes, torture, and other serious human rights violations,

⁷⁰³ ECCHR, FIDH and LJIL (n 23) 15.

⁷⁰⁴ Amnesty International (n 89) 14; ECCHR, FIDH and LJIL (n 23) 15; OHCHR (n 23) 2.

⁷⁰⁵ Amnesty International (n 477) 14; Amnesty International (n 89) 14.

⁷⁰⁶ Amnesty International (n 477) 14.

⁷⁰⁷ Netherlands (n 480) 6-7; Amnesty International (n 477); Amnesty International (n 89) 14 ; ECCHR, LFJL and FIDH, *Situation in Libya—Article 15 Communication on the Commission of Crimes against Migrants and Refugees in Libya* (2021) 15; OHCHR (n 23) 2.

⁷⁰⁸ HRW (n 20) Amnesty International (n 477).

⁷⁰⁹ *ibid*; Ghani al-Kikli's powers broadly encompass law enforcement, including arresting individuals on matters related to 'national security'.

including abductions, unlawful killings, sexual violence against women detainees against Ghani al-Kikli's militia group over the course of 10 years.⁷¹⁰

5.7 The Smuggling and Trafficking Industry in Libya

Smuggling and trafficking networks have long operated across Libya with impunity.⁷¹¹ The industry is a major source of income for many Libyans, especially in the coastal areas, bringing in between 275 to 325 million euros in revenue each year.⁷¹² Typically, the smuggling and trafficking of persons are combined with the illicit trade of arms, drugs, oil and gold.⁷¹³ Smugglers operate along northern and southern migratory routes in Libya.⁷¹⁴ Armed groups and militias are often involved in smuggling business directly or indirectly in collusion with other criminals and Libyan authorities for personal gains.⁷¹⁵

After the breakout of the Libyan conflict in 2011, smuggling and trafficking activities grew exponentially.⁷¹⁶ As the conflicts spread and security worsened, criminals and smugglers capitalised on the absence of effective central authority, control over territories and a breakdown in the rule of law.⁷¹⁷ Between 2012 and 2016,⁷¹⁸ particularly after 2014, human smuggling and trafficking developed into a multi-billion-dollar business because of recurrent conflicts and a deteriorating economy,⁷¹⁹ and a drastic rise in the use of the *hawala* system,⁷²⁰ and a failing formal banking system.⁷²¹

⁷¹⁰ *ibid* (n 477); Ghani al-Kikli became one of the most powerful militia leaders in Tripoli. In spite of their involvement in serious human rights abuses, Ghani al-Kikli and other militia leaders have been given multiple government positions.

⁷¹¹ UNSMIL and OHCHR (n 20) 12; S/2017/466 (n 23) para 255; ECCHR, FIDH and LJIL (n 23) 17; Libya lacks the necessary law enforcement and security apparatus to combat smuggling.

⁷¹² EEAS, *EUNAVFOR MED Op SOPHIA-Six Monthly Report, 1 January-31 October 2016, 14978/16* (Council of the EU 30 November 2016) 7.

⁷¹³ S/2017/466 (n 23) para 255.

⁷¹⁴ *ibid* paras 255-262; ECCHR, FIDH and LJIL (n 23) 17.

⁷¹⁵ S/2017/466 (n 23) para 255; EEAS (n 712) 7.

⁷¹⁶ ECCHR, FIDH and LJIL (n 23) 16; In 2016, the smuggling and trafficking industry contributed about \$978 million to the Libyan economy; This amounted to about 3.4% of Libya's GDP in 2015.

⁷¹⁷ *ibid* 15, footnote 30.

⁷¹⁸ *ibid* 16.

⁷¹⁹ EEAS (n 712) 7; HRW (n 20) 11.

⁷²⁰ ECCHR, FIDH and LJIL (n 23) 16; The *hawala* system is an informal money transfer system. It lacks a paper trail and it is, therefore, harder to track money and the people involved. It was strictly controlled under the Ghaddafi regime.

⁷²¹ *ibid* 16.

The smuggling and trafficking in persons and illicit goods became a major source of funding for many militias and armed groups to pay for the weapons used in fuelling the conflict.⁷²² Refugees and migrants became increasingly commoditised, detained, sold, exploited and extorted for financial gains by competing smuggling groups.⁷²³ The EU⁷²⁴ and UN have reported that some Libyan authorities are also involved in the human smuggling and trafficking business.⁷²⁵ Many refugees and migrants often suffer very serious human rights abuses and violations at the hands of smugglers and traffickers with impunity, both inside Libya,⁷²⁶ and throughout their entire journey to Europe.⁷²⁷

5.8 Systematic Human Rights Violations in Libya

The human rights violations and abuses against refugees and migrants in Libya have been well documented by UN bodies, NGOs and international actors for years.⁷²⁸ Refugees and migrants in Libya face unsafe and life-threatening situations, a lack of protection, access to essential needs and services, including food, housing, hygiene, medicine and safe drinking water.⁷²⁹

In 2016, the UN Support Mission in Libya (UNSMIL) and the OHCHR published a landmark report showing overwhelming evidence of horrific [human rights] abuses' perpetrated against refugees and migrants in Libya.⁷³⁰ This report described the human rights situations of refugees and migrants in Libya as a 'complete human rights crisis' due to the extent of violence and abuses they face in detention.⁷³¹ The report also found overwhelming evidence showing that returned persons, particularly SSA nationals, were routinely subjected to arbitrary

⁷²² S/2017/466 (n 23) 103; ECCHR, FIDH and LJIL (n 23) 16.

⁷²³ Ibid; Some migrants and refugees are also injured and killed; IOM, 'IOM Learns of 'Slave Market' Conditions Endangering Migrants in North Africa' <<https://tinyurl.com/5n8jwpur>> accessed 19 February 2023

⁷²⁴ EEAS (n 712) 7.

⁷²⁵ UNSMIL and OHCHR (n 20) 12.

⁷²⁶ A/HRC/37/50 (n 101) para 30; UNSMIL and OHCHR (n 20) 12; The Special Rapporteur on Torture found that border officials are often complicit or collude in the smuggling of persons and irregular border crossings in exchange for a share in the proceeds from the smuggling and trafficking business.

⁷²⁷ A/HRC/48/83 (n 23) para 67.

⁷²⁸ *Hirsi* (n 22) [118]; Global Detention (654) 3; S/2017/466 (n 23) para 104; CommDH(2019)' (n 31) para 11; IOM (n 723); UNSMIL and OHCHR (n 16) 38-47; A/HRC/48/83 (n 23) para 66; Amnesty International (n 477); Amnesty International (n 89); OHCHR (n 23) 7.

⁷²⁹ IOM, 'Libya Migrant Report 37 (May-June 2021) Report 37 (IOM 2021) 4' <<https://tinyurl.com/2p8bkf7j>> accessed 24 October 2021; HRW (n 17); Palm (n 104) 14; IOM, (n 427) 11-13.

⁷³⁰ UNSMIL and OHCHR (n 20); UNSMIL and OHCHR (n 16) 4, 8; The report was published on 13 December 2016. A second was published in 2018.

⁷³¹ UNSMIL and OHCHR (n 20) 1; Palm (n 25) 254; Palm (n 104) 14; UNSMIL and OHCHR (n 16) 4.

detention in inhumane and unsanitary conditions, without access to sufficient food, clean water, medical care, basic rights and protection.⁷³²

Before the implementation of the Declaration in 2017, Médecins Sans Frontières (MSF) warned the European Council about the Libyan government's lack of sufficient control over the entire Libyan territory, and the incapacity to combat organised human trafficking.⁷³³ The MSF also cautioned EU States about the absence of a national asylum framework, Libya's incapacity to provide adequate protection safeguards for rescued and disembarked persons, process asylum claims 'fairly and efficiently', and to operate detentions in accordance with international refugee law.⁷³⁴

As will be explained in detail below, refugees and migrants are routinely subjected to arbitrary detention, torture, ill-treatment, trafficking, sexual violence, extortion, exploitation, unlawful killings, enforced disappearance, slavery, forced prostitution and forced labour.⁷³⁵ Women, girls, and in some cases, boys and men in detention are subjected to rape and other sexual violence by armed groups.⁷³⁶ Women are also pushed into prostitution while men face forced labour.⁷³⁷

The human rights abuses perpetrated against refugees and migrants must be viewed within the context of general widespread attacks against civilians in Libya.⁷³⁸ Refugees and migrants are targeted based on their migration status and vulnerability due to the absence of legal protection for such persons in Libya.⁷³⁹ Their situation is exacerbated by the absence of meaningful alternative pathways for accessing safe territories and human rights protection outside Libya.⁷⁴⁰ Refugees and migrants are attacked in large numbers and over vast

⁷³² UNSMIL and OHCHR (n 20) 1; Palm, (n 25) 254; Palm (n 104) 14.

⁷³³ *ibid*

⁷³⁴ *ibid*

⁷³⁵ UNSMIL and OHCHR (n 20) 17-18; S/2017/761 (n 24) para 40-47; A/HRC/48/83 (n 23) para 61; HRW (n 17); Amnesty International (n 89); ECCHR, FIDH and LJIL (n 23) 29.

⁷³⁶ UNSMIL and OHCHR (n 20) 12; S/2018/807 (n 559) para 42.

⁷³⁷ S/2018/807 (n 559) para 42.

⁷³⁸ ECCHR, FIDH and LJIL (n 23) 22.

⁷³⁹ UNSMIL and OHCHR (n 20) 12; ECCHR, FIDH and LJIL (n 23) 22.

⁷⁴⁰ OHCHR (n 23) 2,14.

geographical areas in Libya.⁷⁴¹ A Fact-Finding Mission report of 2021 described the acts of human rights violations in Libya as ‘longstanding and on a massive scale’.⁷⁴²

5.9 The Detention of Refugees and Migrants in Inhuman Conditions

Detention is the main form of migration management in Libya.⁷⁴³ Under the Gaddafi regime, all suspected irregular migrants, including refugees and asylum seekers, were mostly detained in facilities under the control of the Passport Investigations Department while some were also held in regular prisons across Libya.⁷⁴⁴ In early 2012, the Passport Department was replaced by the DCIM under the Libyan Ministry of Interior.⁷⁴⁵ The DCIM is the main authority currently responsible for managing irregular migration and detention centres in Libya.⁷⁴⁶ The DCIM works closely with Libya’s Port Security and LCG which is part of the Libyan navy and the main institution responsible for conducting SAR operations at sea.⁷⁴⁷ The above institutions face significant pressures from armed groups, smugglers and traffickers including threats to hand over refugees and migrants.⁷⁴⁸

Libyan detention centres are not run by the DCIM officials only but many are operated by militias, armed groups and private individuals affiliated with or on the payroll of the DCIM.⁷⁴⁹ Firstly, many of the DCIM detention centres are effectively controlled by whichever armed groups or local militias have control over the territory where the facility is located.⁷⁵⁰ Moreover, some of the DCIM staff operating the official detention centres consist of members of the local militias who have been integrated into the DCIM, often with minimal oversight

⁷⁴¹ ECCHR, FIDH and LJIL (n 23) 22.

⁷⁴² A/HRC/48/83 (n 23) para 68.

⁷⁴³ ECCHR, FIDH and LJIL (n 23) 17; The Global Initiative Against Transnational Organised Crime, 'The Political Economy of Migrant Detention in Libya: Understanding the Players and the Business Models' (2019) <globalinitiative.net/wp-content/uploads/2019/11/Final-Report-Detention-Libya.pdf> accessed 20 April 2023

⁷⁴⁴ UNSMIL and OHCHR (n 20) 12-13; Amnesty International (n 10) 26-27.

⁷⁴⁵ Decree No (145) of 2012 on Adopting the Organisational Structure and Powers of the Interior Ministry and the Organisation of its Administrative Unit (23 May 2012) Libya (Cabinet); Decree No (386) of 2014 on establishing the Anti-Illegal Immigration Agency (04 June 2014) Libya (Cabinet); UNSMIL and OHCHR (n 20) 13; Amnesty International (n 89) 16; The establishment of the DCIM was formalised by law in 2014 through Decree No 286; As of 2016 at least two detention facilities in western Libya remained under the control of the Passport Investigations Department.

⁷⁴⁶ Decree No 145 (n 745); UNSMIL and OHCHR (n 20) 13; Amnesty International (n 10) 26.

⁷⁴⁷ UNSMIL and OHCHR (n 20) 13.

⁷⁴⁸ *ibid.*

⁷⁴⁹ ECCHR, FIDH and LJIL (n 23) 17.

⁷⁵⁰ HRW (n 20) 14-15; Amnesty International (n 89) 16.

from State officials.⁷⁵¹ Thirdly, an unknown number of unofficial detention centres are also operated by militias and armed groups without adequate government oversight.⁷⁵²

As of July 2018, the DCIM was operating 16 Libyan detention centres holding over 9,000 asylum seekers and migrants.⁷⁵³ Currently, there are between 8,000 to 10,000 asylum seekers and migrants held in official Libyan detention centres, while an unspecified number of them are also held in unofficial centres operated by smugglers, traffickers and militias.⁷⁵⁴ According to the UN, about half of the detainees are nationals of the seven countries who are permitted by Libyan authorities to register with the UNHCR as 'persons of concern'.⁷⁵⁵ As of 2018, most of the 55,912 registered refugees and asylum seekers were from Syria, Iraq and Eritrea.⁷⁵⁶

Most irregular immigrants in Libya, including *de facto* refugees, live outside Libya's official detention system.⁷⁵⁷ Many irregular migrants, including those in transit to Libya are also held in unofficial places of captivity run by armed groups, smugglers and traffickers.⁷⁵⁸ Unofficial detention centres consist of farms, warehouses, houses and apartments acquired by smugglers, traffickers and armed groups.⁷⁵⁹ According to a UN Panel of Experts report, arbitrary detention is used by armed groups in Libya for political or material gains.⁷⁶⁰ This exacerbates the vulnerability of refugees and migrants.⁷⁶¹

The conditions and manner in which DCIM detentions operate do not meet international standards nor the requirements of Libyan law.⁷⁶² According to UNSMIL, the detention conditions suffer from 'severe overcrowding', 'unhygienic', violent, torturous, degrading and

⁷⁵¹ A/HRC/52/83 (n 106) para 43; Amnesty International (n 89) 16.

⁷⁵² HRW (n 20) 16; Amnesty International (n 89) 16.

⁷⁵³ HRW (n 20) 15; The number of official detention centres fluctuates often because they open and close quite regularly.

⁷⁵⁴ S/2018/807 (n 559) para 39; HRW (n 20) 11.

⁷⁵⁵ S/2018/807 (n 559) para 39; UNHCR, 'Operational Data Portal (Refugee Situations in Libya)' <<https://data2.unhcr.org/en/country/lby>> accessed 27 Nov 2021 see footnote 649 above for the list of nationalities who are permitted to register as refugees and asylum seekers.

⁷⁵⁶ HRW (n 20) 11.

⁷⁵⁷ S/2018/807 (n 559) para 39; HRW (n 20) 11; As of 2018, 8,000 irregular migrants were in the DCIM detention while an estimated 680,000 migrants lived outside detention.

⁷⁵⁸ UNSMIL and OHCHR (n 20) 15; ECCHR, FIDH and LJIL (n 23) 22; Smugglers and traffickers hold persons places known as 'connection houses'.

⁷⁵⁹ UNSMIL and OHCHR (n 20) 15.

⁷⁶⁰ S/2017/466 (n 23) para 89.

⁷⁶¹ UNSMIL and OHCHR (n 20) 12.

⁷⁶² S/2018/807 (n 559) para 39.

‘unfit for human habitation’.⁷⁶³ Refugees and migrants, including women and children in Libyan detention facilities are held for indefinite periods in cruel and extremely overcrowded and inhuman conditions.⁷⁶⁴

According to the UN, DCIM officials and the LCG are insufficiently resourced and poorly trained.⁷⁶⁵ Their working conditions are worsened by the involvement of armed groups and criminal networks in law enforcement and migration management, putting refugees and migrants at further risk of abuses and human rights violations.⁷⁶⁶ The warehouses and other unofficial places of captivity are deemed unsuitable for people.⁷⁶⁷ Refugees and migrants are without access to food, clean water, sanitation and toilet facilities, lights, adequate ventilation or basic medical care.⁷⁶⁸ Many detainees are forced to openly defecate and urinate in their cells.⁷⁶⁹ Many detention facilities have been characterised by infestations and the spread of several infectious diseases, including lice, fleas, scabies, chickenpox, diarrhea and respiratory illnesses.⁷⁷⁰

Many refugees and migrants in Libyan detention suffer from malnutrition due to lack of access to adequate and quality food, leading to illnesses and several deaths.⁷⁷¹ According to UNSMIL, available water is dirty, salty and unsafe for drinking.⁷⁷² In 2016, UNSMIL reported that several

⁷⁶³ Report of the Secretary-General on the United Nations Support Mission in Libya (12 February 2018) UNSC Doc S/2018/140, para 48; UNSMIL and OHCHR (n 16) 28.

⁷⁶⁴ OHCHR, 'Detention of Migrants in Libya is a Human Rights Crisis' 2016) <<https://tinyurl.com/2p8rhtmm>> accessed 08 April 2023 UNSMIL and OHCHR (n 20) 15-16; S/2017/466 (n 23) para 89, 105; S/2018/807 (n 559) para 39; ECCHR, FIDH and LJIL (n 23) 17; Amnesty International (n 89); According to the OHCHR and UNSMIL, the detention facilities are so crowded that people lack space to lie down. In some centres, over 200 persons are held in a places that are supposed to accomodate less than 40 people.

⁷⁶⁵ UNSMIL and OHCHR (n 20) 13.

⁷⁶⁶ Ibid; Amnesty International (n 89) 16.

⁷⁶⁷ OHCHR, 'Detention' (n 764); UNSMIL and OHCHR (n 20) 15; S/2017/466 (n 23) para 89, 105; ECCHR, FIDH and LJIL (n 23) 17.

⁷⁶⁸ OHCHR, 'Detention' (n 764); UNSMIL and OHCHR (n 20) 15-16; S/2017/466 (n 23) para 89, 92; S/2018/807 (n 559) para 39.

⁷⁶⁹ OHCHR, 'Detention' (n 764); UNSMIL and OHCHR (n 16) 15; Detainees at times defecate and urinate in cups, bottles or containers to empty them later outside or they are thrown on the wall to be evaporated by sunlight.

⁷⁷⁰ UNSMIL and OHCHR (n 20) 15,16; A visit by UNSMIL indicated that some detention centres have no windows, very little or no ventilation with extremely bad odour.

⁷⁷¹ Ibid 15-16; UNSMIL has documented that some of the facilities have very little food; in some case 50% of the detainees suffer from malnutrition with 10% being acutely malnourished. The average daily calories of male detainees was 35% of normal requirements.

⁷⁷² Ibid 15.

refugees and migrants in a detention centre in the city of Bani Walid had died of malnutrition.⁷⁷³

Detainees have poor access to medical care which is typically provided by UN agencies in partnership with international organisations.⁷⁷⁴ Detention centres do not have access to healthcare professionals, medicines or maternity care, including post-partum care.⁷⁷⁵ Payment is required by Libyan hospitals before treating foreigners.⁷⁷⁶ According to UNSMIL, some refugees and migrants have been denied medical treatment for non-payment or fear of spreading infectious diseases.⁷⁷⁷ The health situation of refugees and migrants is exacerbated by the near collapse of the Libyan health system due to the years of conflicts that have destroyed the country's health infrastructure, and an absence of medicines, medical equipment and personnel.⁷⁷⁸ The DCIM permits the IOM, the UNHCR and NGOs access to the official detention centres to provide humanitarian assistance including sanitary kits, other necessary items and basic medical care for detainees.⁷⁷⁹ However, access to detention centres for international organisations, including the UNHCR is inconsistent, difficult to obtain and can even be denied.⁷⁸⁰

MSF provides medical care for detainees in official detention centres but its services can be restricted anytime due to a take-over by armed groups and violence.⁷⁸¹ The UNSMIL is responsible for monitoring and reporting on the conditions of detention centres in Tripoli and its surrounding areas.⁷⁸² However, the UN Secretary-General reported in 2018 that UNSMIL's access to DCIM detention centres, in the east, south western Libya was impeded by insecurity, administrative requirements and procedures.⁷⁸³

⁷⁷³ *ibid* 16-17; Bani Walid is one of the major migrant smuggling routes between northern and southern coastal areas of Libya.

⁷⁷⁴ *ibid* 16; HRW (n 20) 87.

⁷⁷⁵ HRW (n 20) 37.

⁷⁷⁶ UNSMIL and OHCHR (n 20) 16.

⁷⁷⁷ *ibid*.

⁷⁷⁸ *ibid* fn 53; According to UNSMIL, 80% of healthcare workers who were mostly foreigners have left Libya since the start of the war. Over 60% of health facilities have shut down or function below capacity due to damage, lack of medicines and equipment.

⁷⁷⁹ UNSMIL and OHCHR (n 16) 13, footnote 46; HRW (n 20) 16.

⁷⁸⁰ S/2018/807 (n 559) para 39; Global Initiative (n 743) 87; HRW(n 20) 9,37; Amnesty International (n 89) 6.

⁷⁸¹ HRW (n 20) 16.

⁷⁸² S/2018/807 (n 559) 40.

⁷⁸³ *ibid* 40.

Refugees and migrants in both official and unofficial Libyan detention centres are routinely subjected to serious human rights abuses and violations, including torture and many forms of ill-treatment, the unlawful use of deadly force, forced labour, sexual and gender-based violence from the DCIM officials, traffickers, criminal gangs and armed groups who control the detention centres.⁷⁸⁴ Detainees are spat on, beaten, humiliated, ‘forced ... to stand still in the sun’ and prevented from moving or leaving their cells.⁷⁸⁵ Women are held in detentions without female guards whereas children are held in adult facilities.⁷⁸⁶

There have been many documented cases where armed groups affiliated with Libyan government officials have been involved in kidnappings, arbitrary detention and torture.⁷⁸⁷ Interviews conducted by the UNSMIL confirmed that detainees are threatened, shot at, kicked, punched and beaten with objects like sticks, rocks, gun butts and metal bars without any justification.⁷⁸⁸ According to UNSMIL, there have also been cases of torture-related deaths in Libyan detention centres.⁷⁸⁹ In 2013 and 2014, research by Amnesty International found that detainees held by Gheniwa-controlled facilities were subjected to abductions, torture and other ill-treatment, which in some cases resulted in deaths.⁷⁹⁰

Many of the refugees and migrants, including those who paid smugglers, are also forced to work for several hours without payment, under very harsh working conditions in farms, private homes, construction, road paving and garbage collection.⁷⁹¹

The UNSMIL has documented that refugees and migrants in DCIM detention centres are held indefinitely⁷⁹² without any formal registration, legal procedures, access to lawyers or judicial review.⁷⁹³ As noted in section 5.4, there are no formal procedures in Libya allowing detainees to have access to a lawyer or any opportunity to challenge the decision to detain them.⁷⁹⁴

⁷⁸⁴ S/2017/466 (n 23) para 93-94, 104-105; Annex 31; S/2018/807 (n 559) para 39; HRW (n 20) 16; Amnesty International (n 89) 16; ECCHR, FIDH and LJIL (n 23) 22.

⁷⁸⁵ UNSMIL and OHCHR (n 20) 16.

⁷⁸⁶ CCPR/C/GC/35 (n 578) para 18; A/HRC/28/68 (n 600) para 80; S/2018/807 (n 559) para 39

⁷⁸⁷ S/2017/466 (n 23) para 93-96.

⁷⁸⁸ UNSMIL and OHCHR (n 20) 17-18.

⁷⁸⁹ UNSMIL and OHCHR (n 16); Amnesty International (n 477) 14.

⁷⁹⁰ Amnesty International (n 477).

⁷⁹¹ UNSMIL and OHCHR (n 16) 18; People are forced to work under bad weather conditions with very minimal or no protection at all. Persons are also not provided adequate food or potable water with serious implications for their health.

⁷⁹² HRW (n 20) 14.

⁷⁹³ UNSMIL and OHCHR (n 20) 15.

⁷⁹⁴ Law No 19 (n 642) Article 10; ECCHR, FIDH and LJIL (n 23) 38.

According to Human Rights Watch, there has been only one case where persons detained in Libya for immigration related reasons were released after a judicial review.⁷⁹⁵ Even so, the persons paid a fine for their illegal entry into and exit from Libya.⁷⁹⁶

As demonstrated in section 5.2.1, detaining persons in such inhuman in the conditions above is inconsistent with Libyan and international human rights law, including the right of all persons to be treated ‘with respect for the[ir] inherent dignity’.⁷⁹⁷ According to the Special Rapporteur on Torture, detaining refugees and migrants for prolonged periods in extremely overcrowded conditions without sufficient access to food, water and medical care or subjecting them to deliberate human rights abuses, including systematic extortions, sexual abuse, beatings by State officials and private guards, may amount to torture and ill treatment.⁷⁹⁸ In 2017, the UN Secretary General stated that ‘the conditions of detention in themselves may amount to torture or other ill-treatment.’⁷⁹⁹

Due to the horrific conditions of Libyan detention centres, many UN bodies and other international human rights organisations and actors, including UNHCR have called for their closures and to find safer alternatives to house refugees and migrants.⁸⁰⁰ In response, DCIM officials attempted to close down some of the most notorious detention centres or improve condition in facilities in operation, especially for the most vulnerable detainees.⁸⁰¹ These efforts have however, been hampered by corruption and the DCIM’s incapacity to exercise total control over their facilities.⁸⁰² In September 2020, DCIM centres in Tripoli, Tajoura, Misrata and Al-Khums were temporarily closed down after officials were investigated for corruption and long-standing human rights abuses.⁸⁰³

⁷⁹⁵ HRW (n 20) 14.

⁷⁹⁶ *ibid* 14, 15; This was a case concerning five Palestinians and two Syrians who had been detained after they were intercepted at sea.

⁷⁹⁷ ICCPR (n 110) Article 10; UNGA Res 43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (adopted 09 December 1988) UN Doc A/RES/43/173 Principles 1 & 2; UNSMIL and OHCHR (n 20) 14-15.

⁷⁹⁸ A/HRC/37/50 (n 101) para 18.

⁷⁹⁹ S/2017/761 (n 24) para 42.

⁸⁰⁰ S/2018/807 (n 559) para 40; Global Initiative n 743) 87; Amnesty International (n 89) 16-17

⁸⁰¹ *ibid*

⁸⁰² S/2017/466 (n 23) para 240-45, Annex 18; Amnesty International (n 87) 16.

⁸⁰³ Amnesty International (n 89) 16-17.

Libyan authorities have failed to take any disciplinary action against DCIM detention staff accused of perpetrating human rights violations against refugees and migrants.⁸⁰⁴ According to Amnesty International, Libyan authorities have even refused to handover persons against whom the ICC has issued arrest warrants on allegations related to crimes against humanity or facing UNSC sanctions for their involvement in human trafficking.⁸⁰⁵

In light of the lack of accountability and justice in Libya, the UN Human Rights Council, adopted a resolution in 2021 to investigate human rights violations perpetrated by all parties involved in the conflict in Libya.⁸⁰⁶ The findings of the two independent Fact-Finding Missions which were published in October 2021 and March 2022 will be included in the analysis of this study in Chapters Six and Seven below .

5.10 Conclusion

Despite its ratification of several international human rights treaties, Libya lacks an asylum framework to protect the lives and safety of refugees and migrants. Drawing on the overwhelming evidence from numerous UN bodies and other reports, this chapter demonstrated that refugees and migrants throughout Libya are routinely subjected to criminalisation, prolonged detention, actual torture and other ill-treatment at the hands of the LCG, DCIM officials, armed groups, traffickers and criminal gangs with impunity. Refugees and migrants outside detention are at increased risk of arbitrary arrests and detention, exploitation, extortion and forced labour without access to justice or an effective remedy.

Libyan authorities have not just failed but have also been unwilling to protect refugees, asylum seekers and migrants, including victims of human trafficking from the systematic and widespread human rights abuses and violations. The prolonged detention and the failure of the Libyan authorities to adopt effective measures to protect refugees and migrants against detention under such horrific conditions without access to effective remedies constitute torture and *refoulement*.

⁸⁰⁴ HRW (n 20) 37.

⁸⁰⁵ Amnesty International (n 477) 16.

⁸⁰⁶ A/HRC/48/83 (n 23) para 61, 66; Report of the Independent Fact-Finding Mission on Libya (29 June 2022) A/HRC/50/63 para 75; OHCHR (n 23) 2; Amnesty International (n 477).

VI. The Question of Jurisdiction: EU States Responsibilities over the Violations of *Non-Refoulement* under the Malta Declaration

6.1 Introduction

This chapter addresses the question of whether EU States exercise jurisdiction over the refugees and migrants rescued and/or intercepted on the CMR and returned to Libya under the Malta Declaration. Answering this question is essential for establishing their responsibility for violations of *non-refoulement* contained in treaties binding upon them.⁸⁰⁷ The connection between jurisdiction and State responsibility for the protection of human rights is contained in many international human rights treaties.⁸⁰⁸

The ECtHR in its extensive case law⁸⁰⁹ has held that ‘the exercise of jurisdiction is a necessary condition’ for holding a State party responsible for ‘acts or omissions imputable to it which give rise to [...] the infringement of rights and freedoms set forth in the [ECHR].’⁸¹⁰ Thus, in order to attribute the *non-refoulement* consequences of the Declaration to EU States, there is a need to demonstrate that they have jurisdiction over the events conducted by virtue of it, including the actions of the Libyan authorities.⁸¹¹

In public international law, the concept of jurisdiction refers to the sovereign right of a State to prescribe and enforce laws against all persons and other entities within its territory.⁸¹² As a core element of sovereignty, jurisdiction, ‘in any form’, particularly enforcement, is primarily territorial, and is to be exercised only within a State’s own territory.⁸¹³ In its influential *Lotus*

⁸⁰⁷ *Soering* (n 169) [86]; *Bankovic and Others v Belgium and Others* Application no 52207/99 (ECtHR, 12 December 2001) [66]; *Assanidze v Georgia* Application no 71503/01 (ECtHR, 8 April 2004) [137]-[138]; *Ilaşcu and Others v Moldova and Russia* Application no 48787/99 (ECtHR, 8 July 2004) [311], [314]; ‘Advisory Opinion’ (n 111) paras 35-43; CAT/C/GC/2 (n 196) paras 7, 15; *JHA v Spain*, Communication No 323/2007 (21 November 2008) UN Doc CAT/C/41/D/323/2007 paras 8.1-8.2; *Hirsi* (n 22) [70].

⁸⁰⁸ ICCPR (n 110) Article 2(1); UNCAT (n 110) Article 2; African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, Addis Ababa, Ethiopia, entry into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 (1990) Article 1; ECtHR (n 616); ‘Advisory Opinion’ (n 111) para 35-43.

⁸⁰⁹ *Soering* (n 169) [86]; *Bankovic* (n 807) [66]; *Assanidze* (n 807) [137]-[138]; *Ilaşcu* (n 807) [314].

⁸¹⁰ *Hirsi* (n 22) [70].

⁸¹¹ Gammeltoft-Hansen (n 256) 117; Palm (n 104) 20.

⁸¹² Klug and Howe (n 261) 72-73; Gammeltoft-Hansen (n 256) 117; Encyclopædia Britannica Inc; The territorial scope covers a State’s horizontal territorial land and sea extending vertically from the ‘von Kármán line’ 50.55 miles above sea level to the sub-soil of national territory ending at the centre of the earth’.

⁸¹³ *Case of the SS ‘Lotus’ (France v Turkey)* [1927] PCIJ Judgement (PCIJ [1927] Judgement Rep Series A-No 70) [18]-[19]; *Bankovic* (n 807) [61], [66]-[67]; *Ilaşcu* (n 807) [314]; *Hirsi* (n 22) [70]-[71]; Gammeltoft-Hansen (n 256)

decision, the Permanent International Court of Justice (PICJ) emphasised that a State's power to enforce its laws over individuals and entities 'cannot be exercised' by that State outside its own territory 'except by virtue of a permissive rule derived from international custom or from a convention'.⁸¹⁴ The Court's reasoning and recent case law show that the exercise of extraterritorial jurisdiction is based solely on a special 'entitlement' which is generally derived from treaty, customary international law or the consent of a State on whose territory jurisdiction is exercised.⁸¹⁵

International human rights law permits the exercise of jurisdiction both within and outside a State's national territory.⁸¹⁶ The concept of jurisdiction in this context is based on the exercise of actual authority or *de facto* control over a person or a given territory, including places outside its national borders,⁸¹⁷ whether lawful or not.⁸¹⁸ According to the UNHCR and other human rights adjudicators,⁸¹⁹ a State's scope of *non-refoulement* obligations applies wherever that State exercises jurisdiction, including when carrying out migration control on the high seas or within a foreign territory.⁸²⁰

Against this backdrop, this chapter addresses the concept of jurisdiction, its territorial scope, the criteria for its establishment and subsequent application in the context of extraterritorial migration controls such as interceptions and rescues on the high seas under Article 33(1) of the Refugee Convention, Article 3(1) of the UNCAT and Article 3 of the ECHR. The analysis

117; Generally, there are three main forms of jurisdiction: prescriptive jurisdiction, adjudicative jurisdiction and enforcement jurisdiction.

⁸¹⁴ *SS 'Lotus'* (n 813) [18]-[19]; *Bankovic* (n 807) [61], [66]-[67]; *Ilaşcu* (n 807) [314]; *Assanidze* (n 807) [137]; *Hirsi* (n 22) [70]-[71]; These specific circumstances are recognised as constituting extraterritorial jurisdiction under customary international law and treaty provisions.

⁸¹⁵ *SS and Others v Italy* Application No 21660/18 (ECtHR, 12 June 2025) [61] [94]-[98]; Submission by the UNHCR in the case of *SS and Others v Italy* (Application No 21660/18) before the ECtHR (14 November 2019) 3.2.3; Klug and Howe (n 261) 73 & 74; Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011) 112.

⁸¹⁶ CCPR 'Concluding Observations: Israel' (adopted 18 August 1998) UN Doc CCPR/C/79/Add.93 para 10 (emphasis added); Conclusion No 97 (n 108); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ) [2004] (Advisory Opinion) [108-109,111]; UNHCR 'SS' (n 815) paras 3.2.1-3.2.4; Gammeltoft-Hansen and Hathaway (n 271) 259-261.

⁸¹⁷ *Wall Opinion* (n 816) [108]; 'Advisory Opinion' (n 111) paras 35-43; *JHAv Spain* (n 807) para 8.2; OHCHR (n 108) 3; Gammeltoft-Hansen (n 256) 119; CSDM, *Information Submitted under Article 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2020) paras 70-76.

⁸¹⁸ Kim 52.

⁸¹⁹ *Bankovic* (n 807) [59]; *Wall Opinion* (n 816) [108-109,111]; 'Advisory Opinion' (n 111) paras 24-43; North (n 315) 4-5; Gammeltoft-Hansen and Feith Tan (n 261) 506.

⁸²⁰ *JHA* (n 807) para 8.2; *Al-Skeini and Others v the UK [GC]* (Application No 55721/07) (ECtHR, 07 July 2011) [131]; [131]; *Hirsi* (n 22) [73]; AIRE and Others, Written Submissions in the Case of in *SS and Others v Italy* (interveners) ECtHR, 11 November 2019; Gammeltoft-Hansen and Feith Tan (n 261) 506.

draws on the principles derived from the case law of the ICJ, the interpretation of the UNHCR and other human rights treaty bodies, particularly the CAT and the ECtHR. It then examines the question of whether EU States' role and contributions to the events in the CMR under the Declaration meet the test for the exercise of jurisdiction under international refugee law.⁸²¹ The analysis also includes the application of the doctrine of State responsibility in the context of rescue and interception at sea and capacity building. This is relevant for determining whether EU State's role and extensive contributions to the events in the CMR is sufficient to trigger their responsibility for violations of *refoulement* by the Libyans under the Declaration.

The chapter demonstrates that although the execution of the Declaration takes place on the high seas and in Libyan territory, outside the physical boundaries of EU States, the actual control over them is exercised by the EU States and institutions.⁸²² Their jurisdiction is based on their substantial funding, training, equipment, support together with their 'decisive control and influence' over the policy's design and implementation, including the actions of the Libyan authorities during interceptions, returns and detention, that give rise to violations of *non-refoulement*.

EU States' jurisdiction is also triggered by their failure to object or prevent harm despite being fully aware of the *non-refoulement* consequences arising from the control actions of the Libyans. Given that the breaches are extensively reported and widely known, EU States cannot claim ignorance of their foreseeability. EU States' jurisdictional link is strengthened by the fact that the interceptions and breaches of *refoulement* committed by the Libyans benefit them by preventing refugees and migrants from reaching their territory.⁸²³

Even if EU States' actions, in this instance, do not rise to the scale required to establish jurisdiction, they may still be responsible for their complicity in the violations committed by

⁸²¹ *Wall Opinion* (n 816) [111]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Judgement [216]; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* General List No 91 [2007] ICJ Judgement [400]-[401]; CSDM (n 817) para 238-241.

⁸²² UNSMIL and OHCHR (n 20) 13; UNSMIL and OHCHR (n 16) 14-15; CSDM (n 817) para 257.

⁸²³ Azadeh Dastyari and Asher Hirsch, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy' (2019) 19 Human Rights Law Review 435, 435.

the Libyans, under Article 16 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ASR).⁸²⁴

⁸²⁴ UNHCR 'SS' (n 815) 5.1-5.9; Gammeltoft-Hansen and Hathaway (n 271) 277-278; Dastyari and Hirsch (n 823) 435.

6.2 The Territorial Scope of *Non-Refoulement* under Article 33(1) of the Refugee Convention

Although the territorial scope of the obligation of *non-refoulement* under Article 33(1) is not expressly defined in the Refugee Convention,⁸²⁵ the UNHCR is of the view that the provision has extraterritorial applicability.⁸²⁶ According to the UNHCR, the norm's extraterritoriality is evident in the wording of Article 33(1) 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened'.⁸²⁷ The Agency has reasoned that the ordinary meanings of the terms 'return' and 'refouler' and the context within in which they were used by the drafters of the Convention does not support an interpretation which would restrict the scope of Article 33(1) 'to a State's conduct within its territory, 'nor ... understood by the drafters ... to be limited in this way.'⁸²⁸

The UNHCR has also stated that the extraterritorial applicability of Article 33(1) is necessary for the fulfilment of the humanitarian object and purpose of the Refugee Convention to ensure the 'widest possible' protection of refugees.⁸²⁹ The preambular paragraphs of the Convention states, *inter alia*, that the object and purpose of the Convention are 'to assure refugees the widest possible exercise of these fundamental rights and freedoms... without discrimination'.⁸³⁰

In the opinion of the UNHCR, the use of different wording by the drafters of the Convention explicitly restricting the territorial scope of certain provisions further supports the clear intent of the drafters not to limit the scope of Article 33(1) to persons within the territory of host States.⁸³¹ While other provisions of the Refugee Convention guarantee the rights of refugees based on their physical, durable or lawful presence in the territory of a State,⁸³² Article 33(1) is

⁸²⁵ UNHCR 'Hirsi' (n 120) para 4.1.2.

⁸²⁶ 'Advisory Opinion' (n 111) paras 9, 24-25; UNHCR 'Hirsi' (n 120) para 4.1.2.

⁸²⁷ Refugee Convention (n 48); 'Advisory Opinion' (n 111) para 26-28; *Sale* (n 119); UNHCR 'Commentary' (n 128)

⁸²⁸ 'Advisory Opinion' (n 111) para 27-28, footnote 57; The ordinary meaning of the words 'return' includes 'to send back' or 'to bring, send, or put back to a former or proper place'. The English translations of 'refouler' "include words like 'repulse', 'repel', 'drive back'.

⁸²⁹ Refugee Convention (n 48) preambular paras 1 and 2; UNHCR 'Advisory Opinion' (n 89) para 25-27, 34.

⁸³⁰ Refugee Convention (n 48) Preambular paragraphs 2 and 5.

⁸³¹ 'Advisory Opinion' (n 111) para 28; UNHCR 'Hirsi' (n 120) para 4.1.2.

⁸³² Articles 15, 17(1), 19, 21, 23, 24 and 28 are for refugees who are 'lawfully staying' in host States.

among a small category of core provisions that are not conditional upon some form of attachment to a State.⁸³³

The extraterritoriality of Article 33(1) is also evident in the use of distinct wording of the provision and its exception in Article 33(2) by the drafters of the Convention.⁸³⁴ Unlike the wording of Article 33(2) that expressly limits its applicability to the territory of the State in which the refugee is located,⁸³⁵ the UNHCR and courts have affirmed that the wording 'No State ... shall expel or return ('refouler') a refugee in 'any-manner whatsoever to the frontiers of territories' applies 'unambiguous[ly] without geographical limitation'.⁸³⁶

The phrase 'to the frontiers of territories' instead of 'States' or 'countries'⁸³⁷ has also been interpreted expansively to encompass any place, territory or circumstances, including embassies in a country of origin or nationality, where a person at risk of persecution comes under the jurisdiction of a State party.⁸³⁸ The UNHCR has emphasised that restricting the territorial scope of Article 33(1) to the conduct of a State within its national territory would be inconsistent with the subsequent State practice and relevant rules of international law.⁸³⁹

In keeping with the general rules on treaty interpretation,⁸⁴⁰ the UNHCR has noted that developments in related areas of international law must also be taken into account when interpreting the territorial scope of Article 33(1).⁸⁴¹ International refugee law and human rights law are considered as 'complementary and mutually reinforcing' in nature.⁸⁴² Therefore, interpreting Article 33(1) in conformity with the developments of international human rights

⁸³³ Refugee Convention (n 48) Core Articles without any territorial qualification include 3 (Non-Discrimination), 13 (Property), 16(1) (Access to Courts), 20 (Rationing), 22 (Public Education), 29 (Taxes), 33(1) (*Non-Refoulement*) and 34 Naturalisation.

⁸³⁴ *Sale* (n 119) [179]-[180]; 'Advisory Opinion' (n 111) para 28, footnotes 58 & 59.

⁸³⁵ 'Advisory Opinion' (n 111) See the limits of Article 33(1) under section 2.2.2; Article 33(1) is not applicable to refugees who constitute a danger to the security or the community of the country in which they are located.

⁸³⁶ *Sale* (n 119) See the dissenting opinion of Justice Blackmun; 'Advisory Opinion' (n 111) para 28, footnotes 58-59.

⁸³⁷ *Lauterpacht and Bethlehem* (n 128) 122.

⁸³⁸ *ibid*

⁸³⁹ Vienna Convention on the Law of Treaties 1969 (adopted 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331 (VCLT) Article 31(3); 'Advisory Opinion' (n 111) para 32; UNHCR 'Hirsi' (n 120) paras 4.1.2 and 4.2.1.

⁸⁴⁰ VCLT 1969 (n 839); Article 31(3) provides that when interpreting an international treaty or the application of its provisions, subsequent State practice and relevant rules of international law applicable between the States concerned must be taken into account.

⁸⁴¹ 'Advisory Opinion' (n 111) para 34.

⁸⁴² Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America (16 November 2004) (Latin American States) Preamble para 6; 'Advisory Opinion' (n 111) para 34, footnote 70; UNHCR 'Hirsi' (n 120) para 4.2.1.

law is essential in addressing the question of the extraterritorial jurisdiction over acts of *refoulement* prohibited under Article 33(1).⁸⁴³ As will be demonstrated in the following sections, the territorial scopes of the *non-refoulement* principle contained in subsequent international refugee and human rights instruments adopted after 1951⁸⁴⁴ firmly supports extraterritorial applicability.⁸⁴⁵ None of them places territorial limitations on the *non-refoulement* provisions.⁸⁴⁶

The extraterritorial applicability of *non-refoulement* in international human rights law has been affirmed in the jurisprudence of courts,⁸⁴⁷ major international human rights bodies⁸⁴⁸ and by dominant state practice.⁸⁴⁹ The ICJ in its seminal Israeli Wall decision held that a State's obligation to secure human rights covers 'both individuals [who are] present within a State's territory and those outside that territory but subject to that State's jurisdiction.'⁸⁵⁰ International human rights bodies and regional courts have developed similar interpretations of the concept of jurisdiction to define the territorial scope of human rights obligations.⁸⁵¹ These bodies have accepted that a State's obligation of *non-refoulement* contained in international human rights

⁸⁴³ 'Advisory Opinion' (n 111) para 34; UNHCR 'Hirsi' (n 120) para 4.2.1.

⁸⁴⁴ UNCAT (n 110) Article 3(1); OAU Refugee Convention (n 116) Article II(3); ACHR (n 116) Article 22(8); Also in non-binding instruments, including Declaration on Territorial Asylum (n 158) Article 3(1); Council of Europe: Committee of Ministers, Resolution (67)14: Asylum to Persons in Danger of Persecution (29 June 1967) para 2; Cartagena Declaration (n 176) Section III(5).

⁸⁴⁵ 'Advisory Opinion' (n 111) para 34; UNHCR 'Hirsi' (n 120) paras 412, 4.2.1.

⁸⁴⁶ *ibid.*

⁸⁴⁷ *Nicaragua* (n 223) [180]; *Wall Opinion* (n 816) [111]; *Loizidou v Turkey* (Preliminary Objections) Application no 15318/89 (ECtHR, 23 March 1995) [52]; *Öcalan v Turkey* Application No 46221/99 (ECtHR, 12 May 2005) [382]-[385]; 'Advisory Opinion' (n 111) paras 33, 36-37; UNHCR 'Hirsi' (n 120) paras 4.1.2, 4.2.1 and 4.2.3.

⁸⁴⁸ CAT, Conclusions and Recommendations, United States of America (25 July 2006) UN Doc CAT/C/USA/CO/2 para 15; *Öcalan v Turkey* (n 847) para 37; General Comment No 31 (n 111) para 10; 'Advisory Opinion' (n 111) paras 33, 36-37; CAT/C/GC/2 (n 196) para 16; UNHCR 'Hirsi' (n 120) paras 4.1.2, 4.2.1-4.2.3.

⁸⁴⁹ Conclusion No 97 (n 108) para iv; *Gammeltoft-Hansen and Hathaway* (n 271) 259, fn 108; *Gammeltoft-Hansen and Feith Tan* (n 261) 506.

⁸⁵⁰ *Wall Opinion* (n 816) [108].

⁸⁵¹ *Delia Saldias de Lopez v Uruguay* Communication No CCPR/C/13/D/52/1979 (CCPR Decision) UN Doc CCPR/C/OP/1 (1984) para 12.2; *Lilian Celiberti de Casariego v Uruguay* (29 July 1981) UN Doc CCPR/C/13/D/56/1979 paras 10.1-10.3; CAT/C/USA/CO/2 (n 848) para 15; *SS and Others* (n 815) [3]; UNHCR 'Hirsi' (n 120) para 4.2.2.-4.2.3; CSDM (n 817) para 239; The CCPR has also decided that the obligation of a State to respect and protect the rights of 'all individuals within its territory and [...] jurisdiction' is not limited to 'the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation [...], wherever they occurred'.

treaties is based on the exercise of its authority or control over either persons or a specific territory by that State through its agents while acting overseas.⁸⁵²

Considering the similar character of the obligations, object and purpose which constitute their legal basis, the UNHCR is of the opinion that the reasoning adopted by courts and human rights treaty bodies, in their authoritative interpretation of the related human rights provisions, is relevant in the interpretation of Article 33(1) of the Refugee Convention.⁸⁵³ As with the *non-refoulement* obligation under international human rights law,⁸⁵⁴ the application of Article 33(1) 'can be based on *de jure* entitlements and/or *de facto* control'.⁸⁵⁵ According to the UNHCR, the decisive criteria for determining a State's responsibility for securing the rights of persons under Article 33(1) is 'not whether that person is on the State's national territory', or a place under the sovereign control of the State, 'but rather, whether or not he or she is subject to that State's effective authority and control'.⁸⁵⁶ Article 33(1) applies in all situations where a party to the Refugee Convention, through its agents or organs exercises jurisdiction or effective control over refugees and other persons at risk of persecution, in any territory under the jurisdiction of the State in question.⁸⁵⁷ It applies in national territories, points of disembarkation, transit, border posts, at the frontier, on the high seas, international zones or on the territory of another State.⁸⁵⁸

Article 33(1) covers all actions or omissions of a State party producing the effect of returning a refugee to a territory where a person would be persecuted or have his/her life or freedom threatened.⁸⁵⁹ Article 33(1) applies in any territory where the refugee fears persecution,

⁸⁵² *Öcalan* (n 847) [91]; *Ilaşcu* (n 807) [382]-[385]; *Issa and Others v Turkey* (Merits) Application no 31821/96 (ECtHR, 30 March 2005) [65]-[72]; CAT/C/USA/CO/2 (n 848) para 15; General Comment No 31 (n 111) para 10-12; 'Advisory Opinion' (n 111) paras 35-39; UNHCR 'Hirsi' (n 120) paras 4.2.1-4.2.3.

⁸⁵³ 'Advisory Opinion' (n 111) para 42, footnote 83.

⁸⁵⁴ *Burgos* (n 851) para 12.3; General Comment No 31 (n 111) paras 10-12; *Celiberti* (n 851) para 10.3; CCPR CCPR/C/79/Add.93 (n 816) para 10; CCPR 'Concluding Observations: Israel' (21 August 2003) UN Doc CCPR/CO/78/ISR para 11; 'Advisory Opinion' (n 111) paras 34-25, 39; UNHCR 'Hirsi' (n 120) para 4.2.1.

⁸⁵⁵ *ibid* para 4.3.1.

⁸⁵⁶ 'Advisory Opinion' (n 111) para 43.

⁸⁵⁷ *Haitian Centre* (n 302) [157]; UNHCR 'Advisory Opinion' (n 111) paras 24, 26-28; footnote 54; Lauterpacht and Bethlehem (n 128) 122; UNHCR 'Hirsi' (n 120) paras 4.1.2-4.3.1.

⁸⁵⁸ *Haitian Centre* (n 302) [157]; UNHCR 'Advisory Opinion' (n 111) paras 24, 26-28, footnote 54; UNHCR '*Hirsi*' (n 120) paras 4.1.2-4.3.1; In the case of *Sale*, the UNHCR challenged the US Supreme Court's decision that Article 33(1) is applicable only to persons within US territory as 'inaccurate' within the scope of the provision.

⁸⁵⁹ Refugee Convention (n 48) Article 40; 1967 Protocol (n 126) Article I (1) and (3); VCLT 1969 (n 839) Article 29; General Comment No 31 (n 111) para 10; CAT 'General Comment No 1: Implementation of Article 3 of the Convention in the Context of Article 22' (Refoulement and Communications) (21 November 1997) UN Doc A/53/44, annex IX para 2; Assanidze (n 807) [147]-[148]; 'Advisory Opinion' (n 111) para 31..

whether it is his/her country of origin, habitual place or residence, or any place where the individual concerned may have a reason to fear for his/her life or freedom if returned.⁸⁶⁰ It applies whether an individual has crossed an international border or not.⁸⁶¹ In the case of *The Haitian Centre for Human Rights v US*, the Inter-American Human Rights Commission disagreed with the finding of the US Supreme Court that 'Article 33 did not apply to the Haitians interdicted on the high seas and not in the [US] territory.'⁸⁶² The Commission reaffirmed the UNHCR's position in its brief to the US Supreme Court that Article 33 has no 'geographical limitations'.⁸⁶³ Article 33(1) is subject to territorial restrictions only with respect to places where 'a refugee [has] a well-founded fear of persecution or threats to their life and freedom of the person in question'.⁸⁶⁴

According to the ICJ and human rights treaty bodies, *de facto* or 'effective [territorial] control can arise from a State's exercise of physical control over 'some or an entire territory of another State mostly by way of occupation, strong or durable military presence or actions in the 'occupied territories', whether lawful or not.⁸⁶⁵ Extraterritorial jurisdiction can also arise from the exercise of [full] 'physical authority or control' by a State's agents or officials over individuals in a foreign territory.⁸⁶⁶ In the context of migration control, jurisdiction has been found in situations where persons are intercepted, detained⁸⁶⁷ or brought aboard aircrafts or vessels registered in their country, or are flying their flag.⁸⁶⁸

In cooperation-based contexts, a sponsoring State is legally responsible for human rights violations committed by its own deployed agents for their direct enforcement of migration activities, including deterrent actions.⁸⁶⁹ Such situations can occur where due to an agreement, a State deploys liaison officers or provide support which in substance result in the exercise of

⁸⁶⁰ UNHCR 'Commentary' (n 128) 341; Lauterpacht and Bethlehem (n 128) 122; 'Note' (n 121) para 1; 'Advisory Opinion' (n 111) para 7.

⁸⁶¹ A/AC.96/694 (n 128) para 23; UNHCR 'Commentary' (n 128) 234; HCR/IP/4/Eng/REV.1 (n 134) para 28-29 29; Professor Atle Grahl-Madsen, *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)* (UNHCR October 1997); 'Note' (n 121) (B) para 3; A/AC.96/951 (n 122) para 16; Lauterpacht and Bethlehem (n 128) 115.

⁸⁶² *Haitian Centre* (n 302) [156].

⁸⁶³ *ibid* [157].

⁸⁶⁴ 'Advisory Opinion' (n 111) (n 89) paras 9, 26 -28.

⁸⁶⁵ *Wall Opinion* (n 816) [110]-[112]; General Comment No 31 (n 111) para 10; *Congo* (n 821) [173]; [173]; *Coard et Al v United States*, Report N 109/99-Case 10951 (IACHR), 29 September 1999) [37]; *Cyprus v Turkey* Application no 25781/94 (ECtHR, 10 May 2001) [37], [52], [78]; *Bankovic* (n 807) [70].

⁸⁶⁶ *Coard* (n 865) [37]; *Issa* (n 852) [71].

⁸⁶⁷ UNHCR 'SS' (n 815) para 3.1.4; Gammeltoft-Hansen and Hathaway (n 271) 262-263.

⁸⁶⁸ Klug and Howe (n 261) 82; Gammeltoft-Hansen and Hathaway (n 271) 262, 297.

⁸⁶⁹ *ibid* 270.

effective control by the sponsoring state.⁸⁷⁰ States can be held responsible for acts committed by the authorities of third States or private persons when acting on the instructions of, or under the direction or control' of the former.⁸⁷¹

Parties to the Refugee Convention have both positive and negative obligations⁸⁷² to take 'effective measures' to protect all persons under their effective control against human rights violations committed by their officials, and to 'prevent mistreatment by private actors, or by organs of third States operating within their jurisdiction'.⁸⁷³

6.2.1 *Non-Refoulement* in the Context of Interception and SAR Operations At Sea

De jure jurisdiction on the high seas is derived from the doctrine of flag State under international maritime law.⁸⁷⁴ The 1982 UN Convention on the Law of the Sea [UNCLOS] provides that ships sailing under the flag of a State 'shall be subject to [that State's] exclusive jurisdiction on the high seas'.⁸⁷⁵ *De jure* jurisdiction can arise during rescues and interceptions where persons are taken aboard vessels sailing under the flag of the intercepting State.⁸⁷⁶ *De facto* jurisdiction is also established whenever a State exercises effective [physical] control over rescued or intercepted persons during rescues or interceptions on the high seas or the territorial waters of another State depending on the specific circumstances of the case.⁸⁷⁷ A State exercises both *de jure* and *de facto* jurisdiction where that State intercepts, rescues and brings the intercepted persons aboard its vessels.⁸⁷⁸ That includes cases where a State's vessels block or 'escort' a vessel carrying refugees as such a blockage indirectly detains or restricts

⁸⁷⁰ *ibid* 272.

⁸⁷¹ *Nicaragua* (n 223) [86]; Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (31 May 2001) UNGA Doc A/CN.4/L.602, Articles 8, 17; Gammeltoft-Hansen and Hathaway (n 271) 268

⁸⁷² A/HRC/37/50 (n 101) para 12; OHCHR (n 108) 3.

⁸⁷³ A/HRC/37/50 (n 101) para 12; Such measures include legislative, administrative, judicial and 'well-established' due diligence.

⁸⁷⁴ UNCLOS (adopted 10 December 1982, entry into force 6 November 1994) 1833 UNTS 3, Articles 92 and 94 read together; Article 92(1) states: 'Ships shall sail under the flag of one State only and Article 94(1) provides: 'Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.' International Convention for the Safety of Life at Sea (adopted 01 November 1974, entry into force 25 May 1980) 1184 UNTS 2 (SOLAS); IMO Maritime Safety Committee, Resolution MSC.167(78) 'Guidelines on the Treatment of Persons Rescued at Sea' (adopted 20 May 2004) UN Doc MSC 78/26/Add.2, Annex 34; Conclusion No 97 (n 108) preambular para 4; UNHCR 'Hirsi' (n 120) para 4.3.1.

⁸⁷⁵ UNCLOS (n 974) Articles 92 and 94.

⁸⁷⁶ UNCHR 'Hirsi' (n 120) para 4.3.2.

⁸⁷⁷ Conclusion No 97 (n 108) preabular paras 4 & 5; UNHCR 'Hirsi' (n 120) para 4.3.1; UNHCR 'SS' (n 815) para 3.1.5.

⁸⁷⁸ UNHCR 'Hirsi' (n 120) para 4.3.2; *Hirsi* (n 22) [77].

their movements to a confined location.⁸⁷⁹ In such situations, the intercepted persons would have been brought under the ‘full (effective) control’ of the State concerned.⁸⁸⁰

A State that exercises jurisdiction over people on the high seas has a legal obligation to ‘fully’ respect the rights of such persons under *non-refoulement*.⁸⁸¹ Such a State also has a positive obligation to provide procedural guarantees, appropriate preventive or protective measures to prevent *refoulement*.⁸⁸² It must also ensure that its interception measures do ‘not result in asylum seekers and refugees being denied access to international protection, or ... directly or indirectly’ cause their return ‘to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or [...] other [personal] grounds for protection based on international law’.⁸⁸³ States cannot deport or transfer individuals over who they exercise *de jure* or *de facto* control to the authority of another State where such a transfer would put such persons at risk of persecution or ill-treatment or result in their subsequent return to a third State where they would face similar risks.⁸⁸⁴

The extraterritorial application of *non-refoulement* on the high seas imposes additional duties and responsibilities on coastal and seafaring States and private vessels. They are obligated to provide prompt and effective SAR services to all vessels and persons in distress at sea, regardless of their nationality, status or the circumstances in which they are found, in accordance with international law of the sea, relevant provisions of international refugee and human rights law.⁸⁸⁵ These duties and responsibilities are contained in many international maritime law instruments and affirmed in the Conclusions of the UNHCR’s Executive Committee.⁸⁸⁶

As a general rule, the State which has jurisdiction over the SAR region where rescue operations occur has the primary responsibility for ensuring the co-ordination and cooperation between

⁸⁷⁹ UNHCR Principle 1; Gammeltoft-Hansen and Hathaway (n 382) 263, 265.

⁸⁸⁰ UNHCR ‘Hirsi’ (n 120) para 4.3.2.

⁸⁸¹ UNCHR-EXCOM Conclusion No 89 (LI) ‘International Protection’ (2000) paras 8-9; Conclusion No 97 (n 108) para (a)(iv); UNHCR ‘Hirsi’ (n 120) paras 4.3.3-4.3.4.

⁸⁸² UNHCR ‘SS’ (n 815) para 3.1.6-3.1.7.

⁸⁸³ Conclusion No 97 (n 108) para (a)(iv); UNHCR ‘SS’ (n 815) para 4.6.

⁸⁸⁴ UNHCR ‘Hirsi’ (n 120) para 4.3.2-4.3.4; *Hirsi* (n 22) [77]; UNHCR ‘SS’ (n 815) para 3.1.6.

⁸⁸⁵ SOLAS (n 874); SAR Convention (n 622); Conclusion No 15 (n 135) para (b-e); UNHCR-EXCOM Conclusion No 31 (XXXIV) ‘Rescue of Asylum-Seekers in Distress at Sea’ (1983); UNHCR-EXCOM Conclusion No 34 (XXXV) ‘Problems Related to the Rescue of Asylum-Seekers in Distress at Sea’ (1984); Conclusion No 97 (n 108) para (a); OHCHR and MPG (n 568) Principle 4; OHCHR (n 108) 3.

⁸⁸⁶ *ibid.*

States.⁸⁸⁷ It must provide a timely and effective response and necessary assistance to all persons found in distress at sea,⁸⁸⁸ including rescuing migrants in unseaworthy vessels.⁸⁸⁹

Rescuing States must thoroughly assess the condition of rescued persons and take reasonable measures to ensure that joint SAR activities are conducted in a way that is 'safe', under international law, and in compliance with *non-refoulement*.⁸⁹⁰ They must protect the lives and respond to the particular needs of refugees and asylum seekers in distress at sea, and to deliver them to a place of safety.⁸⁹¹

In situations where an event occurs outside a State's SAR region, the most responsible State has an obligation to coordinate SAR operations until that responsibility is assumed by another State that is able and willing to do so in way that is consistent with international maritime and human rights law.⁸⁹² Ship masters sailing under their flag must take necessary measures to rescue refugees and asylum seekers on boats and must apply the *non-refoulement* principle when determining 'a place of safety' for disembarkation.⁸⁹³

Rescued persons who come within their jurisdiction are not to be disembarked, sent or transferred to the control of another authority or territory where such persons would be put at risk of persecution, torture and other ill treatment, threats to life, liberty and security directly or indirectly.⁸⁹⁴ States cannot also transfer rescued or intercepted persons over who they exercise authority or effective control, to another vessel where there are reasons to believe that those individuals would be subjected to arbitrary or collective expulsions, including 'tow-backs or push-backs, or the risk of chain *refoulement*'.⁸⁹⁵ In practice, however, enforcement of the SAR and maritime rules above have been hampered by a lack of clarity on where rescued persons should be safely disembarked, varying interpretations of their treaty obligations and

⁸⁸⁷ UNHCR 'SS' (n 815) para 4. fn 61.

⁸⁸⁸ OHCHR (n 108) 3.

⁸⁸⁹ OHCHR and MPG (n 568) Principle 4 (2).

⁸⁹⁰ *Hirsi* (n 22) [22]-[26], [77]-[79]; OHCHR and MPG (n 568) (540) Principle 4(2).

⁸⁹¹ Conclusion No 97 (n 108) Preamble, para (a); UNHCR 'Hirsi' (n 120) para 4.3.4, footnote 63; OHCHR and MPG (n 568) Principle 4, paras 2-4; OHCHR (n 108) 3.

⁸⁹² UNHCR 'SS' (n 815) para 4.2; OHCHR (n 108) 3.

⁸⁹³ UNCLOS (n 974) Article 98(1); CoE Parliamentary Assembly, Committee on Migration, Refugees and Population Rapporteur Mr Arcadio Diaz Tejera, Spain, Socialist Group Report: The Interception and Rescue at Sea of Asylum Seekers, Refugees and Irregular Migrants (01 June 2011) Doc 12628 para 9.3-9.5.

⁸⁹⁴ SOLAS (n 874); *Hirsi* (n 22) [22]-[26]; Conclusion No 97 (n 108); Res MSC167(78) (n 874); CERD Recommendation (n 569) para 25; UNHCR 'Hirsi' (n 120) para 4.3.4; OHCHR and MPG (n 568) Principle 6 (1); A/HRC/47/30 (n 160) para 39

⁸⁹⁵ OHCHR and MPG (n 568) Principle 6, Guideline 2; UNHCR 'SS' (n 815) para 4.2.

the failure of many States to adopt appropriate legislation to facilitate treaty implementation. This has resulted in political stand-offs between States and private vessels, usually with deadly humanitarian consequences.⁸⁹⁶

Rescued and intercepted persons must be informed of the planned place of disembarkation to allow them to express any reasons for believing that the proposed destination would put them at risk of *refoulement*.⁸⁹⁷ States are not to disembark asylum seekers and refugees rescued at sea to a place or territory when those individuals allege a well-founded fear of persecution, a threat to their life or freedom.⁸⁹⁸

States cannot also transfer an individual who 'expressed a fear' of persecution or ill-treatment, or has 'circumstances or characteristics of the person or group to which [he or] she belongs indicates a risk of which the State ought to be aware'.⁸⁹⁹ A rescue or intercepting State cannot transfer a person when it is 'aware or ought to be aware' that the circumstances in the country to which [the] return is contemplated' would subject such persons to a risk of *refoulement*.⁹⁰⁰ That State is required to take those circumstances into account when making transfer decisions, regardless of whether the individuals being transferred have made 'an explicit and articulated request for asylum'.⁹⁰¹

States must ensure that individuals requesting asylum are given access to fair and effective asylum procedures, provide every person with equal access to effective remedies, including the opportunity for asylum seekers and migrants to challenge their expulsion, and access to justice for victims of human rights violations.⁹⁰²

Migrants who are asked to consent to voluntary returns 'must be fully and meaningfully informed' of the choices they make, and be given access to up-to-date, accurate and objective information, particularly in relation to the place and the circumstances in which they would be

⁸⁹⁶ Gammeltoft-Hansen and Feith Tan (n 261) 507, fns 39-45.

⁸⁹⁷ *Hirsi* (n 22) [32].

⁸⁹⁸ UNHCR 'SS' (n 815) para 4.2.

⁸⁹⁹ *ibid* para 3.1.6, fn 35.

⁹⁰⁰ *ibid* para 3.1.6.

⁹⁰¹ UNHCR 'Hirsi' (n 120) para 4; UNHCR 'SS' (n 815) para 3.1.6.

⁹⁰² CERD Recommendation XXX (n 569) para 25; A/HRC/47/30 (n 160) para 39; UNHCR 'Hirsi' (n 120) para 4.3.4.

returning.⁹⁰³ They must be free of any coercion, including violence, ill-treatment, forced compliance or threats of indefinite or arbitrary detention in substandard conditions.⁹⁰⁴

Returning migrants must be allowed to choose a destination State to return to, subject to the agreement of that State.⁹⁰⁵ Returns must be carried out in safe and dignified conditions, in accordance with international law, including access to procedural guarantees and in consideration of the best interests of the child.⁹⁰⁶ Persons cannot be subjected to human rights violations or abuse by State or private actors.⁹⁰⁷ They should, *inter alia* not experience arbitrary detention, violence or ill-treatment, or extortion.⁹⁰⁸

⁹⁰³ OHCHR and MPG (n 568) Principle 6, Guidelines 3.

⁹⁰⁴ *ibid.*

⁹⁰⁵ *ibid* Guidelines 4.

⁹⁰⁶ *ibid* Guidelines 4-5.

⁹⁰⁷ *ibid.*

⁹⁰⁸ *ibid.*

6.2.2 Application of Jurisdiction under Article 33 of the Refugee Convention in Relation to EU States in the CMR

The findings of this study show that the rescues, interceptions and other migration control activities which form the substance of this thesis incontrovertibly occur on the high seas and in Libyan territory, clearly outside of EU territory. As discussed in sections 4.6.2 and 5.9, the LCG, General Administration for Coastal Security and the DCIM ['Libyan authorities'] functioning under Libya's Ministries of Interior and Defence are the principal State institutions responsible for the rescues, interception, return and the detention of refugees and migrants.⁹⁰⁹ Notwithstanding the Libyan government's inability to maintain control over the country's entire territory,⁹¹⁰ it remains a recognised Sovereign by the international community, including the UN and the EU.⁹¹¹ Refugees and migrants are also placed on board vessels flying the Libyan flag.⁹¹² They are neither directly intercepted by the authorities of EU States nor brought aboard EU-flagged vessels as was in the *Hirsi* case.⁹¹³

It can be inferred from the aforementioned principles in the previous sections that, at least on appearance, Libya exercises authority and effective control over the rescued and intercepted persons during rescues, interceptions, returns and in Libyan detention.⁹¹⁴ This means such persons are under the full and effective control of the Libyan LCG, Port Security and the DCIM, clearly engaging Libya's legal responsibility to secure their rights to *non-refoulement*.⁹¹⁵

In this instance however, this study submits that the actual control and jurisdiction over the rescued and intercepted refugees and migrants by the Libyans are exercised by the authorities of EU States and institutions. This argument is based on EU States' total control and influence

⁹⁰⁹ UNSMIL and OHCHR (n 20) 13; UNSMIL and OHCHR (n 16) 14-15; Palm (n 104) 13; CSDM (n 817) paras 202, 257.

⁹¹⁰ Declaration (n 36) Point 5; Netherlands) (n 480) 6; Palm (n 104) 22.

⁹¹¹ S/RES/2323 (n 479) Preamble paras 5 & 6; *SS and Others* (n 815) [56], [83]; UNSMIL and OHCHR (n 20)10; HRW (n 20) 11-12; See also, sections 4.5 & 5.6 above.

⁹¹² Amnesty International (n 89) 23.

⁹¹³ *Hirsi* (n 22) [76].

⁹¹⁴ UNHCR 'Hirsi' (n 120) para 4.3.2; *Hirsi* (n 22) [77].

⁹¹⁵ *Ibid* [67], [78].

over the Declaration and its implementation, together with their significant financial assistance and other material support for the Libyan authorities who act on their behalf.⁹¹⁶

As discussed in section 4.6 above, the interception and return of refugees and migrants are not incidental, but are part of the EU's broader migration management plan,⁹¹⁷ and governed by the Declaration that was concluded with Libya at the instigation of EU States for their own benefit.⁹¹⁸ As shown in Chapter Four, the stated aims of the Declaration was to create the necessary conditions to enhance the operational capabilities of Libyan authorities to 'effective[ly] control' the EU's external borders and to 'stem illegal flows [across the CMR] into the EU'.⁹¹⁹ The text of the Declaration explicitly stated that providing 'training, equipment and support to the [LCG] and other relevant agencies' is the policy's main priority.⁹²⁰ It is aimed at 'strengthening the mainstreaming of migration' within the EU's Official Development Assistance for Africa, by addressing the root causes of irregular migration and displacement in Africa.⁹²¹

The above aims were affirmed in the Italy-Libya MoU of 2017 that was welcomed and fully supported in the Declaration⁹²² and celebrated by the EU at the highest political level.⁹²³ Article 1(C) explicitly expressed Italy's aim of providing material, technical and political support to Libya was to enable its 'institutions in charge of the fight against illegal immigration' to conduct maritime interceptions and returns to Libya without the physical involvement of the Italian forces.⁹²⁴

⁹¹⁶ Declaration (n 36) Points 6; Gammeltoft-Hansen and Hathaway (n 271) 266-267; AI and HRW 'SS' (n 30) para 4; Alarm Phone, 'New Report: Aerial Collaboration Between the EU and Libya Facilitates Mass Interceptions of Migrants' (17 June 2020) 2 <https://eu-libya.info/img/RemoteControl_Report_0620.pdf> accessed 16 September 2023; CSDM (n 817) para 260.

⁹¹⁷ Declaration (n 36) Points 2-5; *SS and Others* (n 815) [94]; Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v Italy, and the "Operational Model"' (2020) 21 German Law Journal 385 390-391.

⁹¹⁸ Declaration (n 36) Points 6; Alarm Phone (n 916)) 2; Dastyari and Hirsch (n 823) 437; CSDM (n 817) para 260.

⁹¹⁹ Declaration (n 36) Points 2 & 6; CAT/C/ITA/CO/5-6 (n 106) para 22; (JOIN(2017) (n 1) 10; CoE Commissioner (n 20) 16; Amnesty International (n 89) 12.

⁹²⁰ Declaration (n 36) Point 6(a); AI and ARCI and Others (n 18); GLAN, ASGI and ARCI (n 552) para 58; Funds are provided to Libya's GACS, LCG, Port Security and the DCIM.

⁹²¹ Declaration (n 36) Points 7; HRW (n 17) 2 & 3.

⁹²² Declaration (n 36) Points 6(i); CAT/C/ITA/CO/5-6 (n 106) para 22; UNSMIL and OHCHR (n 16) 14-15; See also, section 4.6.1 above.

⁹²³ *SS and Others* (n 815) [94]; Moreno-Lax (n 917) 392-393.

⁹²⁴ AI and HRW 'SS' (n 30).

The implementation of the Declaration was concretely executed through the EU's Integrated border and migration management in Libya (IBM) which is funded under the EUTFA.⁹²⁵ The IBM has focused almost entirely on enhancing the operational capacity of the Libyan authorities in 'maritime surveillance, and rescuing at sea',⁹²⁶ the supply and maintenance of SAR vessels, and in assisting Libya 'defining and declaring' its own SAR zone, setting-up a MRCC to coordinate SAR activities and maritime interceptions.⁹²⁷ According to the European Commission, this involved 'full design of an Interagency National Coordination Centre' under Libya's Ministries of Interior and Defence.⁹²⁸ These intentions were articulated by the UK during the first phase of the IBM programme. The UK stated that the main objectives were:

to strengthen the fleets for [the LCG, coastal and port security] through training [...], fleet maintenance and the supply of rubber boats; setting up [...] National Coordination Centre [...] and assisting the Libyan [GNA] in declaring a Libyan SAR region'.⁹²⁹

Through the IBM programme, EU States led by Italy, have encouraged, supported and equipped Libya to declare Libya's own SAR region.⁹³⁰ Since 2013, the LCG has cooperated and received training from EU's naval force, Seahorse Mediterranean network project and EUNAVFOR MED to manage migrant flows and trafficking in the Mediterranean.⁹³¹ EUNAVFOR MED participate in direct operational activities, coordination, training, monitoring of the LCG and navy.⁹³² EU actors also direct the activities of the Libyan authorities in real time through 'aerial surveillance and coordination.'⁹³³

Italy's MRCC, using EU funds, continuously provides essential SAR support and coordination to the Libyan operations in the CMR through to Libya's territorial waters, including receiving

⁹²⁵ EU, 'Support to Integrated Border and Migration Management in Libya' (T05-EUTF-NOA-LY-07)' 2 March 2024) <<http://tinyurl.com/y5azxcz>> accessed 08 February 2024; AI and ARCI and Others (n 18).

⁹²⁶ European Commission (n 528) 1.

⁹²⁷ EU (n 925) 3; AI and ARCI and Others (n 18); As of March 2023, the EU had spent an estimated cost of of €15 000 000 to strengthen the capacity of the LCG for SAR.

⁹²⁸ European Commission (n 528) 1.

⁹²⁹ GLAN, ASGI and ARCI (n 552) para 59; footnote 111.

⁹³⁰ European Parliament, 'Parliamentary Question: Answer Given by Mr Avramopoulos on Behalf of the European Commission' 21 December 2018) <<https://tinyurl.com/ynn3dkt3>> accessed 21 September 2023; AI and HRW (n 28) paras 5-6; European Parliament, 'Maritime Rescue Coordination Centre in Libya (Question for written answer E-000027/2021 to the Commission) Rule 138 Özlem Demirel (The Left)' 2021) <<https://tinyurl.com/5bc38nw9>> accessed 28 May 2021; AI and HRW 'SS' (n 30) paras 5-6; GLAN, ASGI and ARCI (n 552) para 31,38.

⁹³¹ European Parliament (n 930); EUNAVFOR Med's focused on training the LCG and navy on migration management is based in Rome.

⁹³² (S/2019/711) (n 20) para 3.

⁹³³ Alarm Phone (n 916) 2; CSDM (n 817) para 260.

distress calls from migrant boats to meet international maritime standards.⁹³⁴ Libyan authorities have also been equipped with a MRCC, patrol boats and class-500 vessels by Italy.⁹³⁵ In August 2017, Italy deployed operation *Nauras* in Libyan waters and the Tripoli harbour, to enable the LCG to receive distress calls and coordinate maritime operations with the relevant actors,⁹³⁶ including EUNAVFOR Med operations in Rome.⁹³⁷ Prior to that, the Italian Navy had launched *Mare Sicuro* to operate within Libya's 'internal and territorial waters [...] in order to support Libya's naval assets', using EU funds.⁹³⁸

Since the implementation of the Declaration in 2017, the LCG has become EU states' principal proxy force in the CMR to stem irregular flows by sea into EU territory.⁹³⁹ Libyan authorities, at least on appearance, have increasingly taken full ownership of the SAR operations and EU States' responsibility for interceptions and coordination of rescues along the CMR.⁹⁴⁰ The EU and its Member States have significantly withdrawn their naval assets and SAR operations in the CMR.⁹⁴¹ Additionally, EU States have imposed legal and administrative obstructions on rescue NGOs and commercial vessels, including criminalising, a code of conduct and a closed port policy,⁹⁴² to prevent them from conducting SAR operations and from disembarking rescued persons at European ports.⁹⁴³ Rescue NGOs and ships masters have been ordered by EU States not to obstruct the activities of the LCG (see section 7.3.1).⁹⁴⁴ Additionally, ship

⁹³⁴ *SS and Others* (n 815) [66]-[68]; AI and HRW 'SS' (n 30) para 5; GLAN, ASGI and ARCI (n 552) 31. Despite declaring its own SAR zone and the enormous support from EU and Italy, Libyan authorities still face financial and logistical difficulties that inhibit their capacity to conduct SAR and coordination services.

⁹³⁵ *SS and Others* (n 815) [63]; GLAN, ASGI and ARCI (n 552) para 38, footnote 78; Moreno-Lax (n 917) 393.

⁹³⁶ Annick Pijnenburg and Kris van der Pas, 'Strategic Litigation against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Migration Route' (2022) 24 EJML 401, 409.

⁹³⁷ *SS and Others* (815) [62].

⁹³⁸ *ibid*; European Parliament (n 930); GLAN, ASGI and ARCI (n 552) para 38, footnote 77.

⁹³⁹ Joe Galvin Correspondent Ian Urbina Correspondent, "EU cooperation with Libya on Migrants Marred by 'Inhumane' Treatment" (2021) Christian Science Monitor N.PAG 1.

⁹⁴⁰ S/2019/711 (n 20) para 5; UNSMIL and OHCHR (n 16) 34; GLAN, ASGI and ARCI (n 552) para 38.

⁹⁴¹ UNSMIL and OHCHR (n 16) 15-17; Report of the Secretary-General (6 April 2020) UNSC Doc S/2020/275 para 5, footnote 2; Amnesty International (n 89); Only 25 of the 146 SAR operations conducted in the CMR between 01 September 2019 and 29 February 2020 were performed by Italian and Maltese assets, 69 by the LCG and 51 by NGOs and one by a merchant vessels.

⁹⁴² HRW, 'Italy: Navy Support for Libya May Endanger Migrants' 02 August 2017) <<https://www.refworld.org/docid/598337b44.html>> accessed 16 September 2023 para 9; UNSMIL and OHCHR (n 16) 16-17; Alarm Phone (n 916) 5.

⁹⁴³ S/2019/711 (n 20) para 5; OHCHR (n 97); Amnesty International (n 10); GLAN, 'Privatised Migrant Abuse by Italy and Libya' (Press Release) (18 December 2019) <<https://www.glanlaw.org/nivincase>> accessed 17 April 2022; Amnesty International (n 87); Amnesty International (n 425); Amnesty International (n 89) 12.

⁹⁴⁴ UNSMIL and OHCHR (n 16) 15-16; S/2019/711 (n 20) para 5; OHCHR (n 97); Amnesty International (n 425) 20; Amnesty International (n 89) 12.

masters are instructed to return rescued persons to Libya, a place considered unsafe for disembarking persons rescued at sea under international law.⁹⁴⁵

Arguably, the above funding, equipment and support to the LCG enable them to conduct rescues, interception and the return of persons to Libya.⁹⁴⁶ The intent was to achieve the same effects as the pushback practices and policies that were considered unlawful by the Grand Chamber of the ECtHR in *Hirsi*, while allowing EU States to evade their *non-refoulement* obligations.⁹⁴⁷ The combined effect of the withdrawal of EU and Member State's naval assets from sea, their the obstruction of humanitarian SAR operations and active deferral of responsibility to the Libyan authorities contributed to these aims.⁹⁴⁸

Following the Court's *Hirsi* decision,⁹⁴⁹ EU States could no longer return or hand over persons rescued or intercepted by EU-State flagged ships or within the custody or control of EU States to Libya due to the existence of substantial grounds showing that persons returned there would face a real risk of torture, ill-treatment, and *refoulement*.⁹⁵⁰

The EU's facilitation of the interception and detention of refugees and migrants have been documented extensively by several human rights organisations.⁹⁵¹ Reports by NGOs have shown that the support from EU States and institutions have 'facilitated and even directly contributed to systematic '*refoulement* by proxy' operations [... in] a number of ways.⁹⁵² Sea-Watch for instance, reported that the deployment of aerial surveillance by EU States has contributed to 'the capture of [...] thousands of people and their return' to Libya.⁹⁵³ EU aerial assets patrolling in the Libyan SAR region enable the LCG in real time to 'spot migrant boats from the air and to then guide' the LCG 'to the locations of escaping boats'.⁹⁵⁴ Many boat passengers have been captured, transported and detained in EU-funded vessels, buses,

⁹⁴⁵ *Hirsi* (n 22) [127]-[129]; UNSMIL and OHCHR (n 16) 15-16; S/2019/711 (n 20) para 5; OHCHR (n 97); Amnesty International (n 87); Amnesty International (n 425) 20; Amnesty International (n 89) 12.

⁹⁴⁶ *Hirsi* (n 22) [136]-[138]; AI and HRW 'SS' (n 30).

⁹⁴⁷ *Hirsi* (n 22) [93], [94]; Frelick, Kysel and Podkul (n 2) 193; Reviglio (n 2) 2.

⁹⁴⁸ AI and HRW 'SS' (n 30) para 6; OHCHR (n 97) 9.

⁹⁴⁹ *Hirsi* (n 22) [116]-[138].

⁹⁵⁰ HRW (n 942) para 5; CSDM (n 817) para 262; Alarm Phone (n 916); AI and HRW 'SS' (n 30).

⁹⁵¹ A/HRC/52/83 (n 106) para 46.

⁹⁵² Alarm Phone (n 916) 2.

⁹⁵³ *ibid*; CSDM (n 817) para 260.

⁹⁵⁴ Alarm Phone (n 916); CSDM (n 817) para 260.

detention facilities, including shipping containers where they are subjected to arbitrary detention and systematic abuse.⁹⁵⁵

The EU's own internal report has confirmed that its 'technical trainings or equipment' and financial support to Libyan authorities have 'contributed substantially' towards the Libyan 'activities at sea [...and] voluntary returns [...] from Libya'.⁹⁵⁶ The CoE's European Commissioner for Human Rights has also reported that EU States' cooperation and assistance to Libya, particularly the delivery of vessels, communications infrastructure and the naval support have in fact increased the LCG's capacity to intercept persons and returns to Libya.⁹⁵⁷ In its recent decision in *SS and Others*, the ECtHR also acknowledged the existence of plenty of evidence showing that Libya's actions have had 'a clear impact on the number of migrant arrivals in Italy'.⁹⁵⁸

The CoE Commissioner has argued that the EU's assistance to enhance the rescue capacity of the LCG 'may not be distinguishable from assistance enabling the [LCG] to prevent people from fleeing Libya'.⁹⁵⁹ Enabling Libya to take rescued and intercepted persons aboard EU funded vessels after rescues or during interceptions and return them to Libya where they would be subjected to risks of torture, extortion and other ill treatment is a 'clear violation of the obligation only to disembark rescued persons in a place of safety'⁹⁶⁰ and engages the responsibility of EU States.⁹⁶¹

The UNHCR has also affirmed that a State's *non-refoulement* obligation extends 'to the conduct of [...] those acting on behalf of a State', regardless of where the conduct occurs.⁹⁶² Similarly, the ICJ has held that a State would have exercised 'effective control' when an organ, other persons or entities acting on behalf of that State, performs acts 'wholly or in part, on the

⁹⁵⁵ Urbina and Galvin 1; Itamar Mann, 'SS and Others v Italy: Killing by Omission, Confirmed by Design' (*EJIL:Talk*, 19 June 2025) <<https://tinyurl.com/5x48vvcp>> accessed 29 July 2025.

⁹⁵⁶ EEAS (n 538) 3.

⁹⁵⁷ *SS and Others* (n 815) [68]–[69]

⁹⁵⁸ *ibid* [73], [94].

⁹⁵⁹ CoE Commissioner (n 20) 43.

⁹⁶⁰ *ibid*; GLAN, ASGI and ARCI (n 552) para 65.

⁹⁶¹ European Parliament, *Report on the Fact-Finding Investigation on Frontex Concerning alleged Fundamental Rights Violations (RapporteurTineke Strik)* (2021) 5-8.

⁹⁶² UNHCR 'SS' (n 815) para 3.1.5.

instructions or directions’ of that State.⁹⁶³ This follows, therefore, that any human rights violations committed by such organs or entities would be imputable to that State.⁹⁶⁴

The evidence presented above clearly shows the authorities and agents of EU States and institutions are heavily involved in the actual planning, implementation of the Declaration, including the day-to-day operations of the Libyans.⁹⁶⁵ Decisions on the allocation of funds to the Libyan authorities are made at EU level by committees representing EU Members, and on the recommendations of the European Commission.⁹⁶⁶ EU States and institutions, led by Italy, consistently exercise ‘total functional and effective control’ over the Declaration in terms of design, implementation⁹⁶⁷ and the infrastructure used for the Libyan operations.⁹⁶⁸

The Declaration, thus, constitutes a form of ‘legal entitlement’ by way of ‘consent’ or ‘acquiescence’, and therefore, entails EU States’ extraterritorial jurisdiction, in accordance with public international law.⁹⁶⁹ It is an indirect enforcement of migration control whereby EU States have deployed their authorities or naval vessels to jointly work with Libyan authorities to ‘stop, block or advice’ the Libyans on how best to block refugee departures to EU territory.⁹⁷⁰ The Libyan operations are made possible through the substantial financial, naval and logistical support from EU and its members that were contemplated in the Declaration.⁹⁷¹ EU States’ cooperation and overall control over the Libyans operations constitute an exercise of ‘public powers’, or ‘authority and responsibility’ over events, and is sufficient basis for jurisdiction.⁹⁷²

⁹⁶³ *Bosnia Genocide* (n 821) [400]-[401].

⁹⁶⁴ *Ibid* [401].

⁹⁶⁵ *SS and Others* (n 815) [57]-[74]; Moreno-Lax (n 917)387.

⁹⁶⁶ GLAN, ASGI and ARCI (n 552) para 58.

⁹⁶⁷ AI and HRW ‘SS’ (n 30) 5; HRW (n 17); Alarm Phone (n 916) 2; AI and ARCI and Others (n 18) 2; Sea-Watch e.V, *Submission to the UN Special Rapporteur on the Human Rights of Migrants: Push-Back Practices and their Impact on the Human Rights of Migrants*, 29 of January 2021) 1-3.

⁹⁶⁸ Declaration (n 36) Points 2 & 6; CAT/C/ITA/CO/5-6 (n 106) para 22; UNSMIL and OHCHR (n 16) 14-15; CoE Commissioner (n 20) 43; CSDM (n 817) 202, 257; Giulia Tranchina, ‘Italy Reups Funding to Force Migrants Back to Libya: Migrants, Asylum Seekers Face Murder, Torture, Enslavement in Libya’ (HRW, 01 February 2023) <<https://tinyurl.com/488nxer4>> accessed 17 May 2023; Maccanico (n 517) 6; GLAN, ASGI and ARCI (n 552) paras 31-38, 76.

⁹⁶⁹ *SS and Others* (n 815) [61] [94]-[98]; UNHCR ‘SS’ (n 815) 3.2.3; Klug and Howe (n 261) 73 & 74; Gammeltoft-Hansen (n 815) 112; Kim (n 261) 52.

⁹⁷⁰ Gammeltoft-Hansen and Hathaway (271) 266-267.

⁹⁷¹ *SS and Others* (815) [94].

⁹⁷² *ibid* [64]; UNHCR ‘SS’ (n 815) 3.2.3; Gammeltoft-Hansen and Hathaway (n 271) 266-267.

EU States' significant role in coordination, direct provision of funds, patrol vessels, surveillance and other material support to Libya to conduct control activities,⁹⁷³ also constitute 'aiding' or 'assisting'.⁹⁷⁴ Under Article 16 of the ASR, a State can be held responsible for 'aiding' or 'assisting' a third State in the conduct of an internationally wrongful act ... with knowledge of the circumstances of the ...wrongful act'.⁹⁷⁵ According to the ILC commentary, an 'aid or assistance' includes financing a particular activity⁹⁷⁶ or providing 'material aid' to the State that 'uses the aid to commit human rights violations',⁹⁷⁷ particularly torture and *refoulement*.⁹⁷⁸

Although the ILC Articles are not formally binding, Article 16 is considered a rule of CIL by the UNHCR, ICJ and other human rights bodies.⁹⁷⁹ According to the UNHCR, a State may incur 'secondary' responsibility under Article 16 when it provides 'material or other forms of aid or assistance' to another State where the assisting State has 'actual knowledge of risks that its assistance is likely to be used to facilitate serious human rights violations', including the prohibitions of torture, arbitrary detention and *refoulement*.⁹⁸⁰ As already discussed in Chapter VI, there is plenty of evidence showing that EU States' contribution and assistance to Libya are provided with their full knowledge of that their assistance to Libya will 'likely result in serious human rights violations', including torture, ill-treatment and *refoulement*.⁹⁸¹ The CoE Commissioner for Human Rights has also underscored that in light of the extensive information on the serious human rights situation in Libya, EU States cannot claim not to 'have known' that transferring 'either formally or *de facto*, responsibility for rescue and interceptions to Libya would result in exposing refugees and migrants to the risk of torture, inhuman or degrading treatment, and *refoulement*'.⁹⁸²

In *Hirsi*, the ECtHR noted that risks of human rights violations faced by refugees and irregular migrants are 'well known and easy to verify on the basis of multiple sources'.⁹⁸³ In the Court's

⁹⁷³ *SS and Others* (n 815) [71]-[73]; EEAS (n 538) 3.

⁹⁷⁴ UNHCR 'SS' (n 815) 4.1-6.1; *SS and Others* (n 815) [68-77]; HRW (n 942); Alarm Phone (n 916).

⁹⁷⁵ UNHCR 'SS' (n 815) para 5.1.

⁹⁷⁶ ILC (n 971) Article 16 para 1.

⁹⁷⁷ *Ibid* para 9.

⁹⁷⁸ UNHCR 'SS' (n 815) para 5.7.

⁹⁷⁹ ILC (n 971) Article 16; *Bosnia Genocide* (n 821) [400]-[414]; UNHCR 'SS' (n 815) para 5.3; Gammeltoft-Hansen and Hathaway (n 271) 277.

⁹⁸⁰ UNHCR 'SS' (n 815) para 5.7

⁹⁸¹ Article 16, paras 1 & 5; UNHCR paras 2.1-2.7, 6.1; *SS and Others* (n 815) [60], [68]-[77]; Gammeltoft-Hansen and Hathaway 279.

⁹⁸² UNHCR 'SS' (n 815) 2.1-2.7; *SS and Others* (n 815) [68]-[70].

⁹⁸³ *Hirsi* (n 22) [137].

opinion, the existence of verifiable facts was sufficient to conclude that Italian authorities ‘knew or should have known’ of the risk of exposure to ill-treatment upon return to Libya.⁹⁸⁴ In *SS* (cited above), the Court stated that the human rights situation in Libya ‘was no more favourable than it was found to have been in the *Hirsi* case and cannot therefore justify [...] practices which are incompatible with *non-refoulement*.’⁹⁸⁵

Obstructing and criminalising humanitarian and rescue NGOs deprive intercepted refugees and migrants of such life-saving and humanitarian services, including much needed SAR activities, put them at increased risks of death,⁹⁸⁶ and violate EU States’ obligation ‘to prevent, combat and eliminate [...] the deprivation of life’.⁹⁸⁷ The Special Rapporteur on extrajudicial, summary or arbitrary executions has affirmed that ‘the active obstruction of life-saving services and/or the criminalisation [...] ‘constitute violations of the State’s obligation to protect the right to life’.⁹⁸⁸ The Rapporteur noted further that any deaths attributable to such measures amount to the arbitrary deprivation of life, which engages the responsibility of the State.⁹⁸⁹

The refusal of EU States to offer a port of safety constitutes a violation of their obligation under international human rights law⁹⁹⁰ to take ‘all reasonable precautionary steps to protect life’ ... ‘at all times and in all circumstances’.⁹⁹¹ States are not to engage in any acts that would endanger the exercise of that right.⁹⁹² They have a duty to exercise due diligence to prevent arbitrary deprivations of life⁹⁹³ and to facilitate humanitarian action and a negative obligation not to prevent their services.⁹⁹⁴

Given the context of the Libyan operations, the extent and pervasiveness of EU States’ role and financial contributions, this study argues that the Libyan authorities are acting ‘under the direction and control’ of EU States which fund and control the activities of Libyans in the

⁹⁸⁴ *ibid* [128] [131]; UNHCR ‘*SS*’ (n 815) 5.5.

⁹⁸⁵ *SS and Others* (n 815) [109].

⁹⁸⁶ Report on Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Saving Lives is Not a Crime-Note by the Secretary-General (07 August 2018) UNGA Doc A/73/314 paras 11-12; OHCHR (n 108) (n 22) 4.

⁹⁸⁷ OHCHR (n 108) 4.

⁹⁸⁸ A/73/314 (n 986) para 13.

⁹⁸⁹ *ibid*

⁹⁹⁰ GLAN (n 936) 1

⁹⁹¹ Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions (15 August 2017) UNGA Doc A/72/335, paras 14 and 16.

⁹⁹² OHCHR (n 108) 4.

⁹⁹³ A/73/314 (n 986) para 16.

⁹⁹⁴ OHCHR (n 108) 4.

benefits of EU States. They are responsible for violations of *non-refoulement* as contemplated in Article 33(1) perpetrated against the persons intercepted and returned to Libya by the Libyans under the Declaration.⁹⁹⁵

⁹⁹⁵ UNHCR 'SS' (n 815) 5.1-5.3; *SS and Others* (n 815) [70]-[71].

6.3 Establishing Jurisdiction under Article 3 of UNCAT

As with the jurisdiction of *non-refoulement* in Article 33(1) of the Refugee Convention, the jurisdiction of Article 3 of the UNCAT extends beyond a State's national borders.⁹⁹⁶ Article 2(1) of the UNCAT provides:

Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

Paragraph 2 also stipulates that '[n]o exceptional circumstances whatsoever, ... may be invoked as a justification of torture.' The CAT has also decided that nothing in Article 2 or its jurisprudence⁹⁹⁷ can be construed as limiting the scope of application of the phrase 'any territory under its jurisdiction' to the territory of a State only.⁹⁹⁸ It has stressed that jurisdiction over Article 3 is based on the exercise of direct or indirect *de facto* or *de jure* control over a person or an area, under international law, by the State concerned.⁹⁹⁹ In General Comment No 2, the CAT noted that jurisdiction for the purposes of Article 3 refers to 'any territory in which [a State party] exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law'.¹⁰⁰⁰ In this context, 'any territory under its jurisdiction',¹⁰⁰¹ encompasses any conduct attributable to a State on the account of its exercise of control over an area or persons, regardless of where the action occurred.¹⁰⁰²

In the case of *GRB v Sweden*, the CAT affirmed that since Article 3 is 'similarly absolute',¹⁰⁰³ and non-derogable.¹⁰⁰⁴ Article 3 applies without any exception or regard to the circumstances whatsoever, whether internal political instability or any other public emergency.¹⁰⁰⁵ Article 3 applies in 'all areas where the State party exercises, [...] *de jure* or *de facto* effective control',¹⁰⁰⁶

⁹⁹⁶ CAT/C/GC/2 (n 196); 'Advisory Opinion' (n 111) paras 9, 24-25; CAT/C/GC/4 (n 188); UNHCR 'Hirsi' (n 120) para 4.1.2.

⁹⁹⁷ Pursuant to Article 22 of the UNCAT, the CAT receives and considers communications from or on behalf of persons who allege violations of their Convention rights by State parties which also accept the CAT's competence.

⁹⁹⁸ CAT/C/GC/2 (n 196) para 7; CAT/C/GC/4 (n 188) para 7; CSDM (n 817) para 236.

⁹⁹⁹ CAT/C/USA/CO/2 (n 848) paras 15; CAT/C/GC/2 (n 196) para 16; UNHCR 'Hirsi' (n 120) para 4.2.2.

¹⁰⁰⁰ CAT/C/USA/CO/2 (n 848) para 1 *JHA v Spain* (n 807) para 8.2; CAT/C/GC/4 (n 188) para 10; CAT/C/GC/2 (n 196) para 16; *Sonko v Spain* Communication No 368/2008, CAT/C/47/D/368/2008 (23 October 2008) para 10.3; *JHA v Spain* (n 807) para 8.2; CAT/C/GC/4 (n 188) para 10; UNHCR 'Hirsi' (n 120) para 4.2.2.

¹⁰⁰¹ UNCAT (n 110) Article 2(1)

¹⁰⁰² CAT/C/GC/2 (n 196) paras 7; CSDM (n 817) para 232.

¹⁰⁰³ *Paez v Sweden* (n 200) para 14.5; *Agiza* (n 186) para 13.8; CAT/C/GC/4 (n 188) paras 8 & 9..

¹⁰⁰⁴ *Agiza* (n 186) para 13.8; CAT/C/GC/2 (n 196) paras 3, 5-6, 19 & 25; CAT/C/GC/4 (n 188) para 8-9; fn 3.

¹⁰⁰⁵ CAT/C/GC/2 (n 196) paras 5-6; CAT/C/GC/4 (n 188) para 8.

¹⁰⁰⁶ CAT/C/USA/CO/2 (n 848) para 15; CAT/C/GC/2 (n 196) para 16; UNHCR 'Hirsi' (n 120) para 4.2.2.

irrespective of a person's nationality, statelessness or legal, administrative or judicial status under ordinary or emergency law.¹⁰⁰⁷ According to the CAT, 'any territory' in this context includes 'any territory or facilities ... without discrimination and subject to the *de jure or de facto* control of' the relevant State.¹⁰⁰⁸

Article 3 covers any person, including persons seeking asylum or are in need of international protection, in 'any territory', or 'any area' under the jurisdiction of that State, 'control or authority, or on board a ship [...] registered in the State party'.¹⁰⁰⁹ Article 3 applies whenever there are 'substantial grounds' to believe that a person would be in danger of being subjected to torture in another State if deported or expelled to that State either as an individual or as a member of a group.¹⁰¹⁰ States are prohibited from returning or expelling any persons who are found to be at risk of torture upon expulsion or deportation to another State, 'so long as the risk persists'.¹⁰¹¹ They cannot expel or deport persons at risk of torture to another State where that person may face subsequent expulsion or deportation to a third State where the person would face similar risks of being subjected to torture.¹⁰¹²

Similar to States' obligations under the Refugee Convention, parties to the UNCAT must ensure that any person facing expulsion is provided with an effective examination of their individual cases with due regard for their personal risks by its competent administrative and/or judicial authorities.¹⁰¹³ The affected persons must be provided with access to a prompt and transparent process, asylum procedures, and an independent, impartial and effective judicial review of the expulsion or deportation decision, with a guaranteed right of appeal and a suspensive effect against expulsion orders.¹⁰¹⁴ States must also inform individuals of their intended deportation decisions in a timely fashion.¹⁰¹⁵

¹⁰⁰⁷ CAT/C/GC/4 (n 188) para 10.

¹⁰⁰⁸ CAT/C/GC/2 (n 196) para 7; See also, CAT/C/GC/4 (n 188) para 10.

¹⁰⁰⁹ CAT/C/GC/2 (n 196) paras 5-6; CAT/C/GC/4 (n 188) para 10.

¹⁰¹⁰ CAT/C/GC/4 (n 196) para 11.

¹⁰¹¹ *Aemei v Switzerland* Communication No 34/1995 (9 May 1997) CAT/C/18/D/34/1995 para 11; CAT/C/GC/4 (n 188) para 12.

¹⁰¹² General Comment No 1 (n 859) para 2; *Avedes Hamayak Korban v Sweden*, Communication No 88/1997, CAT/C/21/D/088/1997 (16 November 1998) para 7; *Kwami Mopongo and Others v Morocco* Communication No 321/2007, CAT/C/53/D/321/2007 (CAT, 13 January 2015) paras 11.3–11.4; CAT/C/GC/4 (n 188) para 12.

¹⁰¹³ General Comment No 15 (n 607) para 10; A/RES/45/158 (n 685) Article 22(1); *Mopongo* (n 959) paras 6.2-6.3 & 11.3–11.4; CAT/C/GC/4 (n 188) para 13.

¹⁰¹⁴ Concluding Observations of the CAT: Greece (27 June 2012) CAT/C/GRC/CO/5-6, para 19; CAT/C/ITA/CO/5-6 (n 106) para 21; CAT/C/GC/4 (n 188) para 13.

¹⁰¹⁵ *ibid*

States cannot adopt dissuasive measures or policies, such as subjecting persons to detention in deplorable conditions for prolonged periods, refusal or undue delays in processing asylum claims or cutting funding to assistance programmes for asylum seekers and individuals in need of protection to compel them to return to countries of origin where they have a personal risk of being subjected to torture, other ill-treatment and cruel punishment there.¹⁰¹⁶

Under Article 2(1), States have a comprehensive duty to adopt 'effective legislative, administrative, judicial or other measures' to eradicate acts of torture, including possible violations of *non-refoulement*¹⁰¹⁷ within any territory under their jurisdiction. In accordance with Article 16 of the UNCAT, State parties also have a positive obligation to prevent acts of cruel, inhuman or degrading treatment or punishment ['ill-treatment'] which do not amount to torture as defined in Article 1 of the UNCAT.¹⁰¹⁸ This entails determining whether the nature of ill-treatment that a person would be facing upon deportation or expulsion would likely change so as to constitute torture, and ultimately *refoulement*.¹⁰¹⁹

6.3.1 Application of Article 3 of the UNCAT to the Libya Case: Existence of Jurisdiction? As with Article 33(1) of the Refugee Convention,¹⁰²⁰ jurisdiction under Article 3 of the UNCAT exists in the context of migrant interceptions at sea where a State exercises *de jure* or *de facto* effective control over intercepted refugees and migrants.¹⁰²¹ According to the CAT, a State exercises *de facto* effective control when it conducts interceptions in cooperation with the authorities of another State by virtue of an international agreement concluded between the States in question.¹⁰²² Similar to the application of Article 33(1) of the Refugee Convention,¹⁰²³ jurisdiction here can also arise when the authorities of a State exercise control over the persons aboard a vessel registered in or flying that State's flag.¹⁰²⁴

¹⁰¹⁶ CAT/C/GRC/CO/5-6 (n 1014) para 20; CAT/C/GC/4 (n 188) para 13.

¹⁰¹⁷ Ibid para 18.

¹⁰¹⁸ UNCAT (n 110); CAT/C/GC/2 (n 196) paras 3 & 6; CAT/C/GC/4 (n 188) para 16.

¹⁰¹⁹ CAT/C/GC/4 (n 188) para 16.

¹⁰²⁰ CAT/C/USA/CO/2 (n 848) para 15; CAT/C/GC/2 (n 196) para 16; UNHCR 'Hirsi' (n 120) para 4.2.2.

¹⁰²¹ *Sonko v Spain* (n 947) para 10.3; *JHA v Spain* (n 807) para 8.2.

¹⁰²² *JHA* (n 807) para 8.2; CSDM (n 817) para 248.

¹⁰²³ UNHCR 'Hirsi' (n 120) para 4.2.2.

¹⁰²⁴ *Sonko* (n 1000) para 10.3; *JHA* (n 807) para 8.2.

In the case of *JHA v Spain*,¹⁰²⁵ the CAT observed that Spain ‘maintained control’ over the rescued migrants aboard the *Marine I*, from the time of their rescue, throughout their identification, determination of status, repatriation and while in detention in-Mauritania.¹⁰²⁶ Spain’s the *de facto* control, and therefore jurisdiction, was derived from the exercise of physical control by its authorities over the migrants during the rescue, while aboard the Spanish vessel, throughout their detention in Mauritania.¹⁰²⁷ The CAT recalled that Spain ‘exercised [...] constant *de facto* control’ over the individuals while in Mauritanian detention ‘by virtue of a diplomatic agreement’ that Spain concluded with Mauritania.¹⁰²⁸ The alleged victims were ‘subject to Spanish jurisdiction’ and were therefore responsible for the protection of their safety and right to *non-refoulement* rights of the rescued persons under Article 3 of the UNCAT.¹⁰²⁹

The reasoning in the *JHA* case above shows that *de jure* or *de facto* effective control, authority or personal control under the UNCAT can be exercised ‘directly or indirectly, in whole or in part,’ through the exercise of ‘public powers’ abroad in accordance with international law.¹⁰³⁰ Similar to jurisdiction under the Refugee Convention, *de jure* or *de facto* effective control based on public powers under UNCAT may be derived from ‘custom, treaty or other agreement’,¹⁰³¹ including migration control agreements such as the Declaration, at the centre of this thesis. An ‘indirect’ control over refugees and asylum seekers can arise in situations where a State exercises control over persons by ‘detering’, ‘towing’ or ‘forcibly escorting’ vessels carrying refugees and asylum seekers and controlling their movements on the high seas or foreign territory.¹⁰³²

Based on the reasoning above, this study submits that EU States exercise jurisdiction over the interception and returns performed by Libyan authorities along the CMR.¹⁰³³ In this instance,

¹⁰²⁵ *JHA* (n 807); This case concerned the rescue, towing and detention of 369 Asian and African migrants by the Spanish maritime rescue after the cargo vessel *Marine I* on which they were travelling capsized in international waters off the coast of Senegal, Mauritania and the Canary Islands.

¹⁰²⁶ *ibid* para 8.2.

¹⁰²⁷ *JHA* (n 807) para 8.2.

¹⁰²⁸ UNHCR ‘Hirsi’ (n 120) para 4.2.2.

¹⁰²⁹ *JHA* (n 807) para 8.2; UNHCR ‘Hirsi’ (120) para 4.2.2; Although the case was deemed inadmissible because the complainant lacked the expressed consent of the victims to act on their behalf (paras 8.3 & 9(a).

¹⁰³⁰ CAT/C/GC/2 (n 196) para 16; *JHA* (n 807) para 8.2.

¹⁰³¹ CAT/C/GC/2 (n 196) para 18; *Al-Skeini* (n 820) [135], [144]; *Gammeltoft-Hansen and Hathaway* (n 271) 267-268.

¹⁰³² *Gammeltoft-Hansen and Hathaway* (271) 265-66, fns 129-142.

¹⁰³³ *JHA* (n 807) para 8.2.

the degree of control that is exercised by EU States, particularly Italy, over the intercepted persons is much more obvious and stronger than was exercised by Spain in the *JHA* case. This argument is based on the fact that the rescues, interceptions, returns and detention of refugees and migrants are not just carried out by virtue of the Declaration but also the degree of control exercised by EU States, particularly Italy, over the policy and the Libyan authorities which as previously discussed in section 6.2.2 above.¹⁰³⁴

As discussed in Chapter Four, the Declaration is one of several bilateral agreements signed between the EU, its Member States and Libya in recent years,¹⁰³⁵ to enhance the capacity of Libya to combat irregular migration from Libya to Europe by sea.¹⁰³⁶ EU States' years of cooperation with Libya to combat irregular migration to the EU across the CMR was acknowledged in the Italy-Libya MoU of 2017¹⁰³⁷ and by the ECtHR in the *Hirsi* case cited above.¹⁰³⁸ The LCG was initially created by Italy with the signing of the Treaty of Friendship in August 2008 to enable Italy to transfer its responsibility for combatting illegal migration across the CMR from Libya.¹⁰³⁹

Notwithstanding the substantial financial and technical assistance Libya receives from the EU and Italy, Libya still relies heavily on the massive and decisive support from Italian and EU naval assets to coordinate its maritime operations in Libya's own SAR region.¹⁰⁴⁰ As mentioned in section 6.2.2, Libya's MRCC infrastructure and capacity were just recently built between 2016 and 2017 with the financial and material support from the EU and Italy.¹⁰⁴¹ Without the EU and Italy's support, Libya would not be able to declare its own SAR region, established a MRCC or set up a Coast Guard with the capacity to respond to distress calls at sea.¹⁰⁴² The UN Fact-Finding Mission report of 2023 found 'substantial evidence' showing that the interception and

¹⁰³⁴ Declaration (n 36) Points 6; Italy-Libya MoU (n 338) See Preamble, Articles 1 & 2; CAT/C/ITA/CO/5-6 (n 106) para 22; *SS and Others* (n 815) [61]-[63], [72]; UNSMIL and OHCHR (n 16) 14-15.

¹⁰³⁵ European Commission 'MPF' (n 2) 1-2; EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) 23; CoE Commissioner, *A Distress Call for Human Rights: The Widening Gap in Migrant Protection in the Mediterranean (Follow-Up Report to the 2019 Recommendation)* (Council of Europe March 2021) 7; See also, Trocaire (n 13) 3.

¹⁰³⁶ Declaration (n 36) Points 5, 6(a)(b)(c) and (g); (JOIN(2017) (n 1) 10; EEAS (n 538); Amnesty International (n 89) 12.

¹⁰³⁷ (n 338) preambular paragraphs 3 & 9.

¹⁰³⁸ *Hirsi* (n 22) [19]-[22], [122].

¹⁰³⁹ CAT/C/ITA/CO/5-6 (n 106) para 22; UNSMIL and OHCHR (n 16) 14-15; CoE Commissioner (n 20) 43; CSDM (n 817) paras 202, 257; GLAN, ASGI and ARCI (n 552) para 31-38.

¹⁰⁴⁰ AI and ARCI and Others (n 18).

¹⁰⁴¹ AI and HRW 'SS' (n 30) para 6; CSDM (n 817) paras 211-260; Sea-Watch e.V 1-3 (n 967).

¹⁰⁴² AI and HRW 'SS' (n 30) para 6; Amnesty International (n 425); AI and ARCI and Others (n 18).

detention of refugees and migrants in Libya by the LCG and DCIM would not have been possible without the 'direct or indirect' support from the by the EU and its Member States.¹⁰⁴³

Libya only exercises a nominal authority in its territory and on the high seas.¹⁰⁴⁴ The Fact-Finding Mission (cited above) found 'overwhelming evidence' showing that refugees and migrants in Libyan detention centres [were] under the nominal or actual control' of the DCIM.¹⁰⁴⁵

The extent of control exercised by EU Member States', particularly Italy, over the Libyan authorities has been widely documented by several UN bodies and independent international human rights organisations, including the UNHCR.¹⁰⁴⁶ Several reports of NGOs and human rights organisations have concluded that the key role played by EU institutions and States in the design, funding and execution of the Declaration, facilitates and perpetuates the interceptions and continual disembarkation or returns to Libya where they face systematic human rights violations in Libyan detention centres.¹⁰⁴⁷

In August 2017, the UN Special Rapporteur on extrajudicial, arbitrary and summary executions made a similar conclusion on the extent of control exercised by the EU and Member States over the intercepted persons.¹⁰⁴⁸ According to the Rapporteur, the extensive surveillance by the EU and Member States constitutes an exercise of 'sufficient functional control' [...] an adequate and effective system of rescue'.¹⁰⁴⁹ Such a measure must respect the principle of *non-refoulement*, the protection of refugees and migrants against preventable and foreseeable loss of and to provide support to ships operated by NGOs.¹⁰⁵⁰

The UN Special Rapporteur on Torture, Nils Melzer has explicitly stated that an exercise of extraterritorial 'control' such as in the above context, triggers the international responsibility of the controlling state.¹⁰⁵¹ Rapporteur Melzer iterated further that 'States are responsible for

¹⁰⁴³ A/HRC/52/83 (n 106) para 46.

¹⁰⁴⁴ UNSMIL and OHCHR (n 20) 13; UNSMIL and OHCHR (n 16) 14-15; CSDM (n 817) para 257; The LCG is part of the of Libyan navy which in turn act under the command of the Italian navy.

¹⁰⁴⁵ A/HRC/52/83 (n 106) para 48.

¹⁰⁴⁶ Amnesty International (n 10) 27; UNSMIL and OHCHR (n 16) 15-17; CSDM (n 817) para 260; Amnesty International (n 425) 9-14.

¹⁰⁴⁷ AI and HRW 'SS' (n 30) para 8; GLAN (n 936); HRW (n 20); AI and ARCI and Others (n 18) 2-3; GLAN, ASGI and ARCI (n 552); AI (n 425); Sea-Watch e.V (n 967).

¹⁰⁴⁸ A/72/335 (n 991) para 64.

¹⁰⁴⁹ *ibid.*

¹⁰⁵⁰ *ibid.*

¹⁰⁵¹ A/HRC/37/50 (n 101) para 56.

internationally wrongful acts or omissions that are legally attributable to them, whether through direct imputation, joint responsibility or complicity, and regardless of the lawfulness of such acts or omissions under national law'.¹⁰⁵² Elaborating further, Melzer noted that:

States are responsible [for ...] knowingly providing instructions, directions, equipment, training, personnel, financial assistance or intelligence information in support of unlawful migration deterrence or prevention operations conducted by third States incur legal responsibility for these violations.¹⁰⁵³

Rapporteur Melzer also emphasised that States 'cannot circumvent their own international obligations by externalising or delegating their migration control practices' to other States or non-State actors outside their jurisdictional control.¹⁰⁵⁴ Therefore, 'any instigation, support or participation' by a State in such control practices may amount to 'complicity in or joint responsibility' for unlawful interceptions leading to violations of human rights, including torture and ill-treatment.¹⁰⁵⁵

Based on the degree of control exercised by the EU States and institutions over the design and the practical aspects of the Declaration, and their direct and indirect assistance to Libya, this study concludes that EU States exercise jurisdiction under Article 3 of the UNCAT. EU States exercise indirect *de facto* and *de jure* control over the refugees and migrants by supporting and enabling Libya to deter and block refugee movements in the CMR.¹⁰⁵⁶ Consequently, EU Member States are responsible for violations of *non-refoulement* under Article 3 perpetrated against refugees and migrants by the Libyan authorities, armed groups and traffickers by virtue of the Declaration.

6.3.2 Other Basis for Jurisdiction under the UNCAT

Parties to the UNCAT may have jurisdiction over persons through the doctrine of positive obligations, for their failure to ensure due diligence or take appropriate measures to prevent human rights violations by others in areas where they exercise influence.¹⁰⁵⁷ Under Article 2(1) of the UNCAT, State parties have positive obligations to take legislative and other appropriate

¹⁰⁵² *ibid.*

¹⁰⁵³ *ibid.*

¹⁰⁵⁴ *ibid* para 57.

¹⁰⁵⁵ *ibid.*

¹⁰⁵⁶ *JHA* (n 807) para 8.2.

¹⁰⁵⁷ Anna Liguori, *Migration Law and The Externalization of Border Controls, European State Responsibility* (Routledge 2019) Chapter 4; CSDM (n 817) para 263; Vladislava Stoyanova, 'Fault, Knowledge and Risk Within the Framework of Positive Obligations under the European Convention on Human Rights' (2020) 33 *LJIL* 601, 601.

measures to prevent or minimise breaches of the UNCAT within any territory under their jurisdiction (see section 6.3.1 above).¹⁰⁵⁸ They can be held responsible for human rights violations when that State ‘actively facilitated’ and ‘failed to prevent the violations from occurring’.¹⁰⁵⁹

States must also avoid being involved in ‘complicity or participation’ in torture¹⁰⁶⁰ by taking measures to prevent and respond to torture and all forms of exploitation and violence perpetrated against migrants, whether they were committed by their institutions, officials, private institutions or individuals.¹⁰⁶¹ Pursuant to article 3, paragraph 2, States must also take into account, ‘all relevant considerations’, including where applicable, ‘the existence [...] of a consistent pattern of gross, flagrant or mass violations of human rights’ in the destination State.¹⁰⁶²

In its concluding observations on Italy in 2017, the CAT called upon Italy to ‘take all necessary legal, political and diplomatic measures’ to ensure any migration control agreement, cooperation and/or support for third countries complies with Italy’s ‘obligations under international human rights [...] and refugee law’.¹⁰⁶³ The CAT also urged Italy ‘as a matter of urgency,’ to ‘consider, establishing an effective mechanism for monitoring the conditions [...] in Libya for the implementation of the cooperation projects.’¹⁰⁶⁴

This study found that EU States have neglected their positive obligations to prevent violations of torture and *refoulement* against intercepted refugees and migrants at sea and in Libya.¹⁰⁶⁵ Despite the numerous reports of the ‘dangerous, life-threatening interceptions’ by the LCG¹⁰⁶⁶ and the risk of exposure to torture and other serious human rights violations in Libya,¹⁰⁶⁷ EU

¹⁰⁵⁸ Sarah Joseph, Katie Mitchell and Linda Gyorki, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (2006) OMCT Handbook Series 4 s 4.6; CSDM (n 817) para 265.

¹⁰⁵⁹ Liguori (n 1057); GLAN, ASGI and ARCI (n 552) para 56.

¹⁰⁶⁰ Joseph, Mitchell and Gyorki (n 1058) Section 4.6.1; Poon (n 29).

¹⁰⁶¹ OHCHR and MPG (n 568) Principle 7; Migrant children must be protected from exploitation and abuse, including the worst forms of child labour.

¹⁰⁶² UNCAT (n 110) Article 3(2).

¹⁰⁶³ CAT/C/ITA/CO/5-6 (n 106) para 22.

¹⁰⁶⁴ *ibid.*

¹⁰⁶⁵ *ibid.*; UNSC ‘Report of the Secretary-General on UN Support Mission in Libya’ (19 January 2021) UN Doc S/2021/62 para 107; ‘UNHCR Position’ (n 104); A/HRC/47/30 (n 160); CSDM (n 817) para 264.

¹⁰⁶⁶ S/2017/726 (n 556) paras 34-35; CAT/C/ITA/CO/5-6 (n 106) para 22; Amnesty International (n 10); Palm (n 104) 13; ECCHR, FIDH and LJIL (n 23) 10.

¹⁰⁶⁷ S/2021/62 (n 1065) para 107; A/HRC/47/30 (n 160) para 73; ‘UNHCR Position’ (n 104).

States have refused to incorporate human rights guarantees or critical assurances to ensure a lawful and humane treatment of intercepted persons sent to Libya.¹⁰⁶⁸

Substantial evidence from numerous sources show that EU States and institutions had full knowledge of the real risk of exposure to the widespread systematic human rights abuses, including torture and other ill-treatment for intercepted persons upon their return to Libya.¹⁰⁶⁹

The EU and its Members have also publicly acknowledged the accuracy of the information on the widespread and systematic human rights abuses perpetrated against refugees and migrants at sea and in Libya,¹⁰⁷⁰ by the Libyan authorities, including the LCG and DCIM officials, and the unwillingness and incapacity of the GNA government to protect the human rights of refugees and migrants.¹⁰⁷¹

Despite that, that EU States have ignored the above evidence and several criticisms pointing out the negative human rights consequences of the Declaration and international pressure to make their cooperation conditional on the compliance with human rights laws.¹⁰⁷² The MoU Italy-Libya has been renewed twice for three more years since 2017 without any modification or amendment or concrete human rights guarantees, despite concerns about the ongoing conflicts and the GNA's lack of control over the entire Libyan territory.¹⁰⁷³ In November 2019, Malta also signed its own bilateral agreement with Libya to cooperate to intercept and return migrants to Libya.¹⁰⁷⁴

¹⁰⁶⁸ S/2017/761 (n 24) para 46; CAT/C/ITA/CO/5-6 (n 106) para 22; A/HRC/52/83 (n 106) para 46; Amnesty International (n 425) 20;

¹⁰⁶⁹ *Hirsi* (n 22) [106]; HRW (n 20) 12; AI (n 425); CSDM (n 817) para 210.

¹⁰⁷⁰ OHCHR (n 108) 1; CSDM (n 817) para 211; Daniel Howden, Apostolis Fotiadis and Zach Campbell, 'Revealed: The Great European Refugee Scandal' (2020) <<https://tinyurl.com/3nnmc6c>> accessed 02 September 2023; Tranchina (n 968); Hanan Salah, 'Already Complicit in Libya Migrant Abuse, EU Doubles Down on Support Handling Over of Search Boat Makes EU More Complicit in Abuses' (08 February 2023) <<https://tinyurl.com/mwmh2mw6>> accessed 12 May 2023

¹⁰⁷¹ European Commission (n 345) 6; CAT/C/ITA/CO/5-6 (n 106) para 22; Amnesty International (n 425) 20; Report of the Independent Fact-Finding Mission on Libya (23 March 2022) A/HRC/49/4 para 27; A/HRC/50/63 (n 806); A/HRC/52/83 (n 106) paras 40-41, 44.

¹⁰⁷² A/HRC/52/83 (n 106) para 46; CSDM (n 817); Marie Struthers, 'Libya: Renewal of Migration Deal Confirms Italy's Complicity in Torture of Migrants and Refugees' (*Amnesty International*, 30 January 2020) <<https://tinyurl.com/2p98b3y6>> accessed 28 Nov 2020; Amnesty International (n 425) 20; Amnesty International, 'Libya/EU: Conditions Remain 'Hellish' as EU Marks 5 Years of Cooperation Agreements' (*Amnesty International*, 31 January 2022) <<https://tinyurl.com/45n33m3x>> accessed 25 June 2023

¹⁰⁷³ Tranchina (n 968); Maccanico (n 517).

¹⁰⁷⁴ EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) 45, fn 178.

The absence of appropriate conditionality and mitigation measures in the policy constitutes a failure to respect, protect and to prevent human rights violations, and a breach of EU States' obligations to 'do no harm' as enshrined in international refugee and human rights law, and the EU's own funding guidelines for humanitarian assistance.¹⁰⁷⁵ The CAT expressed 'deep' concerns with a lack of 'any particular provision that may render [...] cooperation and support [for the LCG] conditional on respect for human rights, including the absolute prohibition of torture'.¹⁰⁷⁶ It was also 'deeply concerned' at the 'lack of assurances' or 'review' of Italy's cooperation with and capacity building of the LCG or other relevant authorities, 'in light of possible serious human rights violations' in Libya.¹⁰⁷⁷ The CAT and the Fact-Finding Mission of 2023 also noted that the renewal of the Italy-Libya MoU without concrete human rights guarantees facilitates and continues to expose intercepted refugees and migrants in Libya to 'mistreatments'¹⁰⁷⁸ and 'serious human rights violations'.¹⁰⁷⁹

The drastic withdrawal of State-led and NGO rescues and the transfer of those responsibilities to Libya¹⁰⁸⁰ expose intercepted refugees and migrants to risks of being forcibly disembarked to Libya and serious harm, including increased risk of being exposed to torture and other ill-treatment, and *refoulement*.¹⁰⁸¹ The OHCHR has reported that obstructive laws, policies and practices concerning SAR activities have 'negatively impacted' the protection of rescued and intercepted persons at sea and in Libya, including risk of exposure to torture and *refoulement*.¹⁰⁸²

It can thus be inferred from the foregoing that EU States exercise control over the violations of torture and other ill-treatment perpetrated against refugees and migrants intercepted and forcibly returned to Libya. Their obligations are based on their failure to prevent the violations from occurring and their proactive contributions to such violations¹⁰⁸³ through their substantial

¹⁰⁷⁵ ICCPR (n 110) Article 4; Spheres Project, *The Humanitarian Charter* (DG-ECHO 1997); European Commission, Guidelines on Humanitarian Protection (Brussels, 21 April 2009) (Directorate General for Humanitarian Aid-ECHO) ECHO 0/1/ML D (2009) sections 1.1-1.3; GLAN, ASGI and ARCI (n 552) para 56.

¹⁰⁷⁶ CAT/C/ITA/CO/5-6 (n 84) para 22.

¹⁰⁷⁷ *ibid.*

¹⁰⁷⁸ A/HRC/52/83 (n 106) para 46.

¹⁰⁷⁹ CAT/C/ITA/CO/5-6 (n 106) para 22.

¹⁰⁸⁰ Doc 11880 (n 489); OHCHR (n 108) 3; Amnesty International (n 89) 23.

¹⁰⁸¹ *Hirsi* (n 22) [116]-[138]; UNSMIL and OHCHR (n 20) 12 & 29; Alarm Phone (n 916) 5.

¹⁰⁸² OHCHR (n 97) v, 3.

¹⁰⁸³ CAT/C/ITA/CO/5-6 (n 106) para 22; CSDM (n 817) para 264; GLAN, ASGI and ARCI (n 552) para 56.

assistance to the Libyan authorities for the rescue, interceptions and return of persons to Libya despite the numerous reports the systematic human rights abuses in Libya.¹⁰⁸⁴

EU States' active facilitation and failure to prevent human rights abuses against refugees and migrants constitute a violation of their positive obligations to prevent *refoulement* against such persons.¹⁰⁸⁵ EU States can, therefore, be held accountable for such breaches of *non-refoulement* by the Libyan authorities for the purposes of the UNCAT.¹⁰⁸⁶

¹⁰⁸⁴ S/2017/726 (n 556) paras 34-35; CAT/C/ITA/CO/5-6 (n 106) para 22; Amnesty International (n 10); Palm (n 104) 13; ECCHR, FIDH and LJIL (n 23) 10.

¹⁰⁸⁵ CAT/C/ITA/CO/5-6 (n 106) para 22.

¹⁰⁸⁶ CSDM (n 817) para 204; GLAN, ASGI and ARCI (n 552) para 53-56.

6.4 The Jurisdiction Over *Non-Refoulement* under the ECHR

Article 1 of the (ECHR) states:

‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.’¹⁰⁸⁷

The ECtHR’s jurisprudence has firmly established that generally all persons who are present in the territory of a State party to the ECHR, regardless of their legal status, fall within that State’s jurisdiction¹⁰⁸⁸ as in Article 1 above. The Court has underscored that the bases for establishing extraterritorial jurisdiction are ‘defined and limited by the sovereign territorial rights of the other relevant States’.¹⁰⁸⁹ Therefore, a State’s competence to exercise extraterritorial jurisdiction over its nationals abroad is ‘subordinate to that State’s and other States’ territorial competence.’¹⁰⁹⁰

The Court on numerous occasions has also accepted that extraterritorial jurisdiction in the context of Article 1 can be exercised in exceptional cases.¹⁰⁹¹ In *Bankovic*, the Grand Chamber of the Court held that the scope of ‘Article 1 also encompasses other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case’.¹⁰⁹² In a separate opinion in the *Hirsi* case, Judge Pinto de Albuquerque noted that the ‘prohibition of *refoulement* under the ECHR is ‘not limited to the territory of a State, but also applies to extra-territorial State action, including action occurring on the high seas.’¹⁰⁹³

Establishing whether exceptional circumstances exist to trigger an exercise of extraterritorial jurisdiction would require an examination of ‘particular facts,’ such as situations where a State exercises ‘full and exclusive control over a prison or a ship’.¹⁰⁹⁴ According to the Court, extraterritorial jurisdiction over the protection of the rights and freedoms under the ECHR may

¹⁰⁸⁷ ECHR (n 199); The rights and freedoms provided under in Section I of the ECHR includes Articles 2 (life); 3 (prohibition of torture); 4 (slavery and forced labour) 5 (liberty and security) and 6 (fair trial).

¹⁰⁸⁸ *Loizidou* (n 847) [62]; *Issa* (n 852) [68]–[71]; *Mansur PAD and Others against Turkey* (Third Section) Application no 60167/00 (ECtHR, 28 June 2007) [53]; *Al-Skeini* (n 820) [131]; *Hirsi* (n 22) [73].

¹⁰⁸⁹ *Bankovic* (n 807) [56], [59]; *MN and Others v Belgium* [GC] Application No 3599/18 (ECtHR, 5 May 2020) [99]; *SS and Others* (n 815) [78].

¹⁰⁹⁰ *Bankovic* (n 807) [60].

¹⁰⁹¹ *Loizidou v Turkey* (n 847) [52]; *Ilaşcu* (n 807) [312]; *Bankovic* (n 807) [70]–[71].

¹⁰⁹² *ibid* [61].

¹⁰⁹³ *Hirsi* (n 22) [68].

¹⁰⁹⁴ *Ilaşcu* (n 807) [316]; *Medvedyev and Others v France*, Application no 3394/03 (ECtHR, 29 March 2010) [67]; *Al-Skeini* [n 820] [132], [136]; *Hirsi* (n 22) [73].

extend to ‘acts [and omissions of their authorities] performed or producing effects’ outside their national territory.¹⁰⁹⁵

Like the ICJ, the CAT and other human rights bodies, the ECtHR jurisdiction over human rights protections is ‘closely linked to the notion of “control”, whether [...] State agent authority and control” over individuals or “effective control” by a State over a territory.’¹⁰⁹⁶ Jurisdiction thus applies in all territories over which the State in question exercises the functional attributes of sovereignty¹⁰⁹⁷ and/or all persons over whom it exercises authority or effective *de facto* control irrespective of whether persons are located outside of the State’s territory.¹⁰⁹⁸

In the first judgment of *Loizidou v Turkey* and subsequent cases, the ECtHR in conformity with other human rights bodies, held that that a State's responsibility under the ECHR may arise when ‘as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory.’¹⁰⁹⁹ In such cases, the objective element for establishing effective territorial control is based on the existence of a strong military presence or ‘effective authority’ through constitutionally established organs’ in the territory of a third State.¹¹⁰⁰ Such situations may arise ‘directly, through [a State’s own] armed forces, or [indirectly] through a subordinate local administration’. ¹¹⁰¹ A State that exercises jurisdiction is not only responsible for human rights violations committed by its own organs but it is also liable for the acts of rebel forces or local administrations in the area in question.¹¹⁰² This applies with respect to the conducts of ‘diplomatic or consular agents abroad and on board aircraft and ships registered in, or flying the flag of that State’ when those agents exercise ‘authority and control’ over persons or their property.¹¹⁰³

¹⁰⁹⁵ *Drozdz and Janousek v France and Spain* Application no 12747/87 (ECtHR, 26 June 1992) [91]; *Loizidou* (n 847) [75]; *Ilaşcu* (n 807) [310], [314]; *Bankovic* (n 807) [67]; *Al-Skeini* (n 820) [133]; *Hirsi* (n 22) [72], [178]; *ND and NT v Spain* Applications nos 8675/15 and 8697/15 (ECtHR, 13 February 2020) [110]-[111].

¹⁰⁹⁶ *Al-Skeini* (n 820) [132], [136]; *Hirsi* (n 22) [73]-[74]; *MN* (n 1089) [105]; *SS and Others* (n 815) [84]

¹⁰⁹⁷ *Al-Skeini* [n 820] [135], [138], [149].

¹⁰⁹⁸ *Issa* (n 852) [72], [74]-[75]; *Öcalan* (n 847) [91]; OHCHR (n 108) 3,

¹⁰⁹⁹ *Loizidou* (n 847) [52], [71]; *Ilaşcu* (n 807) [314]-[316]; *Hirsi* (n 22) ; *Catan and Others v Moldova and Russia* Applications nos 43370/04, 8252/05 and 18454/06 (ECtHR, 19 October 2012) [106]; *Mozer v the Republic of Moldova and Russia* Application no 11138/10 (ECtHR, 23 February 2016) [101].

¹¹⁰⁰ *Loizidou* (n 847) [52], [56]; *Loizidou v Turkey* ([GC] (Application No 40/1993/435/514) (ECtHR, 28 July 1998) [21]; *Issa* (n 852) [79].

¹¹⁰¹ *Loizidou* (n 847) [52]

¹¹⁰² *ibid* [52], [56]; *Loizidou* (1998) (n 1100) [21].

¹¹⁰³ *Bankovic* (n 807) [73]; *Al-Skeini* (n 820) [134]; *Hirsi* (n 22) [75]; *Medvedyev* (n 1094); ECtHR, *Guide on Article 1 of the European Convention on Human Rights—Obligation to Respect Human Rights—Concepts of “Jurisdiction” and Imputability* (Updated on 31 August 2022) paras 53, 57.

In a series of cases, ECtHR has also recognises situations where a State's conduct is governed by an international treaty providing the framework for the exercise of extraterritorial authority of the parties concerned, 'regardless of where the event occurred'.¹¹⁰⁴ Accordingly, the 'acquiescence or connivance' of States of acts of private actors that breach Convention rights in areas within their jurisdictions also engage their responsibility.¹¹⁰⁵ This applies even when the acts of violations were committed by authorities which may be unrecognised by the international community.¹¹⁰⁶

Similar to the UNCAT, jurisdiction can arise in situations where a State party to the ECHR, 'through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.'¹¹⁰⁷ In *Al-Skeini* and other cases, the Grand Chamber of the Court held that, 'where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention[...], as long as the acts in question are attributable to it.'¹¹⁰⁸ In such cases, the acceptance of jurisdiction is based on the 'authority and responsibility' that was exercised by the State over the relevant events.¹¹⁰⁹

Any actions performed by a State in the territory of one State with consequences in another State may be sufficient to trigger a jurisdictional link for the purposes of Article 1.¹¹¹⁰ Jurisdictional links can be stronger if the actions of the States concerned are based on an international agreement binding upon them.¹¹¹¹ In the case of *X and Y v Switzerland*, the European Commission and subsequently the Court found that the actions of Swiss authorities under an agreement with Liechtenstein produced effects in the territory of the latter.¹¹¹² Both the Commission and the ECtHR determined that Swiss authorities exercised 'public powers'

¹¹⁰⁴ *Güzelyurtlu and Others v Cyprus and Turkey* Application no 36925/07 (ECtHR, 29 January 2019) [186]-[188]; *Romeo Castaño v Belgium* Application no 8351/17 (ECtHR, 09 October 2019) [42]; CSDM (n 817) para 250.

¹¹⁰⁵ *Cyprus* (n 865) [81]; *Ilaşcu* (n 807) [318].

¹¹⁰⁶ *Ibid*

¹¹⁰⁷ *Bankovic* (n 807) [71]; *Al-Skeini* (n 820) [135]; ECtHR 'Guide' (n 1103) para 58; AI and HRW 'SS' (n 30) para 2.

¹¹⁰⁸ *Drozd* (n 1095) [92]-[96]; *Issa* (n 852) [71]; *Al-Skeini* (n 820) [135]; ECtHR 'Guide' (n 1103) para 58.

¹¹⁰⁹ *Al-Skeini* (n 820) [149]; UNHCR 'SS' (n 815) para 3.2.3.

¹¹¹⁰ *Rantsev v Cyprus and Russia*, Application no 25965/04, (ECtHR, 7 January 2010) [207]-[208]; AI and HRW 'SS' (n 30) 2.

¹¹¹¹ *ibid* (n 1110); *Andreou v Turkey* Application no 45653/99, (ECtHR, 3 June 2008) [207]-[208]; *Güzelyurtlu* (n 1104) [186].

¹¹¹² ILC (n 971) Article 6(7); ECtHR 'Guide' (n 1103) para 60.

such as 'authority and responsibility' in respect of the maintenance of security,¹¹¹³ and Switzerland's customs and immigration in Liechtenstein.¹¹¹⁴ Consequently, the individuals in Liechtenstein who were impacted by the measures taken by Swiss authorities under the that particular agreement were 'under Swiss jurisdiction'.¹¹¹⁵

The concept of positive obligation is affirmed in the extensive jurisprudence of the ECtHR.¹¹¹⁶ In *Ilascu*, the Court held that although Moldova, the territorial State, lacked 'effective control over the Transdniestrian territory',¹¹¹⁷ it still exercised jurisdiction in Transdniestria, and therefore, retained a positive obligation to take diplomatic, economic, judicial or other measures within its power to secure Convention rights of the applicants.¹¹¹⁸ Additionally, the Court observed that Russia's strong historical, financial, economic and military relations with the Transdniestrian region¹¹¹⁹ together with 'a continuous and uninterrupted link of responsibility' was positively determinative of Russia's territorial jurisdiction over the area, although it fell outside Russia's sovereign territory.¹¹²⁰ Furthermore, the Court reasoned that the self-proclaimed Moldovan Republic of Transdnistria" (MRT) which exercised effective territorial control over Transdniestria's was under the 'effective authority, or at the very least under the decisive influence, of [Russia], because the MRT essentially 'survive[d] by virtue of the military, economic, financial and political support' it receives from Russia.¹¹²¹ In such cases, jurisdiction is linked to a relation of 'a high level of dependency' or subordination of the foreign State on the State party.¹¹²² According to the Court, jurisdiction can also be established by referring to the 'developments that occurred subsequently' after the facts of the case.¹¹²³

As with their obligations under the Refugee Convention and UNCAT, parties to the ECHR have positive obligations to secure the Convention rights and freedoms by taking appropriate steps

¹¹¹³ *X and Y v Switzerland* 7289/75 7349/76 (Commission (Plenary), 14 July 1977) [91]-[98]; *Drozd* (n 1095) [91]; *MN and Others* (n 1089) [104].

¹¹¹⁴ (n 971) Article 6(7); The exercise of public powers by Swiss immigration and police officers in Liechtenstein were governed exclusively exclusively by Swiss law.

¹¹¹⁵ ECtHR 'Guide' (n 1103) para 60.

¹¹¹⁶ *Ilascu* (n 807) [332]-[352]; *Bankovic* (n 807) [75]; *Castañón v Belgium* (n 1104); *CSDM* (n 817) para 267.

¹¹¹⁷ *ibid* [3], [336]-[352].

¹¹¹⁸ *ibid* [137]-[161], [336]-[352].

¹¹¹⁹ *ibid* [3] Transdniestria is a region of Moldova that declared its independence in 1991 but is not recognised by the international community. The case was filed against Russia and Moldova by four Moldovan nationals for acts committed by Transdniestrian authorities.

¹¹²⁰ *ibid* [379]-[394].

¹¹²¹ *ibid* [392].

¹¹²² *Cyprus v Turkey* (n 865) [76]-[77]; *Catan* (n 1099) [122].

¹¹²³ *Mozer* (n 1099) [103]; *AI and HRW 'SS'* (n 30) para 4.

‘in a manner [that is] proportionate to the level of control exercised in any given extraterritorial situation.’¹¹²⁴ Positive obligations arise where the authorities of the State in question ‘knew, or ought to have been known’ about a real and immediate risk of harm to persons under its jurisdiction.¹¹²⁵ Under the ECHR, EU States cannot ‘knowingly ...hand over a [person] to another State where there are substantial grounds for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment’.¹¹²⁶ In *Al-Adsani v the UK*, the ECtHR held that Articles 1 (together with Article 3) ‘places [...] positive obligations [on its parties] ... to prevent and provide redress for torture and other forms of ill-treatment.’¹¹²⁷

¹¹²⁴ *Bankovic* (n 807) [75]; *Ilaşcu* (n 807) [313].

¹¹²⁵ *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* (Application no 47848/08 (ECtHR, 17 July 2014) [130]; *AI and ARCI and Others* (n 18); GLAN, *Complaint Filed with UN Body Over Italy’s Role in Privatised Push-Backs to Libya Resulting in Migrant Abuse* (2019); *Stoyanova* (n 1057) 601-602.

¹¹²⁶ *Soering* (n 169) [88]-[91]; *Ilaşcu* (n 807) [317]; ECtHR ‘Guide’ (n 1103) para 64.

¹¹²⁷ *Al-Adsani v the UK* Application no 35763/97 (ECtHR, 21 November 2001) [38]; UNHCR ‘SS’ (n 815) para 3.2.4.

6.5 Application of Article 1 of ECHR under the Malta Declaration

Having analysed the text of the Declaration and the documentary evidence contained in several reports, this thesis submits that EU States exercise jurisdiction over the intercepted refugees and migrants returned to Libya under Article 1 of the ECHR. Here also, EU States' jurisdiction is based on their degree of control over the Declaration. Through this agreement with Libya, the authorities of EU States 'exercise all or some of the [...] powers normally to be exercised' by the Libyan government in the CMR.¹¹²⁸

As was discussed in sections 6.2.2 and 6.3.1 above, the exercise of *de facto* control over the CMR, Libyan territory and the intercepted individuals are, in theory, maintained by the Libyans.¹¹²⁹ In practice, however, this study argues the actual control over the area and events is exercised by the EU and Italian authorities based on their pervasive role, political, financial and logistical contributions, including the deployment of naval forces.¹¹³⁰ As in *Ilaşcu*, the cumulative effect of their actions 'have sufficiently proximate repercussions on rights guaranteed', [although] those repercussions occur outside [their] jurisdiction'.¹¹³¹

As demonstrated in the previous sections, EU States are not only involved in the planning, directing and instructing the Libyan authorities but they also provide the equipment used for the interceptions and the vessels on which rescued and intercepted persons are placed during their return to Libya despite flying Libyan flags.¹¹³² It was for the purposes of combating irregular migration across EU's southern border that Libya was assisted and enabled to declare its own SAR zone.¹¹³³ As shown in detail in sections 6.2.2 and 6.3.1, Libya would not have been able to declare its own SAR, establish its own Coast Guards and/or perform those operations without the financial, technical and political support it receives from the EU and its Member States.¹¹³⁴

¹¹²⁸ *Bankovic* (n 807) [71]; *Al-Skeini* (n 820) [135]; EctHR 'Guide' (n 1103) para 58; AI and HRW 'SS' (n 30) para 2.

¹¹²⁹ CoE Commissioner (n 20) 43; CSDM (n 817) para 202; Maccanico (n 517) 6; AI and HRW 'SS' (n 30) para 5;.

¹¹³⁰ *Soering* (n 169) [88]-[91]; *Ilaşcu* (n 807) [317].

¹¹³¹ *ibid*

¹¹³² Amnesty International (n 89) 23.

¹¹³³ Amnesty International (n 87) 16; Amnesty International (n 425) 19; GLAN and ICHR, *GLAN-ICHR Submission on European Pushbacks submitted to UN Special Rapporteur on Rights of Migrants, Felipe González Morales* (unknown) para 4. <<https://tinyurl.com/4738b6py>> accessed 03 June 2024

¹¹³⁴ European Council (n 511); Amnesty International (n 10); Amnesty International (n 425) 19; GLAN and ICHR (n 1133) paras 4-6.

As discussed in Chapter Four, sea crossings in the CMR increased considerably after the ECtHR's ruling in the *Hirsi* case that prohibited EU States from returning refugees and migrants to Libya.¹¹³⁵ Since the intercepted persons are placed under the 'full and exclusive control' of the Libyan authorities who act as agents of EU States, any acts of *non-refoulement* that are perpetrated against such persons by the Libyans can be attributed to EU States.¹¹³⁶

EU States' exercise of 'total functional and effective control',¹¹³⁷ over the Declaration and the relevant events conducted under the framework¹¹³⁸ may be 'sufficient to trigger a jurisdictional link' between them and the rescued and intercepted persons, under Article 1.¹¹³⁹ As in the Court's decision in *Ilaşcu*,¹¹⁴⁰ the Libyan authorities have been operating, at least since 2017, 'under the decisive influence' of EU States by virtue of their substantial financial, technical and other material support to the Libyans to perform the rescues and interceptions.¹¹⁴¹ Italy's military and navy's pervasive involvement to enable Libya to assume almost full responsibility for SAR is manifestation of the use of its public powers in the CMR and proof of Italy's exercise of 'decisive influence' over Libya's actions.¹¹⁴²

This practice taken together with the intent and legal effects of the Declaration, constitute 'refoulement by proxy'. It does not just subject individuals to risks of inhuman and degrading treatment but it also allows EU States to evade their international human rights obligations, as was observed by ECtHR in *Hirsi*.¹¹⁴³ Based on reasoning of the Court in *Ilaşcu* and subsequent cases,¹¹⁴⁴ this study concludes that EU States exercise jurisdiction, at least concurrently with Libya, over Libyan authorities' operations in the CMR, and any associated acts of *refoulement*.¹¹⁴⁵

The Court has underlined a State may still exert control and jurisdiction over areas of policy of a foreign State or an individual, even without the existence of a direct physical occupation or

¹¹³⁵ AI and HRW 'SS' (n 30) para 5; Amnesty International (n 10) 42.

¹¹³⁶ *Ilaşcu* (n 807) [316]; *Medvedyev* (n 1094) [67]; *Al-Skeini* (n 820) [132], [136]; *Hirsi* (n 22) [73]; ECtHR 'Guide' (n 1103) para 53.

¹¹³⁷ CSDM (n 817) para 260; *Sea-Watch e.V* (n 991) 1-3.

¹¹³⁸ CSDM (n 817) para 202; GLAN, ASGI and ARCI (n 552) para 76.

¹¹³⁹ *Loizidou* (n 847) [314]-[316]; *Cyprus* (n 865) [76]; *Bankovic* (n 807) [70]; *Catan Ilaşcu* (n 807) [315]-[316].

¹¹⁴⁰ *Ilaşcu* (n 807) [392]; *Catan* (n 1099) [106]; AI and HRW 'SS' (n 30) para 4.

¹¹⁴¹ AI and HRW 'SS' (n 30) para 5; GLAN, ASGI and ARCI (n 552) para 30; Amnesty International (n 89) 23.

¹¹⁴² *Al-Skeini* (n 820) [140]-[150]; *Catan and Others* (n 1099) [106]; *SS and Others* (n 815) [64]

¹¹⁴³ *Hirsi* (n 22) [129]; UNHCR 'Hirsi' (n 120) 2.1.2; UNHCR 'SS' (n 815) 3.2.1.

¹¹⁴⁴ *Ilaşcu* (n 807) [392]; *Catan* (n 1099) [106]; AI and HRW 'SS' (n 30) para 4.

¹¹⁴⁵ *Ilaşcu* (n 807) [388]-[392]; *Al-Skeini* [n 820] [139]; *SS and Others* [91]

action of the State party in the territory of the foreign State concerned.¹¹⁴⁶ This can arise on the account of the State party's domination and 'decisive influence' over the foreign State.¹¹⁴⁷ In such cases, jurisdictional links can be stronger if the actions imputable to the State party concerned are based on an international agreement binding upon the parties involved.¹¹⁴⁸ Once a State's 'domination over the [third State's] territory is established, it is not necessary to determine whether the State party exercises detailed control over the policies and actions of the subordinate local administration'.¹¹⁴⁹

According to the ECtHR, even when such a domination is lacking, other forms of influence and control may be sufficient to bring events performed by a third State within the jurisdiction of a State party to the ECHR.¹¹⁵⁰ Relevant factors, in this regard, include the 'the economic support being provided through close cooperation'¹¹⁵¹ and the 'extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region'.¹¹⁵² In this context, the EU States, particularly Italy's long history of diplomatic relations and cooperation with Libya¹¹⁵³ together with their 'continuous and uninterrupted link of responsibility' in the CMR is 'positively determinative' of their 'territorial jurisdiction over the area,' where the events at issue take place, despite falling outside EU territory.¹¹⁵⁴

The EU and Italy's long history of diplomatic relations and cooperation with Libya was acknowledged in the 2008 Treaty of Friendship¹¹⁵⁵ key EU documents¹¹⁵⁶ and by the Grand Chamber in the *Hirsi* case.¹¹⁵⁷ As already discussed in Chapters One and Four, Libya has become

¹¹⁴⁶ *Loizidou* (n 847) [62] [314]-[316]; *Bankovic* (n 807) [70] ; *Catan* (n 1099) [106].

¹¹⁴⁷ *Ilaşcu* (n 807) [392]; *Catan* (n 1099) (n 1041) [106]; AI and HRW 'SS' (n 30) para 4.

¹¹⁴⁸ *Rantsev* (n 1110) [207]-[208]; *Güzelyurtlu* (n 1104) [186].

¹¹⁴⁹ *Loizidou* (n 847) [56]; *Ilaşcu* (n 807) [315]; *Catan* (n 1099) [106].

¹¹⁵⁰ *Mozer* (n 1099) [103]; *Catan* (n 1099) [107].

¹¹⁵¹ *Mozer* (n 1099) [103].

¹¹⁵² *ibid* [107]; *Catan* (n 1099) [107].

¹¹⁵³ *Hirsi* (n 22) [76]-[77], [93]-[94]; Treaty of Friendship (n 453).

¹¹⁵⁴ *Ilaşcu* (n 807) [379]-[394].

¹¹⁵⁵ Treaty of Friendship (n 453) Article 19.

¹¹⁵⁶ European Commission (n 345) 5-6, 16; Draft Council Conclusions on Intensified Cooperation on the Management of Migration Flows with Third Countries (14 November 2002) 13894/02; Council-EU (n 421) 7; (JOIN(2017) (n 1) 1-2.

¹¹⁵⁷ *Hirsi* (n 22) [76]-[77], [93]-[94].

one of the top countries in the Southern Mediterranean region for EU cooperation on illegal migration since the early 2000s.¹¹⁵⁸

This study found evidence showing that the EU's deferential reliance on Italy in the implementation of IBM and other EU funded programmes to support the Libyan authorities is neither incidental nor one-off, but a deliberate choice.¹¹⁵⁹ There is no instrument between the EU and Libya to form the legal basis for the disbursement of EU funds to Libyan authorities. Instead, the EU and its Members at least informally, rely on the Italy-Libya MoU of 2017¹¹⁶⁰ for the implementation of the Declaration and related programmes.¹¹⁶¹ The MoU provides that the 'financing of ... reception centres' [by] 'making recourse to funds made available by Italy and the [EU]'.¹¹⁶²

As with States' obligations under the Refugee Convention and the UNCAT, EU States' full awareness of the 'overwhelming evidence of horrific [human rights] abuses' perpetrated against migrants in Libya¹¹⁶³ and the incapacity of Libya to adequately protect rescued and disembarked persons¹¹⁶⁴ also engages EU States' responsibility.¹¹⁶⁵ They fail to prevent harm and human rights violations at sea and in Libya, and are therefore, responsible.¹¹⁶⁶

Both the UNHCR and the ECtHR have emphasised that a State 'cannot circumvent jurisdiction' or evade its responsibility under the ECHR¹¹⁶⁷ 'by relying on its obligations arising from bilateral agreements signed with a third State'.¹¹⁶⁸ The Court stated further that 'the special nature of the maritime environment [...] cannot justify an area outside the law'.¹¹⁶⁹ The ECtHR also pointed out that States cannot use 'problems with managing migratory flows [to] justify [...] practices which are not compatible with [their] obligations under the Convention'.¹¹⁷⁰

¹¹⁵⁸ European Commission (n 345) 8; Seeberg (n 384) 125.

¹¹⁵⁹ GLAN, ASGI and ARCI (n 552) para 39; Moreno-Lax (n 917) 387.

¹¹⁶⁰ Italy-Libya MoU (n 338); *SS and Others* (n 815) [94].

¹¹⁶¹ GLAN, ASGI and ARCI (n 552) para 39.

¹¹⁶² Italy-Libya MoU (n 338) Article 2(2), preamble para 9.

¹¹⁶³ UNSMIL and OHCHR (n 20); UNSMIL and OHCHR (n 16) 4, 8.

¹¹⁶⁴ Palm (n 25) 254; Palm (n 104) 13.

¹¹⁶⁵ *Cyprus* (n 865) [81]; *Ilaşcu* (n 807) [318].

¹¹⁶⁶ *ibid* [394].

¹¹⁶⁷ *Hirsi* (n 22) [79]; UNHCR 'SS' (n 815) para 3.2.1.

¹¹⁶⁸ *Hirsi* (n 22) [129]; UNHCR 'Hirsi' (n 120) para 2.1.2; UNHCR 'SS' (n 815) para 3.2.1.

¹¹⁶⁹ *Medvedyev* (n 1094) [81]; *Hirsi* (n 22) [178]; UNHCR 'SS' (n 815) para 3.2.1.

¹¹⁷⁰ *Hirsi* (n 22) [179]; UNHCR 'SS' (n 815) para 3.2.1.

Based on the above considerations, this study concludes that EU States exercise *de facto* control, and thus jurisdiction over the events in the CMR. Despite not exercising direct physical control over the area or persons, the extent and pervasiveness of EU States' role, financial and other material contributions to the Libyan operations combined with the impacts on refugees and migrants constitute 'an exercise of public powers'.¹¹⁷¹ Moreover, knowingly assisting the Libyans or cooperating in joint control measures in ways where breaches of torture and *refoulement* are foreseeable also engages their legal responsibility.

6.6 Conclusion

This chapter showed that a State's jurisdictional competence under international law is primarily territorial and applies extraterritorially in exceptional cases, including when acting in the context of interception at sea. Scholars and human right treaty bodies have accepted that a State's jurisdiction over *non-refoulement* is derived from the exercise of 'effective control over territory' or 'authority over individuals' by way of 'direct' physical control or the exercise of 'public powers' abroad, under international law'.¹¹⁷² *Non-refoulement* applies whenever a State exercises jurisdiction, including outside a State's own national territory.¹¹⁷³ Even when jurisdiction cannot be found on the above grounds, a State can still be held responsible for 'aiding or assisting' another State to breach its *non-refoulement* obligations.¹¹⁷⁴

The analysis above showed that the events at issue of this study occurred in Libyan territory and international waters, clearly outside the sovereign territories of EU States. The study also accepts that Libya is a sovereign State, a non-Member of the EU community with the right to control its borders against irregular immigration and to coordinate SAR activities in its own SAR zone.

Despite that, this chapter concludes that EU States exercise jurisdiction over the migration control activities of the Libyans. Their jurisdiction is based on their total control over the adoption and practice of the Declaration, decisive influence over the Libyan authorities

¹¹⁷¹ *X and Y* (n 1113) [91]-[98]; *Drozd* (n 1095) [91]; *MN and Others* (n 1089) [104].

¹¹⁷² *Al-Skeini* (n 820) [135]; *MN and Others* (n 1089) [135]; *SS and Others* (n 815) [78].

¹¹⁷³ 'Advisory Opinion' (n 111) para 24; UNHCR 'Hirsi' (n 120) para 4.3.1.

¹¹⁷⁴ ILC (n 971) Article 16; UNHCR 'SS' (n 815) para 5.1-5.9; Gammeltoft-Hansen and Hathaway (n 271) 284.

through their provision of funds, political, technical and logistical support to the LCG who act on their behalf.¹¹⁷⁵

Like other externalisation mechanisms,¹¹⁷⁶ the implementation of the Declaration is strongly linked to increased risks of exposure to torture and *refoulement* of the intercepted refugees and migrants.¹¹⁷⁷ The LCG, navy and other authorities have been maintained and enabled by EU States, led by Italy, to progressively assume full ownership of EU States' responsibility for interceptions and the 'exclusive control' over a vast SAR region along the CMR.

EU States' jurisdiction is also triggered by their exercise of public powers through their cooperation, direct and indirect involvement in deterring, stopping and aiding Libya to stem flows to the EU.

EU States are liable for failing to prevent or minimise breaches of *non-refoulement* against intercepted refugees and migrants. Their responsibility is also activated by the failure to condition their cooperation with Libya in compliance with international human rights law despite being fully aware of the systematic abuses perpetrated against refugees and migrants at sea and within Libya.

EU States' significant withdrawal of naval asset in CMR, their imposition of legal obstructions on independent rescue operations and the transfer of responsibility for rescues and interceptions to the Libyans also trigger their jurisdiction.

Additionally, EU States are also liable for knowingly providing patrol boats and other border enforcement equipment, naval support, surveillance, intelligence sharing and direct funding to assist Libya in the breach of *non-refoulement*.

¹¹⁷⁵ CSDM (n 817) para 202.

¹¹⁷⁶ Gammeltoft-Hansen and Hathaway (n 271) 242.

¹¹⁷⁷ *SS and Others* (n 815) [82], [109]-[114]; Palm (n 104).

VII. Discussion and Analysis of Study Findings: The *Non-Refoulement* Implications of the Declaration

7.1 Introduction

This chapter examines the application of *non-refoulement* in the context of the Declaration, the main instrument governing the EU and its Members' cooperation with Libya to counter irregular migration across the CMR. It specifically analyses whether the Declaration, both in policy and practice, provides adequate safeguards to protect rescued and intercepted refugees returned to Libya against direct and indirect *refoulement*. It draws on the *non-refoulement* provision in the Refugee Convention, the UNCAT and the ECHR (discussed in Chapter Two and Six above) and other human rights instruments. It also relies on general principles, Libyan law, documents and case law and factual reports produced from 2017 to present. The analysis of the situation in Libya will be based mainly on the reasoning of treaty obligations of the States concerned.

The Chapter answers the following research questions posed in Chapter One:

- *Whether the Malta Declaration provides adequate protection safeguards for intercepted refugees, asylum seekers and migrants returned to Libya by the LCG, against direct and indirect refoulement?*

To answer the above question, the chapter attempts to answer the following sub-questions:

1. *How is the non-refoulement principle operationalised under the Declaration to protect the rights of intercepted persons against the risk of direct and indirect refoulement?*
2. *Given the unstable political and social conditions and the lack of an asylum framework in Libya, what mechanisms and procedures are provided in practice to safeguard against risk of torture, or other ill-treatment constituting refoulement after the intercepted persons' return to Libya?*
3. *Whether any remedies are provided to the victims in case of violations?*

The first section of the chapter focuses on the principles and factors for assessing the application of *non-refoulement* within the context of migration control. The second section of the chapter discusses the direct and indirect *non-refoulement* consequences of the Declaration, including the interception, detention and eventual returns of persons to countries of origin. The chapter answers the above research questions, addressing whether the Declaration violates the principle of *non-refoulement* under the Refugee Convention, the

UNCAT and the ECHR. It concludes with recommendations for EU governments, Libya and other relevant stakeholders for the purposes of ensuring better compliance with international refugee and human rights law obligations, in particular, *non-refoulement*.

7.2 General Principles for Assessing Risks of Violations of *Non-Refoulement*

In its *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers*, the UNHCR set standards for assessing the legality and/or appropriateness of international cooperation or transfer agreements on asylum seekers.¹¹⁷⁸ It noted that being a party to the Refugee Convention and/or its Protocol or relevant refugee and human rights instruments is ‘an important indicator’ as to whether the receiving State meets the criteria set forth in the Guidance Note above.¹¹⁷⁹ However, the assessment must also take into account the receiving State’s ‘actual practice’ and ‘compliance’ with the provisions of the relevant refugee and human rights instruments to which that State is a party.¹¹⁸⁰

Transfers of asylum seekers must be ‘fully compatible’ with the obligations of all States involved in the transfer agreements under the ‘[Refugee] Convention and other applicable international instruments’.¹¹⁸¹ Ideally, transfer agreements should be ‘legally binding [...], challengeable and enforceable in a court of law’.¹¹⁸² Instruments must also ‘clearly stipulate’ the rights and obligations of each State party to the arrangement, as well the rights and duties of the asylum seekers.¹¹⁸³ Such instruments must also guarantee minimum procedural safeguards protection against *refoulement*¹¹⁸⁴ as discussed in Chapters Two and Six.

The assessment of protection against *refoulement* in the context of extraterritorial cooperation and migration control also involves: (i) an evaluation of reception conditions for asylum seekers in the receiving country;¹¹⁸⁵ and (ii) the extraterritorial scope of *non-refoulement* in accordance

¹¹⁷⁸ UNHCR (May 2013) para 3(iii), footnote 7.

¹¹⁷⁹ *ibid.*

¹¹⁸⁰ *ibid.*

¹¹⁸¹ UNHCR-EXCOM Conclusion No 58 (XL) ‘Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection’ (1989); UNHCR (n 1178) para 1, 3; UNHCR ‘Nauru’ (n 273) 2.

¹¹⁸² UNHCR (n 1178) para 3(v).

¹¹⁸³ *ibid.*

¹¹⁸⁴ CRC (n 604) Article 3; UNHCR, *Guidelines on Determining the Best Interests of the Child* (May 2008) para 3(vi) and 4; UNHCR ‘Nauru’ (n 273) 2-3; For example, States must give primary consideration to the best interests of unaccompanied and separated children in accordance with the Convention on the Rights of the Child.

¹¹⁸⁵ UNHCR ‘Hirsi’ (n 120) para 1.3.

with States' obligations concerning rescues and interceptions at sea under international maritime law (see section 6.2.1).¹¹⁸⁶ During interceptions and border management activities, whether by land, sea or air, cooperating States are required to 'act in accordance with international law', particularly *non-refoulement*, 'when boarding and searching vessels without a flag'.¹¹⁸⁷

Parties to the UNCAT must also ensure their cooperation and transfer agreements comply with their 'obligations under international human rights law and international refugee law',¹¹⁸⁸ including their positive obligations under Article 2(1) (see discussions in section 6.3). The CAT has consistently stated that in assessing whether there are 'substantial grounds' showing that the person being transferred would face torture upon their return to another State, the 'risk of torture' must be 'foreseeable, personal, present and real'.¹¹⁸⁹ States must take into account 'all relevant' situations,¹¹⁹⁰ including the existence of armed conflicts,¹¹⁹¹ 'a consistent pattern of gross, flagrant or mass violations of human rights',¹¹⁹² and a real risk of irreparable harm to the child in the destination.¹¹⁹³

The ECtHR, in much of its caselaw, has also established that determining whether the removal, expulsion or transfer of a person would give rise to a violation of *non-refoulement*¹¹⁹⁴ under ECHR entails a 'rigorous' assessment of the conditions in the receiving country against the requirements set under Article 3.¹¹⁹⁵ States must assess whether the removal or transfer of a person to a place would expose such a person to a 'real risk of ill-treatment ... in the light of all the material' at the State's disposal 'or, if necessary, material obtained *proprio motu*'.¹¹⁹⁶

¹¹⁸⁶ *ibid*

¹¹⁸⁷ *ibid* paras 2.1.2 and 2.1.5, footnotes 15 and 17.

¹¹⁸⁸ CAT/C/ITA/CO/5-6 (n 106) para 22.

¹¹⁸⁹ *Mostafa Dadar v Canada* Communication No 258/2004 (05 December 2005) CAT/C/35/D/258/2004, (CAT) para 8.4; *NS v Switzerland* Communication No 356/2008 CAT/C/44/D/356/2008 (CAT Decision, 03 June 2010) para 7.3; *Subakaran R Thirugnanasampanthar v Australia* CAT/C/61/D/614/2014 (CAT Decision, 25 September 2017) para 8.3; CAT/C/GC/4 (n 188) para 11.

¹¹⁹⁰ CRC/GC/2005/6 (n 204) para 27

¹¹⁹¹ *Paez* (n 200) paras 14.4, 14.5 and 5, 15; General Comment 29 (n 202) para 11; 'Advisory Opinion' (n 111) paras 20-21.

¹¹⁹² UNCAT (n 110) Article 3(2).

¹¹⁹³ CRC/GC/2005/6 (n 204) para 27.

¹¹⁹⁴ ECHR (n 199) Article 3 (prohibition of torture).

¹¹⁹⁵ *HLR v France* Application no 24573/94 (ECtHR, 29 April 1997) [34]; *Agiza* (n 186) [135]; *Salah Sheekh v the Netherlands* Application no 1948/04 (ECtHR, 11 January 2007 (Final 23 May 2007) [39]; *Hirsi* (n 22) [114].

¹¹⁹⁶ *Chahal* (n 183) [96]; *HLR v France* (n 1131) [36]; *Hirsi* (n 22) [115]-[116].

Determining whether the removal or transfer of a person to another State would subject him/her to 'a real risk of ill-treatment' requires an assessment of the 'foreseeable consequences' of the transfer with due regard to the 'general situation' in the destination State together with the 'personal circumstances' of the individual being transferred.¹¹⁹⁷ With respect to the general conditions in a country, the ECtHR has often attached significant weight to information contained in 'recent reports' from governmental sources and 'independent' international human rights protection organisations, such as the UNHCR, Amnesty International and Human Rights Watch.¹¹⁹⁸ In *FG v Sweden*¹¹⁹⁹ and *JK and Others*,¹²⁰⁰ the ECtHR noted the assessment of general risks of relevant factors amounting to a breach of Article 3 in the destination State must be carried by the relevant States on their own motion through 'a wide number of sources'.¹²⁰¹

To determine an individual's personal risk of exposure to a real risk of ill-treatment, consideration must be given as to whether that person is part of 'a group [that is] systematically exposed to a practice of ill-treatment'.¹²⁰² In a string of cases, the ECtHR held, 'the protection of Article 3' of the ECHR 'enters into play' in situations where an individual being transferred makes a claim which, if corroborated by reports from the credible human rights and governmental sources [...] shows that such a person is 'a member of a group systematically exposed to a practice of ill-treatment'.¹²⁰³ Similar to the jurisprudence of the CAT, the ECtHR has also argued that there have to be substantial grounds to show that the 'risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection'.¹²⁰⁴

¹¹⁹⁷ *Chahal* (n 183) [98]-[100]; *Saadi* (n 145) [130]-[131]; *Hirsi* (n 22) [116].

¹¹⁹⁸ *Chahal* (n 183) [99]-[100]; *Al-Moayad v Germany* Application no 35865/03 (ECtHR, 20 February 2007) [65]-[66]; *Saadi* (n 145) [131]; *Hirsi* (n 22) [101], [118].

¹¹⁹⁹ *FG v Sweden* (n 178).

¹²⁰⁰ *JK and Others v Sweden* Application no 59166/12 (ECtHR, 23 August 2016).

¹²⁰¹ *ibid* [96]; Georges Ravarani, Assessment of the Credibility of Asylum Seekers: The Burden of Proof and the Limits of the ECHR's Examination (Intervention, Opening of the Judicial Year–Seminar–27 January 2017, ECtHR) 2.

¹²⁰² *Al-Moayad* (1198) [65]; *Saadi* (n 145) [132]; *Hirsi* (n 22) [119].

¹²⁰³ *Chahal* (n 183) [98]; *Sheekh* (n 1195) [138]-[149]; *Saadi* (n 145) [132]; *Hirsi* (n 22) [119].

¹²⁰⁴ *HLR v France* (n 1195) [40]; *Hirsi* (n 22) [120].

7.3 Application of *Non-Refoulement* in the Context of the Declaration

The Declaration, both in policy and practice, has had significant *non-refoulement* consequences for rescued and intercepted refugees and migrants returned to Libya.¹²⁰⁵ Like other externalisation policies, the Declaration effectively denies refugees, asylum seekers and migrants access to safe territories in Europe, individualised assessments of their specific protection needs before returning them to Libya, where access to asylum and international protection is practically unavailable.¹²⁰⁶

Evidence gathered for this study showed that the human rights situation of refugees, asylum seekers and migrants in Libya has not improved but has rather deteriorated since the implementation of the Declaration.¹²⁰⁷ The Declaration has subjected rescued and intercepted refugees and migrants to persecution, torture¹²⁰⁸ and *refoulement*.¹²⁰⁹ The following section will discuss acts of *refoulement* perpetrated against refugees and migrants under the Declaration.

7.3.1 Decreased Rescues, Dangerous Interceptions and Increased Risks to Life

The dangerous rescues and interceptions, and forcible returns to Libya have been linked to a rise in the average number of deaths per sea crossings, shipwrecks and the disappearances of refugees, asylum seekers and migrants at sea and on the Libyan shores, especially in 2018 and 2019.¹²¹⁰ In spite of the significant initial decrease in the absolute number of sea deaths claimed by the EU,¹²¹¹ the average number of deaths per attempt has risen.¹²¹² Twice as many boat migrants died while crossing the CMR in 2018 than in 2017.¹²¹³ Thousands of refugees

¹²⁰⁵ UNSC Res 2240 (2015) UN Doc S/RES/2240 Preamble; S/2019/711 (n 20) para 3-6; Poon (n 29); Palm (n 104) 20.

¹²⁰⁶ OHCHR (n 108) 3-4; Amnesty International (n 89) 22-30; A/HRC/47/30 (n 160) para 34; European Parliament, *Pushbacks at the EU's External Borders* (March 2021) PE 89.368 2; Lang and Nagy (n 255) 450.

¹²⁰⁷ A/HRC/48/83 (n 23) para 66; footnote 34 (Annex 2, para 16); S/2017/726 (n 556) paras 34-36.

¹²⁰⁸ UNSMIL and OHCHR '(n 20) 14-23; OHCHR (n 20); OHCHR, 'Libya Must End "Outrageous" Auctions of Enslaved People, UN Experts Insist (Libya Slave Auctions)' (Press Release) (30 November 2017) <<https://tinyurl.com/mv3rb7sa>> accessed 04 Oct 2021; UNSMIL and OHCHR (n 16) 25-31, 38-54; OHCHR (n 558); A/HRC/52/83 (n 106); UNHRC, Report of the Human Rights Council on its Fifteenth Special Session (25 February 2011) A/HRC/S-15/1; A/HRC/49/4 (n 1071); A/HRC/50/63 (n 806); Poon (n 29).

¹²⁰⁹ OHCHR (n 23) 7; OHCHR (n 30) 18.

¹²¹⁰ S/2018/140 (n 763); UNSMIL and OHCHR (n 16) 12; Eric Reidy, 'The Legal Battle to Hold the EU to Account for Libya Migrant Abuses' (*The New Humanitarian*, 10 August 2020) <<https://tinyurl.com/2p9cfn68>> accessed 22 January 2022; Amnesty International (n 425) 19; Palm (n 104) 9; Nashed (n 688).

¹²¹¹ European Commission (n 510); European Commission (n 536); EEAS (n 531).

¹²¹² S/2019/711 (n 20) para 2; OHCHR (n 97) 8; According to the OHCHR, mortality rate has more than doubled.

¹²¹³ UNSMIL and OHCHR 'Detained' (n 20) 12; UNSMIL and OHCHR (n 16) 12, 13; HRW (n 20) 3-12.

and migrants also went missing or died during their journey at sea, interceptions or return to Libya to 'situations of grave harm and uncertainty'.¹²¹⁴ The death rate in the first six months of 2019 was twice as many as the same period in 2018 and was much worse when compared with the death rate in 2017.¹²¹⁵ According to the UN, the death rate could even be much higher because the above data on the number of dead and missing persons recorded by the IOM and UNHCR does not include those recorded by the LCG.¹²¹⁶

The increase in shipwrecks and sea deaths have been attributed to worsening travel conditions¹²¹⁷ and the drastic withdrawal of EU State and NGO-led rescue operations along the CMR.¹²¹⁸ In 2019 the UN found 'considerable evidence' showing that the travel conditions of refugees and migrants at sea and at the borders have significantly been 'worsened' by increased surveillance and other interventions¹²¹⁹ as smugglers and traffickers continually adapt their tactics and techniques to avoid detection.¹²²⁰ The EU's own reports confirmed that the 'continual' adaptation of the business model of migrant smugglers pose significant difficulties to travel conditions.¹²²¹

Smugglers and traffickers continued to transport persons in rubber boats, fishing vessels, fibreglass boats and wooden boats,¹²²² and often without sufficient fuel to reach Europe from Libya.¹²²³ To prevent detection by EUNAVFOR MED naval assets and the LCG, smugglers leave refugees and migrants to travel alone, often instructing them to use a Global Positioning System or satellite phone to navigate towards oil rigs in Libya's territorial sea.¹²²⁴

¹²¹⁴ S/2019/711 (n 20) para 3.

¹²¹⁵ Ibid para 4; In the first half of 2019, at least 333 of the 2,130 persons who arrived in Europe through the CMR died; Shoshana Fine and Tarek Megerisi, 'The Unacknowledged Costs of the EU's Migration Policy in Libya' (*European Council on Foreign Relations*, 25 July 2019) <<https://tinyurl.com/ynn3dkt3>> accessed 27 October 2021

¹²¹⁶ S/2019/711 (n 20) para 3.

¹²¹⁷ Ibid paras 4, 7; UNSMIL and OHCHR (n 16) 12, 13.

¹²¹⁸ Amnesty International (n 425) 19; ISPI, 'Estimated Migrant Departures from Libya' (January 2016-December 2019) (*Italian Institute for Political Studies*) <<https://tinyurl.com/mr47zcdx>> accessed 15 May 2023

¹²¹⁹ S/2019/711 (n 20) paras 4, 7; UNSMIL and OHCHR (n 20) 12, 13.

¹²²⁰ Ibid; Smugglers and traffickers also adapted their tactics, techniques and procedures in reaction to the 'renewed instability' and 'active' conflict in Libya.

¹²²¹ S/2019/711 (n 20) para 7.

¹²²² Ibid para 8-9; The cost of travel range from €500-€3,000 per person depending on the type of boat used. Rubber boats are the least expensive whilst wooden boats are the most expensive.

¹²²³ Ibid para 9; According to EU reports most of the boats observed along the CMR after the implementation of the Declaration were filled with just enough fuel to reach of 12-nautical-mile limit of Libya's territorial waters.

¹²²⁴ Ibid para 9; Smuggled refugees and migrants are instructed contact Italy's MRCC in Rome and to wait for rescue.

The drastic withdrawal of EU and NGO-led assets has resulted in significant gaps in the SAR operational capacities and geographic scope in the CMR.¹²²⁵ According to the Security Council's 2019 report cited above, the number of rescues performed by the EU's naval mission, EUNAVFOR MED, decreased from 543 to just about 153 operations between 01 September 2018 and 02 August 2019.¹²²⁶ In the same period, persons rescued at sea by EUNAVFOR MED fell significantly from 41,961 to just 10,137 persons.¹²²⁷ Rescues performed by NGOs also decreased from 5,200 in 2018 to just 400 refugees and migrants in the first half of 2019.¹²²⁸ Similarly, the number of rescues performed by merchant vessels off the Libyan coast and brought to safety in Europe also fell drastically from over 1,300 in the first six months of 2018 to just 100 persons.¹²²⁹ In comparison, rescue operations and interceptions conducted by the LCG and navy increased between September 2018 and August 2019, to 72 operations.¹²³⁰

The IOM has reported that a lack of assistance at sea has led to delays in rescues, many deaths and disappearances at sea.¹²³¹ In some cases, shipwrecks and deaths have been missed altogether as a result of the reduced dedicated State and NGO-led rescue operations along the CMR.¹²³² According to the IOM's Director of its Global Migration Data and Analysis Centre, the reduced number of rescue operations hinder the ability of the fewer number of ships to intervene promptly or record such events, leading to a situation known as 'invisible shipwrecks'.¹²³³

There have been plenty of cases where persons found in distress at sea are not immediately rescued or have been refused permission to dock at the nearest port of safety.¹²³⁴ Amnesty International for instance, documented cases where refugees and migrants in distress at sea in overcrowded boats reported seeing 'aircraft overhead' and 'ships nearby' without providing

¹²²⁵ GLAN (n 1125).

¹²²⁶ S/2019/711 (n 20) para 5.

¹²²⁷ *ibid.*

¹²²⁸ *ibid.*

¹²²⁹ *ibid.*

¹²³⁰ *ibid.*

¹²³¹ IOM, 'COVID-19 Control Measures, Gap in SaR Capacity Increases Concern About 'Invisible Shipwrecks'' <<https://tinyurl.com/2p9xy9mp>> accessed 15 May 2023

¹²³² Amnesty International (n 425) 19; ISPI (n 1218)

¹²³³ IOM (n 1231); Amnesty International (n 425) 19; 'Invisible shipwrecks' are situations where shipwrecks may have occurred without being recorded; The IOM believes that incidents of invisible shipwrecks 'have increased' in recent years.

¹²³⁴ CoEDoc 11880 (n 489); OHCHR (n 108) 3.

any assistance or delivering them to a safe port.¹²³⁵ Persons in distress were left until the LCG or GACS arrived.¹²³⁶

In July 2020, five different UN Special Rapporteurs, including the mandates on torture, migrant rights and trafficking in persons, sent letters to the Italian and Maltese governments to express their concerns about their ‘closed-port’ policies that led to a delay in the rescue of 63 passengers, including women and children, on 15 April 2020.¹²³⁷ The incident caused five deaths and the disappearance of seven passengers after the passengers were left at sea for days without rescue or assistance from Italy and Malta.¹²³⁸ The surviving passengers were returned to Libya.¹²³⁹

In recent cases, EU States have taken additional measures to divert persons found in distress away from Italy or ‘unlawfully’ detained them ‘on ill-equipped ferries offshore’ in order to ‘avoid assisting’ such persons.¹²⁴⁰ Delays in the SAR of refugees and migrants found in distress on land and at sea or the refusal to designate safe ports for disembarkation ‘may ... amount to torture or ill-treatment and undermine the right to life’.¹²⁴¹

According to Amnesty International, ‘tens of thousands’ of refugees and migrants crossing the CMR to reach Europe in 2020 and 2021 were ‘endangered at sea’ and in Libya because of ‘the failure of Libyan and European authorities to fulfil their SAR responsibilities’.¹²⁴² Refugees and migrants interviewed by Amnesty International have actually contested the efforts of the LCG at sea, ‘consistently’ describing them as ‘negligent, reckless and unlawful’.¹²⁴³ In December 2019 and February 2021, two shipwrecks that led to the drowning of 700 refugees and migrants were attributed to the conduct of the LCG.¹²⁴⁴

¹²³⁵ Amnesty International (n 89) 6.

¹²³⁶ *ibid.*

¹²³⁷ OHCHR (n 108) 1; The incident occurred between the Libyan and the Maltese SAR.

¹²³⁸ *ibid* 1; Although multiple distress calls were sent to the Maritime Recue Coordination Centres in Italy, Malta, Libya and Tunisia, none, including an EU aircraft that flew over and was aware of the situation, provided timely rescue and assistance.

¹²³⁹ *ibid* 1.

¹²⁴⁰ A/HRC/47/30 (n 160) para 74; Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combatting Illegal Immigration (signed 20 May 2020); Sea-Watch (n 991) 4.

¹²⁴¹ A/HRC/47/30 (n 160) para 44; OHCHR (n 108) 4.

¹²⁴² Amnesty International (n 89) 6.

¹²⁴³ *ibid*

¹²⁴⁴ *ibid* 6.

Interceptions by the LCG have been described in numerous UN and international NGO reports as 'dangerous [and] life-threatening'.¹²⁴⁵ UNSMIL and Amnesty International have documented instances where the LCG has used firearms, to 'deliberately' cause damage to migrant boats or to capsize them.¹²⁴⁶ UNSMIL has repeatedly documented incidents of 'reckless' and 'violent' conduct by the LCG during rescues and/or interceptions at sea, leading to 'a number of deaths and injuries'.¹²⁴⁷ In 2017, UNSMIL received 'numerous reports' showing that the interceptions performed by the LCG, involved 'armed men', and were 'dangerous' and 'life-threatening'.¹²⁴⁸ The concerns prompted UNSMIL to consider 'reviewing' its support for the LCG.¹²⁴⁹

Evidence show that intercepted persons at sea are subjected to human rights abuses by the LCG and EU actors.¹²⁵⁰ In 2019, the Global Legal Action Network (GLAN) filed a complaint before the CCPR, on behalf of 94 boat passengers who were intercepted on the high seas by the Panamanian merchant vessel, the *Nivin* and forcibly returned to Libya at the instruction of Italian MRCC and the LCG.¹²⁵¹ The passengers alleged that they were violently removed from the vessel, shot at, [...] 'arbitrarily detained, [...], subjected to forced labour and denied treatment for months' after they refused to disembark from the LCG vessel following a ten-day standoff at the Libyan coast.¹²⁵²

The failure of States to conduct search and rescue activities in a safe and humane manner, put the lives of individuals at risk, in breach of international maritime and human rights laws, including the *non-refoulement* obligation.¹²⁵³ Human Rights Watch has argued that the obstruction of rescue NGOs and the transfer of rescue responsibility to the LCG and navy lead to 'even greater loss of life in the Mediterranean ... and greater suffering in Libya'.¹²⁵⁴

In essence, departure preventions and interceptions restrict intercepted persons to Libya or countries of origin, and only dangerous means of escape to Europe and/or deprive them of the

¹²⁴⁵ S/2017/726 (n 556) para 36; CAT/C/ITA/CO/5-6 (n 106) para 22.

¹²⁴⁶ S/2018/140 (n 763) para 49; Amnesty International (n 89) 6; Such conducts include pointing guns at migrants during rescues, use of 'excessive and unlawful lethal force', opening fire without a warning.

¹²⁴⁷ *ibid*

¹²⁴⁸ S/2017/726 (n 528) para 36.

¹²⁴⁹ *ibid*.

¹²⁵⁰ A/HRC/37/50 (n 101) para 76; Amnesty International (n 425) 19; European Parliament (n 961).

¹²⁵¹ GLAN (n 1125).

¹²⁵² *ibid* 1.

¹²⁵³ *Hirsi* (n 22) [22]-[26], [77]-[79]; CAT/C/ITA/CO/5-6 (n 106) para 22; *SS and Others* (n 552); (1195) paras 7-9.

¹²⁵⁴ HRW, 'EU/Italy/Libya: Disputes Over Rescues Put Lives at Risk' (HRW, 25 July 2018) <<https://tinyurl.com/28h6y7zy>> accessed 15 June 2023

right to flee from danger.¹²⁵⁵ Interceptions and summary returns to Libya by the LCG prevent persons from accessing EU territories, access to asylum procedures, and the opportunity to question EU States authorities for indirectly denying their entry into Europe through Libya.¹²⁵⁶

In 2020, the Special Rapporteur on the human rights of migrants, Felipe González Morales noted that interdiction practices performed by Maltese authorities amounted to the ‘collective expulsion at sea of 51 migrants, [...] and] the death of 12 migrants [...] due to the delay of search and rescue operations’.¹²⁵⁷ In January 2021, the CCPR also decided that Italy’s ‘continued cooperation’ with Libya, including the interception of persons at sea, disembarking such persons in Libya or ‘instructing private vessels to proceed to Libya, despite knowing that ‘Libya is not considered to be a safe port for disembarkation for migrants’ ... has effectively resulted in the circumvention of the prohibition of *refoulement* and collective expulsion’¹²⁵⁸

The Council of Europe’s Committee on Migration, Refugees and Population Rapporteur in a report to the Parliamentary Assembly held that the joint operations between Libya and EU institutions, including FRONTEX, ‘do not have all the adequate guarantees that human rights will be fully respected’.¹²⁵⁹ In February 2021, a UNSC report condemned the ‘interception at sea and return of refugees and migrants to Libya’ and ‘urged relevant Member States to revisit’ the policies that support such practices.¹²⁶⁰

7.3.2 Lack of Procedural Safeguards and Forcible Returns to Libya

The implementation of the Declaration has led to a significant increase in the number of persons intercepted at sea and forcibly returned to Libya.¹²⁶¹ According to the Special Rapporteur on the Human Rights of Migrants, over 60,000 refugees and migrants were intercepted and disembarked in Libya between 2016 and 2021.¹²⁶² As of March 2022, some 87,000 men, women and children had been intercepted in the Mediterranean Sea and returned to Libya by the LCG.¹²⁶³

¹²⁵⁵ UNSMIL and OHCHR (n 16) 12; Palm (n 104) 9, 12.

¹²⁵⁶ *Hirsi* (n 22) [126]-[129]; Palm (n 104) 21-22; OHCHR (n 30) 16-30.

¹²⁵⁷ A/HRC/47/30 (n 160) para 73.

¹²⁵⁸ *ibid*

¹²⁵⁹ CoEDoc 12628 (n 893)

¹²⁶⁰ S/2021/62 (n 1065) para 107.

¹²⁶¹ Amnesty International (n 10) 17-18; Amnesty International (n 425) 19; Amnesty International (n 89) 12.

¹²⁶² A/HRC/47/30 (n 160) para 73.

¹²⁶³ A/HRC/48/83 (n 23) para 68; Amnesty International (n 425) 19; Amnesty International (n 1072)

The Declaration ‘reaffirm[ed]’ EU States’ determination to ‘act in full respect of human rights, international law and European values’.¹²⁶⁴ Despite that, this study found significant inadequacies in the Declaration, particularly the operational framework governing the interception, transfer, treatment and processing of refugees and migrants sent to Libya.¹²⁶⁵ Reports from numerous sources, including the UNSC, human rights monitoring bodies, European institutions and international NGOs, show that the Declaration does not provide adequate safeguards for the protection of refugees, asylum seekers and migrants against *refoulement* under international refugee law.¹²⁶⁶

Firstly, the Tripoli-based GNA government with which the European Council signed the Declaration lacked control over the entire Libyan territory.¹²⁶⁷ Although EU States had official ties with only the GNA, armed groups and notorious human traffickers have been included in the negotiations and meetings concerning the adoption and implementation of the Declaration and the Italy-Libya MOU.¹²⁶⁸

Unlike the EU-Turkey Statement that explicitly contains a provision to protect intercepted persons across the Eastern Mediterranean Route against *refoulement*,¹²⁶⁹ the Declaration lacks a specific human rights provision to ensure the protection of the rights of intercepted persons returned to Libya.¹²⁷⁰ Secondly, the Declaration did not give any special consideration to forcibly displaced persons who due to their lack access of legal pathways, must resort to unauthorised channels to reach the EU.¹²⁷¹ On 27 April 2020, GLAN and other human rights

¹²⁶⁴ Declaration (n 36) Point 1.

¹²⁶⁵ UNSMIL and OHCHR (n 16) 20-54; GLAN, ASGI and ARCI (n 552) paras 59-62.

¹²⁶⁶ UNSMIL and OHCHR (n 16) 12; S/2019/711 (n 20) paras 2-3; S/2018/140 (n 763) paras 48-49; CoE Commissioner (n 20) 15; EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) 46; Ian Urbina, 'Europe's Border Agency Under Fire for Aiding Libya's Brutal Migrant Detentions' (New York, 09 November 2021) <<https://tinyurl.com/bdfaua3p>> accessed 22 January 2022; Papastavridis (n 31) 256-259, 262; Kemal Kirişçi, M Murat Erdoğan and Nihal Eminoğlu, 'New Pact on Migration and Asylum' is Missing a true Foundation' *The Brookings Institution* (Washington, DC 06 November 2020) <<https://tinyurl.com/y8x2a9em>> accessed 06 Dec 2020

¹²⁶⁷ S/RES/2323 (n 479) Preamble paras 5 & 6; Declaration (n 36) Point 5; HRW (n 20) 11-12; State Department (n 479) 1; Palm (n 104) 22; At the time of adoption of the Declaration in February 2017 the GNA controlled Tripoli and surroundings only whilst the rest of Libya is controlled by different militia groups, including the LNA that controlled Eastern Libya (See sec. 5.6).

¹²⁶⁸ S/2017/466 (n 23) para 103; HRW (n 20) 10; CSDM (n 817) para 274; One of the most notorious trafficker Abd al-Rahman Milad (alias Bija) and members of the LCG were involved in operations. General Khalifa Hiftar, the commander of the eastern-based LNA participated in meetings.

¹²⁶⁹ [...] (n 19) Point 1.

¹²⁷⁰ CAT/C/ITA/CO/5-6 (n 106) para 22; OHCHR (n 30) 18; A/HRC/52/83 (n 106) para 46.

¹²⁷¹ European Parliament EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) 20.

groups filed a complaint before the European Court of Auditors and the European Parliament's Petitions Committee arguing that the EU's funding of the IBM programme lacked 'adequate safeguards' for the protection of human rights of refugees and migrants from 'grave danger', and in 'serious' violation of international human rights law.¹²⁷² That same month, Amnesty international, Human Rights Watch and 11 other human rights organisations called on the EU to review the policy and to 'stop any actions', including the funding of the IBM programme 'in contributing to the dire situation of refugees and migrants trapped in Libya'.¹²⁷³

Under the EU-Turkey Statement, asylum seekers arriving in the Greek Islands are provided access to registration and individualised assessments of their asylum claims by Greek authorities 'in accordance with the Asylum Procedures Directive'.¹²⁷⁴ Under the Declaration, all rescued or intercepted persons, including refugees, asylum seekers and victims of trafficking¹²⁷⁵ are disembarked or returned to Libya without individualised assessments of their asylum claims, need for international protection or due regard to the personal circumstances or risks they may face in both Libya and countries of origin.¹²⁷⁶

The UNSC has 'recognised' that some of the rescued and intercepted persons who are returned to Libya without identification and individualised risk assessments may include 'persons who meet the definition of a refugee' under the Refugee Convention and its Protocol.¹²⁷⁷ In 2022, the UNHCR reported that over 20,700 of all intercepted and returned persons to Libya by the Libyan authorities between 2016 and November 2023 included asylum seekers, refugees and other 'persons of concern'.¹²⁷⁸

¹²⁷² GLAN, ASGI and ARCI (n 552) paras 1-3 & 6; See also, AI and ARCI and Others (n 18) 4; As noted in section 6.2.3, The IBM in Libya is mainly funded through the EU's Emergency Trust Fund for Africa; GLAN On 18 May 2020 the ECA decided not to launch an audit into the IBM programme as requested in the complaint partly due to limited resources. Instead pledged to review it during its annual report and a planned 2018 Special Report on the EUTFA.

¹²⁷³ HRW (n 17) 1 & 5-6.

¹²⁷⁴ [...] (n 19) Point 1.

¹²⁷⁵ 'UNHCR Position' (n 104) para 31; A/HRC/49/4 (n 1071) para 27; GLAN, ASGI and ARCI (n 552) para 59.

¹²⁷⁶ A/HRC/52/83 (n 106) para 46; OHCHR (n 108); Elisa Vari, 'Italy-Libya Memorandum of Understanding Italy's International Obligations' (2020) 43 Hastings Int'l & Comp L Rev 105, 106; ECCHR, FIDH and LJIL (n 23) 8.

¹²⁷⁷ S/RES/2240 (n 1141) Preambular para 7; S/2017/761 (n 24) para 10; 'UNHCR Position' (n 104) fn 125; 27% of the top seven most common countries countries and 70% of those originating from Eritrea, Somalia and Sudan are granted international protection in the EU.

¹²⁷⁸ 'UNHCR Libya Operational Update, 15 November 2022' 15 November 2022) <<https://data.unhcr.org/en/documents/details/96787>> accessed 12 May 2023

The EU and its Member States continue to proclaim their ‘determination’, in public and subsequent documents, to ‘act in full respect’ of the right to asylum and *non-refoulement*.¹²⁷⁹ In reality, many of the measures emanating from the policy are designed to make it difficult for individuals fleeing persecution and conflict to seek or obtain protection in the EU.¹²⁸⁰ The lack of procedural safeguards in the Declaration and the absence of a national asylum framework in Libya deprive intercepted persons of access to effective determination of their asylum claims by authorities after their transfer to Libya.¹²⁸¹ Libya remains politically unstable, without a centralised government and the capacity to ‘manage effectively the migratory flows in [...] Libyan territory’.¹²⁸² In March 2017, an administrative body of a Tripoli Court ruled that Libya lacked functional governance structures and the capacity to protect refugees and migrants against human rights violations, including *non-refoulement*.¹²⁸³ The Court also ruled that the absence of a national asylum framework and an accountable national government puts irregular migrants at risk of discrimination, hate and mass detention under inhuman conditions.¹²⁸⁴ It also stated that the Italy-Libya MoU does not provide enough safeguards for refugees, unaccompanied children and victims of human trafficking.¹²⁸⁵

Due to the ongoing conflict, the ‘volatile security’, systemic human rights abuses faced by refugees and asylum seekers in Libya, the absence of a functioning asylum framework and durable solution and protection from *refoulement*,¹²⁸⁶ the UNCHR considers Libya ‘unsafe’ for disembarking persons rescued at sea under international law.¹²⁸⁷ The Agency also maintains that Libya cannot be designated as a ‘safe third country’ for returning intercepted persons.¹²⁸⁸

¹²⁷⁹ Conclusions of 28 June 2018 (n 539) Point 3 and 6; Gammeltoft-Hansen and Hathaway 255, fn 90; Lang and Nagy (n 255) 442; Respect for *non-refoulement* is referenced in many relevant instruments (see fns 257 & 258 above).

¹²⁸⁰ Kirişci, Erdoğan and Eminoğlu (n 1266).

¹²⁸¹ UNHCR ‘Nauru’ (n 273) 2-3.

¹²⁸² S/RES/2240 (n 1141) Preamble; State Department (n 479); State Department (n 696); Palm (n 104) 22.

¹²⁸³ *Notice of Appeal Requesting the Cancellation of a Decision and Urgently Suspending its Application (English Translation)* Tripoli Appeal Court, March 22, 2017 Third: Reasons of objection (i) & (ii); Second Facts [10]-[11]; UNSMIL and OHCHR (n 20) 29; UNSMIL and OHCHR (n 16) 15; The complainants were group of six, consisting of two lawyers and four civil servants.

¹²⁸⁴ *Notice of Appeal* (n 1283) Third: Reasons of objection (i) & (ii).

¹²⁸⁵ Lawyers for Justice in Libya (LFJL), ‘Latest Memorandum of Understanding Between Libyan and Italy on Border Security Fails to Protect Migrants’ (LFJL, 07 Feb 2017) <<https://tinyurl.com/5cc7yr5v>> accessed 22 Nov 2020

¹²⁸⁶ UNHCR, ‘Position on Returns to Libya-Update II’ para 41 <<https://www.refworld.org/policy/countryspos/unhcr/2018/en/121641>> accessed 01 June 2024; UNHCR ‘SS’ (n 815) para 2.2, fn 2-9; ‘UNHCR Position’ (n 104) para 32.

¹²⁸⁷ UNHCR, ‘Update II’ (n 1286) para 41; UNHCR, ‘SS’ (n 815) para 2.2, fn 2-9; ‘UNHCR Position’ (n 104) para 32.

¹²⁸⁸ *ibid*; OHCHR (n 30) 16.

In 2017, it called upon States to ‘refrain from returning ... any third-country nationals intercepted or rescued at sea’ to Libya.¹²⁸⁹

Besides widespread violations and the absence of protection inside Libya, there is a critical gap in the availability of safe and regular pathways for asylum seekers and other persons in search of protection outside of Libya.¹²⁹⁰ Legal pathways, if they exist at all, are very limited, difficult to access, and hampered by delays.¹²⁹¹ Refugee protection and resettlement is available to only ‘a tiny minority’ of those in need of international protection in Libya.¹²⁹²

The UNSC and several other sources have also found that the policy fails to ensure adequate reception conditions, inhibits access to asylum, and exposes refugees and migrants to kidnapping, trafficking, torture, collective expulsions and *refoulement*.¹²⁹³

Disembarking or forcibly returning refugees and migrants to Libya without providing them with the opportunity to claim asylum places such persons at a real risk of torture, collective expulsion and ultimately in breach of *non-refoulement*.¹²⁹⁴ The UN Fact-Finding Mission reports published in 2021 and 2022 found that refugees and migrants intercepted and returned to Libya are routinely subjected to ‘... acts of ... torture, trafficking, ... systematic and widespread attack’,¹²⁹⁵ ‘persecution, ... other ill-treatment’ by DCIM and other State authorities, militias, armed groups and traffickers, ‘employing a consistent pattern of conduct’.¹²⁹⁶

A recent report by the OHCHR showed that refugees and migrants in Libya are ‘routinely’ subjected to ‘collective expulsion[s],’ have been increasing ‘in recent years’.¹²⁹⁷ Many irregular migrants have been arbitrarily expelled or forcibly returned to countries, including Chad, Egypt, Eritrea, Somalia and Sudan without due regard to their individual circumstances or the dangers they may face upon their return.¹²⁹⁸ Between 2019 and 2020, Libyan authorities carried out at

¹²⁸⁹ ‘UNHCR Position’ (n 104) para 32, fn 125; S/2017/761 (n 24) para 46..

¹²⁹⁰ OHCHR ‘Unsafe’ (n 30) 8-9; A/HRC/50/63 (806); A/HRC/49/4 (n 1071); OHCHR (n 23) 3.

¹²⁹¹ OHCHR (n 23) 3.

¹²⁹² ‘UNHCR Position’ (n 104) (n 82) para 17, footnote 87; OHCHR (n 23) 3.

¹²⁹³ European Parliament (n 961) 2; AI and ARCI and Others (n 18)3; Trocaire (n 13) 5; Vari (n 1276) 106.

¹²⁹⁴ *Hirsi* (n 22) [116]-[138]; ‘Advisory Opinion’ (n 111); ‘Guidance Note’ (n 1178) para 4 ; UNHCR ‘Nauru’ (n 273) 2-3; Alarm Phone (n 916) 5.

¹²⁹⁵ A/HRC/50/63 (n 806) para 75.

¹²⁹⁶ A/HRC/48/83 (n 23) para 35-54; A/HRC/49/4 (n 1071) para 47; A/HRC/50/63 (n 806) para 75.

¹²⁹⁷ OHCHR (n 30) 2-3.

¹²⁹⁸ UNHCR ‘Hirsi’ (n 120); Global Detention Project, ‘Libya: Overview’ 18 February 2022) <<https://tinyurl.com/yck8kebw>> accessed 28 Feb 2022; Lillo Montalto Monella and Sara Creta, ‘Paying for

least 7,500 ‘collective’ expulsions at Libya’s external land borders and over 8,500 deportations from Libya to mostly Sudan, Chad, Somalia, Mali and Syria where their lives and dignity are threatened.¹²⁹⁹ Many of the persons expelled included those who were ‘pushed-back’, arbitrarily apprehended near Libya’s external borders as well as those held in Libyan detention centres prior to removal.¹³⁰⁰

The expelled persons were never given access to asylum, individualised procedures or safe means of travel.¹³⁰¹ Deportations of migrants from Libya are carried out in haste and without sufficient administrative or judicial and effective safeguards for migrants including those at risk of persecution in their country of origin.¹³⁰² According to the Special Rapporteur on the Human Rights of Migrants, the expulsions were often carried out using ‘dangerous [and] ... unsafe vehicles’ along the desert to countries of origin where they would be subjected to ‘conditions that create risks of chain *refoulement*’.¹³⁰³

The above findings are consistent with the findings of many legal commentators, the media and human rights organisations.¹³⁰⁴ In April 2020, thirteen human rights associations, including Amnesty International and HRW reported that the first three years of implementation of the policy ‘facilitated the containment of tens of thousands of women, men and children’ in Libya, and subjected them to ‘appalling abuse’, ... constant, grave danger’.¹³⁰⁵

Arguing before the ECtHR in the case of *SS v Italy*,¹³⁰⁶ the CoE Commissioner for Human Rights also stated that returning migrants to Libya would subject them to routine deprivation of liberty, arbitrary detention, torture, and inhuman or degrading treatment.¹³⁰⁷ The systemic human rights abuses against refugees and migrants in Libya was denounced by the ICC

Migrants to go Back Home: How the EU's Voluntary Return Scheme is Failing the Desperate’ Euronews’ *Euronews* (Lyon, France, 22 June 2020) <<https://tinyurl.com/yc6jt9pw>> accessed 03 March 2022

¹²⁹⁹ *Hirsi* (n 19) [139]-[158]; A/HRC/47/30 (n 138) para 58; OHCHR (n 28) 2-3, 13; Amnesty International (n 7) 33-34.

¹³⁰⁰ A/HRC/47/30 (n 160) para 58.

¹³⁰¹ *ibid* para 58.

¹³⁰² CAT/C/ITA/CO/5-6 (n 106) para 20..

¹³⁰³ Amnesty International (n 87) 33-34; A/HRC/47/30 (n 160) para 58; CSDM (n 817).

¹³⁰⁴ Amnesty International (n 10); Amnesty International (n 425) 20; ACT Alliance and Others, ‘Libya: Focus on Anti-Smuggling Policies and Cooperation with Libyan Authorities will Expose People to Ill-Treatment and Arbitrary Detention’ (Brussels, 22 February 2017) <<https://tinyurl.com/58frzhzh>> accessed 20 March 2023; Amnesty International (n 1017); HRW (n 1177); HRW (n 20); Amnesty International (n 89).

¹³⁰⁵ AI and ARCI and Others (n 18).

¹³⁰⁶ *SS and Others* (n 815) [66]-[68].

¹³⁰⁷ CoE Commissioner (n 31) para 11.

prosecutor who initiated an investigation into the human rights implications of EU States' cooperation under the Declaration, particularly their apparent complicity with the situation.¹³⁰⁸

The CAT has also iterated its parties 'should take all necessary legal, political and diplomatic measures to ensure that any cooperation and/or support' they provide to other international actors under bilateral or multilateral migration management agreements are 'consistent with the purposes of the UNCAT and [their] obligations under international human rights law and international refugee law'.¹³⁰⁹

7.3.3 Indefinite Detention and Ill-Treatment of Intercepted Refugees and Migrants

As can be recalled from Chapter Five, Libyan law considers all persons entering Libya by illegal means as clandestine regardless of their need for asylum or international protection.¹³¹⁰ Intercepted persons, including refugees and asylum seekers returned to Libya are systematically arrested and subjected to mandatory detention in conditions that the UNHCR, HRW and Amnesty International, have described as inhuman.¹³¹¹ According to the EEAS' website, Libya has received the largest share of the EU's financial package for Northern African countries, at least 455 million euros.¹³¹² Over 50% of the above amount is put towards the protection of refugees, migrants and vulnerable persons.¹³¹³

Despite these large expenditures, numerous reports found that the policy has worsened the exposure of refugees and migrants in Libya to arbitrary arrest, prolonged detention and incidents of systematic human rights violations, including prolonged arbitrary detention and torture and the risk of *refoulement*.¹³¹⁴ In a Press Release on 14 November 2017, the UN High

¹³⁰⁸ ICC Prosecutor (n 47) paras 2, 13, 17; ICC Prosecutor, 'ICC Prosecutor (Fatou Bensouda) Statement to the United Nations Security Council on the Situation in Libya Pursuant to UNSCR 1970 (2011)' (2020) <<https://tinyurl.com/4u7vjhew>> accessed 22 January 2022; EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) 46.

¹³⁰⁹ CAT/C/ITA/CO/5-6 (n 106) para 23.

¹³¹⁰ *Hirsi* (n 22) [125].

¹³¹¹ Law No 19 (n 642) Articles 2, 4 and 6; *Hirsi* (n 22) [125]; OHCHR (n 30) 8-9; OHCHR (n 23) 3; Struthers (n 1072).

¹³¹² EEAS, (n 538).

¹³¹³ *ibid*.

¹³¹⁴ S/2017/726 (n 556) para 35; CAT/C/ITA/CO/5-6 (n 106) para 22; A/HRC/48/83 (n 23) para 68; S/2018/140 (n 763) para 47; UNSC 'Report of the Secretary-General on United Nations Support Mission in Libya (15 January 2020) UN Doc S/2020/41 para 51; S/2021/62 (n 1065) para 107; A/HRC/49/4 (n 1071) para 46 ; A/HRC/50/63 (n 806) para 75; A/HRC/49/4 (n 1071) para 27-28; HRW (n 20); Amnesty International (n 89) 6; MSF, 'Out of Libya: Opening Safe Pathways for Vulnerable Migrants Stuck in Libya' (*Medecins Sans Frontieres*, June 2022) <<https://tinyurl.com/4ap9ncfy>> accessed 28 June 2023

Commissioner for Human Rights, Zeid Ra'ad Al Hussein ['Commissioner Al Hussein'], noted 'a sharp increase in the number of [refugees and] migrants held in horrific conditions' in Libyan detention stemming from EU's 'inhuman' assistance to the LCG to intercept and return persons.¹³¹⁵ Al Hussein also deplored that the policy has turned the 'suffering' of refugees and migrants in Libyan detention from what was an 'already dire situation' to 'catastrophic', and an 'an outrage to the conscience of humanity'.¹³¹⁶

The Human Rights Council's Fact-Finding Missions published in November 2021¹³¹⁷ and March 2022¹³¹⁸ also found that intercepted refugees and migrants returned to Libya are routinely subjected to 'widespread and systematic arbitrary detention' and other 'inhumane acts [...] in connection with their arbitrary detention'.¹³¹⁹ According to the UNSC, the 'arbitrary detention' of refugees and migrants remains 'widespread and systematic' in both official (DCIM) and unofficial detention facilities, controlled by State officials and armed groups throughout Libya.¹³²⁰ A recent UNSC report also indicated that the 'continued arbitrary detention' of refugees and migrants in detention facilities throughout Libya 'remains a critical concern'.¹³²¹ Intercepted persons face indefinite detentions without the opportunity to challenge the legality of their detention, torture or ill-treatment, before competent administrative or judicial authorities.¹³²²

Commissioner Al Hussein expressed 'dismay at the sharp increase in the number of migrants held' in horrific conditions' at Libyan detention centres.¹³²³ Between mid-September 2017 and early November 2017 alone, the number of refugees and migrants who were detained in DCIM detention centres increased from 7,000 to 19,900.¹³²⁴ Commissioner Al Hussein attributed the

¹³¹⁵ OHCHR (n (n 20).

¹³¹⁶ *ibid.*

¹³¹⁷ A/HRC/48/83 (n 23).

¹³¹⁸ A/HRC/49/4 (n 1071).

¹³¹⁹ A/HRC/50/63 (n 806) para 75; A/HRC/52/83 (n 106) para 67, fn 35; A/HRC/49/4 (n 1071); Amnesty International (n 89) 6.

¹³²⁰ S/2017/726 (n 556) para 35; S/2018/140 (n 763) para 45; S/2020/41 (n 1314) para 51; A/HRC/48/83 (n 23) para 61; A/HRC/50/63 (n 806) para 46; A/HRC/49/4 (n 1071) para 75.

¹³²¹ S/2021/62 (n 1065) para 107.

¹³²² UNSMIL and OHCHR 'Detained' (n 20); UNSMIL and OHCHR (n 16); S/2021/62 (n 1065) para 106-107; A/HRC/48/83 (n 23) paras 53 & 67; UNHRC, Detailed findings of the Independent Fact-Finding Mission on Libya (24 March 2023) A/HRC/52/CRP.8; Amnesty International (n 425); AI and ARCI and Others (n 18).

¹³²³ OHCHR (n 20).

¹³²⁴ *ibid.*; The detention of the migrants followed armed clashes in Sabratha, a major smuggling and trafficking hub, 80 kilometres at the West of Tripoli.

increase to EU States' 'inhuman' policy of cooperation' with the Libyan authorities to 'intercept' persons across the Mediterranean Sea and 'to return them to Libya'.¹³²⁵

Article 10 of Libyan Law No 19 provides that those arrested for immigration related offences to be treated with dignity and the opportunity to appear before competent judicial authorities but it does not provide any additional procedural safeguards.¹³²⁶ As noted in Chapter Five, Libyan law does not make any provisions to regulate the administrative detention of irregular migrants in Libya.¹³²⁷ Secondly, the law does not provide any opportunities for detainees to challenge decisions concerning their detention or deportation.¹³²⁸ The public prosecutor can suspend criminal proceedings against any defendants, including persons held in detention for immigration related offences.¹³²⁹ Obviously, detaining persons for prolonged periods without due process, including judicial review, and keeping them under inhuman conditions, such as described above, is inconsistent with Libyan law¹³³⁰ and international human rights standards.¹³³¹

As explained in section 5.2.1, detaining persons 'beyond the period for which a State party can provide appropriate justification is arbitrary,¹³³² constitute a violation of the prohibition of torture and *refoulement* under the Refugee Convention and UNCAT.¹³³³ Prolonged detention that also occurs under inhumane conditions without judicial supervision,¹³³⁴ such as in the case of the intercepted refugees and migrants in Libya, constitute torture and ill-treatment.¹³³⁵

Detention would be in breach of the prohibition against torture and ill-treatment when it is used as a matter of 'deliberate policy or as a consequence of negligence, complacency or

¹³²⁵ *ibid*; The number of persons transferred to Libyan DCIM controlled centres increased from 7,000 in mid-September to 19,900 by early November 2017. 'Thousands' were detained during armed clashes in Sabratha, a smuggling and trafficking hub, west of Tripoli.

¹³²⁶ ECCHR, FIDH and LJIL (n 23) 38.

¹³²⁷ UNSMIL and OHCHR (n 20) 11; Global Detention (n 654) 4.

¹³²⁸ ECCHR, FIDH and LJIL (n23) 38.

¹³²⁹ OHCHR (n 108).

¹³³⁰ UNSMIL and OHCHR (n 20) 14-15.

¹³³¹ ICCPR (n 110) Article 10; A/RES/43/173 (n 797) Principles 1 & 2; CMW/C/GC/2 (n 575) paras 23-26; A/HRC/20/24 (n 577) para 68; UNSMIL and OHCHR (n 20) 9; UNSMIL and OHCHR (n 16) 23.

¹³³² *Baban* (n 581) 7.2; *Bakhtiyari* (n 579) 9.2.

¹³³³ CAT/C/GC/4 (n 188) para 14; CAT/C/GRC/CO/7 (n 580) para 21; A/HRC/37/50 (n 101) para 28; UNSMIL and OHCHR (n 16) 23.

¹³³⁴ *A v Australia* (n 580) para 9.4; A/HRC/20/24 (n 577) para 68; *Mansour* (n 580) para 10.2; *Shafiq* (n 580) para 7.2; CAT/C/GRC/CO/7 (n 580) para 21; UNSMIL and OHCHR (n 20) 9; According to the Human Rights Committee, the continuation of detention should not last beyond the period that can be justified by the State.

¹³³⁵ A/HRC/37/50 (n 101) para 18.

impunity, subjects or exposes migrants to treatment or conditions of detention grossly inconsistent with universally recognized standards'.¹³³⁶

7.3.4 Torture, Cruel and Other Ill-Treatment While in Libyan Detention

High Commissioner Al Hussein noted with concern that the policy has led to 'a fast deterioration' in the condition of refugees and migrants in Libyan detention centres.¹³³⁷ The Human Rights Council's Fact-Finding Mission also made similar observations stating that the conditions of the detention centres have not improved.¹³³⁸

'Numerous reports' by UN bodies and international NGOs show that refugees and migrants suffer 'horrific conditions' and other human rights violations in detention.¹³³⁹ Firstly, the EU funded detention system under the current agreement with Libya is based on the older detention systems established under the Gaddafi regime with an extensive history of mass detentions and other human rights violations.¹³⁴⁰

The study found considerable evidence showing that the 'intolerable conditions' in which refugees and migrants are held in Libyan detention centres have not changed after the implementation of the Declaration.¹³⁴¹ An UNSMIL investigation found that refugees and migrants in DCIM detention centres continue to face 'severe overcrowding and appalling hygiene conditions', malnutrition and 'limited or no access to medical care'.¹³⁴² UN human rights monitors who visited four DCIM facilities in Tripoli in early November 2017 'were shocked [by] ... thousands of emaciated and traumatized men, women and children piled on top of each other, locked up in hangars with no access to the most basic necessities, and stripped of their human dignity'.¹³⁴³

¹³³⁶ *Mukong v Cameroon* Communication No 458/1991 (21 July 1994) UN Doc CCPR/C/51/D/458/1991 para 9.3; *MSS v Belgium* (n 178) [233]-[234]; ECOSOC, Standard Minimum Rules for the Treatment of Prisoners (adopted 13 May 1977); A/HRC/37/50 (n 101) 19; The international minimum standards are set in the UN Standard Minimum Rules for the Treatment of Prisoners.

¹³³⁷ OHCHR (n 20); UN human rights monitors visited four DCIM facilities in Tripoli and found that many detained refugees and migrants they interviewed had fled conflicts and persecution in African countries.

¹³³⁸ A/HRC/48/83 (n 23) para 67.

¹³³⁹ S/2017/726 (n 556) para 36; CAT/C/ITA/CO/5-6 (n 106) para 22.

¹³⁴⁰ Palm (n 104) 13.

¹³⁴¹ A/HRC/48/83 (n 23) para 67-68; S/2018/140 (n 763); Amnesty International (n 10); Amnesty International (n 425); HRW (n 20); UN investigation has confirmed that the automatic detention under inhumane conditions in Libya are 'not isolated incidents that can [but rather] form part of a pattern'.

¹³⁴² S/2018/140 (n 763) para 48.

¹³⁴³ OHCHR (n 20).

In September 2022, a raid by the *Tobruk* Security Directorate found 285 Egyptian migrants, including 90 children, in 'deplorable humanitarian conditions' in warehouses.¹³⁴⁴ In a second raid in *AlKufra* Libyan authorities found 300 migrants, mainly from Sudan, Chad, Ethiopia and Eritrea, in unlawful detention facilities under 'inhumane conditions, without food for more than four days'.¹³⁴⁵

The horrific conditions of refugees and migrants are also shown in Figures 6 and 7 and captured in a tweet by Commissioner Al Hussein in November 2017 (Figure 8 below). As explained in detail in Section 5.9, the Special Rapporteur on Torture¹³⁴⁶ has observed that State measures denying migrants access to medical assistance, water, food and basic means of survival may 'amount to torture' and constitute 'threat to the right to life'.¹³⁴⁷

¹³⁴⁴ UN Office for the Coordination of Humanitarian Affairs (OCHA), 'Libya-Situation Report:Libya Displacement and Return Timeline (DTM)' (OCHA, 5 Dec 2022) <<https://reports.unocha.org/en/country/libya/>> accessed 19 May 2023; UNHCR (n 1278).

¹³⁴⁵ *ibid*

¹³⁴⁶ A/HRC/37/50 (n 101) para 18.

¹³⁴⁷ A/HRC/47/30 (n 160) para 44.

Figure 6: The Conditions of Refugee and Migrants in Libyan Detention¹³⁴⁸



¹³⁴⁸ Euractiv, 'UN Denounces EU Cooperation with Libya to Stem Migrant Flow as 'Inhuman'' 15 November 2017) <<http://tinyurl.com/35cua84r>> accessed 03 March 2022

Figure 7: The Deplorable Condition of Migrants in Libyan Detention -‘an Outrage to Humanity’¹³⁴⁹



¹³⁴⁹ UN, 'Libya's Detention of Migrants 'An Outrage to Humanity,' Says @UNHuman Rights Chief' (*UN News*, 14 November 2017) <<http://tinyurl.com/446v943n>> accessed 03 March 2022

Figure 8: A Tweet by Commissioner Al Hussein Describing the Detention Conditions of Refugees and Migrants in Libya in November 2017¹³⁵⁰



ZEID RA'AD AL HUSSEIN
UN HUMAN RIGHTS CHIEF

Thousands of emaciated and traumatized men, women and children piled on top of each other, locked up in hangars with no access to the most basic necessities, and stripped of their human dignity.



Numerous reports by multiple UN bodies and other international human rights organisations indicate that 'torture is an established feature' of the Libyan system.¹³⁵¹ The UNSMIL has consistently documented that persons held in Libyan detention continue to face 'torture and other ill-treatment, poor detention conditions, medical neglect and the denial of visits from family and lawyers'.¹³⁵² Detainees, particularly women, continue to face various forms of sexual violence ranging from rape, threats of rape or coercion into engaging in sexual abuse against

¹³⁵⁰ Euractiv (1348).

¹³⁵¹ A/HRC/48/83 (n 23) para 55; A/HRC/49/4 (n 1071) paras 46-52; A/HRC/50/63 (n 806) paras 75-78.

¹³⁵² S/2018/140 (n 763) 46.

other detainees.¹³⁵³ The Fact-Finding Mission report of 2021 also ‘documented several cases of deaths through summary executions, torture, starvation, unsanitary conditions and denial of medical care’.¹³⁵⁴

According to the OHCHR, ‘many’ of the refugees and migrants in Libyan detention have ‘already been exposed to trafficking, kidnappings, torture, rape ... forced labour, exploitation, severe physical violence, starvation and other atrocities in the course of their journeys through Libya, often at the hands of traffickers or smugglers’.¹³⁵⁵ At the Tarik al-Matar DCIM centre where thousands of refugees and migrants were ‘packed into a hangar without functioning toilets’, one person told the UN Human Rights monitors:

We are like a box of matches, we don’t sleep, we have diseases, we lack food, we didn’t shower for months. We will all die if not saved from this place, this is Calvary, it is excessively difficult to survive the smell of faeces and urine, many are [lying] unconscious on the floor’.¹³⁵⁶

Detainees told the president of MSF during a visit to some Libyan detention centres in 2017 that ‘men are forced to run naked in the courtyard until they collapse[d] from exhaustion, while women are raped and made to call family back home for money to free them.’¹³⁵⁷ Amnesty International also documented that detainees were subjected to ‘extortion and forced labour, cruel and inhuman detention conditions, [including] torture, severe beatings with various objects and sexual violence’.¹³⁵⁸

Detainees in DCIM, including women and children, have been subjected to ‘unlawful use of lethal force’,¹³⁵⁹ including daily ‘beatings’, leading to deaths and injuries.¹³⁶⁰ One Cameroonian migrant, for instance, stated ‘they beat us every day, they use electric sticks, just because we ask for food or [medical] treatment or for information about what will happen to us’.¹³⁶¹ A woman from Cote d’Ivoire recounted rape and other sexual violence at the hands of smugglers and guards. She told UN staff that during her journey:

¹³⁵³ A/HRC/48/83 (n 23) para 55; Sexual abuse was found to be more prevalent during interrogation; women are more vulnerable.

¹³⁵⁴ *ibid* para 55.

¹³⁵⁵ OHCHR (n 20).

¹³⁵⁶ *ibid*; As of November 2017, The *Tarik al-Matar* DCIM centre held 2,000 intercepted refugees and migrants.

¹³⁵⁷ Euractiv (n 1348)).

¹³⁵⁸ Amnesty International (n 89) 6.

¹³⁵⁹ *ibid*.

¹³⁶⁰ OHCHR (n 20).

¹³⁶¹ *ibid*.

Armed men came in and chose six women, including me, and took us out one by one. When I first refused, I was slapped and a gun was pointed at my head. Four men raped me outside. I was in [the] early stages of [my] pregnancy, I bled profusely, and I think I lost the baby. I haven't seen a doctor yet.¹³⁶²

Another SSA woman said, 'I was taken away from the DCIM centre and raped in a house by three men, including a DCIM guard'.¹³⁶³ Amnesty International also reported that migrant women who were disembarked in Shara al-Zawiya in 2021 were subjected to 'rape and other forms of sexual violence and torture', including coercion into 'sexual intercourse in exchange for food or their freedom and severe beatings for non-compliance'.¹³⁶⁴ Detainees 'consistently described' the detention conditions as 'cruel and inhuman', including the confinement of persons in 'filthy overcrowded cells sometimes with no access to toilets'.¹³⁶⁵ Amnesty International reported a case where two disembarked babies died in detention after guards refused to send them to the hospital for 'critical treatment'.¹³⁶⁶

According to the UNSMIL, the perpetrators responsible for the above violations include State officials, armed groups, smugglers, traffickers and criminal gangs.¹³⁶⁷ Available evidence also shows that the use of torture, rape and other sexual violence by the perpetrators, including State officials, are a tool of 'intimidation, punishment, humiliation, gratification or exploitation' of the victims.¹³⁶⁸ According to the Fact-Finding Mission's report of 2021, the conditions of the detention are designed to 'cause suffering' for detained persons leading to 'the desire to utilise any means of escape'.¹³⁶⁹ The Mission found cases where victims of torture and rape, including boys and girls, were often forced to witness the torture, rape and killing of the detainees by DCIM officials and other captors.¹³⁷⁰

Access to Libyan detention centres by the UNHCR and other human rights and humanitarian actors remains limited and inconsistent.¹³⁷¹ The UNHCR and the International Rescue Committee (IRC) continue to provide urgent medical care and basic humanitarian relief items

¹³⁶² *ibid*

¹³⁶³ *ibid*

¹³⁶⁴ Amnesty International (n 89) 7.

¹³⁶⁵ *ibid* 7.

¹³⁶⁶ *ibid*; The babies were placed in detention with their mothers after disembarkation.

¹³⁶⁷ S/2018/140 (n 763) para 47.

¹³⁶⁸ A/HRC/48/83 (n 23) para 61-62; A/HRC/49/4 (n 1071)) para 46; A/HRC/50/63 (n 806) para 76.

¹³⁶⁹ A/HRC/48/83 (n 23) para 66.

¹³⁷⁰ *ibid* para 55; A/HRC/49/4 (n 1071) paras 46-52; A/HRC/50/63 (n 806) paras 75-78.

¹³⁷¹ Amnesty International (n 89) 6.

for disembarked persons before their transfer to detention centres by the Libyan authorities.¹³⁷²

Thousands of refugees and migrants, including women and children, have gone missing or disappeared after their disembarkation and during transfers to detention centres and other facilities.¹³⁷³ According to Amnesty International, information concerning the fate and whereabouts of the unaccounted refugees and migrants is unavailable.¹³⁷⁴ Since Libya lacks a secure registration system that aligns with human rights standards, the whereabouts of the persons who disappear through obscure arbitrary detention cannot be tracked.¹³⁷⁵ This impedes the ability of UN bodies and other humanitarian and human rights actors to effectively investigate the whereabouts of such persons.¹³⁷⁶

The Fact-Finding Mission report of 2021 found that many of the detainees in both official and unofficial detention facilities had ‘never been charged, convicted or sentenced’ after a fair hearing.¹³⁷⁷ The investigation also found that ‘many [were] detained incommunicado,’ whilst others were held in secret unofficial prisons at times ‘for years without any prospect of release.’¹³⁷⁸

The detainees have no way of escaping Libyan detention except by paying ‘large sums of money’ to the guards, ‘engaging in forced labour or sexual favours’ inside or outside the detention centre for the benefit of private individuals.¹³⁷⁹ Most of the refugees and migrants detained in Libya are SSAs who also face harsher treatments than people of other nationalities.¹³⁸⁰ This has led the Mission to conclude that their treatment is motivated by discrimination.¹³⁸¹

¹³⁷² UNCHR, ‘Libya Update 25 June 2021’ <<https://data2.unhcr.org/en/documents/details/87428>> accessed 30 May 2023; The IRC is one of the main international medical partners responsible for providing urgent medical care and other humanitarian assistance at the disembarkation points in Libya.

¹³⁷³ S/2017/466 (n 20) 9-11; Nashed (n 668).

¹³⁷⁴ Amnesty International (n 89) 6.

¹³⁷⁵ *ibid.*

¹³⁷⁶ *ibid.*

¹³⁷⁷ A/HRC/48/83 (n 23) para 54.

¹³⁷⁸ *ibid* para 55.

¹³⁷⁹ *ibid* para 67.

¹³⁸⁰ *ibid.*

¹³⁸¹ *ibid.*

In light of the foregoing, High Commissioner Al Hussein urged Libyan authorities to stop detaining refugees and migrants, to take concrete steps to tackle human rights violations and abuses in detention centres, and to investigate and prosecute those responsible.¹³⁸² He stated,

We cannot be a silent witness to modern day slavery, rape and other sexual violence, and unlawful killings in the name of managing migration and preventing desperate and traumatized people from reaching Europe's shores.¹³⁸³

The current DCIM director and his predecessor have made promises and efforts to centralise control and close certain detention centres, particularly those that are notorious for human rights abuses.¹³⁸⁴ New facilities that were opened in 2020 are still characterised by 'patterns of grave human rights violations',¹³⁸⁵ 'consistently described [as] torture and other ill-treatment, cruel and inhuman conditions of detention, extortion of ransom money, and forced labour'.¹³⁸⁶ The Fact-Finding Mission of 2021 found that some detainees they interviewed had been subjected to the same cycle of violence and abuse, including payments to detention guards to secure their own release, dangerous sea crossings and recapture 'up to 10 times'.¹³⁸⁷ Based on the above, Amnesty International has concluded that the closures of individual detention centres or centralisation of migration detention has done 'little to tackle systematic abuse of refugees and migrants, highlighting the need to eradicate the abusive detention system as a whole'.¹³⁸⁸

Commissioner Al Hussein cautioned the international community that the 'unimaginable' suffering and 'horrors' endured by refugees and migrants in Libya cannot 'be remedied' by merely improving the conditions in detention. He called for the 'creation of domestic legal measures and the decriminalisation of irregular migration to ensure the protection of migrants' human rights'.¹³⁸⁹

Violence is systematically perpetrated against refugees, asylum seekers and migrants.¹³⁹⁰ Detainees have been killed because of airstrikes during hostilities between the GNA and other

¹³⁸² OHCHR (n 20).

¹³⁸³ *ibid*

¹³⁸⁴ Amnesty International (n89) 6.

¹³⁸⁵ *ibid*.

¹³⁸⁶ *ibid*.

¹³⁸⁷ A/HRC/48/83 (n 23) para 67.

¹³⁸⁸ Amnesty International (n 89) 6.

¹³⁸⁹ OHCHR (n 20).

¹³⁹⁰ A/HRC/48/83 (n 23) para 66; UNHCR 'Hirsi' (n 120) para 3.5.1; UNSMIL and OHCHR (n 20) 21.

armed groups.¹³⁹¹ In many cases, the Libyan authorities failed to take any action to protect detainees from the air strikes¹³⁹² or separate the detention centres from the vicinity of a potential military target.¹³⁹³ Detainees have also been prevented by detention guards from fleeing buildings after air strikes or explosions, leading to fatalities.¹³⁹⁴ The Fact-Finding Mission's investigation of acts of violence against the *Tawerghans* camps near Tripoli and Benghazi, concluded that Libya 'acquiesces in and fails' to take action to protect refugee camps against violence and human rights abuses.¹³⁹⁵

The deliberate and indiscriminate attacks on detention centres by State forces and the militias during hostilities may constitute a violation of obligations of States under international human rights law to protect civilians under their control from the effects of an attack.¹³⁹⁶ The failure to protect the lives of the detained persons, particularly, preventing them from escaping after the strikes, may constitute 'reasonable grounds to believe that the right to life of the [refugees and] migrants may have been violated'.¹³⁹⁷

7.3.5 Children in Libyan Detention

The Fact-Finding Mission of 2021 found evidence 'across Libya' showing that 'many' children 'have been arbitrarily detained' after the implementation of the Declaration.¹³⁹⁸ Children in Libyan detention are also held together with adults where they are 'subjected to the same harsh conditions'... beatings and torture'.¹³⁹⁹ According to the Mission, 'several' of the children in detention are held for 'prolonged periods without [a] charge or trial' due to, *inter alia*, the refusal of their country of origin to accept them back.¹⁴⁰⁰ Some detained children are also prevented from having contact with their mothers who are held in the women's section of

¹³⁹¹ A/HRC/48/83 (n 23) para 71.

¹³⁹² *ibid.*

¹³⁹³ *ibid.*

¹³⁹⁴ *ibid.*

¹³⁹⁵ *ibid* para 65; The Tawerghans are an ethnic group and Black who faced discrimination, persecution and militia attacks; they are believed to be associated with the Gaddafi regime. 40,000 fled to escape attacks after 2011; Many remain displaced in camps.

¹³⁹⁶ *ibid* para 71; footnote 43.

¹³⁹⁷ ICCPR (n 110) Article 6; A/HRC/48/83 (n 23) para 71.

¹³⁹⁸ A/HRC/48/83 (n 23) para 77.

¹³⁹⁹ *ibid.*

¹⁴⁰⁰ *ibid.*

detention.¹⁴⁰¹ Placing children in the same facility with adults and in harsh conditions puts children at increased risk of violence, including sexual violence.¹⁴⁰²

The detention of children under the above conditions is inconsistent with the prohibition of torture¹⁴⁰³ and *non-refoulement*.¹⁴⁰⁴ The treatment of children in Libya in the conditions detailed above 'may amount to violations of the best interest of the child principle and a number of provisions of the 1989 Child Convention relating to the arbitrary detention of children'.¹⁴⁰⁵ The lack of separation from adults violates the UN Standard Minimum Rules for the Treatment of Prisoners and the Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders' (see also, sections 5.2.1 and 5.9) .¹⁴⁰⁶

Refoulement is also prohibited in certain instruments in situations where there are grounds to believe that the person may be forcibly recruited for hostilities, subjected to enforced disappearances **and trial by a special or *Ad hoc* court**.¹⁴⁰⁷ States are prohibited from returning:

a child in any manner whatsoever to the borders of a State where there is a real risk of underage recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties [Emphasis added].¹⁴⁰⁸

Children of all ages in Libya have been severely affected by the conflicts in Libya since 2016.¹⁴⁰⁹ The Fact-Finding Mission of 2021 found evidence showing of that children are recruited to fight in conflicts, suffered injuries, died and/or are detained for non-compliance.¹⁴¹⁰ In some cases, parents have been abducted, leaving the children to suffer or being placed in arbitrary detention.¹⁴¹¹

¹⁴⁰¹ *ibid.*

¹⁴⁰² *ibid.*

¹⁴⁰³ CRC (n 604) Article 37(a-c); A/HRC/48/83 (n 23) para 77.

¹⁴⁰⁴ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entry into force 12 February 2002) GA Res A/RES/54/263 Article 3(1); CRC (n 604) Articles 3 and 37(b).

¹⁴⁰⁵ CRC (n 604) Articles 3 and 37(b).

¹⁴⁰⁶ A/HRC/48/83 (n 23) para 77.

¹⁴⁰⁷ General Comment No 31 (n 111) para 11; CRC/GC/2005/6 (n 204) para 26-28.

¹⁴⁰⁸ *ibid*

¹⁴⁰⁹ A/HRC/48/83 (n 23) para 75.

¹⁴¹⁰ *ibid* para 76; In late 2019, Syrian children between ages 15 and 18 were recruited to fight as combat support and guards alongside the GNA and LNA and other armed groups. mbats support staff and guards.

¹⁴¹¹ *ibid* para 75-76.

The Mission also found ‘reasonable grounds’ to believe that Libya may be in violation of its obligations under the African Charter on the Rights of the Child.¹⁴¹² The treaty obligates all State parties to ‘take all necessary measures’ to ensure the protection of children during armed conflicts, including preventing their recruitment and direct participation in hostilities.¹⁴¹³ The Fact-Finding Mission also found ‘reasonable grounds’ to believe that Libya may also ‘have failed to comply with its obligations’ under the Optional Protocol to the CRC on the involvement of children in armed conflict¹⁴¹⁴ which also requires its parties to ‘take all feasible measures’ to prevent the ‘recruitment and use’... [of] ‘persons under the age of 18 years’ in hostilities.¹⁴¹⁵

In addition, parties must also ‘ensure that persons within their jurisdiction recruited or used in hostilities contrary to the [...] Protocol are demobilized or otherwise released from service’.¹⁴¹⁶ Although the Libyan authorities are reportedly investigating some of those cases, the UN Mission noted that the ‘gravity of the allegations calls for concerted investigative efforts on the part of the international community’.¹⁴¹⁷

7.4 Access to Justice/Accountability

Accountability entails the right to an effective remedy for human rights violations.¹⁴¹⁸ Pushbacks often worsen the vulnerability of refugees and migrants to multiple and intersecting forms of discrimination, including factors such as gender, race, ethnicity, nationality and migration status.¹⁴¹⁹

To prevent discrimination and ensure access to an effective remedy for any human rights violation suffered at all stages of the migratory process’,¹⁴²⁰ the Special Rapporteur on the Human Rights of Migrants has set guidelines for States for all migrants at each phase of the migration process.¹⁴²¹ States must ‘ensure and facilitate equal and effective access ... to independent, competent, fair, effective, accountable and responsive judicial and quasi-judicial

¹⁴¹² African Charter on Children (n 808); A/HRC/48/83 (n 23) para 76; Libya became party to the African treaty on the Right of the Child on 03 November 2000.

¹⁴¹³ African Charter on Children (n 808) Article 22; See also, A/HRC/48/83 (n 23) para 76.

¹⁴¹⁴ *ibid.*

¹⁴¹⁵ A/RES/54/263 (n 1404) Article 4 (1 and 2).

¹⁴¹⁶ *ibid* Article 6 (1 and 3).

¹⁴¹⁷ A/HRC/48/83 (n 23) para 81.

¹⁴¹⁸ *ibid* para 86.

¹⁴¹⁹ A/HRC/35/25 (n 604) para 63; A/HRC/47/30 (n 160) para 49.

¹⁴²⁰ *ibid.*

¹⁴²¹ *ibid.*

institutions’ for all migrants who are victims of human rights violations rights within their jurisdictions.¹⁴²² The UN Committee on the Protection on Migrant Workers and the Committee on the Rights of the Child have provided child-sensitive guidance to States to ensure that migrant children are guaranteed due process and effective access to justice.¹⁴²³

Since the implementation of the Declaration, Libyan authorities have been put ‘on notice of the widespread and systematic’ nature of the human rights abuses suffered by refugees and migrants during interceptions and in the detention centres.¹⁴²⁴ In spite of the awareness, Libyan authorities have neither investigated nor modified their practices.¹⁴²⁵ Intercepted persons are still being subjected to the same detention practices.¹⁴²⁶

Although Libya’s Constitutional Declaration guarantees the right of every Libyan to have access to the judiciary,¹⁴²⁷ its judicial system still lacks the capacity to provide access to effective remedies for human rights violations within in Libyan territory.¹⁴²⁸ Refugees and migrants in Libya are deprived of access to justice, basic economic and social rights, including health, education, social protection, and an adequate standard of living.¹⁴²⁹ In 2017, the OHCHR and UNSMIL called on Libyan authorities to release ‘vulnerable migrants’ held in detention, ‘end the detention of all migrants, and to amend Libyan legislation to decriminalise irregular migration.’¹⁴³⁰

The failure of the Libyan authorities to hold perpetrators of human rights violations accountable shows that the Libya pursues a policy ‘encouraging the deterrence of sea crossings, the extortion of migrants in detention, and the subjection to violence and discrimination.’¹⁴³¹ The situation is worsened by the involvement of militias, criminal networks,

¹⁴²² A/HRC/35/25 (n 604) para 65; The list of competent authorities for ensuring justice includes national courts, administrative tribunals, national human rights institutions and ombudspersons.

¹⁴²³ A/HRC/47/30 (n 160) para 49.

¹⁴²⁴ A/HRC/48/83 (n 23) para 69.

¹⁴²⁵ *ibid.*

¹⁴²⁶ *ibid.*

¹⁴²⁷ *ibid* para 86; State Department (n 479) 1.

¹⁴²⁸ A/HRC/48/83 (n 23) para 86; UNSMIL and OHCHR (n 20) 12; State Department (n 479) 1; Amnesty International (n 477).

¹⁴²⁹ OHCHR (n 23) 7.

¹⁴³⁰ S/2017/761 (n 24) para 46.

¹⁴³¹ A/HRC/48/83 (n 23) para 69.

traffickers and smugglers in the management of the detention centres and implementation of this Declaration.¹⁴³²

According to the UN Secretary-General's report of 22 August 2017 on the UNSMIL, 'victims of human rights violations in Libya during its reporting period 'had little avenue for redress due to a general state of lawlessness and the weakness of judicial institutions'.¹⁴³³ The Fact-Finding Mission's report of 2022 also noted that Libyan authorities are either 'unable or unwilling' to protect refugees and migrants from human rights abuses perpetrated against them by traffickers and to hold perpetrators of such violations to account.¹⁴³⁴

Libyan authorities admitted to the Fact-Finding Mission of 2021 that they were in need of technical assistance and cooperation to increase their capacity to prosecute human rights violations and international crimes.¹⁴³⁵ The Mission reported that 'a number of arrest warrants' have been issued to ensure accountability for the human rights violations, abuses and crimes committed in Libya since 2016.¹⁴³⁶ Nonetheless, the execution of the warrants has been hampered by political reasons.¹⁴³⁷

While the crimes had occurred over the course of many years, the Mission also found that some could have been committed during the hostilities in the Tripoli area from 2019 to 2020.¹⁴³⁸ According to the UN Secretary-General's on UNSMIL of 2017 above, 'all parties to the conflict committed violations of international human rights and humanitarian law'.¹⁴³⁹

Libya's ability to ensure accountability and to prosecute human rights violations within its jurisdiction is impeded by political divisions, insecurity, the existence of criminal groups throughout the country, a lack of government capacity and limited reach outside of western Libya, which have severely weakened the judicial system.¹⁴⁴⁰ The Libyan justice system is

¹⁴³² *ibid* para 69.

¹⁴³³ S/2017/726 (n 556) para 24.

¹⁴³⁴ A/HRC/49/4 (n 1071) para 54.

¹⁴³⁵ A/HRC/48/83 (n 23) para 86.

¹⁴³⁶ *ibid* 83.

¹⁴³⁷ *ibid*.

¹⁴³⁸ *ibid* para 79.

¹⁴³⁹ S/2017/726 (n 556) para 24.

¹⁴⁴⁰ State Department (n 479) 13; A/HRC/48/83 (n 23) para 84.

further affected by the concurrent claims of jurisdiction over cases by the civil and military judicial authorities, leading to overlaps and duplication of efforts.¹⁴⁴¹

It was in light of the lack of accountability and justice in Libya that the Human Rights Council passed a resolution in 2021 to establish an independent Fact-Finding Mission¹⁴⁴² to investigate and document allegations of ‘violations and abuses ... by all parties in Libya since the beginning of 2016’ in order to hold perpetrators accountable.¹⁴⁴³ The Mission also found that the perpetrators of the human rights violations against refugees and migrants include low-level officials within the LCG and security agencies and non-State actors, with the involvement or with the tacit consent of mid-and senior-level officials.¹⁴⁴⁴

7.5 *Non-Refoulement* Concerns Arising from Voluntary Returns

Voluntary Humanitarian Return (VHR) in Libya is a form of assisted voluntary return scheme and an essential aspect of the Declaration aimed at ‘strengthen[ing] migration governance and to ... save the lives of migrants’ along the CMR.¹⁴⁴⁵ The VHR is expressly recognised in the Declaration as one of the ‘key elements’ and part of the EU’s ‘action plans’ to tackle the rising influx of refugees and migrants into the EU through across the Mediterranean Sea.¹⁴⁴⁶ According to the EU, the VHR is ‘an important protection measure’ that assists ‘vulnerable and stranded migrants who wish to return to their countries of origin’¹⁴⁴⁷ to ‘voluntarily’ do so ‘in a safe and dignified way, in full respect of international human rights standards’.¹⁴⁴⁸

¹⁴⁴¹ A/HRC/48/83 (n 23) para 84.

¹⁴⁴² *ibid* paras 61, 66; A/HRC/52/83 (n 106) para 75; A/HRC/52/CRP.8 (n 1322); OHCHR (n 23) 2; A/HRC/49/4 (n 1071); Tranchina (n 968); The Mission was established by HRC Resolution 43/39 on 22 June 2020 but became fully operational in June 2021. The mandate was extended for another year.

¹⁴⁴³ A/HRC/48/83 (n 23) para 3; See also, A/HRC/S-15/1 (n 1208) para 11; UNHRC, Technical Assistance and Capacity-Building to Improve Human Rights in Libya (7 April 2015) A/HRC/RES/28/30, para 18; A/HRC/49/4 (n 1071).

¹⁴⁴⁴ A/HRC/50/63 (n 806) 75; OHCHR (n 23) 7.

¹⁴⁴⁵ Declaration (n 36) Points 6(e, j) and 8; IOM (Libya), ‘Voluntary Humanitarian Return (VHR)’ (IOM, 2017) <<https://libya.iom.int/voluntary-humanitarian-return-vhr>> accessed 03 March 2022; IOM (n 276); IOM (Dakar Office) (n 537); OHCHR (n 23) 9, footnote 51.

¹⁴⁴⁶ Declaration (n 36) Points 6(e & j), 8; European Commission, ‘Voluntary Humanitarian Return Programme from Libya Resumed Since a Temporary Hold Began Five Months Ago Due to COVID-19’ (11 September 2020) <<https://tinyurl.com/2s3a29cr>> accessed 03 March 2022; OHCHR (n 23) 8.

¹⁴⁴⁷ European Commission-Fact Sheet (n 537).

¹⁴⁴⁸ IOM (Libya) (n 1445); European Commission-Fact Sheet (n 537); IOM (Dakar) (n 537); EU, ‘EU-IOM Joint Initiative Marks Five Years of Supporting Migrants and Their Communities Across Africa’ (EU, 16 December 2021) <<https://tinyurl.com/f36t76ab>> accessed 15 July 2023; OHCHR (n 23) 9.

The VHR is part of the EU-IOM Joint Initiative that was initially launched in 2016 with funds from the EUTFA, Germany and Italy.¹⁴⁴⁹ The programme provides ‘administrative, logistical and financial support, including reintegration assistance, to rescued and/or stranded migrants, including asylum seekers and vulnerable migrants, unable or unwilling to remain in Libya, to ‘voluntarily’ return to their countries of origin.¹⁴⁵⁰ Beneficiaries receive outreach services, information hotline, individual counselling and vulnerability screening, direct immediate assistance, including help to obtain travel documents, access to consular services¹⁴⁵¹ and transportation assistance from the IOM in cooperation with other UN agencies including the UNHCR, governments, local and other international organisations.¹⁴⁵² Individuals also receive assistance with registration, pre-departure health checks, cash, humanitarian aid, psychological support, and reintegration support in their countries of origin.¹⁴⁵³ The programme covers 14 countries, including Chad, Mali, Mauritania, Niger, Nigeria, and Senegal.¹⁴⁵⁴

The programme expanded significantly in recent years, particularly between 2017-2018, following the revelation about the sale of African migrants in Libya in late 2017.¹⁴⁵⁵ In November 2017, the CNN published a ‘shocking’ news report concerning the auctioning of African migrants in Libya that led to a global outrage.¹⁴⁵⁶ Following the publication, the EU, the UN and the AU in partnership with the Libyan Government established a new Joint Task Force at the end of the EU-AU Summit in Abidjan in 2017 to tackle the ‘dramatic situation’ of refugees, migrants and victims of traffickers and criminal networks inside Libya.¹⁴⁵⁷ The

¹⁴⁴⁹ EU, 'Voluntary Humanitarian Returns from Libya Continue as Reintegration Efforts Step Up' (09 April 2018) <<https://tinyurl.com/y3pfycer>> accessed 17 Nov 2020; IOM (Dakar) (n 537); IOM 'AVR' (n 276); EU (n 1448) ; OHCHR (n 23) 9.

¹⁴⁵⁰ IOM (Libya) (n 1445); IOM AVR (n 276)1; EU (n 1448); Moresco (n 47); IOM (Dakar) (n 537);

¹⁴⁵¹ EU (n 1448); InfoMigrants, 'Voluntary Return from Libya: How Does it Work?' 27 July 2020) <<https://tinyurl.com/2p834aww>> accessed 21 Nov 2020

¹⁴⁵² IOM (Libya) 'VHR' (n 1445); EU (n 1449); EU 'EU-IOM' (n 1448); Creta (n 32); Returns and reintegration are coordinated through the IOM, UNHCR, Libya and countries of origin. People return on chartered commercial flights paid for by the EU.

¹⁴⁵³ EU (n 1449).

¹⁴⁵⁴ European Commission-Fact Sheet (n 537)1; IOM (Dakar) (n 537).

¹⁴⁵⁵ CNN Edition, 'People for Sale: Where Lives are Auctioned for \$400 (Exclusive Report)' (14 November 2017) <<https://tinyurl.com/2p82nk3jl>> accessed 04 Oct 2021; EEAS, 'Meeting of the Joint AU-EU-UN Taskforce to Address the Migrant Situation in Libya' 14 December 2017) <<https://tinyurl.com/3j99ekza>> accessed 19 June 2023; UNSMIL and OHCHR (n 16) 19, 20; OHCHR (n 23) 9.

¹⁴⁵⁶ CNN Edition (n 1455); OHCHR 'Outrageous' (n 1208) 9.

¹⁴⁵⁷ European Commission, 'Joint Press Release of the United Nations, the African Union and the European Union' 29 November 2017) <<https://tinyurl.com/59b7bxrv>> accessed 14 July 2023; OHCHR (n 23) 9.

Taskforce sought to ‘ensure unhindered access’ for international organisations and NGOs, including the UNHCR, at disembarkation points and in detention centres for the registration and assistance, evacuation and resettlement, and accelerated voluntary returns of refugees and migrants as the case may be.¹⁴⁵⁸

Thousands of migrants have been returned to their countries of origin from Libya since the implementation of the Declaration.¹⁴⁵⁹ According to the EU, 10,171 migrants were assisted to ‘return home safely’ between November 2017 to March 2018 after the programme was ‘scale[d]-up’ in November 2017.¹⁴⁶⁰ About 9,800 additional migrants were returned to 34 countries of origin in Africa and Asia in 2019.¹⁴⁶¹ In February 2020, 166 Niger nationals were returned from Tripoli to Niamey.¹⁴⁶²

‘Some’ stranded refugees and migrants in Libya who could not ‘voluntarily’ return to their countries of origin, due to the ‘risk to their safety’ upon their return to their home countries, have been evacuated under the UNHCR’s Emergency Transit Mechanism to await resettlement.¹⁴⁶³ Since 2017, some 8,611 refugees and asylum seekers have also been evacuated from Libya by the UNHCR to Niger and Rwanda under the Emergency Transit Mechanism for resettlement or subsequent returns.¹⁴⁶⁴ Of those, around 6,000 refugees and asylum seekers, including persons from Eritrea, Sudan, South Sudan, and Somalia, were sent to Niger and Rwanda for subsequent resettlement or to pursue other ‘complementary pathways’.¹⁴⁶⁵

¹⁴⁵⁸ EEAS (n 1455); OHCHR (n 23) 9; EEAS, ‘Migration: Joint EU Taskforce with African Union and UN Helps More than 16,000 People Stranded in Libya’ <<https://tinyurl.com/y2wndpm7>> accessed 04 October 2021; European Commission (n 1457).

¹⁴⁵⁹ European Council (n 530); OHCHR (n 23) 9; Returns decreased significantly in 2020 (3,391) and 2021 (4,332) because of the COVID-19 pandemic travel restrictions imposed by Libyan authorities.

¹⁴⁶⁰ EU (n 1449); EEAS (n 531).

¹⁴⁶¹ European Commission (n 1446).

¹⁴⁶² EU (n 1448); IOM, ‘Return and Reintegration Key Highlights 2020’ (IOM, 07 July 2021) <<https://publications.iom.int/books/return-and-reintegration-key-highlights-2020>> accessed 15 July 2023; OHCHR (n 23) 9; The top 10 countries of origin for migrants returned in 2020 were Nigeria, Mali, Niger, Bangladesh, Guinea, Sudan, The Gambia, Côte d’Ivoire, Ghana and Senegal.

¹⁴⁶³ European Council (n 530).

¹⁴⁶⁴ EEAS (n 531); OHCHR (n 23) 15; UNHCR (n 1278).

¹⁴⁶⁵ UNHCR (Rwanda), ‘First Evacuation Flight of 2022 from Libya to Rwanda Brings Over 100 Asylum Seekers to Safety’ (30 Mar 2022) <<https://tinyurl.com/mvf56zsy>> accessed 27 June 2023; OHCHR (n 23) 15; Complementary pathways include resettlement, transfers to countries where persons had previously been granted asylum, voluntary returns to countries of origin whenever it is safe to do so or integration into Rwandan communities.

Despite being promoted as a ‘critical lifeline to stranded migrants’,¹⁴⁶⁶ ‘safe’ and a ‘dignified’ transfer in full respect of human rights law,¹⁴⁶⁷ UN bodies, academics and human rights practitioners, including the UNHCR argue that the VHR, in law, policy and practice, may not uphold human rights, in particular, direct and indirect *refoulement*.¹⁴⁶⁸ This is particularly the case in the Libyan context where access to refugee and human rights protection is extremely limited or non-existent.¹⁴⁶⁹

Evidence obtained from multiple sources, including international organisations and NGOs indicate that the VHR scheme under the Declaration fails to provide adequate safeguards for migrants and refugees against *refoulement* as required under international refugee law.¹⁴⁷⁰

7.5.1 Inadequate Safeguards in VHR and *Refoulement*

Besides its legal ambiguity, the informality of the Declaration leads to inherent accountability gaps and judicial loopholes, a lack of monitoring to ensure adequate procedural safeguards and judicial scrutiny against risks of persecution, ill treatment, torture and risks of *refoulement* upon return to countries of origin.¹⁴⁷¹ Critics also argue that the VHR in Libya is neither ‘humane’ nor ‘voluntary’¹⁴⁷² and lack protection and procedural safeguards against risks of exposure to danger, ill treatment and *refoulement*.¹⁴⁷³

The UNHCR has stated that the prohibition on forced return is applicable in the context of voluntary repatriations.¹⁴⁷⁴ The Agency clarified that a person in a host country ‘retaining a well-founded fear of persecution is a refugee and cannot be compelled to repatriate’ because that could amount to an ‘involuntary return of refugees’ which also in practice amounts to

¹⁴⁶⁶ European Commission (n 1446); IOM-Libya, ‘Voluntary Humanitarian Return Programme Offers Lifeline for 60,000 Migrants in Libya’ (IOM, 01 April 2022) <<https://tinyurl.com/2p9647rb>> accessed 18 July 2023; OHCHR (n 23) 3.

¹⁴⁶⁷ Declaration (n 36) Points 1 & 8; European Commission (n 537)1; IOM (Libya) ‘VHR’ (n 1445); IOM (Dakar) (n 537).

¹⁴⁶⁸ CoE Commissioner (n 20) 16, 17; ICC Prosecutor (n 47); EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/06 (n 3) 47; OHCHR (n 30) 3; (n 23) 3, 13.

¹⁴⁶⁹ A/HRC/38/41 (n 286); A/HRC/47/30 (n 160); OHCHR (n 23); Monella and Creta (n 1298).

¹⁴⁷⁰ OHCHR (n 30) 2-3; Papastavridis (n 31) 256-259, 262; GLAN (n 943); Kirişçi, Erdoğan and Eminoğlu (n 1266).

¹⁴⁷¹ A/HRC/37/50 (n 101) para 43.

¹⁴⁷² UNHCR ‘Hirsi’ (n 120) para 3.6.1.

¹⁴⁷³ *NA v Finland* Application no 25244/18 (ECtHR, 14 November 2019) [93]-[97]; Madalina Moraru, ‘The New Design of the EU’s Return System under the Pact on Asylum and Migration’ (*EU Immigration and Asylum Law and Policy*, 14 Jan 2021) <<https://tinyurl.com/ayyv9f9f>> accessed 06 June 2022; Olivia Sundberg Diez, ‘Diminishing Safeguards, Increasing Returns: Non-Refoulement Gaps in the EU Return and Readmission System’ (2019) (European Policy Centre (EPC) Discussion Paper, 4 October 2019) 8.

¹⁴⁷⁴ UNHCR, *Handbook Voluntary Repatriation: International Protection* (Geneva 1996) para 2.3.

refoulement.¹⁴⁷⁵ Returns must be based on ‘free and informed’ consent and must happen only ‘in conditions of safety and dignity’.¹⁴⁷⁶

Given the conditions in Libya and the legal grey zone in which the cooperation and returns take place, many commentators have questioned the VHR’s effectiveness in protecting returnees against persecution, torture and *refoulement*.¹⁴⁷⁷ The UNHCR has noted that due to the ongoing conflict, insecurity, violence, widespread human rights abuses, institutional incapacity, and a lack of functional asylum framework and judicial systems, it is ‘impossible’ for ‘many refugees’, including Eritreans and Somalians to ‘voluntarily’ return to their countries of origin.¹⁴⁷⁸

Screening and risk assessments for returns take place in detention centres where refugees and migrants face indefinite arbitrary detentions in horrific conditions and systematic human rights violations.¹⁴⁷⁹ This raises doubt about the effectiveness of VHR assessments in protecting persons against possible risks in their countries of origin.¹⁴⁸⁰ The situation is worsened by the limited involvement of the UNHCR in assessing the risk of exposure to persecution in the countries of origin.¹⁴⁸¹ The situation is also exacerbated in cases where migrants are held in detention centres that are controlled by militia groups who obstruct the operations of the IOM.¹⁴⁸²

Asylum seekers and migrants have very limited or no real alternatives or choice to VHRs besides paying ransoms to guards at the detention centres.¹⁴⁸³ This raises further questions concerning the voluntariness of migrants’ consent to return to countries of origin because the decisions may not have been made ‘freely’.¹⁴⁸⁴ This raises significant safety concerns, considering that

¹⁴⁷⁵ *ibid*.

¹⁴⁷⁶ UNHCR-EXCOM Conclusion No 101 (LV) ‘Legal Safety Issues in the Context of Voluntary Repatriation of Refugees’ (2004) Preambular paras 3, 5, 6.

¹⁴⁷⁷ CoE Commissioner (n 20) 16, 17; ICC Prosecutor (n 47); Fill and Moresco (n 47).

¹⁴⁷⁸ UNHCR ‘Hirsi’ (n 120) para 3.6.1.

¹⁴⁷⁹ UNSMIL and OHCHR (n 16) 38-47; CoE ‘CommDH(2019)29’ para 11; AI and HRW ‘SS’ (n 30) para 10; Fill and Moresco (n 47).

¹⁴⁸⁰ *ibid*

¹⁴⁸¹ Amnesty International (n 10) 9; OHCHR, ‘Report Highlights Unsafe and Undignified Expulsion of Migrants from Libya’ (*UN News*, 25 November 2021) <<https://tinyurl.com/yc2dkhj7>> accessed 28 January 2022; Fill and Moresco (n 47).

¹⁴⁸² Fill and Moresco (n 47).

¹⁴⁸³ Amnesty International (n 10) 9.

¹⁴⁸⁴ *ibid*; Fill and Moresco (n 47).

consent in relation to the decisions of the vulnerable migrants may not have been provided freely and or entirely 'voluntarily'.¹⁴⁸⁵

In the *Handbook on Voluntary Repatriation*, the UNHCR stated that consent cannot be considered to be 'voluntary' when there is no 'real freedom of choice' for migrants to remain in the host society, or ability to have their basic needs met, rights protected, or be free from restrictions to 'choose to return'.¹⁴⁸⁶ The inability to effectively conduct risks assessments means that that migrants may not be 'freely' and 'voluntarily' consenting to assisted returns to their countries of origin.¹⁴⁸⁷ This puts vulnerable migrants and possibly refugees and asylum seekers at risk of persecution and other serious risks, upon return to their countries of origin, including places where they may face the risk of *refoulement* and chain *refoulement*.¹⁴⁸⁸

Consent must be free of any form of physical, psychological or material pressure, taking into account the legal status of the person and rights in the host country.¹⁴⁸⁹ To protect refugees against involuntary or forced return, and *refoulement*, the sending countries must protect individuals being returned from 'threats and harassment', including any individuals or groups who 'impede' the returnees' access to information in their countries of origin or prevent them from exercising their 'free will' to return.¹⁴⁹⁰

To ensure returnees' own free will to return, voluntary return programmes must take into consideration the prevailing 'conditions' in the country of origin, and 'not necessarily ... the accomplishment of political solutions' in that country.¹⁴⁹¹ States must consider the risk of persecution, discrimination, detention as a result of their departure from their country of origin, or their refugee status, political opinion, race, ethnicity origin, or membership of a particular social group.¹⁴⁹² Refugees must be provided with the necessary information concerning the conditions in their countries of origin to inform them of their decision to repatriate.¹⁴⁹³ Repatriation arrangements must outline the terms and nature, if necessary, with

¹⁴⁸⁵ *ibid*

¹⁴⁸⁶ UNHCR (n 1474) paras 2.3 and 4.1.

¹⁴⁸⁷ *ibid* para 2.3; Fill and Moresco (n 47).

¹⁴⁸⁸ *ibid*

¹⁴⁸⁹ UNHCR (n 1474) para 4.3; International Law Blog, 'The Illusion of Consent-Voluntary Repatriation or Refoulement?' 25 September 2019 <<https://tinyurl.com/2p8tb8xt>> accessed 5 November 2021

¹⁴⁹⁰ Conclusion No 101 (LV) (n 1476) para(d).

¹⁴⁹¹ *ibid* para (e).

¹⁴⁹² *ibid* para (f).

¹⁴⁹³ International Law Blog (n 1489).

the involvement of the UNHCR.¹⁴⁹⁴ The VHR does not provide sufficient safeguards to protect victims of human trafficking.¹⁴⁹⁵ There is no available data nor established procedures for identifying victims of human trafficking in VHR programmes.¹⁴⁹⁶ Consequently, asylum seekers and vulnerable migrants in need of international protection, including persons facing violence and persecution, have been sent to places like Sudan, Eritrea and Somalia where there are grounds to believe that they may be subjected to persecution upon their return.¹⁴⁹⁷ About a quarter of migrants are returned to Nigeria, where most victims of human trafficking originated from and may face a high risk of re-trafficking.¹⁴⁹⁸

7.5.2 Diplomatic Assurances

The IOM seeks diplomatic assurances from countries of origin in cases involving of vulnerable migrants to ensure that such persons can be provided with ‘access to adequate assistance’ upon return to their countries of origin.¹⁴⁹⁹ This is based on the assumption that Libya will adhere to international human rights law and assess the effectiveness of diplomatic assurances in protecting returnees from risks of danger posed to the individuals concerned in the destination country.¹⁵⁰⁰ Given Libya’s lack of compliance with international refugee and human rights laws, it is very doubtful if these assurances provide sufficient guarantees for VHR beneficiaries against torture, ill-treatment and other human rights violations amounting to *refoulement*.¹⁵⁰¹

The UNHCR has clarified that diplomatic assurances, in light of *non-refoulement*, can only be relied upon to provide adequate guarantees for persons being removed and transferred to another country when the sending country can be assured that ‘assurances effectively remove the risk’ of danger and human rights violations to that particular individual in the destination country.¹⁵⁰²

¹⁴⁹⁴ UNHCR-EXCOM Conclusion No 18 (XXXI) 'Voluntary Repatriation' (1980) para (c).

¹⁴⁹⁵ Fill and Moresco (n 47).

¹⁴⁹⁶ *ibid*

¹⁴⁹⁷ EU (n 1449); Creta (n 32); IOM (Dakar) (n 537); Fill and Moresco (n 47).

¹⁴⁹⁸ *ibid*

¹⁴⁹⁹ InfoMigrants (n 1451).

¹⁵⁰⁰ UNHCR, *Note on Diplomatic Assurances and International Refugee Protection* (Geneva August 2006) 9; Olof Hasselberg, 'Diplomatic Assurances-A Judicial and Political Analysis of the Undermining of the Principle of Non-Refoulement' (2010) Rapport 38.

¹⁵⁰¹ UNHCR (n 1500) 9; Poon (n 29).

¹⁵⁰² UNHCR (n 1500) 9.

The CAT has noted that diplomatic assurances must take specific cases of individual asylum seekers into account and be ‘considered only in exceptional cases’.¹⁵⁰³ To protect individuals against *refoulement*, the sending State must take into account its own international human rights obligations, the nature and degree of risk posed to the person in question, the source of the risk or danger and the likelihood that the assurances will be implemented in good faith by the destination State.¹⁵⁰⁴ The CAT has cautioned that the reliance on diplomatic assurances during the transfer of a person from one State to another must not be used as a ‘loophole’ to undermine the principle of *non-refoulement*.¹⁵⁰⁵ Official assurances from the countries of origin must guarantee the safety of returnees, respect for human rights and non-penalisation of those individuals for departure from their countries of origin and the reasons for which they left.¹⁵⁰⁶ In addition, assurances from countries of origin concerning repatriation arrangements and information on the prevailing conditions in the country of origin must also be ‘duly communicated’ to the persons being returned, through relevant authorities in the host country, and if possible, with the involvement of the UNHCR.¹⁵⁰⁷

7.6 Conclusion

This chapter demonstrated that there is a gap between the principle of *non-refoulement* as set out under the 1951 Refugee Convention and other human rights treaties and the actual practice of the Declaration, the bilateral agreement, governing Libya’s interceptions in the CMR. The information examined showed that the policy fails to provide adequate protection and procedural safeguards for intercepted refugees and migrants against torture, ill-treatment and *refoulement*. Most intercepted persons sent to Libya cannot have access to asylum procedures, a legal stay or administrative and judicial review of their arbitrary detention, deportation or expulsion, or remedies for their horrific treatment.¹⁵⁰⁸ The situation is worsened by the policy’s lack of specific human rights provisions, Libya’s refusal to recognise the Refugee Convention and the UNHCR, lack of capacity and a national asylum.¹⁵⁰⁹ This

¹⁵⁰³ Concluding Observations on the Sixth and Seventh Periodic Reports of Sweden (12 December 2014) CAT/C/SWE/CO/6-7 para 11.

¹⁵⁰⁴ UNHCR (n 1500) 9.

¹⁵⁰⁵ CAT/C/GC/4 (n 188) para 20.

¹⁵⁰⁶ Conclusion No 18 (n 1494) para (f).

¹⁵⁰⁷ *ibid* para (e)(g).

¹⁵⁰⁸ *Notice of Appeal* (n 1283) Reasons of objection (i) & (ii), Second Facts, Paras 10-11; Camilli (n 118).

¹⁵⁰⁹ CoE Commissioner (n 20) 16, 17; Fill and Moresco (n 47).

subjects many refugees and migrants, including children, to increased risks of torture, violence, ill-treatment, and direct and indirect *refoulement*.¹⁵¹⁰

¹⁵¹⁰ UNHCR 'Externalization' (n 120) paras 2-5; Boswell (n 5) 619; Hirsch (n 266) 49.

Chapter VIII: Concluding Remarks and Recommendations

This thesis examined the Malta Declaration, a bilateral agreement that was concluded between the EU's political leaders and the Libyan government in February 2017 to control irregular flow of refugees and migrants across the CMR to the EU. The study explored the applicability of the principle of *non-refoulement* within the Declaration and whether it provides effective safeguards for intercepted persons against risks of exposure to persecution, torture, ill-treatment, and *refoulement*. The thesis also investigated whether EU States exercise jurisdiction over the rescues, interceptions and returns performed under the Declaration and any violations of *non-refoulement* arising from these acts.

The study drew on the principle of *non-refoulement* provided in Article 33(1) of the 1951 Refugee Convention, Article 3 of the UNCAT and the norm's conceptualisation in Article 3 of the ECHR. The study also relied on the interpretations of *non-refoulement* by the supervisory bodies of the above treaties and courts. Theoretically, the study relied on the emergent concept of externalisation, a migration control strategy adopted by States to circumvent the *non-refoulement* obligations. The examination of the Declaration was based on evidence drawn from official documents, case law and factual reports by UN bodies, NGOs and other relevant international organisations. The analysis of the situation was based mainly on the reasoning of treaty obligations.

The study found that although the Declaration may have achieved its stated objective of drastically reducing the number of persons irregularly entering EU territory by sea, it has had catastrophic consequences on the right to asylum and *non-refoulement*. Notwithstanding the numerous reports on the systematic human rights abuses perpetrated against refugees and migrants at sea and in Libya, the Declaration was designed and implemented without specific human rights provisions to ensure access to asylum, protection against torture and other ill-treatment, trafficking, collective expulsions and *refoulement*. Consequently, It has deprived a significant number of rescued and intercepted refugees and migrants of physical protection, access to safe European territories and asylum procedures.

Rescues and maritime interdictions have been dangerous, life-threatening and put refugees and migrants at increased risk of deaths and situations of grave harm, including drowning and

refoulement.¹⁵¹¹ Increased interceptions, the deployment of aerial surveillance by EU States coupled with the drastic withdrawal of humanitarian and rescue services have significantly worsened travel conditions for many refugees and migrants. The drastic withdrawal of EU States' naval assets and the obstruction of rescue NGOs also deprive refugees and migrants found in distress at sea of immediate and safe rescues, life-saving and humanitarian services. This puts individuals at increased risks of death,¹⁵¹² in violation of the obligation 'to prevent, combat and eliminate arbitrary [...] deprivation of life'.¹⁵¹³

The lack of procedural safeguards has led to the forcible return of several intercepted persons, including those at risk of persecution or ill-treatment to Libya without individualised assessments of their specific protection needs or the opportunity to claim asylum or question their forcible return. The study found evidence in numerous reports showing that the Declaration has subjected thousands of rescued and intercepted refugees, asylum seekers and extremely vulnerable migrants, including women and small children Libya to persecution, automatic and arbitrary detention in inhumane conditions for indeterminate period, forced labour, death, torture and other ill-treatment¹⁵¹⁴ and *refoulement* directly and indirectly.¹⁵¹⁵ Intercepted persons in Libyan detention also face beatings, sexual violence, exploitation, kidnappings, systematic violence and death in custody due to inadequate medical treatment or a lack of adequate food.¹⁵¹⁶

The results of the study clearly showed that the rescues, interceptions, return and detention of refugees and migrants performed by virtue of the Declaration clearly occur within Libyan territory and on the high seas, and outside the national territories of EU States. The findings also demonstrated that the events are primarily carried out by Libyan authorities and national institutions under Libya's Ministries of Interior and Defence. Evidence gathered also showed that the rescued and intercepted persons are transferred to Libyan-flagged vessels where

¹⁵¹¹ Hirsi (n 22) [116]-[138]; UNSMIL and OHCHR (n 20) 12 & 29; Alarm Phone (n 916) 5.

¹⁵¹² A/73/314 (n 986) paras 11-12; OHCHR (n 108) 4.

¹⁵¹³ (n 22) 4.

¹⁵¹⁴ UNSMIL and OHCHR (n 20) 14-23; OHCHR (n 20); OHCHR (n 558); UNSMIL and OHCHR (n 16) 25-31, 38-54; OHCHR, 'UN Human Rights Chief: Suffering of Migrants in Libya Outrage to Conscience of Humanity' (OHCHR, 14 November 2017) <<https://tinyurl.com/4fcsj9xb>> accessed 20 October 2023; OHCHR (n 1208); A/HRC/S-15/1 (n 1208); A/HRC/52/83 (n 106); A/HRC/49/4 (n 1071); A/HRC/50/63 (n 806).

¹⁵¹⁵ OHCHR (n 23); OHCHR (n 30).

¹⁵¹⁶ AI and ARCI and Others (n 18).

Libyan authorities exercise direct *de jure* and *de facto* control over such individuals at sea, during their return and upon arrival in Libya.

Despite that, this study found evidence showing that the actual control and jurisdiction over them and the violations of torture and *non-refoulement* perpetrated against them are exercised by the authorities of EU States and institutions, albeit indirectly.¹⁵¹⁷ EU States' jurisdiction is based on the control and power they exercise over the Declaration together with their substantial financial, technical, political and other material support provided to the Libyan government and the LCG to stop illegal migration into EU territory.¹⁵¹⁸

The analysis of the text of the Declaration and evidence gathered demonstrated that the LCG was not only created by Italy to act as a proxy force at the behest of the EU but also their activities are enabled and directed in real time by EU States and institutions.¹⁵¹⁹ Libya only exercises a 'nominal authority' or 'actual control' over its territory, the CMR and the operations.¹⁵²⁰ Evidence shows that Libya would not have been able to declare its own search and rescue region,¹⁵²¹ create and/or operate its own Coast Guard, or perform the above events without that the funding, technical and other material support provided by the EU and its Members.¹⁵²² The actual control over Libya's SARs and coordinating activities is still exercised by Italian authorities, with support from EU naval forces. In this regard, the agreement is a form of 'consent, invitation or acquiescence' by Libya, and sufficient to establish EU States' extraterritorial jurisdiction.

Under the UNCAT, EU States' jurisdiction is based on the degree of control and powers they exercise over the Declaration, including the activities of the Libyan authorities on the high seas and in Libyan territory.¹⁵²³ EU States also exercise control at least 'indirectly, or in part' over persons through their surveillance, monitoring and other deterrence measures to enable the

¹⁵¹⁷ Declaration (n 36) Points 6; A/HRC/52/83 (n 106) para 46; Alarm Phone (n 916) 2; CSDM (n 817) para 260.

¹⁵¹⁸ ILC (n 971) Article 16; Declaration (n 36) Points 2 & 6; Italy-Libya MoU (n 338); 'Sharifi' (n 145) para 5.1; GLAN, ASGI and ARCI (n 552) para 76.

¹⁵¹⁹ CAT/C/ITA/CO/5-6 para 22; UNSMIL and OHCHR (n 16) 14-15; CoE Commissioner (n 20) 43; CSDM (n 817) para 202, 257; Tranchina (n 968); Maccanico (n 517) 6; GLAN, ASGI and ARCI (n 552) para 31-38; Palm (n 104) 13; The LCG was initially created by Italy with the signing of the Treaty of Friendship in August 2008.

¹⁵²⁰ UNSMIL and OHCHR (n 20) 13; UNSMIL and OHCHR (n 16) 14-15; A/HRC/52/83 (n 106) para 48; CSDM (n 817) para 257.

¹⁵²¹ European Council (n 511); Amnesty International (n 10); Amnesty International (n 425) 19; Amnesty International (n 87) 16

¹⁵²² GLAN and ICHR (n 1133) paras 4-5; GLAN, ASGI and ARCI (n 552) para 76.

¹⁵²³ CSDM (n 817) para 202; GLAN, ASGI and ARCI (n 552) para 76.

Libyans to stop or intercept or control the movements of migrant boats in the CMR and ‘forcibly’ send them to Libya. In this instance, the study found that the degree of control exercised by EU States over the policy and the Libyans is stronger than was exercised by Spain in the *JHA* case,¹⁵²⁴ through many years of cooperation with Libya and their extensive funding and multi-faceted support to enable Libya to perform the activities.¹⁵²⁵

EU States’ exercise of extraterritorial jurisdiction stems from their proactive cooperation and assistance to Libya without any human rights guarantees¹⁵²⁶ despite being fully aware of the numerous reports of the dangerous, ‘life-threatening interceptions’ conducted by the LCG and the systematic human rights abuses perpetrated against refugees and migrants in Libya.¹⁵²⁷ Knowingly aiding or assisting the Libyans or cooperating in these control activities in ways where breaches of torture and *refoulement* are foreseeable also engages their legal responsibility.¹⁵²⁸ EU States’ exercise of extraterritorial jurisdiction under the above treaties stems from their significant withdrawal of their naval assets in CMR; the imposition of legal obstructions on independent rescue operations and their failure to take appropriate measures¹⁵²⁹ to prevent violations of *non-refoulement* against the intercepted persons by the Libyan authorities over who they exercise significant influence.¹⁵³⁰

EU States’ jurisdiction under the ECHR is also established by virtue of their ‘domination’ and ‘decisive influence’ over the policy and the actions of the Libyan authorities¹⁵³¹ due to their substantial financial, technical and other material support to enable the Libyans perform the rescues and interceptions.¹⁵³²

On the account of the above, this thesis concludes that EU States led by Italy exercise ‘control over the Libyan authorities’ activities in the area of immigration’, and for that matter, ‘public

¹⁵²⁴ *JHA v Spain* (n 807) para 8.2.

¹⁵²⁵ Declaration (n 36) Points 5, 6(a)(b)(c) and (g); (JOIN(2017) (n 1) 10; EEAS (n 538); Amnesty International (n 89) 12.

¹⁵²⁶ CAT/C/ITA/CO/5-6 para 22; CSDM para 264.

¹⁵²⁷ Amnesty International (n 10); HRW (n 20) 12; Amnesty International (n 524); Amnesty International (n 425).

¹⁵²⁸ *SS and Others* (n 815) [68]-[77]; UNHCR ‘SS’ (n 815) 4.1-6.1; HRW (n 942); Alarm Phone (n 916).

¹⁵²⁹ UNCAT (n 110) Article 2(1).

¹⁵³⁰ CAT/C/ITA/CO/5-6 (n 106) para 22; CSDM (n 817) para 265.

¹⁵³¹ *Loizidou* (n 847) [62]; *Cyprus* (n 865) [76]; *Bankovic* (n 807) para 70; *Loizidou* (n 847) [314]-[316]; *Catan* (n 1099) [106].

¹⁵³² *Catan* (n 1099) [107]; *Mozer* (n 1099) [103], [107]; *Hirsi* (n 22); AI and HRW ‘SS’ (n 30) para 5; Amnesty International (n 89) 23.

powers normally to be exercised' [by Libya]'.¹⁵³³ EU States are, therefore, responsible for violations of *non-refoulement* committed by Libyan authorities.

Against this backdrop, the study calls on EU States to ensure that their bilateral and multilateral agreements are implemented in such a way that protects the rights of refugees and migrants, and to immediately denounce and address the humanitarian situation pronounced in Declaration and publicly. EU cooperation agreements and financial programmes with Libya must be conditioned to guarantee compliance with the principle of *non-refoulement*. The EU and its Members must suspend any agreement that does not include specific human rights provisions and measures to ensure full respect of the rights of refugees and migrants, and effective monitoring. If possible, the European Parliament should be charged with supervising the implementation of the Declaration, including the activities of EU agencies, Member States and the Libyans to ensure compliance with international refugee law, particularly *non-refoulement*. The EU and its members must establish accountability and monitoring mechanisms to address human rights violations arising from interdictions and co-operation with Libya. They must also hold their own institutions and authorities accountable for any violations. EU States should require Libya to discontinue its automatic detention of refugees and migrants upon their return to Libya. They must ensure that immigration detention is only implemented for the shortest period possible and as a measure of last resort, and if applied, it must be strictly necessary, proportionate, lawful and non-arbitrary. EU States must also take all measures necessary to support Libya to improve, without delay, current detention conditions.

EU States, particularly Italy, must immediately refrain from using LCG as a proxy and private merchant vessels for SAR activities and maritime interceptions. Since Libyan SAR is not fully operational to provide timely and effective rescues and coordination, EU States are urged to provide speedy and equitable cooperation to save lives, prevent harm and violations of *non-refoulement*. In this regard, EU States are also urged to end the criminalisation of rescue NGOs, whose humanitarian activities are essential to saving lives, considering the significant withdrawal of their assets.

¹⁵³³ *Bankovic* (n 807) [71]; *Al-Skeini* (n 820) [135]; ECtHR 'Guide' (n 1103) para 58; AI and HRW 'SS' (n 30) para 2.

This study urges the EU and its Members to provide legal avenues for those in need of international protection, prevent their *refoulement* to countries of origin or condition their funding and support to Libya by requiring it to improve its human rights standards, treatment of refugees and migrants, reception centres, to establish a national asylum system, improve their political situation, and sign the Refugee Convention.

Libya must refrain from carrying out the collective expulsion of irregular migrants, ensures that all persons who become subject to expulsion orders are provided access to individualised assessments of their asylum claims, personal situation or specific protection needs. Persons must be provided access to due process and procedural safeguards, including the right to fair proceedings, access to legal representation, interpreters and translators, and the right to challenge the legality of return.

Libyan authorities should find a better alternative to detention for intercepted persons who are unable to return to their countries of origin or former habitual residence for fear of persecution and other serious human rights violations. Returns must conform with the principle of *non-refoulement* and the prohibition of collective expulsions.

Libya is urged to intensify its efforts to hold perpetrators of human rights violations against refugees and migrants to account. The international community, including the AU and the EU are urged to provide support to build the capacity of the Libyan judicial system. Stake holders should strengthen their partnership needs to enhance the identification and protection of intercepted people by ensuring immediate access to safety mechanisms, effective access to asylum and other international protection and assistance, including access to legal aid, mental health support and judicial remedies.

Final Reflections and the Way Forward

The case presented above is a sobering example of the damaging consequences of externalisation mechanisms on the international refugee regime,¹⁵³⁴ particularly on the principle of *non-refoulement*.¹⁵³⁵ The study findings have significant implications for scholarship and policy debate on migration governance and international protection. They highlight the policy's lack of protection safeguards, legal migratory alternatives, accountability

¹⁵³⁴ HCR/MMSP/2001/09 (n 231) 241; Gammeltoft-Hansen and Hathaway (n 271) 235-242; Hirst (n 259) 370..

¹⁵³⁵ Hirst 370; Mann and Keady-Tabbal (118); Mann (n 955) .

and EU State's complicity in the horrific violations perpetrated against refugees and asylum seekers.

They confirm similar studies and the views expressed by many human rights institutions and organisations, including the UNCHR and the European Parliament.¹⁵³⁶ These views show that externalisation practices allow States to create an appearance of human rights compliance,¹⁵³⁷ while allowing them to circumvent their obligations under international refugee law¹⁵³⁸

Regrettably, these practices are expected to remain the dominant policy framework for migration management. A recent proposal published by the European Commission would allow EU States to send asylum seekers to countries where they have no connection with and based on mandatory procedures with very minimal human rights guarantees.¹⁵³⁹ The recent reforms introduced in the EU Pact on Migration and Asylum fail to address the existing problems while introducing new practical and legal problems, including issues of enforceability, a lack of differentiation between asylum seekers and inadequate access to asylum procedures.

The most unfortunate aspect of externalisation policies is the near absence of legal challenge to hold offending States legally responsible.¹⁵⁴⁰

The UNCHR and scholars have warned that these practices do not just weaken the international protection system¹⁵⁴¹ but if not stopped, could have the potential to alter the substantive content of international refugee, or even 'send the whole international protection principle down the drain'.¹⁵⁴²

While emerging case law, including *Hirsi*, have challenged the territorial threshold for establishing jurisdiction in these contexts, such decisions have not been effective in furthering

¹⁵³⁶ Moreno-Lax (n 917) 415; Hirst (n 955); Mann (n 955); Judith Sunderland, 'European Commission Endorses Exporting Asylum Seekers: Proposal on "Safe Third Countries" Should be Rejected' (Human Rights Watch, 28 May 2025) <<https://tinyurl.com/3b9s4fex>> accessed 28 May 2025

¹⁵³⁷ Moreno-Lax (n 917) 415; Hirst (n 259); Mann (n 955).

¹⁵³⁸ HCR/MMSP/2001/09 (n 208) 241; Gammeltoft-Hansen and Hathaway 235-242.

¹⁵³⁹ European Commission, 'Pact on Migration and Asylum: A Common EU System to Manage Migration' 21 May 2024) <<https://tinyurl.com/ehtcd578>> accessed 29 March 2025; Sunderland (n 1536).

¹⁵⁴⁰ *SS and Others* (n 815) [110] [114]; North (n 315) 7-8; Mann (n 955).

¹⁵⁴¹ Conclusion No 97 (n 108); North (n 315) 10; Fitzgerald (n 264) 1; Hirst (n 259) 367.

¹⁵⁴² Hirst (n 259) 367, 370; Mann and Keady-Tabbal (n 118); Mann (n 955).

the discourse on the application of *non-refoulement* globally. As shown in the recent *SS* case, there are still loopholes in this area of law.¹⁵⁴³

Going forward, the EU States is urged to acknowledge the critical shortcomings of the Declaration and to replace with human rights-compliant policies that focus on human rights protection, safe and legal alternatives for refugees and migrants, and to seriously address the root causes of forced displacement such as conflict, human rights violations, and poverty.

Since this area of law is expected to continue to develop, the study calls for extension of the threshold of jurisdiction to include a growing number of situations where States exercise different forms of control when they conduct extraterritorial migration control. This will help introduce mechanisms for closing the accountability gap and to strengthen protection for refugees and asylum seekers. Future research on externalisation policies should focus on exploring ways in which current externalising practices can be implemented to ensure legal accountability and refugee protection.

¹⁵⁴³ Gammeltoft-Hansen (n 256) 131; Gammeltoft-Hansen and Hathaway (n 271) 263; Mann (n 955) 104-114.

Appendixes

Appendix1: Libya's Treaty Ratification Status

Treaty	Date of Signature	Date of Ratification/Accession (a)
1984 UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment		16 May 1989 (a)
CAT-OP - Optional Protocol of the Convention against Torture	-	-
CCPR - International Covenant on Civil and Political Rights		15 May 1970 (a)
CCPR-OP2-DP - Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming to the Abolition of the Death Penalty	-	-
CED - Convention for the Protection of All Persons from Enforced Disappearance	-	-
CED, Art.32-Interstate Communication Procedure under the International Convention for the Protection of All Persons from Enforced Disappearance	-	-
CEDAW-Convention on the Elimination of All Forms of Discrimination against Women		16 May 1989 (a)
CERD-International Convention on the Elimination of All Forms of Racial Discrimination		03 Jul 1968 (a)
ICESCR-International Covenant on Economic, Social and Cultural Rights		15 May 1970 (a)
ICMW-International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families		18 Jun 2004 (a)
CRC - Convention on the Rights of the Child		15 Apr 1993 (a)
CRC-OP-AC-Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict		29 Oct 2004 (a)
CRC-OP-SC-Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child prostitution and Child Pornography		18 Jun 2004 (a)
CRPD-Convention on the Rights of Persons with Disabilities	01 May 2008	13 Feb 2018

Source: UN Treaty Body Database

Appendix 2 : European Border Surveillance Vessel in the Mediterranean¹⁵⁴⁴



¹⁵⁴⁴ Ian Urbina (n 1266)

Appendix 3: Sudanese Migrants, Who Returned Home from Libya, Protesting in Front of the Local Office of the IOM in Darfur to Demand Assistance in February 2020¹⁵⁴⁵



¹⁵⁴⁵ Monella and Creta (n 1298).

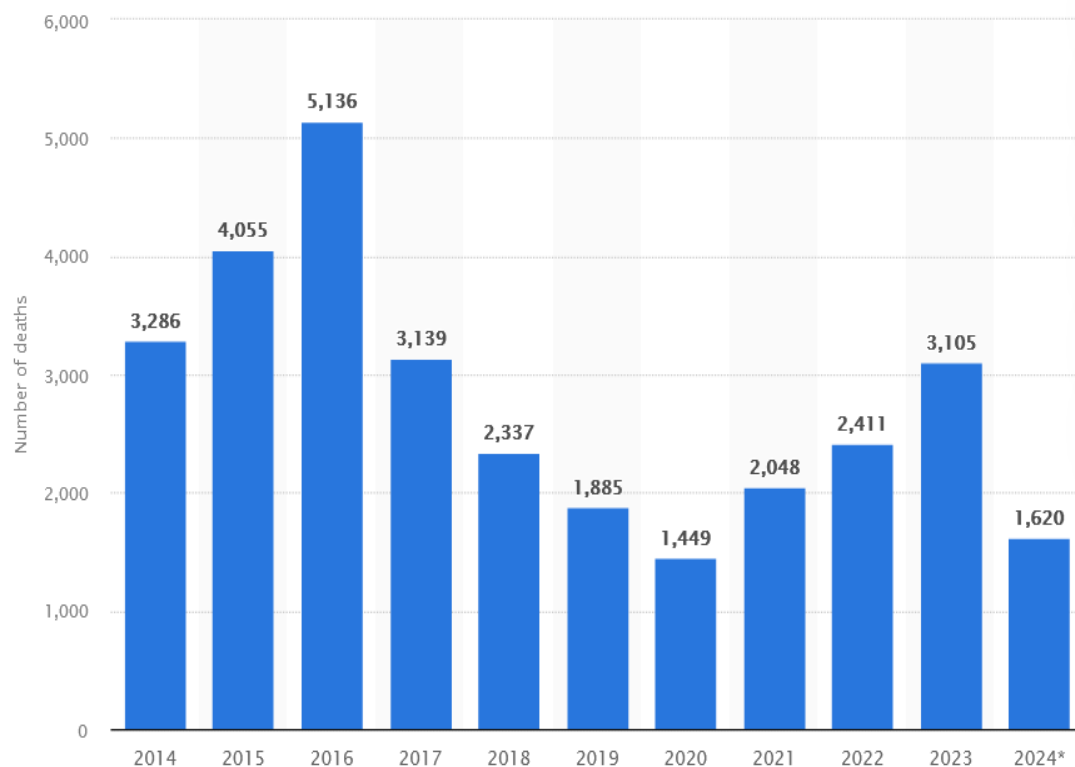
Appendix 4: A Poster in Nigeria Warning of the Risks of Migration¹⁵⁴⁶



Source: Euronews

¹⁵⁴⁶ ibid

Appendix 5: Number of Recorded Deaths of Migrants in the Mediterranean Sea from 2014 to 2024¹⁵⁴⁷



© Statista 2024

¹⁵⁴⁷ Statista, 'Deaths of migrants in the Mediterranean Sea 2014-2024' (24 October 2024) <<https://tinyurl.com/3e5z5fhc>> accessed 23 November 2024

Bibliography

Cases

ICJ (International)

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) of 19 December 2005 [2005] ICJ Judgement

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua V United States of America) (Merits) General List No 70 [1986] ICJ Judgement

Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) General List No 91 [2007] (ICJ) (Judgement)

Case of the SS 'Lotus' (France v Turkey) [1927] PCIJ Judgement (PCIJ [1927] Judgement Rep Series A-No 70

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ) [2004] (Advisory Opinion)

Legality of the Threat or the Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ General List No 95)

North Sea Continental Shelf [1969] ICJ (Judgement) Rep 1969 3

Prosecutor v Anto Furundzija Judgement of 10 December 1998, Trial Chamber, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of IHL Committed in the Territory of the Former Yugoslavia since 1991

Prosecutor v Kunarac and Others, Trial Chamber Yugoslavia, Judgement of 22 February 2001 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (Judgement) IT-96-23-T & IT-96-23/1-T

UN Treaty Bodies: Cases/ Decisions

A v Australia Communication No 560/1993 'Decision by Human Rights Committee 59th Session' (30 April 1997) UN Doc CCPR/C/59/D/560/1993

A V Australia, Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993 (30 April 1997) (CCPR)

Aemei v Switzerland (Merits) Communication No 34/1995 UN Doc (9 May 1997) CAT/C/18/D/34/1995

Ahmed Hussein Mustafa Kamil Agiza v Sweden Communication No 233/2003 (24 May 2005) UN Doc CAT/C/34/D/233/2003

Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v Australia Communication No 1069/2002 (06 November 2003) UN Doc CCPR/C/79/D/1069/2002

Avedes Hamayak Korban v Sweden Communication No 88/1997 (16 November 1998) UN Doc CAT/C/21/D/088/1997

Bachan Singh Sogi v Canada Communication No 297/2006 (16 November 2007) UN Doc CAT/C/39/D/297/2006

C v Australia Communication No 900/1999 (13 November 2002) UN Doc CCPR/C/76/D/900/1999

Cecilia Rosana Núñez Chipana v Venezuela, Communication No 110/1998, CAT/C/21/D/110/1998, (CAT, 16 December 1998)

Delia Saldías De Lopez v Uruguay Communication No 052/1979 (29 Jul 1981) UN Doc CCPR/C/13/D/52/1979, CCPR/C/OP/1 at 88 (1984)

Jalloh v the Netherlands Communication 794/1998 UN Doc A/57/40, Vol II, at 144 (HRC 2002) (CCPR, 26 March 2002)

Jama Warsame v Canada Communication No 1959/2010 (01 September 2011) UN Doc CCPR/C/102/D/1959/2010

JHA v Spain Communication No 323/2007 (21 November 2008) UN Doc CAT/C/41/D/323/2007

Kwami Mopongo and Others v Morocco Communication No 321/2007 (CAT, 13 January 2015)
UN CAT/C/53/D/321/2007

Lilian Celiberti De Casariego v Uruguay (29 July 1981) UN Doc CCPR/C/13/D/56/1979

Mansour Ahani v Canada Communication No 1051/2002 'Decision of the Human Rights Committee' (15 June 2004) UN Doc CCPR/C/80/D/1051/2002

Moses Solo Tarlue v Canada Communications No 1551/2007 (28 April 2009) UN Doc CCPR/C/95/D/1551/2007

Mostafa Dadar v Canada Communication No 258/2004 (05 December 2005) UN Doc CAT/C/35/D/258/2004

Mukong v Cameroon Communication No 458/1991 (21 July 1994) UN Doc CCPR/C/51/D/458/1991

NS v Switzerland Communication No 356/2008 (CAT Decision) (03 June 2010) UN Doc CAT/C/44/D/356/2008

Omar Sharif Baban v Australia Communication No 1014/2001 (18 September 2003) UN Doc CCPR/C/78/D/1014/2001

Shafiq v Australia Communication No 1324/2004 (CCPR, 13 November 2006)
CCPR/C/88/D/1324/2004

Sonko v Spain Communication No 368/2008 (CAT Decision) (23 October 2008) UN Doc CAT/C/47/D/368/2008

Subakaran R Thirugnanasampanthar v Australia (CAT Decision, 25 September 2017) UN Doc CAT/C/61/D/614/2014

Tapia Páez v Sweden Communication No 39/1996 (28 April 1997) UN Doc CAT/C/18/D/39/1996

Treaty Bodies: Conclusions and General Comments

CAT 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Italy' (18 December 2017) UN Doc CAT/C/ITA/CO/5-6

CAT 'Concluding Observations of the CAT: Greece' (adopted 27 June 2012) UN Doc CAT/C/GRC/CO/5-6

CAT 'Concluding Observations on the Seventh Periodic Report of Greece' (02 September 2019) UN Doc CAT/C/GRC/CO/7

CAT 'Conclusions and Recommendations, United States of America' (adopted 25 July 2006) UN Doc CAT/C/USA/CO/2

CAT 'General Comment No 1: Implementation of Article 3 of the Convention in the Context of Article 22' (Refoulement and Communications) (adopted 21 November 1997) UN Doc A/53/44 Annex LX

CAT 'General Comment No 2: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (adopted 24 January 2008) UN Doc CAT/C/GC/2

CAT 'General Comment No 4 (2017) on the Implementation of article 3 of the Convention in the Context of Article 22' (adopted 9 February 2018) UN Doc CAT/C/GC/4

CAT 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Italy' (18 December 2017) CAT/C/ITA/CO/5-6

CAT 'Concluding Observations on the Seventh Periodic Report of Greece' (02 September 2019) Cat/C/GRC/CO/7

CAT 'Concluding Observations on the Sixth and Seventh Periodic Reports of Sweden' (12 December 2014) CAT/C/SWE/CO/6-7

CCPR 'General Comment No 15: The Position of Aliens Under the Covenant' (adopted 11 April 1986) CCPR 27th Session

CCPR 'General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment' (adopted 10 March 1992) 44th Session

CCPR 'General Comment No 29: Article 4: Derogations during a State of Emergency' (adopted 31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11

CCPR 'General Comment No 31 [80]': The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.13

CCPR 'General Comment No 35 on Article 9, Liberty and Security of Person' (16 December 2014) UN Doc CCPR/C/GC/35

CCPR 'Concluding Observations of the Human Rights Committee on Dominican Republic (26 April 2001) CCPR/CO/71/DOM

CCPR 'Concluding Observations: Israel' (21 August 2003) UN Doc CCPR/CO/78/LSR

CCPR 'Concluding Observations: Israel' (Adopted 18 August 1998) UN Doc CCPR/C/79/Add.93

CCPR 'General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992)

Committee on Migrant Workers General Comment No 2 (adopted 28 August 2013) UN Doc CMW/C/GC/2

Committee on the Rights of the Child (CRC) General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin (1 September 2005) CRC/GC/2005/6

Convention on the Rights of the Child (Adopted 20 November 1989, Entry into Force 02 September 1990) 1577 UNTS 3 (CRC)

Joint General Comment No 3 of the CMW and No 22 of the CRC in the Context of International Migration: General Principles (16 November 2017) CRC/C/GC/22-CMW/C/GC/3

UN Committee on the Elimination of Racial Discrimination (CERD) 'General Recommendation XXX (No 30) on Discrimination against Non-Citizens' (5 August 2004) 65th Session (2005)

UN Committee on the Rights of the Child (CRC) General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin' (adopted 01 September 2005) CRC/GC/2005/6

UN Human Rights Committee: Concluding Observations of the Human Rights Committee on Dominican Republic (26 April 2001) UN Doc CCPR/CO/71/DOM

UN Human Rights Committee: General Comment No 36 (Article 6: Right to Life) (3 September 2019) UN Doc CCPR/C/GC/36

ECtHR

Al-Adsani v the United Kingdom (Application No 35763/97) (ECtHR, 21 November 2001)

Al-Moayad V Germany Application No 35865/03 (ECtHR, 20 February 2007)

Al-Skeini and Others v the United Kingdom [GC] (Application No 55721/07) (ECtHR, 07 July 2011)

Andreou v Turkey Application no 45653/99 (ECtHR, 3 June 2008)

Assanidze v Georgia [GC] Application no 71503/01 (ECtHR, 8 April 2004)

Assessment of the Credibility of Asylum Seekers: The Burden of Proof and the Limits of the ECHR's Examination (Intervention, Opening of the Judicial Year–Seminar (ECtHR, 27 January 2017)

Bankovic and Others v Belgium and Others [GC], Application no 52207/99 (ECtHR, 12 December 2001)

Catan and Others v Moldova and Russia [GC] Applications nos 43370/04, 8252/05 and 18454/06 (ECtHR, 19 October 2012)

Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania Application no 47848/08 (ECtHR, 17 July 2014)

Chahal v the United Kingdom Application no 22414/93 (ECtHR, 15 November 1996)

Čonka v Belgium Application no 51564/99 (ECtHR, 5 February 2002)

Cyprus v Turkey Application no 25781/94 (ECtHR, 10 May 2001)

Drozd and Janousek v France and Spain [GC] (Application No 12747/87) (ECtHR, 26 June 1992)

FG v Sweden Application no 43611/11 (ECtHR, 23 March 2016)

Güzelyurtlu and Others v Cyprus and Turkey Application no 36925/07 (ECtHR, 29 January 2019)

Hirsi Jamaa and Others v Italy Application no 27765/09 (ECtHR, 23 February 2012)

HLR v France Application no 24573/94 ECtHR, 29 April 1997)

Ilaşcu and Others v Moldova and Russia Application no 48787/99 (ECtHR, 8 July 2004)

Ilias and Ahmad v Hungary Application no 47287/15 (ECtHR, 21 November 2019)

Issa and Others v Turkey (Merits) [GC] Application no 31821/96 (ECtHR, 30 March 2005)

JK and Others v Sweden Application no 59166/12 (ECtHR, 23 August 2016)

Khlaifia and Others v Italy Application no 16483/12 (ECtHR, 15 December 2016)

Loizidou v Turkey (Preliminary Objections) [GC] Application no 15318/89 (ECtHR, 23 March 1995)

Mansur Pad and Others v Turkey (Third Section) Application no 60167/00 (ECtHR, 28 June 2007)

Medvedyev and Others v France, Application no 3394/03 (ECtHR, 29 March 2010)

MN and Others v Belgium [GC] Application no 3599/18 (ECtHR, 5 May 2020)

Mozer v the Republic of Moldova and Russia Application no 11138/10 (ECtHR, 23 February 2016)

MSS V Belgium and Greece [GC] Application no 30696/09 (ECtHR, 21 January 2011)

N v the United Kingdom Application no 26565/05 (ECtHR, 27 May 2008)

NA v Finland Application no 25244/18 (ECtHR, 14 November 2019)

ND and NT v Spain Applications nos 8675/15 and 8697/15 (ECtHR, 13 February 2020)

Öcalan V Turkey Application no 46221/99 ([GC] ECtHR, 12 May 2005)

PAD and Others v Turkey Court (Third Section) Application no 60167/00 (ECtHR, 28 June 2007)

Paposhvili v Belgium Application no 41738/10 (ECtHR, 13 December 2016)

Rantsev v Cyprus and Russia Application no 25965/04 (ECtHR, 7 January 2010)

Romeo Castaño v Belgium Application no 8351/17 (ECtHR, 09 October 2019)

Saadi v Italy Application [GC] no 37201/06 (ECtHR, 28 February 2008)

Salah Sheekh v the Netherlands Application no 1948/04 (ECtHR, 11 January 2007 (Final 23 May 2007))

Selmouni v France Application no 25803/94 (ECtHR, 28 July 1999)

Soering v the United Kingdom [GC] (Application No 14038/88) (ECtHR, 07 July 1989)

SS and Others v Italy Application no 21660/18 (ECtHR, 12 June 2025)

TI v the United Kingdom Application no 43844/98 (ECtHR, 7 March 2000)

X and Y v Switzerland 7289/75 7349/76 (Commission (Plenary), 14 July 1977)

Inter-American

Case of the Pacheco Tineo Family v Plurinational State of Bolivia Inter-American Court of Human Rights (25 November 2013)

Coard et al v United States Inter-American Commission on Human Rights (IACHR) Report No 109/99-Case 10951 (29 September 1999)

Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14 Inter-American Court of Human Rights (19 August 2014)

The Haitian Centre for Human Rights et al v the US (Merits) IACrtHR Case 10.675 Report No 51/96 (13 March 1997)

National Decisions

UK

R (on the Application of AAA and Others) (Respondents/Cross Appellants) V Secretary of State for the Home Department (Appellant/Cross Respondent) [2023] UKSC 42

Regina v Immigration Officer at Prague Airport and Another, Ex-Parte European Roma Rights Centre and Others [2005] UKHL 55

USA

Chris Sale, Acting Commissioner, Immigration and Naturalization Service et al v Haitian Centers Council Inc et al 509 US 155 113 S Ct 2549 (1993)

Chris Sale, Acting Commissioner, Immigration and Naturalization Service v Haitian Centers Council Inc et al (US Supreme Court)

Filartiga V Pena Irala, 630 F2d 876 (2d Cir ED, NY 1980)

Haitian Refugee Center, Inc v Baker 789 F Supp 1552 (SD Fla 1991) (Dist Court SD Florida)

Australia and Other

Attorney-General v Zaoui and Others (No 2) 1 NZLR 690 (New Zealand: Court of Appeal)

CPCF v Minister for Immigration and Border Protection 255 CLR 514, 2015 HCA 1 (High Court of Australia)

Namah v Pato (N 98) PGSC 13; SC1497, Pacific Islands Legal Information Institute (Supreme Court of PNG)

Notice of Appeal Requesting the Cancellation of a Decision and Urgently Suspending Its Application (English Translation) Tripoli Appeal Court, 22 March 2017

Plaintiff M70/2011 V Minister for Immigration and Citizenship; and Plaintiff M106 of 2011 V Minister for Immigration and Citizenship High Court of Australia

Primary Sources

UN/International Instruments

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entry into Force 26 June 1987) 1465 UNTS 85 (UNCAT)

Convention on the Rights of Persons with Disabilities (adopted 12 December 2006, entry into force 03 May 2008) UNGA Doc A/Res/61/106 Annex I

Convention on the Rights of the Child (adopted 20 November 1989, entry into force 02 September 1990) 1577 UNTS 3 (CRC)

Convention Relating to the Status of Refugees (adopted Geneva 28 July 1951, entry into force on 22 April 1954) 189 UNTS 150 (Refugee Convention)

Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol Relating to the Status of Refugees' (16 January 2002) UN Doc HCR/MMSP/2001/09

Declaration on Territorial Asylum (Adopted 14 December 1967) (Gaor, 22nd Sess Suppl No 16) (A/Res/2312(XXII))

Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (31 May 2001) UNGA Doc A/CN.4/L.602

ECOSOC 'Standard Minimum Rules for the Treatment of Prisoners' (adopted 13 May 1977) E/RES/2013/35

IMO Maritime Safety Committee, Resolution MSC 167(78) 'Guidelines on the Treatment of Persons Rescued at Sea' (adopted 20 May 2004) UN Doc MSC 78/26/Add.2, Annex 34

International Convention against the Taking of Hostages (adopted 16 February 1979, entry into force 3 June 1983) UNGA Res 146 (XXXIV) UN Doc A/RES/34/146

International Convention for the Protection of All Persons from Enforced Disappearance (adopted 23 December 2010, entry into Force 23 December 2010) UNGA Res 47/133 (ICPPED)

International Convention for the Safety of Life at Sea (adopted 01 November 1974, entry into force 25 May 1980) (SOLAS)

International Convention on Maritime Search and Rescue (as Amended) (SAR) (Adopted 27 April 1979, Entry into Force 22 June 1985) Imo (092)/S439 1979, 1403 UNTS

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entry into Force 1 July 2003) UNGA Res 45/158 (ICMWF)

International Covenant on Civil and Political Rights (Adopted 16 December 1966, Entry into Force 23 March 1976) UNGA Res 2200a (XX) (ICCPR)

International Covenant on Civil and Political Rights (Adopted 16 December 1966, Entry into Force 23 March 1976) UNGA Res 2200A (XX) (VHR)

International Maritime Organisation (IMO) International Convention on Maritime Search and Rescue (as amended) (adopted 27 April 1979, entry into force 22 June 1985) IMO (092)/S439 1979, 1403 UNTS

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entry into Force 12 February 2002) UNGA Res A/Res/54/263

Principles and Practical Guidance on the Protection of the Human Rights of Migrants in Vulnerable Situations-Report of the United Nations High Commissioner for Human Rights (adopted 03 January 2018) A/HRC/37/34

Protocol Relating to the Status of Refugees (adopted 31 January 1967, entry into force 04 October 1967) 606 UNTS 267 (1967 Protocol)

Protocol Relating to the Status of Refugees and the Regional Refugee Definitions' (02 December 2016) UN Doc HCR/GIP/16/12

The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (Adopted on 17 December 2015) Unga Res 70/175, Annex

UN Convention against Transnational Organized Crime and the Protocols Thereto (Adopted 15 November 2000, Entry into Force 29 September 2003) GA Res 55/25

UNGA Declaration on Territorial Asylum (adopted 14 December 1967) (GAOR, 22nd Session Suppl 16) UN Doc A/Res/2312(XXXII)

UNGA Global Compact on Refugees (adopted 17 December 2018) GAOR 73rd Session Suppl No 12 UN Doc A/RES/73/151

Unga Res 428 (V) of 14 December 1950, Statute of the United Nations High Commission for Refugees Annex 5 GAOR Supp 2 UN Doc A/1775 ('UNHCR Statute')

UNGA Res 43/173 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (adopted 09 December 1988) UN Doc A/RES/43/173

UNGA Res 55/22 Protocol against the Smuggling of Migrants by Land, Sea and Air (adopted 15 November 2000) 55th Session 2000-2001

UNGA Res 71/1 New York Declaration for Refugees and Migrants (adopted 3 October 2016)
UN Doc A/Res/71/1

UNGA Res 73/195 Global Compact for Safe, Orderly and Regular Migration (11 January 2019)
UN Doc A/RES/73/195

United Nations Convention on the Law of the Sea (Adopted 10 December 1982, Entry into Force 6 November 1994) 1833 UNTS 3 (UNCLOS)

Universal Declaration of Human Rights (adopted 10 December 1948) GA Res 217 A(III) UN Doc A/810 at 71 (UDHR)

UNSC Res 2240 (2015) UN Doc S/RES/2240

UNSC Res 2323 (2016) UN Doc S/RES/2323

UNSC Resolution 1506 (2003) (2 September 2003) S/Res/1506 (2003)

Vienna Convention on the Law of Treaties 1969 (adopted 23 May 1969, entry into Force 27 January 1980) 1155 UNTS 331 (VCLT)

UNHCR Conclusions and Other UN Documents

Final Report of the Panel of Experts in Accordance with Paragraph 13 of Resolution 2278 (2016) (1 June 2017) Security Council Doc S/2017/466

Observatory of Religious Freedom in Latin America, 'Limits to the Full Enjoyment of the Right of Freedom of Religion or Belief of Indigenous Peoples' (2022) Submission to the Special Rapporteur on Freedom of Religion or Beliefs, 77th Session GA

OHCHR and Global Migration Group, Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations (03 April 2018)

'Report of the Independent Fact-Finding Mission on Libya' (01 October 2021) UNGA Doc A/HRC/48/83

Report of the Independent Fact-Finding Mission on Libya (23 March 2022) UN Doc A/HRC/49/4

Report of the Independent Fact-Finding Mission on Libya (29 June 2022) UN Doc A/HRC/50/63

'Report of the Independent Fact-Finding Mission on Libya' (3 March 2023) UN Doc A/HRC/52/83

Report of the Secretary General Pursuant to Security Council Resolution 2312 (2016) (7 September 2017) UNSC Doc S/2017/761

Report of the Secretary-General (5 September 2019) UNSC Doc S/2019/711

Report of the Secretary-General (6 April 2020) UNSC Doc S/2020/275

Report of the Secretary-General on the United Nations Support Mission in Libya (12 February 2018) UNSC Doc S/2018/140

Report of the Special Rapporteur on the Human Rights of Migrants (4 May 2018) UN Doc A/HRC/38/41

Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau (2 April 2012) a/HRC/20/24

Report of the Special Rapporteur on the Human Rights of Migrants: Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea- (2 May 2021) UN Doc A/HRC/47/30

'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or June', Juan E. Méndez (15 March 2015) A/HRC/28/68

Report on Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Saving Lives Is Not a Crime-Note by the Secretary-General (07 August 2018) UNGA Doc A/73/314

Security Council Lifts Sanctions Imposed on Libya after Terrorist Bombings of Pan Am 103 UTA 772 UN Doc SC/7868

UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Migrants on a 2035 Agenda for Facilitating Human Mobility' (28 April 2017) UN Doc A/HRC/35/25

UNCHR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol' 12 European Human Rights Law Review 483

UNCHR, *Commentary of the Refugee Convention* (N 842) (October 1997)

UNCHR, 'Considerations on the "Safe Third Country" Concept: EU Seminar on the Associated States as Safe Third Countries in Asylum Legislation Vienna, 8-11 July 1996'

UNCHR, Detailed Findings of the Independent Fact-Finding Mission on Libya (24 March 2023) A/HRC/52/CRP.8

UNCHR, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers* (May 2013)

UNCHR, 'Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (January 1992) HCR/Ip/4/Eng/Rev.1

UNCHR, *Handbook Voluntary Repatriation: International Protection* (Geneva 1996)

UNCHR, 'Intervention before the ECtHR in the Case of Hirsi and Others V Italy, March 2010, Application No 27765/09' (2010)

UNCHR, *Note on Diplomatic Assurances and International Refugee Protection* (Geneva August 2006)

UNCHR, *Note on Expulsion of Refugees* EC/SCP/3 (4 August 1977)

UNCHR, *Report of the Human Rights Council on Its Fifteenth Special Session* (25 February 2011) A/HRC/S-15/1

UNCHR, *'Report of the Special Rapporteur on the Situation of Human Rights in Eritrea'* 16 May 2019) UN Doc A/HRC/41/53

UNCHR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others V Italy (Application No 27765/09)* (21 Dec 2009)

UNCHR, *'Submission by the UNCHR for the Office of the High Commissioner for Human Rights' Compilation Report' (Universal Periodic Review: Republic of Nauru) 2nd Cycle, 23rd Session* (UNCHR (Division of International Protection) (March 2015)

UNCHR, *Submission by the UNCHR in the Case of SS and Others V Italy (Application No 21660/18) before the European Court of Human Rights* (14 November 2019)

UNCHR, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (CUP, 1995 1990)

UNCHR, *UNCHR Guidelines on Determining the Best Interests of the Child* (May 2008)

UNCHR, 'UNCHR Position on Returns to Libya - Update II' <<https://www.refworld.org/policy/coUNtrypos/UNCHR/2018/en/121641>> accessed 01 June 2024

UNCHR, *'Written Submission in the Case of Sharifi and Others v Italy and Greece'* (Application No. 16643/09)

'UNCHR, *Written Submission on Saadi v the UK* (Application No. 13229/03 in the Grand Chamber of the ECtHR) (30 March 2007)

UNGA *'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or June'* (23 November 2018) UN Doc A/HRC/37/50

UNHCR *'Guidelines on International Protection No 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1a(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions'* (02 December 2016) HCR/GIP/16/12

UNHCR *'Note on Diplomatic Assurances and International Refugee Protection'* (Geneva August 2006)

UNHCR *'Note on the Principle of Non-Refoulement'* (November 1997) (November 1997) <<https://tinyurl.com/3rdbf4h8>> accessed 10 March 2023

UNHCR *'Report of the Human Rights Council on Its Fifteenth Special Session'* (25 February 2011) A/HRC/S-15/1

UNHCR 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Right to Life and the Use of Force by Private Security Providers in Law Enforcement Contexts' (06 May 2016) A/HRC/32/39

UNHCR 'The European Convention on Human Rights and the Protection of Refugees, Asylum-Seekers and Displaced Persons' European Series 2

UNHCR 'Asylum Processes' (Fair and Efficient Asylum Procedures) (31 May 2001) UN Doc EC/GC/01/12

UNHCR -EXCOM 'General Conclusion No 81 (Xlviii) 'International Protection' (1997) UNGA Doc No 2A (A/52/12/Add.1)

UNHCR -EXCOM Conclusion No 15 (XX) 'Refugees without an Asylum Country' (1979)

UNHCR -EXCOM Conclusion No 17 (XXXI) 'Problems of Extradition Affecting Refugees' (1980) UNGA Doc No 12A (A/35/12/Add.1)

UNHCR -EXCOM Conclusion No 89 (LI) 'International Protection' (2000)

UNHCR -EXCOM Conclusion No 97 (LIV) 'Protection Safeguards in Interception Measures' (2003)

UNHCR -EXCOM General Conclusion No 25 (XXXIII) 'International Protection' (1982)

UNHCR EXCOM General Conclusion No 99 (LV) 'International Protection' (2004)

UNHCR ExCom 'Note on International Protection' Submitted by the High Commissioner (31 August 1993) Un Doc a/Ac.96/815

UNHCR 'Mission to Manus Island, Papua New Guinea 15-17 January 2013' <<https://tinyurl.com/mpmxndv>> 16 October 2022

UNHCR 'Note on Non-Refoulement' Submitted by the High Commissioner' (23 August 1977) UN Doc EC/SCP/2

UNHCR 'Note on the "Externalization" of International Protection' (28 May 2021) <<https://tinyurl.com/yc2fbs6u>> accessed 16 July 2022

UNHCR Report of the Human Rights Council on Its Fifteenth Special Session (25 February 2011) A/HRC/S-15/1

UNHCR 'Report of the Special Rapporteur on the Human Rights of Migrants on a 2035 Agenda for Facilitating Human Mobility' (28 April 2017) UN Doc A/HRC/35/25

UNHCR 'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNCHR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2' (31 January 1994) Bvr 1938/93, 2 Bvr 1953/93, 2 Bvr 1954/93

UNHCR, Submission by the UNHCR in the Cases of ND and NT v Spain (Application Nos 8675/15 and 8697/15) before the ECtHR, 15 November 2015, 8675/15 and 8697/15

UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol' (Geneva, 26 January 2007)

UNHCR, Detailed Findings of the Independent Fact-Finding Mission on Libya (24 March 2023) A/HRC/52/CRP.8

UNHCR, Global Consultations on International Protection/Third Track: Voluntary Repatriation (25 April 2002) EC/GC/02/5

UNHCR, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers* (May 2013)

UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012)

UNHCR, *Handbook Voluntary Repatriation: International Protection* (Geneva 1996)

UNHCR, *Manual on the Case Law of the European Regional Courts: The Court of Justice of the European UNCHR and the European Court of Human Rights (Refugees, Asylum-Seekers, and Stateless Persons)* (1st edn, June 2015)

UNHCR, Note on Diplomatic Assurances and International Refugee Protection (Geneva August 2006)

UNHCR, Note on Expulsion of Refugees' EC/SCP/3 (4 August 1977)

UNHCR, 'Note on the "Externalization" of International Protection' (28 May 2021) <<https://tinyurl.com/yc2fbs6u>> accessed 16 July 2022

UNHCR, Note on the Principle of Non-Refoulement (November 1997)

UNHCR, 'Report of the Special Rapporteur on the Situation of Human Rights in Eritrea' 16 May 2019) UN Doc A/HRC/41/53

UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v Italy (Application No 27765/09)* (21 Dec 2009)

UNHCR, 'Submission by the UNCHR for the Office of the High Commissioner for Human Rights' *Compilation Report* (Universal Periodic Review: Republic of Nauru) 2nd Cycle, 23rd Session (UNCHR (Division of International Protection) (March 2015)

UNHCR, *Submission by the UNCHR in the Case of SS and Others V Italy (Application No 21660/18) before the European Court of Human Rights* (14 November 2019)

UNHCR, Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert RoundTable, 9-10 December 2002) (UNCHR February 2003)

UNHCR, Technical Assistance and Capacity-Building to Improve Human Rights in Libya (7 April 2015) A/HRC/Res/28/30

UNHCR, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (CUP, 1995 1990)

UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child* (May 2008)

UNHCR, 'UNHCR Libya Operational Update, 15 November 2022' (15 November 2022) <<https://data.unhcr.org/en/documents/details/96787>> accessed 12 May 2023

UNHCR, 'UNHCR Position on Returns to Libya - Update II' <<https://www.refworld.org/policy/countrysos/unhcr/2018/en/121641>> accessed 01 June 2024

UNHCR, 'Written Submission in the Case of Sharifi and Others V Italy and Greece' (Application No. 16643/09)

UNHCR-EXCOM Conclusion on No 97 (Liv) 'Protection Safeguards in Interception Measures' (2003)

UNHCR-EXCOM Conclusion No 101 (LV) 'Legal Safety Issues in the Context of Voluntary Repatriation of Refugees' (2004)

UNHCR-EXCOM Conclusion No 17 (XXXI) 'Problems of Extradition Affecting Refugees' (1980) Unga Doc No 12a (a/35/12/Add.1)

UNHCR-EXCOM Conclusion No 18 (XXXI) 'Voluntary Repatriation' (1980)

UNHCR-EXCOM Conclusion No 31 (XXXIV) 'Rescue of Asylum-Seekers in Distress at Sea' (1983)

UNHCR-EXCOM Conclusion No 34 (XXXV) 'Problems Related to the Rescue of Asylum-Seekers in Distress at Sea' (1984)

UNHCR-EXCOM Conclusion No 58 (XL) 'Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection' (1989)

UNHCR-EXCOM Conclusion No 6 (XXVIII) 'Non-Refoulement' (1977)

UNHCR-EXCOM Conclusion on No 97 (Liv) 'Protection Safeguards in Interception Measures' (2003)

UNHCR-EXCOM General Conclusion No 79 (XLVII) 'International Protection' (1996) UN Doc No 12A (A/51/12/Add.1)

UNHCR-EXCOM General Conclusion No 81 (Xlviii) 'International Protection' (1997) UNGA Doc No 2A (A /52/12/Add.1)

UNHCR-EXCOM 'Note on International Protection' (13 September 2001) A/AC.96/951

UNHCR-EXCOM 'Note on International Protection' Submitted by the High Commissioner (31 August 1993) UN Doc A/AC.96/815

UNHCR-EXCOM 'Note on International Protection' (Submitted by the High Commissioner) (03 August 1987) UN Doc A/AC.96/694

UNHCR-EXCOM 'Note on the Exclusion Clauses' (30 May 1997) UN Doc EC/47/SC/CRP.29

UNHCR-EXCOM, 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach' (09 June 2000) UN Doc EC/50/SC/CRP.17

UNHCR-EXCOM, Report of the Working Group on Problems Related to the Rescue of Asylum-Seekers in Distress at Sea No 26 (XXXIII)-1982 (20 October 1982)

UNHRC 'Report of the Independent Fact-Finding Mission on Libya' (23 March 2022) UN Doc A/HRC/49/4

UNHRC 'Report of the Independent Fact-Finding Mission on Libya' (29 June 2022) UN Doc A/HRC/50/63

UNHRC 'Report of the Independent Fact-Finding Mission on Libya' (03 March 2023) UN Doc A/HRC/52/83

UNHRC 'Report of the Independent Fact-Finding Mission on Libya' (01 October 2021) UNGA Doc A/HRC/48/83

Unlawful Death of Refugees and Migrants - Note by the Secretary-General - Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions (15 August 2017) Unga Doc a/72/335

UNSC 'General on the United Nations Support Mission in Libya' (12 February 2018) UNSC Doc S/2018/140

UNSC 'Report of the Secretary-General ' (5 September 2019) UN Doc S/2019/711

UNSC 'Report of the Secretary-General on the United Nations Support Mission in Libya' (22 August 2017) UN Doc S/2017/726

UNSC 'Report of the Secretary-General on UN Support Mission in Libya' (19 January 2021) UN Doc S/2021/62

UNSC 'Report of the Secretary-General on United Nations Support Mission in Libya (15 January 2020) UN Doc S/2020/41

UNSC 'Report of the Secretary-General: Implementation of Resolution 2380 (2017)' (31 August 2018) UN Doc S/2018/807

Weis P, *The Draft United Nations Convention on Territorial Asylum, 1979 British Yearbook of International Law* (1979 Brr YB INT'L L 151,152 1980)

Africa

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into Force 21 October 1986) (1982) OAU Doc Cab/Leg/67/3 Rev 5 21 ILM 58 (African Charter)

African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, Addis Ababa, Ethiopia, entry into force 29 November 1999) ('African Charter on Children') OAU Doc CAB/LEG/24.9/49 (1990)

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted Kampala, Uganda 23 October 2009, entry into force 06 December 2012) (2010) 49 ILM 86 (Kampala Convention)

Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entry into Force 24 June 1974) UNTS 14691 (OAU Refugee Convention)

Sirte Declaration (Sirte, Libya) (8-9 September 1999) (4th Extraordinary Session) OAU EAHG/Draft/Decl. (Iv) Rev.1

CoE

Council of Europe Parliamentary Assembly, The Interception and Rescue at Sea of Asylum Seekers, Refugees and Irregular Migrants (29 April 2009) Doc 11880

Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (Adopted 4 November 1950, Entry into Force 3 September 1953) Rome, 4xi 1950 (European Convention on Human Rights as Mended) (ECHR)

Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (Adopted 4 November 1950, Entry into Force 3 September 1953) Rome, 4xi 1950 (European Convention on Human Rights as Mended) (ECHR)

Council of Europe, European Convention on Extradition (adopted 13 December 1957, entry into force 18 April 1960) ETS 024, 359 UNTS 273

Council of Europe, Parliamentary Assembly, Committee on Migration, Refugees and Population Rapporteur Mr. Arcadio Díaz Tejera, Spain, Socialist Group Report: The Interception and Rescue at Sea of Asylum Seekers, Refugees and Irregular Migrants (01 June 2011) Doc 12628

Council of Europe, Resolution 1821 (2011), the Interception and Rescue at Sea of Asylum Seekers, Refugees and Irregular Migrants (01 June 2011) Doc 12628

Council of Europe, 'The European Convention on Human Rights' (CoE, 2024) <<https://www.coe.int/en/web/human-rights-convention/>> accessed 06 April 2024

Council of Europe. Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism (Strasbourg, adopted 11 July 2002) Committee of Ministers at its 804th meeting of the Ministers' Deputies

Council of Europe: Committee of Ministers, Resolution (67) 14: Asylum to Persons in Danger of Persecution (29 June 1967)

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 (Translated Version) (02 February 2017)

Protocol No 4 to the European Convention on Human Rights: European Convention on Human Rights 6IX ETS 5 (1963)

EU

Charter of the Fundamental Rights of the European Union [2012] Oj C326/02

Consolidated Version of the Treaty on European Union [2008] OJ C115/15

Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Military Operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L122/31

Decree No (386) of 2014 on Establishing the Anti-Illegal Immigration Agency (04 June 2014) Libya (Cabinet) <<https://security-legislation.ly/law/34978>>

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast) [2013] OJ L 180/60

Draft Council Conclusions on Intensified Cooperation on the Management of Migration Flows with Third Countries (14 November 2002) 13894/02

EU, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2004] 2005/C 53/01

European Commission (Directorate General for Humanitarian Aid-Echo), Dg Echo, Guidelines on Humanitarian Protection (Brussels, 21 April 2009) Echo 0/1/MI D(2009)

European Council, '*Special Meeting of the European Council, 23 April 2015-Statement*' (2015)

European Council, EU-Turkey Statement, 18 March 2016 (Press Release) <tinyurl.com/z3f8p3mz> accessed 20 Nov 2020

European Council, Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route (February 2017) (Press Release) <<https://tinyurl.com/5e9dwv29>> accessed 10 October 2021

European Council, *Presidency Conclusions, Seville, 21-22 June 2002* (SN 200/1/02 REV 1)

European Parliament 'Tampere European Council 15 and 16 October 1999: Presidency Conclusions'

European Parliament, Resolution of 29 April 2015 on the Latest Tragedies in the Mediterranean and EU Migration and Asylum Policies (2015/2660(RSP))

European Union, Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ C 340/01

European Union, *Valletta Summit, 11-12 November 2015 Action Plan (2015) 2015 Valetta Summit on Migration)*

Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 Establishing the European Border Surveillance System (EUROSUR) [2013] OJ L 295/11

Schengen Agreement and Schengen Implementing Convention [2000] OJ L239/19

Single European Act [1987] OJ L169/1

'Tampere European Council 15 and 16 October 1999: Presidency Conclusions' <https://www.europarl.europa.eu/summits/tam_en.htm#> accessed 18 July 2022

The Treaty on the Functioning of the European UNCHR (TFEU) [2012] OJL C326/47

European Union, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union* (OJ L 2005/C 53/01 (03 March 2005)

OAS/American

American Convention on Human Rights, "Pact of San Jose", Costa Rica (22 November 1969, entry into force 18 July 1978) (1970) 1144 UNTS 123; OASTS No 36 9 ILM 99 (OAS 1969 ACHR)

Cartagena Declaration on Refugees adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (Colombia from 19-22 November 1984) OAS Doc OEA/SerL/V/II.66/Doc 10 Rev 1

Inter-American Convention on Extradition (Caracas) (adopted 25 February 1981, registered 7 December 1993) 1752 UNTS 30597

Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America (16 November 2004) (Latin American States) Final version 16/11/2004 <<https://tinyurl.com/23k6y5d3>> accessed 02 August 2023

Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection Advisory Opinion OC-21/14 (19 August 2014) (IACrHR)

Other Regional and Bilateral Agreements

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Adopted Kampala, Uganda 23 October 2009, Entry into Force 06 December 2012) (2010) 49 ILM 86 (Kampala Convention)

Asian-African Legal Consultative Organization (AALCO), Bangkok Principles on the Status and Treatment of Refugees (adopted 31 December 1966) (Bangkok Principles)

Bali Process Ministerial Conference, 'The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime' (2002) <<https://www.baliprocess.net/>> accessed 12 Aug 2022

Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees (adopted on 24 June 2001) AALCO's 40th Session (New Delhi) Bangkok Principles)

Memorandum of Understanding between the Government of National Accord of the State of Libya and the Government of the Republic of Malta in the Field of Combatting Illegal Immigration (Signed 20 May 2020)

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 (Translated Version) (02 February 2017)

Regional Treaties, Agreements, Declarations and Related, Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (adopted in Minsk on 26 May 1995, published 26 May 1995)

Treaty of Friendship, Partnership, and Cooperation between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya (adopted 30 August 2008) (Benghazi, Libya)

National Legislation

Libya

Decree No (386) of 2014 on Establishing the Anti-Illegal Immigration Agency (04 June 2014) Libya (Cabinet) <<https://security-legislation.ly/law/34978>> 18 March 2023

Law No (19) of 1378 FDP–2010 AD on Combatting Illegal Immigration (The General People's Congress (Libya) Annual Session 1377 FDP <<https://tinyurl.com/md8ecacr>> accessed 11 November 2021

Law No (2) of 2004 Amending Certain Provisions of Law No (6) of 1987 on Organising the Entry and Residence of Foreigners in Libya, 1372 FDP

Law No (2) of 2009 on Ratifying the Treaty of Friendship and Cooperation between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Italy

Law No (6) of 1987 on Organising the Entry, Residence, and Exit of Foreigners in Libya (02 March 1987) 1396 FDP

Law No 5 of 2014 Amending Article 195 of the Penal Code (adopted 1953) (Lby-2014-L-98869)

Libya (Cabinet), Decree No (145) of 2012 on Adopting the Organisational Structure and Powers of the Interior Ministry and the Organisation of Its Administrative Unit (23 May 2012)

Libya, The Constitutional Declaration (03 August 2011) as amended to 2016 The Interim National Transitional Council (Libya) <<https://tinyurl.com/yc6fv4sd>> accessed 30 January 2022

The Constitutional Declaration (03 August 2011) as Amended to 2016 the Interim National Transitional Council (Libya)

UK

UK, Race Relations Act 1976, s.19 D (Ministerial Authorisation: Race Relations (Immigration and Asylum) (No 2) (as amended 27 January 2001) UK

UKHL, *EU Action Plan against Migrant Smuggling 4th Report of Session* (HL 2015-16, 46)

Other

Migration Act 1958 (No 62, 1958 as Amended) Act No 30, 2014

Australia, Migration Act 1958 (Act No 62 of 1958 as amended) (09 Dec 2017)

Secondary

ACT Alliance and Others, 'Libya: Focus on Anti-Smuggling Policies and Cooperation with Libyan Authorities will Expose People to Ill-Treatment and Arbitrary Detention' (Brussels, 22 February 2017) <<https://tinyurl.com/58frzhzh>> accessed 20 March 2023

AIRE Centre and Others, *Written Submissions on Behalf of the Aire Centre, the Dutch Refugee Council (DRC), the European Council on Refugees and Exiles (ECRE), and the International Commission of Jurists (Intervenors) in the Case of in SS and Others V Italy (Application No 21660/18)* (11 November 2019)

Ako R and Olawuyi DS, 'Methodology, Theoretical Framework and Scholarly Significance: An Overview of International Best Practices in Legal Research' (2017) 8 *Journal of Sustainable Development Law and Policy* (The) 225

Alarm Phone, 'New Report: Aerial Collaboration between the Eu and Libya Facilitates Mass Interceptions of Migrants' (17 June 2020) <https://eu-libya.info/img/RemoteControl_Report_0620.pdf> accessed 16 September 2023

Alice Fill and Francesco Moresco, 'Voluntary Returns from Libya in the Eu Externalisation Strategy: A Critical Analysis in the Light of Asgi's Strategic Litigation (2 February 2021)' (*ASGI Scabiaca and Oruka*, 2021) <<https://tinyurl.com/4zv8rs2t>> accessed 06 Oct 2021

Amnesty International and ARCI and Others, 'EU: Time to Review and Remedy Cooperation Policies Facilitating Abuse of Refugees and Migrants in Libya (NGOs Joint Statement)' (2020) <<https://tinyurl.com/mr28xjph>> accessed 12 December 2021

Amnesty International and HRW, *Written Submissions to the Ecthr on Benhalf of the Intervenors Ss and Others V Italy Application No 21660/18 (Nov 2019)* (ECtHR 2019)

Amnesty International, 'A Perfect Storm: The Failure of European Policies in Central Mediterranean' (2017) <<https://tinyurl.com/bntcx2mv>> accessed 02 January 2021

Amnesty International, *Between the Devil and the Blue Sea: Europe Fails Migrants and Refugees in the Central Mediterranean* (29 June 2021) ISBN: EUR 30/8906/2018

Amnesty International, 'Libya/EU: Conditions Remain 'Hellish' as EU Marks 5 Years of Cooperation Agreements' (*Amnesty International*, 31 January 2022) <<https://tinyurl.com/45n33m3x>> accessed 25 June 2023

Amnesty International, 'Libya: Rule of Law and Rule of Militias?' (2012) <<https://www.amnesty.org.uk/files/libyareport.pdf>> accessed 27 April 2023

Amnesty International, 'Libya: Ten Years after Uprising Abusive Militias Evade Justice and Instead Reap Rewards' (10 April 2023) <<https://tinyurl.com/2p9camex>> accessed 10 April 2023

Amnesty International, 'Libya's Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants' (2017)

Amnesty International, *Libya's Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants* (MDE 19/7561/2017 2017)

Amnesty International, *No One Will Look for You. Forcibly Returned from Sea to Abusive Detention in Libya* (15 July 2021) ISBN: MDE 19/4439/2021

Amnesty International, *Waves of Impunity: Malta's Human Rights Violations and Europe's Responsibilities in the Central Mediterranean* (07 September 2020) ISBN: EUR 33/2967/2020

Andrijasevic R, 'Deported: The Right to Asylum at Eu's External Border of Italy and Libya 1' (2010) 48 *International Migration* 148

Anna Liguori, *Migration Law and the Externalization of Border Controls, European State Responsibility* (Routledge 2019)

AU, 'Community of Sahel-Saharan States (Cen-Sad)' (1998) <<https://au.int/en/recs/censad>> accessed 11 Dec 2022

AU, *List of Countries Which Have Signed, Ratified/Acceded to the Oau Convention Governing the Specific Aspects of Refugee Problems in Africa* (2019)

Awotula DO, 'The Global Compact on Refugee: Crystalizing Global North Externalization Policy?' (2021) (SSRN 4146444) 1

Bali Process Ministerial Conference, 'The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime' (2002) <<https://www.baliprocess.net/>> accessed 12 Aug 2022

Barbie Latza Nadeau, 'Pope Prays for Lost Refugees on Visit to Mediterranean Island Cnn' *CNN* (Atlanta, Georgia 08 July 2013) <<https://tinyurl.com/35t9axan>> accessed 09 Dec 2021

Barkan SM, Bintliff B and Whisner M, *Fundamentals of Legal Research* (Legal Studies Research Paper No 2015-09, 10th edn, University of Washington School of Law 2015) 15

BBC News World, 'Libya Country Profile' *BBC News* (London 22 February 2023) <<https://www.bbc.com/news/world-africa-13754897>> accessed 31 May 2023

BBC, 'Libya Tightens Security' *BBC News* (London, UK 27 September 2000) <<http://news.bbc.co.uk/2/hi/africa/943863.stm>> accessed 12 January 2023

BBC, 'Migrant Crisis: Mediterranean Rescue as 34 Drown' *BBC News* (London, UK 24 May 2017) <<https://www.bbc.co.uk/news/world-europe-40027109>> accessed 03 March 2020

Boed R, 'The State of the Right of Asylum in International Law' (1994) 5 *Duke J Comp & Int'l L* 1

Borsacchi E, 'The Malta Declaration and the Italy:Libya Memorandum: A Troubled Relationship with External Partners in Migration' *International Law Blog* <<http://tinyurl.com/y35ptrxp>> accessed 27 Nov 2020

Boswell C, 'The 'External Dimension' of Eu Immigration and Asylum Policy' (2003) 79 *International affairs* (London) 619

Bowen GA, 'Document Analysis as a Qualitative Research Method' (2009) 9(2) *Qualitative Research Journal* 27

Bredeloup S and Pliez O, 'The Libyan Migration Corridor' (European University Institute 2011) (halshs-00585315)

Bryman A, *Social Research Methods (4th Edn)* (OUP 2012)

Budianto A, 'Legal Research Methodology Reposition in Research on Social Science' (2020) 9 *International Journal of Criminology and Sociology* 1339 1340-41.

Camilli A, 'Why the Agreement between Italy and Libya on Migrants Could Be Illegal (Translated English Version)' <<https://tinyurl.com/bdd9x2dz>> accessed 26 December 2020

Carrera S, Vara JS and Strik T, 'The External Dimensions of Eu Migration and Asylum Policies in Times of Crisis', *Constitutionalising the External Dimensions of Eu Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019)

Carter AE, 'Immigration, Repatriation, Asylum-the President Can Order the Repatriation of Haitian Aliens Picked up in International Waters without a Determination as to Their Status as Refugees' (1993) 23 *GA J Int'l & Comp L* 581

Caselli M, Kadio AA and Rizzo C, 'Assisted Voluntary Return & Reintegration Policies and Programmes in Four EU Countries: France, Germany, Italy and Spain' (2022) 409 <internal-pdf://2869553122/AVR-Marco Caselli and all.pdf> accessed 02 December 2021

Chance M, Borghese L and Laura Smith-Spark, 'Survivors Mourn Victims of Italy Shipwreck; at Least 194 Killed' *CNNcom* (Atlanta, Georgia 6 October 2013) <<https://tinyurl.com/4ch6z9zk>> accessed 02 December 2021

Chatty D, 'Has the Tide Turned? Refuge and Sanctuary in the Euro-Mediterranean Space'(06 October 2020) <<https://tinyurl.com/mr2b5494>> accessed 20 June 2023

Chui WH and McConville M, 'Introduction and Overview' in Mike McConville and Wing Hong Chui (eds) *Research Methods for Law*, vol 104 (2 edn, Edinburgh University Press 2007) 1

Chui WH, (eds) *In Research Methods for Law* (2edn) (Edinburgh University Press, 2017)

Chynoweth P, 'Chapter 3—Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (John Wiley & Sons 2009)

CNN Edition, 'People for Sale: Where Lives Are Auctioned for \$400 (Exclusive Report)' (14 November 2017) <<https://tinyurl.com/2p82nk3jl>> accessed 04 Oct 2021

CoE Commissioner for Human Rights, *Recommendation 'Lives Saved. Rights Protected: Bridging the Protection Gap for Refugees and Migrants in the Mediterranean'* (Council of Europe June 2019)

CoE Commissioner for Human Rights, *A Distress Call for Human Rights: The Widening Gap in Migrant Protection in the Mediterranean (Follow-up Report to the 2019 Recommendation)* (Council of Europe March 2021)

CoE Commissioner for Human Rights, *Third Party Intervention by the Council of Europe Commissioner for Human Rights under Article 36, Paragraph 3, of the European Convention on Human Rights Application No 21660/18 Ss and Others v Italy (CommDH(2019))* (15 November 2019)

CoE Parliamentary Assembly, Committee on Migration, Refugees and Population Rapporteur Mr Arcadio Diaz Tejera, Spain, Socialist Group Report: The Interception and Rescue at Sea of Asylum Seekers, Refugees and Irregular Migrants (01 June 2011) Doc 12628

CoE, *ECTHR Guide on Article 4 of Protocol No 4 to the European Convention on Human Rights- Prohibition of Collective Expulsions of Aliens* (30 April 2022)

Corin Ranson, 'Debunking the 'Pull Factor': How Many Deaths Will It Take for a Humanitarian Migration Policy?' *Conversation Over Borders* (21 Feb 2021) <<https://tinyurl.com/2p8p4c9k>> accessed 09 December 2021

Council of Europe, 'The European Convention on Human Rights' (CoE, 2024) <<https://www.coe.int/en/web/human-rights-convention/>> accessed 06 April 2024

Council of the EU, *Intensified Cooperation on the Management of Migration Flows with Third Countries (Brussels, 09 July 2003) 11450/03* (18 November 2002)

Creta S, 'Eritrean Migrants in Libya Claim EU-Backed Voluntary Returns Programme Isn't So Voluntary' *Euronews* (Lyon, France, 21 June 2020) <<https://tinyurl.com/2wjd2rkn>> accessed 03 March 2022

Crisp J, 'What Is Externalization and Why Is It a Threat to Refugees' (*Chatham House*, 14 October 2020) <<https://tinyurl.com/mr2btbby>> accessed 11 September 2022

CSDM, *Information Submitted under Article 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CSDM 2020)

De Guttry A, Capone F and Sommario E, 'Dealing with Migrants in the Central Mediterranean Route: A Legal Analysis of Recent Bilateral Agreements between Italy and Libya' (2018) 56 *International Migration* 44

Diez OS, 'Diminishing Safeguards, Increasing Returns: Non-Refoulement Gaps in the EU Return and Readmission System' (2019) (European Policy Centre (EPC) Discussion Paper, 4 October 2019)

Dijkstra M, 'Syrian Refugees in Turkey: Victims of the Eu's Politics of Non-Entrée? Examining the Impact of the Eu-Turkey Statement on the Right to Work and the Principle of Non-Refoulement for Syrian Refugees in Turkey in 2014-2018' (Tilburg University 2019)

Dimitris Avramopoulos-Speech, Commissioner for Migration, Home Affairs and Citizenship, Recent Human Smuggling Incidents in the Mediterranean (European Parliament Plenary Debate) (Strasbourg) (13 January 2015) Speech/15/3262

Dobinson I and Francis John, 'Legal Research as Qualitative Research' In McConville M Chui WH (eds) *Research Methods for Law* (2edn) (Edinburgh University Press, 2007)

ECCHR, FIDH and LJIL, 'No Way Out: Migrants and Refugees Trapped in Libya Face Crimes against Humanity' (2021) <<https://tinyurl.com/mr29het7>> accessed 22 March 2023

ECCHR, LFJL and FIDH, *Situation in Libya—Article 15 Communication on the Commission of Crimes against Migrants and Refugees in Libya* (2021)

ECtHR, *Guide on Article 1 of the European Convention on Human Rights - Obligation to Respect Human Rights—Concepts of “Jurisdiction” and Imputability (Updated on 31 August 2022)*

EEAS, 'Migration: Joint Eu Taskforce with African Union and Un Helps More Than 16,000 People Stranded in Libya' (<<https://tinyurl.com/y2wndpm7>> accessed 04 October 2021

EEAS, 'About EU Border Assistance Mission in Libya (EUBAM)' (EEAS, 20 June 2016) <<https://tinyurl.com/yckwksry>> accessed 10 October 2021

EEAS, 'Central Mediterranean Route: Protecting Migrants and Managing Irregular Migrant Flows (October 2019)' (<<https://tinyurl.com/mwww3pda>> accessed 25 September 2021

EEAS, 'EU-Libya Relations' (EEAS, 11 February 2022) <<https://tinyurl.com/vkxmmkw3>> accessed 12 May 2023

EEAS, 'EU-Libya Relations (Factsheet) (25 January 2017) 2-3' (2017) <<https://tinyurl.com/2p93ausw>> accessed 20 November 2021

EEAS, 'EUNAFOR Med Operation Sophia Starts Training of Libyan Navy Coast Guard and Libyan (27 Oct 2016) (Press Release)' (<<https://tinyurl.com/y2v53zmm>> accessed 06 January 2021

EEAS, 'European UNCHR Naval Force-Mediterranean (Council Decision 2015/778 Dated 18 May 2015' (<<https://tinyurl.com/28a87pxz>> accessed 03 December 2021

EEAS, 'European Union Naval Force-Mediterranean (Council Decision 2015/778 Dated 18 May 2015' (<<https://tinyurl.com/28a87pxz>> accessed 03 December 2021

EEAS, 'Meeting of the Joint AU-EU-UN Taskforce to Address the Migrant Situation in Libya' (14 December 2017) <<https://tinyurl.com/3j99ekza>> accessed 19 June 2023

El Zaidy Z, 'EU Migration Policy Towards Libya' (2019) <<https://tinyurl.com/2m4bnmza>> accessed 18 Nov 2022

Ellebrecht S, *Mediated Bordering: Eurosur, the Refugee Boat, and the Construction of an External Eu Border* (transcript Verlag 2020)

Ellias S and Gruilters R, 'Border Deaths in the Mediterranean: What Can We Learn from the Latest Data?' (Border Criminologies Blog, 08 March 2017) <<https://tinyurl.com/bvtrh7yw>> accessed 21 November 2020

Embassy U and Consulates in Mexico, 'The Merida Initiative (Pillar Three)' (*US State Department*, 7 September 2021) <<https://mx.usembassy.gov/the-merida-initiative/>> accessed 30 July 2021

Encyclopædia Britannica Inc, 'Jurisdiction' (2024) <<https://tinyurl.com/2pc42n7v>> accessed 29 April 2024

EU, 'A European Agenda on Migration State of Play: December 2016' (December 2016) <<https://tinyurl.com/2p9ybhdu>> accessed 03 December 2021

EU, 'Easy to Read-the European Union (27 Eu Members)' (*EU Directorate-General for Communication*, Jan 2020) <https://european-union.europa.eu/easy-read_en> accessed 21 March 2024

EU, 'EU-IOM Joint Initiative Marks Five Years of Supporting Migrants and Their Communities across Africa' (*EU*, 16 December 2021) <<https://tinyurl.com/f36t76ab>> accessed 15 July 2023

EU, 'European Court of Auditors: What We Do' (<<https://www.eca.europa.eu/en/what-we-do>> accessed 02 June 2024

EU, 'Support to Integrated Border and Migration Management in Libya' (T05-Eutf-Noa-Ly-07)' (2 March 2024) <<http://tinyurl.com/y5azxxcz>> accessed 08 February 2024

EU, 'The Council of the European Union' (01 June 2022) <<https://tinyurl.com/bdh83fd2>> accessed 13 March 2024

EU, 'Voluntary Humanitarian Returns from Libya Continue as Reintegration Efforts Step Up' (*European Union*, 09 April 2018) <<https://tinyurl.com/y3pfycer>> accessed 17 Nov 2020

Euractiv, 'Un Denounces Eu Cooperation with Libya to Stem Migrant Flow as 'Inhuman'' (15 November 2017) <<http://tinyurl.com/35cua84r>> accessed 03 March 2022

European Asylum Support Office (EASO), *Judicial Analysis: Asylum Procedures and the Principle of Non-Refoulement* (IARLJ-Europe under Contract to EASO 2018)

European Commision, *Joint Communication to the Communication to the European Parliament, the European Council and the Council of 25 January 2017 on Migration on the Central Mediterranean Route Managing Flows, Saving Lives (Join(2017) 4 Final* (2017)

European Commision, 'Joint Press Release of the United Nations, the African Union and the European Union' (29 November 2017) <<https://tinyurl.com/59b7bxrv>> accessed 14 July 2023

European Commission (Directorate General for Humanitarian Aid-Echo), Dg Echo, Guidelines on Humanitarian Protection (Brussels, 21 April 2009) ECHO 0/1/MI D (2009)

European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (the European Agenda on Migration) Com (2015) 240 Final* (2015)

European Commission, 'EU Action in Libya on Migration: The Commission's Contribution to the Leaders' Agenda' (07 Dec 2017) <<https://tinyurl.com/ywt27tha>> accessed 21 Nov 2020

European Commission, 'EU Trust Fund for Africa Adopts €46 Million Programme to Support Integrated Migration and Border Management in Libya' (28 July 2017) <<https://tinyurl.com/286kmfm9>> accessed 12 May 2023

European Commission, 'EU Trust Fund for Africa: New Migration-Related Actions to Protect Vulnerable People and Foster Resilience of Host Communities in North of Africa' (03 July 2019) <<https://tinyurl.com/bdakbn4x>> accessed 25 September 2021

European Commission, 'EUROSUR' (No date) <<https://tinyurl.com/4kbue43z>> accessed 16 January 2022

European Commission, 'Guidance Note: Research on Refugees, Asylum Seekers and Migrants-V1.1' (Directorate-General for Research and Innovation, 07 January 2020) 1 &4 <<https://tinyurl.com/2hrrxs45>> accessed 15 April 2022 1

European Commission, 'Irregular Migration & Return' (No date) <<https://tinyurl.com/2782h4rd>> accessed 30 October 2020

European Commission, 'Joint Press Release of the United Nations, the African UNCHR and the European (29 November 2017) <<https://tinyurl.com/59b7bxrv>> accessed 14 July 2023

European Commission, *Migration Partnership Framework: A New Approach to Better Manage Migration' (Fact Sheet) (12 December 2016) (2016)*

European Commission, *Technical Mission to Libya on Illegal Immigration 27 Nov-6 December 2004, (7753/05)*

European Commission, 'The EU's Relations with Libya (Extracts from Successive General Affairs & External Relations Councils)' (20 January 2005) <<https://tinyurl.com/228wy9rc>> accessed 26 January 2023

European Commission, 'Voluntary Humanitarian Return Programme from Libya Resumed since a Temporary Hold Began Five Months Ago Due to Covid-19'(11 September 2020) <<https://tinyurl.com/2s3a29cr>> accessed 03 March 2022

European Commission-Fact Sheet, 'Eu-lom Joint Initiative for Migrant Protection and Reintegration: One Year On' (*European Commission*, 15 December 2017) <<https://tinyurl.com/bddj38tn>> accessed 19 June 2023

European Council Conclusions, 15 December 2016, EUCO 34/16 <<https://tinyurl.com/yxkueuh8>> accessed 20 May 2022

European Council Conclusions, 28 June 2018 (Press Release) <<https://tinyurl.com/vv9mk3uk>> accessed 13 May 2023

European Council on Refugees and Exiles (ECRE), 'Belgium and the Netherlands: Suspension of the Right to Seek Asylum' (19 March 2020) <<https://tinyurl.com/usfv8ju9>> accessed 09 June 2021

European Council on Refugees and Exiles (ECRE), *European Council on Refugees and Exiles-Written Evidence (Pms0004)* (2015)

European Council, 'Central Mediterranean Route' (<<https://tinyurl.com/4bzaa4dw>> accessed 22 September 2021

European Council, *Council Working Document of the European External Action Service of 24/01/2017 (Brussels) (25 January 2017) (Or. En) Eeas(2017) 0109* (2017)

European Council, 'European Council of the European Union' ((01 February 2024) <<https://tinyurl.com/5h5tawmt>> accessed 12 March 2024

European Council, 'Migration Flows in the Central Mediterranean Route' (11 April 2023) <<https://tinyurl.com/3ud984cm>> accessed 30 October 2020

European Council, 'Remarks by President Donald Tusk Following the European Council Meetings on 14 and 15 December 2017' (<<https://tinyurl.com/5n6mm5at>> accessed 30 August 2022

European Council, Special Meeting of the European Council, 23 April 2015-Statement' (Press Release) (23 April 2015) < <https://tinyurl.com/5n7stz9p>> accessed 04 December 2021

European Parliament , *Human Rights Due Diligence Legislation - Options for the EU (June 2020 - Pe 603.495) P/Expo/Droi/Fwc/2019-01/Lot6/1/C/05* (2020)

European Parliament, *EU Cooperation with Third Countries in the Field of Migration Pe 536.469* (Policy Department 2016)

European Parliament, *Eu External Migration Policy and the Protection of Human Rights (in-Depth Analysis) Pe 603.512(Ep/Expo/Droi/Fwc/2019-01/Lot6/1/C/06)* (2020)

European Parliament, *EU External Migration Policy and the Protection of Human Rights (in-Depth Analysis) (September 2020 -Pe 603.512) Policy Department, (Ep/Expo/Droi/Fwc/2019-01/Lot6/1/C/06)* (Directorate General for External Policies 2020)

European Parliament, 'Maritime Rescue Coordination Centre in Libya (Question for Written Answer E-000027/2021 to the Commission) Rule 138 Özlem Demirel (the Left)' (2021) <<https://tinyurl.com/5bc38nw9>> accessed 28 May 2021

European Parliament, 'Parliamentary Question:Answer Given by Mr Avramopoulos on Behalf of the European Commission' (21 December 2018) <<https://tinyurl.com/ynn3dkt3>> accessed 21 September 2023

European Parliament, *Pushbacks at the EU's External Borders (Briefing Eprs) March 2021) Pe 89.368* (European Parliamentary Research Service 2021)

European Parliament, *Report from the Libe Committee Delegation on the Visit to Ceuta and Melilla (Es) Rapporteur: Ms Ewa Klamt (Brussels, 24 January 2006) Pe 367.858v02-00* (2006)

European Parliament, *Report on the Fact-Finding Investigation on Frontex Concerning Alleged Fundamental Rights Violations (Rapporteur: Ineke Strik)*, 14 July 2021)

European Parliamentary Research Service, 'Non-Refoulement, Push-Backs and the Eu Response to Irregular Migration' (*Members' Research Service*, 13 May 2015) <<https://tinyurl.com/y3djdece>> accessed 07 Nov 2020

European Union, Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ C 340/01

Ferhat Polat, 'Libya's Government of National Unity: Priorities and Challenges' (*TRT World Research Centre*, 15 March 2021) <<https://tinyurl.com/3rmx728k>> accessed 31 May 2023

Fetouri M, 'Libya's GNA Is Linked with Notorious Criminals, Including Human Traffickers' *Middle East Monitor* (Italy, Libya 24 October 2019) <<https://tinyurl.com/mwns72k4>> accessed 09 April 2023

FIDH, 'Libya: The Hounding of Migrants Must Stop' (2012) <<https://www.fidh.org/IMG/pdf/libyemigrantsuk-ld.pdf>> accessed 29 March 2023

Fill A and Moresco F, 'Voluntary Returns from Libya in the EU Externalisation Strategy: A Critical Analysis in the Light of AGSGI's Strategic Litigation (2 February 2021)' (*ASGI Scabiaca and Oruka*, 2021) <<https://tinyurl.com/4zv8rs2t>> accessed 06 Oct 2021

Fine S and Megerisi T, 'The Unacknowledged Costs of the Eu's Migration Policy in Libya' (*European Council on Foreign Relations*, 25 July 2019) <<https://tinyurl.com/ynn3dkt3>> accessed 27 October 2021

FitzGerald DS, 'Remote Control of Migration: Theorising Territoriality, Shared Coercion, and Deterrence' (2020) 46 *Journal of Ethnic and Migration Studies* 4

Footer M E, *Researching the Role of Soft Law in International Economic Relations: Some Lessons from Applying a Socio-Legal Approach* (2010);

Frelick B, Kysel IM and Podkul J, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4 *JMHS* 190

Frontex, 'Migratory Routes' ((2021) <<https://tinyurl.com/3nj8477z>> accessed 03 March 2024

Galindo G, 'Coronavirus: Belgium Begins Shutting down Services for Asylum Seekers' (*The Brussels Times*, 07 March 2020) <<https://tinyurl.com/aucdnn43>> accessed 26 June 2021

Gammeltoft-Hansen T and Feith Tan N, 'Extraterritorial Migration Control and Deterrence' in Cathryn Costello, Michelle Foster and McAdam J (eds), *The Oxford Handbook of International Refugee Law* (2021)

Gammeltoft-Hansen T and Tan NF, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5 *Journal on Migration and Human Security* 28

Gammeltoft-Hansen T, 'Extraterritorial Migration Control and the Reach of Human Rights' in Bauloz VCaC (ed), *Research Handbook on International Law and Migration* (Edward Elgar Publishing Limited 2014)

Garcia M and John Cerone, 'Legal Complications and Outcomes of the Eu-Turkey Statement' (*The Fares Center For Eastern Mediterranean Studies*, No Date) <<https://tinyurl.com/3kkbx6rp>> accessed 30 May 2022

Ghezelbash D, 'Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees' (2020) 68 AmJCompL 479

GLAN and ICHR, *Glan-Ichr Submission on European Pushbacks Submitted to Un Special Rapporteur on Rights of Migrants*, Felipe González Morales (unknown)

GLAN, 'Complaint Filed with UN Body Over Italy's Role in Privatised Push-Backs to Libya Resulting in Migrant Abuse' (Press Release, 18 December 2019) <<https://tinyurl.com/4f8s4zja>> accessed 17 April 2022 1

GLAN, ASGI and ARCI, *Complaint to the European Court of Auditors Concerning the Mismanagement of Eu Funds by the Eu Trust Fund for Africa's 'Support to Integrated Border and Migration Management in Libya' (Ibm) Programme*, 2020)

GLAN, 'Petition to European Parliament Challenging Eu's Material Support to Libyan Abuses against Migrants' (GLAN, 11 June 2020) <<https://tinyurl.com/5fzpdk2h>> accessed 02 June 2024

GLAN, 'Privatised Migrant Abuse by Italy and Libya (Press Release)' (GLAN, 18 December 2019) <<https://www.glanlaw.org/nivincase>> accessed 17 April 2022

Global Detention Project (GDP), 'Immigration Detention in Libya' (*Global Detention Project*, February 2015) <<https://www.refworld.org/docid/5567387e4.html>> accessed 13 February 2023

Global Detention Project, 'Libya: Overview' (18 February 2022) <<https://tinyurl.com/yck8kebw>> accessed 28 Feb 2022

Grahl-Madsen PA, *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)* (UNHCR October 1997)

Hamood S, 'African Transit Migration through Libya to Europe: The Human Cost' American University in Cairo, Forced Migration and Refugee Studies Cairo

Hamood S, 'EU-Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?' (2008) 21 Journal of Refugee Studies 19

Hasselberg O, 'Diplomatic Assurances-a Judicial and Political Analysis of the Undermining of the Principle of Non-Refoulement' (2010) Rapport

Hathaway O A, 'The Trump Administration's Indefensible Legal Defense of Its Asylum Ban: Taking a Wrecking Ball to International Law' (*Just Security*, 15 May 2020) <<https://tinyurl.com/wnc8cjh3>> accessed 06 March 2021

Hathaway OA, Stevens M and Preston Lim, 'Covid-19 and International Law: Refugee Law—the Principle of Non-Refoulement' (<<https://tinyurl.com/25fzxua6>> accessed 06 March 2020)

Hessbruegge JA, 'European Court of Human Rights Protects Migrants against "Push Back" Operations by High Seas' (2012) 16 American Society of International Law

Hirsch AL, 'The Borders Beyond the Border: Australia's Extraterritorial Migration Controls' (2017) 36 Refugee Survey Quarterly 48

Hoecke MV, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (1st edn, Hart Publishing Ltd 2011) 2; Chynoweth (n 49) 30.

Howden D, Fotiadis A and Campbell Z, 'Revealed: The Great European Refugee Scandal' (2020) <<https://tinyurl.com/3nnmc6c>> accessed 02 September 2023

HRW, 'EU/Italy/Libya: 'Disputes over Rescues Put Lives at Risk' (HRW, 25 July 2018) <<https://tinyurl.com/28h6y7zy>> accessed 15 June 2023

HRW, 'EU: Time to Review and Remedy Cooperation Policies Facilitating Abuse of Refugees and Migrants in Libya' (2020) <<https://tinyurl.com/sb9u8czx>> accessed 29 September 2021

HRW, 'European Union Managing Migration Means Potential Eu Complicity in Neighboring States' Abuse of Migrants and Refugees' (17 October 2006) <<https://tinyurl.com/3tfyu253>> accessed 31 July 2022

HRW, 'Italy: Navy Support for Libya May Endanger Migrants' (02 August 2017) <<https://www.refworld.org/docid/598337b44.html>> accessed 16 September 2023

HRW, 'Italy-Libya Connection' (2007) <<https://www.hrw.org/news/2009/09/23/italy-libya-connection>> accessed 04 Dec 2022

HRW, *No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya* (HRW 2019)

HRW, 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers' (21 September 2009) <<https://tinyurl.com/2mnprek2>> accessed 10 February 2022

HRW, *Stemming the Flow: Abuses against Migrants, Asylum Seekers and Refugees* (Part III Vol 18 No 5(E) (2006)

Hutchinson T, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Taylor and Francis 2017) 15

ICC Prosecutor FB, 'ICC Prosecutor Statement to the United Nations Security Council on the Situation in Libya, Pursuant to Unscr 1970 (2011)' (Fatou Bensouda) (02 November 2018)' (<tinyurl.com/yc2yfe32> accessed 28 January 2022

ICC Prosecutor, 'ICC Prosecutor Statement to the United Nations Security Council on the Situation in Libya, Pursuant to UNSC 1970 (2011) (Statement)' (14 November 2013) <<https://tinyurl.com/5v22cifn>> accessed 28 May 2022

ICC Prosecutor, 'Icc Prosecutor Statement to the United Nations Security Council on the Situation in Libya, Pursuant to Unscr 1970 (2011) Fatou Bensouda (2020)' (ICC, 2020) <<https://tinyurl.com/4u7vjhew>> accessed 22 January 2022

ICE, 'Statement of Lev J Kubiak (Assistant Director of International Operations Homeland Security Investigations, Us Immigration and Customs Enforcement Department of Homeland Security) before the House Committee on Foreign Affairs on 22 March 2016' (2016) <<https://tinyurl.com/rym2k88f>> accessed 03 Sept 2022

InfoMigrants, 'Voluntary Return from Libya: How Does It Work?' (27 July 2020) <<https://tinyurl.com/2p834aww>> accessed 21 Nov 2020

International A, *Europe's Sinking Shame: The Failure to Save Refugees and Migrants at Sea* (Amnesty International London 2015)

International A, *Lives Adrift. Refugees and Migrants in Peril in the Central Mediterranean* (Amnesty International London, UK 2014)

International Detention Coalition, 'Libya Immigration Detention Profile' (*Global Detention Project*, February 2015) <<https://tinyurl.com/3wdfcjdj>> accessed 27 December 2022

International Law Blog, 'The Illusion of Consent-Voluntary Repatriation or Refoulement?' (25 September 2019) <<https://tinyurl.com/2p8tb8xt>> accessed 5 November 2021

International Rescue Committee, 'These Illustrations Reveal the Human Stories of the World's Most Dangerous Migration Route' (<<https://tinyurl.com/3z4fe44h>> accessed 02 April 2023

IOM (Dakar Office), 'EU-IOM Joint Initiative for Migrant Protection and Reintegration'(28 July 2021) <<https://tinyurl.com/y778khdd>> accessed 28 September 2021

IOM (Libya), 'Voluntary Humanitarian Return (VHR)' (IOM, 2017) <<https://libya.iom.int/Voluntary-humanitarian-return-vhr>> accessed 03 March 2022

IOM Libya, 'Voluntary Humanitarian Return Programme Offers Lifeline for 60,000 Migrants in Libya' (IOM, 01 April 2022) <<https://tinyurl.com/2p9647rb>> accessed 18 July 2023

IOM, 'IOM Counts 3,771 Migrant Fatalities in Mediterranean in 2015 (News Global)' (2016) <<https://tinyurl.com/mryx5ttc>> accessed 03 December 2021

IOM, 'A Framework for Assisted Voluntary Return and Reintegration' (IOM, *Migrant Protection and Assistance Division*, 2018) <<https://tinyurl.com/k43x84vs>> accessed 07 Oct 2021

IOM, 'Covid-19 Control Measures, Gap in Sar Capacity Increases Concern About 'Invisible Shipwrecks'' (<<https://tinyurl.com/2p9xy9mp>> accessed 15 May 2023

IOM, 'IOM Learns of 'Slave Market' Conditions Endangering Migrants in North Africa' (<<https://tinyurl.com/5n8jwpur>> accessed 19 February 2023

IOM, 'IOM Libya Migrant Report 37 (May-June 2021) Report 37 (IOM 2021) 4' (<<https://tinyurl.com/2p8bkf7j>> accessed 24 October 2021

IOM, 'Libya Migrant Report, Round 54 (November-December 2022)' (2022) <<https://tinyurl.com/9fkb3ert>> accessed 10 April 2023

IOM, 'Libya's Migrant Report, Mobility and Tracking, Round 32 (July-Aug 2020)' (2020) <<https://tinyurl.com/2p8ktf5w>> accessed 26 November

IOM, 'Migrant Deaths and Disappearances (Migration Data Portal) (7 May 2021)' (2021) <<https://tinyurl.com/3ejcsbwb>> accessed 26 November

IOM, 'Missing Migrants Recorded in since 2014 (06 February 2022)' (2022) <<https://tinyurl.com/4wp68w4a>> accessed 08 February 2022

IOM, 'Return and Reintegration Key Highlights 2020' (IOM, 07 July 2021) <<https://publications.iom.int/books/return-and-reintegration-key-highlights-2020>> accessed 15 July 2023

ISPI, 'Estimated Migrant Departures from Libya (January 2016-December 2019)' (*Italian Institute for Political Studies (ISPI)*, <<https://tinyurl.com/mr47zcdx>> accessed 15 May 2023

Itamar Mann and Niamh Keady-Tabbal, 'Torture by Rescue: Asylum-Seeker Pushbacks in the Aegean. How Summary Expulsions from Greece Have Continued with Impunity' *Just Security* <<https://tinyurl.com/jzbu3hvf>> accessed 26 June 2021

Jacobsen K and Landau BL, *Researching Refugees: Some Methodological and Ethical Considerations in Social Science and Forced Migration* (UNHCR Geneva 2003) 1; Hutchinson (n 51) 23.

Jahan N and others, 'How to Conduct a Systematic Review: A Narrative Literature Review' (2016) 8(11) *Cureus* 1

Joseph S, Mitchell K and Gyorki L, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (2006) OMCT Handbook Series 4 s 4.6

Kirişçi K, Erdoğan MM and Eminoğlu N, 'New Pact on Migration and Asylum" Is Missing a True Foundation' *The Brookings Institution* (Washington, DC 06 November 2020) <<https://tinyurl.com/y8x2a9em>> accessed 06 Dec 2020

Kuschminder K, 'Libya Is Not Turkey: Why the Eu Plan to Stop Mediterranean Migration Is a Human Rights Concern' (*The Conversation*, 17 February 2017, 2017 February) <<https://tinyurl.com/3cvr7xya>> accessed 29 October 2021

Lang IG and Nagy B, 'External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement' (2021) 17 *European Constitutional Law Review*

Lauterpacht E and Bethlehem D, 'The Scope and Content of the Principle of Non-Refoulement: Opinion (2.1)' in Erika Feller VTaFN (ed), *Refugee Protection in International Law: Unhcr's Global Consultations on International Protection* ((N 106), Cambridge University Press 2003)

Lawyers for Justice in Libya (LFJL), 'Latest Memorandum of Understanding between Libyan and Italy on Border Security Fails to Protect Migrants' (LFJL, 07 Feb 2017) <<https://tinyurl.com/5cc7yr5v>> accessed 22 Nov 2020

LFJL, 'How Did We Get Here? (Timeline)' (2013) <<https://www.reportinglibya.org/>> accessed 02 March 2023

Maccanico Y, 'Analysis Anti-Migration Cooperation between the EU, Italy and Libya: Some Truths' (*Statewatch*, March 2020) <<https://tinyurl.com/5c8nwra6>> accessed 19 Nov 2022

Majeed N, Hilal A and Khan AN, 'Doctrinal Research in Law: Meaning, Scope and Methodology' (2023) 12 *Bulletin of Business and Economics* 559, 559.

Mann I and Keady-Tabbal N, 'Torture by Rescue: Asylum-Seeker Pushbacks in the Aegean. How Summary Expulsions from Greece Have Continued with Impunity' *Just Security* <<https://tinyurl.com/jzbu3hvf>> accessed 26 June 2021

Marshall C and Rossman GB, *Designing Qualitative Research* (Sage Publications 1999) 13

Martin K, 'Duvalierism, with and without Duvalier: Radio Haiti Commemorates the Massacres of April 26, 1963 and 1986' *Blog Roll* (26 April 2016) <<https://tinyurl.com/ytjt8ak3>> accessed 02 Sept 2022

Martinez O and others, 'Evaluating the Impact of Immigration Policies on Health Status among Undocumented Immigrants: A Systematic Review' (2015) 17 *Journal of Immigrant and Minority Health* 947

McConville M and CHUI WH, 'Preface and Acknowledgements to Second Edition', *Research Methods for Law* (Edinburgh University Press 2017)

McConville M and Chui WH, *Research Methods for Law* (Edinburgh University Press 2017)

Medecins Sans Frontieres (MSF), 'Out of Libya: Opening Safe Pathways for Vulnerable Migrants Stuck in Libya' (*Medecins Sans Frontieres (MSF)*, June 2022) <<https://tinyurl.com/4ap9ncfy>> accessed 28 June 2023

Menz G, 'The Promise of the Principal-Agent Approach for Studying Eu Migration Policy: The Case of External Migration Control' (2015) 13 *Comparative European Politics* 307

Merry SE, 'Human Rights and Transnational Culture: Regulating Gender Violence Through Global Law' (2006) 44 *Osgoode Hall LJ* 53

Merry SE, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108 *American Anthropologist* 38, 38

Migration Policy Centre, 'Libya: The Demographic-Economic Framework of Migration, the Legal Framework of Migration, the Socio-Political Framework of Migration' (*MPC (European University Institute)*, 2013) <<https://tinyurl.com/4uhw3r4r>> accessed 19 Nov 2022

Monella LM and Creta S, 'Paying for Migrants to Go Back Home: How the Eu's Voluntary Return Scheme Is Failing the Desperate' *Euronews' Euronews* (Lyon, France, 22 June 2020) <<https://tinyurl.com/yc6jt9pw>> accessed 03 March 2022

Moraru M, 'The New Design of the Eu's Return System under the Pact on Asylum and Migration' (*EU Immigration and Asylum Law and Policy*, 14 Jan 2021) <<https://tinyurl.com/ayyv9f9f>> accessed 06 June 2022

Moreno-Lax, Violeta *Accessing Asylum in Europe* ((Oxford Studies in European Law), Oxford University Press 2017)

Müller P and Slominski P, 'Breaking the Legal Link but Not the Law? The Externalization of Eu Migration Control through Orchestration in the Central Mediterranean' (2021) 28 *Journal of European Public Policy*

Narea N, 'The Us Has Abandoned Asylum Seekers in Mexico during the Pandemic' (*Vox*, (13 May 2020) <<https://tinyurl.com/ysh4jep8>> accessed 29 June 2021

Nashed M, 'What Happens to Migrants Forcibly Returned to Libya?' (*The New Humanitarian*, 5 August 2020), <<https://tinyurl.com/3erykyx>> accessed 07 Nov 2020

Netherlands (Foreign Ministry), *Libya: Militias, Tribes and Islamists*, 19 December 2014)

Nevans MF, 'The Repatriation of the Haitian Boat People: Its Legal Justification Under the Interdiction Agreement between the United States and Haiti' (1991) 5 *Temp Int'l & Comp LJ* 273

Nielsen N, 'Internal EU Report Exposes Libya Turmoil' (*EU Observer*, 20 February 2017) <<https://EUobserver.com/migration/136973>> accessed 20 November 2021

North AM, International Association of Refugee Law Judges World Conference 7-9 September 2011, Bled, Slovenia

OHCHR, "*Lethal Disregard*" *Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea* (UN, May 2021)

OHCHR, 'Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya' (*OHCHR*, April 2018) <<https://tinyurl.com/5yk74ezp>> accessed 16 March 2023

OHCHR, 'Detention of Migrants in Libya Is a Human Rights Crisis' (2016) <<https://tinyurl.com/2p8rhtmm>> accessed 08 April 2023

OHCHR, 'Expulsions of Aliens in International Human Rights Law' *Discussion paper* (Geneva September 2006) <<https://www.UNHCR.org/uk/4bf6813a9.pdf>> 16 March 2023

OHCHR, 'Italy Failed to Rescue More Than 200 Migrants, Un Committee Finds' (*Display News* (27 January 2021), <tinyurl.com/53df5f2v> accessed 09 December 2021

OHCHR, Joint Public Communication from UN Special Rapporteurs to the Government of Malta (20 July 2020) Reference: AL MLT 1/2020 20 July 2020 (20 July 2020)

OHCHR, 'Libya Must End "Outrageous" Auctions of Enslaved People, UN Experts Insist (Libya Slave Auctions)' (Press Release) (30 November 2017) <<https://tinyurl.com/mv3rb7sa>> accessed 04 Oct 2021

OHCHR, 'Libya: UN Human Rights Report Details Violations of Migrants' Rights Amid 'Assisted Return' Programmes' (OHCHR, <<https://tinyurl.com/dk995xt6>> accessed 13 June 2023

OHCHR, *Nowhere but Back Assisted Return, Reintegration and the Human Rights Protection of Migrants in Libya* (OHCHR Migration Unit, 2022)

OHCHR, 'Report Highlights Unsafe and Undignified Expulsion of Migrants from Libya' (UN News, 25 November 2021) <<https://tinyurl.com/yc2dkhj7>> accessed 28 January 2022

OHCHR, 'UN Human Rights Chief: Suffering of Migrants in Libya Outrage to Conscience of Humanity' (OHCHR, 14 November 2017) <<https://tinyurl.com/4fcsj9xb>> accessed 20 October 2023

OHCHR, *Unsafe and Undignified the Forced Expulsion of Migrants from Libya* (OHCHR Migration Unit May 2021)

OHCHR, 'USA: UN Experts Condemn Collective Expulsion of Haitian Migrants and Refugees' (Geneva 25 October 2021) <<https://tinyurl.com/nhaydh94>> accessed 31 March 2023

Palm A, 'The Italy-Libya Memorandum of Understanding: The Baseline of a Policy Approach Aimed at Closing All Doors to Europe?' (*Istituto Affari Internazionali*, 2017) <<https://tinyurl.com/2p9ybd6>> accessed 09 Feb 2023

Palm E, 'Externalized Migration Governance and the Limits of Sovereignty: The Case of Partnership Agreements between Eu and Libya' (2020) 86 *Theoria* (Lund, Sweden) 9

Palm E, 'Refugees and the Ethics of Forced Displacement-by Serena Parekh' (2017) 83 *Theoria* 254

Pan African Chamber of Commerce and Industry (PACCI), 'The Community of Sahel-Saharan States-Cen-Sad' (<<https://tinyurl.com/35xwmmwr>> accessed 12 December 2022

Pan African Chamber of Commerce and Industry (PACCI), 'The Community of Sahel-Saharan States-Cen-Sad' (<<https://tinyurl.com/35xwmmwr>> accessed 12 December 2022

Papastavridis E, 'The EU and the Obligation of Non-Refoulement at Sea' in Trevisanut FlaS (ed), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press 2016)

Pastore F and Roman E, 'Migration Policies and Threat-Based Extraversion. Analysing the Impact of European Externalisation Policies on African Polities' (2020) 36 *Revue Européenne des Migrations Internationales* (Online) 133

Peck T, 'Interdisciplinary Methodological Approaches to Desk-Based Socio-Legal Human Rights Research' (2023) LaM <<https://tinyurl.com/5dkduesn>> accessed 01 July 2024

Peterson J and others, 'Understanding Scoping Reviews: Definition, Purpose, and Process' (2017) 29 *Journal of the American Association of Nurse Practitioners* 12

Pierrot E-J, 'A Responsibility to Protect: Unhcr and Statelessness in Egypt' (2013) *New Issues in Refugee Research* Research Paper No 250

Pijnenburg A and van der Pas K, 'Strategic Litigation against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Migration Route' (2022) 24 EJML 401

Poon J, '*Non-Refoulement* Obligations in Offshore Detention Facilities' E-International Relations <<https://www.e-ir.info/2018/10/16/non-refoulement-obligations-in-offshore-detention-facilities/>> accessed 21 May 2023

Poon J, '*Non-Refoulement* Obligations in the EU-Turkey Deal and Italy-Libya Memorandum of Understanding' (*International Law blog*, 20 June 2019) <<https://tinyurl.com/4vprfa2k>> accessed 21 November 2020

Qureshi S, 'Research Methodology in Law and Its Application to Women's Human Rights Law' (2015) 22 J Pol Stud 629, 633

Ravarani G, Assessment of the Credibility of Asylum Seekers: The Burden of Proof and the Limits of the ECHR's Examination (Intervention, Opening of the Judicial Year–Seminar– 27 January 2017, ECtHR)

Reed K and Padskocimaite A, *The Right Toolkit: Applying Research Methods in the Service of Human Rights* (Human Rights Center, University of California, Berkeley, School of Law April 2012)

Reidy E, 'The Legal Battle to Hold the EU to Account for Libya Migrant Abuses' (*The New Humanitarian*, 10 August 2020) <<https://tinyurl.com/2p9cfn68>> accessed 22 January 2022

Reviglio M, 'The Shift to Soft Law at Europe Borders: Between Legal Efficiency and Legal Validity' (2023) 20(1) Global Jurist 23

Reviglio M, 'Externalizing Migration Management through Soft Law: The Case of the Memorandum of Understanding between Libya and Italy' (2019) Global Jurist 1

Rodenhäuser T, 'The Principle of Non-Refoulement in the Migration Context: 5 Key Points' (*International Committee of the Red Cross*, 30 March 2018) <<https://tinyurl.com/bdhfv4cs>> accessed 04 April 2021

Rodolfo Marques, 'Non-Refoulement under the Inter-American Human Rights System' The Future of Refugee Law, Special Edition of the Refugee Law Initiative Working Paper No 20 (27 Jun 2017) <<https://ssrn.com/abstract=2992709> or <http://dx.doi.org/10.2139/ssrn.2992709> > accessed 14 April 2021

Röhl K, *Unhcr Fleeing Violence and Poverty :Non-Refoulement Obligations under the European Convention of Human Rights*' (UNHCR January 2005)

Ronzitti N, 'The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?' (2009) 1 Bulletin of Italian Politics 125

Salah H, 'Already Complicit in Libya Migrant Abuse, Eu Doubles down on Support Handing over of Search Boat Makes Eu More Complicit in Abuses'(08 February 2023) <<https://tinyurl.com/mwmh2mw6>> accessed 12 May 2023

Salgado L and others, 'Putting Migrant Reintegration Programs to the Test: A Road Map to a Monitoring System' (*Migration Policy Institute*, Januray 2022) <<https://tinyurl.com/3tjcvuzv>> accessed 06 June 2022

School of Social and Political Sciences, 'Externalization and the Erosion of Refugee Protection: Comparative Network on Refugee Externalisation Policies (Conrep)' ((29 Nov 2019)) <<https://tinyurl.com/2p9penn4> > accessed 11 December 2021

Sea-Watch e.V, *Submission to the UN Special Rapporteur on the Human Rights of Migrants: Push-Back Practices and their Impact on the Human Rights of Migrants* (29 of January 2021) <<https://tinyurl.com/2p9bpsc7>> accessed 18 June 2023

Seeberg P, 'EU Strategic Interests in Post- Qadhafi Libya: Perspectives for Cooperation' (2014) 21 *Middle East Policy* 122

Seeberg P, 'The Arab Uprisings and the Eu's Migration Policies—the Cases of Egypt, Libya, and Syria' (2013) 9 *Democracy and Security* 157

Siobhán M-L, 'Legal Methodologies and Human Rights Research: Challenges and Opportunities' in Hans-Otto Sano Bård A Andreassen, and Siobhán McInerney-Lankford, (ed), (*Handbooks of Research Methods in Law* series, Edward Elgar Publishing 2017) 7-9;

Slominski P and Trauner F, 'How Do Member States Return Unwanted Migrants? The Strategic (Non-)Use of 'Europe' during the Migration Crisis' (2018) 56 *JCMS: Journal of Common Market Studies* 101

SOS Mediterranee, 'Government and Rescue Coordination Centres: Place of Safety' (<<https://tinyurl.com/mrh7v45u>> accessed 29 October 2021

Spheres Project, 'The Humanitarian Charter' (DG-ECHO, 1997) <[internal-pdf://2920641561/the-humanitarian-charter.pdf](https://tinyurl.com/2920641561/the-humanitarian-charter.pdf)> accessed 22 March 2024

State Parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) UNTS <<https://tinyurl.com/yc5hh975>> accessed 22 March 2024

States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol (States Parties (as of April 2015)

States Parties, Including Reservations and Declarations, to the 1951 Refugee Convention (28 July 1951) Unts 189 P.137

Stock I, Üstübcici A and Schultz SU, 'Externalization at Work: Responses to Migration Policies from the Global South' (2019) 7 (48) *Comparative Migration Studies* 1

Stoyanova V, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights' (2020) 33 *LJIL* 601

Struthers M, 'Libya: Renewal of Migration Deal Confirms Italy's Complicity in Torture of Migrants and Refugees' (*Amnesty International*, 30 January 2020) <<https://tinyurl.com/2p98b3y6>> accessed 28 Nov 2020

The Brussels Times, 'Belgium Condemned by Court over Failure to Receive Asylum Seekers'(Brussels, Belgium 06 October 2020) <<https://tinyurl.com/ym53te9z>> accessed 26 June 2021

The EU's Relations with Libya (Extracts from successive General Affairs & External Relations Councils) (20 January 2005) <<https://tinyurl.com/228wy9rc>> accessed 26 January 2023

The Global Initiative Against Transnational Organised Crime, 'The Political Economy of Migrant Detention in Libya: Understanding the Players and the Business Models' (2019) <globalinitiative.net/wp-content/uploads/2019/11/Final-Report-Detention-Libya.pdf> accessed 20 April 2023

Thym D, 'Why the EU-Turkey Deal Can Be Legal and a Step in the Right Direction' ((11 March 2016) <<https://tinyurl.com/49tpewrs>> accessed 29 October 2021

Torresi T, 'An Emerging Regulatory Framework for Migration: The Libya-Italy Agreement and the Right of Exit' (2013) 22 Griffith Law Review 648

Tranchina G, 'Italy Reups Funding to Force Migrants Back to Libya: Migrants, Asylum Seekers Face Murder, Torture, Enslavement in Libya' (HRW, 01 February 2023) <<https://tinyurl.com/488nxer4>> accessed 17 May 2023

Trocaire for the Just World, 'Development Adrift the Eu Migration Partnership Framework: The Emerging Paradigm of Security and Conditionality' Migration Policy Paper 3 <tinyurl.com/yckn3p7v> accessed Accessed 18 November 2021

UN Human Rights Treaty Bodies, 'Un Treaty Body Database, Ratification Status by Country' (OHCHR, <<https://tinyurl.com/ymt5tdtt>> accessed 18 December 2023

UN Office for the Coordination of Humanitarian Affairs (OCHA), 'Libya-Situation Report:Libya Displacement and Return Timeline (Dtm)' (OCHA, 5 Dec 2022) <<https://reports.unocha.org/en/country/libya/>> accessed 19 May 2023

UN, 'Legal Brief on International Law and Rescue at Sea' (undated) <<https://tinyurl.com/395yzt5p>> accessed 29 October 2021

UN, 'Libya's Detention of Migrants 'an Outrage to Humanity,' Says @Unhuman Rights Chief' (UN News, 14 November 2017) <<http://tinyurl.com/446v943n>> accessed 03 March 2022

UNCHR (Rwanda), 'First Evacuation Flight of 2022 from Libya to Rwanda Brings over 100 Asylum Seekers to Safety' (UNCHR, 30 Mar 2022) <<https://tinyurl.com/mvf56zsy>> accessed 27 June 2023

UNCHR (USA), 'Statement Attributable to UN High Commissioner for Refugees Filippo Grandi on the Need to End Us Covid-19 Asylum Restrictions' (20 May 2021) <<https://tinyurl.com/2p84t3t3>> accessed 18 June 2021

UNCHR, 'Technical Assistance and Capacity-Building to Improve Human Rights in Libya' (7 April 2015)

UNCHR, 'Beware Long-Term Damage to Human Rights and Refugee Rights from the Coronavirus Pandemic: UNCHR' (*UNCHR*, 22 April 2020) <<https://tinyurl.com/3we5bsue>> accessed 18 June 2021

UNCHR, 'Forced Displacement Worldwide at Its Highest in Decades' (19 June 2017) <<https://tinyurl.com/3sx9upd9>> accessed 23 November 2023

UNCHR, 'Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the Covid-19 Response' (16 March 2020) <<https://tinyurl.com/5yc6dt7d>> accessed 20 August 2022

UNCHR, 'Libya (Quick Impact Projects)' (*UNCHR Libya*, 23 October 2017) <<https://www.UNCHR.org/libya.html>> accessed 21 October 2021

UNCHR, 'Libya Update 25 June 2021' (<<https://data2.unhcr.org/en/documents/details/87428>> accessed 30 May 2023

UNCHR, 'Libya: Registration Is a Right for Asylum Seekers and Refugees Wherever They Are' (*Blog/Interview*, 09 Nov 2018) <<https://tinyurl.com/2p8msnue>> accessed 02 October 2021

UNCHR, 'Mediterranean Crossings Deadlier Than Ever, New UNCHR Report Shows' <tinyurl.com/mw44uebx> accessed 09 December 2021

UNCHR, 'Mixed Migration Trends in Libya: Changing Dynamics and Protection Challenges: Evolution of the Journey and Situations of Refugees and Migrants in Southern Libya ((date Unknown) <<https://www.UNCHR.org/595a02b44.pdf>> accessed 27 Nov 2021

UNCHR, 'Operational Data Portal (Refugee Situations in Libya)' <<https://data2.UNCHR.org/en/coUNtry/lby>> accessed 27 Nov 2021

UNCHR, 'Operational Portal, Mediterranean Situations' (2022) <<https://data2.UNCHR.org/en/situations/mediterranean>> accessed 19 May 2022

UNCHR, 'Over One Million Sea Arrivals Reach Europe in 2015' (30 December 2015) <<https://tinyurl.com/yrdt9ckw>> accessed 20 November 2020

UNCHR, 'UNCHR Global Trends: Forced Displacement Trends 2021' (*UNCHR Global Data Service*, 2022) <<https://www.UNCHR.org/62a9d1494/global-trends-report-2021>> accessed 17 July 2022

UNCHR, 'UNCHR Libya Operational Update, 15 November 2022' (15 November 2022) <<https://data.UNCHR.org/en/documents/details/96787>> accessed 12 May 2023

UNHCR (Rwanda), 'First Evacuation Flight of 2022 from Libya to Rwanda Brings over 100 Asylum Seekers to Safety' (*UNHCR*, 30 Mar 2022) <<https://tinyurl.com/mvf56zsy>> accessed 27 June 2023

UNHCR (USA), 'Statement Attributable to UNHCR Commissioner for Refugees Filippo Grandi on the Need to End Us Covid-19 Asylum Restrictions' (20 May 2021) <<https://tinyurl.com/2p84t3t3>> accessed 18 June 2021

UNHCR Global Trends: Forced Displacement Trends 2021 (UNHCR Global Data Service, Copenhagen, Denmark, 23 May 2022) <<https://tinyurl.com/4mvs8zuv>> accessed 17 July 2022

UNHCR, 'Mixed Migration Trends in Libya: Changing Dynamics and Protection Challenges: Evolution of the Journey and Situations of Refugees and Migrants in Southern Libya' ((date unknown) <<https://www.unhcr.org/595a02b44.pdf>> accessed 27 Nov 2021

UNHCR, 'Operational Data Portal: Refugee Situations (Libya)' (<<https://data.unhcr.org/en/country/lby>> accessed 24 March 2023

UNHCR, 'Operational Portal, Mediterranean Situations' (2022) <<https://data2.unhcr.org/en/situations/mediterranean>> accessed 19 May 2022

UNHCR, 'Over One Million Sea Arrivals Reach Europe in 2015' (30 December 2015) <<https://tinyurl.com/yrdt9ckw>> accessed 20 November 2020

UNHCR, 'UNHCR, Global Trends: Forced Displacement Trends 2021' (*UNHCR Global Data Service*, 17 July 2022) <<https://tinyurl.com/4mvs8zuv>> accessed 17 July 2022

UNSMIL and OHCHR, *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya* (UNSM Tunis 2018)

UNSMIL and OHCHR, *Detained and Dehumanised: Reports on the Human Rights Abuses against Migrants in Libya* (13 December 2016)

UNSMIL, 'UN Report Urges End to Humanitarian Detention of Migrants in Libya' (2016) <tinyurl.com/595zytk7> accessed 06 Nov 2020

Urbina I, 'Europe's Border Agency Under Fire for Aiding Libya's Brutal Migrant Detentions' (New York 9 November 2021) <<https://tinyurl.com/bdfaua3p>> accessed 22 January 2022

US Commission on International Religious Freedom (USCIRF), 'Religious Freedom Conditions in Libya' (*USCIRF*, December 2023) <<https://tinyurl.com/bddpmv77>> accessed 19 May 2024

US Department of State, *2012 Trafficking in Persons Report - Libya* (19 June 2012)

US Department of State, *2020 Country Reports on Human Rights Practices: Libya*, (2020) <<https://tinyurl.com/47cvfshb>> 26 May 2023

US Department of State, 'Libya 2022 Human Rights Report' (20 March 2023) <<https://tinyurl.com/ywm9xn3t>> accessed 12 June 2023

US Department of State, 'The Merida Initiative: Expanding the U.S./Mexico Partnership' (25 April 2013) <<https://2009-2017.state.gov/documents/organization/208786.pdf>> accessed 02 September 2022

US Embassy and Consulates in Mexico, 'The Merida Initiative (Pillar Three)' (*US State Department*, 7 September 2021) <<https://mx.usembassy.gov/the-merida-initiative/>> accessed 30 July 2021

US Homeland Security, 'Migrant Protection Protocols (N 301)' (<<https://tinyurl.com/2mby9hpz>> accessed 12 October 2022

Vari E, 'Italy-Libya Memorandum of Understanding Italy's International Obligations' (2020) 43 Hastings Int'l & Comp L Rev 105

Webley L, 'Qualitative Approaches to Empirical Legal Research' in Cane P and Kritzer H (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010)

Zaptia S, 'PFG Western Division Nasr Brigade Withdraws from Zawia Refinery after Sanalla Public Accusation of Fuel Smuggling Collusion' (*Libya Herald*, 05 January 2017) <<https://tinyurl.com/fhpmu6ej>> accessed 09 April 2023

Zar M, 'Human Rights Strengthen Migration Policy Framework' (*Migration Policy Institute*, 2005) <<https://tinyurl.com/yf9e37pd>> accessed 28 January 2022