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By Miriana Riccio

ABSTRACT

Ongoing and grave human rights violations persist within the borders of Libya, as a consequence of the externalization of migration management pursued by both the Italian government and the European Union. These violations, targeting migrants, refugees, and asylum seekers, are not only extensive in terms of their geographic reach and the number of individuals affected, but also exhibit systematic and pervasive patterns. In light of this situation, this work aims to shed light on the fact that, as of now, the alleged responsibility of Italy and the EU has yet to be formally recognized through judicial sentences. Furthermore, it seeks to explore pathways for addressing this impasse.

In more comprehensive terms, the paper first delineates the context of the EU and Italy's externalization of migration management, which has resulted in severe human rights violations within the Libyan territory (Section I). It then delves into the legal foundations for assigning international responsibility to States, such as Italy (Section II), and international organizations, such as the EU (Section III). Subsequently, the analysis will shift its focus to practical methods for addressing Italy and the EU's impunity and enhancing the accountability of the actors involved in the Libyan wrongdoings (Section IV).

Note: This paper is an adaptation of the author's thesis. For a more comprehensive and in-depth analysis of the issues discussed, it is recommended to refer to the thesis.

INTRODUCTION

In today's discussions and policies related to migration, there is an increasing shift in the way borders are perceived and defined. Rather than just geographical demarcations, borders are now predominantly viewed as functional domains where border control and management policies are actively put into practice. This functional reinterpretation has given rise to the concept known as the "externalization of migration management", a complex and ever-evolving phenomenon involving the delegation of control over the European Union's external borders to authorities in third countries.

While officially presented as a strategy to prevent undesirable individuals from reaching EU territory, the practical application of the externalization of borders has

given rise to profound human rights concerns. This approach often relies on policy tools and practices of questionable legality, raising ethical dilemmas and compromising the rights and well-being of migrants.[1] In effect, it externalizes the risks and vulnerabilities faced by migrants and asylum seekers, potentially leading to arbitrary detention, inadequate access to asylum, and other violations of fundamental human rights. Consequently, the externalization of migration management remains a subject of intense debate and scrutiny, demanding a careful balance between security imperatives and human rights considerations on the global stage.

In practice, third countries agree to detain migrants within their borders on behalf of the EU in exchange for technological resources, funding, training, and logistical support. These collaborative arrangements are typically established through a series of informal and simplified agreements and measures, negotiated and implemented with minimal parliamentary oversight.[2] While this approach offers the advantage of swift and flexible action when immediate intervention is required, it raises concerns as it operates outside the traditional framework of judicial review, which is a fundamental element of societies built on the rule of law.

Furthermore, these informal agreements frequently involve third countries that do not adhere to international standards regarding the rule of law and human rights, complicating matters further. Libya, for example, is a case in point, a country with whom both the EU and Italy collaborate for outsourcing border and migration control. However, this collaboration cannot disregard the fact that asylum seekers and refugees in Libya face unprecedented levels of abuse, raising questions about considering countries like Libya as "safe" third countries, given the absence of a legal framework for asylum procedures, inadequate reception capacity, and a strong record of human rights violations.

Numerous reports, including those from official UN sources, treaty bodies, major human rights organizations, and investigative journalism, have exposed atrocities committed by Libyan authorities during sea rescue operations and in detention centers where migrants and asylum seekers are held. The majority of migrants detained by Libyan authorities face arbitrary detention, with some being sent to detention centers immediately upon reaching Libyan shores, while others are apprehended in various locations. Shocking testimonies from survivors reveal a consistent pattern of brutality, with detainees subjected to physical and psychological torment. They endure torture, sexual violence, and inhumane and degrading treatment. Conditions in these centers are described as "inhumane", falling far short of international human rights standards. Indeed, it might be claimed that the consequences of such actions surpass the threshold set in the provisions included in several human rights treaties' obligations, among which there certainly are: Article 7 of the Internation-

1. A. Riccardi, "Esternalizzazione delle frontiere italiane in Libia e Niger: una prospettiva di diritto internazionale" [2020] Questione Giustizia.
2. G. Pascale, "Esternalizzazione delle frontiere in chiave antimigratoria e responsabilità internazionale dell'Italia e dell'UE per complicità nelle grosse violazioni dei diritti umani commesse in Libia" [2018] Studi sull'integrazione europea 413.

al Covenant on Civil and Political Rights (ICCPR),[3] Article 3 of the Convention Against Torture (CAT),[4] Article 5 of the Universal Declaration of Human Rights,[5] and Article 3 of the European Convention for Human Rights (hereinafter: "ECHR").[6]

While primary responsibility for these abuses rests with Libyan authorities,[7] Italy and the EU share a degree of responsibility by delegating border control to Libya, providing funding, training, and logistical support, and facilitating the return of migrants to these detention centers.

The primary objective of this work is, therefore, to identify the legal framework through which it is possible to frame the international legal responsibility of both Italy and the European Union in relation to such crimes. Subsequently, solutions will be proposed in order to improve a stalling situation that continues to be characterized by the perpetration of gross human rights abuses.

1. THE EXTERNALIZATION OF MIGRATION MANAGEMENT AND THE ITALIAN-LIBYAN COOPERATION

The extensive collaboration between Italy and Libya, serving as a transit point for migrants from sub-Saharan Africa, North Africa, and the Middle East, is driven by the objective of preventing migrants from successfully reaching Italian shores. As a matter of fact, it falls exactly into the above-mentioned scheme of border externalization.

Over the early 2000s, the Italian-Libyan cooperation on migration aimed primarily at curbing the movement of people. A pivotal moment was the ratification of the "Treaty on Friendship, Partnership, and Cooperation" on August 30, 2008, commonly known as the Benghazi Treaty.[8] This agreement signaled a commitment from both parties to intensify their cooperation efforts in effectively managing and addressing

3. International Covenant on Civil and Political Rights (ICCPR), Article 7. The Article in question states that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."
4. Convention Against Torture (CAT), Article 3. "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."
5. Universal Declaration of Human Rights (UDHR), Article 5. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
6. European Convention for Human Rights (ECHR), Article 3. "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
7. Libya has signed, among other instruments, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention).
8. For a throughout analysis of the treaty, see: M.A. Kashiem, "The Treaty of Friendship, Partnership and Cooperation between Libya and Italy: From an Awkward Past to a Promising Equal Partnership" [2010] 1(1) California Italian Studies.

illegal immigration.[9] Subsequently, in February 2009, an implementation protocol was signed to organize joint maritime patrols off the Libyan coast. These measures then took the form of joint pushbacks which were sanctioned in 2012 by the ECtHR in the Grand Chamber case of *Hirsi Jamaa and others v. Italy*.[10]

Following this ruling and amidst the Libyan civil war, the use of the treaty and its linked implementation protocol diminished. However, with the onset of the 2015 migration crisis and EU authorities' endorsement, a new agreement became necessary.[11] This led to the signing of the "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" (MoU) on February 2, 2017 – tacitly renewed on February 3, 2020.[12]

With the stated objective of finding "urgent solutions to the issue of clandestine migrants crossing Libya to reach Europe by sea, through the provision of temporary reception camps in Libya, under the exclusive control of the Libyan Ministry of Home Affairs", the Memorandum has been presented as the beginning of a new era of cooperation between the Italian government and the UN recognized one of Al-Sarraj's in Libya in the field of irregular migration and border control.[13]

The most critical aspect of this agreement concerns, without doubt, the provisions of Article 1 and Article 2. As for Article 1 (A), it outlines a generic commitment to resume cooperation between Italy and Libya on security and irregular migration according to past bilateral agreements, by supporting "security and military institutions in order to stem the flow of illegal migrants". Next, in Art. 1 (C) Italy's engagement to support "Libyan institutions in charge of the fight against illegal immigration" is also made explicit. Article 2 (1) specifies, instead, that the "completion of the system of border control in Southern Libya" constitutes a priority, while on point (2) the authorities agree on the "adaptation and financing of the […] reception centers", (3), the "training of the Libyan personnel within the above-mentioned reception centers" and, (5), the "support to the international organizations that are present and operate in Libya". Lastly, but importantly, Article 4 stipulates

9. "Treaty on Friendship, Partnership, and Cooperation" (commonly known as the Benghazi Treaty), 30 August 2008. Article 19, para 1.
10. European Court of Human Rights (ECtHR), *Hirsi Jamaa and Others v. Italy* [2012] Application No. 27765/09.
11. C. Di Stasio, "Esternalizzazione delle frontiere: violazione dei diritti umani dei migranti e responsabilità dello Stato" [2021] Dirittifondamentali.it.
12. 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 (Italy – Libya) (2 February 2017). Available at: https://eumigrationlawblog.eu/wpcontent/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.
13. The three-page document is divided into two sections: the prologue and the operative section, which contains eight articles. Overall, the Memorandum uses highly broad (and often legally unclear) language, revealing little about the specific initiatives funded or the quantity and source of funds.

the Italian obligation to provide for "the financing of the initiatives mentioned in this Memorandum".

The European Union welcomed the Italian efforts in externalizing border and migration control capabilities to Libya.[14] Following the signing of the MoU, the European Council, during an informal summit in Valletta, affirmed its welcoming stance: "the EU welcomes the Memorandum of Understanding signed on February 2, 2017, by the Italian authorities and President Sarraj and stands ready to support Italy in its implementation".[15] In other words, a strong support was expressed by European institutions towards the Italian agreements with the North African country, as they also made clear their willingness to intensify direct collaboration between the EU and Libya within the framework of the EUNAVFOR MED Operation Sophia.[16]

Although the MoU has allegedly proven useful in reducing the number of migrants arriving on Italian shores, its consequences in terms of human rights violations cannot be overlooked. As early as 2017 Médecins Sans Frontières (MSF) – among other NGOs – foresaw and warned in that the Libyan government would:

> (i) lack the necessary control over parts of its territory and capacity to tackle organized human trafficking, (ii) fail to process asylum claims fairly and efficiently and (iii) be unable to administer detention in accordance with international and regional refugee law.[17]

Regrettably, these predictions materialized, resulting in what many international organizations and NGOs have described as a human rights crisis. Indeed, it is now proven that migrants present in the Libyan territory face serious atrocities at the hands of State and non-State actors alike.[18] This is also because border externalization turned migrants extremely vulnerable, with authorities – e.g., often militias and other (para)military groups - having wide margins of discretion when they implement policies, as they are not subject to any kind of judicial review.

For this reason, the sections to follow will focus on the reconstruction of the legal framework applicable to the process of externalization, with the aim of analyzing the practice described above and bringing about the afore-mentioned violations of international law.

14, G. Pascale (2).

15. European Council, Informal meeting of EU heads of State or Government, Malta, 3 February 2017.

16. The EUNAVFOR MED naval operation (ended March 31, 2021) was a European military maritime security operation, established by Council Decision (CFSP) No. 2015/778 of May 18, 2015, with the objectives of contributing to the management of migration routes in the central Mediterranean and countering illicit trafficking in human beings. The operation has been divided into four phases. For more information, please refer to https://www.difesa.it/OperazioniMilitari/op_intern_corso/eunavfor_med/Pagine/default.aspx.

17. E. Palm, "Externalized Migration Governance and the Limits of Sovereignty: The Case of Partnership Agreements between EU and Libya" [2020] 86(1) Theoria 9.

18. UNHCR, *Detained and Dehumanised: Report on Human Rights Abuses against Migrants in Libya* (2016).

2. ITALY'S INTERNATIONAL LEGAL RESPONSIBILITY FOR COMPLICITY IN GROSS VIOLATIONS OF HUMAN RIGHTS IN LIBYA

Even though Italy disclaims any charge of international responsibility for the previously outlined gross violations of human rights,[19] the question should be whether, and to what extent, Italy's financial and technical support to Libya through agreements such as the Memorandum of Understanding could be considered as an indirect breach of its international human rights and refugee law obligations.

De facto, as previously mentioned, the Italian government cooperates to varying degrees with the LCG and other authorities managing borders and migration in Libya to facilitate the interception of migrants at sea and, more generally, the detection and containment of potential EU immigrants within the African State. Moreover, the subsequent internment of migrants in reception centers overseen by the Department for Combating Illegal Migration (DCIM) is tied to the allocation of resources provided by the Italian government through the MoU. This connection is evident as the establishment, functioning, and personnel training in these centers depend on the support provided.[20]

Considering the above, before going into more detail regarding the framing of Italy's international responsibility, it is necessary to outline the legal basis of international State responsibility. A particular focus will be placed on the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),[21] adopted by the International Law Commission (hereinafter: "ILC") in 2001.

2.1. The International Law Commission Articles on State Responsibility in Relation to Italy's Involvement in Libya

With the main objective of laying down "the definition of the general rules governing international responsibility of States",[22] the articles in question represent nowadays the framework for addressing States' breaches or omissions of international obligations. Indeed, they are extensively used and quoted in the jurisprudence of national, European, and international tribunals.[23] However, they have never been codified in

19. G. Pascale (2). More precisely, the author states that Italy denies any international responsibility for the gross violations of human rights suffered by migrants stranded within Libyan borders and thus outside Italian jurisdiction, and emphasizes that it has not carried out refoulements to Libya since the *Hirsi ruling*, pointing out how migrants are detained or returned to Libyan territory directly by Libyan state bodies.
20. Ibid.
21. Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) (adopted by the International Law Commission, 2001) GA Res 56/83, Annex, UN GAOR, 56th sess, Supp No 49, UN Doc A/56/49 (Vol I) (2001).
22. J. Crawford, *State Responsibility. The General Part* (Cambridge 2013) 3. The focus was on the expression "general rules".
23. R. Kolb, *The International Law of State Responsibility: An Introduction* (Edward Elgar Publishing 2017).

an international treaty and remain widely accepted as customary law. This can be explained in light of the fact that the equilibrium the UN General Assembly was able to find after decades of work could be easily overturned in the eventual process of codification by bargaining stakes and political vagaries.[24]

With regard to its structure, the 2001 draft is divided into four parts and ten chapters, for a total of fifty-nine articles.[25] Part One, Chapter I establishes the general principles of State responsibility. In particular, Article 2 states that: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State".

Part One, Chapter II goes on dealing with the important topic of attribution. Namely, Article 4 establishes that the conduct of State organs "shall be considered an act of that State under international law", while, as enshrined in Article 6, the same conclusion can be reached in the situation in which an organ "is placed at the disposal of a State by another State". After having addressed the *ultra vires* acts of organs or entities in Article 7, Articles 8-11 attempt to delineate the other circumstances in which the conduct that is not that of a State organ or entity is however attributable to the State in international law.[26]

In order to clearly establish the scope of application of this instrument, Chapter III of Part One identifies certain general aspects characterizing the breach of an international obligation. Article 12 highlights that any act which is not in conformity with a given commitment undertaken by a State can be considered as a breach of its obligations under international law. Further boundaries are established by Article 13, which specifies that a State is only responsible for a violation if the obligation in issue was in force for the State at the time the act was performed. The concept of continuing breach of obligations is then introduced in Article 14, while Article 15 addresses breaches involving composite acts.[27]

For the scope of the present analysis, Part One, Chapter IV represents a valuable source of reflection, considering how it explores additional features of State responsibility in relation to the activities of other States – what would be characterized as aiding and abetting or complicity, for instance. Of particular importance is Article 16, which addresses the provision of aid or assistance by one State in the commission of an internationally unlawful act. To complement this scenario, Article 17 deals with situations in which a State directs or controls another State in the performance of a wrongful conduct, whereas Article 18 deals with the more extreme situation of outright coercion between States.[28]

Based on what has been analyzed so far, the law of State responsibility is intended to play an important role in the international scene, in both the ability to define what

24. Ibid.
25. J. Crawford (22) p. 45.
26. Ibid.
27. Ibid.
28. Ibid.

constitutes a breach of an international obligation and in the possibility of covering the consequences of such a violation. Notably, this approach appears to be especially accurate for the circumstances under discussion in this work. Henceforth, a clear analysis identifying how, and to what degree Italy may bear international responsibility for the human rights violations that occur in Libya will be provided in the following sections of this paper, focusing on Articles 16 and 17 ARSIWA.

2.1.1. Issues of Indirect Responsibility: Article 16 ARSIWA

Indirect responsibility refers to a situation in which one entity is held accountable for the actions of another State entity. This occurs when the latter has been facilitated in doing the act by the former. As a result, in such circumstances, the authorizing State is considered indirectly responsible for the actions of the authorized State.

In the context at hand, since the implementation of the Italy-Libya MoU, experts have been debating whether Italy's financial and technical assistance to Libyan authorities could be categorized as a matter of State indirect responsibility. Numerous arguments, in particular, advocate in favor of Italy's responsibility under Article 16 of ARSIWA. This specific article states that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."[29]

With regard to the concept of aid and assistance, one may argue that Italy's support to Libyan authorities can be classified as such. In particular, the funding of training activities of the LCG, the provision of patrolling assets for the deployment of interception operations and, lastly, the training of personnel in Libyan detention centers could facilitate, to a certain degree, the commission of internationally wrongful acts from the part of Libyan authorities. This is because even if this kind of assistance and financing does not violate any international obligations *per se*, the fact that migrants, after being intercepted, are imprisoned in detention centers where they are subjected to severe human rights violations may induce Courts to consider the tangible effects of such "officially authorized" aid and assistance.

Furthermore, the Commission has not set any threshold for the proximity that should exist between, on the one hand, aid and assistance and, on the other, an internationally unlawful conduct. It has limited itself to point out that the help and support must be considerable. In this regard, "there is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act".[30]

29. ARSIWA, Article 16.
30. ILC Yearbook 2001/II/2, p. 66.

Moreover, two more things should be the object of the present analysis, if looking at the subsections (a) and (b) of the article. The State should provide aid and assistance "with knowledge of the circumstances of the internationally wrongful act"[31] and "the act would be internationally wrongful if committed by that State".[32]

Under subsection (a) of Article 16, a State is liable if it provides assistance to another State with the "knowledge" that it is thereby facilitating its unlawful conduct. The interpretation of the requirement of knowledge is, however, unclear. In the judgment rendered in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*,[33] the ICJ applied the element of awareness strictly, as "full knowledge". Nevertheless, it assessed this element in relation to the ruling at hand, thus with respect to the assistance rendered in the commission of the crime of genocide – whose characteristics as an international tort are peculiar.[34] In less specific situations, it might seem correct to find the requirement even when the assisting State is reasonably aware of facilitating the unlawful conduct of the assisted State.[35]

In the present case, the Court may be able to conclude that Italy was aware of the ill-treatment of migrants on the part of the LCG, of the risk that they would be returned, or that they would be subject to abuses of various kinds. Indeed, there have been several accounts of migrants being subjected to extreme violations of their human rights in Libya, as well as evidence that the Italian government was aware of this.[36] In light of that, Courts should have no trouble applying this criterion.[37]

Under subsection (b) of Article 16, the opposability element must be met. It implies that international responsibility for complicity can only arise in relation to unlawful conduct concerning the violation of international norms binding on both the assisting and assisted State. Given the nature of the issue under discussion, it is relatively straightforward to determine that this requirement is likely to be satisfied. Indeed, laws mandating States to respect the life and integrity of people subject to their authority are among the cornerstones of international human rights law. Based on this, it may be stated that, being generally recognized as expressions of customary international law, the right to life and the right not to be tortured or subjected to irreparable injury are expected to bind all States, independent of treaty ratification. In any case, Libya, like EU Member States such as Italy, has ratified the 1926

31. ARSIWA, Art. 16 (a).
32. ARSIWA, Art. 16 (b).
33. ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] Judgement.
34. The ICJ itself pointed out the very peculiar nature of the tort of genocide and the specific applicable conventional rules (para. 421).
35. G. Pascale (2), p. 432.
36. See, among others: *Amnesty International, Libya's Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants* (2017); Forensic Oceanographic, *Mare Clausum. Italy and the EU's undeclared operation to stem migration across the Mediterranean* (2018).
37. A. Pijnenburg, "From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?" [2018] 20(4) *European Journal of Migration and Law* pp. 396-426.

Convention against Slavery, as amended in 1953 under the auspices of the UN;[38] the 1966 International Covenant on Civil and Political Rights;[39] the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention");[40] and the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons.[41]

Lastly, among the elements that determine international responsibility for complicity under Article 16 ARSIWA, in addition to those just mentioned, the concept of intentionality is also included by the ILC in the Commentary. Specifically, for the applicability of Article 16, "the aid or assistance must be given with a view to facilitating the commission of the wrongful act", pointing out that:

> A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.[42]

However, in the ruling made in the *Genocide case*,[43] the ICJ declared the customary nature of the provision codified in Article 16 without mentioning the element of intentionality included in the Commentary. Moreover, the lack of inclination on the part of States to include such a requirement had already been identified during the codification work. Finally, a potential internal contradiction arises within the Commentary itself, particularly in its treatment of Article 2 of ARSIWA, where it underscores that "only the act of a State matters, independently of any intention". In light of the above, when reconstructing the customary norm of international State responsibility for complicity, it seems preferable to disregard the above-mentioned condition in the present case.[44]

38. League of Nations, *Convention to Suppress the Slave Trade and Slavery* (25 September 1926) 60 LNTS 253, Registered No. 1414. Ratified by Italy on February 4, 1954, and by Libya on February 14, 1957.
39. UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. Ratified by Italy on September 15, 1978, and by Libya on May 15, 1970.
40. UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85. Ratified by Italy on January 12, 1989, and by Libya on May 16, 1989.
41. UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, United Nations, Treaty Series, vol. 2237, p. 319. Ratified by Italy on August 2, 2006, and by Libya on September 24, 2004.
42. ARSIWA, Commentary on art. 16, p. 66.
43. ICJ (33).
44. G. Pascale (2), p. 436.

Apart from that, however, despite the complexities of establishing a direct link between aid and assistance and internationally wrongful actions committed by another State, it has been demonstrated that both the condition of knowledge and opposability seem to be met. Therefore, Article 16 ARSIWA could be a viable option for holding Italy responsible for the crimes in question. Nevertheless, to complete the analysis in question, it is also deemed necessary to analyze the possibility that Italy is responsible, not for the aid and assistance, but for the direction and control exercised in the commission of an internationally wrongful act.

2.1.2. Issues of Indirect Responsibility: Article 17 ARSIWA

Another way through which Italy could potentially be held responsible for the crimes committed by Libyan authorities is based on Article 17 ARSIWA, which enshrines that:

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

Article 17 shares several parallels with Article 16. However, its role differs in the interpretation given to the concept of responsibility. Whereas under Article 16, Libya is exclusively responsible for the pullbacks, and Italy is solely responsible for the aid or assistance provided, under Article 17, responsibility for the pullbacks is shared by both Libya and Italy.

Regarding the subsections of the Article in question, the Court would have to find that Italy was aware of the circumstances of the internationally unlawful act under Article 17 (a). Indeed, unlike the Commentary to Article 16, the Commentary to Article 17 does not imply that the appropriate threshold is closer to purpose than knowledge. But as previously stated in relation to Article 16, Courts may conclude that the criterion of awareness is satisfied at least in terms of exposing migrants to the danger of ill-treatment by returning them to Libya.

Finally, Article 17 (b) compels to determine whether "the completed act would have been wrongful had it been committed by the State itself". In this regard, beyond what has been mentioned in connection with Article 16, it can be further added that the *Hirsi case* has already proven that sending refugees to Libya violates Italy's responsibilities under the Convention, and the Court would very certainly find that ill-treatment or torture of migrants would violate Article 3 of the ECHR. As a result, it appears that applying this last criterion will not provide the Court with many difficulties.

Nonetheless, it is worth focusing on what appears to be a notable difference compared to Article 16. Specifically, the Commentary indicates that: "Article 17 deals with a second case of derived responsibility, the exercise of direction and control by

one State over the commission of an internationally wrongful act by another."[45] One can question, therefore, how such direction and control should be interpreted.

In the drafting of Article 17, the term "control" alludes to examples of domination over the commission of wrongdoing rather than just the exercise of monitoring, let alone simple influence or concern. Similarly, the term "direction" does not refer to mere provocation or suggestion, but rather to operational guidance.[46] In this regard, one may wonder whether such direction and control is meant to include instances of broad direction and control, as well as circumstances of effective and real intervention.

Overall, notwithstanding the specific factual dynamics characterizing the relationship between Libya and Italy, an argument can be made that Courts are hesitant to embrace a broader interpretation of Article 17 ARSIWA. The exceptionally challenging task lies in substantiating the claim that the Italian government exerts a level of direction and control consistent with the international standards set by the ILC. Taking these considerations into account, it seems more likely that the conditions outlined in Article 16 are met than those in Article 17.

In any event, the ILC articles simply attempt to define the general principles of State responsibility. As a result, it will ultimately be up to the respondent Courts to evaluate whether a State is effectively responsible for its own or other States' wrongdoing. In light of that, it is deemed necessary to place alongside the theoretical discussion regarding the potential legal basis underpinning Italy's international responsibility, an analysis of the European Court of Human Rights' (ECtHR) jurisdiction regarding the topic at hand, given the Court's widespread ratification by States and the strong authority of its rulings at the regional and, to a lesser degree, global levels. It is useful to start from an analysis and reflection of the *Hirsi case*: the implications of this judgment in relation to Member States' policies on migration management in the central Mediterranean route could be useful for the further assessment of their responsibility before the ECtHR. In this regard, a special reference will then be made to the most recent case of *S.S. and Others v. Italy*.

2.2. *Conceptualizing the Jurisdiction of the ECtHR:* Hirsi Jamaa and Others v. Italy *and* S.S. and Others v. Italy

In the *Hirsi Jamaa and Others* case, the Grand Chamber of the European Court of Human Rights issued a unanimous final judgment, condemning the Italian State for violating Articles 3 and 4 of Protocol No. 4, as well as Article 13 of the European Convention on Human Rights. These violations stemmed from an incident that occurred 35 miles off the coast of Lampedusa on May 6, 2009.

The case revolved around the rescue of over two hundred migrants and refugees from various nationalities, all departed from Libya, in international waters south of

45. ARSIWA, p. 68, para. 1.
46. ARSIWA, p. 69, para.7.

Lampedusa. Instead of bringing them to Italian shores, the Italian Coast Guard and Guardia Di Finanza transferred them to Tripoli, where they were handed over to Libyan authorities and subsequently placed in detention centers. Some of the affected individuals, represented by the Italian Refugee Council (CIR), appealed to the ECtHR, citing mistreatment after being returned to the war-torn territory of Libya without the opportunity to seek international protection.[47]

Italy's defense in the case included three main arguments. First, they challenged the validity of powers of attorney and the quality of contacts between applicants and their lawyers, citing a previous court decision. Second, they argued that the events didn't occur within Italian jurisdiction. However, the ECtHR rejected this argument, emphasizing the Flag State Principle in international waters. Third, Italian officials disputed violating Article 3 of the Convention, claiming Libya posed no obvious risk to refugees and that none had expressed a desire for political asylum in Italy.[48]

Despite that, the ECtHR concluded that Italy had violated Article 3 of the Convention, prohibiting torture and inhuman treatment, by sending the applicants back to Libya where they faced harsh conditions and the risk of further repatriation to a place of persecution. The Court also found Italy in violation of Article 13, pertaining to the right to an effective remedy, as returning the migrants to Libya made it practically impossible for them to file complaints against Italian authorities. Additionally, a violation of the rule against collective expulsions, Article 4 of Protocol No. 4, was established.[49]

One may argue that the *Hirsi Jamaa and Others* case set an important precedent by prohibiting the return of migrants to places where they face inhuman treatment. However, this ruling inadvertently created a legal gap that allowed Member States to circumvent its implications. By anchoring Italy's jurisdiction to the Flag State Principle, the decision permitted States to transport migrants on vessels registered under non-European Convention on Human Rights (ECHR) ratified flag States. This situation has become particularly pronounced following agreements like the Italy-Libya MoU. In light of that, it is imperative to conduct a thorough analysis of the ongoing case of *S.S. and Others v. Italy*,[50] which, being a 2017 case, serves as a pertinent example of current externalization practices and underscores the implications of the prior ruling.

Following a rescue operation at sea, more than 40 survivors were returned to Libya by the LCG, exposing them to confirmed human rights violations. It appears that the operations were remotely managed by the Italian Maritime Rescue Coordination Cen-

47. A. Liguori, "La Corte europea dei diritti dell'uomo condanna l'Italia per i respingimenti verso la Libia del 2009: il caso Hirsi" [2012] Rivista di diritto internazionale.
48. P. De Stefani, "Hirsi Jamaa e altri c. Italia: illegali i respingimenti verso la Libia del 2009" (2012) https://unipd-centrodirittiumani.it/it/schede/Hirsi-Jamaa-e-altri-c-Italia-illegali-i-respingimenti-verso-la-Libia-del-2009/249.
48. Ibid.
50. European Court of Human Rights (ECtHR), S.S. and Others. v. Italy [2017] Application No. 21660/18.

tre (IMRCC), which holds authority over search and rescue operations in the Search and Rescue maritime area under Italian jurisdiction. The precise chain of command remains unclear, with questions surrounding whether the LCG voluntarily assumed operational control or did so at the IMRCC's direction.[51]

In this new case, the claim asserts that Italy is responsible, akin to the *Hirsi case*, for violations of Articles 2 (right to life), 3 (prohibition of torture and inhuman and degrading treatment), and 4 of Protocol No. 4 (prohibition of collective expulsions) of the ECHR. The primary issue revolves around the jurisdictional link. If it can be established that Italian authorities were directly involved in the events, the case becomes straightforward. The critical factor is whether Italy exerted effective control over individuals during the sea rescue operations. Italian assets present at the scene, as well as Italy's influence on Libya through the MoU, which includes financial and technical support measures, the provision of ships, and LCG training, may support such finding.[52]

Alternatively, the Court may invoke the theory of positive obligations.[53] This theory holds that States parties to the ECHR are obligated not to engage in conduct that violates the human rights protected by the Convention. If the Court adopts this approach, it can investigate whether Italy violated its positive obligations under Article 3 of the ECHR. In many cases, the Court has been willing to establish a State's jurisdiction outside its territory by considering complicity scenarios with lower thresholds than the criteria of effective control. This theory could bypass the obstacles that might arise when applying Article 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), where intentionality is a factor.

In conclusion, despite the legal challenges presented by the *S.S. and Others v. Italy* lawsuit, the case law practice reveals more than one element on the basis of which the Court could rule in favor of a welcoming judgment with respect to Italy's responsibility. Such a decision would, however, require moving beyond established paradigms of extraterritorial jurisdiction and embracing new, evolutionary interpretations.[54] Indeed, one may argue that in the current political scenario that sees a legitimation of the practice of externalization of border and migration policies and of the consequent serious violations of human rights, the case under discussion appears to be of fundamental importance to ascertain Italy's international responsibility in relation to the above-mentioned crimes.

51. At the basis of the appeal lies the audio-visual reconstruction of the incident produced by Forensic Oceanography (Forensic Architecture, University of London), which can be found at the link: https://forensic-architecture.org/investigation/seawatch-vs-the-libyan-coastguard#toggle-id-3.
52. A. Fazzini, "Il caso S.S. and Others vs Italy nel quadro dell'esternalizzazione delle frontiere in Libia: osservazioni sui possibili scenari al vaglio della corte di Strasburgo" [2020] Diritto, Immigrazione e Cittadinanza 87.
53. In this regard, see: A Liguori, *Migration Law and The Externalisation of Border Controls* (Routledge 2018) 28.
54. A. Fazzini (52).

3. THE EUROPEAN UNION'S INTERNATIONAL LEGAL RESPONSIBILITY FOR COMPLICITY IN GROSS VIOLATIONS OF HUMAN RIGHTS IN LIBYA

Over the past decade, the European Council has steadily shifted its focus towards the strengthening of the EU's external borders. The Union has become extensively involved in many of the agreements that underlie migration governance outside its territory, whether through the facilitation of migration management or its financing. EU institutions and agencies, such as the European Border and Coast Guard Agency (Frontex), and the European Union Agency for Asylum (EASO), play pivotal roles in the implementation of these agreements.[55] As a result, also the EU has been heavily criticized for prioritizing the externalization of border and migration control in collaboration with third countries over migrants, refugees, and asylum seekers' human rights.[56]

More in detail, the EU is politically and financially assisting third countries – among which Libya – in responding to migratory challenges and is supporting local authorities in reinforcing border controls. The International Organization for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR) have largely channeled this financial aid, which includes supporting the voluntary return of migrants to their countries of origin. Furthermore, there has been an increase in funding through initiatives such as the EU Emergency Trust Fund for Africa (EUTF), followed by the Neighbourhood, Development and International Cooperation Instrument (NDICI), and an over-strengthening of the supportive role of Frontex.[57]

Based on what has been stated, and thus in light of the EU's strong involvement concerning to the externalization of border and migration policies in Libya, it is deemed necessary to analyze the possibility that the Union as well may be potentially responsible for the crimes committed on the Libyan territory – as it was previously done with regard to Italy. This inquiry must take into consideration the heightened complexity when third countries restrict migration flows and commit human rights violations as a result of the cooperation with an international organization like the EU. In support of this argument, a clear example of how difficult it is to hold EU institutions accountable for outsourcing border control and management – even when they are implemented (in part) on the EU territory – is the case of *NF v European Council*.[58] The Court of Justice of the European Union (CJEU) held in this case that the

55. V. Mitsilegas, *The criminalisation of migration in Europe. Challenges for human rights and the rule of law* (New York, NY: Springer 2015).
56. A. Radjenovic, "Pushbacks at the EU's external borders" [2021] EPRS, European Parliament.
57. A. Pijnenburg and C. Rijken, "Playing Cat and Mouse: How Europe Evades Responsibility for its Role in Human Rights Abuses of Migrants and Refugees" in M. Van Reisen, M. Stokmans and K.A. Gebre-Egziabher Mobile Africa: Human Trafficking and the Digital Divide, (Langaa Research & Publishing CIG 2019) 700.
58. CJEU, N.F. v. European Council [2017] T-192/16. The case was filed by three Syrian asylum seekers arrived in Greece and under the risk of being returned to Turkey in case their applications for asylum were rejected according to the provisions contained in the EU-Turkey statement. In light of the above, the applicants wanted to challenge the legality of the statement on the basis of Article 263 TFEU.

EU-Turkey Statement was not signed by the European Council, but rather by the heads of State or governments of EU Member States and Turkey. Based on the above, it was established that the Court lacked jurisdiction.[59]

That being said, with the aim of establishing potential grounds for enhancing the international legal responsibility of an international organization in the commission of a wrongful act, the following section will delve into the International Law Commission Articles on the Responsibility of International Organizations (hereinafter: "ARIO").[60] This instrument will be taken into account as a possible reference to investigate the responsibility of the EU in the violations perpetrated against migrants, refugees, and asylum seekers in Libya.

3.1. The International Law Commission Articles on the Responsibility of International Organizations in Relation to the EU's Involvement in Libya

The responsibility of international organizations is a branch of international law that has grown in prominence – in both theory and practice – in recent decades. The International Law Commission started looking at the topic in 2002. It completed its work in August 2011 by adopting, on second reading, a set of 67 Draft Articles on the Responsibility of International Organizations.

Due to the fact that the ARSIWA draft was used as the foundation for the ARIO, many of the sections are identical, with the key difference being the substitution of the term "international organization" for "State". Considering the above, many States, IOs, and scholars have expressed dissatisfaction with the ILC for failing to justify the substantial similarities between the IOs and State Responsibility Articles. However, according to the ILC special rapporteur Giorgio Gaja: "It would be unreasonable for the Commission to take a different approach on issues relating to international organizations that are parallel to those concerning States".[61]

The fundamental premise at the heart of the ARIO is "that every internationally wrongful act of an international organization entails the international responsibility of that organization". Such a view is based on the international legal personality of international organizations, which was first recognized with the ICJ's 1949 *Reparation for Injuries advisory opinion*.[62] On that occasion, the Court held that the international personality of the UN was separate from that of its Member States, and that therefore the UN was "capable of possessing international rights and duties".

Confirming the above, Article 2 (a) of the ARIO states that: "International organization means an organization established by a treaty or other instrument governed

59. A Pijnenburg and C Rijken (57).
60. International Law Commission, "Draft articles on the responsibility of international organizations" (2011) A/66/10.
61. ILC "Responsibility of International Organizations, First Report on Responsibility of International Organizations" by Mr. Giorgio Gaja, Special Rapporteur (2003) UN Doc. A/CN.4/532, at 6.
62. ICJ, *Reparation for injuries suffered in the service of the Nations* (Advisory Opinion) [1949] ICJ Rep 174, ICGJ 232.

by international law and possessing its own international legal personality".[63] Hence, the Commission's understanding of the international legal personality of IOs is that of an "objective" personality, for which no recognition from an injured State or other entity is deemed necessary.[64] Furthermore, apart from any kind of legal reasoning, from a political point of view one may consider that – based on the significant role that international organizations currently play at the global level – not holding them responsible when violating international norms would be problematic in several respects.

In light of the above, the possible international legal responsibility of the EU will be conceptualized as an instance of aid and assistance. Article 14 ARIO – being the counterpart of Article 16 ARSIWA – will be the main object of the following analysis.

3.1.1. Issues of Indirect Responsibility: Article 14 ARIO

As analyzed in the previous section in relation to the actions of the Italian government, in principle, IOs can also be held responsible for aiding or assisting another State or another IO in committing wrongful conduct. In other words, if the EU supports or enables another State or IO in breaching human rights, it can be held responsible if there is ground to believe that it was aware of actions which would have been considered as an internationally illegal act if performed by the EU itself.

In the case study under consideration, what could qualify as aid and assistance under Article 14 ARIO, is evident in the various initiatives and agreements approved by EU institutions to manage migration along the Central Mediterranean route and aimed at outsourcing border control to non-EU third countries, namely Libya.

As early as February 2017, the European Council declared that it "welcomes the Italian-Libyan Memorandum of Understanding", saying that it was ready "to support Italy in its implementation".[65] Importantly, such support was officialized as the cooperation between the EU and Libya had already intensified, especially with the establishment of the operation EUBAM Libya in 2013. In this regard, it is important to note that the EU has, on the one hand, allocated a substantial package of economic aid to Libya, to be used for the "management" of migratory flows, and, on the other hand, has launched the above-mentioned mission, which assists local authorities in border management.[66]

Later, in 2015, the European naval mission EUNAVFOR MED Operation Sophia was also launched with the first objective of identifying and monitoring networks of migration "through intelligence gathering and patrolling on the high seas in accordance with international law".[67]

63. ARIO, Article 2.
64. ARIO, Commentary to Article 2.
65. European Council, Informal meeting of EU heads of state or government, Malta, 3 February 2017.
66. Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya) [2013] OJ L 138.
67. Council Decision 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L 122, para. 2.

The following year, the Council of the EU decided to expand the mission's mandate to include the training of the LCG, with a focus on patrolling the Libyan territorial waters for the purpose of countering human trafficking.[68] Through its logistical and financial support, the EU helps the LCG in intercepting migrants' vessels directed toward the European shores, so that these can be brought back to Libya.

One may point out, as also noted by several authors,[69] that the aid and assistance that the European Union provides to Libyan actors, fully falls within the provisions of Article 14 ARIO. This is due to the fact that the EU not only supports Italian authorities in outsourcing border and migration control to Libya but has also devised its own policy of entrusting the management of unwanted migration to this North African country. As a consequence, it seems clear that the financial, logistical, and military support provided to Libya with the stated purpose of countering transnational crime has, in reality, facilitated the interception, jailing, and the frequent torturing of migrants.[70] Indeed, as reported by many NGOs, it would not be possible for the LCG to intercept individuals within the Libyan SAR zone without the support of European entities, since Libya does not have a fully operative RMCC yet.[71]

With that in mind, it is now necessary to clarify whether or not this type of support meets the subsections (a) and (b) of Article 14 ARIO. The EU should provide aid and assistance first "with knowledge of the circumstances of the internationally wrongful act" and, second, "the act would be internationally wrongful if committed by that organization".[72]

As with regard to the first element, it seems that the same considerations made for Italy's complicity could be held valid, along with the clarification that the EU's awareness of the serious human rights violations committed in Libya is proven, inter alia, by a EUBAM mission report.[73] The latter states that: "there are reports about these DCs which describe gross human rights violations and extreme abuse and mishandling of detainees, including sexual abuse, slavery, forced prostitution, torture and maltreatment".

Secondly, under subsection (b) of Article 14, namely the opposability element, the international responsibility for complicity can only arise in relation to unlawful conduct concerning the violation of international norms binding on both the assisted State (or organization) and the assisting IO. In this case as well, satisfying this condition should not prove to be particularly problematic. As enshrined in Article 6 TEU,

68. Ibid, Article 2 bis.
69. See, among others, G. Pascale (2).
70. G. Puma, "Complicità tra Stati e organizzazioni internazionali nella violazione di obblighi erga omnes" [2019] Diritto pubblico comparato ed europeo pp. 69-100.
71. See: European Commission, *Support to Integrated border and migration management in Libya – First phase* (T05-EUTF-NOA-LY-04) and European Commission, *Support to Integrated border and migration management in Libya – Second phase* (T05-EUTF-NOA-LY-07).
72. ARIO, Article 14.
73. EUBAM Libya Initial Mapping Report Executive Summary, 25 January 2017, par. 4. 3. Available at: https://www.statewatch.org/media/documents/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf.

the respect of fundamental rights is one of the cornerstones of EU law and the organization is bound by it. Furthermore, the EU is bound by the Charter of Fundamental Rights (CFR) of the European Union and by the fundamental rights enshrined in the ECHR, which, resulting from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.[74] Lastly, not only the right to life and the right not to be subject to inhuman or degrading treatment are part of the above-mentioned instruments, but are also part of international customary law.

With that in mind, although establishing the link between aid and assistance provided by an IO and internationally wrongful act committed by a State is more difficult than establishing the legal responsibility of a State, for the case of Libya and the EU both the subsections of article 14 ARIO seem to be met. Consequently, this article could serve as a viable option for holding the EU responsible for the serious human rights violations taking place on the Libyan territory.

3.2. Frontex and Its Role

Apart from being held responsible for conducts that violate European human rights obligations that are attributable to its institutions, the EU might incur international legal responsibility for the actions of EU agencies having legal personality (but lacking international one) and being involved in the field of migration control. As a matter of fact, given the multifaceted mandate of agencies like Frontex, which encompasses numerous operational tasks, it is deemed relevant to analyze its potential responsibility in relation to the crimes committed in Libya. For doing so, it is essential to first clarify the agency's role and mandate, before contextualizing Frontex's involvement in the African country.

The European Border and Coast Guard Agency (Frontex) was established in 2004 with the primary objective of enhancing border security. Its main task is to coordinate the activities of Member States in the implementation of Community measures relating to the management of external borders.[75] Like a growing number of other European agencies, Frontex possesses independent legal status and enjoys operational and financial autonomy.[76] Its legal foundation is based on Article 62 and more broadly in Title IV of the Treaty Establishing the European Community, which governs visas, asylum, immigration, and other policies linked to the free movement of persons.[77]

While the control and surveillance of external borders remain primarily responsibilities of Member States, Frontex's main tasks, as enshrined in Article 2 of the

74. Treaty on European Union (TEU), Article 6 (3).
75. See: Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Co-operation at the External Borders of the Member States of the European Union (FRONTEX) OJ L 349.
76. FRONTEX Regulation, Article 15, para. 1.
77. See: Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community [2006] C 321 E/1.

Frontex Regulation, are to: foster cooperation between Member States in the management of the EU's external borders; to assist Member States in the training of national border guards; to carry out risk analyses, and, to intercede when increased technical and operational assistance is needed. Furthermore, over the years and especially following the 2016 Regulation,[78] the role of Frontex has been strengthened and extended to several operational aspects of external border control, including actions in third countries[79] and the repatriation of third-country nationals who are deemed to be "illegally" present on EU territory.

In the context of joint operations in the Mediterranean Sea, the role of Frontex is that of coordinating SAR operations when migrants are intercepted at sea, especially in border areas that are under particular distress. It does so by deploying Border and Coast Guard Teams, as well as vessels, aircrafts, and other types of equipment either funded or owned by Member States.[81] Examples of such interventions are evident in various operations in which the agency participates, including Operation Triton (later replaced by Operation Themis in 2018), and the previously mentioned EUNAVFOR MED Operation Sophia.[82]

Based on the fact that migrants, also thanks to Frontex's interceptions, are often returned to Libya at the ends of those operations, the conduct of the agency at sea appears to be particularly relevant to the issue under discussion. In fact, accusations against Frontex do not point to a direct involvement in these pushbacks, but rather to an indirect collaboration with the LCG where Frontex plays a coordinating and surveillance role.[83] Notably, while Member States maintain primary responsibility for managing their external borders due to sovereignty considerations, Frontex actively coordinates most of their activities.

3.2.1. The Conduct of Frontex and the Consequent European Union's Indirect Responsibility under Article 14 ARIO

The respect for and the protection of fundamental rights should be unconditional and essential to integrated border management strategies. In light of that:

> Frontex strictly adheres to the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, and relevant international

78. Regulation (EU): 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L 251.
79. Regulation (EU) 2016/1624, Consideration 3.
80. Ibid, Consideration 11.
81. M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018).
82. A. Pijnenburg and C. Rijken (57).

> and human rights law instruments, including the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.[84]

These commitments are further underscored in Article 80 of the EBCG Regulation,[85] mandating the European Border and Coast Guard Agency to ensure compliance with human rights standards. Despite these assurances, the agency's conduct has come under intense scrutiny and has been a subject of political debates.

The increasing number of pushbacks at sea has resulted in many NGOs – among which Front-lex[86] – initiating official legal actions against Frontex. More specifically, in May 2021, the NGO filed a legal proceeding on behalf of two asylum seekers, an unaccompanied minor from Burundi and a Congolese woman. According to the NGO's official statement, these applicants, while seeking asylum on EU soil (Lesbos), were subjected to severe mistreatment. They were "rounded up, assaulted, robbed, abducted, detained, forcibly transferred back to sea, collectively expelled, and ultimately abandoned on rafts with no means of navigation, food or water off the coast of Lesvos, Greece". Allegedly, Frontex played a role in these violations and displayed reluctance in suspending its operations within the Joint Operation Poseidon. Consequently, the legal action was framed as a claim of failure to act in accordance with Article 265 of the Treaty on the Functioning of the European Union (TFEU).

While this remains a viable option for activating intra-EU actions to scrutinize and, when necessary, suspend operations whose implementation violates human rights, the Union's international responsibility in Libya remains a more contested issue. In this context, the conditions stipulated in Article 14 ARIO must also be met.

Without reiterating what has already been stated in relation to EU's institutions, it is plausible to argue that the EU, through Frontex, could be held responsible for the wrongful conduct perpetrated against refugees, migrants, and asylum seekers in Libya. By considering that over 60% of the agency's budget was channeled to operational activities,[87] the EU's contribution via this agency must be deemed substantial enough under Article 14 of the ARIO to be regarded as support for the operations of Libyan authorities.

Such operational activities, involving the interception of boats in distress at sea and the subsequent alert of the LCG, could be considered sufficient for establishing a decisive link between the alleged wrongful conduct and the facilitation of human rights violations against migrants and refugees, as mandated by Article 14. Furthermore, both the conditions (a) and (b) of the article seem to be satisfied. While the opposability element concerning the breached obligation appears to be the same

84. Frontex, "Fundamental Rights at Frontex" https://frontex.europa.eu/accountability/fundamental-rights/fundamental-rights-at-frontex/.
85. Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295.
86. Front-LEX, "Legal Action Against FRONTEX Submitted", https://www.front-lex.eu/2021/05/25/legal-action-against-frontex-submitted-2/.
87. European Court of Auditors, Audit Preview Frontex (2020).

in this case as well, with regard to the condition of "knowledge", the recurrent references by NGOs to episodes of pushbacks which have seen Frontex's involvement bolster the argument that the EU is well aware of such circumstances.[88] Additionally, the fact that Frontex's Executive Director has not taken any action under Article 46 (3) and (4) of the EBCG Regulation to withdraw funding from contested operations highlights a notable inaction.

It is thus evident that not only EU institutions, but also agencies such as Frontex, by aiding and assisting the LCG, play a quite active role in contributing to the violations of migrants and asylum seekers' human rights in Libya. This could allegedly be considered enough for the international responsibility of the EU to be taken into account by the CJEU which, at present, is the only Court that holds jurisdiction over the actions of the Union.

4. BEYOND THE EU AND ITALY'S IMPUNITY IN THE EXTERNALIZATION OF MIGRATION AND BORDER CONTROL IN LIBYA

The grave human rights violations that continue to take place on the Libyan territory, with the alleged complicity of the Italian government and European institutions and agencies, continue to attract the attention of the international community. As emphasized, the crimes perpetrated against migrants, refugees, and asylum seekers in Libya not only exhibit extensive geographic reach and impact a significant number of individuals but also possess a systematic nature. Consequently, it becomes evident that there is a need to reflect not only on the lack of formal acknowledgment of the alleged responsibility of Italy and the EU through judicial sentences but also on the paramount importance of addressing and rectifying the existing stagnant situation.

Based on these considerations, given that the previous sections delineated the framework of the EU and Italy's externalization of migration management and scrutinized the legal underpinnings of the international responsibility of States and international organizations, it is now imperative to delve into the analysis of the subsequent issues. Regarding Italy, as the matter of State responsibility has been examined through practical examples from the ECtHR jurisdiction, this section will pivot to the potential individual criminal responsibility of Italian officials involved in the same crimes. Following this, suggestions for enhancing Italian-Libyan cooperation will be outlined, recognizing that the sole means to avoid incurring criminal responsibility or the afore-mentioned international State responsibility is to suspend or terminate the MoU.

Conversely, for the European Union, a distinct question will be addressed. Given the impossibility of subjecting the Union to the jurisdiction of international Courts

88. EURIS Jean Monnet Project 'Frontex' involvement in illegal pushbacks and EU's possible international responsibility' (2022) https://www.jm-euris.eu/frontex-involvement-in-illegal-pushbacks/.

such as the ICC or the ECtHR, the focus will be on improving the capacity of the CJEU – the sole Court with jurisdiction over the organization's actions. This will be achieved, subsequent to outlining avenues for accessing the CJEU jurisdiction for fundamental rights violations caused by EU bodies, by drawing inspiration from existing models of the ECtHR. Lastly, considering that the EU-Libya cooperation lacks a formal treaty like the MoU that could be suspended or terminated, general recommendations will be provided to enhance the existing framework of collaboration.

4.1. Prosecution of Italian Officials Before the ICC for Complicity in the Libyan Wrongdoings

The international State responsibility of Italy in relation to the crimes committed by Libyan authorities has already been dealt with and is currently under the scrutiny of the ECtHR in the pending case *S.S. and Others v. Italy*. However, State responsibility is not the only way to address alleged violations of international law. As a matter of fact, since individuals may be held criminally responsible for international crimes (i.e., war crimes, crimes against humanity, and genocide) under the jurisdiction of the International Criminal Court (hereinafter: "ICC"), it is deemed relevant to explore this possibility in relation to the participation of Italian officials in the Libyan wrongdoings, which may amount – as also confirmed by the 2022 Human Rights Council "Report of the Independent Fact-Finding Mission on Libya"[89] – to crimes against humanity under Article 7 of the ICC Statute.[90]

There are three options through which a case can reach the jurisdiction of the Court: it can be reported by a State party, by the UN Security Council or, alternatively, it can be initiated as a result of an independent investigation of the ICC.[91]

In the Libyan context, the UN Security Council adopted, in 2011, the United Nations Security Council Resolution 1970, which established the jurisdiction of the Court in relation to war crimes and crimes against humanity committed on the Libyan territory since 2001.[92] In May 2018 the Prosecutor of the Court Fatou Bensouda, on the occasion of the Statement to the United Nations Security Council on the Situation

89. Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya* (2022).
90. UN General Assembly, "Rome Statute of the International Criminal Court" (last amended 2010) (17 July 1998) ISBN No. 92-9227-227-6, Article 7. On the matter, see: A. Pizzuti, 'ICC Situation on Libya: The ICC Prosecutor Should Look into Libyan Criminal Proceedings Concerning Crimes Committed Against Migrants' (2020) http://opiniojuris.org/2020/11/20/icc-situation--on-libya-the-icc-prosecutor-should-look-into-libyan-criminal-proceedings-concerning-crimes-committed-against-migrants/; C. Meloni and X. Zhang, "Complementarity Is No Excuse: Why the ICC Investigation in Libya Must Include Crimes Against Migrants and Refugees" (2021) https://opiniojuris.org/2021/12/01/complementarity-is-no-excuse-why-the-icc-investigation-in-libya-must-include-crimes-against-migrants-and-refugees/.
91. UN General Assembly, "Rome Statute of the International Criminal Court" (last amended 2010) (17 July 1998) ISBN No. 92-9227-227-6, Article 13.
92. UN Security Council, 'Security Council resolution 1970 (2011) [on the situation in the Libyan Arab Jamahiriya]' (2011) S/RES/1970.

in Libya, affirmed that "migrants are reportedly killed, abused and mistreated while in detention and in transit" and that therefore ongoing investigations should also focus on the crimes allegedly committed against them.[93] In light of the above, should the decision be made to investigate Italian officials for their complicity in the previously mentioned crimes, it would be possible to do it within the framework of the ongoing investigation in Libya.

Alternatively, a second possibility involves the launching of a new preliminary independent investigation that would only focus on the alleged wrongdoings committed against migrants, without being connected to the ongoing one. Indeed, since Italy has ratified the ICC Statute, also known as the Rome Statute, according to Article 12 the jurisdiction of the ICC can be exercised for crimes committed on the Italian territory (2) (a) and for crimes committed by Italian nationals (2) (b).[94] However, based on the fact that the potential responsibility of Italian officials is accessory to the activities of Libyan authorities, it is uncertain whether the Prosecutor would initiate such separate investigation.[95]

Lastly, a third option involves a second referral on the Libyan situation from the part of the UN Security Council. Indeed, the option in question could be more appropriate for enhancing the jurisdiction of the ICC, but would require a solid political willingness coming from UN Members States, especially the five with veto rights, namely China, France, Russia, the United Kingdom, and the United States.[96]

In all the scenarios mentioned above, for the Prosecutor to start an investigation, it is necessary to satisfy the principle of complementarity, and therefore to demonstrate Italy's unwillingness to address such crimes. According to Article 17 (1) (a): "A case is inadmissible where: The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution".[97]

In addition, it seems worth of observing that the *modus operandi* of the Prosecutor is that of focusing on the individual who has demonstrated the greatest re-

93. The statement is available at: https://www.icc-cpi.int/news/statement-united-nations-security-council-situation-libya-pursuant-unscr-1970-2011-4.
94. In particular, Article 12 (2) establishes that: "In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national."
95. A. Preziosi, "Can top Italian officials be prosecuted and tried by the ICC for complicity in the crimes committed against migrants in Libya?" (2022) https://www.grojil.org/blog2/2019/02/04/can-top-italian-officials-be-prosecuted-and-tried-by-the-icc-for-complicity-in-the-crimes-committed-against-migrants-in-libya.
96. A.S. Galand, "Making Libya an ICC Priority Situation: Fake Promises to a Difficult Customer?" (2017) http://opiniojuris.org/2017/01/13/making-libya-an-icc-priority-situation-fake-promises-to-a-difficult-customer/.
97. ICC Statute, Article 17 (1) (a).

sponsibility in the occurrence of a given situation. Considering that high-level political or military offices do not represent a shield in front of the activity of the Court, this means that a person can be held accountable for the behaviors of those under his or her authority. This is all the more relevant if one takes into account the fact that, according to Article 27 of the ICC Statute, the Statute (1) "shall apply equally to all persons without any distinction based on official capacity" and that (2) "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".[98]

With regard to the modes of liability, it is necessary to establish on which grounds it would be eventually possible to hold Italian officials responsible for their actions. More in detail, a first possibility to be taken under consideration is that of Article 25 (3) (c) of the ICC Statute, which deals with the issue of aiding and abetting – and is similar to Article 16 ARSIWA and 14 ARIO with regard, respectively, to the responsibility of States and of international organizations.[99] Indeed, without repeating what has already been stated in the previous chapters, by supporting the operations carried out by the LCG, and thus by contributing to the return of the rescued migrants, asylum seekers and refugees on the Libyan shores, it may be argued that Italian officials have facilitated the commission of such crimes.

Alternatively, Italian officials may be held responsible under the meaning of Article 25 (3) (d), which criminalizes the intentional assistance provided to a group with a common purpose when involving the commission of a crime falling within the jurisdiction of the ICC.[100]

However, it is the author's opinion that such a path, despite being the preferred one, could encounter several difficulties. Indeed, for such options to be effectively implemented the ICC would require a strong political support that is unlikely to be put in place at this particular moment in history, during which the concern is mostly focused on curbing migratory flows and on continuing the path of externalization of migration management. For this reason, it is deemed useful to propose, in the section that follows, a more practical way for enhancing the accountability of the Italian government with regard to the crimes committed in Libya. Namely, the possibility

98. ICC Statute, Article 27.

99. ICC Statute, Article 25 (3) (c) enshrines that: "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."

100. ICC Statute, Article 25 (3) (d) states that: "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime."

of terminating the MoU will be taken into account, as it represents a viable option for avoiding the commission of such crimes and not incurring in both State and individual criminal responsibility.

4.2. Improving the Current Italian-Libyan Cooperation: Termination or Suspension of the MoU

The termination or suspension of the MoU could be pursued according to Article 60 of the Vienna Convention on the Law of Treaties (hereinafter: "VCLT"), which states that: "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part".[101] The material breach, as defined in Article 60 (3) (b), pertains to "the violation of a provision essential to the accomplishment of the object or purpose of the treaty". In simpler terms, it refers to any breach that undermines a fundamental aspect necessary for the treaty's intended goals or objectives.[102]

The human rights violations committed against migrants by both the LCG and the personnel in charge of the Libyan detention centers – as well as their involvement in human trafficking activities – violate the MoU, especially Article 2 and Article 5. Accordingly, the material breach arising from such a violation could entitle the Italian government to suspend the agreements pursuant to Article 60 (3) (b) of the VCLT.[103]

More specifically, one may argue that Libya's violations affect provisions that are essential for the "accomplishment of the object and purpose of the treaty". This is because the preamble and the specific provisions enshrined in the agreement, with particular regard to Article 2 (3),[104] all seem to recognize that the fight against the human trafficking business is a key element of the treaty, as well as one of the main reasons behind its conclusion.[105] Henceforth, the collusion between Libyan authorities and human traffickers, undermines a key aspect of the object and purpose of the MoU.

Similar considerations apply in relation to Article 5, which requires both parties to act consistently with their human rights obligations.[106] Furthermore, all actions

101. United Nations, "Vienna Convention on the Law of Treaties" (1969) United Nations, Treaty Series, vol. 1155, p. 331, Article 60.
102. Vienna Convention on the Law of Treaties (VCLT), Article 60 (3) (b).
103. C.F. Moran, R. Alyamkin, L. Prosperi, E. Tranchez, "Towards a Better Migrant Protection Framework Along the Central Mediterranean Route: Human Rights Implications and Necessary Revisions of the Memorandum of Understanding Between Italy and Libya" (2021) Uprights.
104. MoU (12), Article 2 (3): "The Parties commit to undertake actions in (3) the "training of the Libyan personnel within the above-mentioned reception centers to face the illegal immigrants' conditions, supporting the Libyan research centers operating in this field so that they can contribute to the identification of the most adequate methods to face the clandestine immigration phenomenon and human trafficking."
105. MoU (12). Namely, in the preamble, it is stated that "the importance of Libyan land and sea borders' control and security, in order to ensure the reduction of illegal migratory flows, the fight against human trafficking and fuel smuggling".
106. MoU (12). Article 5: "The Parties commit to interpret and apply the present Memorandum

under the MoU should be performed "considering the obligations deriving from international customary law and agreements to which the parties are bound, including Italy's membership to the European Union, in the framework of the legal systems in force in the two Countries".[107] While such obligations – and their consequent alleged violation – have been dealt with in the previous sections, it appears sufficient to point out that Libya's continued failure to comply with human rights standards as required, among other instruments, by Article 5 of the MoU, can qualify as a material breach. Having established grounds for breaches under Article 60 VCLT, the Italian government could proceed to terminate or suspend the agreement according to Article 65 of the VCLT, which deals with the procedure to be followed in case of invalidity, termination, withdrawal from or suspension of the operation of a treaty.[108]

This might absolve Italy from its responsibility in connection to the illegal actions of Libyan authorities and is critical if the Italian government wants to avoid potential consequences arising from Italy's international State responsibility or individual criminal responsibility (of Italian officials operating on behalf of the Italian government).

With that in mind, it is now possible to discuss the extent to which it is possible to enhance the accountability of the EU with regard to the same crimes.

4.3. ENHANCING THE ACCOUNTABILITY OF THE EU IN RELATION TO THE CRIMES COMMITTED IN LIBYA

To embark on our analysis, it's vital to contemplate the intricacies of holding international organizations accountable for human rights violations. We must recognize that international tribunals, such as the ICJ, ICC, and ECtHR, face barriers to scrutinizing international organizations' violations of their international obligations.

The ICJ primarily deals with disputes of a legal nature submitted by States, making it unsuitable for probing violations committed by international organizations.[109] Likewise, the ICC's jurisdiction is centered on crimes perpetrated by individuals, rendering it unable to assess the EU as an entity.[110] The immunity of EU officials and the EU's non-signatory status to the ICC Statute further complicate the landscape, while the relationship between the EU and the ECtHR adds another layer of complexity and requires a more in-depth analysis.

in respect of the international obligations and the human rights agreements to which the two Countries are parties."

107. MoU (12). Preamble.

108. Vienna Convention on the Law of Treaties (VCLT), Article 65 (1): "A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor."

109. ICJ Statute, Article 34.

110. ICC Statute, Article 25.

The Lisbon Treaty of 2009 marked a shift toward international accountability for the European Union. It paved the way for the EU's accession to the ECHR in 2013.[111] However, this process was obstructed by the Court of Justice of the European Union which, through Opinion 2/2013, identified six areas of incompatibility between EU law and the ECHR, effectively halting the EU's accession to the Convention.[112] This failed the attempt to enhance the EU's accountability for human rights violations under the jurisdiction of international tribunals.

As for the EU intra-legal framework, the current state of affairs reveals that the CJEU lacks a specific approach to fundamental rights violation cases, especially in the realm of migration and asylum. Individuals find it challenging to directly invoke the Charter of Fundamental Rights against EU institutions or organs.[113] As a result, victims of fundamental rights violations must resort to general remedies available for breaches of Union law.

One of the primary options is the legality review, governed by Article 263 of the Treaty on the Functioning of the European Union (TFEU).[114] However, this provision presents hurdles. It differentiates between privileged applicants (i.e., EU countries, the European Parliament, the Council and the Commission), semi-privileged applicants (i.e., the Court of Auditors, the ECB and the Committee of the Regions), and non-privileged applicants (i.e., legal persons, such as businesses, and natural persons, such as individuals), with the latter facing a significantly higher threshold.[115] Furthermore, individuals whose rights have been violated in the context of rescue operations within EU-Libyan cooperation often face limited success due to much of the conduct being categorized as "purely factual conduct", rather than as legally binding acts.[116]

Alternatively, conduct by EU institutions and organs, previously categorized as aid and assistance under Article 14 of the ARIO legal framework, might be challenged through actions for damages under Article 340 TFEU.[117] This article mandates the

111. C. Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Edward Elgar Publishing 2018).

112. Opinion pursuant to Article 218 (11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties. Case Opinion 2/13.

113. S. Grigonis, "EU in the face of migrant crisis: Reasons for ineffective human rights protection" [2016] International Comparative Jurisprudence pp. 93-98.

114. Treaty on the Functioning of the European Union (TFEU), Article 263: "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties".

115. For more information, see: https://eur-lex.europa.eu/EN/legal-content/summary/annulment-of-legal-acts-by-the-court-of-justice.html.

116. M. Fink (81).

117. Treaty on the Functioning of the European Union (TFEU), Article 340: "In accordance with

Union to compensate for damage caused by its institutions or servants in the performance of their duties. However, even when basic rights are openly invoked, they frequently concern economic rights or rights that find expression in special secondary Union legislation, such as defense rights or data protection.[118] Cases involving core fundamental rights – which are at stake in the context under discussion – such as the right to life, the freedom from torture or cruel or degrading treatment or punishment, or the right to privacy and family life, do not frequently occur, or at all. This is because the requirement for gaining access to the CJEU's jurisdiction regarding such violations remains excessively demanding. In light of these challenges, it becomes necessary to either lower the threshold for accessing the CJEU when fundamental rights violations occur or establish a fundamental rights complaint procedure under EU law.

4.3.1. *Integrating ECtHR Approaches into the CJEU*

After having outlined the shortcomings related to the possibility of invoking liability for fundamental rights violations before the CJEU, particular attention should be devoted to those procedures which constitute the heart of the *modus operandi* of the ECtHR and that could be used more frequently by the CJEU. A particular reference will be made to non-state third-parties' interventions (the possibility for non-state third parties to intervene and submit observations before the Court) and interim relief measures (generally referred to as the Rule 39 Procedure in the ECtHR framework, it involves the suspension of an action posing an imminent risk of irreparable damage to an applicant's ECHR rights).[119]

Intervention is a well-established procedure allowing non-state organizations to participate in judicial proceedings without being formal parties. *Amici curiae* briefs from human rights protection actors have been prominent in significant decisions by the ECtHR, often at the Court's request. For example, in the *Hirsi case*, the ECtHR relied on the opinions of organizations such as Amnesty International, Human Rights Watch, the United Nations High Commissioner for Refugees, the International Federation for Human Rights, and the Centre for Advice on Individual Rights in Europe. These organizations provided crucial data and legal elements, demonstrating Italy's breach of international human rights obligations in returning African nationals to Libya.[120]

the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

118. In this regard, A. Ward in "Damages under the EU Charter of Fundamental Rights" [2011] ERA Forum pp. 589-611, points out that "almost all of the cases concerning damages for breach of EU law, whether by the EU institutions or the Member States, have arisen in the context of commercial or economic law."

119. S. Carrera, M. De Somer, B. Petkova, "The Court of Justice of the European Union as a Fundamental Rights Tribunal: challenges for the effective delivery of fundamental rights in the area of freedom, security and justice" [2012] CEPS Papers in Liberty and Security in Europe 49.

120. Ibid.

Enhancing this measure in the CJEU's operational framework would offer several benefits. It would enable more precise monitoring and reporting of on-the-ground abuses and provide valuable legal and evidence-based expertise for sound final judgments. Non-state actors could strategically use this opportunity to impact significant cases and broader policy areas. Also, the restricted access for civil society and multi-level human rights organizations to the CJEU is contradictory, given the EU's commitment to ensuring the highest level of rights protection in common areas of interest with the ECtHR, as stated in Article 52 (3) of the EU Charter.

In conclusion, adopting a more accommodating approach, similar to the ECtHR, and improving the accessibility of third-party interventions in the CJEU framework would be highly significant in the context under discussion. Human rights organizations active in the Libyan context could serve as a valuable resource, shedding light on EU externalization policies and contributing to cases involving such violations brought before the CJEU.

Alternatively, Rule 39 of the European Court of Human Rights provides the Court with the authority to suspend specific actions when handling cases that involve severe human rights violations, particularly when the applicants are facing immediate and serious threats.[121] This mechanism is in place to safeguard individuals' rights during ongoing legal proceedings. However, when we compare the European Union's legal framework for interim relief measures in judicial proceedings to the ECtHR's Rule 39 procedure, we observe a significant disparity.

Within the EU, Articles 278 and 279 of the TFEU grant the CJEU the power to suspend a measure "if the circumstances require it" until a final judicial decision is reached.[122] Surprisingly, the CJEU has infrequently used this tool, even in cases related to migration and asylum.

This limited use of interim relief measures, especially in the context of preliminary rulings, extends to what is referred to as the "expedited procedure", which imposes strict time constraints on the arbitration tribunal for hearing and reaching a final decision on the dispute.[123] The primary challenge here is that the CJEU's criteria for implementing relief measures are considerably more stringent than the ECtHR's Rule 39. Furthermore, the CJEU must balance potential advantages and disadvantages for the EU, which can sometimes impede its ability to act swiftly.

121. Rule 39 (as amended by the Court on 4 July 2005 and 16 January 2012) establishes that "[t]he Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it".

122. Treaty on the Functioning of the European Union (TFEU). According to Article 278: "Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended." Similarly, Article 279 states that: "The Court of Justice of the European Union may in any cases before it prescribes any necessary interim measures".

123. Court of Justice of the European Union, Urgent Preliminary Ruling Procedure and Expedited Procedure. https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-10/tradoc-en-div-c-0000-2019-20190608605_00.pdf.

A substantial limitation, in comparison to how the ECtHR operates, is that these procedures cannot be initiated by parties not directly involved in a given case. In contrast, the Strasbourg Court allows external parties to request such interim measures, adopting a broader interpretation of the term "representative".

Overall, the CJEU has made very limited use of its powers to accelerate proceedings or issue emergency relief measures with regard to actions involving fundamental rights implications. However, since interim relief measures are often indispensable for certain fundamental rights-sensitive cases in the area of migration and asylum, a more active stance on behalf of the Court itself will indeed be extremely welcomed.

4.3.2. Improving the Current EU-Libya Cooperation

While the Italian case allowed for the suggestion of terminating the MoU, the cooperation between EU institutions and Libyan authorities lacks a formal treaty and relies primarily on Council decisions establishing EU missions, such as EUBAM Libya. Examining these decisions, it becomes apparent that isolating a single provision that clearly violates EU legal requirements and that could, therefore, put an end to such type of collaboration, is challenging. This difficulty arises because EU border control and rescue operations mainly involve "purely factual conduct" executed outside the legal framework provided by these tools. Consequently, substantial improvements in EU-Libya relations regarding the respect and protection of asylum seekers and migrants' rights should primarily be pursued through policy-making processes. In the following paragraph, the work will explore potential avenues for improvement within the existing cooperation framework, based on current missions and the broader support the Union extends to the African country.

Specifically, it is essential that the assistance provided to the LCG, the Department for Combating Illegal Migration (DCIM), and other Libyan authorities, including training and material support, is accompanied by robust, independent monitoring mechanisms. These mechanisms are crucial to ensure that all involved parties adhere to their international human rights, refugee, and other relevant international law obligations.[124]

Regarding search and rescue operations, improvements can stem from increased monitoring of LCG operations, even for units not trained by the EU, and ensuring that findings are made public. The LCG authorities must fulfill their obligations to preserve lives, refrain from using excessive force, and protect the human rights, safety, and dignity of all rescued individuals. Additionally, the Union should consider retaining some responsibility for search and rescue operations, at least until Libyan authorities halt arbitrary detentions, demonstrate sustained and substantial detention facility improvements, and possess adequate autonomous capabilities for conducting search and rescue activities.[125]

124. UNHCR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya* (2018).

125. Human rights watch, *No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya* (2019).ì

Furthermore, the EU should prioritize ensuring that all operations carried out in areas under the jurisdiction of EU member states, including extraterritorial areas, comply with international law, adhere to due procedural guarantees, and fully respect the prohibition on arbitrary and collective expulsion, as well as the principle of *non-refoulement*.[126]

In the specific context of detention, the EU should work to enhance access for the United Nations, humanitarian NGOs, and other relevant entities to provide life-saving assistance and monitoring in all detention facilities. In this context, individuals who have been victims of physical and mental abuse and other traumatic abuses should have access to medical and psychological services.[127]

All forms of cooperation with Libya, including missions like EUBAM Libya, should not only be based on effective and independent human rights monitoring bodies but should also be subject to renegotiation to include human rights clauses.

Finally, the expansion of safe and regular entry channels for migrants, asylum seekers, and refugees into Europe is not merely advisable, but a moral imperative. States must take bold steps to revamp their visa regimes, demonstrating unwavering commitment to providing humanitarian solutions. This entails offering a diverse array of avenues, including but not limited to temporary protection, visitor visas, family reunification, and labor mobility opportunities. Additionally, States should actively consider introducing long-term residence permits, retirement programs, and student visas, thereby embracing a comprehensive approach that ensures the rights, dignity, and safety of those seeking asylum within the EU's borders.

CONCLUSION

The joint engagement of Italy and the European Union with Libya in the arena of migration and asylum is a complex landscape fraught with legal, moral, and humanitarian challenges. This comprehensive analysis has examined the multifaceted dimensions of the EU and Italy's responsibility for crimes committed on the Libyan territory as a consequence of the externalization of migration management, and has proposed measures to enhance their role in shaping a more just, humane, and rights-based approach.

The groundwork for this investigation was established in the introduction, emphasizing the urgent need to address the harsh realities faced by asylum seekers and migrants, who often endure severe human rights violations within Libya's migration control and detention system. These abuses provided the context against which the indirect responsibilities and actions of Italy and the EU were evaluated.

The analysis then focused on the Italy-Libya Memorandum of Understanding (MoU), a pivotal document regulating collaboration between the two nations in the field of migration control. Situated within the broader framework of border exter-

126. UNHCR, (124).
127. UNHCR, (19).

nalization supported by the European Union, this agreement served as the starting point for examining the dynamics of their engagement.

Moving forward, the subsequent section of the document scrutinized Italy's international State responsibility, specifically concerning its cooperation with Libya under the framework of the ARSIWA Draft. More specifically, both the concept of "aid and assistance" and "direction and control", as provided for in Articles 16 and 17, were thoroughly investigated. At the end of the analysis, it was established that the funding Italy provides to the LCG, the training of personnel in Libyan detention centers and the provision of patrolling assets for the deployment of interception operations could be easily qualified as an instance of aid and assistance. Moreover, both the subsections of Article 16 appeared to be met, namely the condition of knowledge and opposability. Henceforth, the Article in question was identified as the most appropriate tool for exploring Italy's international legal responsibility for aiding and assisting Libya in the commission of an internationally wrongful behavior.

However, the above-mentioned theoretical discussion was placed alongside an examination of the ECtHR's jurisdiction over the subject at hand, through both the *Hirsi Jamaa and Others v. Italy* case – based on the strong implications it had in relation to Member States' policies on migration management - and to the *S.S. and Others v. Italy* case – which is currently under the scrutiny of the ECtHR and whose importance is crucial in establishing Italy's alleged responsibility for the Libyan wrongdoings. In this regard, applying the legal framework provided by Article 16 ARSIWA and analyzed in detail in the present work appears as the most effective procedure to pursue such an aim.

Within this framework, it is nevertheless fundamental to acknowledge that the border externalization strategies implemented in recent years by Italy are not just supported by the EU but also constitute a Communitarian priority. For this reason, the ARIO Draft – being the reflection of the ARSIWA one – has been identified as the most powerful legal basis, in section three, to investigate the responsibility of the EU in the violations perpetrated against migrants, refugees, and asylum seekers in the African country. In particular, both the role of the Union in Libya and the possible fundamental rights violations arising from the latter have been contextualized. Then, an attempt was made to classify the EU's involvement in the African country as an instance of indirect responsibility under the meaning of Article 14 ARIO, which, just as Article 16 ARSIWA, deals with the concept of aid or assistance in the commission of an internationally wrongful act. Subsequently, the work set out to analyze the role of Frontex, the most active European agency in the implementation of EU migration policies. Frontex plays, in the Libyan context, a strong role in the coordination of SAR operations. However, lacking international legal responsibility, it was demonstrated how the actions of the agency, which also appear to satisfy Article 14 ARIO, could easily be traced back to the European Union, further confirming the latter's possible responsibility for the Libyan wrongdoings.

At the end of this analysis, it became clear that, although there is a legal framework that could be activated to address the serious human rights violations taking place in Libya – connected to the policy of externalization of migration management

pursued by both Italy and the EU – such violations continue to be perpetrated with impunity. It was thus deemed essential, in the concluding section of this work, to propose solutions for enhancing the accountability of both Italy and the EU in relation to the afore-mentioned crimes.

With regard to Italy, the possibility of investigating the complicity of Italian officials in relation to the Libyan wrongdoings through the ICC was explored. In particular, the analysis focused on the ways through which it would be possible to activate the court's jurisdiction, as well as the modes of liability necessary to establish such responsibility. Article 25 (3) (c) of the ICC Statute, which deals with the issue of aiding and abetting – and is indeed similar to Article 16 ARSIWA and 14 ARIO, was identified as a viable solution. However, as it was acknowledged that activating such a mechanism is rather unlikely to date, the possibility of terminating the MoU was evaluated, through the activation of Article 60 of the Vienna Convention on the Law of Treaties.

Differently, after having recognized that the scrutiny of the EU's actions on the part of international tribunals – despite being the best option to enhance the accountability of the Union in relation to the Libyan crimes – cannot be activated, several proposals were made to mobilize already existing instruments and guarantee a wider protection of fundamental rights within the EU intra-legal framework. First, it was deemed of particular relevance to analyze the way through which it is possible to access the CJEU jurisdiction for fundamental rights violations caused by EU bodies. Afterward, with the aim of upgrading the capacity of the Court in relation to human rights proceedings, such as the ones that may arise as a consequence of the EU action in Libya, the reflection built on two existing models that are already active under the ECtHR framework and that could improve the CJEU's ability to try fundamental rights cases: third-parties' interventions and interim relief procedures. Based on the fact that the activation of those measures is often indispensable for certain fundamental rights-sensitive judicial proceedings in the area of migration and asylum, applying them in the case under discussion could, therefore, be a viable option for upholding the rights of those who have faced severe crimes in Libya as a consequence of the actions of EU and non-EU actors alike. Finally, following the same approach implemented in the portion of this reflection dedicated to Italy, several paths of improvement have been proposed in order to enhance the current EU-Libyan cooperation framework and ensure a wider protection of human rights within the present collaboration scheme.

In conclusion, Italy's and the European Union's involvement with Libya within the context of migration and asylum stands as a pressing and intricate issue. While this analysis has delved deeply into the legal basis for recognizing the responsibilities of both States and international organizations, as well as potential avenues for improvement, it is paramount to emphasize that achieving accountability and fostering real change goes beyond mere reliance on legal frameworks. True progress necessitates a combination of legal tools, political determination, international collaboration, and an unwavering dedication to safeguarding the rights and dignity of those who are most vulnerable.

The challenge we face now is to translate these insights into tangible actions and policies that promote a more equitable, compassionate, and rights-centric approach. It is a challenge that the global community cannot afford to neglect and one that should stand as a testament to the fundamental values and principles it holds dear.

BIBLIOGRAPHY

Books

C. Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Edward Elgar Publishing 2018).

J. Crawford, *State Responsibility. The General Part* (Cambridge 2013).

M. Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018).

R. Kolb, *The International Law of State Responsibility: An Introduction* (Edward Elgar Publishing 2017).

A. Liguori, *Migration Law and The Externalisation of Border Controls* (Routledge 2018).

V. Mitsilegas, *The criminalisation of migration in Europe. Challenges for human rights and the rule of law* (New York, NY: Springer 2015).

Book Chapters

A. Pijnenburg, C. Rijken, "Playing Cat and Mouse: How Europe Evades Responsibility for its Role in Human Rights Abuses of Migrants and Refugees" in M. Van Reisen, M. Stokmans and K.A. Gebre-Egziabher, Mobile Africa: Human Trafficking and the Digital Divide (Langaa Research & Publishing CIG 2019) 700.

Academic Papers

S. Carrera, M. De Somer, B. Petkova, "The Court of Justice of the European Union as a Fundamental Rights Tribunal: challenges for the effective delivery of fundamental rights in the area of freedom, security and justice" [2012] CEPS Papers in Liberty and Security in Europe 49.

C. Di Stasio, "Esternalizzazione delle frontiere: violazione dei diritti umani dei migranti e responsabilità dello Stato" [2021] Dirittifondamentali.it.

A. Fazzini, "Il caso S.S. and Others vs Italy nel quadro dell'esternalizzazione delle frontiere in Libia: osservazioni sui possibili scenari al vaglio della corte di Strasburgo" [2020] Diritto, Immigrazione e Cittadinanza 87.

S. Grigonis, "EU in the face of migrant crisis: Reasons for ineffective human rights protection" [2016] International Comparative Jurisprudence pp. 93-98.

M.A. Kashiem, "The Treaty of Friendship, Partnership and Cooperation between Libya and Italy: From an Awkward Past to a Promising Equal Partnership" [2010] 1(1) California Italian Studies.

A. Liguori, "La Corte europea dei diritti dell'uomo condanna l'Italia per i respingimenti verso la Libia del 2009: il caso Hirsi" [2012] Rivista di diritto internazionale.

C.F. Moran, R. Alyamkin, L. Prosperi, E. Tranchez, "Towards a Better Migrant Protection Framework Along the Central Mediterranean Route: Human Rights Implications and Necessary Revisions of the Memorandum of Understanding Between Italy and Libya" (2021) Uprights.

E. Palm, "Externalized Migration Governance and the Limits of Sovereignty: The Case of Partnership Agreements between EU and Libya" [2020] 86(1) Theoria 9.

G. Pascale, "Esternalizzazione delle frontiere in chiave antimigratoria e responsabilità internazionale dell'Italia e dell'UE per complicità nelle grosse violazioni dei diritti umani commesse in Libia" [2018] Studi sull'integrazione europea 413.

A. Pijnenburg, "From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?" [2018] 20(4) European Journal of Migration and Law pp. 396-426.

G. Puma, "Complicità tra Stati e organizzazioni internazionali nella violazione di obblighi erga omnes" [2019] Diritto pubblico comparato ed europeo pp. 69-100.

A. Radjenovic, "Pushbacks at the EU's external borders" [2021] EPRS, European Parliament.

A. Riccardi, "Esternalizzazione delle frontiere italiane in Libia e Niger: una prospettiva di diritto internazionale" [2020] Questione Giustizia.

Official Documents and Legislation

Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) (adopted by the International Law Commission, 2001) GA Res 56/83, Annex, UN GAOR, 56th sess, Supp No 49, UN Doc A/56/49 (Vol I) (2001).

Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community [2006] C 321 E/1.

Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya) [2013] OJ L 138.

Council Decision 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L 122.

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Co-operation at the External Borders of the Member States of the European Union (FRONTEX) OJ L 349.

Court of Justice of the European Union (CJEU), *N.F. v. European Council* [2017] T-192/16.

European Commission, *Support to Integrated border and migration management in Libya – First phase* (T05-EUTF-NOA-LY-04).

European Court of Human Rights (ECtHR), *Hirsi Jamaa and Others v. Italy* [2012] Application No. 27765/09.

European Court of Human Rights (ECtHR), *S.S. and Others. v. Italy* [2017] Application No. 21660/18.

International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] Judgement.

International Court of Justice, *Reparation for injuries suffered in the service of the Nations* (Advisory Opinion) [1949] ICJ Rep 174, ICGJ 232.

International Law Commission, 'Draft articles on the responsibility of international organizations' (2011) A/66/10.

League of Nations, *Convention to Suppress the Slave Trade and Slavery* (25 September 1926) 60 LNTS 253, Registered No. 1414.

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 (Italy-Libya) (2 February 2017).

Opinion pursuant to Article 218 (11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties. Case Opinion 2/13.

Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295.

Regulation (EU): 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L 251.

UN General Assembly, 'Rome Statute of the International Criminal Court' (last amended 2010) (17 July 1998) ISBN No. 92-9227-227-6.

UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (15 November 2000) United Nations, Treaty Series, vol. 2237, p. 319.

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

UN Security Council, "Security Council resolution 1970 (2011) [on the situation in the Libyan Arab Jamahiriya]" (2011) S/RES/1970.

United Nations, "Vienna Convention on the Law of Treaties" (1969) United Nations, Treaty Series, vol. 1155, p. 331.

Reports

Amnesty International, *Libya's Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants* (2017).

Centro Studi di Politica Internazionale (CeSPI), *Frontex: sicurezza e respingimenti di migranti ai confini dell'Unione Europea* (2021).

European Court of Auditors, *Audit Preview Frontex* (2020).

Forensic Oceanographic, *Mare Clausum. Italy and the EU's undeclared operation to stem migration across the Mediterranean* (2018).

Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya* (2022).

Human rights watch, *No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya* (2019)

UNHCR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya* (2018).

UNHCR, *Detained and Dehumanised: Report on Human Rights Abuses against Migrants in Libya* (2016).

Online Articles

P. De Stefani, "Hirsi Jamaa e altri c. Italia: illegali i respingimenti verso la Libia del 2009" (2012) https://unipd-centrodirittiumani.it/it/schede/Hirsi-Jamaa-e-altri-c-Italia-illegali-i-respingimenti-verso-la-Libia-del-2009/249.

EURIS Jean Monnet Project, "Frontex' involvement in illegal pushbacks and EU's possible international responsibility" (2022) https://www.jm-euris.eu/frontex-involvement-in-illegal-pushbacks/.

Front-LEX, "Legal Action Against FRONTEX Submitted" https://www.front-lex.eu/2021/05/25/legal-action-against-frontex-submitted-2/.

Frontex, "Fundamental Rights at Frontex" https://frontex.europa.eu/accountability/fundamental-rights/fundamental-rights-at-frontex/.

A.S. Galand, "Making Libya an ICC Priority Situation: Fake Promises to a Difficult Customer?" (2017) http://opiniojuris.org/2017/01/13/making-libya-an-icc-priority-situation-fake-promises-to-a-difficult-customer/.

C. Meloni, X. Zhang, "Complementarity Is No Excuse: Why the ICC Investigation in Libya Must Include Crimes Against Migrants and Refugees" (2021) https://opiniojuris.org/2021/12/01/complementarity-is-no-excuse-why-the-icc-investigation-in-libya-must-include-crimes-against-migrants-and-refugees/.

A. Pizzuti, "ICC Situation on Libya: The ICC Prosecutor Should Look into Libyan Criminal Proceedings Concerning Crimes Committed Against Migrants" (2020) http://opiniojuris.org/2020/11/20/icc-situation-on-libya-the-icc-prosecutor-should-look-into-libyan-criminal-proceedings-concerning-crimes-committed-against-migrants/.

A. Preziosi, "Can top Italian officials be prosecuted and tried by the ICC for complicity in the crimes committed against migrants in Libya?" (2022) https://www.grojil.org/blog2/2019/02/04/can-top-italian-officials-be-prosecuted-and-tried-by-the-icc-for-complicity-in-the-crimes-committed-against-migrants-in-libya.