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Can Italy be Held Accountable under Article 20 UNCAT for its Role in the "Pull-back" of Migrants in the Mediterranean?

I. Introduction

There is extensive evidence of widespread and systematic violations of the human rights of migrants[1] in Libya. The violations include torture, summary executions, rape, forced labour and arbitrary detention, all of which have been conclusively documented by UN bodies[2] and international NGOs[3]. Despite the international outcry,[4] European policies in the Central Mediterranean have focussed on outsourcing migration control to Libya. A key aspect of the externalisation strategy has been to strengthen the Libyan authorities' capacity to intercept and "pull-back" migrants who attempt to cross to Europe by boat, thus (re)exposing them to the well-known abuses.

Legal commentators are increasingly suggesting that the externalization of migration control to Libya renders European states complicit in the violation of migrants' human rights.[5] Some scholars argue that European states' – in particular Italy's – collaboration with the Libyan Coast Guard (LCG) is so extensive that it amounts to a form of "contactless control"[6] over migrants intercepted in the Mediterranean for which they can be held accountable under international law.

Advocates are testing these theories in litigation before international bodies including before the UN Human Rights Committee[7] and the European Court of Human Rights (EctHR) by means of individual complaints for violations of the *non-refoulement* principle.[8]

Other legal action includes a complaint to the European Court of Auditors for mismanagement of EU funds in the amount of 91,300,000 EUR made available to support Italian-Libyan cooperation[9] and a communication to the Office of the Prosecutor of the International Criminal Court arguing that EU policies vis-à-vis refugees and migrants fleeing Libya constitutes a crime against humanity under Article 7 of the Rome Statute.[10]

The most recent legal challenge in this context is the submission by the *Centre Suisse pour la Défense des Droits des Migrants* (CSDM) to the UN Committee against Torture. On 26 June 2020, the CSDM submitted a request for the opening of an official inquiry under Article 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) regarding Italy's responsibility for the torture of migrants pulled back to Libya.[11] The submission argues that since Italy is exercising extraterritorial control over migrants by financing and operating the LCG as a proxy, it is asserting its jurisdiction over pull-back migrants and can be held accountable under the CAT.

The aim of this article is to set out the factual and legal basis of the request, focussing in particular on the issue of Italy's exercise of extraterritorial jurisdiction under the CAT.

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1 The term "migrant" is used inclusively to refer to asylum seekers, refugees and economic migrants.

2 United Nations Support Mission in Libya (UNSMIL) and Office of the High Commissioner for Human Rights (OHCHR), 'Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya', 20 December 2018; OHCHR and UNSMIL, 'Detained and Dehumanized: Report on Human Rights Abuses against Migrants in Libya', 13 December 2016.

3 Amnesty International (AI), 'Between the devil and the deep blue sea: Europe fails refugees and migrants in the Central Mediterranean', August 2018; Human Rights Watch (HRW), 'No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya' 21 January 2019; Doctors without Borders (MSF), 'Trading in suffering: detention, exploitation and abuse in Libya', 23 December 2019.

4 In Switzerland, parliamentarian Balthasar Glättli submitted detailed questions to the government concerning its role, if any, in preventing illegal refoulement to Libya, see Parliamentary Interpellation 19.5377 at https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20195377.

5 See inter alia Anna Liguori, 'Migration Law and the Externalisation of Border Controls, European State Responsibility', Routlege 2019; see also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 2. November 2018, A/HRC/37/50 at § 56.

6 Violeta Moreno-Lax and Mariagiulia Giuffré, 'The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows', forthcoming in S. Juss (ed), Research Handbook on International Refugee Law, see also UN Special Rapporteur on extrajudicial, arbitrary and summary executions, 'Unlawful deaths of refugees and migrants', UN Doc. A/72/335, § 64. https://reliefweb.int/sites/reliefweb.int/files/resources/N1725806.pdf.

7 S.D.G. v. Italy, Human Rights Committee, 18 December 2019, concerning a Panamanian merchant vessel, the Nivin, which was redirected by the Italian authorities to Libya where the complainant was subjected to torture and forced labour, see https://www.glanlaw.org/nivincase.

8 S.S. and Others v. Italy, App no. 21660/18 (ECtHR, communicated case) concerning the responsibility of Italy for assisting the Libyan Coast Guard in returning intercepted migrants to Libya.

9 Complaint to the European Court of Auditors Concerning the Mismanagement of EU Funds by the EU Trust Fund for Africa's 'Support to Integrated Border and Migration Management in Libya' (IBM) Programme, submitted by GLAN, ASGI and ARCI.

10 Communication to the Office of the Prosecutor of the International Criminal Court pursuant to Article 15 of the Rome Statute available at: https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf.

11 See https://centre-csdm.org/request-for-un-inquiry-into-italys-role-in-the-systematic-torture-of-migrants-pulled-back-to-libya/.

II. The Factual Context[12]

Many refugees, asylum seekers and migrants continue to attempt to escape Libya by crossing the Mediterranean in unsafe boats. Their objective is to reach safety in Europe where they can enjoy their basic rights as human beings. The majority have endured horrific brutalities before embarking on the life-threatening journey. A German diplomat based in Niamey, Niger, described the conditions in migrant detention centres in Libya as "concentration camp-like" in an internal diplomatic cable to Chancellor Angela Merkel: *"[e]xecutions of migrants who cannot pay, torture, rapes, blackmail and abandonment in the desert are the order of the day there."*[13]

Until the end of 2014, the response of the Italian government towards migration flows across the Central Mediterranean was focussed on search and rescue operations (SAR). From October 2013 to October 2014, Operation Mare Nostrum deployed units from the Italian Navy and Air Force to cover a 70,000 km² territory in the Mediterranean including rescue zones in Italian, Libyan and Maltese waters. Mare Nostrum ran 421 missions and rescued over 170,000 migrants.[14]

After termination of Operation Mare Nostrum, the Italian government's role in relation to the crossings from Libya changed radically from one focussed on search and rescue to one of prevention and deterrence. The most significant aspect of this change was the outsourcing of border control to Libya.

The European Court of Human Rights (ECtHR) played an important role in defining the parameters of the new Italian strategy. In the *Hirsi Jamaa and Others v. Italy* judgment, the Grand Chamber established that *refoulement* to Libya constituted inter alia a violation of the prohibition of torture and inhuman or degrading treatment because of the serious human rights violations facing migrants in Libya.[15]

As a result, it was no longer possible for Italy to use its own navy to intercept and *refoule* migrants in the Mediterranean – as it had done in *Hirsi* – without openly violating international law. Italy needed someone else to do this for them. The idea was succinctly expressed by Admiral Credendino in an interview with the Italian magazine *Internazionale: "We will create a Libyan system capable of stopping migrants before they reach international waters. As a result it will no longer be considered a push-back because it will be the Libyans who will be rescuing the migrants and doing whatever they consider appropriate with the migrants."*[16]

In the civil war following the fall of the Gaddafi regime, most state structures in Libya had been destroyed. Due to the absence of functioning institutions, Italy's new policy of externalising border control required the Italians to re-create the LCG and to take command of its operations until such a time as it could operate autonomously.

With these objectives in mind, in 2017 a Memorandum of Understanding (MoU) was signed between Italy and the UN recognized Libyan Government of National Accord (GNA), the primary purpose of which was "stemming illegal migrants' fluxes [sic.]"[17]

To achieve this aim, the MoU stipulates that Italy will provide financial and technical resources to "the Libyan institutions in charge of the fight against illegal immigration" such as "the border guard and the coast guard" (MoU Article 1 [A and B]).[18] Italy would also fund detention centres for migrants, provide training for Libyan personnel working in the centres, provide medical equipment and supplies for use in the centres, and support international organizations in arranging forced and voluntary repatriation of migrants (MoU Art. 2).

Following the agreement, which was renewed without amendment in February 2020, the Italian Government supplied funds, equipment and training to the LCG, including boats and surveillance technology. The Italian government also set up a floating Maritime Rescue Coordination Centre (MRCC) on an Italian naval vessel stationed in the harbour in Tripoli to coordinate the LCG's SAR activities.

The consequence of this sustained and multi-pronged collaboration, was that Italy had effectively resurrected the LCG. To this day, the Libyan authorities have no autonomous capacity to locate and intercept migrant boats in its own search and rescue zone, but depend entirely on Italian assistance, directly and through the EU.[19]

In parallel to orchestrating the massive pull-back operation, the Italian government conducted a campaign to obstruct independent SAR activities by criminalizing NGO rescue efforts including through the imposition of prohibitive fines for

12 For a detailed analysis of the evidence, see CSDM's submission at www.centre-csdm.org.

13 Deutsche Welle, 2017, 'Libyan Trafficking camps are hell for refugees, diplomats say'; https://p.dw.com/p/2WaEd.

14 Amnesty International, https://www.amnesty.eu/news/jha-ministers-must-brave-the-waters-and-commit-to-a-meaningful-search-and-rescue-operation-in-t-0865/.

15 Hirsi Jamaa and Others v. Italy [GC], App no. 27765/09, (ECtHR 23 February 2012), the Court further found a violation of the prohibition on collective expulsions in Protocol No. 4 Art. 4 and a violation of the right to an effective remedy under Art. 13 in relation to Art. 3 ECHR and Art. 4 of Protocol No. 4.

16 Video available at https://www.internazionale.it/video/2017/05/04/ong-libia-migranti, the quotation starts at 3'51'.

17 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, Art. 1(A), available in English translation at https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

18 For a discussion of the Italy-Libya MoU, see Liguori op. cit.

19 The extent of EU Member States' operational control over the LCG – with Italy playing the most prominent role – has been conclusively documented in a report published on 17 June 2020 by a group of NGOs active in SAR operations in the Central Mediterranean. Alarm Phone, Borderline-Europe, Mediterranea, Sea-Watch, 'Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean', 17 June 2020; https://eu-libya.info/.

each migrant rescued and the prosecution of NGO personnel for allegedly facilitating illegal trafficking in human beings.[20]

In consequence, at least 40,000 individuals were intercepted by the LCG and pulled back to Libya during the period 2016–2018.[21] At the same time, migrant arrivals on Italian shores have declined dramatically.[22]

III. Legal Submission under CAT Article 20

The inquiry procedure under Article 20 CAT allows the Committee against Torture (Committee) to open a formal investigation into a "systematic practice" of torture occurring on the "territory" of a State Party.[23] The Committee may designate one or more of its members to receive observations from the State Party and carry out in-country visits. The inquiry procedure is confidential and the Committee must seek the State Party's agreement to publish a full report of its findings. If the State Party does not consent, the Committee will publish only a summary version in its annual report to the UN General Assembly.

In its submission to the CAT, the CSDM argues that in view of the wealth of reliable reports on the situation of migrants in Libya, it is uncontroversial that the evidentiary standard of "reliable information" under Article 20 CAT is satisfied. On the basis of the same evidence, it is equally uncontroversial that the alleged violations of the prohibition of torture constitute a "systematic practice" as the Committee has defined this term.[24]

The key aspect of the analysis concerning the Committee's authority to investigate Italy's conduct in the Central Mediterranean under the inquiry procedure, concerns the term "territory". The Committee's past practice under Article 20 has concerned allegations of systematic torture occurring within the national territory of a State party.[25] However, an analysis of the jurisdictional provision of the CAT enshrined in Article 2(1), taken together with the Committee's jurisprudence concerning the convention's extraterritorial application, demonstrates that the jurisdictional term "territory" must be interpreted to reach Italy's conduct also outside its borders under circumstances where it is exercising "*de jure* or *de facto* effective control" over territory or persons.

Article 2(1) of the CAT provides that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". By its own terms, the CAT's jurisdictional clause at Article 2(1) assumes that there will be situations where States Parties exercise jurisdiction beyond their own borders and it expressly extends the protections of the Convention to those situations, i. e. to "**any** territory" controlled by the State party.

In General Comment No. 2, the Committee further clarified that the jurisdiction of a State party refers to any territory in which it "exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law."[26]

This interpretation of the jurisdictional scope of the CAT finds ample resonance in the law of other international bodies.[27] For instance, the UN Human Rights Committee has explained that "... a State party must respect and ensure the rights laid down in the Covenant *to anyone within the power or effective control of that State Party,* even if not situated within the territory of the State Party (our emphasis)."[28]

The UN Committee on the Rights of the Child (CRC)[29] and the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)[30] have also developed tests for jurisdiction based on the State Party's authority and control over an area or persons.

Specifically, in the context of migrant interceptions at sea, the Committee has found that a State party exercises *de facto* control when such interceptions are organized and executed by a State party in close collaboration with the authorities of a third country. In the case of *J. H. A. v. Spain (Marine 1),* a Spanish rescue tug sailing from Tenerife intercepted the *Marine I,* a migrant boat in distress in international waters with 369 persons on board.[31] Under a diplomatic agreement negotiated between Spain and Mauritania in the days following the

20 On 14 June 2019, Italy passed an emergency decree, imposing fines on vessels for every person rescued at sea and transferred to Italian territory, as well as threatening them with having their licenses revoked or suspended. On 29th June 2019, the Captain of migrant rescue vessel 'Sea-Watch 3' was placed under arrest after entering the Italian port of Lampedusa with 40 migrants on-board. She faced criminal proceedings for facilitating illegal immigration and endangering the lives of police officers.

21 Italian Institute for International Political Studies (ISPI), Estimated Migrants Departures from Libya, https://docs.google.com/spreadsheets/d/1ncHxOHIx4ptt4YFXgGi9TIbwd53HaR3oFbrfBm67ak4/edit#gid=0; see also UNHCR Libya 'Activities at Disembarkation, monthly updates'.

22 According to data collected by the UNHCR, the number of migrants arriving in Italy by sea peaked at 181,436 in 2016, fell to 119,696 in 2017, 23,370 in 2018 and to 11,471 in 2019. https://data2.unhcr.org/en/situations/mediterranean/location/5205.

23 Italy is subject to the Committee's inquiry procedure because it did not opt-out under Article 28(1) upon ratification of the Convention.

24 See https://www.ohchr.org/EN/HRBodies/CAT/Pages/InquiryProcedure.aspx.

25 Turkey 1994, Egypt 1996, Peru 2001, Sri Lanka 2002, Mexico 2003, Federal Republic of Yugoslavia (Serbia and Montenegro) 2004, Brazil 2008, Nepal 2012, Lebanon 2014, Egypt 2017; https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Inquiries.aspx.

26 CAT General Comment no. 2, § 16.

27 The International Court of Justice (ICJ) has repeatedly affirmed that international human rights treaties have extraterritorial application for jurisdictional purposes ICJ, Bosnia and Herzegovina v Serbia and Montenegro, Judgment, paras 400–401; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, para 111; Armed Activities on the Territory of the Congo, Judgment, para 216; Provisional Measure in the case of Georgia v. Russian Federation, No. 35/2008, para 109.

28 Human Rights Committee, General Comment no. 31 at § 10.

29 Joint General Comment no. 4 of the CRC and CMW at § 12 provides that "[j]urisdiction cannot be limited/excluded in zones or areas subjected to migration control operations, including international waters or other transit zones ..."

30 Ibid. Joint General Comment no. 4.

31 J. H. A. v. Spain (Marine 1), CAT Communication no. 323/2007.

rescue, the *Marine I* was brought to Nouadhibou, Mauritania, where the passengers were allowed to disembark two weeks later. The Spanish authorities provided technical assistance with the identification, medical care, status determination and repatriation process while the migrants remained detained in a former fish processing plant in the harbour of Nouadhibou.

The author of the communication in *J. H. A.* complained that the conditions on the *Marine I,* and the conditions in Nouadhibou where he was subsequently detained for several months, were unsanitary and overcrowded, and that he had at various times had insufficient food and medical attention. According to the complainant, these conditions amounted to torture and ill-treatment in violation of Articles 1 and 16 of the CAT.

The complainant also alleged that, as part of the diplomatic agreement, Mauritania had been paid € 650,000 by Spain to take in the migrants, that Spain remained responsible for them because Spain had rescued them in international waters and was in charge of their supervision during the entire period of their detention in Nouadhibou.

Spain objected to the admissibility of the complaint on the basis that the events did not occur on Spanish territory and therefore did not engage Spain's obligations under the CAT. The Committee rejected this argument, noting Spain's involvement in the SAR operation and subsequently on land in Mauritania during the processing of the migrants pursuant to the bilateral treaty with Mauritania.

Under these circumstances, the Committee found that Spain had exercised *de facto* control over the migrants, triggering jurisdiction under all aspects of the Convention, including for purposes of the Committee's supervisory procedures. The Committee noted in particular that *"the State party exercised, by virtue of a diplomatic agreement concluded with Mauritania, constant de facto control over the alleged victims during their detention in Nouadhibou. Consequently, the Committee considers that the alleged victims are subject to Spanish jurisdiction insofar as the complaint that forms the subject of the present communication is concerned* (our emphasis)".[32]

Like the Spanish authorities in *J. H. A.,* the Italian authorities in the Central Mediterranean are exercising *de facto* control over refugees and migrants pulled back by the LCG. Arguably, the extent of Italian control over the persons in question is much more obvious than in *J. H. A.,* taking into consideration the extensive and multi-faceted material, financial and political assistance Italy is providing to Libya in order for it to be able to operate the LCG. As we explained above, the LCG is an entity that was re-created, funded, equipped, trained and is directed in real time by Italy. Although the LCG is nominally a Libyan authority, it is in fact acting as a branch of the Italian navy. The jurisdictional link is even more manifest when considering that Italy's conduct is governed by a bilateral agreement with Libya which provides the legal framework for its exercise of extraterritorial authority in the Central Mediterranean.

IV. Conclusion

As Gammeltoft-Hansen and Hathaway have aptly stated, "[p]owerful states are … faced with a trade-off between the efficiency of *non-entrée* mechanisms, and the ability to avoid responsibility under international refugee law. If, as we believe probable, the preference for more control rather than less control persists, legal challenges are likely to prove successful."[33]

Whether current legal challenges are successful or not remains to be seen. What is certain, however, is that Italy's shift from "push-backs" – involving its own navy and which were declared illegal by the ECtHR in the *Hirsi Jamaa* judgment – to "pull-backs" where it outsources the very same activity to the Libyans, constitutes a blatant attempt to avoid accountability under international law.

We argue here, and in our submission to the Committee, that despite this shift in strategy, Italy has not succeeded in relinquishing "control" in the jurisdictional sense of human rights treaties. On the contrary, the evidence demonstrates clearly the Italian government's overall "*de facto* effective control" of the pull-back operations across the Mediterranean which have resulted in thousands of migrants being intercepted and returned to Libya where they face systematic torture. The jurisdictional link is rendered even more manifest due to the fact that the control is exercised pursuant to a bilateral agreement between Italy and Libya which provides the framework for the joint operations. We conclude therefore that the control exercised by Italy is sufficient to trigger jurisdiction under the CAT and to justify an inquiry procedure for systematic torture of migrants in Libyan custody. The opening of such a formal procedure against Italy would constitute an important precedent in achieving legal accountability for a practice which results in the gross abuse of tens of thousands of migrants every year.

32 Supra J. H. A. v. Spain at § 8.2.

33 Thomas Gammeltoft-Hansen, James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence', Columbia Journal of Transnational Law, 2015, p. 284.