

## Responsibility for Violation of Rights of Migrants in Libyan Detention Centre

Mohammad Bitar \* & Benarji Chakka\*\*

### Abstract

Migrants in Libya are experiencing the worst form of human rights violations, particularly after the fall of the Gaddafi regime. Post-2014 migrants faced a serious threat of human rights violations in detention centres and became the most vulnerable in Libyan society. The migrants experienced various human rights violations such as murder, torture, rape, enforced disappearance, and forced labour that may amount to crimes against humanity in international criminal law. In light of this situation, European policies aim at returning migrants to the European coasts. This has led to the conclusion of bilateral and multilateral migration agreements with the Libyan government and armed non-state actors. These policies have contributed to the vulnerability of migrants and the legitimization of violations by armed non-state actors. This article examines the violations committed against migrants in detention centres in Libya under the national and international legal framework with the aim of revealing the shortcomings and gaps in the Libyan national legal system and identifying the responsibility of the Libyan government, European Union countries and non-state actors for violations committed against immigrants in Libya.

### Key terms:

Detention Centre · Migrants · Violations · Armed conflict · Libya · Human Rights · Responsibility

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## 1. Introduction

The Libyan coasts close to Europe have always attracted the attention of migrants, mainly from Africa. This route –known as the Central Mediterranean Route (CMR)– is considered the most dangerous migration route.<sup>1</sup> In CMR alone, nearly half of the migrant deaths occurred compared to the worldwide situation.<sup>2</sup> As of 2022, more than 24,451 migrants died on the

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### Frequently used acronyms:

ACHPR	African Charter on human rights
ANSAs	Armed non-state actors
CAT	Convention on the Prohibition of Torture
CRC	Convention on the Rights of the Child
DCIM	Directorate of Combatting Illegal Migration
ECHR	European Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICPPED	International Convention on the Protection of Persons against Enforced Disappearance
ICTR	International Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
LCG	Libyan Coast Guard
OHCHR	Office of the United Nations High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UNSMIL	United Nations Special Mission in Libya

<sup>1</sup> International Rescue Committee (2020). *The human stories of the world's most dangerous migration route*, The IRC, <https://www.rescue.org/article/human-stories-worlds-most-dangerous-migration-route> (last visited Aug 20, 2022).

<sup>2</sup> IOM, *International Organization for Migration Missing Migrants Project*, <https://missingmigrants.iom.int/> (last visited Aug 20, 2022).

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CMR. The year 2022 witnessed the deaths of 1080 migrants.<sup>3</sup> Over time, Libya has thus become the primary transit country to Europe.

Those who survive at sea await a much bleaker fate that begins when migrant boats are intercepted by the Libyan Coast Guard (LCG) and then taken to detention centres.<sup>4</sup> These detention centres are primarily controlled and supervised by the Directorate of Combatting Illegal Migration (DCIM). However, the armed conflict in Libya has led to the integration of armed militias into the state apparatus, as they took over the supervision of many detention centres, which led to an increase in violations against migrants detained in these centres. This makes the issue of immigration in Libya a very critical concern that requires immediate attention.

The policies of the European Union and bilateral agreements between European countries and Libya to reduce illegal immigration led to widespread violations of international human rights law and international humanitarian law (IHL) throughout Libya against civilians in general and migrants in particular. The state of armed conflict, political instability, impunity, and the absence of the government's accountability have contributed to the severity of these violations.<sup>5</sup> In addition to being deliberately targeted during armed conflict operations, over 5,000 migrants detained in detention centres<sup>6</sup> are being subjected to many violations such as rape, torture, murder, enforced disappearance and forced labour. Some of these violations amount to crimes against humanity and war crimes.<sup>7</sup>

Moreover, Libya's lack of appropriate legislative frameworks to protect refugees has led to an increase in the frequency and severity of such violations. The laws that criminalize entry to Libyan territory without a permit provide the appropriate legal power to detain migrants indefinitely. The weakness of

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<sup>3</sup> Ibid.

<sup>4</sup> In implementation of the memorandum of understanding signed in 2017 between Libya and Italy on security and migration, with the aim of reducing the number of migrants coming to Italy through Libya

<sup>5</sup> Amnesty (2021). *ICC must investigate attack on Libyan Migrant Detention Centre* Amnesty International, <https://www.amnesty.org/en/latest/news/2019/07/libya-investigate-abhorrent-attack-on-migrant-detention-centre/> (last visited Aug 26, 2022).

<sup>6</sup> GDP, *Libya Immigration Detention Profile* (GDP February 2022) <https://www.globaldetentionproject.org/countries/africa/libya#:~:text=18%20February%202022&text=The%20UN%20reported%20in%20January,armed%20groups%20or%20%27secret%20facilities.> (Last visited Aug 26, 2022).

<sup>7</sup> UNHRC (2023), *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/52/83, para 41, A/HRC/49/4 para 46. See also A/HRC/48/83, paras 57–62.

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national legislation has impeded the prevention of basic human rights violations committed systematically in detention centres.

This article aims to identify the shortcomings of Libyan laws to draw attention to reform them in accordance with international standards and to identify the responsibility of government, non-state armed actors, and the European Union for the violations committed in detention centres. The attribution of responsibility can contribute towards the prevention of subsequent violations and redressing the victims with appropriate compensation. The article focuses on legal analysis of international and Libyan domestic laws based on relevant English and Arabic sources.

## **2. Violations Committed under the Current Legal Framework**

This section deals with violations such as murder, torture, enforced disappearance, enslavement, and rape under international and Libyan national law. Before discussing the violations committed in detention centres, it is essential to understand how international law is being treated under the existing legal framework of Libya. Although the Constitutional Declaration 2011 does not expressly state the binding effect of international law under the legal system of Libya, Article 13 of the unified Libyan draft constitution (2017) provides: “The State shall take the necessary measures to enforce such treaties and conventions so as not to conflict with the provisions of this Constitution.”

Moreover, in 2013, the Libyan Supreme Court and previous Libyan authorities have confirmed that international conventions adhered by Libya enjoy a higher status than domestic law. Consequently, Libya is bound by all provisions of the conventions to which it is a party. In the case of any conflict between domestic and international law, international law will prevail.<sup>8</sup>

In the context of violations committed in detention centres, it is necessary to analyse the national and international legal framework to understand the extent of the Libyan government's responsibility and the adequacy of the national legislative framework.

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<sup>8</sup> HRW (2006). *Libya: Words to Deeds: The Urgent Need for Human Rights Reform*, p.13.

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## 2.1 Detention of immigrants in Libya

Migrant detention is a widespread practice in Libya. Immigrants whose boats are intercepted at sea are arrested and taken to detention centres.<sup>9</sup> LCG, DCIM, human traffickers, and members of armed groups detain migrants in detention centres after stripping them off their belongings and official documents. These migrants are detained without any official registration and without being allowed to communicate with lawyers or official authorities.<sup>10</sup> The 2023 report of the United Nations Special Mission in Libya (UNSMIL) indicated that most cases of migrant detention and ill-treatment were often based on racial discrimination.<sup>11</sup>

### 2.1.1 Migrant detention under international law

It is forbidden for any country to detain migrants. The immigrant must enjoy security and freedom.<sup>12</sup> It is to be noted that illegal entry or presence in a country without an official residence does not constitute a crime that warrants imprisonment.<sup>13</sup> Article 9 of the International Covenant on Civil and Political rights (ICCPR)<sup>14</sup> prohibits arbitrary detention. Moreover, Article 14 of the Universal Declaration of Human Rights (UDHR) indicates asylum as an international legal principle. International Law prohibits the detention of refugees and migrants without sufficient cause; and the international obligations prohibit torture, and inhuman and degrading treatment of detainees under the Convention on the Prohibition of Torture (CAT)<sup>15</sup>, the Convention on the Rights of the Child (CRC)<sup>16</sup>, the African Charter on human rights (ACHPR)<sup>17</sup> and the ICCPR<sup>18</sup>, which have been ratified by Libya.<sup>19</sup>

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<sup>9</sup> FIDH (2022). *No way out: Migrants and Refugees Trapped in Libya Face Crimes against Humanity*.

<sup>10</sup> OHCHR (2003). *Administrative detention of migrants*, p. 14.

<sup>11</sup> A/HRC/52/83, para 40.

<sup>12</sup> Art. 9 of ICCPR.

<sup>13</sup> CMW, General Comment No. 2/ 24, (2013), CMW/C/GC/2 “crossing the border of a country in an unauthorized manner or without proper documentation, or overstaying a permit of stay does not constitute a crime”.

<sup>14</sup> Art. 9 of ICCPR “No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty”

<sup>15</sup> Art. 4 of CAT.

<sup>16</sup> Art. 37 of CRC.

<sup>17</sup> Art 5 of ACHPR.

<sup>18</sup> Art 7 of ICCPR.

<sup>19</sup> Libya ratified CAT on 16 May 1989, CRC on 15 Apr 1993, ACHPR on 26/06/1987, and ICCPR on 15 May 1970.

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The principle of non-refoulment provides that, no person shall be sent against his will to a place where he would be subjected to torture, persecution and other serious violations.<sup>20</sup> The scope of this principle is not limited to refugees, but also includes immigrants.<sup>21</sup>

### **2.1.2 Migrant detention under Libyan National law**

Libya has not ratified the Refugee Convention of 1951 nor the 1967 Protocol on the Status of Refugees. Article 10 of the Constitutional Declaration of Libya of 2011 does not recognize the right to asylum. Libya lacks a comprehensive framework regulating migration. The laws and regulations governing migration are not sufficient to protect refugees, migrants, and victims of trafficking.<sup>22</sup> Nor do they meet international standards.

Law No. 6 of 1987<sup>23</sup> is designed for refugee registration in Libya. Article 17 of Law No. 6, provides non-citizens who have overstayed their residence permit and who have illegally entered the country must be deported or/and imposed fine and imprisonment<sup>24</sup> up to three years.<sup>25</sup> Law No. 6 was amended by Law No. 2 of 2004, which increased the requirements for obtaining a Libya entry visa and the punishment for crimes of smuggling.<sup>26</sup>

The increase in the number of migrants crossing the Libyan coast to Europe has led to European pressure on the Libyan government, which in turn prompted Libya to pass Law 19 of 2010 on combating illegal immigration. Article 6 of Law No. 19 indicates that unauthorized immigrants must be detained and deported after serving their sentence. Article 6 is contrary to the provisions of Article 16(4) of the migrant worker convention (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families), to which Libya is a party. Article 16(4) of the Convention prohibits exposing migrants to arbitrary arrest or detention. Migrants in detention centres lack legal rights such as communication with lawyers, relatives, or UNHCR (United Nations High Commissioner for Refugees); and they don't have access to any legal assistance.<sup>27</sup> This violates Articles 16(8) and 16(9) of the Convention. These provisions grant migrants

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<sup>20</sup> The 1951 Refugee Convention and CAT prohibit the principle of non-refoulment.

<sup>21</sup> Art. 3 of CAT.

<sup>22</sup> Amnesty (2012). *Libya: Rule of Law or Rule of Militias?* p. 8.

<sup>23</sup> Law No. (6) of 1987 on organizing foreigners' in Libya, 1987.

<sup>24</sup> Art 19 of Law No. 6 of 1987.

<sup>25</sup> Art 22 of Law No. 6 of 1987.

<sup>26</sup> Art. 1 of Law No. 2 of 2004 .

<sup>27</sup> Amnesty (2013). *International Report 2013. The State of the World's Human Rights*, p. 162.

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the right to bring proceedings before the courts, to request the court to adjudicate without any delay, and to obtain the necessary legal aid.

Law No. 19 is not only limited to criminalizing entry, stay, and exit but has also put thousands of residents in the dilemma of being the illegal resident. The Law grants two months to all foreigners in Libya to register their residence, and failure to do so renders their status illegal.<sup>28</sup> This law contains severe legal and human rights gaps, as it legalizes the detention of migrants, refugees, and victims of trafficking while making them vulnerable to forced labour and many other violations.<sup>29</sup> Moreover, the law allows indefinite detention of migrants before deporting them.<sup>30</sup> This constitutes a clear breach of Libya's obligations under Articles 9 and 14 of the ICCPR, which prohibits arbitrary detention and obliges the State party to promptly conduct fair trial for detainees.

## **2.2 Torture and other cruel, inhuman or degrading treatment in detention centres**

The UNSMIL report (2023) provides overwhelming evidence which show that leaders in the Directorate of Combatting Illegal Migration (DCIM) such as Tariq al-Sikka, Gharyan, Abu Isa and Tariq al-Matar have committed acts of torture in detention centres.<sup>31</sup> Migrants are routinely abused by sharp tools, sticks and plastic hoses.<sup>32</sup> Migrants (detained in 2020-2021) have confirmed that irregular immigration officials systematically abuse the detainees to punish, instil fear in them or to force their families to pay money.<sup>33</sup>

Médecins Sans Frontières (MSF) has confirmed treatment of detained migrants for fractures and other injuries resulting from beatings in detention centres.<sup>34</sup> One pregnant detainee was, for example, severely beaten until DCIM public official broke her leg because she went to the bathroom without

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<sup>28</sup> Art. 11 Law No. 10 of 2010.

<sup>29</sup> Art. 10 Law No.10 of 2010.

<sup>30</sup> Art 6 of Law No.10 of 2010 provides that “unauthorised migrants are to be detained and then deported after they serve their sentences. Additionally, those detained do not have avenues to challenge the grounds of their detention or deportation decisions.”

<sup>31</sup> A/HRC/52/83, para 48; see also A/HRC/49/4 para 51.

<sup>32</sup> OHCHR, *supra* 10, p.17.

<sup>33</sup> Enes Mehmet Beşer & Fatimah Elfeitori (2018). “Libya detention centres: A state of impunity”, *Ankara: Migration Policy Center*, p. 9; see also A/HRC/52/83 (2023), para 44.

<sup>34</sup> MSF (2021). *Libya: One dead and two injured following shooting in Tripoli detention centre*.

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prior permission.<sup>35</sup> More than half of the people interviewed by UNSMIL mentioned that they witnessed many deaths among migrants resulting from torture and conditions of detention. Some immigrants reported that many of them lost sight and hearing due to beatings on their heads and ears. This reflects the kind of torture that is widely and systematically practised in detention centres of Libya.<sup>36</sup>

### 2.2.1 Torture under international law

The Convention against Torture (CAT), ICCPR, CRC, ACHPR, and Arab Charter prohibit torture.<sup>37</sup> CAT defines torture as a distinct crime.<sup>38</sup> Article 16 of the Convention provides that measures taken to prevent torture must also be applied to cruel treatment, even if it does not amount to torture.<sup>39</sup>

### 2.2.2 Torture under Libyan national law

The Libyan Penal Code fails to criminalize cruel and inhumane acts that may not amount to torture *per se*.<sup>40</sup> The Penal Code and Law No. 10 of 2013 do not comply with Article 16 of CAT which prohibits cruel acts. The Committee against Torture notes that the obligation to prohibit torture, cruel and inhumane treatment that may not amount to torture are interrelated, overlapping and indivisible obligations. This indicates the gaps in Libyan Laws against torture towards migrants. Thus, to make sure that Libya fulfils its international obligations, Libyan national law must criminalize other cruel acts even if they do not constitute torture *per se*.

The Penal Code and Law No. 10 of 2013 deal with torture. Article 2 of Law No. 10 imposes five-year imprisonment against the offence of torture. However, Article 2 does not provide a comprehensive definition of torture as it omits many essential aspects enshrined in Article 1 of the Convention against Torture. Article 2<sup>41</sup> limits torture only to its commission for the

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<sup>35</sup> Amnesty (2021). *Libya: 'No one will look for you': Forcibly returned from sea to abusive detention in Libya*, p.37.

<sup>36</sup> OHCHR, *supra* 10, p.17.

<sup>37</sup> Art. 16 of CAT, Art. 7 of ICCPR, Art 37(a) of CRC, Art.8 of Arab Charter, Art 5 of ACHPR.

<sup>38</sup> ICTY, *Prosecutor v. Brdanin* (2007), IT-99-36, 246.

<sup>39</sup> CAT, General Comment 2, paras. 3, 4, 5, 6.

<sup>40</sup> Art. 16 of CAR “Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture”

<sup>41</sup> Article 2 of No. 10 of 2013 defines *torture* as “ anyone who inflicts or orders another person to inflict physical or mental pain on a detainee under his control in order to

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purposes of extracting confession, thus ignoring its criminalization when it is committed for “obtaining information, punishing a person for an act committed or is suspected of having committed, intimidating or coercing the victim or third person”.

Article 1 of the CAT, provides an inclusive list for purposes of torture unlike Article 2 of Law No. 10 of Libya, which is narrower in scope. Therefore, the Libyan national law must define torture in a broader manner consistent with Article 1 of the CAT. Libyan national law also fails to be consistent with the relevant international law framework. It clearly neglects many essential aspects in the definition of torture, and in the criminalization of cruel and inhuman acts that may not amount to torture.

### **2.3 Enforced disappearance of immigrants**

When migrants' boats are intercepted they end up being arrested by LCG and transferred to detention centres indefinitely. Many migrants end up being victims of enforced disappearance after their arrest by DCIM, LCG, armed groups and human traffickers who refuse to disclose the migrants' fate and whereabouts as well as deny protection under the law.<sup>42</sup> The Amnesty Report 2020 indicates the involvement of DCIM and LCG in perpetrating enforced disappearances against migrants in “data collection and investigation facilities and Tobacco Factory”.<sup>43</sup> Both of these centres are run by armed militias affiliated with The Libyan Ministry of Interior.<sup>44</sup> The 2023 UNSMIL report reveals that many people were subjected to enforced disappearance by the Libyan National Army led by Haftar (LNA) and the militias affiliated with the National Unity Government led by Abdul Hamid al-Dabaiba.<sup>45</sup>

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extract a confession for any act that such detainee has or has not committed, or because of discrimination, regardless of its type, or revenge, regardless of its motive”.

<sup>42</sup> Raja Abdulrahim (2020). “Migrants in Libya suffer torture, abuse in off-the-grid detention, aid groups say”, *The Wall Street Journal*, <https://www.wsj.com/articles/aid-groups-report-abuse-torture-in-libyas-off-the-grid-detention-centers-11594649292> (last visited Aug 20, 2022).

<sup>43</sup> Amnesty (2020). *‘Between life and death’: Refugees and migrants trapped in Libya’s cycle of abuse*, p. 23.

<sup>44</sup> Mat Nashed (2021). “Where are Libya's missing migrants?” *The New Humanitarian*, <https://www.thenewhumanitarian.org/news-feature/2020/08/05/missing-migrants-Libya-forced-returns-Mediterranean> (last visited Aug 20, 2022).

<sup>45</sup> A/HRC/52/83, Report of the Independent Fact-Finding Mission on Libya 2023 para 55

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### 2.3.1 Enforced disappearance under international law

Although Libya is not a party to the International Convention for the Protection of All Persons from Enforced Disappearance, it has ratified both CAT and ICCPR<sup>46</sup> which guarantee protection of fundamental human rights against enforced disappearance<sup>47</sup> (from torture, ill-treatment, arbitrary detention, violation of the right to life).<sup>48</sup> Moreover, the Human Rights Committee advises that member states must detect and prosecute the perpetrators of enforced disappearances.<sup>49</sup> Accordingly, The Libyan government is obligated under CAT and ICCPR to put an end to these human right violations,<sup>50</sup> and it has the obligation to prosecute the perpetrators of these violations and compensate the victims.<sup>51</sup>

### 2.3.2 Enforced disappearance under Libyan national law

Article 1 of Law No. 10 of 2013 criminalizes enforced disappearance and punishes perpetrators with imprisonment up to seven years where the crime is committed “(1) Against ascendants, descendants or spouses; (2) Or by a civil servant who transgresses the limits of the powers associated with his position; (3) to realise a gain in exchange for releasing the victim”. Article 1 is not comprehensive and Libya does not meet its international obligations concerning enforced disappearance. Although Article 1 includes deprivation of liberty as one of the elements of enforced disappearance, it neglects important elements of enforced disappearance such as concealing information about a victim's fate and whereabouts. It also omits the enforced disappearance committed by a public official. Hence, Article 1 does not lead to a comprehensive approach to ban this crime and it fails to specify the nature of enforced disappearance and include all of its elements stipulated in Article 2 of ICPPED.

Law No. 10 does not prohibit the extradition, deportation, or expulsion of individuals to another country where they may be exposed to danger, enforced disappearance, or torture, similar to Article 3 of CAT. Moreover, Law No. 10 ignores the right of victims of enforced disappearance to obtain compensation, rehabilitation and legal assistance, provided under Article 24(4) of the

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<sup>46</sup> Libya has ratified CAT in 16 May 1989 and ICCPR in 15 May 1970.

<sup>47</sup> HRC, *Boucherf v. Algeria*, U.N. Doc. CCPR/C/86/D/1196/2003, para. 9.2 (2006),

<sup>48</sup> María Fernanda Pérez Solla (2006). *Enforced Disappearances in International Human Rights*, McFarland, p. 32.

<sup>49</sup> Art 2 of DPED.

<sup>50</sup> Art 16 of ICCPR.

<sup>51</sup> HRC, General Comment No. 31 of ICCPR, CCPR/C/21/Rev.1/Add. 13, para 18 (2004).

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Convention on Enforced Disappearance. This law neglects the establishment of national commission to investigate and document enforced disappearances, while many countries (including Argentina, South Africa, Chile, Sierra Leone and others) have established investigation and reconciliation commissions.

The Libyan government is thus expected to fix the deficiencies of Law No. 10 on enforced disappearance in accordance with international standards, to make it more effective in dealing with enforced disappearance and compensate victims such as migrants in Libyan detention centres.

## 2.4 Rape in detention centres

Rape and sexual violence are crimes that target people based on their gender.<sup>52</sup> Migrants detained in Libya are considered one of the most vulnerable social groups who have been subjected to rape and other forms of sexual violence. Rape in detention centres is used as means of punishment for disobedience.<sup>53</sup> The independent fact-finding mission in Libya 2022 report indicates that numerous interviews were conducted, where people testified either being subject or witnesses to sexual violence and rape. The mission also received reports of women in detention centres being subjected to stripping and harassment during searches, amounting to rape.<sup>54</sup> Especially women who came alone, were subjected to rape under the threat of firearms or knives in case of resistance.<sup>55</sup>

Many detainees were subjected to rape in exchange for food, water, or release in at least seven detention centres.<sup>56</sup> The report of Fact-Finding Mission found that most of the rape and sexual violence cases are related to the detention centres affiliated with the Directorate of Combatting Illegal Migration (DCIM).<sup>57</sup> The *Shari Al Zawiya* and *Surman* Detention Centre<sup>58</sup> in western Libya witnessed repeated cases of rape<sup>59</sup>, human trafficking and sexual exploitation.<sup>60</sup>

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<sup>52</sup> Council of Europe (2011). *Council of Europe Convention on preventing and combating violence against women and domestic violence*.

<sup>53</sup> Mehmet Enes Beşer & Fatimah Elfeitori *supra* 33.

<sup>54</sup> A/HRC/49/4, 39.

<sup>55</sup> OHCHR *supra* note 10, p. 21.

<sup>56</sup> Amnesty, *supra* 35, p. 7.

<sup>57</sup> A/HRC/49/4 para 57–62.

<sup>58</sup> They are centres under the supervision of DCIM

<sup>59</sup> A/HRC/49/4 para 40

<sup>60</sup> Malakooti Arezo (2019). *The Political Economy of Migrant Detention in Libya: Understanding the players and the business models*, p. 81.

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### 2.4.1 Rape under international law

According to international law, Libya is obligated to criminalize, prosecute, and punish rape and all other forms of gender-based crimes. Libya must protect children from rape and sexual exploitation.<sup>61</sup> Libya is also under the obligation of ACHPR, of which it is a member, to take all necessary measures to protect women, including drafting of necessary legislation criminalizing rape and sexual violence.<sup>62</sup> Although rape is a crime in itself, it is also classified as a form of torture under CAT<sup>63</sup> as well as by the International Tribunal for Rwanda (ICTR)<sup>64</sup> and Yugoslavia (ICTY).<sup>65</sup>

### 2.4.2. Rape and national laws of Libya

Rape is prohibited under the Libyan Penal Code.<sup>66</sup> Under Article 407, the prohibition of crimes of sexual violence is limited to cases where “force, threat, or deceit” is being used. Hence, the limited scope of sexual violence to specific acts omits many other situations and circumstances amounting to rape. UNSMIL documented many cases of rape in exchange for food in detention centres such as Ajdabiya Centre, run by DCIM affiliated with the Libyan government.<sup>67</sup> Such cases of rape in Libyan detention centres in exchange for food or release do not constitute a crime under Article 407 as such.

Another severe shortcoming of the Libyan Penal Code is reflected in Article 424 which provides that “[i]f the offender marries the victim of rape, the offence and penalty shall be extinguished, and the penal effects thereof shall cease”. In this context Article 424 substantially empties the effect of criminalization of rape because it is sufficient for the rapist to marry the victim to evade punishment. Thus Article 424, represents a significant breach of Libya's obligations under international law,<sup>68</sup> where marrying the victim

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<sup>61</sup> Art. 19 (1) and 34 of CRC.

<sup>62</sup> Art. 3 of ACHPR.

<sup>63</sup> CAT, General Comment No. 2, UN. CAT/C/GC/2. See also Felice D. Gaer (2012), “Rape as a Form of Torture: The Experience of the Committee against Torture”, *CUNY L. Rev.*, Vol (15)2, p. 295. 10.31641/clr150213

<sup>64</sup> ICTR, *The Prosecutor V. Jean-Paul Akayesu*, No. ICTR-96-4-T, Trial Chamber, (1998), para. 597

<sup>65</sup> ICTY, *Prosecutor v. Kunarac et al.*, (2002) IT-96-23 & IT-96-23/1-A, Appeals Chamber 150.

<sup>66</sup> Arts. 407, 408, 411 section 3 of Libyan penal code,

<sup>67</sup> A/HRC/50/6, para 56.

<sup>68</sup> Art 7(2) of Rome Statute, Art 4(e) of ICTR, Art 5 (g)(i) of ICTY, Art 3 of Geneva Conventions (GCs), Article 76(1) of Additional protocol of GCs and Rule 94 of Customary IHL.

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cannot be one of the mitigating factors that leads to the revocation of the perpetrator's criminal liability.<sup>69</sup> Article 424 also violates women's rights by forcing the woman to marry her rapist against her will, making her a victim of psychological and physical violence as well. It also omits her right to obtain justice and redress.

Hence, it is apparent that Libya has failed to meet its obligations under international law regarding prohibition of rape and sexual violence. Libya must thus amend Article 407 of the Libyan Penal Code and repeal Article 424 to fulfil its international commitments.

## **2.5 Forced labour and migrants in Libya**

Migrants in detention centres have faced many violations including forced labour. Many immigrants were forced to do farming, construction and cleaning work, without getting paid. Human traffickers or employees of the DCIM<sup>70</sup> hire migrants and take them to work after obtaining money from the employer and force the detainees to work.<sup>71</sup> Detainees are forced to work in unbearable conditions lacking necessary protections from the harsh climate. Moreover, employers provide insufficient quantities of food and dirty water for drinking which leads to catastrophic consequences on health of detainees.<sup>72</sup>

The United Nations Report 2023 found out that many migrants in Libya fell prey to forced labour and exploitation. Government, armed non-state actors (ANSAs), and human traffickers supervising detention centres force people to drive boats to Europe. Later, many of them were detained in Italy on charges of human trafficking, ignoring that they were victims of trafficking and forced to drive migrant boats.<sup>73</sup>

### **2.5.1 Forced labour under international law**

Article 8, paragraph 3 of the International Covenant on Civil and Political Rights (ICCPR) provides, "No one shall be required to perform forced or compulsory labour". Article 11 of the International Convention on the

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<sup>69</sup> The International Court of Justice (ICJ) recommended that Forced marriage after rape cannot be considered a mitigating circumstance for perpetrators, ICJ, (2019) "Obstacles to Women's and Girls' Access to Justice for Gender-based Violence in Morocco", p. 37

<sup>70</sup> Amnesty *supra* 43, p. 31.

<sup>71</sup> OHCHR, (2016). *Detained and dehumanised report on human rights abuses against migrants in Libya*, p.18.

<sup>72</sup> Ibid.

<sup>73</sup> A/HRC/52/83, para 94.

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Protection of the Rights of All Migrant Workers, Article 4 of the Universal Declaration of Human Rights, and Article 6 of African Charter on Human Rights (ACHPR) prohibit forced labour. The Slavery Convention also obligates member states to enact the necessary legislation to criminalize slavery and the slave trade.<sup>74</sup>

These international instruments have been ratified by Libya and are binding.<sup>75</sup> It is to be noted that the Yugoslavia tribunal has identified several acts that constitute modern forms of slavery, such as forced labour, “control of someone's movement, control of the physical environment, psychological control, etc.”<sup>76</sup> Therefore, international law instruments ratified by Libya provide a comprehensive ban on forced labour and bind it to develop legislative frameworks that guarantee the elimination of this crime, which represents a form of modern-day slavery.

### 2.5.2 Forced labour under national law

Article 425 of the Libyan Penal Code criminalizes slavery and punishes “anyone who deals in or traffics in slaves or any manner disposes of a slave or a person in a condition resembling slavery”<sup>77</sup>. Law No. 12 of 2010 defines *forced labour* as “all work or services to be rendered by any person and are carried out under threat” and without consent by the person’s free choice.<sup>78</sup> However, the Libyan national law does not criminalize forced labour.<sup>79</sup>

Moreover, National anti-immigration policies in many countries contribute to the promotion of discrimination and coercion, which in turn leads to forced labour,<sup>80</sup> as is the case in Libya. The Law of Combating Illegal Immigration No. 19 of 2010 transformed the status of thousands of people in Libya into illegal residents. Law No. 2 of 2004 and Law No. 19 of 2010 impose imprisonment and fine on illegal residents. Libya's anti-immigration policies strengthen forced labour and have made thousands of people victims of human trafficking. Consequently, the national law does not consider forced labour a criminal offence, which indicates its failure to fulfil Libya’s international

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<sup>74</sup> Slavery Convention, 25 Sep 1926, Art 2, 6-7.

<sup>75</sup> Ratified by Libya on 14 Feb 1957.

<sup>76</sup> ICTY, *The Prosecutor v. Kunarac, Kovač and Vuković*, para. 119.

<sup>77</sup> Art 425 of Libyan Penal Code.

<sup>78</sup> Art 5 of Law No. 12 of 2010.

<sup>79</sup> Art 2 (5) of Law No. (12) of 2010, Jan 2010.

<sup>80</sup> Chantal Thomas (2017). “Immigration Controls and Modern-Day Slavery”, Prabha Kotiswaran (editor), in *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery*, Cambridge University Press, p. 215.

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obligations. Libya's anti-immigration policies thus need amendments in accordance with international law.

## 2.6 Murder and death in detention centres

Immigrants are at risk of being killed even before they are detained. Many interceptions of migrant boats have caused death of immigrants after LCG opened fire on them. In July 2020, Libyan security forces opened fire on a group of migrants who were preparing to set out their boats across the sea, killing three.<sup>81</sup> Migrants are transferred to detention centres and exposed to various kinds of violation. Many of the detainees' accounts indicate that those in charge of detention centres disregard the right to life of persons under their custody.

An Italian human rights organization reported that thirty per cent of the interviewed migrants who were detained witnessed deaths in detention centres.<sup>82</sup> Violations that lead to death vary, in the form of shooting, torturing, or leaving them in poor detention conditions, such as lack of food and medical neglect. In 2018, one of the most brutal acts against migrants took place, as several migrants who were trying to escape from the detention Centre in Bani Walid were shot by human traffickers which led to the killing of 15 persons.<sup>83</sup> In October 2021, a riot in Tripoli Detention Centre run by DCIM ended with the shooting of detainees, killing 6 detained migrants.<sup>84</sup>

### 2.6.1 Murder under international law

ICCPR and ACHPR provide the legal framework for protecting the right to life and Libya has already ratified these instruments. As per Article 4 of the ICCPR, the right to life is an inherent right of a human being; no one can violate it, and its protection is guaranteed under the law. International law and relevant jurisprudence strictly prohibit extrajudicial executions by arbitrary procedures.<sup>85</sup> International humanitarian law protects civilians' right to life by prohibiting killings that are inconsistent with the fundamental principles of proportionality, distinction, and precautions. Moreover, Article 3 of the Geneva Convention prohibits "the passing of sentences and the carrying out

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<sup>81</sup> MSF (2020). "People shot and killed in Libya while trying to flee arbitrary detention" Médecins Sans Frontières (MSF) International, <https://www.msf.org/people-shot-and-killed-libya-while-trying-flee-arbitrary-detention> (last visited Aug 23, 2022).

<sup>82</sup> MEDU (2020). *Report on Human Rights Violations against Migrants and Refugees in Libya* (2014-2020) p.12.

<sup>83</sup> HRW (2019). *No Escape from Hell EU Policies Contribute to Abuse of Migrants in Libya*, p. 25.

<sup>84</sup> UNICEF (2021). *UNICEF Libya Flash Update 2: Migrant raids and detention*.

<sup>85</sup> CCPR, General comment No. 36, para 12, 13.

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of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees ...”

### **2.6.2 Murder under national law**

Even though international law prohibits arbitrary deprivation of life, the Libyan Penal Code violates this obligation by justifying public officials' use of lethal force. Article 71 of the Penal Code exempts a public official from liability of murder or any other act committed under “the necessity to repel force or to overcome the resistance of public authorities.” The words used in Article 71 are broad in interpretation and scope thereby empowering the public servant with authority that is dangerous and threatening to the lives of citizens.

In line with international principles, the use of weapons should be restricted, whereby public officials shall resort to the use of lethal force only in cases where it is unavoidable. These principles permit the use of lethal weapons in particular situations, such as self-defence, defence of another person's life, to prevent a serious crime or in extremely dangerous act whereby a person resists his arrest.<sup>86</sup> Thus, the Libyan national law, particularly Article 71 of Penal Code, violates both the international principles on the use of force by public official and the jurisprudence of human rights conventions.<sup>87</sup>

## **3. Serious Violations as Crimes against Humanity**

Killings,<sup>88</sup> rape,<sup>89</sup> enforced disappearances,<sup>90</sup> enslavement,<sup>91</sup> and torture<sup>92</sup> constitute crimes against humanity when committed as part of a widespread or systematic practice against civilians.<sup>93</sup> UN reports and government organizations indicated that serious violations in a comprehensive, systematic and indiscriminate manner took place against migrants in detention centres of Libya.<sup>94</sup>

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<sup>86</sup> Principle 9, “Basic Principles on the Use of Force and Firearms by Law Enforcement Officials”.

<sup>87</sup> General comment no 4 of ACHPR , para 24

<sup>88</sup> Art. 7(1)(a) of Rome Statute.

<sup>89</sup> Rape and sexual violence crimes are listed in the ICTY (International Criminal Tribunal for the Former Yugoslavia) and ICTR (The International Criminal Tribunal for Rwanda) Statutes. Art 5(g) of ICTY, Art 3(g) of ICTR.

<sup>90</sup> Art 5 of ICPPED.

<sup>91</sup> Art. 5(c) of the ICTY, Art. 3(c) of the ICTR.

<sup>92</sup> ACHPR, General Comment No. 4 on Art 5 CAT and art. 7(1)(f) of ICC Statute,

<sup>93</sup> Art. 7(2)(a) of Rome status, Art. 7(2)(a).

<sup>94</sup> A/HRC/49/4, para 49.

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### 3.1 Detention of migrants in Libya as a crime against humanity

The fundamental rules of international law prohibit arbitrary detention. These rules embody the right to fair trial for the detainee and the detainee's right to legal representation. These rights are manifested as peremptory in international law under the ICCPR.<sup>95</sup> The arbitrary detention in Libya is so widespread that it became a systematic and dangerous practice.<sup>96</sup> The Libyan National Army, DCIM, LCG, government-affiliated armed militias and other armed militias have pursued a policy of detaining migrants and transferring them to detention centres in Libya.<sup>97</sup> UNSMIL reported that there are several instances of widespread and systematic practices of arbitrary detention in Libya.<sup>98</sup>

Under Rome Statute of the International Criminal Court, imprisonment or severe deprivation of liberty amounts to crime against humanity when practiced against one or more persons and violates the basic rules of international law. The determinant elements of crime against humanity are the knowledge or intention of perpetrator as part of a widespread and systematic attack.<sup>99</sup> Therefore, the practices of arbitrary detention against migrants in Libya amount to crimes against humanity.

### 3.2 Forced labour as a crime against humanity

Enslavement is a crime against humanity when “the perpetrator exercises any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty”.<sup>100</sup> The act constitutes a crime against humanity where such action is committed with knowledge and as part of widespread and systematic attack against the civilian population.

In international jurisprudence, forced labour is a form of exercising the powers of ownership.<sup>101</sup> UN reports indicate that a large number of migrants were subjected to forced labour in detention centres in Libya.<sup>102</sup> In International Organization for Migration's interviews, it was found that half

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<sup>95</sup> Judge Patrick Robinson (2009). “The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY”, *Berkeley J.L Int'l L*, p.7.

<sup>96</sup> A/HRC/52/83, para 63.

<sup>97</sup> A/HRC/50/63, para 40.

<sup>98</sup> A/HRC/52/83, para 4.

<sup>99</sup> ICC element of crime Article 7 (1) (d) of Rome statute

<sup>100</sup> Art. 7 (1) (c) of Rome statute.

<sup>101</sup> ICC (2021). Ongwen Trial Judgment, para. 2712.

<sup>102</sup> A/HRC/52/83, para 44.

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of the detainees were forced to work without pay indicating forced work as a systematic and widespread practice in detention centres.<sup>103</sup> Therefore, the conduct of forcing, selling, and enslaving migrant detainees, are considered as exercise of powers of ownership amounting to crimes against humanity.

### 3.3 Murder as a crime against humanity

Under the Rome Statute of ICC, acts and omissions that cause death tantamount to murder, and this amounts to a crime against humanity where the perpetrator kills one or more persons<sup>104</sup> “as part of a widespread or systematic attack directed to civilians”.<sup>105</sup> Killing is a general practice in both official and unofficial detention centres of Libya. Often it is a common response to protests, the detainee's resistance to physical violence, or the inability of the detainee or his family to pay the ransom for release.<sup>106</sup> In addition to direct killings, poor medical conditions, lack of food and water cause many deaths inside detention centres.<sup>107</sup>

### 3.4 Rape as a crime against humanity

The Rome Statute defines rape,<sup>108</sup> and it is committed through force, threat of force, or coercion. The act of coercion can have many forms, such as threat of violence, duress, detention, psychological oppression, or abuse of power.<sup>109</sup> International and human rights organizations documented rape on a large scale in Libyan detention centres.<sup>110</sup> Rape often takes place to punish or oppress victim in exchange for food, drink, or release.<sup>111</sup> The OHCHR (Office of the High Commissioner for Human Rights) reported that most of the women had been sexually assaulted and raped by guards in governmental and non-governmental detention centres.<sup>112</sup> Rape is a systematic and widespread practice, and many migrant women take birth control pills before coming to

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<sup>103</sup> IOM (2017). *Mixed Migration Flows in the Mediterranean and Beyond: Flow monitoring data analysis*, p. 2.

<sup>104</sup> Art. 7(1)(a) of Rome statute.

<sup>105</sup> Ibid.

<sup>106</sup> Amnesty, *supra* 43, p. 6.

<sup>107</sup> ACAPS, (2021) LIBYA Humanitarian situation in detention centres, p.3.

<sup>108</sup> ICC the element of crime , Art 7 (1) (g)-1 of Rome statute).

<sup>109</sup> Ibid.

<sup>110</sup> Amnesty, *supra* 43, p. 30.

<sup>111</sup> Amnesty, *supra* 35, p. 40.

<sup>112</sup> OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 20 December 2018, p.31

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Libya since they have knowledge that they will often be subject to rape and sexual assault.<sup>113</sup>

### 3.5 Enforced disappearance as a crime against humanity

The Rome Statute provides that enforced disappearance is a crime against humanity, whereby one or more persons are detained without any information about their fate and place of detention.<sup>114</sup> ICPPED also considers enforced disappearance a crime against humanity when committed as a part of systematic and widespread practice.<sup>115</sup> Reports from the United Nations and human rights organizations revealed that migrants detained in Libya were subjected to enforced disappearance on a large scale.<sup>116</sup> The International Organization for Migration has reported on many occasions that there are hundreds of migrants in “data collection and investigation facilities and Tobacco Factory” of Libya whose fate or whereabouts are unknown.<sup>117</sup> The practice of arrest and abduction of migrants (by concealing the information about their fate and whereabouts) is extensive in detention centres,<sup>118</sup> thereby amounting to crime against humanity.

The legal framework of Libya permits indefinite detention of migrants which ultimately turns into these violations and sufferings. Perhaps what reinforces these violations is the existence of historical background of hostility and discrimination against migrants in Libya. Therefore, the violations committed against migrants,<sup>119</sup> cannot be classified as individual or random acts,<sup>120</sup> but they amount to crimes against humanity.<sup>121</sup>

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<sup>113</sup> OHCHR *supra* 71, p. 21

<sup>114</sup> ICC Elements of Crimes, Article 7 (1) (i) of Rome statute.

<sup>115</sup> Art 5 of ICPPED.

<sup>116</sup> Amnesty, *supra* 35, p. 5; A/HRC/49/4 para 27; see also A/HRC/48/83 para 58.

<sup>117</sup> IOM Libya, (2020) Twitter post, [twitter.com/IOM\\_Libya/status/1276768980758380544](https://twitter.com/IOM_Libya/status/1276768980758380544) see also IOM, “Migrants Missing in Libya a Matter of Gravest Concern” [www.iom.int/news/migrants-missing-libya-matter-gravest-concern](http://www.iom.int/news/migrants-missing-libya-matter-gravest-concern).

<sup>118</sup> A/HRC/52/83, para 55; see also /HRC/49/4 para 36 and A/HRC/50/63 para 39.

<sup>119</sup> A/HRC/49/4, 2022 para 27.

<sup>120</sup> HRC (2021). *Report of the Independent Fact-Finding Mission on Libya*, para. 69,

<sup>121</sup> A/HRC/49/4, 2022 para 26.

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#### 4. The Impact of Armed Conflict on the Migrant Crisis in Libya

After the fall of Gaddafi, Libya witnessed an escalation in violence perpetrated by militias affiliated with the government on one hand and armed groups on the other. Extremist militias, especially the Islamic State, played a significant role in this conflict.<sup>122</sup> The political instability in Libya contributed to an escalation in the intensity of conflict, which quickly turned into a second civil war in 2014, which is still going on.<sup>123</sup> The intensity of the non-international armed conflict has reached the threshold required under Common Article 3 Geneva Conventions (GC), 1949 and Additional Protocol II 1977.<sup>124</sup> Under the context of the chaos caused by the bloody conflict in Libya, the migration and human trafficking across the Mediterranean Sea has accelerated significantly due to its geographical proximity to Europe.

The state of instability, chaos and the expansion of militias contributed to atrocities against migrants. In 2019, amid the clashes, one of the warplanes bombed the *Tajoura complex detention* centre for migrants, killing 53 migrants.<sup>125</sup> In another incident, the clashes forced the responsible guards to flee from the *Abu Salim Detention Centre* leaving the detained migrants without food or water for two days.<sup>126</sup> Many incidents witnessed deaths due to explosions in immigration detention centres.<sup>127</sup>

The violations committed during armed conflict constitute a breach of obligations under the Geneva Convention and its protocols by the conflicting parties. For example, the air raid on Tajoura centre in 2019 violates the principle of proportionality and distinction.<sup>128</sup> The raid targeted Tajoura Centre without distinction, causing a large number of civilian casualties.<sup>129</sup>

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<sup>122</sup> Geneva Academy (2019). *The War Report Armed Conflicts in 2018*, p.102.

<sup>123</sup> Amnesty (2019). *Evidence of War Crimes during Tripoli Offensive*.

<sup>124</sup> Center for Preventive Action, "Instability in Libya | global conflict tracker Council on Foreign Relations," <https://www.cfr.org/global-conflict-tracker/conflict/civil-war-libya> (last visited Sep 15, 2022).

<sup>125</sup> UNSMIL (2019). *The airstrikes on the Daman building complex, including the Tajoura Detention Centre*, para 6.

<sup>126</sup> Ibid.

<sup>127</sup> Several sources also mentioned an explosion at the Abu Rashada Detention Centre in Gharyan on June 20, 2021. The DCIM has had control of the centre, a former military compound, since 2014.

<sup>128</sup> UNMSIL (2019). *The airstrikes on the Daman building complex*, para 46.

<sup>129</sup> According to OCHA hostilities in Libya have killed more than 41 civilians and injured more than 135 others.

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Hence, the conflicting parties in Libya have failed to respect the principles of IHL relating to the conduct of hostilities.

## **5. Responsibility for violations committed against migrants in Libya**

In light of the atrocities taking place in Libya, particularly the human rights violations in migrant detention camps, all parties to the conflict are involved in these violations. Therefore, it becomes necessary to attribute the responsibility to the perpetrators of violations under the relevant rules of International and national law, and ensure that those responsible for the crimes are held accountable.

### **5.1 Responsibility of the Libyan government**

The state is obligated to protect all persons under its control and their human rights regardless of nationality or immigration status. Under ICCPR Libya is committed to respect, protect, and fulfill state responsibility for human rights.<sup>130</sup> Under Article 2 of the ICCPR, Libya is required to respect migrants' human rights, by taking necessary measures to prevent violations in detention centres. Libya is responsible for the crimes of torture, murder, enforced disappearance, forced labour, rape and arbitrary detention against migrants in detention centres under its jurisdiction.

In the context of international humanitarian law, Libya is responsible for violations and grave breaches of the Geneva Conventions and their Additional Protocols. These grave breaches including murder, torture, inhuman treatment, and willfully causing severe suffering in migrants' detention centres of Libya clearly entail state responsibility. According to (GC 1 Art. 50, GC 2 Art 51, GC 3 Art 130, GC 4 Art 147, AP 1 Article 11, AP 1 Article 85), Libya is responsible for the violations committed by its armed forces and affiliated armed militias.<sup>131</sup> The Libyan government is also required to exercise due diligence to prevent violation by armed militias in areas outside its control.<sup>132</sup> These provisions obligate Libya to prosecute persons implicated in grave breaches and compensate migrant detainees.

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<sup>130</sup> Art 2 of ICCPR.

<sup>131</sup> Art. 8 of ARSIWA (Articles on Responsibility of a State for its Internationally Wrongful Acts).

<sup>132</sup> HRC, Comment. 36, para.21, The Right to Life, Art 4, para 9 (2015).

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As discussed above, murder, torture, enforced disappearance, forced labour, arbitrary detention, and rape constitute serious violations of international human rights and IHL, amounting to crimes against humanity.<sup>133</sup> Although Libya is not a party to the Rome Statute, the International Criminal Court (ICC) has jurisdiction to prosecute the perpetrators of crimes against humanity, war crimes and genocide committed in Libya since February 15, 2011. Security Council Resolution 1970 of 2011<sup>134</sup> enables ICC to exercise its jurisdiction in prosecuting members of the LCG, DCIM, armed militias affiliated with the government, and armed non-state actors (ANSAs) who have committed crimes in detention centres.

It must be noted that the jurisdiction of ICC in Libya is subject to the principle of complementarity thereby enabling the ICC to exercise its jurisdiction only when the national court refuses or cannot exercise its jurisdiction to prosecute the perpetrators. As the responsibility of the Libyan government under international criminal law is yet under development, granting ICC jurisdiction is a crucial step to protect the rights of civilians and migrants.

International humanitarian law and international human rights law impose obligations on the Libyan government to curb abuses, prosecute perpetrators in detention centres, and bring them to justice. It is worth noting that the jurisdiction of ICC in Libya under Security Council Resolution 1970 is limited to crimes against humanity, war crimes and genocide. Thus, other crimes committed against migrants—in violation of national and international law that are outside the jurisdiction of ICC—obligates Libyan government to pursue them and prosecute the perpetrators in national courts.

## **5.2 Responsibility of armed non-state actors (ANSAs)**

The Libyan government controls only less than one-third of the country's area, and the ANSAs represented by the Libyan National Army led by Khalifa Haftar control the rest of Libyan land.<sup>135</sup> The responsibility cannot thus only be limited to the Libyan government, because obligations must also be attributed to ANSAs.

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<sup>133</sup> A/HRC/52/83 para 2.

<sup>134</sup> UNSC S/RES/1970 (2011).

<sup>135</sup> Alia Chughtai & Ramy Allahoum (2020). *Libya: Mapping areas of military control*, <https://www.aljazeera.com/news/2020/7/27/libya-mapping-areas-of-military-control> (last visited July 30, 2023).

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Common Article 3 of the Geneva Conventions applies to non-international armed conflicts between government and ANSAs, and it imposes obligations on ANSAs. Accordingly, ANSAs in Libya, regardless of their political or ideological affiliations, are obligated to treat civilians humanely, as well as refrain from killing, mutilating, torturing and other harmful treatment of protected persons under IHL. ANSAs remain obligated even if their members are not acting in an official capacity. Furthermore, ANSAs have responsibility to compensate civilian damages in their violation of Common Article 3.

The armed conflict in Libya meets the threshold of Additional Protocol II necessary for its implementation.<sup>136</sup> Thus, under Articles 4 and 5, ANSAs in Libya are obligated to protect migrants in detention centres, should not subject migrants to arbitrary detention, torture, forced labour, sexual exploitation, and have the obligation to provide them with legal assistance and a fair trial. Moreover, ANSAs in Libya are bound by Security Council resolutions 2174 on Libya.<sup>137</sup> The resolutions assign responsibility to the parties of conflict for crimes committed, including the Libyan National Army for human rights violations of murder, torture, rape and other violations committed against migrants in detention centres.

### 5.3 Responsibility of European countries

Despite constant violations against civilians and migrants in Libya, the European Union has deepened its partnership with the Libyan government to control immigration. The EU, especially Italy, has contributed to the tragedy of migrants by supporting, financing, and empowering the Libyan Coast Guard and the armed militias. EU's responsibility for crimes against migrants outside its borders is closely linked to the extraterritorial reach of human rights. This evokes the question whether a state can be held responsible for human rights violations outside of its territories?<sup>138</sup>

The European Court of Human Rights (ECtHR) has held that ECHR can extend to matters that occur outside territories of a state party, if that state

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<sup>136</sup> Louise Arimatsu & Mohbuba Choudhury (2014). *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya*, p. 38.

<sup>137</sup> UNSC, S/RES/2174 (2014), 27 August 2014.

<sup>138</sup> Violeta Moreno-Lax, Daniel Ghezelbash & Natalie Klein, (2019), "Between life, security and rights: Framing the interdiction of 'boat migrants' in the Central Mediterranean and Australia", *Leiden Journal of Int L*, Vol. 32(4), p. 715. doi.org/10.1017/S0922156519000451.

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party exercises ‘effective control’<sup>139</sup> over the area in question.<sup>140</sup> This applies where the state party in question has the power to take measures to prevent human rights violations. Italy exercises effective control over the Libyan Coast Guard (LCG) through financial and logistical support.<sup>141</sup> This support allows the LCG to intercept migrants at sea and return them to Libya, where they are subjected to arbitrary detention, torture, and other human rights abuses.<sup>142</sup>

The ECtHR has not yet ruled whether EU's support for the LCG entails responsibility for the crimes committed against migrants in Libya.<sup>143</sup> However, the Court has pointed out that it is likely for EU to have a responsibility in this case. Although the debate over the EU's responsibility for crimes against migrants outside its borders is complex, the issue is becoming increasingly important, as the EU's migration control policies are being seen as complicit in human rights abuses.

Moreover, the European Union and Italy are responsible under Article 16 of ARSIWA (Articles on Responsibility of a State for its Internationally Wrongful Acts) as they have knowledge of forced return of migrants and violations committed in detention centres. Article 16 of ARSIWA fixes the responsibility of auxiliary state that contributes to human rights violations. Therefore, assisting the return of migrants from sea, knowing that they will be detained with severe violations being committed against them makes the EU responsible. Hence, the support of European countries for the Libyan government gives rise to crimes against humanity.

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<sup>139</sup> ECtHR, *Hirsi Jamaa and Others v. Italy*, Appl. 27765/09, 23 February 2012, para. 73.

<sup>140</sup> María-Teresa Gil-Bazo (2017). “Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law”, *European Journal of International Law*, Vol. 29(3), p.1030. doi.org/10.1093/ejil/chy048

<sup>141</sup> Reuters (2017). *Italy tries to bolster Libyan Coast Guard, despite humanitarian concern*, <https://www.reuters.com/article/us-europe-migrants-libya-idUSKCN18B2E5>, (last visited July 30, 2023)

<sup>142</sup> Violeta Moreno-Lax (2020). “The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, *S.S. and Others v. Italy*, and the “Operational Model”, *German Law Journal*, Vol. 21(3), pp.385-416. doi.org/10.1017/glj.2020.25.

<sup>143</sup> ECtHR, *Hirsi Jamaa and Others v. Italy*. App. No. 27765/09 (2012).

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## 6. Conclusion

By examining the national and international laws, it can be asserted that Libya lacks the necessary legal framework to deal with immigrants and asylum seekers. The present Libyan laws are not sufficient to criminalize serious human rights violations in detention centres. The Libyan laws in Article 2 of Law No 10 of 2013 (torture), Article 1 of Law No 10 (enforced disappearance), and Article 407 Libyan Penal Code (rape and sexual violence) are not defined well in accordance with international standards.

As discussed above, the content of Article 424 lacks the core elements that criminalizes rape and Article 71 of the Penal Code relieves public officials from responsibility of killing or any act committed as “the necessity of repeating force or overcoming the resistance of public authorities.” Moreover, the indefinite detention of immigrants under Article 19 of Law No. 6, 1987 entails violation of human rights. Libya's anti-immigration policies, Law No. 19 of 2010 and Law No. 2 of 2004, have fortified forced labour thereby exposing thousands of migrants to human trafficking. These drawbacks in the national law have led to more violations and atrocities, especially in immigration detention centres of Libya.

Libya is obligated under ICCPR and other international conventions to respect, protect and fulfil human rights. It is responsible for the violations committed by the LCG, the DCIM and affiliated armed militias in detention centres. Furthermore, the Libyan government must exercise due diligence to prevent abuses by armed militias in areas outside its control. The government should establish an investigative mechanism to expose and prosecute violations committed by its public officials, and ANSAs. Likewise, Libya must reform its national law considering international principles as well as ratify the 1951 Refugee Convention and its protocol. Libya should take strict measures to prosecute the perpetrators that do not fall within the jurisdiction of the International Criminal Court under Security Council Resolution (SCR) 1970. ANSAs are also responsible to comply with the minimum standards set out in Common Article 3, additional protocol II, and SCR,

Responsibility for these violations rests with the state, ANSAs, and the European Union. The policies of European countries supporting the refoulement of migrants (along with prevailing political instability, the fragility of the security situation, the armed chaos, and the absence of accountability at the international and national levels) have contributed to the continued perpetration of violations by the government and ANSAs. Considering that some European countries, especially Italy, exercise effective control over Libyan Coast Guards (LCG), EU bears responsibility to

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extraterritorial human rights violations against immigrants in detention centres of Libya.

EU is obliged to respect Article 78 of the Treaty on the Functioning of the European Union (TFEU), which requires the European Union's policies on migrants to be in line with the Geneva Convention of 1951 as a guarantee of nonrefoulement. The European Union must thus ensure that the humane treatment of detainees and people are not ignored merely because the victims suffer from the violations while migrating to Europe. \_\_\_\_\_■

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