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## Cooperation Initiatives by Member States with Third Countries for the Control of Migratory Flows: The Case of the Memorandum between Malta and Libya.

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### Abstract

Following the previous informal Italy-Libya; EU-Turkey agreements, in May 2020, Malta concluded its own Memorandum of Understanding with Libya to establish two coordination centres in Tripoli and Malta, fully funded by Malta. In our paper, we will frame this non-legally binding agreement within the strategy of the EU and its Member States to cooperate with Libya in the deterritorialisation of migration management to reduce the number of migrants and asylum seekers arriving at Europe's external borders. We will analyse the legal implications, both formal and material concerns, that exist in the application of this Memorandum, starting with the informalisation of cooperation and the deterritorialisation of migration management, and its effects on human rights and the possible international responsibility that it may entail.

### Keywords:

Externalisation, Memorandum of Understanding Malta-Libya, Migration, Human Rights.

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## I. Introduction

The so-called refugee crisis has been a turning point for the European External Borders management model. With the premise of combating human trafficking and reducing the number of people that risks their lives in the Mediterranean Sea, the EU has prioritised the cooperation with third countries on migration and border management, in what some authors have called an externalisation strategy by the EU and its Member States<sup>2</sup>.

Among third States located in North Africa, Libya is key as a gateway to Europe via the central Mediterranean route. The critical political situation in Libya and the proliferation of armed and criminal groups provide the perfect scenario for migrant smuggling activities and human trafficking recognised as a “systemic” problem<sup>3</sup>.

However, informality has become the defining feature of new cooperation mechanisms with third States developed by the EU and its Member States. In this regard, the paradigmatic example is the 2017 Memorandum of Understanding (MOU) between Italy and Libya, renewed in 2020, to reduce the flow of irregular migrants from Libya by training and developing the capacities of the Libyan Coast Guard. Although the International Criminal Court confirmed the existence of international crimes in Libya, and Human Rights protection international organisms appealed for the suspension of the Memorandum, it has not prevented other States such as Malta from following Italy's lead and signing their own MOU with Libya in May 2020.

Our objective is to discuss the contents of this Memorandum, as well as the scope of its bilaterally agreed commitments, framing this unilateral policy of an EU Member State in the current informal policy of EU cooperation. Main legal questions arise not only on the formal aspect of the Memorandum but also on its material aspect. First, it constitutes a soft law norm lacking democratic and judicial guarantees. And second, it lacks guarantees for the respect of international obligations of human rights and international refugee law. We will first address the European context in which the EU's cooperation policy towards Libya has been framed since the so-called refugee crisis (II). We will then analyse the content of the MOU between Malta and Libya in 2020, with particular emphasis on its formal and material aspects (III). Subsequently, we will analyse the implications of the MOU for the policy of deterritorialisation, characterised by informality and its inadequacy with the rights obligations that may be implied by Malta's responsibility for human rights violations through cooperation with Libya (IV).

## II. The context: the broader cooperation between the EU, Member States and Libya after the so-called refugee crisis

The informal and individual agreements between the EU Member States and Libya do not constitute isolated national policy initiatives. However, it fits within the EU's strategy of focusing all its efforts on cooperation with third States to reduce migratory flows that reach Europe's external borders<sup>4</sup>. Within this cooperation, the focus on capacity building, training and funding for the authorities responsible for intercepting migrants in Libyan waters has been and continues to be particularly significant<sup>5</sup>.

The 2015 European Agenda on Migration already mentioned of the need to cooperate with Libya in the capacity building and training of the competent Libyan authorities in migration control to reduce the arrival of irregular immigrants at Europe's external borders<sup>6</sup>. Besides, Libya continues to be the focus of attention in the Communication on the New Partnership Framework with third countries in 2016, where the European Commission echoes the problematic situation in Libya and the need for continued political and financial

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<sup>2</sup> Juan Santos Vara, *La Dimensión Exterior de las Políticas de Inmigración de la UE en tiempos de crisis* (Tirant lo Blanch, Valencia, 2020) 48-49

<sup>3</sup> UNSMIL and ACNUDH, *Detained and dehumanised. Report of Human Rights abuses against migrants in Libya*, 13.12.2016; UNSMIL and ACNUDH, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 20 December 2018

<sup>4</sup> Violeta Moreno-Lax and Mariagiulia Giuffré, ‘The Raise of Consensual Containment: From “Contactless Control to “Contactless Responsibility” for Forced Migration Flows’, in S. Juss. (ed), *Research Handbook on International Refugee Law* (2017) 9

<sup>5</sup> Miguel Ángel Acosta Sánchez, ‘La formación de guardacostas libios: hacia un modelo de sinergia de políticas en la gestión integrada de fronteras marítimas europeas’ (2019) *Revista de Derecho Comunitario Europeo* 64, 859-895

<sup>6</sup> European Commission, ‘A European Agenda on Migration’, COM (2015) 240 final, 13 May 2015, 7

investment in security and border management support<sup>7</sup>. The main financial instrument would be the EUTF for Africa, which since its creation has been the main financial instrument used to translate the political commitments made with African partners in the area of migration into projects<sup>8</sup>. Furthermore, the 2017 Joint Communication of the European Commission and the EU High Representative identified Libya as the top priority for cooperation on border control and the fight against irregular migration and human trafficking. With the express aim of reducing pressure on affected Member States such as Italy and Malta, the EU has a comprehensive strategy focused on Libya that addresses four key issues: training, equipment and capacity building, through the various EU initiatives to enable the Libyan Border and Coast Guard to rescue people at sea, including coordinating rescue operations; improving the Libyan authorities' capacities and information exchange systems to deal with people smuggling; improving Libya's capacities to assist refugees and asylum seekers with the support of UNHCR and IOM<sup>9</sup>; and supporting the Libyan authorities in the management of their southern border<sup>10</sup>.

This scenario of promoting cooperation initiatives with Libya facilitates the achievement of two key acts: the Italy-Libya MOU<sup>11</sup> and the 2017 Malta European Council Declaration on the Central Mediterranean Route<sup>12</sup>. Both acts focus primarily on stemming illegal flows to the EU, reducing pressure on Libya's land borders, and working with its authorities to prevent outflows and manage returns.

Thus, the pillars on which cooperation with Libya is based are twofold: on the one hand, training the competent Libyan authorities in the control of Libya's territorial and maritime borders, as well as interception operations at sea; on the other hand, supporting the creation of a Maritime Rescue Coordination Centre in Libya to establish a Libyan Search and Rescue (SAR) area in which it can take responsibility for the coordination and organisation of further rescue operations.

First, the training of the Libyan authorities has materialised in initiatives within the Area of Freedom, Security and Justice coordinated by Frontex, as well as within the Common Security and Defence Policy. Both EUNAVFOR MED Sophia and Irini, with the support of the EUBAM Libya Mission, included the specific mandate to develop the capacities and training of the Libyan coast guard and navy and the contribution to dismantling the business model of smuggling and human trafficking networks<sup>13</sup>.

Second, the Joint Communication of the then High Representative and the European Commission of January 2017 already called on the Italian Government to assist the Libyan Coast Guard with EU financial support for the establishment of a Maritime Rescue Coordination Centre in Libya, as well as the designation of a Libyan SAR Zone. In August 2017, Libya proceeded to unilaterally declare its own SAR Area, which it withdrew once the IMO advised that, without a Rescue Coordination Centre, Libya would not meet the requirements for international registration of the SAR Area. In December of the same year, following a re-declaration of the SAR Area by Libya, Italy sent a communication to the IMO on the "Libyan Maritime Coordination Centre Project", funded by the European Commission. As a result, the IMO recognised the Libyan SAR Area in June 2018, and Libya hosts a Joint Rescue Coordination Centre (aeronautical and maritime) in Tripoli. Thanks to

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<sup>7</sup> European Commission, 'on the creation of a new Partnership Framework with third countries in the context of the European Agenda on Migration', COM (2016) 385 final, 7 June 2016

<sup>8</sup> European Commission, Fact Sheet, EU Emergency Trust Fund for Africa, North of Africa window. <[https://ec.europa.eu/trustfundforafrica/sites/default/files/eutf\\_libya\\_en.pdf](https://ec.europa.eu/trustfundforafrica/sites/default/files/eutf_libya_en.pdf)>

<sup>9</sup> For an analysis of the cooperation between the EU, IOM and UNHCR in Libya see Lorena Calvo Mariscal, 'Derechos humanos y la implicación del ACNUR y la Organización Internacional para las Migraciones en la dimensión exterior de la política sobre inmigración y asilo de la UE', (2020) *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián* 20, 109-156

<sup>10</sup> European Commission, 'Migration on the Central Mediterranean route Managing flows, saving lives', JOIN (2017) 4 final, 25 January 2017

<sup>11</sup> 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. Translation available in Odyssey Network website <[https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM\\_translation\\_finalversion.doc.pdf](https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf)>

<sup>12</sup> Council of the European Union, 'Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route', 3 February 2017. <[www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/#](http://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/#)>

<sup>13</sup> Montserrat Pi Llorens, 'La Unión Europea y la lucha contra los traficantes y tratantes de migrantes en Libia: balance tras el fin de la operación Sophia', (2020) *Revista Electrónica de Estudios Internacionales*, 40

this, Libya assumes primary responsibility for search and rescue coordination, in an area extending beyond Libya's territorial sea and contiguous zone, up to 100 nm south of Malta's SAR Area<sup>14</sup>.

Based on these two pillars, European States' exchange of information with the Libyan authorities is achieved through Libya's participation in the Seahorse project. This is a programme entirely financed by the EU aimed at increasing and strengthening the capacities of the authorities of the North African countries in the field of surveillance and border control of the States of origin and transit of irregular immigration. The objective of this participation is for Libya to receive the necessary orders and information to carry out rescue operations, as recognised in the 2017 Communication of the former High Representative<sup>15</sup>.

Therefore, the previous support of the EU and Italy in establishing the Libyan Joint Rescue Coordination Centre has paved the way for the Malta-Libya MOU. This, together with the training of the Libyan authorities in the interception of migrants at sea, constitutes another example of externalisation through the facilitation of interceptions by the Libyan Border and Coast Guard.

### III. The Memorandum of Understanding between Malta and Libya of May 2020

Malta's geographical location in the middle of the central Mediterranean migratory route and the disproportionate SAR Area it controls has led Malta to pay particular attention to cooperation with both Italy and Libya in the Mediterranean.

As in the Italian case, individual cooperation between Malta and Libya dates back to a period before the outbreak of the Arab Spring in 2011. In 2009, Malta and Libya signed a MOU to cooperate on SAR operations in the Mediterranean region. This MOU provided the political framework within which both states would coordinate any rescue operations occurring in their SAR areas: they agreed to authorise their Coordination Centres to request mutual assistance and provide all information on the situation in distress. The MOU also includes training by the Maltese armed forces and regular meetings<sup>16</sup>. However, the crisis in 2011 and the destruction of Libyan capabilities made the continuation of this MOU impossible<sup>17</sup>.

After the so-called refugee crisis, cooperation between Malta and Libya has remained purely informal. Some media reports have revealed that non-normative agreements were secretly negotiated between the Maltese Armed Forces and the Libyan authorities in 2019, providing for the Maltese armed forces to coordinate with the Libyan coast guard to intercept migrants and return them to Libyan territory<sup>18</sup>.

The various negotiations between the Libyan and Maltese governments resulted in the signing of the MOU with the Government of National Accord of the State of Libya in combating illegal immigration on 28 May 2020, adopted by the Government of the Republic of Malta and the Government of National Accord of the State of Libya<sup>19</sup>. Its preamble - significantly more succinct than the preamble of the Italy-Libya MOU - refers to the intention to consolidate the historical relations between Malta and Libya based on national laws and international conventions and controls, particularly, the objectives of the United Nations Charter.

The basis of the Memorandum can be found in Articles 1 and 2, which provide two specific commitments to "establish two coordination centres, one in Valletta and the other in Tripoli". These centres, which would be

<sup>14</sup> Kiri Santer, 'Governing the Central Mediterranean through Indirect Rule: Tracing the Effects of the Recognition of Joint Rescue Coordination Centre Tripoli', (2019) 21 *European Journal of Migration and Law*, 2, 141–65

<sup>15</sup> Matthias Monroy, 'A seahorse for the Mediterranean: Border surveillance for Libyan search and rescue zone' (*Security Architectures in the EU*, 1 March 2018) <<https://digit.site36.net/2018/01/03/border-surveillance-technology-for-new-libyan-search-and-rescue-zone/>>

<sup>16</sup> 'MOU Signed in Tripoli: Malta, Libya, to cooperate in search and rescue operations', (*The Malta Independent*, 21 March 2009) <<https://www.independent.com.mt/articles/2009-03-21/news/mou-signed-in-tripoli-malta-libya-to-cooperate-in-search-and-rescue-operations-222104/>>

<sup>17</sup> Ángeles Jiménez García-Carriazo, Small Island, Big Issue: Malta and its Search and Rescue Region – SAR, (2019) *Peace & Security-Paix et Sécurité Internationales (EuroMediterranean Journal of International Law and International Relations)* 07, 299-321

<sup>18</sup> 'Exposed: Malta's secret migrant deal with Libya', (*Times of Malta*, 10 November 2019) <<https://timesofmalta.com/articles/view/exposed-maltas-secret-migrant-deal-with-libya.748800>>

<sup>19</sup> Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of the Republic of Malta in the Field of Combating Illegal Immigration, 28 May 2020 <<https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf>>

operational as of 1 July 2020, aim to combat illegal migration in Libya and the Mediterranean region. Article 2 establishes the composition of the centres: they will be attended by six officers, three in Valletta (two appointed by the Maltese Government and one by the Libyan Government) and three others located in Tripoli (two appointed by the Libyan Government and one by the Maltese Government). As we can see, the objectives of the Malta-Libya MOU are apparently more concrete than the Italy-Libya MOU since articles 1 and 2 of the latter envisage broad and generic commitments of financial, technical and operational support from Italy to develop programmes aimed at combating illegal immigration at Libya's borders<sup>20</sup>.

It is conceivable that this MOU is made in the framework of Chapter III on cooperation in search and rescue of the SAR Convention of 1979, to which both states are parties. However, the Malta-Libya MOU of 2020 makes no reference to the status of "rescue coordination centres" nor to the coordination of SAR operations in crises. The MOU establishes such coordination centres only for "combating illegal migration in Libya and the Mediterranean". Article 3 stipulates that Malta will fully fund both centres, and their operations will be limited to support and coordination. This coordination centres will facilitate interception, information exchange, and support Libya in taking over the rescue work through authorities funded and equipped with Maltese support. In fact, in the first quarter of 2020 alone, and prior to the MOU itself, the Libyan coastguard prevented 2,000 migrants from reaching the Maltese coast in compliance with its commitments to Malta<sup>21</sup>. Reference is made to an annexe to be prepared between the two parties. This annexe, which has not been published, would contain the working locations of both centres and the contact points between the two centres (Art. 4).

Art. 5 develops another of the objectives implicit in the text of the Memorandum. Under the heading of "financial support", this article indicates that Malta will request the European Commission and the Member States to increase financial support for "securing the southern borders of Libya and the provision of the necessary technologies for border control and protection, as well as in the dismantling and monitoring of human smuggling networks, and the reduction of organised crime operations". Also, in coordination with the EU, it will propose funding for additional maritime assets necessary for the interception and monitoring of people smuggling activities in the SAR region in the Mediterranean basin.

Same as the MOU with Italy, reference is only made to 'illegal immigration' as an element to be prevented from the southern borders of Libya itself. It does not contain any provision for what happens to intercepted persons or where they should be transferred to when they disembark. Nor is there any differentiated mechanism for cases in which the operations affect potential refugees, as the text does not distinguish between migrants, asylum seekers and refugees. Unlike the Italy-Libya MOU, there is no article dedicated to respecting international human rights obligations and international refugee law. Only a reference to the fact that their application may not contravene rights and obligations under other international treaties to which they are part (Art. 6).

It can be assumed that the coordination centres in Valletta and Tripoli fall under the responsibility of the Maltese and Libyan governments respectively. According to art. 2 of the MOU, the former head of a Maltese prison, Alex Dalli, was chosen "as the special government representative in Libya" because of his extensive experience in the armed forces to assume responsibility for security matters, including irregular immigration<sup>22</sup>.

#### **IV. Legal implications of the Memorandum. Informalisation, deterritorialisation and human rights.**

##### **1. Informalisation of cooperation and deterritorialisation of border controls and migration management**

<sup>20</sup> Anja Palm, 'The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?', (2017) EU Immigration and Asylum Law and Policy blog, Odysseus Network <<https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>>

<sup>21</sup> Violeta Moreno-Lax, Jennifer Allsopp, Evangelia (Lilian) Tsourdi, and Philippe De Bruycker, 'The EU approach on Migration in the Mediterranean', (2021) *Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies*, European Parliament, 129

<sup>22</sup> The election of Mr. Dalli has led to criticism because of his previous management of the prisons for which he was responsible, resulting in his resignation. 'Alex Dalli to be government's 'special representative' in Libya', (*Times of Malta*, 30 December 2021) <<https://timesofmalta.com/articles/view/alex-dalli-to-be-governments-special-representative-in-libya.924715>>

The current trend in terms of deterritorialised migration management is towards the implementation of informal or non-binding agreements. This section will look firstly at the use of informal instruments in cooperation with third States, especially with Libya, and secondly at the EU's and its Member States' policy of deterritorialisation to see how the Malta-Libya MOU continues to reflect this trend.

On one hand, through such soft law agreements, the common objective is often to empower third States and provide them with funding to increase the capacities of their authorities to control migration potentially arriving in Europe<sup>23</sup>. Thus, informality has prevailed in agreements with third countries, with a visible interest in blurring possible legally binding commitments between the parties and the actors carrying out such agreements<sup>24</sup>. An example of this is the Agreement between the EU and Turkey and the successive Memoranda Italy-Libya and Malta-Libya, all of which have in common that they are considered individual agreements between the Member States and third countries without legally involving the EU.

The Malta-Libya MOU is thus a non-legally binding agreement but has certain legal effects: it commits Malta to establish and fund two coordination centres in Tripoli and Valletta. The formal aspect of the MOU has led to its rapid and simplified adoption, following several visits by the representative of the Libyan and Maltese governments, respectively. It did not follow any legislative process, although it was subsequently subject to parliamentary questions in the Maltese Parliament, which questioned, among other things, the lack of publicity of the MOU<sup>25</sup>. Likewise, a soft law norm makes it difficult to monitor it both politically and judicially. To such an extent that, if it were to be submitted to ordinary legislative procedures providing for specific control mechanisms, it would probably reveal the critical situation for the human rights of migrants in Libya<sup>26</sup>. As has been raised with the Italian MOU, it is questionable the effectiveness of the Libyan Government of National Accord signing the MOU. Indeed, Fayed Serraj's government cannot maintain control of the entire Libyan territory due to the political crisis that divides the Libyan country. This also makes it difficult to control the departments and ministries responsible for controlling Libya's maritime areas and assuming the Maltese authorities' technological and training capabilities. Furthermore, the lack of political stability has led to the postponement of the elections scheduled for December 2021.

On the other hand, this policy of informalisation is part of a progressive strategy of deterritorialisation of border control and migration management functions by the EU and its Member States. The current cooperation model seen in Malta's and Italy's informal agreements with Libya is based on the assumption that the aim is to reduce the number of migrants leaving Libya to embark on European territory<sup>27</sup>. To this end, the generic concept of externalisation has been used to refer to the broad European strategy in which these initiatives on immigration control are framed, or in general, to the European migration policy that has effects or is implemented abroad. Two central problems can be found in this generic term. First, its imprecision led some authors to include different policies: from the externalisation of the asylum procedure to the externalisation of EU border control or even the externalisation of the EU's own external borders. Second, it is difficult to distinguish between the subjects that carry out the process of externalising European immigration policy. Whether it is the third States themselves that are responsible for controlling Europe's external borders, whether it is the EU itself that exercises this control from the territory of a third State, or whether it is both the EU States and the third countries of origin and transit that actively cooperate to control and reduce migratory flows towards the European border. However, they all have the common objective of “blocking or interrupting transit to European countries in such a way as to prevent access to their territory for those who [...] aspire to access the EU ...”<sup>28</sup>. Therefore, such policies would entail a process of both geographical and functional externalisation,

<sup>23</sup> Francina Esteve García, ‘La externalización del control de los flujos migratorios: La cooperación de la unión europea con Libia y Níger’, in Diana Marín Consarnau (ed), *Retos en inmigración, asilo y ciudadanía: perspectiva Unión Europea, internacional, nacional y comparada*, (Marcial Pons 2021), 65. M Stevis-Gridneff, ‘Corruption threatens to land EU funds in the pockets of migrant smugglers’, (2017) *Global Flows, Migration and Security, Discussion Paper*, 39

<sup>24</sup> Martino Reviglio, ‘Externalizing Migration Management through Soft Law: The Case of the Memorandum of Understanding between Libya and Italy’, (2020) 20 *Global Jurist* 1

<sup>25</sup> ‘Malta-Libya agreement presented in Parliament’ (*Newsbook*, 3 June 2020) <<https://newsbook.com.mt/en/malta-libya-agreement-presented-in-parliament/>>

<sup>26</sup> Reviglio (n 24) 5

<sup>27</sup> Annick Pijnenburg, ‘Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?’, (2020) 20 *Human Rights Law Review* 2, 306-332

<sup>28</sup> Ángel Sánchez Legido, ‘Externalización de Controles Migratorios versus Derechos Humanos’, (2019) *Revista Electrónica de Estudios Internacionales* 37

by shifting migratory controls outwards and involving, where appropriate, entities outside the Union in their extraterritorial implementation.

Based on the differentiation proposed by Prof. del Valle, we refer to the general term of deterritorialisation as practices and policies involving the relocation beyond the external borders of EU Member States -either on the high seas or on the territory of third countries- of external border control activities (Art. 77 TFEU), asylum policy (Art. 78 TFEU) or immigration management (Art. 79 TFEU)<sup>29</sup>. The purpose is to prevent or reduce the number of migrants entering the territory of EU Member States. These measures may involve the active cooperation or complicity of third States of origin, transit, and other international organisations<sup>30</sup>. Within this generic concept of deterritorialisation, two concepts could be distinguished, differentiated mainly by whether or not there is a displacement of authorities from an EU Member State or from the EU itself. On the one hand, we would refer to externalisation to describe those deterritorialisation measures that necessarily involve cooperation with third countries of origin and transit, either through agreements or the implementation by the latter of plans and programmes drawn up by the EU or its Member States. On the other hand, we would use the term extraterritorialisation to refer to those deterritorialisation measures that imply a displacement of European public agents in activities located outside the territory of the Member States to control a specific situation related to migration or asylum<sup>31</sup>. These policies can be carried out autonomously by the European authorities - in international spaces - or with the consent of the third State.

As we can see, the Malta-Libya MOU of 2020 combines externalisation and extraterritorialisation measures, as it envisages the posting of a Maltese public authority to Libya to control irregular immigration from there. In this sense, the difference is essential. The movement of authorities from one State to another State, with its consent, could involve the exercise of extraterritorial jurisdiction and powers of a personal nature. This would make it easier to determine the existence of effective control over rescue operations carried out with the involvement of the Maltese authority operating in Libya, which results in disembarkation in Libyan territory. Using a functional notion of the concept of jurisdiction, one can take into account effective control over persons or territory for the application of international human rights obligations, especially the ECHR under Art. 1, or the ICCPR under Art. 2. But that effective control can also be extended to the operational activities that may reach the threshold of "exercise of public powers", which would constitute the exercise of jurisdiction extraterritorially, as they manifest a degree of deliberation and voluntariness of the State<sup>32</sup>.

## **2. Malta and Search and Rescue obligations under international law. The human rights situation of migrants and refugees disembarked in Libya.**

The duty to protect life at sea is an obligation under the Law of the Sea and international human rights protection treaties<sup>33</sup>. The obligation to rescue persons in distress at sea is enshrined in Art. 98.1 of the United Nations Convention on the Law of the Sea, which commits States to ensure assistance, whatever the condition of persons in distress. Art. 98 of the UN Convention on the Law of the Sea is complemented by the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention), and the 1979 International Convention on Maritime Search and Rescue (SAR Convention). The latter incorporated provisions for the coordination of rescues in the SAR Area of Responsibility to be determined by the parties and notified to IMO, as well as the establishment of Rescue Coordination Centres. The SAR Convention was amended in 2004 to impose further cooperation and coordination obligations to ensure that rescuing vessels can disembark persons in "places of safety" for disembarkation.

Malta has formally opposed amendments to the 2004 SAR Convention that would oblige it to assume responsibility for providing a safe place of disembarkation to those in distress rescued in its SAR region. It

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<sup>29</sup> Alejandro del Valle Gálvez, 'Inmigración, Derechos Humanos y Modelo Europeo de Fronteras. Propuestas Conceptuales Sobre 'Extraterritorialidad', 'Desterritorialidad' y 'Externalización' de Controles y Flujos Migratorios', (2020) *Revista de Estudios Jurídicos y Criminológicos* 2, 168-169

<sup>30</sup> Jorrit J Rijpma and Marise Cremona, 'The Extra-Territorialisation of EU Migration Policies and the Rule of Law' (1 EUI Working Paper LAW, 2007)

<sup>31</sup> Del Valle Gálvez (n 29) 169-174

<sup>32</sup> Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy', and the 'Operational Model', (2020) 21 *German Law Journal* 3, 385–416

<sup>33</sup> Joana Abrisketa Uriarte, *Rescate en el mar y asilo en la Unión Europea. Límites del Reglamento de Dublín III* (Thomson Reuters Aranzadi, Navarra, 2020), 202

does not recognise either the provisions of the 2004 IMO Guidelines on the Treatment of Persons Rescued at sea, which, although not legally binding, provide a concept of a safe place of disembarkation. This would be a place where "the survivors' life safety is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met"<sup>34</sup>.

The SAR region of a State does not constitute a maritime space in which States automatically exercise jurisdiction over all incidents occurring in the SAR region. However, it is true that in cases where the SAR Region State Coordination Centre is contacted, we can assume that there is an exercise of some functional jurisdiction over persons in distress. This is so insofar as it could trigger the due diligence obligations that the SAR region State must fulfil as it exercises some "spatial control" over that area<sup>35</sup>.

The creation of two coordination centres in Libya and Malta, funded by the latter, read in conjunction with the Maltese objection to amendments to the SAR Convention, leads to more frequent debarkations in Libya in operations controlled or supervised by the Maltese authorities. The MOU, in any case, is not expressly aimed at coordinating rescue operations but at fighting "illegal" immigration, using a term that criminalises all persons in distress at sea without distinguishing between those who may be refugees and potential asylum seekers.

In fact, there have been cases in which the Maltese armed forces have used private vessels to rescue people in distress. Thus, the Maltese authorities would send the coordinates where the boat in distress would be so that they could be intercepted and handed over to the Libyan authorities or disembarked in Libyan ports<sup>36</sup>. The Council of Europe Commissioner for Human Rights has echoed this situation in her report following her visit to Malta in October 2021 and has called on Malta to refrain from issuing instructions to private vessels involving return and disembarkation in Libya, as well as to comply with the obligation to take responsibility for incidents that occur due to the action of its own authorities<sup>37</sup>.

Furthermore, the critical situation in Libya is more than evident: neither the Libyan coastguard guarantees a safe rescue, nor do the conditions after disembarkation makes Libya a safe place for disembarkation. Even so, Libya has significantly increased the number of people rescued in the SAR zone declared by the country. From a lack of adequate personnel and naval assets to undertake rescue actions at sea, in 2017, the Libyan Coast Guard intercepted 15,238 migrants and refugees<sup>38</sup>. The number of interceptions/rescues by the Libyan Coast Guard in 2019 was 9,035<sup>39</sup> and 11,265 in 2020<sup>40</sup>. However, this has not influenced the trend of migrant and refugee arrivals to European shores to continue to go downwards.

Reports by the Group of Experts on Libya also reflect the appalling allegations that the Libyan authorities responsible for interception/rescue actively put the lives of migrants and asylum seekers at risk. Firstly, by obstructing rescue efforts by humanitarian organisations; secondly, through the direct use of firearms, physical violence, threats, racist insults or behaviour that causes these boats to capsize or their occupants to jump into the water without life jackets<sup>41</sup>.

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<sup>34</sup> Jiménez García-Carriazo (n 17) 306

<sup>35</sup> Efthymios Papastavridis, 'Rescuing Migrants at Sea and the Law of International Responsibility', in T Gammeltoft-Hansen and J Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation. Transnational law enforcement and migration control* (Routledge 2016) 168

<sup>36</sup> 'Med: 100 Lives Lost at Sea, Malta Paid for Pushbacks to Libya, EU Seeks to Enhance Cooperation in North-Africa' (ECRE, 21 May 2021) <<https://ecre.org/med-100-lives-lost-at-sea-malta-paid-for-pushbacks-to-libya-eu-seeks-to-enhance-cooperation-in-north-africa/>>

<sup>37</sup> Commissioner for Human Rights of the Council of Europe, *Report following her visit to Malta from 11 to 16 October 2021*, CommDH(2022)1, 5 <<https://rm.coe.int/report-of-the-council-of-europe-commissioner-for-human-rights-dunja-mi/1680a5498d>>

<sup>38</sup> UNHCR Flash Update Libya (28 December 2017) <<https://reliefweb.int/report/libya/unhcr-flash-update-libya-28-december-2017>>

<sup>39</sup> UNHCR Libya operational update and response dashboard - UNHCR Libya Activities in 2019 <<https://data2.unhcr.org/en/documents/details/73290>>

<sup>40</sup> UNHCR Libya Update 18 December 2020) <<https://data2.unhcr.org/en/documents/details/83832>>

<sup>41</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Concluding Observations on Libya's initial report CMW/C/LBY/CO/1, 8 May 2019



Once disembarked in Libya, UNHCR and other NGOs on the ground provide medical assistance and basic necessities “before the Libyan authorities transfer them to a detention centre”<sup>42</sup>. Various reports from international agencies state that the return of any person intercepted or rescued at sea by Libyan officials to immigration detention centres is virtually automatic, systematic and arbitrary<sup>43</sup>. Even the Libyan authorities admit that 99% of the migrants present in detention centres had been intercepted at sea and handed over by the Libyan coastguard<sup>44</sup>. In addition, hundreds of rescued migrants reported to have been sent to detention centres were later listed as missing and probably trafficked or sold to smugglers. Others disappeared in transit from one location to another<sup>45</sup>. Numerous reports from international bodies such as the Human Rights Council and the Office of the Prosecutor of the International Criminal Court have found that the numerous violations against migrants held in detention centres in Libya can be considered crimes against humanity<sup>46</sup>.

### 3. Malta's position on possible human rights violations

There is extensive literature that addresses the possible international responsibility of the EU and its Member States for the violation of human rights obligations arising from the activities of de-territorialisation of migration control towards third countries, particularly concerning cooperation with Libya. Below, we will look at Malta's possible responsibility for cooperation with Libya following the Memorandum.

First, to attribute responsibility for violations of international human rights obligations, it needs to be possible to establish the existence of those human rights obligations, which depend on the jurisdiction clauses of those treaties<sup>47</sup>. In the case of the Malta-Libya MOU, we have found that the effective control that Malta can exercise may be sufficient to trigger the jurisdiction of the ECHR and the PCDIP, among other international human rights protection treaties<sup>48</sup>.

Secondly, to determine the attribution of international responsibility for the commission of wrongful acts to States, we will look to the Draft Articles on International Responsibility of States for the Commission of wrongful acts.

In cases where the Maltese authorities are directly involved in violating human rights, the provisions of Articles 4 and 5 of the Draft Articles on State Responsibility would apply. Likewise, it would apply in the case of interceptions at sea by European authorities when they violate human rights obligations at the time of rescue or disembarkation in Libya. And not only when they are committed directly but also under Article 8 of the Draft Articles when a Member State orders private vessels to return rescued persons to the Libyan authorities, in our case, when this involves the violation of the principle of *non-refoulement*, among other human rights protection standards<sup>49</sup>. It could be considered as a case of personal control by interposition verified by the private operator under his instruction and control attributable to the State party<sup>50</sup>.

The Draft Articles also include other cases in which the attribution of responsibility to a State occurs in relation to the wrongful act committed by another State. Thus, one could consider the existence of "direction or control"

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<sup>42</sup> Security Council, Report of the Secretary-General on the Implementation of resolution 2437 (2018) S/2019/711, 5 September 2019

<sup>43</sup> *Inter alia*, Human Rights Council, Report of the Independent Fact-Finding Mission on Libya A/HRC/48/83, 1 October 2021, paras 67-69

<sup>44</sup> Security Council, Final report of the Panel of Experts on Libya established pursuant to Security Council resolution 1973 (2011) S/2021/229, para 43

<sup>45</sup> Security Council, United Nations Support Mission in Libya, Report of the Secretary-General S/2019/682, 26 August 2019, para 53

<sup>46</sup> International Criminal Court, 19th Report of the Prosecutor of the ICC to the UNSC pursuant to UNSCR 1970 (2011), 5 May 2020 <[https://www.ohchr.org/sites/default/files/2022-03/A\\_HRC\\_49\\_4\\_AUV.pdf](https://www.ohchr.org/sites/default/files/2022-03/A_HRC_49_4_AUV.pdf)>

<sup>47</sup> Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to', (2012) 25 *Leiden Journal of International Law* 4, 867. Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford, OUP, 2011)

<sup>48</sup> María Nagore Casas, 'Los Acuerdos de capacitación a terceros Estados para la contención migratoria: nuevos desarrollos en el concepto de jurisdicción de los tratados de derechos humanos', in Joana Abrisketa Uriarte (dir), *Políticas de asilo de la UE: Convergencias entre las dimensiones interna y externa* (Thomson Reuters Aranzadi, 2021) 223-250

<sup>49</sup> Elspeth Guild and Vladislava Stoyanova, 'The Human Right to Leave Any Country: A Right to Be Delivered', (2018) *European Yearbook on Human Rights*, 380

<sup>50</sup> Sánchez Legido (n 28) 17

by European States in their policy of cooperation with Libya for the management of migratory flows, according to Art. 17 of the Draft Articles, which attributes responsibility to the state that directs and controls another State in the commission of a wrongful act when it does so with knowledge of the circumstances of the act and if the act would be internationally wrongful if committed by the directing and controlling State<sup>51</sup>.

## V. CONCLUSIONS

Undoubtedly, the maritime scenario and the external borders in the Mediterranean Sea is where the greatest problems arise regarding the respect and protection of the human rights of immigrants and refugees, revealing the unfeasibility of the current model of surveillance and border control<sup>52</sup>. Maritime migration at sea and its control by European authorities indeed present a wide range of legal problems<sup>53</sup>.

In response to the impracticality of maritime borders, the EU and its member states have relied on cooperation with third countries, particularly Libya as the main gateway to the Mediterranean Sea. The main consequence of cooperation based on funding the Libyan authorities and empowering Libya to take on rescue operations is the deterritorialisation of migration control functions and the transfer of responsibility for rescue operations to a failed state like Libya, under an appearance of legitimacy created by the European authorities<sup>54</sup>. As noted in previous OHCHR reports, at least since August 2017 when Libya declared the extension of its SAR zone, the EU and its Member States have gradually reduced their maritime assets in the central Mediterranean, transferring responsibility for SAR operations in international waters to the Libyan coastguard.

Malta's geographical position in the Mediterranean, and its disproportionate SAR region, makes cooperation with Libya to reduce the number of migrants that can reach the island essential for the Maltese government itself. However, the Memorandum of Understanding between Malta and Libya is part of Europe's strategy of deterritorialising migration control functions through informal arrangements, plans, and funding towards Libya. In fact, the creation of the coordination centres in Tripoli and Malta stems from the Joint Rescue Coordination Centre and the SAR region of Libya recognised by the IMO, thanks to prior and constant operational and financial support from Italy and the EU.

The choice of soft-law norms such as the MOU is not trivial, especially since a legally binding agreement could lead to major political and legal controversies in light of the human rights situation in Libya. Unlike the Italian MOU, the Malta-Libya MOU expressly combines measures involving the funding and training of Libyan authorities (externalisation) with the transfer of Maltese authorities to Tripoli (extraterritorialisation). This could involve the exercise of extraterritorial jurisdiction and personal powers outside Malta's territory, thus facilitating the possible establishment of effective control and jurisdiction by Malta.

The application of international treaties to protect human rights implies that states must comply with and act following the obligations applicable to them. Therefore, human rights violations occurring as a result of disembarkations in Libya, with the direct support, in this case, of Malta may give rise to the attribution of international responsibility under the Draft Articles on Responsibility of States for the commission of an internationally wrongful act. Each situation must indeed be analysed on a case-by-case basis, identifying the degree of a state's involvement in the act that results in the commission of a wrongful act: whether directly or through direction, control, aid or assistance. However, the problem remains the lack of transparency regarding the participation and involvement of the Maltese authorities in the interception operations resulting in disembarking in Libya, in application of the Memorandum. These aspects were to be clarified in an Annex that has not been made public.

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<sup>51</sup> Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 2, 279. Moreno-Lax and Giuffrè (n 4) 19

<sup>52</sup> Alejandro del Valle Gálvez, 'Sobre la inviabilidad del modelo de fronteras exteriores europeas en el mediterráneo', (2020) 72 *Revista Española de Derecho Internacional* 1

<sup>53</sup> Marcello Di Filippo, 'Irregular Migration Across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life at Sea', (2013) *Peace & Security-Paix et Sécurité Internationales (EuroMediterranean Journal of International Law and International Relations)* 1

<sup>54</sup> Santer (n 14)

What is certain is that Maltese authorities are fully aware of the consequences of their constant support to the Libyan authorities in the interception of migrants - which even takes place in Malta's SAR regions<sup>55</sup> - and the subsequent disembarkation on their territory. Reports by the UN High Commissioner for Human Rights, the Human Rights Council, the Office of the Prosecutor of the International Criminal Court, and the Commissioner for Human Rights of the Council of Europe, as well as by NGOs and other civil society entities, all point to a practice that must be suspended until conditions in Libya can be considered safe for the human rights of migrants and refugees.

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<sup>55</sup> 'Migrants in distress returned to Libya – on Malta's request', (*Infomigrants*, 29 June 2021) <<https://www.infomigrants.net/en/post/33257/migrants-in-distress-returned-to-libya--on-maltas-request#:~:text=In%202019%2C%20the%20Times%20of,and%20return%20them%20to%20Libya>>

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