

# The impact of externalization of border controls on the human rights of refugees in the Italian-Libyan Mediterranean Sea

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## ABSTRACT

*The issue of the high mortality of immigrants related to violations of international law is not an easy discourse. Failure to do so, both in scholarship and in activism towards human rights, shows significant limitations and hurdles of international law and international relations specifically in addressing human rights for refugees. This study aims to address and shine a light on the problem that migrant poses in the Mediterranean Sea. In the wake of the migration crisis, European Union in particular Italy adopted a series of policies in order to reduce migration flows within the EU. This article uses methods qualitative research methodology with a focus on conducting an in-depth literature review. The findings present that an ambitious policy to reduce the flow of migrants was introduced to combat the surge of refugees, an example of these steps is the Italian-Libyan Memorandum of Understanding of 2 February 2017 which led to questions about the ability of the state to uphold their roles and obligation in addressing human rights for refugees that caused twenty more people died at the Mediterranean Sea. This article examines the challenges posed by the refugees that have been caused by the treaties in force at the Mediterranean Sea as well as specific issues regarding the monitoring and implementation of the above regulations, which cause obstacles and challenges that impact the life and the migration process of refugees. Through this article we also highlighted that one of the most important motives in migration from Libya to Italy is economic opportunities for migrants, hence further studies are necessary in resolving the ongoing dispute.*

## Keywords:

*human rights; refugees; international law*

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## INTRODUCTION

Over the past few years, the EU's frontline member countries (i.e. Italy, Greece, etc.) have been facing high migration pressure due to the lack of a fair burden-sharing system among European countries (Mann, 2020). Over the past few years, the EU's frontline member countries have faced high migration pressures caused by The *Common European Asylum System*, European countries such as Italy have long criticized the system, it puts Italy and other coastline countries to be a burden in processing each migrant in comparison with the other mainland or landlock countries in Europe. The *Common European Asylum System* (CEAS) poses a weakness in processing a high flow of refugees, however, its mechanism supposedly prevented 'asylum shopping' through the *Dublin III* agreement.

Dublin III agreement tried to establish that only one member state of the European Union is responsible for examining applications for international protection as stated in Article 3 point (1) "***The application shall be examined by a single Member State....***". Each state has the responsibility to evaluate immigrants who enter their land both legally and illegally, according to *Dublin III*. The state has a role in evaluating each individual as can be quoted as follows "***The Member State thus entered shall be responsible for examining the application for international protection.....on which the irregular border crossing took place***" (Regulation (EU) No 604/2013 of The European Parliament and of The Council, 2013).

Due to their obligation to process all refugees entering their seas without having to share the burden with other countries, certain EU member states, namely Greece and Italy, have faced an unprecedented bureaucratic burden. This is especially important of their procedures for processing asylum applications and their capacity to receive large influxes of refugees. In an effort to stop the crossing of migrants from the Mediterranean to Europe, Italy, and the European Union have implemented various "shadow" operations. These operations are often known as ***Mare Clausum***.

*Mare Clausum* is one of the events in ancient Greece, where the countries at that time due to weather conditions closed the sea for the benefit of the country (Crum, 2017). While at the moment *Mare Clausum* is a term used in International Law of The Sea, ocean, or water areas that can be passed by ships under the jurisdiction of a sovereign state that cannot be accessed by other countries.

This operation has implemented two complementary mechanisms, first, *Non-Governmental Organizations* (NGO) role to do rescuers have been criminalized with the aim of limiting their activities, they are told not to disembark migrants on European shores. Second, Italy and the European Union have tasked and increased the capacity of the Libyan Coast Guard to intercept and withdraw immigrants to Libya through political agreements, provision with support materials, and technical, and coordination mechanisms (Ciliberto, 2018).

The purpose of this paper is to analyze the accountability and obligation between Italy and Libya towards their view and implementation on the protection for human rights of refugees by asking "*How are international legal instruments used to hinder the flow of refugees or asylum seekers into a country?*"

Approaches to understanding the problems above can be done through the International Law Theory of Human Rights, Human rights theories based on dignity, well-being, or development are all motivated by the desire to protect and develop the quality of life of someone. Because one life, one must live a life full of dignity, well-being, or sustainable development. A view of human rights based on subsistence is ultimately concerned only with preserving life itself. The term "international human rights theory" is broad and covers a

range of fundamental and conceptual conundrums that international human rights scholars and practitioners must grapple with.

It raises important questions about the nature, function, evolution, and future discourse of human rights on a global scale. The concept of international human rights is not as simple as human rights "in theory" or anything resembling a utopian blueprint of what might occur, but rather a set of presumptions and a general understanding that together form a thorough understanding of the international legal system, which contains the core principles of human rights.

As far as the traditional view of international relations identifying the primary actors in international relations is constrained, international human rights are likewise an issue. Non-state actors are becoming more significant in international relations, but this does not change the state's responsibility to uphold human rights obligations. Non-state actors' policies and cooperative efforts can be used to assess how well international human rights norms are formed, implemented, and even upheld (Welde & Wardhani, 2020). These theorists agree on the constructivist approach, which emphasizes how concepts like national interests and sovereignty help create the world in which we live and how those concepts are then translated into legal frameworks or ingrained into our social institutions (Fraser, 2019).

Discussion on the importance of the right to rescue at sea as a foundation for rescuers to protect the rights of migrants has been done by Mann (2020) this research provides an in-depth understanding of the rights and obligations to rescue at sea. This research also highlights the importance of solidarity in rescuing migrants at sea and how government strategies to thwart rescue actions can be considered illegal under international law. The second study by Ciliberto (2018), highlights the pull-back operations done by Libya against migrants at sea, the research question whether Italy can be held accountable for the violations of international law that have occurred. This research provides a critical view of the legal aspects of the current problems.

These studies provide in-depth insight into the legal and human rights challenges related to migration at sea. One of the main findings is that international migration issues cannot be solved by one country alone but require close international cooperation. This research builds on important findings from previous research that are relevant in the context of international migration and the protection of human rights at sea.

The novelty of this research lies in its comprehensive approach to the complex issues of international migration. This research does not only focus on legal aspects but also covers humanitarian aspects, understanding the socio-economic motives and the implications of international cooperation in dealing with the challenges of migration at sea. In doing so, this research contributes to filling knowledge gaps in efforts to understand the complex relationship between migration, human rights, and international relations.

## METHOD

This study employs a qualitative research methodology with a focus on conducting an in-depth literature review. Given their substantial involvement in the externalization of border controls in the Mediterranean Sea, the research design chooses Italy and Libya as the main study areas. The study mainly draws on the examination and summary of previously published material, which includes reports, academic articles, government policies, and other relevant news sources. A systematic and thorough methodology is used in the literature study to collect data and information on the subject. Key themes, trends, and discoveries about the effects of externalized border controls on refugee rights are extensively studied from the gathered material. The results are interpreted in light of well-established theoretical frameworks on externalization, border control, and human rights. The conclusion

of the research explores the effects of externalizing border controls on the human rights of refugees, drawing connections to the existing literature, and providing key findings to contribute to the understanding of the issue.

## RESULT AND DISCUSSION

More than one thousand and five hundred people died in the Mediterranean Seas in 2021 alone (see Table 1). IOM has recorded more than 37.167 migrants who have been reported missing in the Mediterranean Sea and are presumed dead between 2014 and 2022. The right to life is possibly the most logical place to start when looking into the rights of the numerous migrants who have perished in the Mediterranean. People migrate for a variety of reasons, including improving their standard of living and expanding their opportunities (Segal, 2021).

**Table 1.** Migrants in Numbers 2017-2022

| Time         | Number of souls<br>reported ( <i>Arrived</i> )<br>Entry to EU via Libya<br>(Soul) | Number of souls<br>reported ( <i>Departed</i> )<br>going to EU via Libya<br>(Soul) | Number of Lives<br>reported<br>returned to Libya<br>(Souls) | Number of people<br>reported or<br>presumed to have<br>died at sea |
|--------------|---|--|---|--|
| AUG 2017     | 10,552  | 10,833   | -   | 2,410  |
| JUL-AUG 2018 | 19,874  | 33,699   | 13,273  | 1,130  |
| 2019         | 14,876  | 12,216*  | 9,225   | 1,070  |
| 2020         | 36,435  | -  | 11,981  | 984  |
| 2021         | 68,315  | -  | 32,425  | 1553   |
| JUL-AUG 2022 | 30,703  | -  | 15,076  | 999  |

Source: International Organization of Migration (IOM) Report Libya 2017-2022

\* Jan-Nov 2019 IOM report

## Human Rights Violations and Legal Framework

Today Human rights treaties have protected the human rights of refugees Article 6 of *the International Covenant on Civil and Political Rights*, Section 2 of *the European Convention on Human Rights*, and Section 2 of *the Charter of Fundamental Rights of the European Union* and the above agreement emphasizes that the Right to Life applies regardless of nationality. Even the *preamble Universal Declaration of Human Rights* says, “*all members of the human family*” (United Nations, 1948). Human rights law generally exhibits this universality, which may mean that everyone always has rights, no matter where they are.

The opinions represent the commonly accepted belief that human rights serve as a basis for morality everywhere. This point of view contends that regardless of where they are or how those rights are being enforced, people have access to all human rights. It appears that when refugees perish in the Mediterranean, their right to life is being infringed either individually (Jahren, 2013). International law on refugees is a crucial subject to consider while trying to fill the gap in international maritime law. The issues of mass murder and the right to life are somewhat symmetrical.

International law on refugees provides substantial rights to refugees who are discriminated against or threatened with persecution, terror, and so on. The obligation of nonrefoulement also offers refugees who are in danger of deportation and who run the risk of experiencing torture, cruel or degrading treatment, or other significant human rights abuses strong protection. According to the UNHCR, the principle of nonrefoulement also gives refugees a legal status derived from international norms (Goodwin-Gill & McAdam, 2021).

In the research that has been done, there are several disputes about whether refugees have the right to protection under the law even before they enter the jurisdiction of a

country, such as protection from refugees who are traveling illegally through the Mediterranean seas. **United Nations High Commissioner for Refugees** (UNHCR) has long explained that:

*"Determination of refugee status can only be declaratory in nature of any person is a refugee within the framework of a given instrument if he meets the criteria of the refugee definition in that instrument, whether he is formally recognized as a refugee or not."*

In other words, even before a country should process requests for asylum seekers and refugees, refugees are already "refugees" under Article 1 of the 1951 Refugee Convention. **non-entry**, seek to restrict refugee access, and are often illegal under international law (United Nations Support Mission in Libya, 2016).

### **Non-Entrée Policies and Their Impact on Migration Management and Human Rights Violations**

The policies we see today, particularly in the Mediterranean Sea, are not new in the field of migration management; non-entry tactics have long been a feature of state strategy in carrying out border controls (i.e., Italy, France, and the United Kingdom, America, Australia, etc.), to prevent migrants from entering their territory. This approach is based on the idea of immigrants as a potential threat to their destination country and the community. These safeguards have evolved over time to strengthen their effectiveness while safeguarding the perspective countries' national interests (Orchard, 2014).

The first generation of non-entrée policies was based on the unilateral deterrence paradigm, meaning they were implemented by the receiving nation, and comprised of three major tools: (i) denial of visas for the purpose of seeking international protection, combined with sanctions imposed on transporters crossing the border carrying persons without a valid permission; (ii) the setting of an international space within a nation's borders (i.e. airports, seaports, etc.), where a country can control or even refuse any individual to entry especially one without a permit; and (iii) interception on the high seas by a country of destination (Moreno-Lax & Papastavridis, 2016). However, these measures have proven to be ineffective in reducing the flow of immigrants, or insufficient to screen the state from legal responsibility.

Countries have attempted to address the shortcomings of the above strategies by taking a non-entree approach by collaborating with other nations outside of their jurisdiction. To reduce the number of immigrants arriving, this collection of policies is aimed not only to prohibit but also to actively control the flow of immigrants through actions taken by nations of origin or transit.

In order to escape governmental responsibility for abuses of immigrant rights, the regime proxy (in partnership with the nation of origin) does this outside the destination country's borders and under the authority of another country. Among other strategies, the state has created cooperation agreements to discourage immigrants from arriving by sea. Several nations, including Australia, the United States, Greece, Italy, and Spain, have implemented these types of collaboration in various geographical areas.

Three primary techniques have been utilized to achieve securitization of Search and Rescue activities carried out in it: (I) militarization of the water against the movement in the water, (ii) criminalization of non-governmental organizations (NGOs) with an interest in carrying out search and rescue operations, and (iii) externalization of migration management through a proxy state or countries (Shilhav, 2017). These strict cross-border control measures have proven to be very effective in reducing arrivals to Greece and Italy,

making one label all of these management migration policies also known with the term '*European Fortress*'.

The militarization in the Mediterranean Sea was carried out as a way to reduce the number of incoming refugees, this scheme has been in operation and is named **Operation Nostrum Mare**, on 18 October 2013 the Italian Government launched a response to a humanitarian crisis in the Strait of Sicily (Phelia et al., 2016). The Italian-run military operation has two objectives: to combat human trafficking and smuggling and to protect human life at sea. However, this program is considered by immigrants as a pulling factor to cross the Mediterranean, because at the end of the day, they know there will be someone to save them when their lives are threatened by the high seas. On 31 October 2014, Operation Nostrum Mare was replaced by **Operation Triton**, This particular operation carry out border control and surveillance under the European Union FRONTEX, however, this operation is not what refugees thought it was, it is not a Search and Rescue Operation (Cusumano, 2019). This operation encourages the presence of coordination between the countries that are members of it to inform the Coast Guard of the country of origin to return immigrants to their territory.

In order to end human smuggling and trafficking activities, The European Union instituted Operation called Sophia on 7 October 2015, which has the specific task of enforcing illegal activities on the Mediterranean seas, this particular operation was reinforced through the **United Nations Security Council (2015)**. The contents of this particular operation, delegate authority power in inspecting Libyan-owned ships if that particular transportation is being subject to investigation for smuggling immigrants or other forms of human trafficking. This operation also gave leeway for the authority to confiscate ships that are proven to be used for transnational crime activities.

This operation aims to use all measures necessary in special circumstances to deal with immigrant smugglers or traffickers (**United Nations Security Council, 2015**). Critics of this agreement emphasize that changes in views occur to ships coming from Libya without permission as a form of crime without any approach or consideration that the passengers of these ships may be immigrants who need to be protected.

Criminalization of Non-governmental organizations engaging in self-rescue also exists, this is the second measure meant to carry out the securitization of Search and Rescue operations. Several NGOs (non-governmental groups) have attempted to carry out various rescue missions since 2015. This NGO's operations, like the earlier Operation Nostrum Mare, have been seen as a consistent draw factor by immigrants, smugglers, and traffickers. Because the lives of immigrants are in danger, NGOs such as Sea Watch have set up a rescue system to get migrants to mainland Europe, particularly Italy.

The response of national authorities to the search and rescue operations carried out by these organizations has been negative. On the other hand, the Italian judiciary has charged NGOs such as Sea Watch with criminal activity for supporting illegal migration (Berti, 2021). The Italian government, on the other hand, prevents Sea Watch from carrying out such activities by enacting legal actions that sanction Sea Watch through the refusal of access towards Sea Watch vessels in the Italian port and even de-flagging ships to prevent them from operating in international waters. It should also be highlighted that the framework includes the Italian-Libyan relationship or also known as the Malta Declaration, through this particular agreement Italy pledge to contribute to Libya by giving equipment and even assisting or training the Libyan Coast Guard, and as previously stated, the agreement in EUNAVFOR was expanded to include this task (Berti, 2021).

One of the most relevant setbacks and events undertaken under the Italian-Libyan MoU was the one that occurred on 6 November 2017. During that time, the immigrant boat is in

imminent danger and their location was not covered by Search and Rescue Italy. According to the data acquired, on the afternoon of November 5, 2017, a ship carrying around 130 people left the port of Tripoli. The next morning, the NGO Sea Watch ship named Sea Watch 3, cruising beyond Libya's Sovereign zone, intercepted an SOS signal transmitted by Italian Rescue Coordination Center (IRCC). The message was sent to all vessels in the region as well as the Libyan Coast Guard, who are sending communications to its patrolling unit off the coastline of Tripoli. However, in this case, Libya Coast Guard contacted Sea-Watch 3 and directed the NGOs not to approach the location. The Libyan Coast Guard was told by Sea-Watch 3 that they would travel to the location of the migrant vessel, as authorized by the IRCC.

According to the incident reports, Libyan Coast Guard forces engaged in unsafe maneuvers, mistreating detained immigrants, intimidating NGO personnel, and willfully and aggressively blocking rescue efforts. That day Sea-Watch 3 a vessel from Sea Watch managed to save 49 persons. However, more than twenty souls died during the rescue operation, Libyan Coast Guard managed to get 47 people and all of them were returned to Libya. Seventeen survivors filed an action with the European Court of Human Rights, alleging that the Italian government breached their rights by letting the Libyan coast guard conduct a militarization during a signal that was sent for a search and rescue operations, the survivors argue that the Italian government infringed their right to exist (Article 2 ECHR), the principle of nonrefoulement (Article 3 ECHR), and the prohibition on collective expulsion (Article 4, Protocol 4 ECHR) (European Council on Refugees and Exiles, 2018).

### Challenges and Vulnerabilities of Immigrants in Libya

The above mention event and more occurrence that has occurred raise the question of the motive and the goals of each individual, nine out of ten or 87% of immigrants stated that the main motivation for migrating was economic interest, 49% of immigrants interviewed by IOM said that the low wages in their country of origin motivated them to migrate (International Organization for Migration, 2022). Libya apart from being a destination for immigrants, is also a transit point for those trying to get better welfare by making the EU country as the final destination.

IOM has identified how many immigrants use Libya as a transit country. IOM findings identify the nationality of illegal immigrants originating from the Eastern region of Libya and the Western region of Libya. Immigrants traveling in Libya mostly reported using private vehicles 50% and public transportation 26%. In 2022 the IOM report indicated that an average of immigrants needed to pay USD \$919. 86% of the total immigrants interviewed by IOM admitted that they purchased the services of a facilitator in carrying out transportation to their destination also a form of service usually given by transnational crime organizations (International Organization for Migration, 2022).

Research conducted by IOM indicates that despite Italy's actions to suppress the number of immigrants in Libya who are trying to make Italy their final destination, to date the number of immigrants continues to increase. Libya is currently well-known as a transit destination for immigrants, but the International Labor Organization (ILO) found that employment is an important aspect for immigrants in Libya whether they choose to stay or for those who seek to get to their final destination (International Labour Organization & Reach, 2022).

Immigrants in Libya are often involved in jobs with low skills and with high uncertainty (i.e., threats of layoffs, deportation, protection of rights, etc.) and migrants do not receive benefits (i.e., insurance, overtime pay, leave, and so on) and even work without protection and legal certainty. These general characteristics are the situation and conditions of the

immigrant working class in Libya. As a result, and in the absence of a legal framework protecting immigrants' rights, immigrants often find themselves vulnerable to protection issues, both outside and within the workplace (International Labour Organization & Reach, 2022).

In addition to employment status, the most important aspects of individual daily life also relate to the welfare and access to the daily needs of immigrants in Libya. IOM's findings indicate that immigrants' daily needs are lacking. More than 1 in 5 immigrants do not have access to clean water for their daily needs, 33% of Men and 27% of Women immigrants in Libya stated that they have to share a toilet room to meet their needs with more than 10 people every day. Research conducted on sanitation indicates that sharing a clean room can have an impact on disease exposure (Heijnen et al., 2014).

Apart from clean water, immigrants in Libya stated that access to drinking water is very difficult so that  $\frac{3}{4}$  of the immigrants need to buy bottled water for their daily needs. In addition, 79% of the immigrant population in Libya said that they still have to rent their homes with accommodation needs such as beds, clothes, blankets, cleaning tools, and cooking utensils also being primary needs that are difficult for immigrants to obtain (Op.cit. International Organization for Migration, 2022).

Access to education for children cannot be separated from the problems of immigrants in Libya, 6% of the immigrant population in Libya stated that 86% of the problems with access to education were primarily economic capabilities, 64% stated a lack of documents and 55% of them had language barriers (Op.cit. International Organization for Migration, 2022).

## CONCLUSION

In recent years, Italy's strategy aimed at lowering migration has always centered on approaches involving maritime operations with militarism, in combination with the prosecution of civil groups, and partnerships with foreign states. The last method additionally involves the externalization of migration through several agreements done between potential countries of destination (i.e., Italy) and countries of origin or transit (i.e., Libya), a system that is particularly problematic in terms of effectively safeguarding the fundamental rights of immigrants. Apart from reducing arrivals, the outsourcing of cross-border control through detention flow policies by third countries aims to protect the alleged destination countries from the responsibilities to uphold international human rights law especially accepting immigrants. Practice *non-entree* proved somewhat successful in achieving control over migration management. However, it also portrays a lot of flaws in reducing it and in upholding human rights. As the events of November 6, 2017, illustrate, the *Law of the Sea* as well as provisions of *International Human Rights Law* Agreement-based solutions do not provide solutions to challenges posed by individuals who seek refuges. On the one hand, though *Law Of the Sea* set some obligations related to operations *Search and Rescue* aiming to protect human life, this regulation is a state-centered scheme that provides no place for to be disputed. On the other hand, even though every man has human rights to refugees, their rights are very dependent on various policies and cooperation that have emerged in the various countries of their destination. It should also be noted further studies should be done on whether a particular economic approach should be done by destination countries in the origin or transit countries since these studies show that the prominent factors that cause migration are wealth and welfare, and the approach done through international law by bending the rules would not create permanent solutions both for migrant and even Italy.

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