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Unsafe and Undignified The forced expulsion of migrants from Libya

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migrants from Libya



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CONTENTS

Executive Summary	ii
1. INTRODUCTION AND METHODOLOGY	1
2. CONTEXT	5
3. EXERCISING DUE DILIGENCE IN SUPPORT TO MIGRATION AND BORDER MANAGEMENT IN LIBYA	11
4. KEY HUMAN RIGHTS CHALLENGES FACED BY MIGRANTS IN THE CONTEXT OF FORCED RETURN	15
A. LACK OF PROCEDURAL GUARANTEES AND DUE PROCESS	16
Recommendation	20
B. THE USE OF ARBITRARY ARREST AND DETENTION TO ENFORCE RETURNS	22
Recommendation	26
C. DANGEROUS AND UNDIGNIFIED FORCED RETURN JOURNEYS	27
Recommendation	30
D. LACK OF ACCESS TO JUSTICE AND EFFECTIVE REMEDY	31
Recommendation	32
5. CONCLUSION	33

EXECUTIVE SUMMARY

On 10 December, 2018, on the occasion of International Human Rights Day, the world's leaders met in Marrakech, Morocco to adopt the Global Compact for Safe, Orderly and Regular Migration (GCM).¹ The adoption of the GCM was hailed as an “historic moment” as it was the first intergovernmentally negotiated agreement, prepared under the auspices of the United Nations, to cover all dimensions of international migration in a holistic and comprehensive manner.² The GCM contains a number of important State commitments including, among others, “to facilitate and cooperate for safe and dignified return and to guarantee due process, individual assessment and effective remedy, by upholding the prohibition of collective expulsion and of returning migrants when there is a real and foreseeable risk of death, torture, and other cruel, inhuman, and degrading treatment or punishment, or other irreparable harm, in accordance with our obligations under international human rights law”.³

In light of this GCM commitment, this report aims to highlight the human rights impacts of migrants being forcibly returned from Libya.⁴ The report is part of a wider project by the Office of the United Nations High Commissioner for Human Rights (OHCHR) seeking to identify, document and analyse human rights violations and abuses as well as protection gaps impacting migrants in Libya and the neighbouring region and to formulate recommendations to relevant governments and other stakeholders, aimed at ensuring compliance with international human rights law and standards. It builds upon and complements the findings of previous joint reports by OHCHR and the United Nations Support Mission in Libya (UNSMIL) on the protection of the human rights of migrants in Libya.⁵

The report is structured according to four key human rights challenges and in each section the human rights legal framework is discussed, followed by an analysis of the challenge and a set of recommendations. The key challenges highlighted in this report include: a) lack of due process and procedural safeguards; b) the use of arbitrary arrest and detention to enforce returns; c) dangerous and undignified forced return journeys; and d) lack of access to justice and effective remedy. The recommendations in this report are directed at Libyan authorities, the European Union (EU), its Member States and institutions, United Nations (UN) entities and other stakeholders who have a role in ensuring that border management and security initiatives in Libya promote and uphold respect for international law. They seek to provide guidance to ensure return policies and practices are consistent with the effective respect, protection and fulfilment of the human rights of all migrants in Libya, regardless of their status.

In the absence of more systematic data collection and public reporting by Libyan authorities, it is difficult to assess the full extent of potential human rights violations and abuses as a result of migrants being forcibly expelled from Libya. However, information gathered by OHCHR and presented in

¹ The Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195, Resolution adopted by the General Assembly on 19 December 2018.

² UN News, ‘Historic moment’ for people on the move, as UN agrees first-ever Global Compact on migration, 13 July 2018, available at <https://news.un.org/en/story/2018/07/1014632>.

³ The Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195, Objective 21, para. 37.

⁴ There is no universal legal definition of “migrant”. OHCHR uses the term “international migrant” to refer to “any person who is outside a State of which they are a citizen or national, or, in the case of stateless person, their State of birth or habitual residence”. See, OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (2014), available at: https://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf.

⁵ See, UNSMIL/OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 18 December 2018, available at: <https://unsmil.unmissions.org/sites/default/files/libya-migration-report-18dec2018.pdf>; and UNSMIL/OHCHR, *“Detained and Dehumanized”: Report on Human Rights Abuses Against Migrants in Libya*, 13 December 2016, available at: https://unsmil.unmissions.org/sites/default/files/migrants_report-en.pdf.



this report indicates that migrants in Libya are routinely at risk of arbitrary or collective expulsion without an individual assessment of their rights, circumstances or protection considerations. Some are being expelled to places where they may face persecution, torture, ill-treatment or other irreparable harm in violation of the principle of *non-refoulement*, and raising serious concerns regarding potential *chain-refoulement* when migrants are returned to Libya from international waters.⁶ Expulsions from Libya overwhelmingly lack proceedings afforded with due process and procedural guarantees, including judicial control, access to legal assistance, the ability to challenge the legality of one's return, and individual assessment. Additionally, the expulsions themselves often place migrants in extremely vulnerable situations, including long and perilous return journeys, with migrants being forced to travel on overcrowded vehicles across remote stretches of the Sahara Desert, without adequate safety equipment, food, water and without being provided with appropriate medical care, including COVID-19 testing and prevention measures.

Information received by OHCHR also indicates that expulsions from Libya are increasingly taking place under so-called “emergency procedures” linked to preventing the spread of COVID-19, despite calls from the UN system and the human rights mechanisms to suspend all forced returns during the pandemic, in order to protect the health of migrants and communities in countries of origin, transit and destination, and to uphold human rights.⁷ Throughout the process, and especially following their

⁶ See, OHCHR, “Lethal Disregard”: Search and rescue and the protection of migrants in the central Mediterranean Sea, March 2021, available at: <https://www.ohchr.org/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf>.

⁷ OHCHR, *COVID-19 and the Human Rights of Migrants: Guidance*, April 2020, available at: https://www.ohchr.org/Documents/Issues/Migration/OHCHRGuidance_COVID19_Migrants.pdf; UN Network on Migration, *Forced Returns of Migrants Must be Suspended in Times of COVID-19*, 13 May 2020, available at: <https://migrationnetwork.un.org/un-network-migration-official-statement-forced-returns-migrants-must-be-suspended-times-covid-19>; UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and UN Special Rapporteur on the human rights of migrants, *Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants*, May 2020, available at: <https://www.ohchr.org/Documents/Issues/Migration/CMWSPMJointGuidanceNoteCOVID-19Migrants.pdf>.

expulsion from Libya, migrants lack meaningful access to justice and effective remedy for harms suffered during the return process, which are further obscured by the lack of independent monitoring and official disaggregated data, made publicly available, on the number and circumstances of the people being expelled.

While Libya is a party to several international human rights instruments which contain provisions relevant for the forced return of migrants,⁸ this report documents continued incidents of expulsions from Libya that fail to uphold migrants' human rights. Moreover, despite the known human rights risks inherent to forced returns from Libya, the report documents how, in recent years, efforts to strengthen Libya's external border security have become increasingly prominent in bi-lateral and multi-lateral discussions, including with donor governments and international organisations supporting Libya in its stated efforts to "combat illegal migration". The report finds that in the absence of more robust due diligence and human rights-based approaches, current operational and capacity-building efforts focused on strengthening Libya's external border security are putting migrants' human rights at risk.

OHCHR has consistently highlighted that Libya cannot be considered a safe place for the return or disembarkation of migrants and that such returns to Libya may violate the principle of *non-refoulement*.⁹ Previous public statements and reporting by OHCHR point out that migrants in Libya systematically and routinely face the risk of unlawful killings, enforced disappearance, slavery and forced labour, arbitrary detention, torture, ill-treatment, trafficking, gender-based violence, extortion, exploitation, lack of access to health, housing, education and other human rights violations and abuses by both State and non-State actors.¹⁰ The findings of this report further strengthen the evidence that Libya is not a safe place for migrants due to the risk of collective expulsion, *refoulement*, and other human rights violations.

⁸ Libya is a State party to eight of the nine core international human rights law instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW); and Convention on the Rights of Persons with Disabilities (CRPD). See, <https://indicators.ohchr.org/>. At the regional level, Libya has also ratified the Arab Charter on Human Rights (Arab Charter), the African Charter on Human and Peoples' Rights (African Charter) and the Protocol to the African Charter on the establishment of the African Court on Human and Peoples' Rights.

⁹ OHCHR, "Lethal Disregard", *supra* note 6.

¹⁰ UNSMIL/OHCHR, *Desperate and Dangerous*, and UNSMIL/OHCHR, "Detained and Dehumanized", *supra* note 5. See also, OHCHR, *Shocking Cycle of Violence for migrants departing Libya to seek safety in Europe*, 2 October 2020; OHCHR, *Press briefing note on Migrant rescues in the Mediterranean*, 8 May 2020; OHCHR, *Press briefing note on Libya*, 28 April 2020; OHCHR, *Press briefing note on Libya*, 20 December 2019; OHCHR, *Statement by UN High Commissioner for Human Rights Michelle Bachelet, Attack on Libyan migrant detention centre*, 3 July 2019; OHCHR, *Press briefing note on Libya*, 7 June 2019; all available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24681&LangID=E>.



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1

Introduction and Methodology

While no official government data exists, the International Organization for Migration (IOM) estimates that there are currently around 610,128 migrants comprising more than 44 nationalities in Libya,¹¹ many of whom are undocumented and, therefore, at risk of being subject to forced return. There is no internationally agreed definition of “return” in the context of migration. In the absence of an agreed legal definition, OHCHR understands return to be:



An umbrella term to refer to all the various forms, methods and processes by which migrants are returned or compelled to return to their country of origin or of habitual residence, or a third country. Returns may thus include deportations, expulsions, removals, rejections at the border, extraditions, repatriations, handovers, transfers or other types of return as defined in different national legal frameworks and practices. In practice, returns are often characterized as either “forced” or “voluntary”, though the reality is often less clear-cut.¹²

For the purposes of this report, the terms “forced return”, “expulsion”, “removal” and “deportation” are used interchangeably to refer to the involuntary return of migrants from Libya.

While States have legitimate interests in governing their borders, including in order to protect human rights and respond to transnational organized crime, international borders are not zones of exclusion or exception for human rights obligations.¹³ States must exercise their jurisdiction at their international borders in full compliance with their human rights obligations.

The UN Special Rapporteur on the human rights of migrants has previously highlighted that State efforts to return migrants to their countries of origin are often expensive, difficult to implement and problematic to carry out in accordance with international human rights law.¹⁴ Moreover, in the absence of sufficient safe and regular pathways for migrants to regularly enter and remain in a country—and especially where the drivers of precarious migration persist—migrants who are forcibly returned may be left with few other options than to undertake renewed precarious and irregular journeys.¹⁵ The failure to safeguard migrants’ rights in the context of return has been demonstrated to lead to a number of serious human rights concerns globally, such as the risk of *refoulement* and collective expulsion.¹⁶

In 2019 and 2020, at least 7,500 migrants have been expelled from Libya’s external land borders.¹⁷ According to official statistics from the Libyan Directorate for Combatting Illegal Migration (DCIM),

¹¹ IOM, Displacement Tracking Matrix (DTM) Libya’s Migrant Report: Round 38, July - September 2021, available at <https://displacement.iom.int/reports/libya-%E2%80%94migrant-report-38-july-%E2%80%94september-2021>.

¹² See, OHCHR/UNCT, Human Rights at International Borders: A Trainer’s Guide (2021), available at https://www.ohchr.org/Documents/Publications/HR_InternationalBorders.pdf; and OHCHR/GMG, *Recommended Principles and Guidelines on the Protection of the Human Rights of Migrants in Vulnerable Situations* (2018), available at: <https://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>; See also, CAT, General Comment No. 4 (2017) on *The implementation of article 3 of the Convention in the context of article 22*, CAT/C/GC/4, para. 4; CCPR, General Comment No. 15 (1986) on *The position of aliens under the Covenant*, HRI/GEN/1/Rev.9 (Vol. I), para. 9.

¹³ See, OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (2014), *supra* note 4.

¹⁴ A/HRC/38/41, para. 10; A/72/643, para. 39.

¹⁵ *Ibid.*

¹⁶ See OHCHR, Expert Meeting on protecting the human rights of migrants in the context of return, Informal Summary, 6 March 2018, available at: <https://www.ohchr.org/Documents/Issues/Migration/Return/InformalSummary.pdf>.

¹⁷ This is a conservative estimate derived from official statistics published by the Libyan Ministry of the Interior’s Benghazi branch of the Directorate for Combatting Illegal Migration (DCIM), on file with OHCHR. However, it should be noted that this official figure may not include several forced returns documented by the UN and civil society organizations in Libya, including those taking place by de facto authorities or from unofficial detention centres in Libya.



3,375 “deportation incidents” were carried out from Libya in 2019 and 5,182 such “incidents” were carried out in 2020.¹⁸ These returns were primarily of migrants from Egypt, Sudan and Chad, but also included nationals of Algeria, Bangladesh, Burkina Faso, Cameroon, Ethiopia, Ghana, India, Jordan, Mali, Morocco, Niger, Nigeria, Pakistan, Senegal, Somalia, South Sudan and Syria.¹⁹ Because the officially reported figures provide no disaggregation indicating the age and gender of returnees, nor of the legal basis for their return, it is difficult to verify their accuracy.²⁰ Moreover, independent monitoring of forced returns by UN and civil society actors in Libya indicate that DCIM’s official figures may represent a significant undercount as they do not systematically account for forced returns being carried out by de facto Libyan authorities, including from unofficial detention centres operated by the Libyan National Army (LNA), militias or non-State actors affiliated with the internationally recognized Government of National Unity (GNU).²¹

¹⁸ DCIM statistics on file with OHCHR.

¹⁹ DCIM statistics on file with OHCHR. Nationalities listed according to the total number of “deportation incidents” reported.

²⁰ There are also several internal discrepancies with the officially reported DCIM figures. For example, the figures include a total of 925 returns carried out in 2019 and 2020 by the International Organization for Migration (IOM), which are not typically understood to be deportations carried out by the State. Additionally, the official 2020 figures indicate 3,657 Egyptian nationals were deported from the Musaid border crossing station in north-eastern Libya. However the total number of deportations through the Musaid station are recorded as only 3,587, or 70 fewer individuals. It is unclear whether such discrepancies are due to simple counting errors or whether there is cause for concern regarding the fate and whereabouts of these missing individuals. Other internal discrepancies include, in both 2019 and 2020, inconsistencies between the number of “sick persons” indicated as deported and, in 2020, a discrepancy in the total number of persons indicated as deported by nationality versus the overall figure provided.

²¹ OHCHR interview.

The report covers the period from January 2019 to December 2020 and is based on interviews with migrants in Libya and its neighbouring countries conducted by OHCHR, as well as on information received from relevant experts, NGOs, UN partners and other stakeholders. The findings of this report are also based on information gathered through desk research and other remote monitoring activities throughout the reporting period, including meetings with relevant stakeholders, official statistics, reports by national and international organizations, views and observations of international and regional human rights mechanisms, and public media reports.



2

Context



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Libya shares more than 4,000 km of land borders with six countries – Algeria, Chad, Egypt, Niger, Sudan and Tunisia – and over two-thirds of migrants in Libya originate from the neighbouring countries of Chad, Egypt, Niger and Sudan.²² However, there are also tens of thousands of migrants in Libya from across North Africa, the Middle East, West Africa and Asia, including a significant number of nationals of Bangladesh, Burkina Faso, Eritrea, Ethiopia, Ghana, Guinea, Mali, Morocco, Nigeria, Senegal, Somalia, Syria, and Tunisia, as well as the State of Palestine.²³ Approximately 10 percent of

²² IOM, *supra* note 11, p. 26.

²³ IOM, *supra* note 11, p. 26.

all migrants in Libya are women and an additional 10 percent are children, including two percent who are unaccompanied or separated.²⁴

Libya is not a party to the 1951 Convention Relating to the Status of Refugees or its Protocol. Despite having ratified the 1969 OAU Convention relating to refugees, it does not have a functioning national asylum system. As of 31 December 2020, the United Nations High Commissioner for Refugees (UNHCR) had registered 44,725 refugees and asylum seekers in Libya.²⁵ However, the actual number of asylum seekers is believed to be much higher given UNHCR's limited access to persons of concern as well as restrictive governmental policies that only permit migrants of designated nationalities to register with UNHCR as asylum-seekers.²⁶

In addition to those officially registered by UNHCR, there are an unknown number of migrants in Libya who fall outside the specific legal category of "refugee", but who nevertheless cannot be forcibly returned on grounds related to the principle of *non-refoulement* or other obligations under international human rights law. As Member States acknowledged in the New York Declaration for Refugees and Migrants, migrants are often compelled to move for a range of complex and inter-connected reasons, including conflict and persecution, extreme poverty, food insecurity, water scarcity, the adverse impacts of climate change and environmental degradation, and other human rights violations in their countries of origin.²⁷ Such migrants in vulnerable situations may require specific legal protection, including in some cases from forced return, as a result of the situations compelling them to leave their country of origin, the circumstances in which they travel or the conditions they face on arrival, or because of personal characteristics such as their age, gender identity, disability or health status.²⁸

Libya has historically been a transit and destination country for mixed migration from Sub-Saharan and North African countries due to its geographic location, extensive land and sea borders, reliance on foreign labour and historically open immigration policies.²⁹ From the 1970s to 1990s, the Government of Libya actively encouraged migration to help meet its domestic labour needs.³⁰ However, beginning in the 2000s, Libya became more restrictive in its approach to migration, in part in response to pressure from European countries to stop onward movement.³¹ During this period, visa requirements for all nationalities, except for those from countries in the Maghreb region, were introduced, along with policies of detention and deportation of undocumented migrants.³²

A series of bilateral agreements signed between Italy and Libya beginning in 2000 included provisions for fighting terrorism, organized crime and irregular migration, which led to a program of charter flights financed by Italy to forcibly return undocumented migrants to their countries of origin, as well as increased training and technical equipment for Libyan border security, and the construction of centres in Gharyan, al-Kufra and Sabha for the purpose of detaining migrants prior to their forcible

²⁴ IOM, *supra* note 11, p. 4.

²⁵ UN High Commissioner for Refugees (UNHCR), Update Libya, 31 December 2020, available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20Libya%20Recap%202020.pdf>.

²⁶ UNHCR, UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea, September 2020, para. 31.

²⁷ UN General Assembly, New York Declaration for Refugees and Migrants, Resolution adopted by the General Assembly on 19 September 2016, A/RES/71/1, para. 1; see also IOM/WFP, *Hunger, displacement and migration: A joint innovative approach to assessing needs of migrants in Libya*, November 2019, p. 11, available at: <https://displacement.iom.int/reports/dtm-wfp-hunger-displacement-and-migration-libya>.

²⁸ OHCHR/UN-GMG, *Recommended Principles and Guidelines on the Protection of the Human Rights of Migrants in Vulnerable Situations* (2018), *supra* note 12, p 5-7.

²⁹ UNSMIL/OHCHR, *Desperate and Dangerous*, *supra* note 5, p. 10.

³⁰ *Id.* at p. 5.

³¹ UNSMIL/OHCHR, *"Detained and Dehumanized"*, *supra* note 5, p. 5.

³² UNSMIL/OHCHR, *Desperate and Dangerous*, *supra* note 5, p. 25.

return from Libya.³³ In 2001, the Libyan government expelled thousands of undocumented migrants to the borders with Chad and Niger.³⁴ From 2003-2005, these efforts were significantly expanded as Libyan authorities forcibly returned roughly 140,000 migrants to their countries of origin in a process described at the time as “arbitrary and chaotic”, with migrants arrested for irregular entry, stay or exit; detained in a patchwork of detention and removal facilities, many of them with substandard conditions; and then summarily removed from Libya following only basic verification of personal identity and nationality.³⁵

Additional bilateral agreements on border security and control were agreed between Libya and Algeria, Chad, Sudan, and Tunisia in 2012 and with Egypt in 2013, with the aim of stopping irregular migration and of combatting trafficking and smuggling of migrants across Libya’s land borders.³⁶ In 2015, Libya further extended entry bans to all nationals of Bangladesh, Iran, Pakistan, Sudan, Syria, Yemen and the State of Palestine as part of stated government efforts to “fight illegal emigration” to Europe.³⁷ Collectively, these efforts have made it virtually impossible for migrants to enter and remain in Libya in a regular manner.

A Memorandum of Understanding (MOU) was signed with Italy in 2017 in part to “fight against illegal immigration” and to reinforce Libyan border security.³⁸ A similar MOU was signed in May 2020 with Malta, agreeing to the creation of two co-ordination centres, one in Valletta and another in Tripoli, to “offer the necessary support relating to combatting illegal immigration in Libya and the Mediterranean region” and proposing that the European Commission and European Member States increase their financial support in order to help the Libyan authorities secure their southern borders and provide “the necessary technologies for border control and protection, as well as in the dismantling and follow up of human trafficking networks, and curtailing the operations of organized crime”.³⁹

Libyan law continues to criminalize the irregular entry, stay and exit of migrants from its territory. Libyan Law No. 6 of 1987 on Organizing the Entry, Residence and Exit of Foreigners in Libya, criminalizes irregular entry, stay and exit in Libya, punishable by a mandatory sentence of imprisonment or fine, and followed by the possibility of further immigration detention while awaiting mandatory deportation from the country and an indefinite re-entry ban.⁴⁰ In 2004, Libya acceded to the Protocol against the Smuggling of Migrants by Land, Sea and Air (“Smuggling Protocol”) and amended Law No. 6 to impose a further mandatory sentence of imprisonment and fine on any person committing migrant smuggling-related offenses.⁴¹ Libyan Law No. 19 on Combatting Illegal Migration, adopted in 2010, defines the concept of “illegal immigrant” and related “acts of illegal immigration”, determines

³³ See Silja Klepp, *Italy and its Libyan Cooperation Program: Pioneer of the European Union’s Refugee Policy?*, (Middle East Institute) 1 August 2010, available at: <https://www.mei.edu/publications/italy-and-its-libyan-cooperation-program-pioneer-european-unions-refugee-policy#edn52>; and European Commission, *Technical Mission to Libya on Illegal Migration November 17– December 6, 2004 Report*, 7753/05, p. 58, available at: <http://www.statewatch.org/news/2005/may/eu-report-libya-illimm.pdf>.

³⁴ See, Human Rights Watch, *Stemming the Flow: Abuses Against Migrants, Asylum Seekers and Refugees*, September 2006, <https://www.hrw.org/reports/2006/libya0906/libya0906web.pdf>; and Sara Hamood, *African Transit Migration Through Libya to Europe: The Human Cost*, January 2006, <https://www.migreurop.org/IMG/pdf/hamood-libya.pdf>.

³⁵ *Ibid.*

³⁶ UNSMIL/OHCHR, “*Detained and Dehumanized*”, *supra* note 5, p. 6.

³⁷ Reuters, *Libya’s official government bans Yemenis, Iranians, Pakistanis from entry*, 1 September 2015, available at: <https://www.reuters.com/article/us-libya-security-ban-idUSKCNOR14PZ20150901>; The Daily Star, *Libya bans entry of Bangladesh workers*, 18 May 2015, available at: <https://www.thedailystar.net/backpage/libya-bans-bangladesh-workers-83323>.

³⁸ Unofficial translation available at: https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

³⁹ Available at: <https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf>.

⁴⁰ Articles 17-19 of Law No. 6 of 1987 on Organizing the Entry, Residence and Exit of Foreigners in Libya, available at: <https://security-legislation.ly/node/34591> (unofficial translation).

⁴¹ Law No. (2) of 2004 amending certain provisions of Law No. 6 of 1987 on Organizing the Entry, Residence and Exit of Foreigners in Libya, available at: <https://security-legislation.ly/node/33686> (unofficial translation).

penalties for smuggling and harbouring of so-called “illegal immigrants”, and directs the mandatory detention and deportation of all foreign nationals convicted of “acts of illegal immigration”.⁴²

The law does not distinguish between different categories of migrants—such as refugees, migrant workers, victims of trafficking, or children—nor account for their specific rights to protection under international law.⁴³ These developments—combined with the lack of opportunities for migrants to regularize their migration status in Libya —have created an environment in which migrants in irregular situations in Libya are under the constant threat of arrest and detention, often for an indefinite period and in conditions amounting to torture or ill-treatment,⁴⁴ followed by the further risk of deportation from the country.

Since the 2011 uprising and armed conflict in Libya, violations and abuses of international human rights law and violations of international humanitarian law have steadily increased, marked by political instability, a general state of lawlessness, limited capacity of Libyan institutions to uphold the rule of law, and widespread impunity for violations and abuses committed against migrants.⁴⁵ The renewal of armed hostilities in Libya in 2014 gave rise to a security, governance and humanitarian crisis characterized by ongoing violence, the fragmentation of national institutions, and the collapse of the rule of law.⁴⁶ The internationally recognized Government of National Accord (GNA) began operating from Tripoli on 30 March 2016 but faced challenges in asserting control over large parts of the country, which were controlled by the Libyan National Army (LNA), and to enforce accountability for the widespread human rights violations and abuses being committed against migrants and other civilians.⁴⁷

This situation, coupled with the breakdown of the economy and devaluation of the currency, contributed to increasing numbers of migrants, including those who had lived in Libya for decades, embarking on desperate and dangerous journeys across the Mediterranean Sea to seek safety and a life with dignity in Europe.⁴⁸ At the same time, the imposition of stricter border controls and increased border management efforts, coupled with the lack of safe and regular migration pathways in the region, have led to the emergence of abusive and often violent interactions between migrants and their smugglers or traffickers.⁴⁹

With the arrival of COVID-19 to Libya in 2020, migrants have faced additional human rights challenges, including a lack of access to health services such as COVID-19 prevention, testing, treatment and vaccination, in a context of aggravated risks of exposure to COVID-19 in Libyan detention centres, a lack of access to decent work, livelihoods and social protection, border closures and other COVID-19 related mobility restrictions, and a noted rise in COVID-19 related stigma and xenophobia.⁵⁰

In June 2020, the UN Human Rights Council established, through resolution 43/39, an independent Fact-Finding Mission (FFM) on Libya with a one-year mandate to investigate alleged violations and abuses of international human rights law and international humanitarian law committed in Libya

⁴² Law No. 19 (2010) on Combating Irregular Migration, available at: <https://security-legislation.ly/node/32174> (unofficial translation).

⁴³ UNSMIL/OHCHR, “Detained and Dehumanized”, *supra* note 5, p. 11.

⁴⁴ See articles 7 of ICCPR, and 1 and 16 of CAT.

⁴⁵ UNSMIL/OHCHR, *Desperate and Dangerous*, *supra* note 5, p. 10.

⁴⁶ UNSMIL/OHCHR, *Desperate and Dangerous*, *supra* note 5, p. 10.

⁴⁷ UNSMIL/OHCHR, *Desperate and Dangerous*, *supra* note 5, p. 10.

⁴⁸ UNSMIL/OHCHR, *Desperate and Dangerous*, *supra* note 5, p. 10; See also OHCHR, “Lethal Disregard”, *supra* note 6.

⁴⁹ See, Gabriella Sanchez, Migrant smuggling in the Libyan context: re-examining the evidence, September 2020.

⁵⁰ See, OHCHR, *A Pandemic of Exclusion: The impact of Covid-19 on the human rights of migrants in Libya*, July 2021, available at: https://www.ohchr.org/Documents/Issues/Migration/A_pandemic_of_exclusion.docx.

since 2016.⁵¹ In its report of October 2021, the FFM found that migrants in Libya had been subjected to a litany of abuses committed on a widespread scale by State and non-State actors, with a high level of organization and with the encouragement of the State, noting that the patterns of violence are suggestive of crimes against humanity.⁵²

On 23 October 2020, representatives of the GNA and LNA agreed to a permanent ceasefire, bringing hope for a strengthening of Libyan institutions and ability to uphold the rule of law.⁵³ This was followed, in November 2020, with the first-round Libyan Political Dialogue Forum (LPDF), which adopted a Roadmap for credible, inclusive and democratic national elections, to be held on 24 December 2021.⁵⁴

⁵¹ See, https://www.ohchr.org/EN/HRBodies/HRC/FFM_Libya/Pages/Index.aspx.

⁵² OHCHR, Libya: Evidence crimes against humanity and war crimes committed since 2016, UN report finds, available at: <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=27595&LangID=E>.

⁵³ Agreement for a Complete and Permanent Ceasefire in Libya, 23 October 2020, available at: https://unsmil.unmissions.org/sites/default/files/ceasefire_agreement_between_libyan_parties_english.pdf. The agreement includes provisions for respecting international human rights and humanitarian law and is based on the outcomes of the Berlin Conference of January 2020, which urged the parties to amend Libyan legislation on migration and asylum to align with international law, to take steps to close all immigration detention centres in Libya, and to hold accountable those who have committed human rights violations and abuses against migrants. See, The Berlin Conference on Libya, Conference Conclusions, 19 January 2020, available at: <https://unsmil.unmissions.org/berlin-international-conference-libya-19-january-2020>.

⁵⁴ See, <https://unsmil.unmissions.org/libyan-political-dialogue-forum>.



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3

Exercising Due Diligence in Support to Migration and Border Management in Libya



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International support to migration and border management in Libya has historically been provided primarily through bilateral State-to-State agreements.⁵⁵ Today, the overwhelming majority of logistical, financial and capacity-building support to Libya’s migration and border management comes through cooperation with the European Union. Since its creation in November 2015, the EU Emergency Trust Fund for Africa (EUTF) has been the EU’s main tool for actions to support migration related issues in Libya and has mobilised at least €435 million in funding for migration-related projects and programmes in Libya.⁵⁶ This has included several major EU-funded projects in support of migration and border management in Libya,⁵⁷ such as a €10 million programme on “Support to Rights-based Migration Management and Asylum in Libya” implemented by the International Centre for Migration Policy Development (ICMPD) and the International Federation of Red Cross and Red Crescent Societies (IFRC)⁵⁸ and a two-phase €61.3 million project on “Support to Integrated Border and Migration Management in Libya” implemented by the Italian Ministry of the Interior and IOM.⁵⁹

A dedicated EU Border Assistance Mission (EUBAM) in Libya, launched in 2013, is also contributing strategic policy advice and technical capacity support to the Libyan authorities, including by training

⁵⁵ Human Rights Watch, *Stemming the Flow*, *supra* note 34.

⁵⁶ EUTF for Africa, Factsheet: EU Support on Migration in Libya, June 2020, available at: https://ec.europa.eu/trustfundforafrica/sites/default/files/july_2020_eutf_factsheet_libya_2.pdf; See also EEAS, EU-Libya relations, available at: https://eeas.europa.eu/headquarters/headquarters-homepage_en/19163/EU-Libya%20relations.

⁵⁷ See, EUTF for Africa, *Libya*, available at: <https://ec.europa.eu/trustfundforafrica/region/north-africa/libya>.

⁵⁸ Available at: https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/c_2013_9196_annex_en.pdf.

⁵⁹ Available at: https://ec.europa.eu/trustfundforafrica/sites/default/files/t05-eutf-noa-ly-04_modified.pdf (first phase); and <https://ec.europa.eu/trustfundforafrica/sites/default/files/t05-eutf-noa-ly-07.pdf> (second phase).

and providing advice on ‘integrated border management’⁶⁰ to hundreds of Libyan border officials; piloting a project together with Italy and the European Border and Coast Guard Agency (FRONTEX) to train the General Administration for Coastal Security (GACS); setting up a cross-ministerial Border Management Working Group (BMWG); and drafting a proposal (‘White Paper’) for the “comprehensive reform of border administration” in Libya.⁶¹

Several UN Special Procedures mandate-holders of the Human Rights Council, including the Special Rapporteur on the human rights of migrants and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, have previously raised concerns that cooperation with Libya on migration and border management appears to be largely conducted within a securitized approach that emphasizes policing and border control, often to the detriment of human rights.⁶² More recently, concerns have been raised at the European Parliament and by migrant advocates, academics and human rights defenders, that EU support to migration and border management in Libya may be facilitating the abuse of migrants by containing them in a country where their lives and dignity are at risk.⁶³

In order to ensure the effective respect, protection and fulfilment of human rights, OHCHR has recommended States adopt a human rights-based approach (HRBA) to migration.⁶⁴ An essential aspect of any HRBA to international cooperation on migration and border management is to exercise sufficient due diligence to prevent, mitigate and remedy reasonably foreseeable human rights violations or abuses committed by other States and private actors as a direct result of such cooperation.⁶⁵ It is recommended that before adopting new external policies or engaging in bilateral or multi-lateral cooperation on migration, States undertake human rights impact assessments and consult migrants and other relevant stakeholders on the potential impacts of their actions.⁶⁶ States should also take steps to immediately review and suspend cooperation measures that have a negative or disproportionate impact on the human rights of migrants.⁶⁷

⁶⁰ Art. 4 of the Regulation (EU) 2016/1624 (European Border and Coast Guard Regulation) describes the main components of IBM as: border control; prevention and detection of cross-border crime; referral of persons who are in need of, or wish to apply for, international protection; search and rescue operations for persons in distress at sea; risk analysis for internal security and security of the external EU borders; cooperation with third countries, focusing on neighbouring countries and those which have been identified as countries of origin and/or transit for irregular migration; and return of third-country nationals who are subject to return decisions. See, https://ec.europa.eu/home-affairs/content/european-integrated-border-management_en.

⁶¹ See, e.g. Euobserver, *EU to help draft Libya’s strategy on border security*, 18 September 2020, available at: <https://euobserver.com/migration/149468>.

⁶² See, e.g. UN Special Rapporteur on the human rights of migrants, *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, A/HRC/23/46, 24 April 2013; see also Press Release, *EU ‘trying to move border to Libya’ using policy that breaches rights*, 17 August 2017, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=21978>.

⁶³ See, e.g. European Parliament, *Report on human rights protection and the EU external migration policy*, 2020/2116(INI), available at: https://www.europarl.europa.eu/doceo/document/A-9-2021-0060_EN.html; See also NGOs Joint Statement, *EU: Time to review and remedy cooperation policies facilitating abuse of refugees and migrants in Libya*, 28 April 2020, available at: https://www.hrw.org/news/2020/04/28/eu-time-review-and-remedy-cooperation-policies-facilitating-abuse-refugees-and#_ftn5; Oxfam International, *The EU Trust Fund for Africa: Trapped between aid policy and migration politics*, 30 January 2020, available at: <https://www.oxfam.org/en/press-releases/eu-aid-increasingly-taken-hostage-migration-politics>; and The New Humanitarian, *The legal battle to hold the EU to account for Libya migrant abuses*, 10 August 2020, available at: <https://www.thenewhumanitarian.org/analysis/2020/08/10/Libya-migrant-abuses-EU-legal-battle>.

⁶⁴ A human rights-based approach brings the treatment of migrants as human beings to the forefront of all discussion and programming on migration, and prioritizes strengthening the capacities of migrants to claim their rights, and of duty-bearers to uphold their human rights obligations. See OHCHR, *Improving Human Rights-Based Governance of International Migration*, 2014, available at: https://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf.

⁶⁵ See Monnheimer, M. (2021). *Due Diligence Obligations in International Human Rights Law*. Cambridge: Cambridge University Press; See also Ferstman, C. (2020). *Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent “Irregular” Migration: European Union and United Kingdom Support to Libya*. *German Law Journal*, 21(3), 459-486.

⁶⁶ OHCHR/GMG, *Recommended Principles and Guidelines on the Protection of the Human Rights of Migrants in Vulnerable Situations* (2018), *supra* note 12, Principle 1, Guideline 2, p. 21.

⁶⁷ *Ibid.*

Within the UN system, all UN offices, agencies, funds and programmes, as well as peacekeeping operations and special political missions, are required to adhere to the Secretary-General's Human Rights Due Diligence Policy on Support to Non-United Nations Security Forces (HRDDP).⁶⁸ The HRDDP requires UN entities contemplating providing support to non-UN security forces, including police, border guards, coast guards and other immigration officials, to first conduct a risk assessment in order to identify the risk that such forces will commit grave violations of international humanitarian, human rights or refugee law.⁶⁹ If, as a result of that assessment, it is determined that there are substantial grounds to believe that there is a real risk of such violations taking place, the UN entity must put in place effective measures to eliminate or minimize that risk ('mitigating measures').⁷⁰ Where a UN entity has engaged in the provision of support to non-UN security forces, and subsequently receives reliable information that the recipient forces are committing grave violations of international humanitarian, human rights or refugee law, the UN entity must intercede with the relevant national authorities with a view to bringing those violations to an end.⁷¹ If, despite the application of mitigating measures or intercession with relevant authorities, grave violations persist, UN entities are required to suspend or withdraw their support.⁷²

In conclusion, all Member States should ensure that their policies include a human rights based-approach and exercise due diligence in all their interactions with Libyan authorities on migration and border management, particularly given the known risks of grave human rights violations in this context

⁶⁸ See United Nations, Guidance Note - Human Rights Due Diligence Policy on UN Support to Non-United Nations Security Forces (2015), available at <https://unsdg.un.org/sites/default/files/Inter-Agency-HRDDP-Guidance-Note-2015.pdf>.

⁶⁹ HRDDP, paras. 14-17. For the purpose of the HRDDP purpose, see the meaning of "Grave violations" in its para. 12.

⁷⁰ *Ibid.*

⁷¹ HRDDP, paras. 26-27.

⁷² *Ibid.*



4

Key Human Rights Challenges Faced by Migrants in the Context of Forced Return



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Focusing on the laws, policies and practices impacting the human rights and protection of migrants in the context of forced return, OHCHR identified the following set of selected challenges, which have given rise to serious human rights violations and abuses. These have been identified on the basis of applicable norms and standards of international human rights law, as well as other relevant norms and standards of international law.

A. LACK OF PROCEDURAL GUARANTEES AND DUE PROCESS

LEGAL FRAMEWORK

Under international human rights law, States have an obligation to respect and ensure the rights of due process and procedural guarantees of all migrants, regardless of their status, in forced return procedures. A State must comply with such obligations in its territory and all areas where the State exercises effective control.⁷³ This includes *inter alia* the right to an individual assessment of the lawfulness of the return measure as well as of the individual circumstances of each person, including any foreseeable, personal and real risk of irreparable harm if they are returned. Each case should be examined individually, impartially and independently by the competent administrative and/or judicial authorities, in conformity with due process and essential procedural safeguards, such as a prompt and transparent process, access to information, legal representation, interpreters and translators, and the ability to challenge the legality of the return decision.⁷⁴ Access to an effective remedy requires that the person concerned have the right to seek a stay of the return, pending the final decision by a competent and independent authority.⁷⁵

⁷³ See, OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (2014), *supra* note 4, Principle A.7.

⁷⁴ ICCPR, art. 6, 7, 13 (in case of aliens lawfully in the territory of the State) and 14; CCPR, General Comment No. 31 (2004) on *The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 12; CRC, art. 12(2) and 22; ICMW, art. 22(1-9); Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on *The general principles regarding the human rights of children in the context of international migration*, CMW/C/GC/3-CRC/C/GC/22, paras. 32(c, e and g), 33, 35 and 47; CAT, arts. 1, 3 and 16; CAT, General Comment No. 4, *supra* note 12, para 13; CEDAW, art. 2; CEDAW, General Recommendation No. 32 (2014) on *The gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, CEDAW/C/GC/32, paras. 25 and 31; CERD, General Recommendation No. 30 (2002) on *Discrimination Against Non-Citizens*, CERD/C/GC/30, paras. 25-28; see also United Nations, *Draft articles on the expulsion of aliens*, adopted by the International Law Commission at its sixty-sixth session, in 2014, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/69/10), Article 26.

⁷⁵ ICMW, art. 22(4); CMW, General Comment No. 2 (2013) on *The rights of migrant workers in an irregular situation and members of their families*, CMW/C/GC/2, para 53. See also CAT, General Comment No. 4, *supra* note 12, para. 13.

Such guarantees are necessary to comply with the principle of *non-refoulement*, enshrined in international human rights, humanitarian, refugee, and customary law. The prohibition of refoulement requires States to ensure that they do not return any person from their territory or under their effective control to a place where they will be at real and personal risk of persecution, death, torture or other cruel, inhuman or degrading treatment or punishment, enforced disappearance or other irreparable harm.⁷⁶ It also prohibits transferring a person to another State from which the person may subsequently face deportation or removal to a third State in which there are substantial grounds for believing that the person would be in danger of irreparable harm.⁷⁷ As an inherent element of the prohibition of torture and other forms of ill-treatment, the principle of *non-refoulement* is characterised by its absolute and non-derogable nature.⁷⁸ The prohibition applies to all persons, irrespective of their citizenship, nationality, statelessness, or migration status, and it applies wherever a State exercises jurisdiction, including through effective control, even when outside of that State's territory.⁷⁹ The principle of *non-refoulement* under international human rights law may be broader than the scope of the principle under international refugee law since it may also require the protection of migrants not entitled to refugee status.⁸⁰

Collective expulsion, without an objective examination of the individual cases with regard to personal risk, is a violation of international human rights law, including the principle of *non-refoulement*.⁸¹ Article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) explicitly prohibits the collective expulsion of migrant workers and members of their families, requiring any expulsion to be examined and decided individually, and to be based on the decision of a competent authority, in accordance with the law and procedural safeguards. Any State wishing to expel a group of non-nationals is required to first carry out an, with due diligence individualized assessment of the lawfulness of such measure and whether it would expose a person to a foreseeable, personal and real risk of irreparable harm. The assessment should take into account a full range of individual circumstances. Some of the relevant circumstances to be considered include, but are not limited to, the best interests of the child, the right to health, the right to family life, the right to rehabilitation of victims of trafficking and victims of torture, legal claims preventing expulsion due to natural disasters, the adverse effects of climate change or environmental degradation, and risks of persecution, torture, ill-treatment or other irreparable harm related to the fundamental prohibition of *refoulement*.⁸²

⁷⁶ The prohibition of *refoulement* is explicitly included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3, 1), the International Convention for the Protection of All Persons from Enforced Disappearance (Article 16, 1) as well as the 1951 Convention Relating to the Status of Refugees (1951 Convention) (Article 33, 1). The principle of *non-refoulement* has also been interpreted to be an implicit obligation of States parties to the ICCPR, the CRC, the CMW and the ICMW. See also, OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (2014), *supra* note 4, p. 37.

⁷⁷ CAT, General Comment No. 4, *supra* note 12, paras. 12 and 45; CCPR, General Comment No. 31, *supra* note 74, para 12; See also, ICRC, *Note on migration and the principle of non-refoulement* (2018), p. 5, available at: <https://international-review.icrc.org/sites/default/files/irrc-904-19.pdf>.

⁷⁸ CAT, General Comment No. 4, para. 8.

⁷⁹ *Id.* at para. 10.

⁸⁰ CCPR, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, para. 31.

⁸¹ CAT, General Comment No. 4, *supra* note 12, para. 13.

⁸² See, OHCHR, *The principle of non-refoulement under international human rights law*, available at: <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>.

Accordingly, States should establish and implement procedural safeguards ensuring the right of each person to have their case individually examined, so as to assess their individual circumstances and protection needs under international human rights, humanitarian and refugee law. Furthermore, the procedure applied must be child-sensitive and gender-responsive and special measures must be put in place to allow migrants in vulnerable situations, including inter alia children, survivors of torture or trauma, and trafficking victims, the opportunity to have their protection needs individually considered.⁸³

The prerequisite to any return of a child, whether accompanied, unaccompanied or separated, is that the decision to return is based on an independent and impartial best interests determination procedure with the central involvement of child protection officials and that return has been found to be the sustainable solution that upholds the best interests of the child.⁸⁴ Considerations such as those relating to general migration control cannot override best interests considerations.⁸⁵

Individuals have the right to challenge the expulsion decision and to be heard by a competent authority within a reasonable time. A first prerequisite to ensure this right is the duty to put in place appropriate judicial and/or administrative mechanisms or to designate a competent authority to review the challenged decision. The mechanism must be independent and impartial and be able to substantially examine the claims brought before it. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families considers that the ‘competent authority reviewing the decision of expulsion should ideally be a court’.⁸⁶

The lack of due process and procedural safeguards in return procedures is a serious human rights protection gap that can lead to violations of the prohibition of collective expulsion and the principle of *non-refoulement*, including *chain-refoulement*. In April 2020, OHCHR expressed concern regarding forced returns from Libya’s external land borders, noting that Libyan authorities appeared to be summarily deporting migrants without access to asylum or other protection under international human rights law, and without access to due process and essential procedural safeguards.⁸⁷ Absent such safeguards, OHCHR noted these returns appeared to be in violation of Libya’s international law obligations prohibiting collective expulsion and therefore of the principle of *non-refoulement*.⁸⁸

Libya’s national legal framework provides that any lawful deportation must be based either on a judicial order or a “substantiated decision issued by the director of the General Directorate of Passports and Nationality”.⁸⁹ However, based on official DCIM statistics and OHCHR remote monitoring, OHCHR has documented that Libyan authorities have arrested and deported at least 7,500 migrants between January 2019 to December 2020, in operations appearing to lack meaningful due process and procedural safeguards, including judicial oversight, fair trial rights, an individual assessment of protection needs, access to legal assistance and interpreters, or the right to challenge the legality of the return.⁹⁰

⁸³ OHCHR/GMG, *Recommended Principles and Guidelines on the Protection of the Human Rights of Migrants in Vulnerable Situations* (2018), *supra* note 12, Principle 5, Guidelines 5-6, p 29-30.

⁸⁴ CMW and CRC, Joint General Comment No. 3/22, *supra* note 74, para. 33.

⁸⁵ *Ibid.*

⁸⁶ CMW, General Comment No. 2, *supra* note 75, para 53.

⁸⁷ OHCHR, *Press briefing note on Libya*, 28 April 2020, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25834&LangID=E>.

⁸⁸ *Ibid.*

⁸⁹ Law No. 19 of 2010 on Combatting Irregular Migration, article 17.

⁹⁰ OHCHR interview.

This is consistent with the information received from NGO advocates and human rights defenders, who have claimed that Libyan officials and other de facto authorities across southern, eastern and western Libya appeared to be stepping up forced returns, particularly as a response to “security” concerns, crimes of irregular entry, and efforts to combat “contagious diseases”, including COVID-19, and that these forced returns have been taking place in the absence of access to judicial procedures, due process and procedural safeguards, including the ability to seek protection from *refoulement* or to challenge the lawfulness of the return prior to their deportation.⁹¹ Among those who have reportedly been forcibly returned were children and other migrants in vulnerable situations, including some 2,672 Egyptian nationals expelled at the Emsaid land border with Egypt, and 2,393 nationals of Chad, Mali, Nigeria, Niger and Somalia expelled from the city of al-Kufra in southeastern Libya, to the land borders with Chad and Sudan.⁹²

OHCHR has also verified reports that Libyan authorities have “stepped up counter-smuggling measures” in the Sahara Desert, resulting in an increasing number of pushbacks at the Libyan borders with Algeria, Chad, Niger and Sudan, where access to judicial oversight and due process are difficult to secure due to the remote location of the operations, weak Libyan judicial institutions and a lack of access to legal assistance, interpreters and other essential procedural safeguards in these areas.⁹³ According to IOM’s ‘Point of Entry Monitoring’ dashboard, at least some of Libya’s official border crossing points are run by non-State groups.⁹⁴ Furthermore, local communities in al-Kufra in the southeast of Libya and Sabha in the southwest of Libya have been reported to have “unilaterally taken steps to close their communities” to migrants in irregular situations by restricting access to their cities and closing points of entry.⁹⁵

It is of particular concern the large number of expulsions taking place from al-Kufra, where the UN Secretary-General has noted “continued reports of large-scale deportations by officials of the Directorate for Combating Illegal Migration along the southern border of Libya with Chad and Sudan under the so-called ‘emergency procedures’, raising concerns of collective expulsion and possible cases of *refoulement*,” with the detention centre in al-Kufra becoming a “de facto deportation centre”.⁹⁶

OHCHR has received information from witnesses of the expulsions in al-Kufra, which included the deportation of migrants from Chad, Eritrea, Ethiopia, Somalia, South Sudan, and Sudan. Most migrants were reportedly deprived of their liberty, without a formal judicial order or possibility to seek prompt judicial review of the measure, from their places of work or from the streets and subsequently transferred to the al-Kufra detention centre, without any COVID-19 protection measures, after which the detention centre transferred the migrants to the Chadian or Sudanese border.⁹⁷ Migrants were not afforded with procedures to challenge their deprivation of liberty or the expulsion decision. According to the witnesses interviewed, officials awaiting migrants at the border only verified their names and identities based upon identification provided by the migrants—where identification did not exist, migrants were allegedly registered without verification as nationals of the countries to which they were being expelled.⁹⁸

⁹¹ See, e.g. Amnesty International, *Libya: New evidence shows refugees and migrants trapped in horrific cycle of abuses*, 29 September 2020, <https://www.amnesty.org/en/latest/news/2020/09/libya-new-evidence-shows-refugees-and-migrants-trapped-in-horrific-cycle-of-abuses/>.

⁹² Ibid.

⁹³ See, e.g. IMREF/MMC, *Exploring the Impact of COVID-19 on the Vulnerabilities of Migrants on the Central Mediterranean Route*, 1 July 2020, available at: https://www.alnap.org/system/files/content/resource/files/main/FULL-REPORT_IMREF-COVID-19-study-Part-2.pdf.

⁹⁴ See, e.g., the Al Sarra border crossing with Chad:

<https://iom.maps.arcgis.com/apps/Minimalist/index.html?appid=3b00fdbfaee4891a9bb1af865914153>.

⁹⁵ IMREF/MMC, *supra* note 93.

⁹⁶ Report of the Secretary-General, S/2021/62, para. 60.

⁹⁷ OHCHR interview.

⁹⁸ OHCHR interview.

For example, on 10 April 2020 OHCHR received information that the al-Kufra detention centre received 238 migrants from Chad, Ghana, Mali, Niger, Nigeria, and Sudan, who were all transferred from the Ganfouda detention centre in Benghazi.⁹⁹ Reportedly, there were hundreds of migrants being detained in both Ajdabiya and Ganfouda detention centres, for the purpose of transferring them to al-Kufra for subsequent deportation.¹⁰⁰ In the following days, from 11-15 April 2020, nearly 900 migrants were reported to have been expelled by truck and bus from the al-Kufra detention centre to the borders of Chad and Sudan, and the al-Kufra centre's director was reported to indicate that they would be "deporting more people faster than ever before".¹⁰¹

As OHCHR has previously noted, large scale expulsions from remote parts of Libya without an individualized assessment of the expulsion measure and access to legal procedures, afforded with due process and essential procedural safeguards, to challenge such measure, give rise to serious concerns of collective expulsion and the potential for return of persons in violation of the principle of *non-refoulement*. Nor did migrants have access to organizations, such as the UNSMIL Human Rights, Transitional Justice and Rule of Law Service (HRS), which could monitor the compliance of these expulsions with Libya's international human rights obligations.

RECOMMENDATIONS

To the official and de facto Libyan authorities:

- Refrain from forcibly returning migrants without undertaking an individualized assessment and in the absence of a legal procedure, with due process and procedural safeguards, including rights to fair proceeding, access to legal representation, access to interpreters and translators, the right to challenge the legality of return, and the right to restitution or remedy, in all return decisions and procedures.
- Ensure that expulsions only proceed on the basis of an individual assessment of the full range of circumstances that may prohibit expulsion, in accordance with the principle of *non-refoulement* and the prohibition of collective expulsions, including transferring a person to another authority that would result in *chain-refoulement*. Individual assessments should be conducted with due diligence and in accordance with international human rights law and standards.
- Ensure that children are only returned where it has been determined through an independent and participatory process with the central involvement of child protection authorities, and taking into consideration the views of the child, that return is in the best interests of the child. When children are returned in accordance with their best interests, ensure that a guardian will accompany children throughout the return process, that the family or a guardian has been identified, and that there is clarity about reception and care arrangements of children in the countries to which they are being returned.
- Adopt appropriate administrative and legislative mechanisms to grant regular migration status to migrants in Libya, including those who cannot be removed on grounds related to the principle of *non-refoulement* or other obligations under international human rights law.

⁹⁹ OHCHR interview.

¹⁰⁰ OHCHR interview.

¹⁰¹ See, e.g. Lori Hinnant and Isabel Debre, *Desert or sea: Virus traps migrants in mid-route danger zone*, 3 May 2020, available at: <https://apnews.com/article/virus-outbreak-united-nations-libya-guatemala-mediterranean-sea-8e03a003aaa32fa2cac91929c70a1b22>.



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To the European Union and its Member States:

- Strengthen due diligence to ensure that bilateral, regional and international cooperation agreements do not have a negative effect on the human rights of migrants in Libya, including by adopting human rights safeguards, monitoring and evaluation in all cooperation agreements and programmes related to migration and border management in Libya.
- Require assurances by the Libyan authorities to uphold international human rights law, including the principle of *non-refoulement* and the prohibition of collective expulsions, in the provision of any equipment, technology, funding, technical or capacity-building support to migration and border management, and make continued support to the Libyan authorities contingent upon a demonstrated commitment and continual review that such prohibitions are being respected.

To United Nations agencies:

- United Nations entities providing support to DCIM or other Libyan State security forces engaged in migration and border management, should fully apply the Human Rights Due Diligence Policy by adopting mitigating measures to reduce the risk of grave or systematic violations of international humanitarian, human rights, or refugee law, including the prohibitions of *refoulement* and collective expulsion, and by withholding or suspending such support when mitigating measures are insufficient to avoid such violations.

B. THE USE OF ARBITRARY ARREST AND DETENTION TO ENFORCE RETURNS

LEGAL FRAMEWORK

The right to liberty of person is the fundamental right guaranteed to everyone without discrimination, including all migrants, irrespective of status.¹⁰² Deprivation of liberty is defined as any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will.¹⁰³ According to the Human Rights Committee, deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12 of the ICCPR and is without free consent.¹⁰⁴ Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health. Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons. The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.¹⁰⁵ The Committee on Migrant Workers (CMW) and the Committee on the Rights of the Child (CRC) understand “immigration detention” as any setting in which a person is deprived of their liberty for reasons related to their, or their parents’, migration status, regardless of the name and reason given to the action of depriving a person of their liberty, or the name of the facility.¹⁰⁶ Immigration detention is typically an administrative measure related to irregular entry, stay or exit, however it also includes situations where migrants are detained on criminal grounds where immigration offenses are criminalized.

International human rights law provides that no one shall be subjected to arbitrary arrest or deprivation of liberty, including automatic, mandatory or indefinite detention, as well as detention in conditions falling below international minimum standards. The fundamental guarantee against arbitrary detention is non-derogable.¹⁰⁷ The Human Rights Committee has stated that “the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but must be interpreted more broadly to include such elements as inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity and proportionality.”¹⁰⁸ As the UN Working Group on Arbitrary Detention (WGAD) has noted, all forms of deprivation of liberty are “detention” for the purposes of determining whether someone is being arbitrarily detained,¹⁰⁹ and the ICMW specifically guarantees that migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention.¹¹⁰

¹⁰² This right is recognized in article 3 of the UDHR, article 9 of the ICCPR, article 37 (b-d) of CRC, article 16 of the ICMW, article 6 of the African Charter, and article 14 of the Arab Charter. See also CCPR, General Comment No. 35 (2014) on *Article 9 (Liberty and security of person)*, CCPR/C/GC/35, para. 3.

¹⁰³ WGAD, Revised deliberation No. 5 (2018) on *deprivation of liberty of migrants*, A/HRC/39/45, para. 45; See also, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2002), A/RES/57/199, art. 4(2).

¹⁰⁴ CCPR, General Comment No. 35, *supra* note 102, paras. 5-6.

¹⁰⁵ *Id.* at para. 18.

¹⁰⁶ Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on *State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, CMW/C/GC/4-CRC/C/GC/23, para. 6.

¹⁰⁷ CCPR, General Comment No. 35, *supra* note 102, para. 66.

¹⁰⁸ *Id.* at para 12.

¹⁰⁹ WGAD, Revised deliberation No. 5, *supra* note 103.

¹¹⁰ ICMW, Art. 16(4).

According to the WGAD, immigration detention is largely arbitrary and should gradually be abolished, as administrative offenses relating to irregular entry, stay or exit of migrants should not, under any circumstances, have the same or similar consequences to those derived from the commission of a crime, including the use of detention.¹¹¹ Under international human rights law, immigration detention must always be an exceptional measure of last resort. It must always be strictly lawful, based upon a legitimate aim, justified as reasonable, necessary and proportionate, and imposed only where less restrictive alternative measures have been considered and found inadequate to achieve the same aim.¹¹² Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons.¹¹³ It must also be accompanied by procedural safeguards; be of limited scope and duration; and be subject to periodic re-evaluation and judicial review.¹¹⁴ Furthermore, immigration detention is strictly prohibited in certain circumstances, for example when it would constitute punishment for irregular entry or stay for the purposes of seeking asylum.¹¹⁵ Likewise, according to the CMW and CRC “children should never be detained for reasons related to their or their parents’ migration status”.¹¹⁶

The practice of detention in Libya is of outmost concern and affecting tens of thousands of migrants every year. According to one recent survey of 119 migrant children and youth that attempted to transit through Libya, nearly half of all those surveyed (47.9 percent) said they had been detained by the Libyan authorities at least once due to their irregular immigration status.¹¹⁷ Similarly, migrants interviewed by OHCHR in Malta in September 2020 overwhelmingly recounted the experience of having been arbitrarily detained in Libya, often in harrowing conditions amounting to torture and ill-treatment.¹¹⁸

When disembarked in Libya following their interception at sea, or when arrested off the streets or from their places of work for being in an irregular situation, which is considered as a crime under Libyan law, thousands of migrants each year are detained in official DCIM detention centres, under the authority of the GNU Ministry of Interior, where they continue to be subjected to a range of human rights violations that have previously been well-documented.¹¹⁹ As of June 2019, there were 26 official DCIM detention centres operating in the country, holding roughly 5,695 migrants, but by April 2020, this had dropped to 11 official detention centres, holding roughly 1,500 migrants, the lowest figure since 2019.¹²⁰ However, according to reports these figures are unreliable due to the lack of access, transparency and formal registration process by DCIM.¹²¹

¹¹¹ WGAD, Revised deliberation No. 5, *supra* note 103, para. 10.

¹¹² CCPR, General Comment No. 35, *supra* note 102,, para. 18; CMW, General Comment No. 5 (2021) on *migrants’ rights to liberty, freedom from arbitrary detention and their connection with other human rights*, CMW/C/GC/5, para. 17; WGAD, Revised deliberation No. 5, *supra* note 103, paras. 12-20.

¹¹³ CCPR, General Comment No. 35, *supra* note 102, para. 18.

¹¹⁴ *Id.* at para. 14.

¹¹⁵ UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, para. 11.

¹¹⁶ CMW and CRC, Joint General Comment No. 4/23, *supra* note 106, para. 5.

¹¹⁷ Vasileia Digidiki and Jacqueline Bhabha, *Returning Home? The reintegration challenges facing child and youth returnees from Libya to Nigeria*, <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2464/2019/11/Harvard-FXB-Center-Returning-Home-FINAL.pdf>, p. 23.

¹¹⁸ OHCHR, “*Lethal Disregard*”, *supra* note 6.

¹¹⁹ UNSMIL/OHCHR, “*Detained and Dehumanized*”, *supra* note 5.

¹²⁰ IOM, *Migrants Missing in Libya a Matter of Gravest Concern*, 17 April 2020, available at: <https://www.iom.int/news/migrants-missing-libya-matter-gravest-concern>.

¹²¹ Cuttitta, P. (2020). *Libya’s Figures About Detained Migrants and Detention Centres: Reasons for Recent Fluctuations*; available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/03/libyas-figures>.

Moreover, many migrants have effectively been subjected to enforced disappearance upon being transferred to unofficial detention centres, under the command of the LNA, militias or other non-State actors affiliated with the GNU, or to “investigation centres” formally under the control of DCIM but which may, in fact, be run by militias affiliated with DCIM.¹²² International observers, including UN organizations in Libya, do not have access to these unofficial and “investigation” centres. According to IOM, at least 3,200 persons intercepted and returned to Libya by the Libyan Coast Guard from January-March 2020 have been deprived of their liberty in such centres where they remain unaccounted for.¹²³

Libya’s detention regime is a critical tool in carrying out forced returns from the country. Historically, detention centres in Libya have been used to carry out both forced and so-called “voluntary” returns taking place across the country from Tripoli, Misrata and Surman in the north, to al-Kufra, and Sabha in the southeast and southwest of Libya.¹²⁴ There has been significant concern over the ongoing detention of migrants in Libya and the often arbitrary and sub-standard conditions and human rights violations and abuses they face.¹²⁵ Libya’s detention policy also does not make exceptions for migrants in vulnerable situations, including children and families, asylum seekers, victims of trafficking, survivors of torture, or other migrants who are at a heightened risk of human rights violations.¹²⁶

According to Médecins Sans Frontières (MSF), Libyan authorities have rarely carried out forced returns from detention centres in the north of the country in recent years.¹²⁷ However OHCHR is concerned that a growing number of deportations appear to be taking place from a patchwork of new, re-furbished or re-branded “Gathering and Return Centres” across the country under the control of DCIM, including in Dirj, Tiji, Surman al-Mahmiya, Tripoli (al-Mabani and Ain Zara), and al-Kufra. In some cases, detention centres that had been closed due to past human rights violations committed against migrants are among those being re-opened as “Gathering and Return Centres”. For example, Ain Zara and Shara’ al-Zawiya in Tripoli, and Aburshada in Gheriyan were reopened in early 2021, with some DCIM officials earlier suspected of committing grave violations against migrant detainees appointed to head these detention facilities.¹²⁸

According to DCIM figures, throughout 2019 and 2020, at least 5,693 Egyptian migrants have been transferred from detention centres under the control of the Benghazi DCIM in the east of Libya to the Musaid border crossing station at the border with Egypt, from where they have subsequently been expelled.¹²⁹ As early as May 2019, OHCHR also observed that an increasing number of migrants, primarily from Chad, Ethiopia, Somalia and Sudan, were similarly being transferred from detention centres under the control of the Benghazi DCIM, particularly from Ganfouda and Ajdabiya, to the al-Kufra detention centre in south-eastern Libya, from where they were subsequently expelled.¹³⁰ OHCHR received information that those detained in al-Kufra often include women and children and that conditions within the detention centre are marked by serious overcrowding and a lack of proper infrastructure to provide basic sanitation and hygiene, including having only three functioning toilets for over 200 detainees.¹³¹ Newly arrested or transferred migrants are reportedly detained in the al-Kufra detention centre without COVID-19 testing or prevention measures, putting the health and

¹²² Global Detention Project, Libya Country Profile, 16 July 2020, available at: <https://www.globaldetentionproject.org/countries/africa/libya>; See also, UNSMIL, *UNSMIL Expresses Concern About Increased Enforced Disappearances in Libya*, 18 March 2020, available at: <https://unsmil.unmissions.org/unsmil-expresses-concern-about-increased-enforced-disappearances-libya>; and Infomigrants, *Libya: UNHCR Worried for Migrants in Detention Centers*, 10 July 2020, available at: <https://www.infomigrants.net/en/post/25936/libya-unhcr-worried-for-migrants-in-detention-centers>.

¹²³ IOM, *supra* note 120.

¹²⁴ Human Rights Watch, *Stemming the Flow*, *supra* note 35, p. 48.

¹²⁵ See generally, UNSMIL/OHCHR, “*Detained and Dehumanized*”, *supra* note 5.

¹²⁶ UNSMIL/OHCHR, “*Detained and Dehumanized*”, *supra* note 5, p. 11.

¹²⁷ Médecins Sans Frontières, *Trading in suffering: detention, exploitation and abuse in Libya*, 23 December 2019, available at: <https://www.msf.org/libya%E2%80%99s-cycle-detention-exploitation-and-abuse-against-migrants-and-refugees>.

¹²⁸ OHCHR interview.

¹²⁹ DCIM statistics on file with OHCHR.

¹³⁰ OHCHR interview.

¹³¹ OHCHR interview.



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safety of detainees and personnel at risk.¹³² There have also been reports of poor quality food, lack of clean water, health care, medication, soap and basic items for children being detained in the facility, including milk and diapers.¹³³

Additionally, OHCHR has noted an increased presence of ‘border brigades’ or ‘desert patrols’ along Libya’s land borders, particularly in the west of the country near the borders with Algeria and Tunisia.¹³⁴ These brigades, operating under the control of DCIM, are increasingly arresting and transporting migrants to the above-referenced “Gathering and Return Centres” in Zuwara, al-Mahmiya in Surman, Tiji and Dirj.¹³⁵ The Secretary-General has noted with concern that these “desert patrol units” have intensified security checks and may be engaging in discriminatory profiling and increased expulsions outside of process and procedural safeguards.¹³⁶

OHCHR has also received information that hundreds of migrants who have been “freed” by Libyan security forces since 2019 following raids on trafficking compounds in Bani Walid, al-Kufra, Tazirbu and Nesma, were subsequently handed over to either to DCIM, police directorates or Criminal Investigation Departments where they were reportedly automatically placed in detention and subject to imminent deportation.¹³⁷ Reportedly, they were all detained in deplorable conditions, without access to medical care, psycho-social support, or legal assistance.¹³⁸

Amnesty International has also reported that deported migrants are sometimes arbitrarily arrested by armed groups allied to the LNA and kept in detention centres across eastern Libya, including in Shahat, Ganfouda, al-Baydha, Tubruq Ajdabiya, Derna and Talmitha, before being taken to land borders with Egypt or to the al-Kufra “Gathering and Return Centre”, from where they are summarily expelled.¹³⁹

As OHCHR has previously noted, Libya’s current immigration detention regime is fundamentally arbitrary, marked by prolonged and indefinite detention in sub-standard conditions amounting to ill-treatment, and resulting in a range of human rights violations including torture, sexual violence,

¹³² OHCHR interview.

¹³³ OHCHR interview.

¹³⁴ OHCHR interview.

¹³⁵ OHCHR interview.

¹³⁶ Report of the Secretary-General, S/2021/62, para. 60.

¹³⁷ OHCHR interview.

¹³⁸ OHCHR interview.

¹³⁹ Amnesty International, *supra* note 91.

enforced disappearance, trafficking, and the routine denial of migrants' economic, social and cultural rights, including adequate food, water and medical care.¹⁴⁰ The use of these detention centres to carry out forced returns from Libya, including both unofficial and official centres being re-branded as “Gathering and Return Centres”, raise serious human rights concerns that migrants are being summarily expelled from centres that violate the non-derogable prohibition of arbitrary detention, and that may be further exposing migrants to torture, ill-treatment and other serious human rights violations in the context of return procedures.

RECOMMENDATIONS

To the Libyan authorities:

- Immediately release all arbitrarily-detained migrants from both unofficial and official detention centres, including “investigation” centres and “Gathering and Return Centres”, prioritizing the release of individuals in particularly vulnerable situations.
- Prioritize the development and implementation of non-custodial alternatives to detention, in line with international human rights law, such as safe and accessible shelter in the community, consistent with migrants' right to an adequate standard of living, and gradually close all Libyan immigration detention centres.
- Amend Libyan legislation, including Laws no. 6 of 1987 and no. 19 of 2010, to decriminalize irregular entry, stay and exit from the country, and end the practice of mandatory detention of migrants for the purposes of forced returns, ensuring that any immigration infractions are treated as administrative, rather than criminal, offences.
- Ensure that children are never detained on the basis of their, or their parents', migration status.

To the European Union and its Member States:

- Require adequate and sufficient assurances by the Libyan authorities to uphold the right to liberty, including the prohibition of arbitrary detention, in all support to migration and border management, and make continued support to the Libyan authorities contingent upon the development of a clear plan to: release all arbitrarily detained migrants; end the criminalisation and mandatory detention of migrants in an irregular situation; and develop viable human rights-based alternatives to immigration detention, including in the context of returns.
- Support the urgent development and implementation of non-custodial alternatives to detention, in line with international human rights law and standards, and the gradual closure of all Libyan immigration detention centres.

To United Nations agencies and other international actors:

- UN entities providing support to DCIM within detention centres, including “Gathering and Return Centres”, should fully implement and apply the Human Rights Due Diligence Policy by suspending support where mitigating measures either remain unimplemented or are insufficient to avoid grave violations of international humanitarian, human rights, or refugee law, including the risk of collective expulsion and *refoulement*.

¹⁴⁰ UNSMIL/OHCHR, “Detained and Dehumanized”, *supra* note 5, p. 14-17.

C. DANGEROUS AND UNDIGNIFIED FORCED RETURN JOURNEYS

LEGAL FRAMEWORK

Migrants in forced return procedures must be treated with humanity and with respect for the inherent dignity of the human person at all stages of the return process¹⁴¹ and migrants in vulnerable situations are entitled to appropriate protection and care with due regard for their specific vulnerabilities.¹⁴²

Under international human rights law, everyone also enjoys the rights to life¹⁴³, liberty and security of person¹⁴⁴, including all migrants regardless of their status. The right to life is a right from which no derogation is permitted, including in the context of return.¹⁴⁵ The duty to protect the right to life requires States to take special measures of protection towards persons within their jurisdiction or effective control who may be in situations of vulnerability or whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence.¹⁴⁶ States also have a heightened duty of care to take any necessary measures to protect the lives and bodily integrity of persons deprived of their liberty, including by providing them with the necessary medical care and appropriate regular monitoring of their health.¹⁴⁷

The right to security of person further protects individuals from non-life-threatening injuries.¹⁴⁸ Security of person includes the right to freedom from intentional infliction of bodily or mental injury, including use of force violations by government authorities, as well as to bodily and mental integrity, as well as States taking appropriate measures to protect individuals from any foreseeable threats resulting from the actions of either governmental or private actors.¹⁴⁹ This requires, for example, appropriately addressing known patterns of violence against certain groups or individuals.

All people within the jurisdiction of the State, including migrants in irregular situations, should also enjoy economic, social and cultural rights, without discrimination.¹⁵⁰ This includes the right to health, and the right to an adequate standard of living, which comprises the rights to food, housing, water and sanitation.¹⁵¹ The Committee on Economic, Social and Cultural Rights (CESCR) has pointed out that the essential minimum content of each right set forth in the ICESCR should be preserved in all circumstances, and that the State's corresponding duties extend to all people under the effective control of the State, including migrants in irregular situations.¹⁵²

¹⁴¹ United Nations, *Draft articles on the expulsion of aliens*, *supra* note 74, Article 13.

¹⁴² *Id.* at Article 15.

¹⁴³ ICCPR, Art. 6.

¹⁴⁴ ICCPR, Art. 9.

¹⁴⁵ CCPR, General Comment No. 36, *supra* note 80, para. 2.

¹⁴⁶ CCPR, General Comment No. 36, *supra* note 80, para. 23. See also CCPR, *A.S., D.I., O.I. and G.D v. Italy*. CCPR/C/130/D/3042/2017, paras. 7.8 and 8.5.

¹⁴⁷ CCPR, General Comment No. 36, *supra* note 80, para. 25.

¹⁴⁸ CCPR, General Comment No. 35, *supra* note 102, para. 55.

¹⁴⁹ CCPR, General Comment No. 35, *supra* note 102, para. 9.

¹⁵⁰ ICESCR, Art. 2 and 3; CESCR, *Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights* (2017), E/C.12/2017/1, para. 3.

¹⁵¹ OHCHR, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, 2014, p. 24, available at https://www.ohchr.org/Documents/Publications/HR-PUB-14-1_en.pdf.

¹⁵² CESCR, *Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights*, paras. 7 and 9.

This includes the duties to secure freedom from hunger, to guarantee access to water to satisfy basic needs, access to essential drugs, and access to education, which are core obligations of the State and should not be restricted on the basis of nationality or legal status.¹⁵³ The CESCR further recalled that, consistent with the requirement of non-discrimination, States parties should pay specific attention to the practical obstacles that certain groups of the population may encounter in the enjoyment of their rights under the Covenant and that, due to their precarious situation, asylum seekers and undocumented migrants are at particular risk of facing discrimination in the enjoyment of Covenant rights.¹⁵⁴

In the particular context of COVID-19, international human rights law also requires inclusion of migrants in the public health and recovery response to the pandemic.¹⁵⁵ This includes ensuring that migrants, regardless of immigration status, receive equal access to testing, treatment, vaccination and information regarding COVID-19 in a language they can understand, including during return procedures.¹⁵⁶

Libya's land borders are generally remote and marked by the presence of armed groups, militias, traffickers, and criminal gangs that are known to abduct and exploit migrants. Migrants expelled across Libya's land borders by DCIM may be exposed to long and arduous journeys, a lack of adequate transportation, food, water and medical attention, and are at risk of ultimately being abandoned in the desert in inhospitable border areas where they are at further risk of abduction, dehydration, starvation and death. Psychosocial distress appears to be particularly acute among returnees, who have reported either experiencing or witnessing a range of human rights violations, including forced labour, beatings, torture, sexual and gender based violence, and assaults during expulsions from Libya.¹⁵⁷

OHCHR's monitoring raises significant concerns that Libyan authorities do not always adequately ensure the safety and welfare of deportees during forced return operations, nor effectively coordinate with authorities in the countries to which they are forcibly returning migrants. For example, during one expulsion of nearly 900 men and women from al-Kufra in April 2020, migrants reported being driven across hundreds of miles of desert and being left in remote border towns in Chad or Sudan, where they lacked sufficient food, water and shelter, and were forced to quarantine in an open lot as a result of COVID-19 related restrictions.¹⁵⁸ A Sudanese migrant deported from al-Kufra reported that he and hundreds of other migrants were loaded onto crowded trucks and forced to endure a four-day journey in which their vehicles became stuck in the desert.¹⁵⁹ Others have reportedly been abandoned in so-called "no man's land" at international borders, unable to enter their countries of origin either because their countries of origin do not recognize them as nationals or because they lack passports or other identity documents necessary to enter.¹⁶⁰

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ OHCHR, *COVID-19 and the human rights of migrants: Guidance*, 7 Apr. 2020, available at https://www.ohchr.org/Documents/Issues/Migration/OHCHRGuidance_COVID19_Migrants.pdf.

¹⁵⁶ Ibid. Also see, OHCHR, *A Pandemic of Exclusion: The impact of Covid-19 on the human rights of migrants in Libya*, *supra* note 50.

¹⁵⁷ IMREF/MMC, *supra* note 93.

¹⁵⁸ Hinnant and Debre, *supra* note 101.

¹⁵⁹ Hinnant and Debre, *supra* note 101.

¹⁶⁰ Hinnant and Debre, *supra* note 101.

According to information received by OHCHR, migrants expelled to Chad are forced to quarantine for 14 days in Ouanga Kebir, often without adequate food, shelter and other assistance.¹⁶¹ There is little information about what happens to migrants deported to Sudan, with some indicating that migrants may be subsequently transported by Sudanese officials to Khartoum, but without access to reintegration or other support.¹⁶²

OHCHR has received information that in some cases, migrants who have been arbitrarily or collectively expelled across Libya's southern land borders have later been abducted, re-trafficked and exploited by criminal networks or armed groups. For example, a woman migrant alleged that, when trying to cross into Libya, she and others she was travelling with were pushed back across the Sudanese border by Libyan authorities and that following this pushback, she was abducted by an armed group in Sudan, raped by unidentified armed men at the border, and subsequently re-trafficked into Libya.¹⁶³

OHCHR has also received information that migrants have been forced by border officials to pay for their own expulsions, including by purchasing their transportation and providing their own food, water and medical care. For example, Sudanese migrants being deported from al-Kufra reported to OHCHR that they were required to pay 260 Libyan dinar (approx. 57 USD) for their own transportation, and confirmed that the deportations usually took place at night and were marked by frequent road accidents.¹⁶⁴ NGOs working in southern Libya also interviewed a number of migrants expelled and/or about to be expelled between 2019 and 2020. According to their testimonies, victims alleged that they were forced to arrange their own forced return to Sudan, including by paying for transportation, fuel, food and water.¹⁶⁵ Despite DCIM official assurances that such returns were "voluntary", several migrants alleged that they had never been given any choice and were forcibly returned against their will.¹⁶⁶

Notably, despite restrictions on freedom of movement and border closures introduced in Libya in March 2020 to mitigate the spread of COVID-19,¹⁶⁷ similar restrictions do not appear to have been applied to forced returns from Libya, which continued during this time, often under so-called "emergency procedures", including in the absence of COVID-19 testing or preventive measures.¹⁶⁸ Instead, with the arrival of COVID-19 to Libya in 2020, the accusation that irregular migrants may be "carriers of contagious diseases" was among the primary reasons cited for their arrest and expedited deportation.¹⁶⁹

The use of these unsafe and undignified journeys to carry out forced returns from Libya appears to be leading to ongoing and routine violations of migrants' rights to life, health and an adequate standard of living. In extreme situations, they have led to instances of re-trafficking and may even result in migrants dying or going missing during forced return operations. Such accounts raise serious concerns of the failure to safeguard migrants' dignity and security of person in forced return procedures, including by protecting the rights and welfare of migrants in particularly vulnerable situations.

¹⁶¹ OHCHR interview.

¹⁶² OHCHR interview.

¹⁶³ OHCHR interview.

¹⁶⁴ OHCHR interview.

¹⁶⁵ OHCHR interview.

¹⁶⁶ OHCHR interview.

¹⁶⁷ On 15 March 2020, the Government of National Accord closed the Wazin/Dehiba border and the Ras Ajdir with Tunisia, and on 30 March, the Libyan National Army closed the border between Libya and Egypt at Tobruk. Libya's southern land border with Niger at Tuommo was reported closed on 29 March 29. See, Mixed Migration Centre, *The Impact of COVID-19 on the Mobility of Refugees and Migrants in Libya*, MMC North Africa Snapshot, May 2020, available at: https://drc.ngo/media/noli4nfw/4mi_north_africa_may2020.pdf.

¹⁶⁸ OHCHR interview.

¹⁶⁹ Amnesty International, *supra* note 91.

RECOMMENDATIONS

To the Libyan authorities:

- Avoid forced returns whenever possible as a practice that involves serious risks to the safety and human rights of migrants. Suspend all “emergency procedures” in this context, and implement the recommendation of the UN system to cease forced returns particularly during times of COVID-19 to protect the health of migrants and communities and uphold their human rights.¹⁷⁰
- Prioritize alternatives to forced return, particularly for migrants in vulnerable situations, including regularization, the extension of residence and work permits, or voluntary return that upholds migrants’ human rights, including respect for their free, prior and informed consent.
- End dangerous forced return journeys, that include a lack of adequate healthcare, food, water and sanitation, or the return of migrants to situations of destitution or inhospitable conditions where their safety or human rights are threatened, such as deportation to so-called “no-man’s land” between borders. Returns should not be carried out at night or involve dangerous methods of transportation.
- Where returns are carried out in full compliance with international law, including that they do not endanger the safety and dignity of the migrants concerned, cooperate with countries of origin to ensure the safe and dignified reception and sustainable reintegration of migrants in full respect of their civil, political, economic, social and cultural rights.



¹⁷⁰ UN Network on Migration, *Forced Returns of Migrants Must be Suspended in Times of COVID-19*, 13 May 2020, available at: <https://migrationnetwork.un.org/un-network-migration-official-statement-forced-returns-migrants-must-be-suspended-times-covid-19>.

D. LACK OF ACCESS TO JUSTICE AND EFFECTIVE REMEDY

LEGAL FRAMEWORK

Access to justice and effective remedy are general principles of the rule of law which ensure all individuals, without discrimination, can exercise their rights, hold persons accountable for the violation of their rights, and receive an effective remedy in case of rights violations.¹⁷¹

The ICMW affirms: “Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals”,¹⁷² and “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy”; “any persons seeking such a remedy shall have his or her claim reviewed and decided by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy”; and “the competent authorities shall enforce such remedies when granted”.¹⁷³

For a remedy to be effective, those seeking it must have prompt access to an independent authority, which has the power to determine whether a violation has taken place and to order cessation of the violation and reparation to redress harm. The independence of the judicial system, together with its impartiality and integrity, are an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice.¹⁷⁴

Additionally, States should ensure that all forced returns are effectively monitored by independent public bodies, such as National Human Rights Institutions, as well as allow for independent external monitoring by civil society and other stakeholders, in order to ensure transparency and accountability for possible human rights violations occurring during removal procedures.¹⁷⁵

OHCHR has previously noted how the general climate of lawlessness in Libya affects migrants disproportionately.¹⁷⁶ Years of armed conflict and political divisions have weakened Libyan institutions, including the judiciary, which have been unable to address the many human rights violations and abuses committed against migrants by smugglers, traffickers, members of armed groups and State officials, with near total impunity. The protection of human rights grows out of the ability of victims to seek redress, which in turn helps produce positive human rights change. When judicial and other accountability systems are weak or dysfunctional, this critical aspect of human rights is undermined and severely threatens the protection of migrants’ rights.

Throughout the process of forced returns from Libya migrants appear to lack meaningful access to justice and effective remedy for any harms suffered during the return process, and this gap is virtually insurmountable once they have been expelled from Libya. For example, despite the several observed

¹⁷¹ Under international human rights law, the rights of access to justice and to an effective remedy are found, inter alia, in Articles 7, 8 and 10 of the UDHR, Article 2 of the ICCPR, Article 6 of the ICERD, Article 14 of the CAT, Article 18 of the ICMW; and Article 39 of the CRC.

¹⁷² ICMW, Article 18.

¹⁷³ ICMW, Article 83.

¹⁷⁴ UN General Assembly, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, 30 November 2012, A/RES/67/1, para. 13.

¹⁷⁵ OHCHR/GMG, *Recommended Principles and Guidelines on the Protection of the Human Rights of Migrants in Vulnerable Situations* (2018), *supra* note 12, Principle 17 (2); see also OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (2014), *supra* note 4, Guidelines 1(8),5 (6), 8 (19), 10 (9).

¹⁷⁶ UNSMIL/OHCHR, *Desperate and Dangerous*, *supra* note 5, p. 4, 52.

human rights concerns noted above, OHCHR is unaware of a single legal case filed in Libya from 2019-2020 by, or on behalf of, migrants challenging for example, the lawfulness of their deportation, the use of arbitrary detention to enforce their removal, or claims of mistreatment during the removal process. There are also no known formal complaints mechanisms within DCIM for such claims to be heard.

There is also an absence of independent monitoring of return procedures, due in part to the remote locations from where many of Libya's expulsions are taking place, as well as the inability of most international organisations and human rights observers to access and publicly report on deportations being carried out from both official and unofficial detention centres. Since April 2018, the UNSMIL Human Rights, Transitional Justice and Rule of Law Service has not had regular access to migrants in Libya despite repeated requests to the Libyan authorities. COVID-19 restrictions, security and logistical constraints have further impeded UNSMIL's and other actors' ability to visit migrants in southern Libya and to monitor and publicly report on their situation, including in the context of returns.

RECOMMENDATIONS

To the Libyan authorities:

- Carry out independent, impartial, thorough and prompt investigations of all human rights violations and abuses committed against migrants in the context of forced returns, including while in pre-removal detention, imposing sentences commensurate with the seriousness of the offence, providing adequate reparation to the victims and taking measures to ensure non-repetition.
- Strengthen or establish official mechanisms and procedures to receive allegations of human rights violations and abuses affecting migrants during return procedures, and ensure migrants and other stakeholders are informed of these mechanisms, while protecting migrants from potential retribution as a result of any allegations lodged against State or non-State actors.
- Ensure unrestricted access to and monitoring of all relevant locations and procedures related to forced returns by the UNSMIL Human Rights, Transitional Justice and Rule of Law Service, National Human Rights Institution and other relevant actors.
- Regularly collect and make publicly available disaggregated data of the number and circumstances of migrants subject to forced returns, while protecting migrants' personal data and the right to privacy. This should include, inter alia, age, sex, nationality, country of return, legal basis for the return, and the official border point through which the return was carried out.

To the European Union and its Member States:

- Support increased monitoring of and reporting on forced return procedures and integrate this information into due diligence assessments of ongoing support to migration and border management activities in Libya.
- Condition continued support to migration and border management activities in Libya on a demonstrated commitment of the Libyan authorities to strengthen Libyan judicial systems and to uphold migrants' rights to access justice and effective remedy.



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Conclusion

While much has been said about the desperate and shocking situation of migrants trapped in Libya, comparatively little attention has been paid to the fate of migrants who are being forcibly expelled from Libya to its neighbouring countries.

Owing primarily to the lack of transparent and accessible data provided by the Libyan authorities, but also to the lack of access and independent monitoring of return procedures, there are significant knowledge gaps not only as to the overall number of migrants expelled from Libya in any given period but, more importantly, as to the lives, safety and well-being of the thousands of migrants who are forcibly expelled from Libya every year.

The central findings of this report indicate that forced returns from Libya overwhelmingly lack a meaningful individual assessment within a procedure with due process and procedural safeguards, and in which the affected migrant could challenge the decision of return. Such forced returns do not comply with the principle of *non-refoulement* or the prohibition of collective expulsions and, thus, are contrary to international human right law. Furthermore, the way that forced returns are being carried out from Libya exposes migrants to risks of their physical integrity, trafficking and death in remote border areas. It also significantly undermines migrants' rights to liberty, security and human dignity, subjecting migrants to arbitrary arrest and detention; as well as to a precarious situation that constitutes an obstacle for the enjoyment of the essential minimum content of their economic, social and cultural rights. Throughout these forced return procedures and following their expulsions, migrants are unable to effectively challenge the lawfulness of their returns or to access justice, accountability and remedy for harms suffered.

The documented forced return practices described above, together with findings of OHCHR's previous reports, provide further evidence that Libya cannot currently be considered a safe place for migrants. Libyan authorities must urgently reform their migration and border governance policies and practices in order to ensure they are fully consistent with Libya's obligations under international law. Against this background, the provision of operational, financial and capacity-building support to the Libyan government requires greater due diligence and the institutionalization of adequate and sufficient safeguards, including the conditioning of ongoing or future support on the protection of the human rights of migrants and concrete achievements in migrants' ability to access justice and accountability for human rights violations and abuses committed against them in the course of forced return operations.

The EU, its Member States and institutions, and other stakeholders are encouraged to review current cooperation agreements, programmes and activities in support of migration and border management in Libya, to ensure they are exercising sufficient due diligence and ultimately promoting human rights-based migration governance in Libya that prioritizes the protection of all migrants, regardless of status.

OHCHR stands ready to assist Libyan authorities, the EU, its Member States and institutions, and other stakeholders in practical efforts to implement the recommendations contained within this report, in order to ensure the effective respect, protection and fulfilment of the human rights of all migrants in Libya.



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