THE *CONTINUUM* BETWEEN HUMAN TRAFFICKING AND ENSLAVEMENT: RECENT ITALIAN JURISPRUDENCE ON ABUSES COMMITTED AGAINST (FEMALE) MIGRANTS IN LIBYA

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1. *Introduction: the unending plight of (female) migrants detained and abused in Libya*

"[T]he Mission has found reasonable grounds to believe that since 2016 crimes against humanity have been committed against Libyans and migrants throughout Libya in the context of deprivation of liberty. Notably, the Mission (…) made findings on numerous cases of, inter alia, arbitrary detention, murder, torture, rape, enslavement and enforced disappearance (…). In its assessment of evidence on the treatment of migrants, the Mission concluded that there were reasonable

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grounds to believe that sexual slavery, as an additional underlying act of crime against humanity, was committed against migrants"[1].

These are the conclusions reached in its final report by the Independent Fact-Finding Mission on Libya (hereinafter: the Mission or FFM Libya), an organ established by the United Nations Human Rights Council in 2020 and mandated, among other things, "to document alleged violations and abuses of international human rights law and international humanitarian law committed by all parties in Libya since the beginning of 2016, *including any gendered dimensions of such violations and abuses*" (emphasis mine)[2]. Such conclusions are no surprise to anyone who has been paying attention to what has been happening in Libya since (at least) 2016.

In early 2016, the International Organization for Migration (hereinafter: IOM) conducted a survey among more than 4,000 migrants and refugees who had travelled along the so-called "Central Mediterranean Route[3]". The results were appalling. The IOM found that 51% of the respondents had been held against their will during their journey by groups other than governmental authorities, that 49% had worked or provided services for no or little pay, that 47% of them had

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[1] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/52/83, 3 March 2023 ("FFM Libya – Final Report"), para. 2 (emphasis mine).

[2] *See* Human Rights Council, *Resolution 43/39. Technical assistance and capacity-building to improve human rights in Libya*, A/HRC/RES/43/39, 6 July 2020, para. 43, letter a).

[3] The Central Mediterranean Route commonly refers to (irregular) sea crossings from North Africa (mainly Libya, but also Tunisia, Algeria, and Egypt) to Italy and, to a lesser extent, Malta. It is by far the deadliest migration route in the world, with more than 17,000 deaths and disappearances recorded since 2014 by the "Missing Migrants Project" (*see* IOM, *Migration within the Mediterranean*, at https://missingmigrants.iom.int/region/mediterranean).

been forced to work or perform activities against their will, and – most shockingly – that 93% of cases had allegedly occurred in Libya[4].

It was still the IOM that reported, in April 2017, that sub-Saharan migrants were being "sold and bought" in slave markets taking place in Libya, and that women were "bought" by local men and "forced to be sex slaves"[5]. This information was picked up by the then-Prosecutor of the International Criminal Court (hereinafter: ICC, the Court), Fatou Bensouda. In presenting the thirteenth report of the Office of the Prosecutor of the ICC on the situation in Libya to the United Nations Security Council on 8 May 2017[6], she announced that her office was collecting and analysing "information relating to serious and widespread crimes allegedly committed against migrants attempting to transit through Libya" and stated that she was "dismayed by credible accounts that Libya has become a marketplace for the trafficking of human beings[7]".

[4] IOM, *Europe — Flow Monitoring Surveys in the Mediterranean and Beyond: Human Trafficking and other Exploitative Practices (June — October 2016)*, pp. 2-4, at https://dtm.iom.int/sites/g/files/tmzbdl1461/files/reports/Analysis_Flow_Monitoring_and_Human_Trafficking_Surveys_in_the_Mediterranean_and_Beyond_3_November_2016.pdf.

[5] IOM, *IOM Learns of 'Slave Market' Conditions Endangering Migrants in North Africa*, 11 April 2017, at https://www.iom.int/news/iom-learns-slave-market-conditions-endangering-migrants-north-africa.

[6] Pursuant to paragraph 7 of Resolution 1970/2011, the ICC Prosecutor shall address the Security Council every six months on actions taken pursuant to the resolution (*see* UN Doc. S/RES/1970 (2011), 26 February 2011).

[7] ICC, *Statement of ICC Prosecutor to the UNSC on the Situation in Libya*, 8 May 2017, paras. 25 and 27, at https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib. *See* also *Thirteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)*, 8 May 2017, paras. 23-24, at https://www.icc-cpi.int/iccdocs/otp/otp-rep-unsc-lib-05-2017-ENG.pdf.

Between 2016 and 2023, allegations relating to abuses committed against migrants held in official and unofficial detention centres throughout Libya have been detailed and analysed in reports published, among others, by the ICC Office of the Prosecutor[8], UN organs and missions[9], and non-governmental entities[10], and have been *popu-*

[8] *See*, in particular: *Fourteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970(2011)*, 8 November 2017, paras. 32-35; *Eighteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970(2011)*, 6 November 2019, paras. 30-33; *Twentieth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970(2011)*, 10 November 2020, paras. 26-29; *Twenty-Second Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970(2011)*, 23 November 2021, paras. 23-29.

[9] *See*, among others: UNSMIL-OHCHR, *"Detained and Dehumanised". Report on Human Rights Abuses Against Migrants in Libya*, 13 December 2016, at https://www.ohchr.org/sites/default/files/Documents/ Countries/LY/DetainedAnd-Dehumanised_en.pdf; UNSMIL-OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 20 December 2018, at https://www.ohchr.org/sites/default/files/Documents/Coun-tries/LY/LibyaMigration Report.pdf; *Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011)*, S/2017/466, 1 June 2017, paras. 104-105 and Annexes 17, 30, and 31; *Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011)*, S/2018/812, 5 September 2018, paras. 47-71 and Annexes 20 and 21; *Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011)*, S/2019/914, 9 December 2019, paras. 46-57 and Annex 21; *Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011)*, S/2021/229, 8 March 2021, paras. 40-50; and *Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011) concerning Libya*, S/2022/427, 27 May 2022, paras. 45-51 and Annexes 23 and 24.

[10] *See, among others: The Global Initiative against Transnational Organized Crime, The Human Conveyor Belt: trends in human trafficking and smuggling in post-revolution Libya, March 2017, at https://globalinitiative.net/wp-content/uploads/2017/03/GI-Human-Conveyor-Belt-Human-Smuggling-Libya-2017.pdf; Amnesty International, Libya's Dark Web of Collusion, Abuses against Europe-bound refugees and Migrants, 11 December 2017, at https://www.amnesty.org/en/wp-content/uploads-/2021/05/MDE1975612017ENGLISH.pdf; Human Rights Watch, No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya, 21 January 2019, at https://www.hrw.org/sites/default/files/report_pdf/eu0119_ web2.pdf; The Global Initiative Against Transnational Organized Crime and Clingendael, The Political Economy of Migrant Detention in Libya: Understanding the players and the business models,*

larized by documentaries[11], news stories[12], non-fiction books[13], as well as novels[14]. Scholars and experts have looked at the abuses through different lenses, including – but not limited to – international criminal law, international relations, and criminology[15].

April 2019, at https://globalinitiative.net/wp-content/uploads/2019/11/Final-Report-Detention-Libya.pdf; Amnesty International, 'Between Life and Death': Refugees and Migrants Trapped in Libya's cycle of abuse, 24 September 2020, at https://www.amnesty.org/en/documents/mde19/3084/2020/en/; ECCHR/FIDH/LFJL, No Way Out: Migrants and Refugees Trapped in Libya Face Crimes Against Humanity, 23 November 2021, at https://www.ecchr.eu/fileadmin/Publikationen/NO_WAY_OUT_Migrants_and_refugees_trapped_in_Libya_face_crimes_against_humanity_EN.pdf.

[11] *See*, among many: France 24 English, *Libya the infernal trap: daily struggle of dozens of migrants*, 9 December 2019, at https://www.youtube.com/watch?v=0-7fjbVj3hfM; *Libya: No Escape from Hell*, released in 2021 (*see* https://javafilms.fr/film/libyas-detention-camps-the-shame-of-europe/); and The Guardian, *'Get away from the target': rescuing migrants from the Libyan coast guard*, 2 December 2021, at https://www.youtube.com/watch?v=Y7CuTxZnjXk&t=3s.

[12] The most shocking of which has been published in 2017 by the CNN: *see* CNN, *People for sale: Where lives are auctioned for $400*, 14 November 2017, at https://edition.cnn.com/2017/11/14/africa/libya-migrant-auctions/index.html. A similar story was published one year later on BuzzFeed: M. MARK, *Inside The Country Where You Can Buy A Black Man For $400*, 15 December 2018, at https://www.buzzfeednews.com/article/monicamark/slavery-nigeria-libya. The Italian journalist Francesca Mannocchi has brought the issue to the attention of the Italian mainstream audience not only through news articles, but also through harrowing video reports broadcasted on *La7*, particularly during a show called *Propaganda Live* (*see,* for instance: *L'esclusivo reportage di Francesca Mannocchi dalla Libia*, 14 May 2019, at https://www.youtube.com/watch?v=52xLTnzuDFY; and *Francesca Mannocchi tra i prigionieri dei centri di detenzione libici*, 2 December 2019, at https://www.youtube.com/watch?v=_GeIMOJv3GQ).

[13] *See*, in particular: S. HAYDEN, *My Fourth Time, We Drowned*, London, 2022; P. TINTI, T. REITANO, *Migrant, Refugee, Smuggler, Savior*, Oxford, 2017; M. DE BELLIS, *Lontano dagli occhi. Storia di politiche migratorie e persone alla deriva tra Italia e Libia*, Busto Arsizio, 2021; N. PORSIA, *Mal di Libia. I miei giorni sul fronte del Mediterraneo*, Milano, 2023.

[14] *See* G. CATOZZELLA, *Don't Tell Me You're Afraid*, Waterville, 2017; and F. MANNOCCHI, *Io Khaled vendo uomini e sono innocente*, Torino, 2019.

[15] *See*, among others: M. VAN REISEN, M. MAWERE, K. SMITS, M. WIRTZ (eds.), *Enslaved. Trapped and Trafficked in Digital Black Holes*, Bamenda, 2023; K. KUSCHMINDER, A. TRIANDAFYLLIDOU, *Smuggling, Trafficking, and Extortion: New Conceptual and Policy*

No less than three communications have been filed to the ICC, asking the Prosecutor to initiate an investigation into such abuses (including those regarding the involvement of nationals of third states such as Italy)[16]. Unfortunately, also due to legal and practical constraints, and particularly issues concerning the scope of the jurisdiction of the Court and the limited access its investigators have had to the territory of Libya[17], this has not (yet) led to the issuance of any war-

Challenges on the Libyan Route to Europe, in *Antipode,* 2019, vol. 52, issue 1, pp. 206-226, at 215; W. LACHER, *Libya's Fragmentation. Structure and Process in Violent Conflict*, London/New York/Oxford/New Delhi/Sydney, 2020; L. RAINERI, *La crisi libica e l'ordine internazionale. Dall'intervento umanitario alla competizione geopolitica*, Roma, 2022; F. PACELLA, *Cooperazione Italia-Libia: profili di responsabilità per crimini internazionali*, in *Diritto Penale Contemporaneo,* No. 4/2018, at https://-archiviodpc.dirittopenaleuomo.org/upload/8892-pacella2018a.pdf.

[16] The communications have been filed by: Omer Shatz, Juan Branco, and the students of a legal clinic of the Sciences Po University (see *EU Migration Policies in the Central Mediterranean and Libya (2014-2019)*, June 2019, at https://www.-statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf; ECCHR/FIDH/LFJL (*Article 15 Communication to the Office of the Prosecutor of the International Criminal Court Re: Situation in Libya – Crimes against Migrants and Refugees in Libya*, 19 November 2021, at https://www.ecchr.eu/-fileadmin/user_upload/Redacted_Art_15_Communication_to_the_ICC_on_crimes_against_refugees_and_migrants_in_Libya.pdf; and UpRights/StraLi/AdalaForAll (*Article 15 Communication on War Crimes and Crimes Against Humanity Committed Against Migrants and Asylum Seekers in Libya*, 17 January 2022, at https://static1.squarespace.com/static/5eccc1ca80c 0dd25fddf363f/t/-62700396ce98e81f5eaf7824/1651508122395/Public+Circulation+Article+15+Communication+on+War+Crimes+and+Crimes+Against+Humanity+Committed+Against+-Migrants+and+Asylum+Seekers+in+Libya.pdf).

[17] On issues relating to the ICC jurisdictional and practical constraints, *see* L. PROSPERI, *The ICC (Symbolic) Investigation into Crimes Allegedly Committed Against Migrants in Libya*, in N. RONZITTI, E. SCISO (eds.), *I conflitti in Siria e Libia. Possibili equilibri e le sfide al diritto internazionale*, Torino, 2018, pp. 243-264; A. PIZZUTI, *ICC Situation on Libya: The ICC Prosecutor Should Look into Libyan Criminal Proceedings Concerning Crimes Committed Against Migrants*, in *OpinioJuris*, 20 November 2020, at http://opiniojuris.org/2020/11/20/icc-situation-on-libya-the-icc-prosecutor-should-look-into-libyan-criminal-proceedings-concerning-crimes-commit-ted-against-migrants/; C. MELONI, *Complementarity Is No Excuse: Why the ICC Investigation in Libya Must Include Crimes Against Migrants and Refugees*, in *OpinioJuris*, 1 December 2021, at https://opiniojuris.org/2021/12/01/complementarity-is-no-excuse-why-the-

rants of arrest by the ICC. In the meantime, and particularly since at least 2019, the OTP has turned to states parties – including Italy – in order to "close the impunity gap regarding alleged criminality against migrants in Libya"[18].

In addressing this issue, Italian authorities have taken a rather cynical approach.

After the shut-down of the "*Mare Nostrum*" rescue mission on 31 October 2014[19], in 2017 Italy concluded a "Memorandum of understanding" with the National Reconciliation Government of Libya "on cooperation in the development sector, to combat illegal immigration, human trafficking and contraband and on reinforcing the border security"[20]. Since then, successive governments (of all colours) have consistently framed the issue in terms of fighting against illegal immigration from Libya, going as far as to criminalise human rights defenders engaged in sea-rescue missions[21] and call NGOs operating such mis-

icc-investigation-in-libya-must-include-crimes-against-migrants-and-refugees/; and L. PROSPERI, *Never Too Late: A New Impetus For the Prosecution of Crimes Committed Against Migrants in Libya Before the ICC?*, in *Rivista OIDU – Osservatorio Tribunali Penali Internazionali*, 2022, n. 1, at https://www.rivi-staoidu.net/wp-content/uploads/2022/03/1_TPI_1_222.pdf.

[18] *Eighteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970(2011)*, 6 November 2019, para. 33. *See* also: *Twenty-Second Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970(2011)*, 23 November 2021, paras. 28-29.

[19] "*Mare Nostrum*" was a search and rescue mission commenced by the Italian government in October 2013 and operated by the Italian Navy, which resulted in the rescue of around 150,000 migrants trying to cross through the Central Mediterranean Route (*see* IOM, *IOM Applauds Italy's Life-Saving Mare Nostrum Operation: "Not a Migrant Pull Factor"*, 31 October 2014, at https://www.iom.int/news/iom-applauds-italys-life-saving-mare-nostrum-operation-not-migrant-pull-factor).

[20] "Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana", concluded on 2 February 2017, at https://www.governo.it/ sites/governo.-it/files/Libia.pdf (an English translation is available at https://www.asgi.it/wp-content/ uploads/ 2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf).

[21] A policy which has been harshly criticized at the international level, including most recently by the UN Special Rapporteur on the situation of human rights defend-

sions "*sea taxi service*"[22]. A vast majority of criminal proceedings have targeted migrants who steered boats and dinghies. In 2020, a case study on Italy found that between 2015 and 2018, around 1,300 *scafisti* were arrested for suspicion of "facilitating illegal immigration" (an offence under Article 12 of the Legislative Decree No. 286/1998, as amended by Law No. 189/2002[23]) – including migrants who had allegedly been forced to steer those vessels by the actual smugglers and traffickers[24].

However, Italian authorities have also initiated a handful of criminal investigations against people suspected of being involved in the commission of crimes against migrants in the context of their detention in Libya[25]. Tracking these proceedings is difficult, and no "consol-

ers, Mary Lawlor (*see* OHCHR, *Italy: Criminalisation of human rights defenders engaged in sea-rescue missions must end, says UN expert*, 9 February 2023, at https://www.ohchr.org/en/press-releases/2023/02/italy-criminalisation-human-rights-defenders-engaged-sea-rescue-missions). On this issue, *see*, among many: E. CUSUMANO, M. VILLA, *From "angels" to "vice smugglers": the criminalization of sea rescue NGOs in Italy*, in *European Journal On Criminal Policy And Research*, 2021, vol. 17, issue 1, pp. 23-40; and M. MINETTI, *The Facilitators Package, penal populism and the Rule of Law: Lessons from Italy*, in *New Journal of European Criminal Law*, 2020, vol. 11, issue 3, pp. 335-350.

[22] *See* Politico, *Italy's fading 5Stars lash out on migration,* 14 July 2017, at https://www.politico.eu/article/sicilians-are-better-europeans-than-macron/; and Askanews, *Migranti, Di Maio: chiudere tutti i porti ai taxi del mare*, 5 August 2017, at https://askanews.it/old/op.php?file=/politica/2017/08/05/migranti-di-maio-chiu-dere-tutti-i-porti-ai-taxi-del-mare-pn_20170805_00012/.

[23] *See* the English translation of the *Consolidated Act on Illegal Immigration* ("Testo Unico sull'Immigrazione"), at https://ec.europa.eu/migrant-integration/-library-document/legislative-decree-2571998-no-286-consolidated-act-provisions-concerning_en.

[24] F. PATANÈ, M.P. BOLHUIS, J. VAN WIJK, H. KREIENSIEK, *Asylum-Seekers Prosecuted for Human Smuggling: A Case Study of* Scafisti *in Italy*, in *Refugee Survey Quarterly*, 2020, vol. 39, issue 2, pp. 123-152. *See* also A. RICARD-GUAY, *Criminalizing migrants who steer the dinghies in the Mediterranean: A collateral effect of migration management?*, in *Robert Schuman Centre for Advanced Studies Working Paper* 2018/32, at https://cadmus.eui.eu/bitstream/handle/1814/55645/RSCAS_2018_32.pdf.

[25] Unfortunately, domestic courts can only exercise jurisdiction over crimes allegedly committed by foreigners in Libya under strict conditions. Pursuant to Article 10, paragraph 2 of the Italian Criminal Code, it is required that the suspect is found in Italy, that the minimum penalty for the offence he/she is suspected of is 3 years, that

idated study" nor database have been produced so far. It appears that only three (first-instance) judgments have been published online[26]; others are mentioned in academic commentaries and newspaper articles[27]. For the purpose of this paper, I will focus on the judgments is-

there is a request of the Minister of Justice, and that no extradition of the suspect may take place.

[26] *Corte d'Assise di Milano*, Judgment 10 October 2017, n. 10 ("Corte d'Assise Milan No. 10/17"), at https://archiviodpc.dirittopenaleuomo.org/upload/1875-sentenza-matammud.pdf; *Corte d'Assise di Agrigento*, Judgment 12 June 2018, n. 1 (Corte d'Assise Agrigento No. 1/18), at https://www.asgi.it/wp-content/uploads/-2019/07/sentenza-Corte-di-Assise-di-Agrigento-Campo-di-Sabratha-Libia-riduzione-in-schiavitù.pdf; *Tribunale di Messina*, Judgment 28 May 2020, n. 149 at https://www.sistemapenale.it/pdf_contenuti/1601584178_gip-messina-centri-detenzione-libia-tortura-migranti.pdf. *See* also the following commentaries: S. BERNARDI, *Una condanna della Corte d'assise di Milano svela gli orrori dei "centri di raccolta e transito" dei migranti in Libia*, in *Diritto Penale Contemporaneo*, 2018, No. 4, pp. 207-2011, at https://archiviodpc.dirittopenaleuomo.org/d/5976-una-condanna-della-corte-d-assise-di-milano-svela-gli-orrori-dei-centri-di-raccolta-e-transitodei; and G. MENTASTI, *Centri di detenzione in Libia: una condanna per il delitto di tortura (art. 613 bis c.p.). Nuove ombre sulla cooperazione italiana per la gestione dei flussi migratori*, in *Sistema Penale*, 20 October 2020, at https://www.sistemapenale.it/-it/scheda/mentasti-gip-messina-centri-detenzione-libia-condanna-carcerieri.

[27] *See*, for instance: F. PATANÈ, *Immigrazione, torture e omicidi nel campo di prigionia libica: due condanne all'ergastolo*, in la Repubblica, 18 December 2018, at https://palermo.repubblica.it/cronaca/2018/12/18/news/immigrazione_torture_e_omicidi_nel_campo_di_ prigionia_libica_due_condanne_all_ergastolo-214 557185/ (reporting on a judgment issued by the *Giudice dell'Udienza Preliminare* of Palermo on 18 December 2018 against two men accused of abusing migrants at a detention facility in Sabha); G. MENTASTI, *Campi di detenzione per migranti in Libia: il caso Matammud,* in *Diritto, Immigrazione e Cittadinanza*, 2020, No. 1, at https://www.-dirittoimmigrazionecittadinanza.it/archiviosaggi-commenti/note-e-commen-ti/fascico-lo-2020-1/524-campi-di-detenzione-per-migranti-in-libia-il-caso-matammud-nota-a-sentenza-corte-ass-app-milano-sez-i-n-9-2019-ud-20-3-2019/file (on the appeals judgment issued on 20 March 2019 by the *Corte d'Assise d'Appello* of Milan in the *Matammud* case); and M. IKONOMU, *Torture in Libia nei centri di detenzione, condannati a vent'anni i torturatori*, in *Domani*, 3 February 2022, at https://www.-editorialedomani.it/fatti/centri-prigionia-detenzione-libia-condanna-torturatori-tratta-sequestro-gup-palermo-h7jizq 5a (both reporting on the judgment issued on 3 February 2022 by the *Giudice dell'Udienza Preliminare* of Palermo in the proceeding against two Bangladeshi nationals suspected of abusing migrants held at a detention facility in or around Zuwara – "GUP Palermo, 22 February 2022"). Other decisions are discussed in C. FERRARA, *Prime applicazioni giurisprudenziali in tema di tratta di esseri umani*, in *Giu-*

sued by the *Corte d'Assise* of Milan on 10 October 2017 (hereinafter*: Bani Walid camp* judgment), the *Corte d'Assise* of Agrigento on 12 June 2018 (hereinafter: *Sabratah camp* judgment), and the *Giudice dell'Udienza Preliminare* (so-called GUP) of Palermo on 3 February 2022 (hereinafter*: Zuwara camp* judgment). Such judgments are worth analysing for at least two reasons. First, they found *beyond reasonable doubt* that the victims had been subjected to a litany of abuses while held in unofficial detention facilities throughout Libya, at the hands of members of criminal networks. Second, these decisions may contribute to shedding light on grey areas and blind spots of the current legal framework, with particular regard to "trafficking in human beings" and "enslavement". This will be the focus of this paper.

In Section 2, I will discuss the factual and legal findings of the judgments. However, in light of the scope of the paper and the fact that not all of them are of public knowledge[28], I will only discuss those factual findings which may have an impact on the legal characterization of the conducts as "enslavement" and "trafficking in human beings" under the Italian Criminal Code (hereinafter: Criminal Code or CC). In particular, I will discuss findings of the *Bani Walid camp* judgment relating to abuses committed against female migrants, and compare them with the findings of FFM Libya. As to the legal basis, I will focus on the provisions of the Criminal Code that have been applied by domestic judges, namely Articles 600 and 601 CC[29]. The question this section aims to address is under which conditions, according to Italian judges, the said abuses may amount to "enslavement" and/or

stizia insieme, 11 October 2019, at https://www.giustizia-insieme.it/it/diritto-penale/750-prime-applicazioni-giurisprudenziali-in-tema-di-tratta-di-esseri-umani?hitcount=0.

[28] In fact, the 3 February 2022 judgment has not been published yet. A copy of this judgment is with the Author.

[29] On the amendments to the Italian Criminal Code provisions concerning "enslavement" and "trafficking in human beings", *see*, among others: D. GENOVESE, *La direttiva europea sulla tratta di esseri umani: problematiche applicative nell'ordinamento italiano*, in *Rivista ADIR*, 2015, at http://www.adir.unifi.it/ rivista/2015/genovese/index.htm; L. PROSPERI, *La tratta di migranti in Libia come crimine contro l'umanità: prospettive per la repressione sul piano nazionale e internazionale*, in G. NESI (a cura di), *Migrazioni e diritto internazionale: verso il superamento dell'emergenza? (Atti XXII Convegno SIDI, Trento 8-9 giugno 2017)*, pp. 404-424.

"human trafficking". Conversely, for the purpose of this contribution I will not focus on "enslavement as a crime against humanity"[30].

In Section 3 I will turn to the international law framework. For the purpose of this paper, I will only focus on those legal instruments imposing an obligation to criminalise "enslavement" and "human trafficking" which Italy has ratified and implemented, including those adopted by the Council of Europe (hereinafter: CoE) and the European Union (hereinafter: EU). I will compare the offences defined in Articles 600 and 601 Criminal Code with the definitions adopted in those supranational legal instruments, as interpreted in the case law of international courts and international criminal tribunals. On the other hand, I will not focus on "practices similar to slavery" nor on "forced or compulsory labour". This section aims to address two questions: 1) whether the definitions provided at the domestic level are compatible with those adopted at the supranational level; and 2) whether the conducts committed against migrants, and particularly acts of sexual violence against women and girls, could be qualified as "human trafficking" and/or "enslavement" *in light of* the definitions provided under international law and case law[31].

In Section 4, I will shed light on "unsung strengths" and the unexplored potential of the three judgments under scrutiny, in particular in terms of helping scholars and practitioners to grasp the "*continuum*" between "human trafficking" and "enslavement". I will thus identify and discuss three potential lessons and hopefully give additional food for thought.

In conclusion, this contribution aims to address the question whether Italian judgments concerning abuses committed against (female) migrants in Libya may contribute to identifying grey areas and/or blind spots in the international legal framework, and thus to

[30] On the issue of the relationship between trafficking and enslavement as a crime against humanity, *see* N. SILLER, *Trafficking in Persons under International Law and its Incorporation within Enslavement as a Crime against Humanity*, Groningen, 2017.

[31] Regrettably, neither international legal instruments nor the case law of international courts and tribunals have been taken into account in the three judgments under scrutiny.

(better) understanding the relationship – and *continuum* – between "enslavement" and "human trafficking".

Also considering that this contribution will not focus on "enslavement as a crime against humanity", in the next sections I will use "slavery" and "enslavement" interchangeably.

2. *The abuses committed against (female) migrants, as detailed in the Italian judgments*

Based on the findings of the judgments under scrutiny, the context and nature of abuses that victims had been subjected to in Libya were strikingly similar.

In all three cases, it was alleged that after they got to Libya, migrants were taken to detention camps run by criminal organizations. They were thus locked in warehouses and subjected to grave abuses for the purpose of forcing their family members to pay a fee and secure their release. After their families paid such fee, perpetrators stopped abusing migrants and allowed them to continue their journey towards Europe. For the purpose of this paper, I will focus on the following findings: a) that migrants had been taken to detention camps in order to force their families to pay a ransom[32]; b) that female migrants, including women and underage girls, were subjected to sexual and gender-based violence at the camps[33]; and c) that after their families paid the required fee, migrants were taken to the coast and boarded small boats and dinghies (that sometimes would prove unfit for navigation).[34] Conversely, for the purpose of this analysis I will not deal with other crimes charged in those cases, including unlawful association to commit a crime, torture, as well as facilitating illegal immigration.

[32] *See* Corte d'Assise Milan No. 10/17, cit., pp. 36-40, 41-42; Corte d'Assise Agrigento No. 1/18, *cit.*, pp. 10, 16; GUP Palermo, 22 February 2022, pp. 8-9, 25, 54.

[33] *See* Corte d'Assise Milan No. 10/17, cit., pp. 70-77; Corte d'Assise Agrigento No. 1/18, *cit.*, p. 10.

[34] *See* Corte d'Assise Milan No. 10/17, cit., pp. 40-43, 45; Corte d'Assise Agrigento No. 1/18, cit., p. 16; GUP Palermo, 22 February 2022, pp. 7, 57-58, 60.

Even though these findings match those of FFM Libya, the three judgments got to rather different conclusions with regard to the legal characterization of facts. An important clarification is needed in this respect. After the ratification of the Rome Statute of the International Criminal Court[35] (hereinafter: ICC Statute, the Statute) in 2002, Italy has not proceeded to incorporate all the crimes falling under the jurisdiction of the Court into the domestic legal system[36]. As a consequence, national judges could not qualify the abuses committed against migrants *as crimes against humanity*. Nevertheless, they were in the position to apply provisions of the Italian Criminal Code (hereinafter: CC) that proscribed conducts corresponding to some of the underlying acts amounting to crimes against humanity pursuant to Article 7 of the Statute – that is, murder, torture, enslavement, and rape. For the purpose of this paper, I will only focus on the conducts that the three judgments characterized as enslavement and (aggravated) rape[37].

Interestingly, only one of the judgments – the *Sabratah camp* judgment – characterized the conducts of the defendant as "enslavement", pursuant to Article 600 CC. A further clarification is needed in this regard. Paragraph 1 of Article 600 (titled "*Riduzione o mantenimento in schiavitù o in servitù*"[38]) contains two distinct offences, only one of which amounts to "enslavement". This offence is defined as exercising over a person powers attaching to the right of ownership (hereinafter: Article 600(1) first part). An additional offence is defined, in the se-

[35] *Rome Statute of the International Criminal Court*, 17 July 1998 (entered into force on 1 July 2002), 2187 UNTS 3.

[36] On the missed incorporation of the Statute, *see* L. PROSPERI, *'With or Without You': Why Italy Should Incorporate Crimes Against Humanity and Genocide Into Its National Legal System*, in *International Criminal Law Review*, 2021, vol. 21, issue 4, pp. 698-714.

[37] It is also worth noting that all three judgments convicted the defendants of unlawful association to commit a crime, pursuant to Article 416 of the Criminal Code. Although this matter will not be dealt in this paper, such findings seem relevant for the purpose of meeting the "organizational" requirement under Article 7(2)(a) of the ICC Statute.

[38] Literally "enslaving or reducing someone to a servile status or keeping someone enslaved or in a servile status".

cond part of paragraph 1, as reducing a person in a state of constant subjugation, forcing him/her to perform work or sex or to beg or, in any case, to perform illegal activities entailing his/her exploitation or removal of organs (hereinafter: Article 600(1) second part). Pursuant to paragraph 2, subjugation or keeping someone in such condition implies the use or threat of force, deception, abuse of power or of a position of vulnerability (including physical or psychological vulnerability or a state of need), or giving or receiving payments or benefits to achieve the consent of a person having control over another person[39]. Unfortunately, the part of the judgment dealing with the legal characterization of the facts is rather succinct. The judgment found that the criminal organization running the camp had "enslaved" migrants by means of preventing them from leaving the camp, threatening or using force against them, and forcing those who were unable to pay to work for free in order to secure their release[40]. In addition, it distinguished between this offence and "kidnapping for the purpose of extortion", and only took into account the "profit" as an aggravating factor of a distinct offence (facilitating illegal immigration)[41]. Therefore, one is tempted to conclude that the legal basis for the conviction was Article 600(1) second part. However, such offence also requires an exploitative purpose (forcing the victim to perform work or sex or to beg or, in any case, to perform illegal activities entailing his/her exploitation or removal of organs) which the judgment only considered in respect to those victims that had been forced to work. The defendant was thus convicted of "enslavement", as well as unlawful association to commit a crime and facilitating illegal immigration, and sentenced to 10 years in prison[42].

Conversely, the *Zuwara camp* judgment characterized similar abuses as *human trafficking*, pursuant to Article 601 CC[43]. I would like to share two considerations in this regard. First, although it did not quali-

[39] All English translations of the relevant provisions (and any mistakes) are my own.

[40] *See* Corte d'Assise Agrigento No. 1/18, cit., p. 16.

[41] *Ibidem*, p. 17.

[42] *Ibidem*, pp. 18-19.

[43] *See* GUP Palermo, 22 February 2022, pp. 59-61.

fy the relevant conducts as *enslavement*, the *Zuwara camp* judgment found that migrants had indeed been enslaved. This depends on the definitions of the two offences enshrined in the Criminal Code. In fact, paragraph 1 of Article 601 CC (titled "*Tratta di persone*"[44]) contains two distinct offences:

1) recruiting, introducing into the territory of the State, transferring even outside the said territory, transporting, transferring authority over a person to another person, or harbouring one or more persons who are in the conditions specified in Article 600 (hereinafter: Article 601(1) first part);
2) recruiting, introducing into the territory of the State, transferring even outside said territory, transporting, transferring authority over, or harbouring one or more persons by means of deception, of the threat or use of force, of the abuse of power or of a position of vulnerability, including physical or psychological vulnerability or a state of need, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of inducing or forcing them to perform work, sex or to beg or, in any case, to perform illegal activities entailing their exploitation or removal of organs (hereinafter: Article 601(1) second part)[45].

In the *Zuwara camp* judgment, the GUP focused on the former offence and found that at the time the organization running the Zuwara camp had purchased them, migrants were in the conditions specified in Article 600 CC – namely, slavery[46]. That is not all. According to the judge, victims were then "subjected to a state of constant subjugation" by the members of this organization – including the defendants –, who had taken advantage of their position of vulnerability. After their families paid the required fee, victims were "forced" to board "unstable boats" and to cross the Mediterranean "despite the hostile sea condi-

[44] Literally "trafficking in human beings".

[45] The fact that they shall be considered as two distinct offences has been confirmed by the GUP (*see* GUP Palermo, 22 February 2022, pp. 59-60).

[46] *See* GUP Palermo, 22 February 2022, p. 60.

tions"[47]. In light of these considerations, the judge concluded that the defendants committed two distinct offences, both qualified as "trafficking in human beings" pursuant to Article 601(1) first part: 1) purchasing persons that were in the conditions specified in Article 600, and 2) introducing into the territory of Italy persons that they had put in the conditions specified in Article 600 (namely, slavery). I will delve into the logic and the consequences of this legal characterization deeper in Sections 3 and 4. In conclusion, the defendants in this case were both convicted of trafficking in human beings, as well as unlawful association to commit a crime, torture, and kidnapping for the purpose of extortion, and sentenced to 20 years in prison[48].

The *Bani Walid camp* judgment took a completely different approach, and concluded that migrants had been subjected to kidnapping for the purpose of extortion, pursuant to Article 630 CC[49]. In fact, the offences under Articles 600 and 601 CC had not been charged in this case. Such different approach and conclusions do not seem to depend on the specific circumstances of the case. In addition, this judgment did not consider whether acts of sexual violence repeatedly committed against female migrants, and particularly against two underage victims who testified at trial, could have been taken into account in order to *at least* qualify the abuses those two girls had been subjected to as (sexual) slavery or human trafficking. While I will further analyse such findings in Sections 3 and 4, it is important to note that the factual findings in the *Bani Walid camp* judgment *might have supported* the conclusion that the conducts actually amounted to enslavement (in accordance with Article 600 CC) and/or human trafficking (in accordance with Article 601(1) first part and/or 601(1) second part CC). Two quick points in this regard. First, the judgment found that migrants had been subjected to very poor living conditions, that they were "constantly threatened" and "punished for no reason", that "the deprivation of freedom was absolute", and that migrants did not enjoy any right to "self-determination"[50]. Second, concerning sexual

[47] *Ibidem*.
[48] *Ibidem*, pp. 65-66.
[49] *See* Corte d'Assise Milan No. 10/17, *cit.*, pp. 111-112.
[50] *Ibidem*, pp. 110-111.

and gender-based violence the judgment held that "tens of girls" had been subjected to rape while detained in the camp, including the two underage girls who testified at trial. Perpetrators had subjected those girls to sexual violence "on a daily basis" by taking advantage of the victims' "vulnerability" and by "threat or use of force"[51]. The above-mentioned victims/witnesses testified that they had felt "at the mercy" of the defendant, who not only had sexually abused them, but also beaten them and threatened to let other guards rape them[52]. The judgment concluded that the defendant's conduct had the (additional) purpose to "subjugate the victims" and thus force their respective families to pay the fee required by the criminal organization he was a member of[53].

The *Bani Walid camp* judgment findings concerning sexual violence are in line with information received by FFM Libya. In particular, the Mission stressed that migrant women held in detention facilities were "forced to have sex in order to survive, in exchange for food or other essential items"[54]. In its final report, the Mission found "reasonable grounds to believe that the crime against humanity of sexual slavery, previously unreported by the Mission, had been committed in the trafficking hubs of Bani Walid and Sabratah during the Mission's mandate"[55]. Regrettably, no such offence has been incorporated into the Italian domestic legal system. As a result, in *Bani Walid camp* judgment the above-mentioned conducts, and particularly those committed against the two underage victims/witnesses, were qualified as "aggravated rape"[56]. However, in light of the seriousness of the conducts he had committed – in addition to "kidnapping for the purpose of extortion", he was convicted of murder of a kidnapped person, unlawful association to commit a crime, aggravated rape, and facilitating illegal immigration –, the defendant was sentenced to life in prison[57].

[51] *Ibidem*, p. 120.

[52] *Ibidem*, p. 121.

[53] *Ibidem*, p. 121.

[54] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/50/63, 27 June 2022, paras. 55-56.

[55] FFM Libya – Final Report, cit., para. 41.

[56] *See* Corte d'Assise Milan No. 10/17, *cit.*, pp. 121-122.

[57] *Ibidem*, pp. 122-123.

3. *The relationship between the offences contained in Articles 600 and 601 CC and the definitions of human trafficking and enslavement under international law*

Both "enslavement" and "human trafficking" are conducts prohibited under international law. For the purpose of this paper, I will only focus on the relevant provisions of the legal instruments providing definitions of such conducts that Italy has ratified and implemented. I will provide an overview of the relevant legal instruments and the definitions they contain, as they have been interpreted by international courts and tribunals, in sub-section 3.1.

In the following two sub-sections I will aim to address two questions: 1) whether Articles 600 and 601 CC are *compatible with* the international provisions (sub-section 3.2); and 2) whether the three judgments under scrutiny might have qualified the conducts committed against migrants differently, had they applied those international provisions instead of Articles 600 and 601 CC (sub-section 3.3).

3.1. *The definitions of "enslavement" and "human trafficking", as provided in the relevant international instruments and/or implemented by Italy*

With regard to enslavement, the main applicable instruments are the 1926 "Slavery Convention"[58] and the 1956 "Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery"[59] . These treaties provided the definitions of "slavery", "slave trade", and "practices similar to slavery", and imposed obligations on states parties to criminalize such conducts[60]. In particular, Article 1 of the Slavery Convention defines slavery as "the status or condition of a person over whom any or all of the powers at-

[58] *Slavery Convention*, 25 September 1926 (entered into force on 9 March 1927), 212 UNTS 17. Italy ratified the convention in 1928.

[59] *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956 (entered into force on 30 April 1957), 266 UNTS 3. Italy ratified the convention in 1958.

[60] *See* Article 6 Slavery Convention and Articles 3 and 6 of the 1956 Supplementary Convention.

taching to the right of ownership are exercised" (paragraph 1) and the slave trade as "all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery", "all acts involved in the acquisition of a slave with a view to selling or exchanging him", and "all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves" (paragraph 2). However, the convention does not detail any specific "power attaching to the right of ownership". Article 7 of the 1956 Supplementary Convention reproduces these definitions almost literally.

Judgments issued by the International Criminal Tribunal for the former Yugoslavia (*hereinafter:* ICTY) provided an interpretation of these provisions for the purpose of defining "enslavement" (as a crime against humanity)[61]. In the judgment against *Kunarac et alii*, the Trial Chamber held that the *actus reus* of the crime consisted in "the exercise of any or all of the powers attaching to the right of ownership over a person[62]". In upholding such finding, the Appeals Chamber later explained that "as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality[63]". While the "traditional" forms of slavery (e.g. *chattel slavery*, where the victim is reduced in slave-like conditions and treated like a moveable property) would result in a "greater" destruction of the juridical personality, the definition of enslavement also encompassed the more "contemporary forms of slavery" [64]. Most interestingly, the Trial Chamber enumerated a series of "indications of enslavement", including: elements of control and ownership; the restriction or control of the victim's autonomy, freedom of choice or

[61] For the purpose of this paper, also in light of the fact that Italy has not incorporated international crimes into its domestic legal system, I will only take into account the definition of the underlying act.

[62] ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT-96-23-T&IT-96-23/1-T, Trial Chamber, 22 February 2001 ("Kunarac Trial Judgment"), para. 540.

[63] ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT-96-23&IT-96-23/1-A, Appeals Chamber, 12 June 2002 ("Kunarac Appeals Judgment"), para. 117.

[64] *Ibidem*.

freedom of movement; control of physical environment and measures taken to prevent or deter escape; psychological control; use of force, threat of force or coercion; duration; assertion of exclusivity; sex; control of sexuality; prostitution; the exaction of forced or compulsory labour or service; and human trafficking[65]. In particular, judges found that "[t]he 'acquisition' or 'disposal' of someone for monetary or other compensation … is a *prime example of the exercise of the right of ownership over someone*" (emphasis mine), whereas the importance of the duration of the exercise of powers attaching to the right of ownership depended, in any given case, on the existence of other indications of enslavement[66]. The Appeals Chamber concluded that the duration was not an element of the crime, but "one of the factors" that determine "the quality of the relationship between the accused and the victim[67]". Concerning the consent of the victim, the Trial Chamber held that it is "often rendered impossible or irrelevant" through, among others, "the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions[68]". Other (international) criminal tribunals followed the same approach as the ICTY[69].

With regard to human trafficking, the main international legal instrument entailing an obligation to criminalize such conduct is the "Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime", adopted in 2000 (hereinafter: Human Trafficking Protocol)[70]. Article 3, letter a) defines

[65] Kunarac Trial Judgment, paras. 542-543. Such list was endorsed by the Appeals Chamber (Kunarac Appeals Judgment, para. 119).

[66] Kunarac Trial Judgment, para. 542.

[67] Kunarac Appeals Judgment, para. 121.

[68] Kunarac Trial Judgment, para. 542.

[69] An analysis of judgments issued by the Special Court for Sierra Leone and the Extraordinary Chambers of the Courts of Cambodia is provided in N. SILLER, *Modern Slavery*, in *Journal of International Criminal Justice,* 2016, vol. 14, issue 2, pp. 405-428.

[70] *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000 (entered into force on 25 December 2003), 2237

"human trafficking" as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation". According to Article 5, states parties undertake to criminalize "trafficking in person" as defined in Article 3. However, as Article 4 prescribes that the Protocol shall apply to offences that "are transnational in nature and involve an organized criminal group", states are only required to criminalize conducts having those additional features.

As a member state of CoE and the EU, Italy has implemented two additional instruments adopted by such organizations. Pursuant to Article 18 of the "Council of Europe Convention on Action against Trafficking in Human Beings", adopted in 2005 (hereinafter: CoE Convention)[71], states parties undertook an obligation to criminalize human trafficking as defined in Article 4. Article 4 of the convention reproduces Article 5 of the Human Trafficking Protocol almost literally. The definition provided in the Protocol is also reproduced in Article 1, paragraph 1 of Directive 2011/36/EU (hereinafter: 2011 EU Directive)[72]. The Human Trafficking Protocol, the CoE Convention, and the 2011 EU Directive provide an almost identical definition of "exploitation". According to the Human Trafficking Protocol and the CoE Convention, it includes "at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs" (Article 3, letter a) of the Protocol). In addition to that, the 2011 EU directive expanded the list, incorporating "begging" and "the exploitation of criminal activities".

UNTS 319. Italy ratified the Protocol in 2006.

[71] *Council of Europe Convention on Action against Trafficking in Human Beings*, 15 November 2000 (entered into force on 25 December 2003), CETS No. 197. Italy ratified the Convention in 2010.

[72] Directive 2011/36/EU of the European Parliament and of the Council *on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA,* 5 April 2011, in OJEU L 101/1, 15 April 2011.

In sum, the definition of "human trafficking" enshrined in these instruments encompasses three elements: a) an action; b) a means by which that action is achieved; c) the purpose of exploitation[73]. As stressed by scholars, "[a]ny combination of one or more of the elements of action, means, and exploitative purpose involves trafficking[74]". However, "[a]ll three elements must be present to constitute "trafficking in persons" in international law[75]". There is only one exception. When the victim is a person under the age of eighteen, a conduct amounts to "human trafficking" also when it does not involve any of the prohibited means[76].

The Legislative Guide and the Working Group on Trafficking in Persons offered guidance in respect to some of the most contentious concepts incorporated into the definition of "human trafficking". In particular, they clarified that *vulnerability* "is to be understood as referring to "any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved[77]". As to *consent*, the Working Group stressed that it "cannot be used to absolve an alleged perpetrator from criminal responsibility if any specified means have been used" and that the relationship between consent and *means* can "explain and nullify the apparent consent a victim may have given at some stage of the trafficking process[78]". Concerning *ex-*

[73] *See* Working Group on Trafficking in Persons, *Key concepts of the Trafficking in Persons Protocol, with a focus on the United Nations Office on Drugs and Crime issue papers on abuse of a position of vulnerability, consent and exploitation,* CTOC/COP/WG.4/2015/4, 25 August 2015 ("Key Concepts of the Trafficking in Persons Protocol"), para. 2.

[74] N. BOISTER, *Slavery and Human Trafficking*, in N. BOISTER (ed.), *An Introduction to Transnational Criminal Law,* 2nd Edition, Oxford, 2018, pp. 56-75, in particular p. 66.

[75] Key Concepts of the Trafficking in Persons Protocol, cit., para. 2.

[76] *See* Art. 3, letters c) and d) Human Trafficking Protocol; Art. 4, letters c) and d) CoE Convention; and Art. 1, paras. 5 and 6 2011 EU Directive.

[77] Key Concepts of the Trafficking in Persons Protocol, *cit.*, para. 8. *See* also, in the same spirit: UNODC, *Legislative Guide for the Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children*, 2000, para. 108, at https://www.unodc.org/documents/treaties/Review_Mechanism/Review_Mechanism_2020/Website/Legislative_Guide_on_TiP/TiP_LegislativGuide_Final.pdf.

[78] Key Concepts of the Trafficking in Persons Protocol, cit., para. 13.

ploitation, among other things the Working Group held that "existing international legal definitions of slavery and forced labour are directly relevant to interpreting their substantive content within the context of the Trafficking in Persons Protocol[79]".

Additional guidance as to the definitions of, as well as to *the relationship between* "enslavement", "slavery", "sexual slavery" and "human trafficking" has been provided in judgments issued by the European Court of Human Rights (hereinafter: ECtHR) and the ICC.

Pursuant to Articles 1 and 4 ECHR, states parties to the Convention shall guarantee that everyone under their jurisdiction is not held in slavery or servitude, nor required to perform forced or compulsory labour. In what is probably the most interesting judgment the Court has issued to date, in the case *Rantsev v. Cyprus and Russia*, the ECtHR focused on the relationship between slavery and human trafficking, and held that "trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership" because it implies treating human beings "as commodities to be bought and sold and put to forced labour", closely surveilling their activities and movements, and thus threatening the victims' "human dignity and fundamental freedoms". Therefore, trafficking would fall "within the scope of Article 4[80]". In a following case against Austria, the Court stressed that the elements of trafficking identified in the *Rantsev* judgment "cut across the three categories set out in Article 4[81]". In a recent judgment against Croatia, the Grand Chamber explained that "trafficking can properly be incorporated … within the scope of Article 4" because it runs counter its "spirit and purpose[82]". In addition, it noted that "instances of serious exploitation

[79] *Ibidem*, para. 24.

[80] European Court of Human Rights, First Section, Judgment of 7 January 2010, Application no. 25965/04, *Rantsev v. Cyprus and Russia*, paras. 280-281. This finding was reiterated in other cases (*see*, for instance, European Court of Human Rights, Second Section, Judgment of 31 July 2012, Application no. 40020/03, *M. and Others v. Italy and Bulgaria*, para. 151).

[81] European Court of Human Rights, Fourth Section, Judgment of 17 January 20107, Application no. 58216/12, *J. and Others v. Austria*, para. 104.

[82] European Court of Human Rights, Grand Chamber, Judgment of 25 June 2020, Application no. 60561/14, *S.M. v. Croatia*, paras. 291-292.

… may have elements qualifying it as "servitude" or "slavery" under Article 4[83]".

This ECtHR case law has drawn criticism from several scholars. For instance, van der Wilt has lamented that in *Rantsev,* the Court has left open whether the particular instance of trafficking can be categorized as "slavery", "servitude" or "forced and compulsory labour"; and has noted that "[t]he incorporation of trafficking in human beings within the scope of Article 4 is not decisive, because that provision encompasses several concepts … and the ECtHR refrains from indicating under which tag trafficking can be brought[84]". While praising the contribution of the *Rantsev* judgment, Anne Gallagher has concluded that "[e]ven taking into account the extensive consideration of "trafficking as slavery," it remains unclear why trafficking falls within the parameters of Article 4[85]". Vladislava Stoyanova has taken the criticism further, arguing that "human trafficking has been made the dominant frame through which abuses are defined and, as a result, the concept of slavery has been marginalized[86]". In fact, "the determination that trafficking in human beings is 'based on the exercise of powers attaching to the right of ownership' is incorrect[87]" since the harm inflicted to migrants' well-being "is captured by the concepts of slavery, servitude and forced labour, not necessarily by the concept of human trafficking[88]".

The main legal instruments and the case law of the International Criminal Court seem to have further contributed to blurring the boundaries between slavery and human trafficking. The ICC Statute includes "enslavement" among the underlying crimes against humanity, and defines it (in Article 7, paragraph 2, letter c)) as "the exercise

[83] *Ibidem*, paras. 300.

[84] H. VAN DER WILT, *Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts*, in *Chinese Journal of International Law*, 2014, vol. 13, issue 2, pp. 297-334, in particular p. 312.

[85] A. GALLAGHER, *The International Law of Human Trafficking,* Cambridge, 2010, p. 189.

[86] V. STOYANOVA, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law,* Cambridge, 2017, p. 293.

[87] *Ibidem*, p. 302.

[88] *Ibidem*, p. 314.

of any or all of the powers attaching to the right of ownership over a person," including "the exercise of such power *in the course of trafficking in persons, in particular women and children*" (emphasis mine). Article 7, paragraph 1, letter c) of the Elements of Crimes enumerates forms in which powers attaching to the right of ownership can be exercised, such as "by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty". A footnote provides that "[i]t is also understood that the conduct described in this element includes trafficking in persons, in particular women and children[89]". Concerning the material elements of "enslavement", in addition to those defined in the Elements of Crimes, the *Katanga, Ntaganda,* and *Ongwen* judgments endorsed substantially the same list of "indications of enslavement" which had been provided in *Kunarac* judgment[90].

Conversely, while including it among the underlying crimes against humanity, the Statute does not define "sexual slavery". As of today, the ICC has not had the chance to further clarify the relationship between enslavement and human trafficking. On the other hand, it has discussed the relationship between enslavement and sexual slavery. In this respect, in *Ongwen* the Trial Chamber held that "[t]he crime of sexual slavery is a specific form of the crime of 'enslavement', penalising the perpetrator's restriction or control of the victim's sexual autonomy while held in the state of enslavement[91]". The material element requirements of "sexual slavery" are that "the material element of enslavement is fulfilled" and that the perpetrator also caused the victim

[89] *See* ICC, *Elements of Crimes,* Article 7(1)(c), para. 1 and footnote 11, at https://www.icc-cpi.int/sites/default/files/ Publications/Elements-of-Crimes.pdf.

[90] *See* ICC, *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, Trial Chamber II, 7 March 2014, para. 976; ICC, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Judgment, Trial Chamber VI, 8 July 2019, para. 952; and ICC, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Trial Judgment, Trial Chamber IX, 4 February 2021 ("Ongwen Trial Judgment"), para. 2712.

[91] Ongwen Trial Judgment, *cit.*, para. 2715. In the same spirit, *see* also Chambre Africaine Extraordinaire d'Assises, *Ministère Public v. Hissein Habré*, Jugement, 16 May 2016, para. 1497 ("*…la Chambre considère que l'esclavage sexuel n'est autre qu'une forme d'esclavage*").

"to engage in one or more acts of a sexual nature[92]". As to the acts of sexual nature, the *Ongwen* judgment found that they include, but are not limited to, rape[93].

Therefore, as noted by Palacios-Arapiles, "[i]f we remove the sexual element from the crime of sexual slavery, slavery remains and so does its definition[94]". Viseur Sellers and Getgen Kestenbaum have stressed, in this regard, that "sexual violence or assaults on sexual integrity are integral to *de jure* and *de facto* forms of slavery," and have criticized the "bifurcation of sexual slavery and enslavement" because it "denudes the crimes of slavery and enslavement of their long-accepted *indicia* comprised of attacks on sexual integrity[95]".

3.2. *The compatibility of the Italian Criminal Code provisions on enslavement and human trafficking with the definitions provided in the relevant international legal instruments*

The Italian legislator executed the obligations arising from the international legal instruments on enslavement and human trafficking through successive amendments to Articles 600 and Article 601 Criminal Code.

The body in charge of monitoring the implementation of the CoE Convention – namely, the Group of Experts on Action Against Trafficking in Human Beings of the Council of Europe ("GRETA") – has only identified two weaknesses in Article 601. In a report issued in 2018, GRETA recommended Italy to "ensure that 'receipt' as one of the actions and 'abduction' as one of the means for committing [human trafficking] … are appropriately taken into account in practice"[96].

[92] Ongwen Trial Judgment, cit., para. 2715.

[93] *Ibidem*, para. 2716.

[94] S. PALACIOS-ARAPILES, *The Interpretation of Slavery before the International Criminal Court: Reconciling Legal Borders?*, in *Max Planck Yearbook of United Nations Law Online*, 2022, vol. 25, issue 1, pp. 416-456, in particular p. 422.

[95] P. VISEUR SELLERS, J. GETGEN KESTENBAUM, *'Sexualized Slavery' and Customary International Law*, in S. WEILL, K. T. SEELINGER, K. B. CARLSON (eds.), *The President on Trial: Prosecuting Hissène Habré,* Oxford, 2020, pp. 366-380, in particular p. 367 and p. 380.

[96] *See* GRETA, *Report concerning the implementation of the Council of Europe*

The definition provided in Article 600(1) first part reproduces the definition of enslavement contained in the 1926 Slavery Convention literally. As mentioned in Section 2, "enslavement" is defined as the exercise over a person of powers attaching to the right of ownership (pursuant to Article 600(1) first part). However, Article 600 also contains a distinct offence – namely, Article 600(1) second part –, consisting in reducing a person in a state of constant subjugation, forcing him/her to perform work or sex or to beg or, in any case, to perform illegal activities entailing his/her exploitation or removal of organs. The means through which the perpetrator may subjugate the victim, as enumerated in the second paragraph of Article 600, reproduce those mentioned in the international legal instruments defining "human trafficking" almost literally.

Similarly, Article 601 CC contains two distinct offences. While the offence prohibited in accordance with Article 601(1) second part reproduces the definition provided in the international instruments almost literally, Article 601(1) first part does not seem to be grounded in such definitions.

In consequence, the Italian legislator seems to have gone beyond the scope of the relevant international obligations to criminalize – which may not raise any concerns, as (being absent any express limitation to this end) states can exercise their "jurisdiction to prescribe" freely under international law[97]. This is expressly provided for with regard to offences relating to "human trafficking". Article 1 of the Human Trafficking Protocol establishes that such instrument supplements, and shall be interpreted together with the United Nations Convention against Transnational Organized Crime (hereinafter: UNTOC). As a result, Article 33, paragraph 3 UNTOC applies, according to which states parties "may adopt more strict or severe measures than those provided for by this Convention for preventing and combating

Convention on Action against Trafficking in Human Beings by Italy, GRETA (2018) 28, 25 January 2019 ("GRETA Report 2019"), para. 225.

[97] On this matter *see*, for instance: C. RYNGAERT, *The Concept of Jurisdiction in International Law*, in A. ORAKHELASHVILI (edited by), *Research Handbook on Jurisdiction and Immunities in International Law*, Cheltenham, 2015, pp. 50-76.

transnational organized crime". This is precisely what Italy seems to have done.

Also considering that "purchasing or selling slaves" is defined in Article 602 CC as a *residual offence* in respect to those proscribed by Article 601 CC, one is bound to conclude that indeed, the offences established in accordance with Article 600(1) second part and Article 601(1) first part are not grounded in any of the above-mentioned international instruments. This is not the only instance where the provisions on "slavery" and "trafficking in human beings" partially overlap with others. Article 603*bis* criminalizing illegal intermediation and labour exploitation is probably the most interesting example[98]. In this regard, a study on the implementation of the 2011 EU Directive has warned that trafficking in human beings' cases are sometimes requalified or investigated as different offences because "this may be easier and more practical from the perspective of the criminal justice systems," which may result in lower punishments for offenders and "lead to the termination of the provision of support to the victim[99]".

In conclusion, the conducts the legislator criminalized under Articles 600(1) second part and Article 601(1) first part seem to amount to "hybrid" offences that are only partially tied to the international definitions of slavery and human trafficking. These offences are a mix of *elements of enslavement* and *elements of human trafficking*. Although this is not the only case where domestic offences partially overlap, the fragmentation of criminal responses to phenomena potentially amounting to slavery or human trafficking risks diluting these concepts and creating an unnecessary "compartmentalization".

[98] On this offence and its relationship with human trafficking and slavery, see C. CUCINOTTA, *The Offences of Slavery, Servitude, Forced Labour and Labour Exploitation: A Comparative Study (Part I)*, in *European Criminal Law Review*, 2022, vol. 12, issue 2, pp. 190-216, in particular pp. 195-204.

[99] See European Parliamentary Research Service, *Implementation of Directive 2011/36/EU: Migration and gender issues. European implementation assessment*, 2020, p. 109.

3.3. *Weighing the findings of the* Bani Walid camp, Sabratah camp, *and* Zuwara camp *judgments against the provisions of the relevant international legal instruments*

The second question this section aims to address is whether the conducts that the Italian domestic tribunals have considered could have been qualified as "human trafficking" and/or "enslavement" *in light of* the international provisions and relevant case law analysed in Section 3.1. The question I will try to address in this sub-section is, in other words, whether any of the conducts committed against migrants held in the three camps might have been qualified as human trafficking and/or enslavement and/or (sexual) slavery in accordance with international law.

a) Human Trafficking

In Section 3.1, I recalled that "human trafficking" is generally considered as consisting of three elements: action, means, exploitative purpose.

In the cases under scrutiny, the "action" element seems to be the least problematic. In fact, the three judgments characterized the conduct of the defendants as "kidnapping"[100], "recruitment"[101], and both "recruitment" and "kidnapping"[102].

The judgments also provide guidance with regard to the "means" element. Even though they did not provide a legal characterization of the facts, judges indicated that the defendants had used violence and/or exploited the victims' vulnerability. The *Bani Walid camp* judgment found that migrants had been "taken to Libya illegally" and *thus* transported to the camp, where they were locked in warehouses and subjected to abuses[103]. Considering that migrants had not even agreed on the fee they would pay to their (supposed) smugglers once they got to Libya[104], this situation seems to fall within the scope of the

[100] Corte d'Assise Milan No. 10/17, *cit.*, p. 111.
[101] Corte d'Assise Agrigento No. 1/18, *cit.*, p. 16.
[102] GUP Palermo, 22 February 2022, pp. 59-61, in particular p. 64.
[103] Corte d'Assise Milan No. 10/17, *cit.*, p. 106.
[104] *Ibidem*, p. 34.

definition of "vulnerability" – including as clarified by the Legislative Guide and the Working Group on Trafficking in Persons (see Section 3.1 above). The use of prohibited means is all the more evident with regard to those migrants who had already been held in one or more camps before being transferred to Bani Walid, and against whom it can be argued that "force", "threat of force", or "coercion" had been used[105]. The *Sabratah camp* judgment seems to strongly suggest that migrants where indeed in a condition of vulnerability for the purpose of "human trafficking", where it found that migrants "accepted the living conditions they had been subjected to *for the only reason* that they would be allowed to leave [the camp][106]" (emphasis mine). The *Zuwara camp* judgment seems to suggest that victims had been subjected to force or coercion, where it found that the victims had been "captured" or "kidnapped[107]".

The most problematic element is the "exploitation". This is in fact an element that only one of the three judgments considered. The *Zuwara camp* judgment convicted the defendants of the offence defined in Article 601(1) first part (the *hybrid* "trafficking in human being" offence), which does not require an intention to exploit. As to the *Bani Walid camp* judgment, it characterized the conducts as "kidnapping for the purpose of ransom". The *Sabratah camp* judgment, on the other hand, has to some extent dealt with the exploitative purpose. In finding the defendant criminally responsible on the basis of Article 600(1) second part (the *hybrid* "enslavement"), it explained that the criminal organization he was a member of had enslaved migrants for the purpose of securing revenues, and that those victims that could not pay had been forced to work. In so doing, the latter judgment may have (inadvertently) exposed a "blind spot" of the international framework.

Katie Kuschminder and Anna Triandafyllidou brilliantly posited that "the kidnapping and extortion [of migrants throughout Libya] *do not foresee exploitation properly speaking* … but rather a criminal act of torture and extortion for profit" (emphasis mine)[108]. In fact, in the

[105] *Ibidem*, p. 36.
[106] Corte d'Assise Agrigento No. 1/18, cit., p. 16.
[107] GUP Palermo, 22 February 2022, pp. 8, 60, 61.
[108] K. KUSCHMINDER, A. TRIANDAFYLLIDOU, cit., p. 215.

circumstances at hand the main problem from the legal point of view is that "there is no exploitation after arrival *either in Libya or in Italy*" (emphasis mine)[109]. Having said that, I believe that there is room left for conceptualizing the said conducts as human trafficking. The fact that *while enslaved*, migrants are allowed to call their families does not displace the enslavement. It is their "subjugation", and particularly the coexistence of indications of enslavement that we should focus on. Drawing from the *Kunarac* judgment list, I believe that the victims of the crimes charged in the *Bani Walid camp, Sabratah camp*, and *Zuwara camp* cases had been *at least* subjected to the restriction and control of their autonomy, freedom of movement, physical environment, as well as to the use of force, and – particularly with regard to women and girls – to sexual violence. This is not to say that the conducts under scrutiny *should* be qualified as "human trafficking" under international law. My point is that the abuses committed against migrants in Libya, as described in the three judgments under scrutiny, might also be looked at through the lens of human trafficking. As stressed by Allain and Bales, "trafficking is not in itself slavery, but a process by which slavery can be achieved ". In fact, we need to recognize – as suggested by Anne Gallagher – that "the inclusion of slavery and slave-like practices in the definition of trafficking is strong evidence of a substantive link between the two concepts" and that "the legal understanding of what constitutes slavery has evolved to potentially include contemporary forms of exploitation such as debt bondage and trafficking" . On the other hand, I agree with van der Wilt that this does not mean that enslavement does always also constitute trafficking in human beings . Thus we should try to reconceptualize this relationship in terms of continuum – analogously to what scholars have proposed with respect to the relationship between labour exploitation, forced labour, and slavery . As this would result in accepting that there is a grey area and potential overlaps between the offences, we should seek further clarification of the distinction between enslavement as a crime and enslavement as exploitative purpose (within the context of trafficking).

[109] *Ibidem*, p. 221.

b) Enslavement, Slavery, and Sexual slavery

Acts committed against migrants may (also) amount to "enslavement", "slavery", and/or "sexual slavery" under international law.

Two of the judgments I am focusing on – in the *Sabratah camp* and *Zuwara camp* cases – recognized that victims had been "enslaved" by the organizations running the detention facilities where they had been held. The *Sabratah camp* judgment (rather succinctly) explained that the defendant had "enslaved" hundreds of migrants by means of preventing them from leaving the camp, threatening to use or using force against them, and forcing those who were unable to pay to work for free in order to secure their release[110]. The defendant was convicted of "enslavement". This conclusion seems to be fully consistent with the practice of international criminal tribunals. However, the case may not be so "clear-cut". Regrettably, the judgment did not detail how the defendant had exercised "powers attaching to the right of ownership", besides mentioning that he had restricted the victims' freedom of movement and used force as well as threats in order to keep them in conditions of slavery[111]. In addition to that, the judgment expressly mentioned that those migrants whose families could not pay for their release had been forced to work for free to pay the fee required for the next leg of their journey[112]. On the other hand, while noting *in passing* that one witness testified that "the defendant sexually abused women in the camp"[113], the judgment did not take into account alleged acts of sexual violence (including as an indication of enslavement). As a result, it seems that all these conducts, and not only those encompassing forced labour might have been qualified as human trafficking as well as enslavement. Once again, the qualification would depend on the definition of enslavement as exploitative purpose vis-à-vis enslavement as a crime.

The legal findings of the *Zuwara camp* judgment also require further consideration. Having found that the victims had been bought by the criminal organization the defendants were members of, and thus

[110] Corte d'Assise Agrigento No. 1/18, cit., p. 16.
[111] *Ibidem*, p. 16.
[112] *Ibidem*, p. 16.
[113] *Ibidem*, p. 10.

subjected to a state of constant subjugation (characterized as slavery), the judgment found that such conducts amounted to human trafficking pursuant to Article 601(1) first part[114]. The problem, in this case, is evidently the availability of the *hybrid* offence. (This is, of course, not something one should blame the Prosecution nor the judge for.) Based on the factual findings of the judgment, I believe that such conducts could have been labelled as "enslavement". Not only the perpetrators' conducts tick several of the "*Kunarac* judgment boxes" for enslavement (e.g. restriction of freedom of movement, use of force, control of physical environment, and measures taken to prevent or deter escape). On top of that, members of the organization clearly exercised powers attaching to the right of ownership by purchasing their victims from others. As detailed in Article 7, paragraph 1, letter c) of the ICC Elements of Crimes, this is one of the forms in which powers attaching to the right of ownership can be exercised.

All considered, the most interesting of the three is the *Bani Walid camp* judgment. This is in fact the only case where the offences defined in Articles 600 and 601 where not considered at all[115]. The judgment established that the perpetrator had subjected migrants to very poor living conditions, that he had used or threatened to use force against them, and that "the deprivation of freedom was absolute" and they did not enjoy any right to "self-determination"[116]. In addition to that, the judgment concluded that the defendant committed acts of sexual violence against at least 10 women, including two underage girls that testified at trial, and that he did so in order to "completely subjugate" the victims and force their families to pay for their release[117]. In my view, the findings concerning such acts of violence may have led to a re-qualification of the conducts as (sexual) slavery[118]. Even though

[114] GUP Palermo, 22 February 2022, pp. 60-61.

[115] In this regard, it is worth recalling that the penalty attached to the offence prohibited under Article 630 (kidnapping for the purpose of extortion) – 25 to 30 years in prison – is more severe than those attached to "enslavement" and "human trafficking" pursuant to Articles 600 and 601 – 8 to 20 years in prison.

[116] Corte d'Assise Milan No. 10/17, cit., pp. 110-111.

[117] *Ibidem*, pp. 120-122.

[118] Pursuant to Article 521 of the Italian Code of Criminal Procedure, the judge can qualify the conducts differently in the judgment than provided in the indictment.

"sexual slavery" has not been incorporated into the Criminal Code, the *Ongwen* judgment has clarified that such conduct is a *species* of the *genus* "slavery". The *Corte d'Assise* might have considered that the defendant had restricted the victims' freedom of movement, used force and threats against them, and that he had controlled their sexual autonomy and committed acts of rape that resulted in "some destruction of the juridical personality"[119] – particularly with respect to two underage victims/witnesses. In accordance with the practice of international criminal tribunals, as discussed in Section 3.1, the defendant could have therefore been convicted of enslavement. As a result, I believe one can argue that such conducts, and *at least* the acts committed against the two underage victims/witnesses, could (should?) have been qualified as "enslavement" in accordance with Article 600(1) first part.

4. *Moving forward: grasping the* continuum *between "human trafficking" and "enslavement"*

In this contribution, I have reviewed three recent judgments issued by Italian criminal tribunals regarding grave abuses committed against migrants throughout Libya. Such judgments deserve praise because they represent the first (known) attempts to fight impunity in a very complex scenario such as Libya. Also considering that the first reports concerning those abuses emerged in 2016, and that the International Criminal Court has been investigating those allegations since at least 2017, the judgments at hand represent a historical development. Their factual findings contribute to our understanding of power dynamics and the complex reality (or realities) on the ground. Most importantly, they have given victims the opportunity to tell their stories, be heard, and obtain justice[120].

In Section 2, I provided an overview of the main factual findings, particularly with regard to the conducts that were labelled as "human

[119] Kunarac Trial Judgment, cit., para. 117.

[120] In fact, all three judgments found the witnesses reliable, and the convictions were largely based on their testimonies.

trafficking", "enslavement", "kidnapping for the purpose of exploitation", and "(aggravated) rape".

In Section 3, I reflected critically on the legal findings of the three judgments, including by looking at them through the lens of international law. I focused on Articles 600 and 601 of the Italian Criminal Code, and compared the definitions of "enslavement" and "trafficking in human beings" they incorporate with those adopted at the international level. I argued that the Italian legislator seems to have gone beyond the obligation to criminalize human trafficking in accordance with the relevant international legal instruments, creating two "hybrid" offences containing elements of slavery and elements of human trafficking. In addition, I argued that despite the lack of a domestic provision criminalizing "sexual slavery" as such, some of the acts in relation to which convictions were entered in the *Bani Walid camp* judgment – and particularly acts of rape committed against two underage girls – could have been qualified as enslavement. This is because in light of the practice of the ICC and other (international) criminal tribunals, "sexual slavery" is a crime composed of two material elements: enslavement and acts of sexual violence. Therefore, the offence defined in Article 600 may capture acts of sexual slavery.

These judgments seem to also offer an opportunity to practitioners and scholars to further reflect on the "*continuum*" between human trafficking and enslavement. In Section 3.3, I stressed that the experience of migrants detained and abused in Libya may or may not meet the definition of human trafficking. However, the Sabratah camp judgment indirectly illuminates a potential "blind spot" where it explains that the criminal organization the defendant was a member of had enslaved the victims with a view to securing financial benefits. Extortion does not seem to fall within the scope of the definition of "trafficking in human being". However, also considering that the list of what constitutes "exploitation" provided in the relevant international law instruments is non-exhaustive, there is room to argue that extortion may amount to exploitation. In order to address the question whether the conduct should rather be characterized as "enslavement" or as "human trafficking", one should therefore focus on the definition of enslavement.

The definition provided under Article 600(1) first part CC mirrors the definition of slavery provided in the 1926 Slavery Convention and its 1956 Supplementary Convention. This definition has also been adopted by the ECtHR in its more recent judgments, where the Court of Strasbourg has stressed that trafficking in human beings is based on the exercise of powers attaching to the right of ownership and that instances of *serious exploitation* may have elements qualifying it as slavery. In fact, those instances are often labelled (especially in domestic legislation, NGO reports, and mainstream media coverage) "modern slavery"[121]. In applying the provisions on "enslavement", the ICTY's *Kunarac* appeals judgment (discussed in Section 3.1) explained that, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality. However, enslavement does not require the *complete* destruction of the victim's personality; "contemporary forms of slavery", also falling within the scope of the material element of enslavement, entail *lesser* destructions of the personality. In addition, the duration of the exercise of those powers is *not an element* of the crime. As a result, one may indeed conclude that abuses committed against migrants in Libya amount to enslavement. This is the conclusion reached in the *Sabratah camp* judgment, as well as in the final report of the Independent Fact-Finding Mission on Libya.

Based on the above, we may want to re-conceptualize "human trafficking" and "enslavement", and understand their relationship in terms of a "*continuum*". Which does not mean that the only way forward is to equate human trafficking with slavery. In moving beyond this idea, I believe the judgments issued by Italian courts illuminated "grey areas" and "areas of overlap", and may thus help us better understand the above-mentioned *continuum* – including by taking into account the context in which acts occur. Hence I believe we can draw three lessons from such decisions.

First, as found by the *Sabratah camp* judgment, enslavement can be a core activity of criminal organizations operating in Libya. In order to

[121] Anne Gallagher argued that "*the link between trafficking and slavery is not well understood*" also due to the "*notion of trafficking as 'slavery' or 'modern slavery'*" (A. GALLAGHER, cit., p. 177).

secure revenues as quickly as possible, these organizations need to lure migrants into the detention facilities they control and subject them to (increasingly severe) abuses with the aim of forcing their families to pay a fee to secure their release. The findings of the judgment show how the defendant, as a member of one such criminal organizations, had the purpose to exploit migrants – but not in the sense envisaged in the Human Trafficking Protocol. On the one hand, this sheds light on the need to further clarify what *enslavement as exploitative purpose* entails. On the other hand, the operation of detention camps on the part of organizations with resources, manpower, and a hierarchical structure, together with the widespreadness or systematicity of the abuses committed within the camps, might justify the treatment of such acts as *enslavement as a crime against humanity*.

Second, as detailed in the *Zuwara camp* judgment, migrants are sometimes (often?) sold and purchased by members of different organizations. The seller and buyer in such cases may have different understandings of the situation – and thus deserve different criminal treatment. The acts of the sellers (especially one that is not a member of a criminal organization running a detention camp) might be better understood in terms of "human trafficking", as they exploit the vulnerability of migrants whose goal is to reach the coast of Libya and cross into Europe to secure a profit. The fact that they trade the victims to a criminal organization that runs detention camps might demonstrate the sellers' intention to subject migrants to enslavement. In this spirit, I agree with Siller that to describe the concept of enslavement in terms of "acquisition" or "disposal" of someone would "border with equating enslavement with human trafficking[122]". In addition, by lowering the threshold for "enslavement", this may make the offence of "slave trade" redundant (although in this respect, Siller has argued that this concept is already "indistinguishable" from trafficking)[123]. The most problematic aspect, with regard to this scenario, is distinguishing the features and peculiarities of *enslavement as exploitative purpose* vis-à-vis those of *enslavement as a crime*.

[122] *See* N. SILLER, *Modern Slavery*, cit., p. 420.
[123] *Ibidem*, p. 421.

Third, the *Bani Walid camp* judgment can be analysed with a view to challenging our understanding of the abuses committed against female migrants as *opportunistic crimes* (that is, rape committed in the context of human trafficking). Building up on the scholarship of Viseur Sellers and Getgen Kestenbaum, one could re-define acts of sexual violence committed against migrant women and girls held in detention centres in terms of "structural violence". These conducts are grounded in patriarchal value systems and exacerbated by the existence of a "transit space of exception" (today's Libya) where criminal networks represent "some form of local order and authority that is imposed through a system of violence[124]". It is this system of violence, and not an exploitative purpose, that is at the heart of the abuses against female migrants. Therefore, the acts of sexual violence committed within the detention camps may be better understood as acts of (sexual) slavery. Such acts are perpetrated through the imposition of the perpetrators' authority over people detained in the camps, and result in a (partial) destruction of women's juridical personality. This is a means to secure their "obedience" or "silence" (though fear and violence) and thus be able to treat them *as objects*. Also considering that the ICC Statute defines "enslavement" as the exercise of any or all of the powers attaching to the right of ownership over a person, *including in the course of trafficking in persons, in particular women and children*, conceptualizing the crimes committed against female migrants held in detention centres throughout Libya may contribute to disentangling this knot.

[124] K. KUSCHMINDER, A. TRIANDAFYLLIDOU, cit., p. 215.

Abstract

In March 2023, the Independent Fact-Finding Mission on Libya found that crimes against humanity may have been committed since 2016 throughout Libya against migrants in the context of deprivation of liberty. As the International Criminal Court faces jurisdictional as well as practical obstacles to the investigation of such crimes, it turned to domestic authorities for the purpose of closing the impunity gap. This contribution will focus on three judgments issued in recent years in Italy against third country nationals. These judgments found the defendants guilty of, among others, human trafficking, enslavement, kidnapping for the purpose of extortion, and/or rape. Through the analysis of their findings, this contribution aims to draw lessons from such judgments for the purpose of better understanding the continuum between human trafficking and enslavement, particularly when committed against female migrants.

KEYWORDS: Human trafficking – enslavement – slavery – sexual and gender-based violence – Libya – migrants

LA RELAZIONE TRA TRATTA DI ESSERI UMANI E RIDUZIONE IN SCHIAVITÙ: LA RECENTE GIURISPRUDENZA ITALIANA SUGLI ABUSI COMMESSI CONTRO (DONNE) MIGRANTI IN LIBIA

Il 3 marzo 2023, la *Independent Fact-Finding Mission on Libya* ha concluso che crimini contro l'umanità potrebbero essere stati commessi in Libia a partire dal 2016 contro migranti che si trovavano in stato di detenzione. Poiché la Corte penale internazionale deve affrontare ostacoli di tipo giurisdizionale e pratico, il compito di lottare contro l'impunità degli autori di quei crimini è ricaduto sugli stati. Questo contributo si concentra su tre sentenze emesse negli ultimi anni in Italia contro cittadini di paesi terzi. Le sentenze hanno condannato gli accusati per, tra gli altri reati, tratta di esseri umani, riduzione in schiavitù, sequestro a scopo di estorsione, e/o stupro. Attraverso l'analisi delle risultanze di queste decisioni, il contributo si propone di ricavarne lezioni allo scopo di meglio comprendere il *continuum* tra tratta di esse-

ri umani e riduzione in schiavitù, in particolare quando commesse nei confronti di donne migranti.

KEYWORDS: Tratta di esseri umani – schiavitù – riduzione in schiavitù– violenza di genere – Libia – migranti