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HUMAN RIGHTS PROTECTION AND THE SCOPE OF HUMANITARIAN ACTION
The Case of Mixed Migrations in Libya

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ABSTRACT

In the past twenty years, the scope of humanitarian action has largely evolved after shortcomings were observed in the response to the Rwandan and Bosnian crises. As a result, the early 2000's saw the integration of human security, rights-based approaches, empowerment and protection to programming activities, putting into question the strict application of humanitarian principles. However, the goal of humanitarian action — to save lives, alleviate human suffering, and preserve human dignity in times of armed conflict and manmade or natural disasters — requires the respect of these principles in order to secure access to the people in need: the discipline is still subject to limitations of its scope, but these limitations must be determined through a case-by-case approach.

This research aims at finding out what the protection of mixed migrants living in or transiting through Libya entails for the scope of humanitarian action. It firstly looks into the personal scope of humanitarian action: mixed migration flows are composed by refugees, and other forcibly displaced people, but also by economic migrants — which are not traditionally considered as subjects of humanitarian assistance. This variety of profiles calls for new narratives justifying the protection of all these different groups. In a second chapter, the research looks into the material scope of humanitarian action, in order to understand what is the role and what are the tools of humanitarian actors in order to protect migrants against the dangerous threats to their physical and mental integrity they often encounter in Libya.

Table of Content

Somewhere in Libya, a sunny day, a dusty plot, a building that seems to be a dormitory, and a man standing next to the front door, with a pole in the hand. One can easily guess that the camera capturing the scene is hidden, in a car parked in front of the shack. A black man appears, puts his hands on the wall in a submissive gesture, let the guard beat him hard, twice, with the pole, and enters the dormitory without a word. A second black man appears, takes the exact same posture, and gets beaten up by the guard before getting into the building. The scenario is repeated multiple times, while migrants are calmly queuing to enter the barrack. On the foreground, a janitor is swiping the floor without paying any attention to what is happening ten meters from him. This scene, revealed in a video published by the British newspaper *The Telegraph* in February 2017, perfectly represents the extreme cruelty migrants have to get used to in Libya, amid general indifference[1].

Worldwide, the scale of migration flows has considerably enlarged in the past years, resulting from a mix of factors such as protracted crisis, climate change, and global inequalities[2]. Wherever they are and whatever their destination is, irregular migrants have given a face to the quest for human security. In this context of global crisis, the human dignity of people on the move is challenged, as the path is often long and full of obstacles that can be natural — frontiers, desert, sea — human — traffickers, smugglers, violent police forces — and practical — lack of money. Not only can migrants have to cross through fragile States, but they often have to do so irregularly, and by putting their trust and money in the hands of criminal networks which turned human misery into a lucrative business. Because of the proportion of migrants, the variety of migrations profiles, the high number of human security threats, and the lack of legal and financial means to respond, the route that goes from Sahel and the Horn of Africa to Europe has become a symbol, and a laboratory for the study of mixed migrations flows.

Whether it is a country of destination or just a place of transit on the doorstep of Europe, the case of post-Gaddafi Libya is particularly representative of the existence of a gap between the human rights migrants are entitled to enjoy, and the cruel reality they face everyday. This gap is called the protection gap. In the increasingly fragile country, threats to human dignity have become a part of daily life, while the primary protection actor that is the State has failed to be of any help. Indeed, legally speaking, the authorities, formal or not, are accountable for the protection of persons located

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[1] *« Women and child migrants raped, beaten and starved in Libyan 'hellholes' says Unicef report »*, The Telegraph, 28 February 2017, available here: http://www.telegraph.co.uk/news/2017/02/28/women-child-migrants-raped-beaten-detained-libyan-hellholes/

[2] Christopher Horwood and Tuesday Reitano, *A Perfect Storm? Forces shaping modern migration & displacement*, RMMS discussion paper 3, Danish Refugee Council and RMMS Horn of Africa and Yemen, May 2016, available here: http://www.regionalmms.org/images/DiscussionPapers/A_Perfect_Storm.pdf

on their jurisdiction[3]. However in Libya, it appeared that in some situations they have been complicit, if not responsible, of gross and repeated human rights violations, and in other situations they have been incapable of preventing violations. In this context, humanitarian actors found themselves *de facto* in charge of safeguarding the physical and psychological integrity of mixed migrants, while obliged to find a balance with the principles upheld by humanitarianism. Designing such protection activities is commonly admitted as being part of aid work, yet it does entail quite a few ambiguities.

When we speak about protection in humanitarian action, we refer to a very specific type of human rights work. Even though there is a common and general understanding about how the concept of protection is implemented in practice, a good way to define it is to locate it on the humanitarian spectrum. In this regard, several classifications are competing: Firstly, for the International Committee of the Red Cross (ICRC), protection is a pillar. When considered as such, protection is opposed to the notion of assistance: these are the two terminologies that must be used to define humanitarian activities. While assistance consists in responding to the most vital needs of persons affected by a crisis, protection « *aims to ensure that authorities and other actors respect their obligations and the rights of individuals in order to preserve the safety, physical integrity and dignity of those affected by armed conflict and other situations of violence* »[4]. Protection and assistance are both complementary and interlinked, as the former is to be mainstreamed in the provision of the latter. The Sphere Project, which has established widely accepted standards in humanitarian action, went further and provided a more technical definition of protection, building on the pillars defined by the ICRC. It divides the protection pillar in four core protection principles, which can be summarized as follow: i/ do no harm, ii/ non-discrimination in the provision of aid, iii/ protection of people from physical and psychological harm, iv/ assistance in access to remedies[5]. This research work will be largely building on these principles. Secondly, for the United Nations (UN), protection is a key focal issue in crisis response: it is one of the eleven clusters introduced by the humanitarian reform of 2005 that followed the ascertainment of shortcomings in the response to the South-Asian tsunami of December 2004. The cluster approach is a tool used in order to coordinate the delivery of aid by dividing aid work into focal issues — health, nutrition, early recovery, emergency tele-

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[3] Art. 2, Resolution 53/144 of the General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, A/RES/53/144, 9 December 1998.

[4] *ICRC Protection Policy, Institutional Policy,* International Review of the Red Cross, Volume 90 n° 871, September 2008, p. 752, available here: https://www.icrc.org/eng/assets/files/other/irrc-871-icrc-protection-policy.pdf.

[5] *Humanitarian Charter and Minimum Standards in Humanitarian Response,* The Sphere Project, 2011, p. 29.

communications, water and sanitation, education, shelter, logistic, camp management and protection — and by ensuring the holding of inter-agency meetings in order to avoid overlaps. The overall objective is to ensure more effectivity and a better cost efficiency of aid. Finally, protection is described and explained in several guidelines and other texts of reference such as the Core Humanitarian Standards (CHS)[6], the Active Learning Network for Accountability and Performance in Humanitarian Action's (ALNAP) Protection Guide for Humanitarian Agencies[7], the ICRC Professional Standards for Protection Work[8], and the website of the Global Protection Cluster (GPC)[9].

Despite the various definitions of protection activities, it appears that there is a general consensus on the political potential of the concept: for instance, protection can lead to directly oppose State authorities when they are violating human rights, or to influence them through advocacy and capacity building. This contrasts very much with the traditional approach to humanitarianism, which is considered to originate in Henri Dunant's observations pursuant to the battle of Solferino[10] and in the following creation of the ICRC based on the principles of neutrality and impartiality - and latter on also on the principles of humanity and independence. Even though it would not be realistic to expect every humanitarian actor to strictly apply the Dunantist doctrine - there are multiple philosophies shaping aid work - it is by far the main trend when it comes to aid delivery, because respecting these principles is the best way to make sure that people in need of assistance or protection will be reached: in times of conflict, humanitarian principles are essential to obtain the trust of all parties. However, traditional humanitarianism has largely evolved through practice since its theorization by Henri Dunant, and among all evolutions, the most important took place after the end of the Cold War, and led to the development of rights-based approaches and protection activities.

Until the very early nineties, humanitarian protection was essentially a legal discipline based the Geneva conventions and on international human rights law and aimed for instance at providing

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[6] *Core Humanitarian Standards on Quality and Accountability,* CHS Alliance, Groupe URD and the Sphere Project, 2014.

[7] Slim Hugo. and Bonwick Andrew, *Protection - An ALNAP Guide for Humanitarian Agencies*, Overseas Development Institute, 2005.

[8] *Professional Standards for Protection Work carried out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence,* ICRC, February 2013.

[9] Website of the Global Protection Cluster, available here: http://www.globalprotectioncluster.org/

[10] Joost Herman and Dennis Dijkzeul*, A Matter of Principle, Humanitarian Principles,* The Broker, 9 February 2011, available here: http://www.thebrokeronline.eu/Articles/A-matter-of-principles

refugees with a status and certain rights, or at setting up strict rules regarding the conduct of wars[11]. It wouldn't be completely accurate to say that protection, from a non-legal perspective, did not exist already: in the 1940's, the Emergency Rescue Committee (which later on became the International Rescue Committee) was conducting rescue operations aimed at WWII refugees[12]. However, the principles of humanity, impartiality, neutrality and independence were mostly interpreted in a strict manner, and largely prevented other humanitarian actors from carrying protection activities on the field.

It is only when witnessing bloodsheds without being in capacity to prevent them that the humanitarian community started questioning the relativity of the principles of impartiality and neutrality[13]. Whereas these principles where quite efficient in order to alleviate the suffering of civilians caught between crossfires, in Rwanda and in Bosnia, large groups of civilians were a primary military target, and respecting strictly these principles made their protection impossible[14].

Consequently, from the end of the nineties to the present days, we have witnessed the development of a new humanitarianism, in which assistance is increasingly delivered following a human rights-based approach, and protection plays a much bigger role in the provision of aid[15]. This trend goes in pair with the emergence of the concept of human security that builds on the humanitarian/ development nexus and has therefore a strong political dimension. Applied to humanitarian action, human security requires to empower and to protect beneficiaries in order to ensure long-term recovery and to provide the tools for further development.

Humanitarian aid has undeniably evolved towards more protection, but the humanitarian principles are anchored in international humanitarian law[16]. Besides, as reminded by Angelo Gnaedinger in a speech in 2007, they define the limits of the scope of humanitarian action, and are still

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[11] Elizabeth G. Ferris, *The Politics of Protection: The Limits of Humanitarian Action*, Brookings Institution Press, March 30, 2011, p.xi.

[12] *Rescuing the Nazis' "most wanted"*, Rescue Timeline (1940), 6 September 2016, available here: https://www.rescue.org/article/varian-fry-rescuing-nazis-most-wanted

[13] See for instance Marc Weller, *The Relativity of Humanitarian Neutrality and Impartiality*, Proceedings of the Annual Meeting, American Society of International Law, Vol. 91, April 1997, pp. 441-450.

[14] Claude Bruderlein, Jennifer Leaning, *New Challenges for Humanitarian Protection*, BMJ, Vol. 319, August 1999, p. 430.

[15] Daniela Nascimento, One step forward, two steps back? Humanitarian Challenges and Dilemmas in Crisis Settings, The Journal of Humanitarian Assistance, 18 February 2015, available here: https://sites.tufts.edu/jha/archives/2126

[16] Annex I.2, Resolution 46/182 of the General Assembly, *Strengthening of the coordination of humanitarian emergency assistance of the United Nations*, A/RES/46/182, 19 December 1991.

relevant in order to secure access to the victims of conflicts and disasters[17]. This means that, if they want to remain effective, humanitarian organizations have a rather small margin of maneuver in order to protect human rights, and even though this margin has been studied to some extent[18], it still challenged and constantly reshaped by unforeseen situations. Because of the adaptive challenges it presents, it appears that the phenomenon of mixed migrations in Libya has a strong transformative potential: it pushes humanitarian actors to address the protection needs of a mixed group whose condition of victim of a humanitarian crisis is questionable, and to adapt their protection activities to respond to particularly dangerous threats to dignity, and to psychological and physical integrity. It is a relevant case to study in order to explore in more-depth the definition and the limits of human rights protection in humanitarian action, by answering the following question:

To which extent is the scope of humanitarian action challenged by the protection of migrants' human rights in Libya?

Scopes are usually defined through three perspectives: the personal scope, the material scope, and the geographical scope. In the following research however, the geographical scope of humanitarian action will not be studied. As mentioned above, it appears that two adaptive challenges stand in the way of humanitarian actors carrying out protection activities for mixed migrants in Libya. Firstly, a challenge for the personal scope of humanitarian action (Chapter I), consisting in acting in a humanitarian capacity while providing protection to flows mixing asylum seekers, trafficked persons, and economic migrants. Secondly, a challenge for the material scope of humanitarian action (Chapter II) consisting in acting in a humanitarian capacity while responding to structural and particularly violent threats to human rights. For both these challenges, it is relevant to try to determine whether or not protection activities can be justified with humanitarian arguments, and to which extent the protection of beneficiaries is affected by the Libyan situation.

The reflection will be accompanied by examples of coping strategies from three organizations widely committed to the humanitarian protection of mixed migrants in Libya but with very different profiles, in order to support the normative observations through practical evidences. The organizations chosen are i/ the International Organization for Migrations (IOM), which is a mandated agency and therefore isn't extremely flexible in face of exceptional situations, has a privileged

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[17] Speech delivered by the director-general of the ICRC, Mr Angelo Gnaedinger, at the conference *Humanitarian Aid in the Spotlight: upcoming challenges for European actors,* Lisbon, 12 October 2007, available here: https://www.icrc.org/eng/resources/documents/statement/humanitarian-principles-statement-121007.htm

[18] See for instance Elizabeth G. Ferris, *The Politics of Protection: The Limits of Humanitarian Action*, Brooklyn Institution Press, 2011, 286 pages.

relation with Libyan authorities, and covers a wide range of protection activities, iii/ the office of the United Nations High Commissioner for Refugees (UNHCR), which has a similar profile but a mandate theoretically limited to the protection of refugees and asylum seekers, and ii/ the Danish Refugee Council, which is a non-governmental organization, and therefore is much more flexible in face of exceptional situations, doesn't collaborate so strongly with Libyan authorities, and cover a smaller range of protection activities — but different from and complementary with the ones carried out by the IOM and by the UNHCR.

CHAPTER I

Human Rights Protection and
the Personal Scope of Humanitarian Action

In the Libyan case, the personal challenge for human rights protection in humanitarian action lies in the variety of profiles in need of aid. Libya is a country with a complex migration background[19]: firstly, it has been a country of destination for nationals from neighboring countries ever since oil and hydrocarbons were discovered on its territory, almost 60 years ago. Latter on, in the 1990's, Gaddafi conducted and open-door policy leading to large scale arrivals of national from sub-Saharan States. Even though the flows of migrant workers were consequently reduced by an extremely restrictive migration policy set up in the late 2000's, and with the 2011 crisis, the country remains largely dependent on immigration from an economic perspective. Nowadays, despite the current security situation and the legal shortcomings with regards to migrations, Libya still attracts a large number of economic migrants, but is also increasingly a country of transit on the central mediterranean route to Europe: climate change, conflicts, protracted crisis and global inequalities are resulting in more people fleeing hunger, war, but also less life-threatening situations such as poverty. Others are being trafficked. Because of the diversity of reception conditions offered by different States, more and more migrants are willing to go beyond neighboring countries and to undertake South-North migration - Roger Zetter calls this phenomenon the displacement *continuum*[20].

As a result of all these elements, the migrations flows in Libya are mixed. According to the IOM, *"the principal characteristics of mixed migration flows include the irregular nature of and the multiplicity of factors driving such movements, and the differentiated needs and profiles of the persons involved. Mixed flows have been defined as 'complex population movements including refugees, asylum seekers, economic migrants and other migrants'. Unaccompanied minors, environmental migrants, smuggled persons, victims of trafficking and stranded migrants, among others, may also form part of a mixed flow"* [21].

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[19] *Libya, The Demographic-Economic Framework of Migration, The Legal Framework of Migration, The Socio-Political Framework of Migration*, MPC - Migration Profile, Migration Policy Group, available at: http://www.migrationpolicycentre.eu/docs/migration_profiles/Libya.pdf

[20] Roger Zetter, *Protection in Crisis : Forced Migration and Protection in a Global Era*, Migration Policy Institute, March 2015, p.13.

[21] IOM, *Challenges of Irregular Migration: Addressing Mixed Migration Flows,* Discussion Note: International Dialogue on Migration, 96th Session, MC/INF/294, 7 November 2008, p.2.

The objective of the following sections is to understand how this diversity of migration profiles is challenging humanitarianism, and what can be done in order to cope with this challenge. The base of this chapter's analysis will be set in a first section aimed at shedding light on the protection needs of mixed migrants in Libya and the challenges these needs entail for humanitarian actors (I). In a second section, we will try to demonstrate how this resulted in a horizontal stretch of the personal scope of humanitarian action (II).

I. The context: the converging needs of all groups of migrants

Libya has a rather non-comprehensive approach towards the different profiles of migrants, which is one of the reason why their protection needs are converging (A). This results in humanitarian actors providing protection to all migrants in need, which, in practice, carries a strong political dimension and consequences (B).

A. Shortcomings of migrants' rights in Libya

1. Refugee law

The legal position of Libya towards refugees is ambiguous: first of all, the country is not signatory of the 1951 Refugee Convention[22] and is therefore not directly bound by the international definition of refugees. However this does not mean that the right to asylum doesn't exist in Libya: while the right to asylum isn't enshrined in the International Covenant on Civil and Political Rights, the principle of non-refoulement is part of international customary law and Libya is bound by it. The principle actually appears in the Libyan transitional Constitution of 2011, and is repeated in the draft constitution of 2016, but only applies to foreign nationals with a legal residency in Libya: « *it shall be prohibited to extradite [foreigners with legal residency in Libya] if they are expected to face torture, and this shall be subject to judicial guarantees* »[23].

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[22] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

[23] Art. 42 of the final draft, which was completed by the Constitution Drafting Assembly in July 2016. The draft is not officially available in english but can be found on the website of the Libya Herald: https://www.libyaherald.com/2016/07/16/new-draft-constitution-gives-everyone-something-and-nobody-everything/

Moreover, Libya is part of the African Convention Governing Specific Aspects of Refugees in Africa, which not only recognized the refugee definition provided by the Refugee Convention of 1951, but also extends it to persons who, *"owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality"[24]*. The African definition is therefore not limited to victims of potential persecutions - requiring therefore a personal threat - but also includes people fleeing event seriously disrupting public order, such as conflict. In the African context, this considerably enlarges the proportion of migrants entitled to receive asylum. The African Convention Governing Specific Aspects of Refugees in Africa also calls on signatory States to take part to the Refugee Convention[25].

In order to provide a clearer and judicially safer protection to asylum seekers and refugees, the UNHCR has been present in Libya since 1991, but has also an ambiguous relation to the national authorities. Indeed, it has never signed any memorandum of understanding with them, and it was expelled from the country by Gaddafi in 2010, without any explanation[26]. The UNHCR offices in Tripoli on reopened in September 2011 in the aftermath of the conflict and in response to the increased protection needs of foreigners in the country. Nowadays, its mission includes the provision of basic food and non-food items (NFIs) to refugees, asylum seekers and internally-displaced persons (IDPs), but is essentially dedicated to protection activities that consist in the registration and documentation of persons in need of international protection, the monitoring of detention centers, the training of relevant authorities, the release of asylum seekers from detention centers, and the promotion and facilitation of durable solutions, such as resettlement and voluntary repatriation, for refugees and asylum seekers, giving particular attention to the most vulnerable…

So, on paper, even though there are some blur elements, refugees and asylum seekers can benefit from the UNHCR protection. However, the practice is much more nuanced, as it will be discussed latter on, after presenting the rights of economic migrants.

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[24] Art.1, African Convention Governing Specific Aspects of Refugees in Africa, Adopted on 10 September 1969 by the Assembly of Heads of State and Government. CAB/LEG/24.3. Entry into force on 20 June 1974

[25] Ibid, Preamble, §10

[26] *UN refugee agency expelled from Libya,* The Guardian, 8 June 2010, available here: https://www.theguardian.com/world/2010/jun/08/un-refugee-agency-libya

2. The rights of economic migrants

As mentioned earlier, economic migrants in Libya are both vital to the economy of the country because of its migration background, and suffering rejection from the authorities. This is particularly true with regards to sub-Saharan migrants because of the role played by mercenaries brought by Gaddafi in the repression of the 2011 revolution.

Legally speaking, while the visa migration policy was very liberal during decades, it evolved towards much stricter conditions in the middle of the 2000's after the signatures of agreements aimed at externalizing the EU migration policy[27]. Nowadays, there is an existing legal framework allowing economic migration, that results from the 1987 law as amended in 2004. However the conditions for regularization are hard to meet: migrants have to present a visa, a valid passport, and authorized health certificate obtained in a Libyan hospital, as well as an employment contract in order to obtain a Libyan ID and to be allowed to work in Libya[28]. Not only are these documents particularly hard to obtain for some sub-Saharan migrants, because of a lack of documentation or money, but the development of a fake Libyan ID business have also been witnessed. Unfortunately, migrants are very badly informed and very much vulnerable to these practices.

Anyone who does not meet the requirements, or who possesses a fake ID, is considered an irregular migrant. Already precarious, this legal status has been jeopardized by the political instability since 2011, and by the 2010 law criminalizing irregular entrance on the Libyan territory[29].

3. Implementation: irregularity and the convergence of protection needs

The weakness of the legal frameworks on both asylum and economic migrations is very much enhanced by the practical implementation that is made by Libyan authorities. Regarding the asylum, if virtually the right to asylum might exist in Libya, the country has neither an asylum law, nor an administrative system to protect refugees. Regarding economic migrants, the law requires to

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[27] *Libya, The Demographic-Economic Framework of Migration, The Legal Framework of Migration, The Socio-Political Framework of Migration*, MPC - Migration Profile, Migration Policy Group, p.1, available at: http://www.migrationpolicycentre.eu/docs/migration_profiles/Libya.pdf

[28] Sara Hamood, *African Transit Migration through Libya to Europe: The Human Cost,* American University in Cairo, Forced Migrations and Refugees Studies, 2006, p.20, available here http://schools.aucegypt.edu/GAPP/cmrs/reports/ Documents/African_Transit_Migration_through_Libya_-_Jan_2006_000.pdf

[29] Eva Svoboda, Migration in Libya: Transit Zone or Final Destination? Humanitarian Policy Group, Policy Brief n°65, April 2016, p.3, available here: https://www.odi.org/sites/odi.org.uk/files/resource-documents/10527.pdf

obtain certain documents in Libya (ex: health certificate), putting therefore migrants at risk of being arrested and considered irregular before having a chance to regularize their situation.

In practice, Libya never grants the refugee status, *de facto* considering every migrants as economic migrants bound by the conditions set up in the migratory law of 1987 as amended in 2004. Authorities have justified this attitude by the fear of having a legal distinction creating an *« unmanageable situation »* in which a large number of migrants would apply to the refugee status without actually meeting the pre-requisites to obtain it[30].

But as mentioned earlier, the documents necessary to regularize a migrant's situation in Libya can be hard to gather, on one hand because lots of people haven't obtained a visa before undertaking their journey to Libya, others don't have a valid passport, and some cannot afford the health certificate. Therefore, a very large proportion of migrants living in Libya or transiting in the country are in an irregular situation, which, since 2010, is criminalized by the Law on Combatting Irregular Migration. According to this law, it is possible to detain for an indefinite period of time and to deport any foreign national that is irregularly on the Libyan territory[31].

This is a key element to understand why, in Libya, mixed migrants are addressed as a group rather than through their legal statuses: because of a weak legal framework and of a poor implementation, the needs of all irregular migrants are converging. Three major protection threats result from the treatment of migrants by Libyan authorities.

Firstly, irregular migrants are usually sent to detention centers when discovered by the police. This structures are administered either by the Directorate for Combatting Illegal Migration (DCIM) or by militias, and have been heavily criticized for the poor living conditions they offer. Human Rights Watch denounces *« horrific human rights abuses »* that include widespread torture, forced labor, and sexual violences[32]. UNICEF goes further and presents cases of human trafficking - as militia-ran detention centers have become a lucrative business in which migrants are being blackmailed and their families ransomed - while describing the terrible living conditions of children

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[30] Sara Hamood, *African Transit Migration through Libya to Europe: The Human Cost,* American University in Cairo, Forced Migrations and Refugees Studies, 2006, p.20, available here http://schools.aucegypt.edu/GAPP/cmrs/reports/Documents/African_Transit_Migration_through_Libya_-_Jan_2006_000.pdf

[31] '*Libya Is Full of Cruelty': Stories of Abduction, Sexual Violence and Abuse from Migrants and Refugees*, Amnesty International, May 2015, p.20, available here: http://www.amnesty.eu/content/assets/Reports_and_Briefings_2015/Libya_is_full_of_cruelty.pdf

[32] *Libya: End 'Horrific' Abuse of Detained Migrants - UN Report Details Widespread Torture, Forced Labor, Sexual Violence,* Human Rights Watch, 14 December 2016, available here: https://www.hrw.org/news/2016/12/14/libya-end-horrific-abuse-detained-migrants

stranded in the centers[33]. Detention centers are the structures in which gross human rights violations of migrants are the most visible however they only represent the tip of the iceberg, as fear from being arrested creates a spillover effect, potentially putting migrants in a very vulnerable situation.

Secondly, and in relation to what was just said, migrants are afraid of being caught by authorities and tend to hide from them - even if this means not going to the UNHCR office to register as an asylum seeker when relevant in order to obtain a certain degree of protection from the police in the future. While hiding in urban setting, a large proportion of migrants become invisible and extremely hard to reach and to protect[34]. As a result, numerous persons do not have access to basic food and non-food items, nor to health care, legal protection, other other essential services, and their presence in Libya cannot be monitored for data collection purposes, policy making or protection.

Thirdly, irregularity results in the absence of safe passage. Migrants are people of the move, crossing borders to settle in or transit through Libya. Some, who first considered Libya as a destination, decide to resume their journey as a result of fear and insecurity, for instance towards Europe. To do so, people consent to rely on criminal networks and on dangerous transportation means. By doing so, they expose themselves to potential kidnapping and ransoming, which seems to be a widespread phenomenon in Libya[35], to slavery, as attested by a recent report from IOM on the existence of slave markets in the country[36], and risk their lives on the Mediterranean: between 1st January and 21 June 2017, no less than 2000 migrants died at sea, which represents nearly 3% of the 72000 persons who used the maritime route[37].

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[33] Francesca Mannocchi,*Trapped: Inside Libya's detention centres*, UNICEF, 22 February 2017, available here: https://blogs.unicef.org/blog/libyan-detention-centres/

[34] *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, Human Rights Watch, 2009, available here: https://www.hrw.org/sites/default/files/reports/italy0909webwcover_0.pdf

[35] '*Libya Is Full of Cruelty': Stories of Abduction, Sexual Violence and Abuse from Migrants and Refugees*, Amnesty International, May 2015, available here: http://www.amnesty.eu/content/assets/Reports_and_Briefings_2015/Libya_is_-full_of_cruelty.pdf

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

[37] Data collected between 1 January and of 21 June 2017 and available on the website of the IOM's Missing Migrants Project: https://missingmigrants.iom.int/mediterranean

B. Difficulties for humanitarian access as a result of a poor legal system

The most obvious consequence of migrants' irregularity in Libya is the absence of willingness, from the authorities, to secure safe spaces for people in need to seek protection without fearing for their freedom. As mentioned by Thomas Linde, Special Representative on Migration at the International Federation of Red Cross and Red Crescent Societies in 2009, assistance programme for migrants who are in an irregular situation can be perceived, in many countries, as a transgression[38], and as James Darcy sums it up, *« by entering political controversy, humanitarians risks losing their perceived neutrality »*. An example, extreme but no less relevant, could be the one of the criminalization of humanitarian smuggling in Europe: parallels can be drawn with the much more innocent assistance of migrants that are hiding from Libyan authorities in urban settings. Assisting irregular migrants, who themselves are criminalized, can be perceived as based on the idea that they are entitled to protection as a right. This rights-based approach, yet legally correct - migrants are entitled to rights protected by the two international covenants of 1966 - and of great use for human rights defenders, can be detrimental to humanitarian access because of its political dimension.

Even though the protection of irregular migrants can be considered as an interference in the State's sovereignty, in practice this doesn't result in the Libyan authorities directly opposing humanitarian access to the persons of concerns. But the biggest issue faced by humanitarian actors isn't so much the opposition of the State, but its lack of positive efforts in order to help them reach migrants in urban settings: irregularity remains a challenge as it will, as mentioned in the previous paragraph, discourage migrants from reaching for vital services, or encourage them to resume their journey. In this regard, securing an effective access to persons in need requires the State not only to refrain from opposing humanitarian access, but also to take positive measures which is not done in the case of Libya. Such position measures can for instance consist in setting up safe spaces where migrants aren't afraid of being arrested if they seek support. In a position paper published in 2016, the Red Cross describe this positive measures as the « firewall principle », namely the insurance of a clear separation between immigration authorities, and other law enforcement authorities and public services. This principles implies, for instance, that *« the police and immigration authorities should not be allowed to apprehend migrants without a legal status in the vicinity of schools or*

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[38] Thomas Linde, *Humanitarian Assistance to Migrants Irrespective of their Status – Towards a Non-categorical Approach*, International Review of the Red Cross, Volume 91, n°875, September 2009, p. 573, available here: http://www.ifrc.org/PageFiles/89397/Article%20Thomas%20Linde.pdf

healthcare facilities »[39]. This principle also concerns the justice area: another key element of protection is making sure migrants can benefit from an effective access to justice and denounce human rights violations. In practice however, the firewall principle is far from being implemented in Libya, restraining therefore the possibilities of access to people in need of protection.

Because of this, humanitarian actors have to cope with the lack of safe space, for instance by reaching beneficiaries in hubs such as detention centers or disembarkation points. Detention centers are the main structure in which humanitarian organizations get to provide services to migrants. However, their access is limited by the will of Libyan authorities and only a small number of actors manage to make their way to the centers. It is for instance the case of the IOM, which carries out different types of activities within the detention facilities[40]: firstly, it provides medical consultations and treatment, and facilitates the transfer to an hospital in case it is needed. In this context, it also provides psychosocial support and mental healthcare. Secondly, the IOM conducts operations aimed at improving living conditions in the detentions centers by, for instance, disinfecting and fumigating the locals. Thirdly, the organization conduct capacity building for the DCIM staff and monitors the living conditions of migrants in the centers. The Danish Refugee Council was also granted access to a certain number of detention centers in which, in addition to provide humanitarian assistance, they carry out protection activities consisting in assessing the needs and vulnerabilities, referring to service providers, re-establishing family links and training DCIM staff on protection and mixed migrations[41]. Both the IOM and the Danish Refugee Council are members of the Mixed Migrations Detention Task Force in Libya, which is aimed at providing protection to detainees. That being said, not only aren't every organizations granted such access, but it also raises two questions: firstly, the authority of the central government on the entire territory of Libya is extremely weak - if not inexistent in most areas - and only 24 detention centers across the country are being managed by the DCIM. The other ones are at the hands of militias and are inaccessible for humanitarian organizations[42]. Most cases of extortion, ransoming and torturing are reported to take place in these centers and they are the one in which the protection needs are the most important, but they also constitute a

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[39] Red Cross EU Office, *Protecting the Dignity and Rights of Migrants in an Irregular Situation*, Position Paper, 29 July 2016, p.6.

[40] IOM, Libya brief, available at: https://www.iom.int/fr/countries/libya

[41] *Libya: Detention Task Force, key partners overview document*, UNHCR, available at: https://www.humanitarianresponse.info/system/files/documents/files/unhcr_detention_task_force_may2016.pdf

[42] Francesca Mannocchi,*Trapped: Inside Libya's detention centres*, UNICEF, 22 February 2017, available here: https://blogs.unicef.org/blog/libyan-detention-centres/

lucrative business that is being threatened by protection actors. Secondly, it is regrettable that orga-nizations have to wait, before being able to intervene, for migrants to be imprisoned in areas where the living conditions are extremely bad and the threats to their protection are enhanced. And even then must they wait for being granted access, by cooperating with the DCIM.

A second important hub for intervention is the disembarkation points, which are the places where the boats conducting search and rescue operations - the Libyan coast guards in the case of disembarkation points located in Libya - return after a rescue. Irregular migrants intercepted are to be sent in detention centers, however before doing so, disembarkation points offer an opportunity for humanitarian organizations to provide assistance and protection services. While the Danish Re-fugee Council isn't active in these spots, the IOM has set up medical clinics in order to tackle dehy-dration that is often suffered during the mediterranean journey, as well as medical assistance and psychosocial support.

Finally, and even though made much more complicated by the irregularity of the migrants, it is also possible to reach « invisible migrants » hiding in urban settings, as testified by the Danish Refugee Council, the UNHCR and, more recently, the IOM. In order to do so, two methods have been used in Libya: firstly, to rely on communities and on local civil society that benefits from a grassroots legitimacy and a privileged access to migrants hiding in urban settings. The Danish Re-fugee Council cooperate with Mercy Wings to reach victims of human trafficking, but also with the Libyan Organization International for cooperation and Emergency Aid (OICEA) for legal advices to asylum seekers and refugees, and with the Libyan Red Crescent for basic assistance and protection. The IOM also works on the capacity building of local NGOs in order to enable them to respond to protection needs. Secondly, organizations can set up safe channels for invisible migrants to enter in contact with them without fearing of being arrested. The UNHCR has set up a hotline in 2011 which has allowed a significant number of migrants to register as asylum seekers and to seek assis-tance without risking to leave the safety of their home.

Libyan treatment of asylum seekers and economic migrants clearly results in a convergence of protection needs, but also in access problems partly due to the fact that humanitarian actors are considered as going beyond the scope of humanitarian action when protecting irregular migrants. It is therefore relevant to analyze whether or not new narratives could be adopted in order to make the access of protection actors to irregular migrants easier.

II. The response: a horizontal stretch of the personal scope of humanitarian action

As just demonstrated, the access of humanitarian organizations to migrants in need isn't optimal, and one of the reasons is probably because protecting irregular migrants isn't perceived as a humanitarian activity but as a human rights one. First, it is essential to understand how the status of beneficiaries matters to humanitarianism (A). Only then is it possible for us to see why using the criteria of the legal status as a point of reference to provide humanitarian aid isn't relevant to the case of mixed migrations in Libya, and what are the alternative narratives that would allow us to stretch the personal scope of humanitarian action by including all migrants in need (B).

A. Beneficiaries matter

The status of beneficiaries is a determinant element in the provision of humanitarian aid: everybody is not entitled to receive assistance and protection in any circumstance. There seems to be a general consensus on the personal scope of humanitarian aid: it is aimed at populations who have been directly affected by a conflict, or by a natural or manmade disaster[43]. The origins of this consensus are blur, and its formal authority questionable, however it does play a very important role in legitimizing the accession of aid workers to populations in need.

From a strictly legal perspective, there is no such thing as a clear right to humanitarian assistance for all these populations - at best sometimes an obligation to secure access to people in need in wartime - but one category of persons can claim a right to legal protection on humanitarian grounds: refugees, namely persons who « *owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it*»[44]. In Libya this definition is complemented by the African Convention that

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[43] This definition appears in several organization's websites, such as the Red Cross (https://redcross.eu/about/international-red-cross-red-crescent-movement), the Danish Refugee Council (https://drc.dk/media/1309690/drc-profile-2015.pdf) but also in legal texts such as the European Council Conclusion on a EU approach to Resilience (3241st Foreign Affairs Council meeting, Brussels, 28 May 2013).

[44] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

also includes persons who, « *owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality »*[45]**.** However, there is no mention in international law of the right of migrants - other than refugees or IDPs - to receive humanitarian protection. The only relevant references can be found in human rights law such as the International Covenant on Economic, Social and Cultural Rights.

Regardless this gap, a few major humanitarian actors present in Libya have set up projects, and cooperation mechanisms aimed at insuring the protection of all mixed migrants in need. This includes renowned organizations such as the ICRC, the IOM, the Danish Refugee Council, Médecins Sans Frontières, the International Medical Corps, etc… The question is no longer whether or not mixed migrants are entitled to receive aid, but what is the idea justifying their protection by humanitarian actors.

In an article published in the Forced Migration Review, Tarak Bach Baouab, Hernan del Valle, Katharine Derderian and Aurelie Ponthieu call on to look beyond the legal status of migrants caught in mixed flows and to deliver aid according to the needs only[46]. This position was also adopted during the special session on migrants and humanitarian action at the World Humanization Summit, and is championed by a large number of actors — as will be discussed later on. Before analyzing in more depth the concept of need-based approach and the complementary concept of rights-based approach, it is relevant to see why, in the case of mixed migration in countries such as Libya, using the legal status as a point of reference can be detrimental for both the scope of humanitarian action and the dignity of beneficiaries.

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[45] Art.1, African Convention Governing Specific Aspects of Refugees in Africa, Adopted on 10 September 1969 by the Assembly of Heads of State and Government. CAB/LEG/24.3. Entry into force on 20 June 1974

[46] Tarak Bach Baouab, Hernan del Valle, Katharine Derderian and Aurelie Ponthieu, *Looking beyond legal status to human need*, Forced Migration Review, Issue 39, June 2012, p.19

B. The legal status as a point of reference: implications and shortcomings

1. Perceiving mixed migrations as a melting pot of legal statuses

Using the starting point of the legal status as a precondition for obtaining humanitarian protection leads us to use the « melting pot » argument to justify the actual behavior of organizations in Libya. This argument, both practical and moral, consists in saying that mixed migrations flows can benefit from humanitarian assistance because of their very nature: they are mixed - including among others refugees and asylum seekers who must receive aid - and are subject to important needs. Using the legal status as a point of reference appears to be close to traditional and conservative humanitarian concerns in the sense that it does not recognize the entitlement of economic migrants to receive humanitarian assistance. However for practical reasons and morality concerns, it doesn't deprive them either from such assistance. The result is a clear overtaking of the personal scope of humanitarian action.

This justification lies on one hand on the variety of profiles and legal statuses composing mixed migration flows, and on the other hand on their variability. Firstly, with regards to the variety of profiles, mixed migrations flows are composed by both refugees/asylum seekers and economic migrants, and among who can be found victims of human trafficking, unaccompanied minors, environmental migrants, stranded migrants, smuggled persons, etc… So not only are mixed flows partly composed of persons that are traditionally considered as entitled to receive international protection, but they also include people with high protection needs. Secondly, this situation is made even more complex by the variability of legal statuses: mixed migrations are characterized by the possibility of a change of status at any point of the migrant's journey: for instance, an economic migrant can become a refugee due to a change of situation in his/her country of origin, a regular migrant can become irregular after a relationship ends and end up being stranded in a detention center, and a person who was originally trafficked into Libya can chose to flee and, as a result, become a smuggled person. Because of this variability in time, all persons can potentially be in need of protection or become entitled to receive international protection, and it becomes extremely difficult, in practice, to make a distinction before providing aid.

For instance in the case of detention centers, acknowledging the fact that all detainees are regarded as irregular by the DCIM staff, how can we identify asylum seekers and refugees easily and without creating unfair situations? The UNHCR, which is limited by its mandate, does carry out

such identification activities when it comes to its legal agenda — in order to negotiate the release of asylum seekers and refugees and to provide them with legal protection — however even this agency ended up extending its mandate to *« persons of concerns in detention centers »* when it come to the provision of hygiene kits for instance[47]. It is practically and morally complicated do distinguish the different categories of migrants in order to provide assistance.

2. A justification that undermines the importance of targeting vulnerabilities

One of the main shortcoming of the melting pot approach is that is builds on the convergence of needs and on the difficulties to distinguish the groups composing migration flows. However this is in direct contradiction with the idea of targeting vulnerabilities, which is at the core of protection activities: not only do refugees have different needs, such as legal protection, but even beyond the classical distinction refugees/economic migrants, a large number of vulnerable groups with specific protection needs can appear.

Refugees, as mentioned earlier, are entitled to receive international protection, however there is a common fear that the phenomenon of mixed migrations would undermine their access to such protection by blurring the distinction between the rights of the different categories of migrants, or creating confusion between « bogus refugees » and « genuine refugees »[48]. In response to this concerns, the UNHCR published *Refugee Protection and Mixed Migrations: The 10 Points Plan of Action*[49], however it largely relies on the setting up reception capacity by the national authorities, which are, as mentioned earlier, inexistent in Libya, as authorities fear to be overwhelmed with an excessive number of asylum applications. In Libya, an approach based on the legal status requires the intervention of the UNHCR in order to have effect.

Among specific groups that are more vulnerable than the rest of migrants, we find unaccompanied minors, women who are at greater risk of sexual abuse, victims of human trafficking, who are often traumatized by exploitation, kidnappings, etc… Not only do these people have particular needs that must be answer through specific programs such as psychosocial support, but their protection must also be mainstreamed within every program aimed at assisting and/or protecting

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[47] UNHCR, Libya Fact Sheet, February 2017, available here: http://reporting.unhcr.org/sites/default/files/UNHCR%20Libya%20Fact%20Sheet%20-%20April%202017.pdf

[48] Anna Triandafyllidou, *Routledge Handbook of Immigration and Refugee Studies,* Routledge, 5 oct. 2015, p. 300.

[49] *Refugee Protection and Mixed Migration: A 10-Point Plan of Action,* UNHCR, revision 1, January 2007

migrants: for instance, ensuring that the food items provided to women aren't funneled by men or making sure female doctors are available to conduct medical examination on women are protection activities. In fact, these activities are at the core of protection work.

As a result, protection cannot be done without acknowledging the particularities of individuals, and even though a vulnerability assessment is a heavy task to carry in a context of emergency and mixed migrations, it is a mandatory pre-requisite to any protection work: In practice this means for instance that protection actors must collect data, which is challenging not only because of the variety and the variability of the migration profiles in Libya, but also because of the phenomenon of invisible migrants. However a lot of effort is put into setting up innovative data collection instruments, as testified by the Displacement Tracking Matrix of the IOM, *« designed to regularly and systematically capture, process and disseminate information to provide a better understanding of the movements and evolving needs of displaced populations, whether on site or en route »*[50]. or by the 4Mi project set up by the Regional Mixed Migrations Secretariat (RMMS) in collaboration with the Danish Refugee Council, as *« an innovative, low-cost approach to collect and analyze data on mixed migration flows »*[51]. In addition to collect data, protection actors must organize partnerships and cooperate in order to meet the needs of the different vulnerable groups: for instance while UNHCR is focusing on the needs of refugees, UNICEF is expert in the protection of children, and the IOM has projects specifically aimed at victims of human trafficking.

It appears from the amount of work carried out by protection actors in order to target vulnerabilities that the melting pot approach does not quite fit the reality of the field. In addition, it is an over-pragmatic way of perceiving mixed migrations, and new humanitarianism can provide us with more flexible approaches that are respectful of the scope of humanitarian action.

3. An over pragmatic argument with regards to new humanitarianism

The melting pot justification constitutes an over-pragmatic response to the needs of refugees and asylum seekers, that also includes economic migrants only for practical and moral reasons. Even though this theory is based on a traditional conception of humanitarianism — a conception based on the legal status of beneficiaries — it also entails a certain failure in the sense that humani-

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[50] More information available here: http://www.globaldtm.info/fr/

[51] More information available here: http://4mi.regionalmms.org/4mi.html

tarian actors are going beyond the personal scope of humanitarian action — as understood from the perspective of traditional humanitarianism — by assisting all migrants.

It is a questionable theory in terms of ethics: if we take the example of the disembarkation after search and rescue operations in the Mediterranean (the search and rescue operation in themselves are ruled by the 1974 International Convention for the Safety of Life at Sea), it can be interpreted as providing services — for instance medical — to refugees and asylum seekers by duty, and to economic migrants by default, on one hand on practical grounds — it is impossible to make a distinction between the legal statuses in the time-frame and in the conditions of a rescue operation — and on the other hand on moral grounds — it would obviously be an inhumane and unacceptable move to assist only a part of the passengers after a traumatic and health-threatening event — but in any case violating a certain conception of humanitarianism by doing so. This type of black-and-white and over pragmatic conception of humanitarian standards played a big role in the design of a new humanitarianism, with a more flexible definition, in the late 1990's.

So, according to the melting pot approach, assisting all migrants is not compliant with the scope of humanitarian action. Traditional humanitarianism lacks case-sensitivity, and in the present case the result is that not only does the approach based on the legal status of beneficiaries results in a denial of a right to protection of economic migrants - which has negative effects on the dignity of beneficiaries - but it also overlooks the nature of the needs - and therefore it doesn't reflect on how the needs could qualify as « humanitarian needs », justifying therefore a protection by humanitarian actors.

New humanitarianism, more respectful of human rights and case-sensitive when it comes to making hard calls, can offer an alternative to the melting pot approach through two kinds of justifications that go beyond the criteria of the legal status and that are currently gaining momentum, as responding to mixed migrations is an increasingly important topic: the rights-based approach and the needs-based approach to mixed migrations.

B. Beyond the legal status: rights and needs as points of reference

As demonstrated above, justifying the protection of all migrants while keeping the legal status as a point of reference is a very complicated exercise. Actually, there is a growing acceptance among both academics and practitioners of the fact that the current framework for refugee protection is no longer adapted to the reality of forced displacement and, because of this, the criteria of the

legal status isn't sufficient to protect the lives and dignity of those who fled, or who migrated and found themselves in life-threatening situations due to the conditions of their journeys[52]. This has already been acknowledged by humanitarian practitioners: according to the Sphere protection principles, affected people do not need to have a special legal status in order to receive humanitarian assistance and to be protected[53]. In addition, the Red Cross guidelines on protection are supposed to apply not only in armed conflict but also in *« other situations of violence »*. This is the practice, but using theoretical arguments may help us find out why this new narrative has seen the light, how it is justified, and what are its limits.

Two conceptions have been developed in order to address migrations in a more comprehensive manner: the rights-based approach and the needs-based approach. These two conceptions are conceptually radically opposite: while the first recognizes the existence of a right to receive protection —, the second consists in stating that the needs are of a humanitarian nature and justify the protection. Even though what they propose is very different, it appears that the two theories are not only conciliable in practice, but complementary and much more adapted to the reality of the field.

Unlike the melting pot approach, both these theories fall within the description of new humanitarianism, and aim at making the scope of humanitarian action more flexible, in order to demonstrate that protection actors are acting in a humanitarian capacity when protecting migrants. However, they do it in different manners, which make them relevant to study in more depth.

1. The rights based approach

The theory of the rights-based approach to mixed migrations is based on the fact that everybody is entitled to enjoy human rights, and the assumption that this is sufficient to justify the intervention of humanitarian actors. This theory therefore recognizes to humanitarian action a role in the protection of human rights — which is not the case in the framework of traditional humanitarianism, solely based on the saving of lives and the alleviation of human suffering motivated by the principle of humanity. The rights-based approach to migrations requires that the practice that consist in supporting victims of manmade or natural disasters is no longer relevant - only human rights are. This doesn't undermine the role played by international humanitarian law and by the 1951 Refugee Convention in accessing people in need of protection, however it does recognize international hu-

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[52] Demetrios G. Papademetriou, *Beyond Asylum: Rethinking Protection Policies to Meet Sharply Escalating Needs*, Transatlantic Council on Migration, Migration Policy institute, June 2015.

[53] *Humanitarian Charter and Minimum Standards in Humanitarian Response,* The Sphere Project, 2011, p. 37.

man rights law as another point of reference in order to justify the intervention of humanitarian actors.

The human rights of migrants can firstly be found in *lex specialis* such as the 1951 Refugee Convention[54] and the Convention on the Protection of the Rights of All Migrants Workers and their Families[55] — which covers both regular and irregular migrant workers. Libya has ratified the latter in 2004, and even though it hasn't ratified the former, it is part to the African Convention on the Specific Aspects of Refugee Problems in Africa that covers an even larger scope of application. These conventions entitle refugees and migrants to a certain amount of rights: refugees can for instance enjoy legal assistance, education, social security, etc... and migrants worker are entitled to health, social security and education, but also to an adequate standard of living including housing, food, and water and sanitation. That being said, some rights aren't covered by these conventions, and every category of migrant cannot claim protection based on this *lex specialis*. However, they are also protected by *lex generalis* such as the International Covenant on Civil and Political Rights[56] and the International Covenant on Economic, Social and Cultural Rights[57], which, in the case of Libya, have both been ratified. The most relevant to the provision of humanitarian assistance is the second, as it contains a large number of rights essential to survival such as food, housing, water and sanitation, education, etc. That being said, the International Covenant on Civil and Political Rights is also relevant, in particular to protection activities, as a number of rights that are frequently violated in Libya, such as the right to life and the prohibition of torture, are enshrined in this convention. It can also be relevant to note that when it comes to search and rescue operations, the International Convention for the Safety of Life at Sea[58] does provide a legal framework for the protection of migrant engaging on the central mediterranean route, and can be interpreted as containing a proper right to protection. As a result, all migrants regardless their status are protected, to some degree, by international human rights law.

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[54] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

[55] UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158,

[56] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

[57] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3

[58] International Maritime Organization (IMO), *International Convention on Maritime Search and Rescue*, 27 April 1979, 1403 UNTS

But only the existence of rights is not sufficient to justify the intervention of humanitarian actors. What is it that makes it possible for them to step in, in the hypothesis of human rights violations? The rights-based approaches to humanitarian action are a tool for the achievement of human security, which consists in the realization of economic, food, health, environmental, personal, community and/or political security. In practice, human security requires both protection and empowerment, and can only be done through the lens of a rights-based approach. Unlike traditional assistance, human security is blurring the line between humanitarian aid and development policies, in particular because of its clear objective to improve livelihoods. In this sense, when traditional humanitarian aid is solely driven by the short term objective of saving lives and alleviating human suffering in the name of the principle of humanity, human security approaches carry a much stronger political potential. According to the Declaration on the Right to Development, the primary duty bearer of the obligation to respect, protect and fullfil the right to development is the State[59], and when the State cannot act he has the obligation to reach for assistance from the international community. So even if it doesn't seem like Libya has any intention to actively reach for international support, this principle pushes the country to refrain from restraining access to humanitarian organizations providing human security services - namely the protection of migrants in need regardless their status. The combination of the existence of rights and of the duty of the state to protect them legitimates the presence of humanitarian actors.

The rights-based approach to migrations is championed by actors who hold a large authority in the field of humanitarian action, namely the UN system and the IFRC. According to the OHCHR, « *the lack of human rights-based systems of migration governance at the global, regional and national level is creating a human rights crisis for migrants at borders and in the territory of countries of transit and destination* »[60]. This lack of consideration of human rights is the reason why a large number of migrants are hiding and much more vulnerable to protection threats. Protecting the human rights of refugees and migrants regardless their status is also part of the conclusions of the New York Declaration for Refugees and Migrants adopted by the UN Genera Assembly in September 2016[61]. In the follow up of the 30th International Conference of the Red Cross and Red Crescent,

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[59] UN General Assembly, *Declaration on the Right to Development : resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128

[60] Migration and Human Rights, OHCRC, available here: http://www.ohchr.org/EN/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx

[61] UN General Assembly, *New York Declaration for Refugees and Migrants* : resolution / adopted by the General Assembly, 3 October 2016, A/RES/71/1

the IFRC published a declaration called *Together in Humanity*, and stating the following: « *We are particularly concerned that migrants, irrespective of their status, may live outside conventional health, social, and legal systems and for a variety of reasons may not have access to processes which guarantee respect for their fundamental rights*»[62].

Until the late 1990's, when the strict application of humanitarian principles was put into question, giving birth to a new humanitarianism, human rights protection wasn't considered as part of the scope of humanitarian action. Indeed, as Kristin Bergtora Sandvik, while human right are a matter of justice, politics, and redistribution, humanitarian action is all about the principles of neutrality and impartiality[63]. However since the beginning of the 2000's rights-based approaches have been extensively studied and are now commonly admitted as being an essential feature of humanitarian action that must be included, following a case-by-case interpretation. However this doesn't mean there shall be no limitation to the use of human rights as a point of reference to justify the intervention of humanitarian actors. Indeed, from a practical perspective, human rights can still potentially make it more complicated for them to access populations in need, which is ultimately the purpose of humanitarian action. For James Darcy, from the Humanitarian Policy Group, the shortcomings of rights-based approach can be summarized in seven points: i/ it politicizes the humanitarian space, ii/ the human rights agenda may be hindered by the demands of operational humanitarianism in a context of mutual incompatibilities iii/ there are risks of co-option by political actors hijacking the humanitarian agenda, iv/ it misleads the public opinion into thinking that agencies and NGOs are in the driving seat of human rights protection and undermines the role of the State, v/ there might be an instrumentalization of rights, vi/ it is irrelevant in the sense that if the State is knowingly violating human rights, invoking rights become a rhetorical exercise, and vii/ it responds to inflated and unrealistic aims: given the interlinkages between all human rights and the time and amount of work that a human rights agenda entails, it is impossible for humanitarian actors to fill the protection gap by themselves[64].

So, in conclusion, adopting a rights-based approach to migrations is by far the most interesting behavior when it comes to protecting the dignity of beneficiaries. However such approach must

[62] *Together for Humanity,* ICRC, 30th International Conference Geneva, 26-30 November 2007, p.74

[63] Kristin Bergtora Sandvik, *Aid in Crisis? Rights-Based Approaches and Humanitarian Outcomes*, project presentation available here: https://www.prio.org/Projects/Project/?x=1131

[64] James Darcy, *Human Rights and Humanitarian Action: A review of the issues*, Humanitarian Policy Group, Background paper, April 2004, available here: https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2311.pdf

be adopted following a case-by-case interpretation, and in the case of mixed migrations, even from the prism of new humanitarianism, it tends to stretch the personal scope of humanitarian action to its limits, which may not be perceived as a very neutral and impartial move, and may be detrimental to humanitarian access.

2. The needs-based approach

The theory of a need-based approach to migrations also takes position in favor of abandoning the criteria of the legal status, however, unlike the theory of the rights-based approach, it does not tackle the issue through the lens of human right. In fact, the idea underlying needs-based approaches is that the very nature of forced displacement creates wide-ranging risk related to livelihoods, socio-economic structure and physical security[65]. Migrants are vulnerable, and in the absence of State response humanitarian actors have the duty to protect them. For example, the IFRC professional standards for protection work are aimed at *«conflicts and other situations of violence »*[66], highlighting, on the way, the fact that violence generates protection needs.

The relevance of the needs-based approach lies in the importance it gives to the identification of special vulnerabilities and to the mainstreaming of protection in order to tackle them. Unlike the melting pot approach, the needs-based approach allows distinctions — and in this sense it is much closer to what is actually in place in reality — by pushing not only for taking into account cross-cutting issues and mainstreaming them into assistance, but also for acknowledging specific problems thats require specific protection techniques. In this sense, the needs-based approach probably offers the most comprehensive response to mixed migrations.

It is very easy to apply need-based approaches to humanitarianism, as they do not require to overstretch the personal scope of humanitarian action. In fact, rather than trying to make the notion of mixed migrants fit into the personal scope of humanitarian action, the needs-based approach consist in making the protection threat fit in the scope of « conflict and manmade/natural disaster ». By doing so, migrants become directly affected by such situation and entitled to receive assistance and protection. For Oxfam, *« protection is about people being safe from the harm others might*

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[65] Roger Zetter, *Protection in Crisis : Forced Migration and Protection in a Global Era*, Migration Policy Institute, March 2015, p.22.

[66] *Professional Standards for Protection Work carried out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence,* ICRC, February 2013.

cause them when conflict or disaster may leave them more vulnerable »[67]. Such approach is less ambitious than the rights-based approach, which truly challenges the personal scope of humanitarian action. However, applied to mixed migrations, the needs-based approach remains a manifestation of new humanitarianism, in the sense that it is used to justify protection measures - while the focus of traditional humanitarianism is set on assistance.

It is relevant to use practical examples in order to fully explain the relevance of needs-based approaches: in practice, in Libya, the needs justifying humanitarian action can originate in both the transportations means used by migrants (a), and in the very nature of forced displacement and its impact on vulnerabilities (b).

a. The transportation means: a manmade disaster

In an article on the challenge of mixed migrations by sea, Judith Kumin describes the transportation means that is the smuggling by boat as a humanitarian crisis in itself[68]. It is true that the numbers are alarming: since January 2017, no less than 2000 migrants died at sea, which represents nearly three per cent of the 70000 persons who used the maritime route. Moreover, this reasoning is applicable to all means of transportation that are based on smuggling: for instance, the RMMS estimates that at the very least 1275 persons perished trying to cross the Sahara desert — which is an obstacle almost impossible to avoid in order to enter Libya — between 2014 and 2016, and the telegraph reports that ninety percent of those who succeed have witness death, torture, or beatings during the journey[69].

In additions of being extremely dangerous because of their existence in itself, these transportation means create a spillover effect: on one hand migrants become vulnerable to criminal networks, and on the other hand, they become irregular and, when not arrested, try to hide from authorities. Because of this accumulation of protection threats resulting from the transportation means, the latter may qualify as manmade disasters, and call for a humanitarian response.

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[67] Ellie Kemp, *Protection: What is it anyway?* Global Protection Cluster, 22 March 2016

[68] Judith Kumin, *The Challenge of Mixed migration by Sea*, Force Migration Review, Issue 45, February 2014, p. 49.

[69] *Ninety per cent of migrants and refugees crossing Sahara in hope of reaching Europe have witnessed death, torture and beatings,* The Telegraph, 13 September 2016, available here: http://www.telegraph.co.uk/news/2016/09/13/ninety-per-cent-of-migrants-and-refugees-crossing-sahara-in-hope/

Is it possible to consider that, perhaps, irregular migrants constitute a proper vulnerable group? Before explaining how this is possible (ii), it is relevant to mention the existing consensus on the mainstreaming of protection for vulnerable groups (i).

i. A consensus: mainstreaming protection for vulnerable groups

Certain groups of persons are being more at risk of suffering human rights violations and of not being reached by humanitarian action. They are therefore considered as needing specific protection measures. This groups include, among others, children, elderly, women, persons with disability… The list is not limitative but reflects some of the most obvious grounds for discrimination.

Women and girls are particularly vulnerable to different kinds of gender-based violences. They also have specific needs with regards to their sexual and reproductive health, especially in case of pregnancy, and generally have to cope with traditional perceptions of their role: for instance, they are usually considered as bearing the responsibility of child care, which can be an additional ground for vulnerability in a context of migrations. The Committee on the Protection of the Rights of Migrant Workers and Members of their Families considers as « extreme » the vulnerability faced by women and children who are irregular migrants[70]. In the case of migrations through Libya, the gender plays an important role in enhancing vulnerabilities. Often, women have recourse to prostitution in order to pay smugglers, and face important risks of rape and sexual exploitation along the journey[71]. Amnesty international interviewed 15 migrant women who reported perpetual fear of being raped on their way to the Libyan coasts and received several testimonies of sexual violences from both survivors and witnesses[72]. Trauma, unwanted pregnancies and HIV transmission are common results from such situations. Being a woman can also be the cause of the migration to Li-

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[70] UN Committee on the Protection of the Rights of all Migrant Workers and Members of their Families (2011), General Comment No. I on Migrant Domestic Workers, CMW/C/GC/1, 23 February, para. 43

[71] Giussy Barbara, Giussy Barbara, Federica Collini, Cristina Cattaneo, Laura Marasciuolo, Laura Chiappa, Luigi Fedele, Alessandra Kustermann, *Sexual violence and unwanted pregnancies in migrant women*, The Lancet Global Health, Volume 5, No. 4, April 2017, p.396

[72] *Refugees and migrants fleeing sexual violence, abuse and exploitation in Libya*, Amnesty International, 1 July 2016, available at: https://www.amnesty.org/en/latest/news/2016/07/refugees-and-migrants-fleeing-sexual-violence-abuse-and-exploitation-in-libya/

bya in the first place, as women are more likely to become victims of human trafficking for sexual exploitation purposes[73].

Children suffer from a triple vulnerability[74]: firstly, their biological and physical needs are specific, as they are in the process of growing up. Secondly, their limited level of autonomy and their dependance on adults generate strategic needs which for instance make them vulnerable to adults with bad intentions. Thirdly, they are institutionally invisible and lack voice in political agendas. UNICEF surveyed 122 women and children stranded in Libya, and published the findings in a Child Alert in February 2017[75]. The report found out that three quarter of the interviewed children had experienced violence, harassment or aggression at the hands of adults. Most of them also reported not having had an adequate access to food on their way to Libya, and having no access to education at all. Finally, most children were left behind, as they represent a financial and physical burden in such a journey, and even though most mothers reportedly left their country of origin with at least one children. The report also includes stories of children detained by the DCIM.

Finally, evidences show that persons with disabilities have higher rates of poverty, and face physical barriers, communication barriers, attitudinal barriers, and a lack of sensitivity or awareness[76]. However in the context of migrations, it is the physical barriers that are the most problematic for persons with disabilities. For instance, Amnesty international reported the testimony of a migrant who had witnessed the abandoning of a disabled man by smugglers, in the desert, in 2016.

Mainstreaming the protection of the most vulnerable groups against discrimination in access to aid and against specific threats against them have became an increasingly important aspect of humanitarian action in the past twenty years. According to the Red Cross Professional Standards for Protection Work, not only must humanitarian actors abstain from discriminating vulnerable groups — principle 2 —, but they must also actively ensure that their activities do not have a discriminatory effect when carrying activities specifically aimed at one vulnerable group — principle 3 — and avoid harmful effect arising from their work, for instance on vulnerable groups — principle 3. The

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[73] *The Gender Dimension of Human Trafficking*, European Parliament, Briefing, February 2016, available here: http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577950/EPRS_BRI(2016)577950_EN.pdf

[74] Roelen, K. & Sabates-Wheeler, R. *A Child-Sensitive Approach to Social Protection: Serving Practical and Strategic Needs*. Journal of Poverty and Social Justice, 20(3), 2012, p. 292.

[75] *A Deadly Journey for Children: The Central Mediterranean Route*, UNICEF, Child Alert, February 2017, available here: https://www.unicef.de/blob/135970/6178f12582223da6980ee1974a772c14/a-deadl-journey-for-children---unicef-report-data.pdf

[76] Rohwerder, B, *Disability inclusion in social protection*, GSDRC Helpdesk Research Report 1069, University of Birmingham, 2014, p. 6.

mainstreaming of protection for the most vulnerable categories of persons is also enshrined in the protection principle 2 of the Sphere project, consisting in ensuring people's access to impartial assistance, in proportion to need and without discrimination. According to this principle, « *special measures to facilitate the access of vulnerable groups should be taken, while considering the context, social and cultural conditions and behaviors of communities. Such measures might include the construction of safe spaces for people who have been the victim of abuses, such as rape or trafficking, or putting in place means that facilitate access for people with disabilities. Any such measures should avoid the stigmatisation of these groups* »[77].

In practice, two types of activities aim at addressing particularly vulnerable groups: on one-hand the mainstreaming, and on the other hand the setting up of specific protection activities for these groups. For instance, mainstreaming gender can consist in making sure women can be examined by a female doctor if their convictions require so, while setting up specific activities aimed at protecting women can consist in offering antenatal consultations to pregnant women.

However for some scholars, the usual discourse surrounding vulnerable groups and consisting in treating them through the lens of gender, age, or disability presents rhetorical inconsistencies[78]: R. Charli Carpenter accuses this perception of perpetuating stereotypes, as the underlying idea is that that women and children are the innocent actors of a conflict, and the result of this gender essentialism is that the protection needs of young men tend to be undermined. The idea behind R. Charli Carpenter's reasoning isn't to undermine the existing vulnerabilities of women, children and the disabled, but rather to include intersectionality in the picture. According to the Oxford dictionary, intersectionality can be defines as « *the interconnected nature of social categorizations such as race, class, and gender as they apply to a given individual or group, regarded as creating overlapping and interdependent systems of discrimination or disadvantage* ». For instance in war-time young men are more likely of being enrolled in armed forces against their will and therefore they must also be considered as a vulnerable group in itself. So, more generally, this argument opens the door to a broadened conception of vulnerabilities, encompassing perhaps also the notion of intersectionality, and just calling for a case-by-case vulnerability assessment: in the case of Libya for instance, one can wonder if migrants aren't a vulnerable group in itself.

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[77] *Humanitarian Charter and Minimum Standards in Humanitarian Response,* The Sphere Project, 2011, p. 37.

[78] *'Women, Children and Other Vulnerable Groups": Gender, Strategic Frames and the Protection of Civilians as a Transnational Issue*, International Studies Quaterly, Volume 49, Issue 2, June 2005, p.296

ii. Are irregular migrants a vulnerable group in itself?

What are the vulnerabilities that can be associated with the fact of being a migrant, and can they be tackled in the same way as vulnerabilities arising from the fact of being a woman, a child, an elderly or a disabled person?

For Jorge A. Bustamante, the idea of a migrant's vulnerability is *« based on the premise that migrants are inherently vulnerable as subjects of human rights from the point of their departure as they leave home to initiate their migration. That is, any human being is less vulnerable at home than after he/she leaves home to become a migrant »*[79].

In practice, it is true that migrants are exposed to certain threats that are closely linked to the fact that they are migrants: for instance, only migrants recourse to smugglers in order to pass the border, and by doing so they are much more vulnerable to kidnappings and ransoming. In addition, because their situation is irregular, they are at risk of being arrested and therefore they are capable of renouncing their access to basic services, even when provided by humanitarian actors, in order not to be sent to detention centers.

So we can reasonably say that migrants are a vulnerable group in itself, just as women, children, elderly and people with disability, within the broader context of a humanitarian crisis going on in Libya. Humanitarian actors must on one hand mainstream their protection — for instance by making sure that migrants can access a hospital without fearing of being arrested — or by setting specific protection programs — such as campaigning on the dangers of using smuggler services, or psychosocial support.

CONCLUSION ON HUMAN RIGHTS PROTECTION AND THE PERSONAL SCOPE OF HUMANITARIAN ACTION

The diversity of profiles composing mixed migrations flows might appear as a challenge to humanitarianism, as the protection of persons in an irregular situation can be perceived as an interference in the State's sovereignty, and result in a restriction of access for humanitarian actors.

In Libya, this situation is made even more complicated by important shortcomings in legal protection, as not only does the country refuse to grant asylum by denying the presence of refugees, but it also criminalizes irregular entrance or stay on its territory. It is true that the Libyan authorities

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[79] Jorge A. Bustamante, *Extreme Vulnerability of Migrants: The Case of the United States and Mexico*, Georgetown Immigration Law Journal, Issue 3 and 4, Spring/Summer 2010, p.565

do not directly oppose the presence of humanitarian actors, however this systematic criminalization of irregular migrants results in a dangerous lack of safe space, and no effort is made is order to fill this gap. This results in both an increase in vulnerability and in the convergence of the protection needs of the different categories of migrants.

Protecting migrants requires to look beyond the legal status and to adopt new narratives adapted to the modern humanitarian challenges and that can be heard and accepted by the actors in charge of protecting the access to beneficiaries. While the legal status has historically been a point of reference for the protection of migrants, it has proven to be not adapted to the challenges of mixed migrations. We currently witness a change of paradigm, as the international community realizes that dealing with the increasing complexity of migration flows requires flexible instruments and comprehensive approaches. The protection of mixed migrants must not be based on their legal status, but on their human rights and on their needs: the personal scope of humanitarian action must be horizontally stretched, in order to include all migrants in need of protection.

The two approaches that were developed in this chapter in order to do so have complementary features: while the rights-based approach appears to be more focused on the dignity of beneficiaries, it may overstretch the personal scope of humanitarian action to its limits. On the other hand, the needs-based approach builds on a more traditional humanitarianism but lacks consideration for human-rights issues. However, as Roger Zetter points it out, *« in essence, both are predicated on mainstreaming protection into humanitarian assistance programs. Irrespective of the basis for protection, all evidences points to the need for a framework that is as inclusive as possible »*[80].

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[80] Roger Zetter, *Protection in Crisis : Forced Migration and Protection in a Global Era*, Migration Policy Institute, March 2015, p.22.

CHAPTER II

Human Rights Protection and
the Material Scope of Humanitarian Action

In Libya, the challenge to the material scope of humanitarian action lies in the nature of the protection threats, which are structural and which present a particularly high degree of dangerosity. This raises the following question: *To which extent can humanitarian actors respond to structural threats to both the dignity and the physical integrity of migrants, and act in a humanitarian capacity when doing so?* The structural nature of the threats plays a significant role in generating protection needs when it comes to migrants in Libya, even though personal aspects can enhance the likelihood of being harmed: for instance, women's vulnerability is enhanced in a context of smuggling, where they are more at risk of sexual abuse. Fragile contexts tend to create or to exacerbate vulnerabilities. A first section of this chapter will aim at understanding the role played by fragility in creating a challenging protection environment, to identify the duty bearer of the obligation to protect, and to better understand the role of humanitarian actors in this dynamic (I). In a second section, we will demonstrate that the material scope of humanitarian action is vertically challenged in the case of mixed migrations in Libya, through an analysis of its extent and of its content (II).

I. The context: State fragility and the development of structural threats

Since the uprising that led to the 2011 international intervention and to the killing of Muammar Gaddafi on 20 October 2011, Libya has been increasingly fragile, opening the way for the development of threats which are mostly of a structural nature.

Shortly after the end of the uprising, the National Transitional Council was formed in 2011 by the main opposition group, and recognized by the international community as being the legitimate government of Libya, while the Libyan National Army, which originated in the rebellion, entered the process of becoming a regular army. The elected General National Congress took over the National Transitional Council in August 2012, but in February 2014 the Institution refused to disband after the end of its mandate, which caused a civil war, as the Libyan National Army accused Ahmed Maiteg, the newly appointed prime minister, of being in thrall to islamist groups.

In the mid-time, IS has been on the rise in the country: In 2014, an IS militia took control of the port of Derna, in the East of the country, while in Tripoli, clashes took place between the Libyan army and the Libya Dawn Militias which later supported the settlement of the Governement of National Salvation in the city. On the North-East coastal line, IS progressed until the end of 2016, progressively taking the cities of Sirte and Ras Lanuf, and threatening to take Tobruk. Finally since December 2016, pro-governmental forces took back the city of Sirte. In May 2017 the second jihadist, group Ansar Al Sharia, mainly present in Benghazi, announced its dissolution.

Nowadays, the country is deeply divided between three different governments: the Presidential Council, based in Tripoli since 30 March 2016, and presiding over the Government of National Accord, which is internationally recognized, the rival Government of National Salvation, an islamist government also based in Tripoli, and the Tobruk government in the east. In addition, a multitude of armed groups are controlling different areas. The Libyan National Army largely controls the east of the country, with the exception of a few coastal areas - including Benghazi - controlled by the Shura Council. The west is much more divided, between Tuaregs and Tebus in the south, and Abam and Misrata forces, Zintan and allies, and diverse groups of local militias in the north[81]. The Government of National Accord only controls a small area in the north-west of the country. In the mid-time, ISIS is present in a substantial part of western Libyan, and rumors have it that it is also present on the southern borders with Chad and Sudan.

Given these circumstances, the country is hardly governable. This raises the question of who is responsible to provide a protective environment (A), and to which extent can humanitarian organizations fill the protection gap when the primary duty bearer cannot (B)?

A. The responsibility of the State to provide a protective environment

As signatories of international conventions, States are the primary duty bearer of the duty to protect. In this regard, two main sources of international law are relevant to the Libyan situation and must be taken into account: International humanitarian law, which protects civilians in armed conflicts, on one hand, and international human rights law, which applies regardless the context, on the other hand.

The situation of non-State actors — such as militias and non-recognized governments which controls a large amount of Libyan territories — is more complex, as they are not signatories of any

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[81] *A quick guide to Libya's main players*, European Council on Foreign Relations, available here: http://www.ecfr.eu/mena/mapping_libya_conflict

international convention. International humanitarian law and international human right law have however developed specific mechanisms encompassing the traditional idea that States are the only subjects of international law. In fact, in resolution 1894, the Security Council reaffirms that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians, must comply with humanitarian, human rights and refugee law[82]. In international humanitarian law for instance, certain rules are aimed at both State and non-State armed groups: it is the case for provisions that concern non-international armed conflict, but also for customary law such as the principles of distinction and of proportionality[83]. Concerning Human Rights law on the other hand, it appears that a number of non-State actors can, under certain circumstances, become bounded by human rights obligations. It is particularly true when the non-State actor exercise some degree of control over a territory, as it is the case for militias and informal governments in Libya. But under certain conditions, human rights violations committed by non-State actors can fall under the responsibility of the State. For the OHCHR, this is the case when *« i/ The group has been empowered by the law of that State to exercise elements of the governmental authority, ii/ The group is in fact acting on the instructions of, or under the direction or control of, the State in carrying out the conduct, iii/ The group has violated international legal obligations and subsequently becomes the new Government of the State, iv/ The group has violated international legal obligations and subsequently succeeds in establishing a new State in part of the territory of a preexisting State or in a territory under its administration. »[84]*

However, in Libya duty bearers, and in particular the Government of National Accord which is the primary duty bearer, are not only unable to provide a protective environment for migrants (1), they also are responsible for actively violating migrant's human rights (2).

1. Libya's failure to protect

When it comes to human rights obligations, and as far as particular economic, social, and cultural rights are concerned, the States not only have a duty to abstain from violations and to acti-

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[82] UN Security Council, Security Council resolution 1894 (2009) [on the protection of civilians in armed conflict], 11 November 2009, S/RES/1894 (2009)

[83] OHCHR, *International Legal Protection of Human Rights in Armed Conflicts*, UN publications, 2011, available at: http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf

[84] Ibid

vely uphold the rights, but they also must protect individuals from potential violations committed by a third party. It appears that Libya is failing to respect its obligations in this regard.

As discussed in Chapter I, the Libyan legal framework for the protection of migrants and its implementation are characterized by its weakness: firstly the authorities, even if bound in theory by the African Convention on the Specific Aspects of Refugee Problems in Africa, don't acknowledge the presence of refugees on their territory. Secondly, physical obstacles, such as the requirement of documents particularly hard to gather, make it complicated for economic migrants to regularize their situation. Therefore a large proportion of migrants living in or transiting through Libya, even when fleeing persecutions in their home country, find themselves in an irregular situation. In parallel, the irregular entrance or stay in the country is criminalized, and leads to detention for an indefinite period of time, and then to deportation. As a result, there is no such thing as safe spaces in which migrants can access basic services. Actually, because of the fear of being caught and detained or deported, migrants are particularly dependent on criminal networks for entering the territory or for leaving it — smugglers — and for securing their stay in the country — for instance with fake documents. Not only do these businesses build on existing vulnerability and are therefore abusively expensive, but they also lead to more serious violations such as rape, beating, torture, kidnapping, ransoming, and in extreme cases murder. In the Amnesty International Report *Libya is full of Cruelty*, Ibrahim, a Gambian migrant, testifies: *"It was not the police. Anyone is the police in Libya. They all have arms. They catch you and tell you that you have to pay money or else you will never get out"*[85]. Nothing, in the Libyan law, keeps irregular migrants from being dependent on such networks.

The second problem concerns human rights violations by militias, and the question as to whether or not the Government of National Accord is responsible for not protecting migrants from militias' violence is quite relevant. Indeed, detention centers hold by militias are more likely to host gross human rights violations, as they operate following lucrative objectives. Just as criminal networks do, it is not rare that militias beat, torture and ransom detainees[86]. The only difference for militias is that they do use the Libyan law on irregular immigration as an excuse to proceed to « kidnappings ». So, this groups justify human rights violations with national law. However given the

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[85] '*Libya Is Full of Cruelty': Stories of Abduction, Sexual Violence and Abuse from Migrants and Refugees*, Amnesty International, May 2015, p.11, available here: http://www.amnesty.eu/content/assets/Reports_and_Briefings_2015/Libya_is_full_of_cruelty.pdf

[86] *Refugee women and children 'beaten, raped and starved in Libyan hellholes'*, The Guardian, 28 February 2017, available here: https://www.theguardian.com/world/2017/feb/28/refugee-women-and-children-beaten-raped-and-starved-in-libyan-hellholes

complexity of the Libyan non-international armed conflict, the number of militias with different types of affiliation to different formal or informal governments, and the lack of information regarding the number of militia-ran detention centers and the existence of a delegation of power to them by the DCIM, it is impossible to draw a general conclusion on the responsibility of the Government of National Accord for human rights violations committed by militias — it may be that some are the result of the government's failure to protect from third party's violations, while some are the direct responsibility of local militias. The only sure thing is than these violations are partly constitutive of the protection gap suffered by migrants in Libya.

2. Libya's active human rights violations

With regards to the duty to refrain from violating human rights, Libya is also not an example. The State authorities are responsible for the direct violation of several human rights. To start with, the country recognizes the right to asylum but doesn't grant it to people actually corresponding to the definition of refugee. This results not only in the absence of legal protection for this people, but also in the deportation of some migrants in violation with the principle of non-refoulement and consequently of the Libyan transitional constitution itself. Not to mention that the very possibility to have someone detained indefinitely because of his immigration status is constitutive of a serious human rights violation.

The living conditions within DCIM-ran detention centers are also a matter of concerns, as all of them are overcrowded and underfunded. For instance, none of the 23 centers run by the DCIM has female guards, which enhances the risk of sexual assault on detained women. An IRIN report — that only assessed the living conditions in one center — mentions the presence of unwashed bodies and flies, the insufficient number of toilets to be shared by hundreds of people everyday, the violence perpetrated by the guards, the impossibility to get any sleep because of overcrowded rooms, and the lack of general information[87]. In other centers held by the DCIM, UNICEF mentions the detention, of several children, only allowed to go outside once every four days. One of the center visited for the purpose of the report has no electricity, no clean water, and all centers have poor hygiene conditions in general[88]. Finally, Amnesty International also carried out investigations

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[87] Tom Westcott, *« They beat us with chains »: Life into Libya's Detention Centers*, IRIN, 27 May 2015, available here: http://newirin.irinnews.org/photo-feature-libya-detention-centre-migrants/

[88] Francesca Mannocchi, *Trapped: Inside Libya's detention centres*, UNICEF, 22 February 2017, available here: https://blogs.unicef.org/blog/libyan-detention-centres/

and denounced « terrible conditions ». Several migrants interviewed by Amnesty International reported being asked to clean, build or renovate the immigration detention centers where they were held in exchange for an eventual release that, most often, did not take place before months. Other witnessed murders perpetrated by guards themselves and caused by successive beatings or by a shooting[89]. The organization also gathered testimonies regarding the lack of heath care, and the fact that guards do not take detainees to the hospital unless they are afraid they might carry contagious diseases[90]. Lack of food and skin diseases are among the most common testimonies. Finally, Amnesty International also reported religious discrimination against christian migrants within the detention facilities, who are sometimes segregated from the rest of the detainees, and are more likely to be beaten.

Multiple abuses from the Libyan coastguards carrying search and rescue operations have also been reported:, as they recourse to beatings, but also to extra-judicial execution of persons assumed to be the drivers of the boat, and sometimes abandon at sea the people they just rescued[91].

Finally, there have been cases of smugglers bribing detention center guards in order to obtain the release of a detainee who would pay to attempt a sea crossing[92].

B. Humanitarian actors and the protection gap: contributors, not duty bearers

Given the above-mentioned violations and the responsibility of the Libyan authorities in their existence, it is important, before resuming to the second part of the chapter, to understand what is the extent of the role of humanitarian actors in filling the protection gap - only then can we discuss the means through which humanitarian actors can have an impact on it.

In an article called *Protection: The New Humanitarian Fig Leaf,* Marc Dubois discusses and deconstructs myths surrounding protection activities by humanitarian actors, among which the idea

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[89] *EU Risks Fuelling Horrific Abuse of Refugees and Migrants in Libya*, Amnesty International, 14 June 2016, available here: https://www.amnesty.org/en/latest/news/2016/06/eu-risks-fuelling-horrific-abuse-of-refugees-and-migrants-in-libya/

[90] '*Libya Is Full of Cruelty': Stories of Abduction, Sexual Violence and Abuse from Migrants and Refugees*, Amnesty International, May 2015, p.11, available here: http://www.amnesty.eu/content/assets/Reports_and_Briefings_2015/Libya_is_full_of_cruelty.pdf

[91] *EU Risks Fuelling Horrific Abuse of Refugees and Migrants in Libya*, Amnesty International, 14 June 2016, available here: https://www.amnesty.org/en/latest/news/2016/06/eu-risks-fuelling-horrific-abuse-of-refugees-and-migrants-in-libya/

[92] Ibid

that *« the protection gap is the problem »*[93]. The expression has been increasingly used since the beginning of the 2000's, and went through a momentum during the Darfur crisis, which was for the first time labelled a protection crisis. The problem, for Marc Dubois, is that conceptually speaking, the protection gap has become the lens through which humanitarian actors perceive their work, therefore self-flagellating themselves for human rights violations they believe to be responsible for. But when people are being raped, kidnapped, tortured, ransomed, he argues that it is not a failure of humanitarian actors: it is a failure of the duty bearer. The protection gap is not the problem in the first place, it is the extreme violence of the environment and the lack of capacity of the State to respond to it that creates protection needs.

Even though this distinction is purely conceptual — the gap is unchanged — it isn't without consequences. Firstly, considering that the protection gap is the problem tends to shift the spotlight away from the violence and the perpetrators. Such conception has a concrete impact in the way policies are being formulated, and can partly explain, for instance, policy orientations such as the willingness from the EU authorities to externalize border policy by building capacity among the Libyan coast guards to better « protect » migrants from a dangerous journey[94]. Training authorities is obviously a positive action, especially if it takes into account the human rights dimension of search and rescue operations, but it doesn't change the fact that Libya is a violent country and that interceptions at sea will most likely lead to detention and to further human rights violations by the same authorities the EU is cooperating with. So understanding that violence and human rights violations are the problem allows decision makers and humanitarian actors to design more comprehensive, and consequently more effective responses. Secondly, embracing the idea that humanitarian actors are not responsible for filling the protection gap makes it easier to delimitate the scope of their action and therefore to understand the physical and political limits to what they can and cannot do in order to contribute to the reduction of the protection gap. For Marc Dubois, the real protection gap is the gap between the protection needs and the protection offered by humanitarians. This idea, and the notion of contribution rather than of responsibility to fill the gap, will be further developed in the second part of this chapter.

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[93] Marc Dubois, *Protection: the new humanitarian fig-leaf*, Discussion Paper, Refugee Studies Center, 2009, p.2.

[94] See for instance the EEAS Joint Communication to the European Parliament, the European Council and the Council, *Migration on the Central Mediterranean route, Managing flows, saving lives*, JOIN(2017) 4 final, OJEU 25 January 2015.

II. The response: a vertical challenge to the material scope of humanitarian action

It very complicated to define the material scope of humanitarian action in a positive manner, for the very reason that when it comes to protection, some violent situations constitute adaptive challenges, requiring comprehensive approaches and innovative responses. However we can attempt to define the extent of the material scope in a negative manner: in fact the idea of contribution rather than responsibility developed by Marc Dubois reminds us of its very obvious limits. What follows is a long citation of his article, but worth quoting in order to understand these obvious limits: *« Imagine that you and your family are under attack by violent marauders. Brutal men armed with guns and machetes kill your oldest son, drag one screaming daughter out the door by the hair, herd together all your livestock and set your grain silo on fire. Suddenly your savior appears – just like in the movies! – in the form of a helicopter from the international community. They land in front of your about-to-be-burned home, the pillaging stops and all eyes focus on the doors as they begin to creak open. Out steps . . . not Rambo, not the Magnificent 7, not a heavily armed crack unit of commandos prepared to drive the marauders from your village. No, in the place of those protectors steps a group of logo wearing humanitarians, armed with clip boards, pens, and the promise of documentation. In addition, you will soon learn, they will hold consultations with you to ensure that food rations are sufficient and will regularly fumigate the malaria-carrying mosquitoes breeding in the drainage water from their leaky tap systems »[95]*. Such scenario is highly unlikely to take place, partly with regards to the principle of neutrality — even though, lessons learned from Rwanda, genocide can call for exceptions to the principle — but mostly because of the fact that aid workers are civilians, who do not take part in hostilities, but also can hardly put themselves between an armed perpetrator and his victim. It would be over realistic to expect such selfless — paradoxically somehow also self-centered — attitude from humanitarian actors. This gives us an idea of the extent of the material scope of humanitarian action, however the content of such scope, namely the humanitarian protection toolbox, will be analyzed later on.

In the Libyan case, this reasoning could be applied to the protection of migrants: it is clearly dangerous to interfere with the lucrative activities of criminal networks and militias, and the political implications of frontal protection against human rights violations committed by the State can be perceived as being in direct opposition with the principle of neutrality.

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[95] Marc Dubois, *Protection: the new humanitarian fig-leaf*, Discussion Paper, Refugee Studies Center, 2009, p.4.

The next section will aim at demonstrating that the protection of mixed migrants in Libya represents a vertical challenge to the material scope of humanitarian action: because this scope is limited in its extent, protecting migrants requires an innovative use of its content (A). Perhaps one of the activities that are the most interesting to study in this regard are the search and rescue operations, which combine efficiency and respect for the scope of humanitarian action (B).

A. Using limited means in the most effective manner

In order to assess whether or not protection actors use the limited scope of humanitarian action in a way that is optimal, we must first understand the humanitarian protection toolbox — allowing us to better understand the content of the material scope of humanitarian action (1) — and then see how this toolbox is put at use in order to protect migrants from human rights violations committed by authorities and criminal networks (2).

1. The humanitarian protection toolbox

For the ICRC, *« protection encompasses all activities, aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law (i.e., human rights, humanitarian law and refugee law)»*[96]. As discussed above, it does not consist in interfering directly between a perpetrator and the victim, but rather at ensuring most conditions are present in order to avoid harm — *ex ante* intervention — or to control the damages — *ex post* intervention. When it comes to protecting people from being harmed by third parties, the methods used by humanitarian organizations are everything but substantial, and this can be explained by the limits of the material scope of humanitarian action. From the analysis of diverse guidelines on protection[97], we can draw conclusions as to the existence of three types of activities that constitute the humanitarian protection toolbox.

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[96] *Professional Standards for Protection Work carried out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence,* ICRC, February 2013, p.8.

[97] The list of guidelines analyzed includes ; *Guidelines to protect migrants in countries experiencing conflict or natural disaster*, MICIC, October 2016, *Professional Standards for Protection Work carried out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence,* ICRC, February 2013 ; *Core Humanitarian Standards on Quality and Accountability,* CHS Alliance, Groupe URD and the Sphere Project, 2014 ; and *Protection - An ALNAP Guide for Humanitarian Agencies*, Overseas Development Institute, 2005.

Firstly, protection entails the mainstreaming of the rights of particularly vulnerable groups. This appears particularly in the Sphere protection principle n°2 according to which *« people can access humanitarian assistance according to need and without adverse discrimination. Assistance is not withheld from people in need, and access for humanitarian agencies is provided as necessary to meet the Sphere standards »,* as well as in the standards n°2 and n°3 of the Red Cross Professional Standards for Protection work.

Secondly, humanitarian actors can carry out autonomous protection activities — in the sense that they do not consist in mainstreaming protection within the framework of another humanitarian activity. In the case of the ALNAP Protection Guide[98], these activities are themselves divided into three categories: firstly, environment building, which is preventive and can for instance consist in building capacity, or in measures aimed at informing migrants on the risks entailed by the journey. Secondly, autonomous protection activities can consist in responsive action, which is for instance the case of search and rescue operations aimed at putting an end to an existing danger. Thirdly, the action can be remedial — ex post — and this can consist in psychosocial support, healthcare, the activation of legal remedies, etc… The MCIC guidelines also stresses the importance of acting before, during, and after harm is done, as the guidelines are divided into three sections: crisis preparedness, emergency response and post-crisis action.

Finally, the third type of activity that can contribute to protection is advocacy. The ALNAP protection guide dedicates an entire section to the different advocacy strategies that can contribute to enhance the protection environment. It stresses in particular the importance of persuasion, mobilization, and denunciation. However it is relevant to note that this tool might be closer to human rights defense than to humanitarian programming. Nonetheless, it does have an impact on the field, particularly in situations in which the direct intervention of humanitarian actors is not possible because the context is too dangerous. In fact, advocacy can lead duty bearer to fill their human rights obligations, and consequently reduce the protection gap.

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[98] Slim Hugo. and Bonwick Andrew, *Protection - An ALNAP Guide for Humanitarian Agencies*, Overseas Development Institute, 2005.

2. Application and effectivity

a. Protecting against harm from authorities

When it comes to the protection of migrants against human rights violations committed by Libyan authorities, humanitarian actors have a substantial advantage, namely the will of authorities to set up cooperation mechanisms, and to improve their image towards the international community. The large majority of the human rights violations committed by authorities reportedly takes place in detention centers, disembarkation points, or on the way to these places. However thanks to existing cooperation between organizations and the Libyan authorities, these places are accessible to protection actors — although only to a limited number of them. Because of this cooperation, humanitarian actors mostly use classical protection methods, which do not particularly challenge the principle of neutrality and are not excessively invasive politically speaking, such as capacity building, livelihood improvement, monitoring, repatriation and mainstreaming, and there is a limited need for really innovative approaches.

The Danish Refugee Council, the IOM and the UNHCR have set up different activities aimed at protecting migrants in both the detention centers and the disembarkation points. One of the most important activity consist in building capacity within relevant authorities. For instance, the IOM organizes rights-based capacity building for DCIM staff in order to raise awareness about human rights respect in the framework of guarding activities, and to provide authorities with an understanding of mainstreaming — for instance by stressing the importance of organizing space as to avoid sexual and gender-based violence[99]. The Danish Refugee Council also carries our training aimed at detention centers staff, with different topics such as a comparative approach between asylum and Islam, practical steps for working in detention centers, and the monitoring-referral mechanism[100]. Finally, the UNHCR can also be cited as an example: it organizes capacity building in order to improve the registration capacity at disembarkation points[101]. The purpose is to tackle the question of the recognition of the refugee status in Libya, but it does not have any impact on the

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[99] *Libya Plan of Action - August 2016 to December 2017*, IOM, p.5, available here: https://www.iom.int/sites/default/files/country/docs/Libya/IOM-Libya-Plan-of-Action-2016-2017.pdf

[100] *Libya: Detention Task Force, Key Partners Overview Document*, UNHCR, May 2016, available here: https://www.humanitarianresponse.info/system/files/documents/files/unhcr_detention_task_force_may2016.pdf

[101] *Expanded Response in Libya 2016, Supplementary Appeal January 2017 - December 2017*, UNHCR, May 2017 p. 16, available here: http://reporting.unhcr.org/sites/default/files/UNHCR%20Expanded%20Response%20in%20Libya%20Supplementary%20Appeal%20-%20Jan-Dec%202017%20-%20May%202017.pdf

human rights conditions observed during search and rescue operations, nor on the subsequent detention. The absence of rights-based capacity building for the Libyan coast guards is one of the major shortcoming of migrants' protection in Libya, and it seems like the human rights violation they perpetrate are being overlooked in the design of the humanitarian response.

Another important aspect of protection from harm by authorities is the improvement of living conditions within the detention centers. The three organizations — Danish Refugee Council, IOM and UNHCR — also act directly on this aspect, through the distribution of food and non-food items the organization of medical consultations, but also with small interventions consisting for instance in disinfections and fumigations[102]. A major aspect of the improvement of living condition is the conduct of protection monitoring missions in the detention centers. Such investigations are carried out by the Danish Refugee Council, the IOM, and other actors present in Libya such as UNICEF.

Protection can also consist in putting an end to the journey in case the migrant is willing to: one of the IOM most known activity consist in organization the voluntary return of those who want to. As for August 2016, the IOM had repatriated nearly 11000 migrants since the 2011 crisis[103].

Finally a large part of the protection activities consist in taking into account the vulnerabilities and mainstreaming the protection of the vulnerable categories of persons. In this regard, the Danish Refugee Council carries out vulnerabilities assessment in a number of detention centers, aimed at sharing information with other organizations working in the centers[104]. The UNHCR conducts activities aimed at preventing sexual and gender based violence and negotiates the release of unaccompanied children and vulnerable individuals[105]. In disembarkation points, the organization also conducts targeted age and gender-specific measures including for protection from sexual and gender-based violence[106].

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[102] See for instance *Libya Plan of Action - August 2016 to December 2017*, IOM, p.5 available here: https://www.iom.int/sites/default/files/country/docs/Libya/IOM-Libya-Plan-of-Action-2016-2017.pdf

[103] *Assisted Voluntary Returns of Migrants from Libya Approach 11,000*, IOM, Press Release, 26 August 2016, available here: https://www.iom.int/news/assisted-voluntary-returns-migrants-libya-approach-11000

[104] *Libya: Detention Task Force, Key Partners Overview Document*, UNHCR, May 2016, available here: https://www.-humanitarianresponse.info/system/files/documents/files/unhcr_detention_task_force_may2016.pdf

[105] *Expanded Response in Libya 2016, Supplementary Appeal January 2017 - December 2017*, UNHCR, May 2017 p. 15, available here: http://reporting.unhcr.org/sites/default/files/UNHCR%20Expanded%20Response%20in%20Libya%20Supplementary%20Appeal%20-%20Jan-Dec%202017%20--%20May%202017.pdf

[106] *Libya: Detention Task Force, Key Partners Overview Document*, UNHCR, May 2016, available here: https://www.-humanitarianresponse.info/system/files/documents/files/unhcr_detention_task_force_may2016.pdf

Among the several measures aimed at protection migrants from harm coming from the authorities, none seems to exceed the obvious limits of humanitarian action, but a few are rather innovative and aim at using the humanitarian toolbox in the most effective manner possible: for instance, the Danish Refugee Council, the IOM and the UNHCR are all part of the Working Group on Mixed Migration, and more specifically of a sub-entity called the Detention Task Force[107]. In this group of organizations, protection activities in detention centers are being coordinated from a geographical perspective — all organizations do not access the same detention facilities — and materially — some organizations are focusing on healthcare, others such as UNICEF on child protection, etc… The overall idea of the task force is to obtain an optimal efficiency with the limited tools humanitarian action offers, and as a result of the task force efforts, a large number of protection needs are covered in a large number of detention centers. Another activity, interesting enough, is the re-establishment of family links by the Danish Refugee Council, in the absence of effort made in that direction by Libyan authorities[108]. The interesting thing about it is that it is not a survival necessity, and even in the framework of protection activities, the right to family life is rarely considered. However it responds to a real need met by migrants, and it is not a particularly invasive activity for Libyan authorities.

Humanitarian actors have managed to considerably contribute to the reduction of the protection gap when it come to human rights violations committed by Libyan authorities However, some challenges remain: firstly, capacity building efforts aimed at DCIM staff and facilities are considerable. However these centers remain underfunded, and this is one of the main cause for the poor living conditions they offer. It is unfortunately something humanitarian actors can hardly do anything about. Secondly, and this goes back to the question as to who is responsible for human rights violations, the Libyan territory is deeply divided, and several different authorities claim control aver different place. In some areas, militias-ran detention centers are inaccessible for humanitarian actors, who, again, are helpless when facing such situation. Finally, even in DCIM facilities accessible by organizations, some migrants have issues accessing protection services: Amnesty International reported that some persons who were carrying obvious marks of mistreatment by the DCIM staff would not dare registering to medical consultations, by fear of having to confess the mistreatments

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[107] Ibid.

[108] Ibid.

and being punished by the guards latter on[109]. About this, humanitarian actors may not be helpless: this is the type of vulnerability that calls for more innovation from protection actors.

So, in conclusion, when it comes to protecting migrants from harm perpetrated by the Libyan authorities, humanitarian actors make a rather agile use of the humanitarian toolbox, that allows them, despite their limited powers, to provide a slightly more protective environment to a large number of migrants, and on a large number of protection issues. There is still some space for improvement — for instance with human rights sensitive capacity building for the Libyan coast guards, or with innovative solutions so that detainees would not fear punishment if they seek help — but generally the results are rather positive.

b. Protecting against harm from criminal networks

Protecting people from criminal networks is much more challenging for humanitarian actors. In fact, unlike authorities, criminal networks have no interest in cooperating with organizations that will interfere in their lucrative business, and trying to push in this direction would be a dangerous bet from humanitarian actors. In this situation, we touch upon « the obvious limits » of humanitarian action. Because of this, reaching an optimal number of beneficiaries on an optimal number of protection issues requires an ingenious use of the humanitarian toolbox, with innovative solutions.

The Danish Refugee Council, the IOM, and the UNHCR have set up several types of projects aimed at protecting migrants from harm perpetrated by criminal networks. Firstly, and just as in the above paragraph, the organizations work on capacity building, but unlike in the case of harm perpetrated by authorities, in the present case it consists mainly in building the capacities of local partners. For instance, the Danish Refugee Council, which stresses the importance of working with local partners as a way to build trust and to ensure access, delivery and sustainability in a highly sensitive and complex context, works on building the capacities of two local NGOs in Libya — the OICEA and Mercy Wings[110]. The IOM also perceive local civil society as strategic partners, and

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[109] *EU Risks Fuelling Horrific Abuse of Refugees and Migrants in Libya*, Amnesty International, 14 June 2016, available here: https://www.amnesty.org/en/latest/news/2016/06/eu-risks-fuelling-horrific-abuse-of-refugees-and-migrants-in-libya/

[110] *Strategic Programme Document - DRC/DDG in Libya and Tunisia*, Danish Refugee Council, 2014, p.8, available here: https://drc.dk/media/1194589/libya-tunisia-strategic-programme-document-2014.pdf

works on building their capacities[111]. Finally, for the year 2017, the IOM plans to train the first responders in search and rescue operations on psychosocial first aid and supportive communication[112].

Protecting migrants from criminal network can be done through preventive measures: the IOM leads multimedia campaigns of informations aimed at informing prospective migrants of the risks they will take if they hire smugglers, at discouraging them from engaging in an irregular journey, and at sharing safe migration practices[113].

Remedial measures also play an important role in the protection of victims of harm by criminal networks: psychosocial support is at the heart of protection services provided by humanitarian actors in hubs such as disembarkation points and detention centers. However the issue with such services is that, because of the lack of safe space for irregular migrants, they are mostly accessible to people who are already in detention centers.

The third type of measures, responsive measures, is particularly interesting as it consists in directly putting an end to an on-going dangerous situation. This is the case for search and rescue operations. Even though these are partly done by the Libyan coast guards, a number of non-governmental organizations such as Médecins Sans Frontières, are participating to these operations. When conducted by humanitarian organizations, the migrants are not brought back to the Libyan shores, where they'll be at risk of human rights abuses, but to Italy.

The biggest obstacle to the protection of migrants from criminal networks is their invisibility. Data collection is a key element of protection. In order to better identify the migratory routes, the number of migrants transiting through them, and their evolving needs, the IOM set up the Displacement Tracking Matrix[114]. In parallel, the organization launched the Missing Migrants project, which gathers information coming from coast guards, medical staff, media reports, NGOs and survivors in order to establish a mapping of the casualties and disappearances on the main migratory routes to Europe[115]. Finally, the IOM also established Standard Operational Procedures (SOP) in order to identify the migrants missing or deceased at sea. In order to have a database that is as accu-

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[111] IOM Libya Brief, available here: https://www.iom.int/fr/countries/libya

[112] *Libya Plan of Action - August 2016 to December 2017*, IOM, p.4, available here: https://www.iom.int/sites/default/files/country/docs/Libya/IOM-Libya-Plan-of-Action-2016-2017.pdf

[113] Ibid, p.6

[114] Website of the Global Displacement Matrix: http://www.globaldtm.info/fr/libya/

[115] Website of the Missing Migrants Project: http://missingmigrants.iom.int/

rate as possible, the IOM builds the capacity of coast guards — including training, infrastructures and equipment — in order to implement the SOPs[116]. The Danish Refugee Council is also very much implied in the process of gathering information. It contributes the the 4Mi project of the Regional Secretariat on Mixed Migrations, which also aims at identifying the main migratory routes, but also at reporting incidents such as attacks by criminal networks, etc[117].

So when it comes to the protection of migrants against harm by criminal networks, the coverage by humanitarian actors — both in terms of migrants accessed and in terms of protection needs addressed — is much lighter than when it comes to protecting migrants from the behaviors of the authorities. However a large part of it is due to the fact that defending people from such threat is just outside the scope of humanitarian action and there isn't much organizations can physically do in order to change that. However one challenge could still be addressed by humanitarian actors, in order to reach more people and to protect them better: in the absence of safe space, it is possible to find innovative solutions to reach irregular migrants hiding in urban settings. The UNHCR showed the example by setting up a hotline that refugees and asylum seekers can call when they need help. In 2016, 3191 persons called the phone number[118]. The Danish Refugee Council, on the other hand, understood the key role that can be played by local civil society in better accessing migrant hiding in urban settings, and tackling harm by criminal networks with grassroots information and a more comprehensive approach.

In conclusion, humanitarian actors use the humanitarian toolbox more optimally when it comes to protecting migrants from harm by authorities than by criminal networks. However, in both cases one issues arise from the dependence to detention centers and disembarkation points for providing protection services. Protection actors, and in particular the international civil society, must learn how to cooperate with local civil society in order to set up innovative solutions and to access more people in need, still through the humanitarian toolbox.

In the next section, we will nonetheless study search and rescue operations as a successful example of innovative protection tool that builds on the humanitarian toolbox.

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[116] *Libya Plan of Action - August 2016 to December 2017*, IOM, p.4, available here: https://www.iom.int/sites/default/files/country/docs/Libya/IOM-Libya-Plan-of-Action-2016-2017.pdf

[117] Website of the 4Mi project: http://4mi.regionalmms.org/4mi.html

[118] Libya: Dashboard of key activities 2016, UNHCR, available here: https://www.humanitarianresponse.info/system/files/documents/files/unhcr_libya_key_activities_2016.pdf

B. Non-governmental search and rescue: a good practice of using the humanitarian toolbox?

This section aims at analyzing the ratio between the respect for the scope of humanitarian action and the effectivity of the protection activity in the case of search and rescue operations conducted by non-governmental organizations. The question remains relevant to the protection of mixed migrants in Libya, as it consist in responding to the smuggling of people by criminal networks from the Libyan coast.

In an article published in March 2017, Eugenio Cusumano discusses the links between search and rescue missions and humanitarianism[119]. The interesting thing when it comes to these operations is that they do put humanitarian actors in the position of the rescuer — which echoes the example provided above to illustrate the obvious limits of humanitarian action — and yet, all the conditions are present so that humanitarian principles can be respected. Impartiality is ensure by the fact that the very nature of rescue at sea does not allow rescuers to make a distinction based on the legal status: only the need of being rescued matters. Because these operations do not take place in a conflict setting, it is also much easier for humanitarian organizations to observe the principle of neutrality. Finally, several factors play in favor of the principle of independence: firstly, when it comes to international sea, both Libyan and Italian coast guards must refrain from limiting a vessel's freedom of navigation, unless they have an excellent justification to do so. Moreover, thanks to the 1974 International Convention for the Safety of Life at Sea, NGOs can justify their intervention with an actually duty to safeguard the life at sea. Interestingly enough, search and rescue operation also positively take into account the « do no harm » principle: not only are migrants rescued from a directly life threatening situation, but in addition, when intercepted by humanitarian organizations, they are not sent back to Libya. However this is made possible by a decision, from the Italian authorities, to allow the disembarkation of all migrants rescued offshore Libya in Italian ports, and as to 2 July 2017, it seems that the country may decide to close its shores to rescued migrants unless the European Commission accepts to intervene[120].

Despite these very good conditions in terms of humanitarian principles, search and rescue missions in the Mediterranean are currently suffering from an increasing external pressure shrinking

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[119] Eugenio Cusumano, *The Sea as Humanitarian Space. Non-Governmental Search and Rescue Dilemmas on the Central Mediterranean Migratory Route*, Journal of Mediterranean Politics, March 2017, p.1-8.

[120] *L'Italie menace de fermer ses ports aux ONGs,* Le Soir, 28 Juin 2017, available here: http://www.lesoir.be/101991/article/2017-06-28/migration-litalie-menace-de-fermer-ses-ports-aux-ong

the humanitarian space. Firstly, and with regards to the principle of independence, as just mentioned, the organizations carrying such activities are highly dependent on the Italian authorities in order to proceed to disembarkation in Europe. The operations are also coordinated by the Italian coast guards, and one can wonder if a refusal to cooperate during the conduct of operations could lead to negative consequences for NGOs disembarking in Italy. The principle of neutrality is also at jeopardy, in particular because of the pressure applied by the EU in the implementation of its anti-smuggling policy. As a result, some organizations are pressured into participating to the investigations. Some of them, such as MSF, refuse to participate to the EU investigations, whereas others, such as MOAS, do. But general, the overall result of this pressure from the EU is the fear of being accused of collusion with smugglers, as Frontex has already done recently. Finally, there also has been efforts made in order to involve NGOs in early identification processes, which may have an impact on the principle of impartiality, as the idea is to prepare migrants to be sorted at disembarkation. The strength of SAR is that they give a good occasion for completely disregarding the legal status, and this shall not change.

Another issue met by search and rescue operations is the tensions between governmental and non-governmental actors operating in similar areas. While their actions are complementary — the governmental operations aren't sufficient to rescue every migrant — they do have different overall objectives: governmental entities such as the Libyan coast guards are fight against smuggling, in particular under the pressure of the EU, whereas the focus of non-governmental organizations is on the provision of a safe passage to Italy. This leads to complicated relation and several incidents in which the Libyan Coast guard interfered with search and rescue operations conducted by NGOs were reported.

Finally, non-governmental search and rescue operations also suffer from a number of criticism: firstly, it is said to lead to an abdication, from the States, of their responsibility to protect life at sea. However this criticism goes back to the idea according to which protection actors are not responsible for the protection gap, and it is absurd to put the blame on them for the State's refusal to carry its international obligations. Secondly, the non-governmental search and rescue operations are said to feed dangerous behaviors from smugglers, who are ready to put more people on a boat and to use more dangerous routes. That being said, in Eugenio Cusumano's view, the change of behavior of smugglers can also, and mostly, be explained by the destruction of boats carried out in the framework of the Sophia's mission. If anything, both of this criticisms can explain that humanitarian organizations are doing the best they can with the tools they have — acknowledging their li-

mits and yet saving thousands of lives. With search and rescue operations, NGOs make an innovative and optimal use of the humanitarian toolbox. However, it may be jeopardize, in particular by the interference of the EU.

CONCLUSION ON THE HUMAN RIGHTS PROTECTION AND THE MATERIAL SCOPE OF HUMANITARIAN ACTION

Protecting mixed migrants in Libya definitely raises questions with regards to the material scope of humanitarian action. Indeed, the challenge is for humanitarian actors to respond to particularly dangerous and structural threats to both the dignity and the physical integrity of migrants, and yet to act in a humanitarian capacity when doing so.

In this chapter we have defined the extent of the material scope of humanitarian action in a negative manner - by stating the obvious limits of humanitarian action, and we have looked into and synthesized a set of texts of reference in order to grasp more clearly what protection activities — the content of the scope — can consist in. From this, we can already conclude that humanitarian actors cannot fill the protection gap by their actions alone and acknowledging that is already extremely important. Their power is limited to a simple contribution to the reduction of the protection gap, which can be done through a rather limited toolbox. It seems like the material scope of humanitarian action is vertically challenged as it is limited in extent, but call for an optimal use of its content. Practice shows that, when it comes to the protection of migrants against harm from authorities, using this toolbox doesn't entail much challenge, but doing so in order to protect migrants from harm perpetrated by criminal networks requires innovative solutions, in particular in order to access those hiding in urban settings — a bottom up approach is for instance one of the keys towards a more efficient coverage.

GENERAL CONCLUSION

The humanitarian world, which already went through a significant transformation process in the past twenty years, is being challenged by the global migration crisis on many levels. Humanitarian actors turned into human security actors, targeting new beneficiaries and carrying new activities focusing on empowerment and protection. The humanitarian/development nexus is more than ever at the heart of discussions. However, the humanitarian values are so vital that a future in which these disciplines are merged is not something to hope for, as both are limited in scope: while development must focus on long term and political solutions, the goal of humanitarian action — to save lives and to alleviate human suffering in emergency settings — requires to respect strict principles in order to build trust and to access beneficiaries.

Nonetheless, the limits of the scope of humanitarian action are increasingly blur, as the focus on humanity begins to prevails on the strict respect for the principles of neutrality and impartiality. We can conclude from the above research that, when facing a situation such as the phenomenon of mixed migrations in Libya, the personal scope of humanitarian action is being horizontally stretched — meaning that the definition of beneficiaries is being enlarged as the point of reference becomes the rights, or the needs, rather than the legal status — while the material scope of humanitarian action is being vertically challenged — because protection against dangerous threats requires an accumulation of innovative measures that can hardly go beyond the « obvious limits » of the humanitarian toolbox. In any case, it is because human rights have been progressively integrated in humanitarian action in the past two decades that humanitarian actors have been capable to adapt to the challenge of the global migration crisis.

We cannot stress enough that the States are the primary duty bearers of protection obligations, and the only ones able to fully address the structural issues that are causing harm to migrants. The scope of humanitarian action allows humanitarian actors to contribute, sometimes substantially, to the reduction of the protection gap, but this must not lead Libya to abdicate on its responsibility, nor the international partners — such as the EU — to overlook the human rights implications of their bilateral policies. Without their efforts, the situation of migrants in Libya will just not improve, and humanitarian actors will be increasingly tempted to extend the scope of humanitarian action.

In this regard, the EU has been bearing an important responsibility since it had started to externalize its migration policy in the broader context of its recent *« migration management »* strategy.

The two main pillars of this strategy are (i) the fight against organized crime, which results in the Libyan authorities committing more and more violations of procedural rights pursuant the arrests of irregular migrants, and in the smuggler taking additional risks when it comes to choosing a route, and (ii) the support of livelihood in the countries of departures through instruments such as the EU Trust Fund for Africa, which is suspected of only resuming preexisting development projects through the lens of migration management, contributing therefore to build a negative narrative on migrations without actually having an added value for development. If the EU keeps going in this direction without minding the human rights consequences, we can expect the scope of humanitarian action to be further challenged in the future.

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