Roma Tre University, Department of Law

International Protection of Human Rights Legal Clinic

LEGAL EXPERT OPINION

rendered in the context of an individual communication to be submitted to the Committee on the Elimination of All Forms of Discrimination against Women

12 April 2021

1. Introduction

This legal expert opinion is rendered upon the request of ASGI (Associazione per gli Studi Giuridici sull'Immigrazione), in the context of the Project Sciabaca&Oruka – Oltre il Confine. It has been prepared, under the supervision of Prof. Alice Riccardi, by the students of the Legal Clinic in International Protection of Human Rights of the Roma Tre University (Rome, Italy) Department of Law, class of 2019/2020. The students who participated in the drafting of this opinion are Federica Borlizzi, Hamish Christopher Eoin Hamilton, Max Johnson, Ginevra Marchesi and Beko Wood. Ms Chiara Cardinali assisted in the drafting process.

The opinion limits itself to a general legal point of view and does not discuss the individual facts underlying the communication submitted to the Committee on the Elimination of All Forms of Discrimination against Women (the Committee). General factual information presupposed by this opinion derive from reliable, multi-level and authoritative sources available in the public domain, meeting commonly agreed standards for so-called Country of Origin Information (COI) reports. The Legal Clinic is one of the main Italian COI providers, whose COI reports are widely used among administrative authorities, the judiciary and lawyers. Notably, the Legal Clinic published two COI reports (in 2018 and 2019) on the situation of migrants in Libya and appeared as *amicus curiae* before the European Court of Human Rights with the aim to assist the Court in conducting a factual scrutiny into the migrants' condition of life in Libya (2019).[1] Furthermore, in 2020, the Legal Clinic published a COI report focused on the issue of human trafficking in Nigeria.[2]

This opinion aims to determine whether States Parties to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as States of destination of migrant women victims of human trafficking, may violate the CEDAW by supporting the return of said women from transit States to their State of origin. This is in the context of so-called Assisted Voluntary Return and Reintegration (AVRR) programs or Voluntary Humanitarian Returns (VHR) programs run by International Organization for Migration (IOM). In particular, the opinion aims to assess whether European States parties to the CEDAW may violate it by supporting the IOM-conducted return of migrant women victims of human trafficking stranded in Libya.

To answer the question put to the Legal Clinic, this opinion proceeds in three steps. First, it outlines the relevant legal framework – as originating from the CEDAW and customary international law – and concludes that CEDAW States Parties are under an obligation not to conduct and to prevent others from conducting so-called "disguised expulsions" exposing migrant women victims of trafficking to gender-based violence. Second, the report discusses issues of jurisdiction. It affirms that CEDAW States Parties shall respect and protect trafficked women's right not to be exposed to gender-based violence through disguised expulsion, regardless of where said victims are located, provided that a normative relationship of power ties mentioned victims to CEDAW States Parties. Lastly, it depicts scenarios in which CEDAW States Parties may be held responsible, under the Convention, for conducting, supporting or tolerating the disguised expulsion of said migrant women from Libya to their country of origin.

[1] ECtHR, *S.S. and others v. Italy*, *Written Submissions pursuant to Article 36 ECHR and Rule 44 of the Rules of the Court by the Legal Clinic in International Protection of Human Rights of the Department of Law at Roma Tre University* (11 November 2019).
[2] Roma Tre University, Legal Clinic in International Protection of Human Rights, *Rapporto COI Nigeria – tratta di esseri umani* (19 May 2020).

2. The CEDAW prohibits its States Parties from conducting or failing to prevent others from conducting disguised expulsions

2.1. CEDAW States Parties must respect and protect women's rights against trafficking

The CEDAW, as a gender-specific and dynamic human rights instrument, forms part of a comprehensive legal framework directed to, *inter alia*, ensure that migrant women do not suffer sex- and gender-based discrimination.[3] The Committee recognizes that gender-based violence is a form of discrimination, thereby falling within Article 1 of the Convention.[4] In turn, gender-based violence includes trafficking, which the Committee considers "one of the major forms of persecution experienced by [migrant] women".[5]

Consistent with international law and practice, the Committee took note that trafficking in women may be a ground for granting international protection,[6] including residence on humanitarian grounds, asylum and refugee status. In this latter respect, the United Nations High Commissioner for Refugees (UNHCR), in its Guidelines on international protection, classifies women victims of trafficking as a "social group" for the purposes of refugee status.[7] Accordingly, under the specific circumstances of the case, States are bound not to refoul a trafficked woman. As upheld by the Committee, this particularly applies when return of a trafficked woman to her country of origin does not appear as an appropriate and durable solution due to the fear of being re-trafficked or experiencing stigma, threats, intimidation, violence or retaliation; or when she may face persecution and/or violations of the right to life or the prohibition against torture and other forms of ill-treatment.[8]

Consequently, under the CEDAW, States shall respect and protect migrant women's rights against trafficking, including re-trafficking. Such obligations generally stem from Article 2 CEDAW, an umbrella provision requiring States Parties to respect, protect and fulfil women's right to non-discrimination in "all its forms",[9] and more specifically from Article 6 CEDAW, which binds States Parties to take all appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of prostitution of women, as follows.

2.1.1. CEDAW States Parties shall respect women's rights against trafficking at all stages of the displacement cycle

The CEDAW Committee clarified that the two protection regimes stemming from the principle of non-refoulement and Article 2(d) CEDAW – pursuant to which States Parties undertake to refrain from engaging in any act or practice of discrimination against women

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[3] See CEDAW, *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women* (5 November 2014) UN Doc CEDAW/C/GC/32 (hereinafter *General recommendation No. 32*), para 9.

[4] CEDAW, *General recommendation no. 19*: *Violence against women* (1992) UN Doc A/47/38), para 7(b); CEDAW, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* (16 December 2010) UN Doc CEDAW/C/GC/28, para 5 (hereinafter *General recommendation no. 28*).

[5] *General recommendation No. 32*, para 15; CEDAW, *General recommendation no. 38 (2020) on trafficking of women and girls in the context of global migration* (20 November 2020) UN Doc CEDAW/C/GC/38, para 25 (hereinafter *General recommendation no. 38*).

[6] *General recommendation No. 32*, para 15.

[7] UNHCR, *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked* (7 April 2006) UN Doc HRC/GIP/06/07; see also *General recommendation No. 32*, para 45.

[8] *General recommendation no. 38*, para 89.

[9] *General recommendation no. 28*, para 8. See also *General recommendation No. 32*, para 17 ff.

and to ensure that public authorities and institutions act in conformity with this obligation[10] – complement and reinforce one another.[11] Due to such overlap, although the Convention does not contain an explicit provision on non-refoulement, still such obligation is implicitly provided by the CEDAW, to the effect that it binds its States Parties not to extradite, deport, expel or otherwise remove a woman from their territory to the territory of another State where there are substantial grounds for believing that there is a real risk of irreparable harm,[12] e.g. where "she would risk suffering serious forms of discrimination, including serious forms of gender-based persecution or gender-based violence", including re-trafficking.[13]

This means that CEDAW States Parties shall refrain to adopt "policies, regulations, programmes, [and] administrative procedures … that directly or indirectly"[14] result in the forcible return of women victims of trafficking to their country of origin when there is a real risk of re-trafficking. The Committee clarified that the Convention applies at every stage of the displacement cycle. Accordingly, the said duty applies both during status determination procedures in the State of destination and throughout the return or resettlement process of the migrant in the States of transit and origin.[15]

2.1.2. CEDAW States Parties must prevent trafficked women from being exposed to re-victimization

In addition to the obligation to respect, States parties have another primary duty under the CEDAW: they must, both individually and collectively, prevent women and girls from being exposed to violations of their Convention rights committed by private persons and non-State actors,[16] including organizations.[17] This duty comprises an obligation to punish those responsible for the violation of CEDAW's rights and a duty to exercise due diligence in order to prevent the violation of CEDAW's rights.[18] Article 2(e) CEDAW incorporates this latter principle by explicitly providing that States Parties are to take "all appropriate measures to eliminate discrimination against women by any person, organization or enterprise".[19] The Committee accepts that this includes exposure to the risk of non-refoulement[20] and of being trafficked,[21] as explicitly provided for under Article 6 CEDAW.

In turn, this framework implies that firstly, CEDAW States Parties must possess, on a permanent basis, a legal and administrative apparatus guaranteeing respect for the duty to prevent trafficked women to be exposed to non-refoulement and re-trafficking. This *inter*

[10] CEDAW, *S.O. v Canada*, Inadmissibility decision, Comm. No. 49/213 (19 December 214) UN Doc CEDAW/C/59/D/49/2013, para 9(5).
[11] *General recommendation No. 32*, para 9.
[12] ibid, para 21 ff. See *General recommendation no. 28*, para 12.
[13] *General recommendation No. 32*, para 23. See also CEDAW, *N. v. The Netherlands*, Decision, Comm. No. 39/2012 (12 March 2014) UN Doc CEDAW/C/57/D/39/2012, para 6.4.
[14] *General recommendation no. 28*, para 9.
[15] *General recommendation No. 32*, para 20.
[16] ibid, para 7.
[17] *General recommendation no. 38*, para 17.
[18] See CEDAW, *J.I. v. Finland*, Adoption of Views, Comm. No. 103/2016 (5 March 2018) UN Doc CEDAW/C/69/D/103/2016 (hereinafter *J.I. v. Finland*), para 8.9.
[19] CEDAW, *General recommendation no. 35 (2017)* on gender-based violence against women, updating general reccomendation No. 19 (26 July 2017) UN Doc CEDAW/C/GC/35 (hereinafter *General recommendation no. 35*), para 24.
[20] *General recommendation No. 32*, para 22.
[21] *General recommendation no. 38*, para 6.

alia includes the duty to prohibit trafficking[22] and more generally to align the domestic legal order to the CEDAW,[23] e.g., by ensuring victims' access to justice.[24]

Secondly, CEDAW States Parties must pursue by all appropriate means a policy of eliminating discrimination against women,[25] including trafficking. Although the due diligence standard grants a certain degree of flexibility to States, still adopted measures, in order to satisfy the requirement of appropriateness, must address all aspects of States' obligations under the CEDAW. In general terms, the Committee accepts that States must, *inter alia*: abstain from performing, sponsoring or condoning any practice, policy or measures that violates the Convention;[26] adopt comprehensive action plans and implementation mechanisms for the practical realization of CEDAW's rights;[27] investigate, prosecute and punish perpetrators and provide reparation to victims of violence.[28] In the specific context of trafficking, the Committee has referred to the duty to, *inter alia*: identify, assist and protect trafficking survivors;[29] prevent revictimization by guaranteeing trafficked women against forcible return to their country of origin;[30] improve cooperation with receiving States to ensure that the truly voluntary repatriation of trafficked citizens is facilitated through standardized processes and effective communication between the authorities and officials involved. There is also a duty to ensure that the receiving country complies with international standards for the protection and provision of assistance to victims of trafficking.[31]

2.2. General international law prohibits so-called disguised expulsions

According to the United Nations (UN) International Law Commission (ILC), a so-called disguised (or constructive or indirect) expulsion consists in:

> "the forcible departure of an alien from a State resulting indirectly from an action or omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons, intending to provoke the departure of aliens from its territory other than in accordance with the law".[32]

The ILC clarified in the Commentary to the Draft Articles on the Expulsions of Aliens that disguised expulsions are such when two constitutive elements are present.

First, an element of intention, whereby the forcible departure of the alien must be the "intentional result of an action or omission attributable to the State". According to the ILC, this happens when the "expelling State, without adopting a formal expulsion decision, engages in conduct intended to produce and actually producing … the forcible departure of an alien from its territory".[33] In this respect, the ILC added that a State may commit a

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[22] ibid, para 14.
[23] *General recommendation no. 28*, para 10.
[24] *General recommendation no. 38*, para 6.
[25] *General recommendation no. 28*, para 23.
[26] ibid, para 37.
[27] ibid, paras 17 and 24; *J.I. v. Finland*, para 8.9; CEDAW, Anna Belousova v. Kazakhstan, Comm. No. 45/2012 (25 August 2015) UN Doc CEDAW/C/61/D/45/2012, para 10.8.
[28] CEDAW, *General recommendation No. 19 (1992)* on violence against women (1992), para 9; *General recommendation no. 35*, para 24.2(b).
[29] *General recommendation no. 38*, para 6.
[30] ibid, para 41.
[31] ibid, para 91.
[32] ILC, *Report of the International Law Commission, Sixty-sixth session (5 May-6 June and 7 July-8 August 2014)*, UN Doc A/69/10 (hereinafter ILC, 2014 Report), p 35, art 10(2).
[33] ibid 36, para 3.

disguised expulsion through its own agents, or by supporting or tolerating acts committed individually or collectively by other persons, when support or tolerance is "constituted [by] an action or omission attributable to the State … intending to provoke departure of aliens".[34] Doctrine agrees that, according to the wording of Draft Article 10, intention shall not be demonstrated in each individual case.[35]

Second, an element of compulsion, whereby "the circumstances in the country of residence [shall be] such that the alien cannot reasonably be regarded as having any real choice".[36] The Committee against Torture (CAT) referred *inter alia* to the adoption of "dissuasive measures or policies, such as detention in poor conditions for indefinite periods".[37] Furthermore, the Special Rapporteur on the human rights of migrants stated in 2018 that all acts by which persons are sent back or returned to their country of origin or habitual residence shall be considered forced returns when they lack "genuine, fully informed and valid consent, thus … voluntariness" on the part of the returnee. The free character of voluntariness may be determined either by coercion or by "lack of alternatives to return".[38] In regard to coercion, the Special Rapporteur made *inter alia* reference to the fact that migrants may agree to return "out of despair, to avoid deportation, or because they are held in detention – some indefinitely".[39] Regarding the alternatives offered, they shall be "sufficiently valid … e.g., through the facilitation of temporary permits or permanent residence, accompanied by relevant administrative, logistic and financial support".[40] The European Court of Human Rights (ECtHR) echoed this approach in *M.S. v Belgium*, where it affirmed that consent to return expressed by the migrant shall be "surrounded by sufficient guarantees in order to ensure that it is expressed freely for it to be valid".[41]

Draft Article 10(1) of the mentioned ILC Draft Articles affirms that "[a]ny form of disguised expulsion" is prohibited. The ILC specifies that such prohibition stems "under international law" as, "in essence, [a] disguised expulsion infringes the human rights of the alien in question, including the procedural rights".[42] In turn, migrants who are so expelled are subject to the full protection of the principle of non-refoulement, the prohibition on collective expulsion and the right to an effective remedy. The ECtHR embraced this perspective in *N.A. v Finland*, where it established that the consent to return, expressed by the applicant, did not relieve Finland from its European Convention of Human Rights non-refoulement obligations, both substantive and procedural. This is because Finland did not offer valid alternatives to the applicant other than an assisted voluntary return procedure conducted by the IOM.[43]

Conclusively, under customary law, States shall not create circumstances which leave an individual who is protected by international law against return with no real alternatives

[34] ibid 37-38, para 6.
[35] Won Kidane, 'Missed Opportunities in the International Law Commission's Final Draft Articles on the Expulsion of Aliens' in (2017) 30 Harvard Human Rights Journal, 4.
[36] ILC, 2014 Report 36, para 4.
[37] CAT, *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22* (4 September 2018) UN Doc CAT/C/GC/4, para 14.
[38] HRC, *Report of the Special Rapporteur on the human rights of migrants* (4 May 2018) UN Doc A/HRC/38/41, paras 17-18.
[39] ibid para 30.
[40] HRC, *Visit to the Niger: Report of the Special Rapporteur on the human rights of migrants* (16 May 2019) UN Doc A(HRC/41/38/Add.1, para 50.
[41] ECtHR, *M.S. v Belgium*, App No 50012/08 (31 January 2012), para 124.
[42] ILC, 2014 Report 36, para 4. Accordingly, the prohibition of disguised expulsions is rooted in customary international law.
[43] ECtHR, *N A. v Finland*, App No 25244/18 (14 November 2019), paras 54-57.

other than returning. This may happen by action or omission, and also by support or toleration of acts and omissions of others. Regardless of the form it takes, or the methods employed to conduct it, the return of migrants to their country of origin may qualify as a disguised expulsion when the two conditions mentioned above are met. This means that if a State cannot directly return migrants to their country of origin, because such return would be contrary to international law, it cannot take indirect or disguised measures to the same effect either. International practice has consistently employed the test of free consent to evaluate whether returns hide disguised expulsions. Doctrine has noted that such practice shall be understood as endorsing a test that examines both "the pressure applied by the State as well as the vulnerability of the individual to the pressure exerted".[44]

2.3. The CEDAW shall be read in light of the customary prohibition of disguised expulsions

Against this background, we submit that Articles 2 and 6 CEDAW shall be read together with the customary notion of disguised expulsions upheld by the ILC.[45] As recognized by the Committee, the CEDAW is an instrument which "adapts itself to the development of international law".[46] Although mentioned provisions do not expressly prohibit States Parties from creating circumstances that leave trafficked women who are protected by the CEDAW with no real alternatives other than returning to her country of origin, such provisions are to be read in light of, and in harmony with, the entire legal system prevailing at the time of the interpretation. [47] Treaties shall not to be interpreted in isolation, as they are part of a "coherent and meaningful whole" constituted by their surrounding normative environment,[48] which includes customary law.[49]

This means that States Parties that are prohibited, under the terms of the CEDAW, from directly returning a migrant victim of trafficking to her country of origin, cannot intentionally take indirect or disguised measures to the same effect either. This includes leaving vulnerable migrant women victims of trafficking with no real alternatives other than returning to their country of origin, where they are at real risk of re-trafficking. In line with this interpretation of CEDAW States Parties' obligation to respect women's rights against trafficking, States shall refrain from adopting policies, regulations, programmes and administrative procedures, affecting both status determination procedures and return processes, that result in the disguised expulsions of women at real risk of re-trafficking.

This means that CEDAW States Parties are also under an obligation to ensure that their legal and administrative apparatus permanently guarantees trafficked women against disguised expulsions. They must also prevent non-State actors from committing disguised expulsions of trafficked women at risk of re-trafficking. This obligation extends to situations of both support and mere toleration, when "constituted [by] an action or omission attributable to the State … intending to provoke departure of aliens".[50] Notably, this

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[44] Penelope Mathew, 'Constructive refoulement', in Satvinder Singh Juss (ed) *Research Handbook on International Refugee Law* (Elgar, 2019) 222.
[45] ILC, 2014 Report 35, art 1(2).
[46] *General recommendation No. 32*, para 2.
[47] Art 31(3)(c) of the Vienna Convention on the Law of Treaties; cf ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*, Advisory Opinion (21 June 1971), 16 ICJ Rep, para 53.
[48] Adamantia Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law', 66(3) International & Comparative Law Quarterly (2017) 557–588, p 559.
[49] See ECtHR, *Golder v. The United Kingdom*, App. No. 4451/70, Judgment (21 February 1975), para 35.
[50] ILC, 2014 Report 37-38, para 6.

includes the support offered to non-State actors or private persons who materially return the migrant without offering any real alternative other than returning.

3. CEDAW States Parties must respect and protect trafficked women from disguised expulsions, regardless of whether the affected victims are in their territory

Article 2 of the Optional Protocol (OP) to the CEDAW establishes that the Committee is competent to receive communications from individuals subject to the jurisdiction of its States Parties. For the purposes of this opinion, Article 2 OP means that the Committee may consider communications claiming that CEDAW States Parties conducted or failed to prevent others from conducting disguised expulsions of trafficked migrant women at real risk of re-trafficking situated in their territory. Furthermore, this extends to migrant women within the power of CEDAW States Parties. As noted by the Committee, CEDAW States Parties "are responsible for all their actions [and omissions] affecting human rights, *regardless of whether the affected persons are in their territory*" (emphasis added)[51] Accordingly, States shall also respect and protect trafficked women from disguised expulsions located outside of their territory, when they have the power to have a direct and reasonably foreseeable impact on the enjoyment by said women of their right to be free from trafficking.[52] This understanding of jurisdiction embraced by the Committee is perfectly coherent with the functional approach to jurisdiction of the Human Rights Committee (HRC). The HRC recently stated that a "special relationship of dependency" ties States to individuals irrespective of where such individuals find themselves, when they are "directly affected by the decisions taken by the [State] authority in a manner that was reasonably foreseeable in light of the relevant obligations of [such State]".[53]

In light of the obligation to respect, CEDAW States Parties must refrain from adopting policies, regulations, programmes, and administrative procedures resulting in the disguised expulsion of women victims of trafficking at real risk of re-trafficking, irrespective of where the migrant women find themselves when the adoption of said policies, regulations, programmes, and administrative procedures by the concerned State takes place. This is provided that such policies, regulations, programmes and administrative procedures directly and foreseeably cause the violation of the CEDAW duty not to expose women to trafficking.

Concerning the obligation to protect, the Committee already clarified that CEDAW States Parties must protect women from being exposed to a real, personal and foreseeable risk of serious forms of discrimination, including gender-based violence and thus also trafficking, to be determined on a case-by-case basis,[54] "irrespective of whether such consequences would take place outside the territorial boundaries of the sending State party".[55] This is

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[51] *General recommendation no. 28*, para 12.

[52] Cf HRC, *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life* (30 October 2018) UN Doc CCPR/C/GC/36, para 63 (hereinafter HRC, *General Comment No. 36*).

[53] HRC, *A.S., D.I., O.I. and G.D. v. Italy, Views adopted by the Committee under article 5(4) of the Optional Protocol*, Comm. No. 3042/2017 (27 January 2021) UN Doc CCPR/C/130/D/3042/2017, para 7(8) (hereinafter HRC, *A.S. and others v Italy*).

[54] CEDAW, *S.O. v Canada, Inadmissibility Decision*, Comm. No. 49/2013 (27 October 2014) UN Doc CEDAW/C/59/D/49/2013, para 9.5; CEDAW, *M.N.N. v. Denmark, Decision adopted by the Committee at its fifty-fifth session, 8-26 July 2013*, Comm. No. 33/2011 (15 July 2013) UN Doc CEDAW/C/55/D/33/2011, para 8.10

[55] *General recommendation No. 32*, paras 7, 22; CEDAW, *N. v. The Netherlands, Decision adopted by the Committee at its fifty-seventh session*, Comm. No. 39/2012 (17 February 2014) UN Doc CEDAW/C/57/D/39/2012, para 6.4; CEDAW, *Y.W. v. Denmark, Decision adopted by the Committee at its sixtieth session*, Comm. No. 51/2013 (2 March 2015) UN Doc CEDAW/C/60/D/51/2013, para 8.6.

again coherent with the HRC's approach; when States are tied to victims through a special relationship of dependency imposing positive obligations, they must act with due diligence to protect their Convention rights.[56] Said states may be liable for omissions even if the consequences of violations take place outside of any territory effectively controlled by the State. That is, when such consequences occur in a direct and reasonably foreseeable manner.[57] In other terms, when there is a *normative* relationship between the State and the victim, and the former has the factual ability to act in the circumstances of the case, then the State is under a duty to act. In this respect, it is worth recalling that in General Comment No. 36, the HRC established that States must "take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory … but having a direct and reasonably foreseeable impact … outside their territory" are consistent with the Covenant.

4. By supporting IOM-conducted returns of trafficked migrant women stranded in Libya, CEDAW States Parties may violate the Convention

UN sources affirm that it is common that "the conditions under which migrants request assisted voluntary return do not allow for the return to be qualified as voluntary". In fact, migrants often sign up to return because it is the only assistance offered to them.[58] This would be particularly true for migrants held in indefinite detention, or that can no longer endure the violation of their fundamental rights while detained. This includes migrants who consent to IOM-conducted returns.[59] Regarding migrant women and girls held in Libyan migrants' detention centres, both official and unofficial, it is commonly acknowledged that they are routinely subject *inter alia* to discrimination, torture, sexual violence, slavery, sexual slavery and sexual exploitation.[60] This means that IOM-conducted HVR may entail an element of compulsion and thereby qualify as disguised expulsions, should the circumstances of the case so demonstrate.

In light of the foregoing elaboration, the support offered by CEDAW States Parties to the IOM-conducted return of a trafficked migrant woman stranded in Libya to her country of origin, when she is at real risk of re-trafficking, may violate Articles 2 and 6 CEDAW.

Firstly, Libya – i.e. the State having territorial jurisdiction over the returned migrant – may violate both the duty to not refoul the migrant woman through disguised measures and the duty to prevent her from exposure to this violation.

Libya violates the *duty to respect* if it intentionally takes indirect or disguised measures meant to return the vulnerable migrant woman to her country of origin, i.e. by adopting legislation, policies, regulations, programmes and administrative procedures which, alternatively: (a) leave the migrant woman with no real alternatives other than returning to her country of origin through the IOM's VHR programme, notwithstanding the real risk of re-trafficking; or (b) coerce her to accept to enrol in the IOM's VHR programme, an alternative which the woman accepts due to the overall coercive environment, notwithstanding the real risk of re-trafficking.

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[56] HRC, *A.S. and others v Italy*, para 7(8).
[57] HRC, *General Comment No. 36*, para 63; 6(4); HRC, *A.S., D.I., O.I. and G.D. v Malta, Comm. No. 3043/2017* (27 January 2021) UN Doc CCPR/C/128/D/3043/2017, para 6(4).
[58] HRC, *Report of the Special Rapporteur on the human rights of migrants* (4 May 2018) UN Doc A/HRC/38/41, para 30.
[59] HRC, *Report of the Special Rapporteur on the human rights of migrants* (16 May 2019) UN Doc A/HRC/41/38/Add.1, para 49.
[60] As of recently UNSC, *United Nations Support Mission in Libya, Report of the Secretary-General* (19 January 2021) UN Doc S/202162, paras 58, 63, 106.

Libya violates the *duty to prevent* if it intentionally allows its legal and administrative apparatus to not guarantee the woman against the disguised expulsion conducted by the IOM, either by: (a) supporting through definite actions, including material support or by financial means, the IOM's VHR programme, which offers to the woman the only alternative to return to her country of origin, an alternative which the woman accepts due to the overall coercive environment, notwithstanding the real risk of re-trafficking; (b) tolerating the IOM's VHR programme, which offers to the woman the only alternative to return to her country of origin, an alternative which the woman accepts due to the overall coercive environment, notwithstanding the real risk of re-trafficking.

Secondly, European States may either aid or assist Libya in violating Articles 2 and 6 CEDAW or infringe upon Articles 2 and 6 CEDAW by their own acts and omissions.

European States *aid or assist*[61] Libya in taking indirect or disguised measures meant to return the vulnerable migrant woman to her country of origin – an obligation opposable both to Libya and to such European States under the CEDAW – if: (a) the assistance provided significantly facilitates the violation of the CEDAW; (b) the assistant States have knowledge of the circumstances of the wrongful act committed by Libya;[62] and (d) they have jurisdiction over the migrant, i.e. they have the power to have a direct and reasonably foreseeable impact on the enjoyment by the said woman of her rights. In case of derivative responsibility, it is commonly acknowledged that the notion jurisdiction shall not be strictly interpreted.[63]

European States directly violate the CEDAW if they allow their legal and administrative apparatuses to not guarantee the woman against disguised expulsion. This may happen by action or omission.

European States directly *violate by action* the obligation to not allow their legal and administrative apparatuses to not guarantee the woman against disguised expulsion if they support the acts of others that create the circumstances leaving the woman with the only alternative to enroll in the IOM's VHR programme, which she accepts due to the overall coercive environment, notwithstanding the real risk of re-trafficking, provided that: (a) such support consists in definite actions attributable to European States, including material support or by financial means offered to actors creating mentioned circumstances. e.g. through support offered *inter alia* to the IOM;[64] (b) European States act intentionally, i.e. with the aim to provoke the migrant's return. Intention shall not be demonstrated in each

[61] The following criteria stem from customary law. See ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) UN Doc A/56/10, art 16. See *mutatis mutandis* Giuseppe Pascale, 'Is Italy Internationally Responsible for the Gross Human Rights Violations against Migrants in Libya?' (2019) 56 QIL, Zoom-in, paras 5-6.

[62] Facts along the lines of what we elaborated have *inter alia* led the UN Security Council Panel of Experts on Libya to report that the Libyan Ministry of Interior "tied the existence [of migrants' detention centres] to the pressure exerted by a few European countries to prevent migrants from crossing the Mediterranean". In this respect, the Panel of Experts included among the "policies and agreements" representing such pressure the Libya-Italy Memorandum of Understanding of 2017 renewed for further three years in 2020, the establishment by the EU of Operation IRINI and the Libya-Malta agreement of June 2020 in the area of combating illegal immigration. See UNSC, *Final report of the Panel of Experts on Libya established pursuant to Security Council resolution 1973 (2011)* (8 March 2021) UN Doc S/2021/229, para 44 and Annex 17, 124.

[63] *Ex multis* Maarten den Heijer, 'Shared Responsibility before the European Court of Human Rights' (2013) LX Netherlands International Law Review 410, 435 ff. Cf *inter alia* the case-law of the ECtHR, including *Ilaşcu amd others v. Moldova and Russia*, App. No. 48787/99 (8 July 2004) paras 392-394.

[64] In this respect, it is irrelevant whether the primary obligation is incumbent upon the IOM or not. Indeed, under customary law, States shall not cause the forcible departure of an alien from a State resulting indirectly from an action or omission attributable to the State, including where the State supports or tolerates acts committed by other persons, irrespective of who such persons are. See ILC, *2014 Report*, 35, art 10(2).

individual case but may be proved by States' general policies aimed at migrants' departure;[65] and (c) European States have jurisdiction over the migrant, demonstrated by the power to have a direct and reasonably foreseeable impact on the enjoyment by the said woman of her right to be free from trafficking. This means that European States have jurisdiction over the migrant when the provision of financial assistance to the IOM by the conclusion of *ad hoc* arrangements directly and foreseeably violates the CEDAW duty not to expose the woman to trafficking.

European States directly *violate by omission* the obligation to not allow their legal and administrative apparatuses to not guarantee women against disguised expulsion if they do not possess, on a permanent basis, a legal and administrative apparatus guaranteeing respect for the duty to prevent trafficked women from being exposed to CEDAW's violations, including non-refoulement and trafficking. This includes the duty to align their domestic legal order with CEDAW provisions. Consequently, if States do not prohibit the provision of assistance to CEDAW-violating third party States and non-State actors, the said States violate the obligation to prevent under the CEDAW. Particularly in the case of non-State actors, this may extend to serious CEDAW violations corresponding to *jus cogens*, e.g. the prohibition of slavery and the slave trade. The CEDAW Committee recognized that, "in certain cases, trafficking in women and girls may amount to such violations".[66]

[65] Facts along the lines of what we elaborated have *inter alia* led the ILC Special Rapporteur Kamto to note that during the Euro-African Ministerial Conference on Migration and Development (Rabat, 10-11 July 2006), it emerged that "for the European countries the main aim … was to lay the foundations for the mass expulsion, with international legitimacy, of illegal migrants originating in African countries" (see ILC, *Second report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur* (20 July 2006) UN Doc A/CN.4/573, p. 227, para 34). Over the years, through the so-called "Africa Fund" established in 2017, Italy funded IOM HVR from Libya with over €10 million (see Italian MFA, *Resolution n. 2* (27 June 2017) 2).

[66] *General recommendation no. 38*, para 15.