

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

MIGRANT SMUGGLING/HUMAN TRAFFICKING  
AS A CRIME AGAINST HUMANITY  
(8 June 2017)

*Abstract*

The migrant journey is very dangerous and migrants are subject to systematic violations of human rights. They are kept in inhumane conditions, deprived of the freedom and of the choice over starting the travel towards Europe, recurrently beaten, sexually abused, and forced to work.

So, the line of demarcation between migrant smuggling and human trafficking is becoming thinner and thinner. Such a new phenomenon, requires a new answer at the international level. The international community cannot remain indifferent to this large scale violation of human rights.

It is analysed whether they may be deemed as crimes against humanity, going beyond the traditional categorizations. First it is explored whether they can fit with the existing definition contained in Article 7 of the Rome Statute of the International Criminal Court. Then other options are taken into account, especially in a treaty making perspective.

**1. Introduction**

Since 2011, gross violations of human rights are occurring in Libya. The Western coast of Libya is the point of departure of the major irregular migration route by sea to Europe. Almost all sources of information confirm that migrants and trafficked persons are typically kept in inhumane conditions, waiting for the departure in hubs where their basic needs are not met, where they are deprived of the freedom and of the choice over starting the travel towards Europe

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

and the modality of the travel itself<sup>1</sup>. They are recurrently beaten, sexually abused, and forced to work.

The abuses take the form of abduction-style detention, enforced disappearances, torture, and killings.

The one taking place in Libya is clearly a new kind of phenomenon, which hardly fit with the current legal distinction between the crimes of migrant smuggling and human trafficking.

In particular Migrant Smuggling is not limited only to the procurement of irregular border-crossing but generates systematically profound suffering for the human beings involved and systematic and organized violations of their basic rights.

During the journey migrants are often exploited.

Sometimes individuals, who are originally smuggled, become victims of human trafficking, as it is often reported to happen for Nigerian women, who initially pay for their travel and are then forced to prostitution.

Concurrent evidence can be found in the interviews of the migrants. It is reported that in Libya they are held in unofficial places of detention while transiting through Libya, including in detention centres run by armed groups and “connection houses” – places where smugglers and traffickers hold migrants during transit before transfer onto the next location.<sup>2</sup> Migrants are also held in farms, warehouses, houses and apartments secured by smugglers, traffickers and armed groups.

Migrants are usually held in “connection houses” where they report to be beaten for no reason. “Half of the migrants interviewed who had been detained in official and unofficial places of detention in Libya said that they had witnessed the deaths of other migrants. They attributed the fatalities to the conditions of detention, including severe malnutrition, illness, beatings, or other violence.”<sup>3</sup>

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<sup>1</sup> United Nations Support Mission in Libya, Office of the United Nations High Commissioner for Human Rights, Joint Report “Detained And Dehumanised” Report On Human Rights Abuses Against Migrants in Libya, 13 December 2016, European Parliament, Directorate-General For External Policies, Policy Department, Migrants in the Mediterranean: Protecting human rights, 2015; United Nations General Assembly Human Rights Council Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Libya, including on the effectiveness of technical assistance and capacity-building measures received by the Government of Libya Thirty-fourth session 27 February-24 March 2017 A/HRC/34/42; United Nations General Assembly Human Rights Council Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya - Report of the Office of the United Nations High Commissioner for Human Rights, 15 February 2016, A/HRC/31/47 ; Amnesty International, Report Libya 2016/2017, at <https://www.amnesty.org/en/countries/middle-east-and-north-africa/libya/report-libya/>; Human Rights Watch, World Reports 1016-Libya, at <https://www.hrw.org/world-report/2016/country-chapters/libya>; United Nations Support Mission in Libya, Office of the United Nations High Commissioner for Human Rights, Joint Report on the Human Rights Situation in Libya, 16 November 2015, at [http://www.ohchr.org/Documents/Countries/LY/UNSMIL\\_OHCHRJointly\\_report\\_Libya\\_16.11.15.pdf](http://www.ohchr.org/Documents/Countries/LY/UNSMIL_OHCHRJointly_report_Libya_16.11.15.pdf)

<sup>2</sup> United Nations Support Mission in Libya, Office of the United Nations High Commissioner for Human Rights, Joint Report “Detained And Dehumanised” Report On Human Rights Abuses Against Migrants in Libya, cit., p.14

<sup>3</sup> United Nations Support Mission in Libya, Office of the United Nations High Commissioner for Human Rights, Joint Report “Detained And Dehumanised” Report On Human Rights Abuses Against Migrants in Libya, cit., p.17

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

Forced labour and sexual exploitation do not seem to be an exception along the trip.

“The overwhelming majority of migrants interviewed, including those who paid smugglers in other countries, described experiences in Libya of being forced to work in farms, as domestic workers, construction and road paving workers, and rubbish collectors. Those who were forced to work said that they did not receive payment. Others in detention centres were forced to work in order to save enough funds to buy their way out of detention”<sup>4</sup>.

Migrants are also vulnerable to sexual exploitation and abuses in Libya, including being forced to work as sex workers. Women travelling without male relatives are particularly vulnerable, but also migrant boys and men described being subjected to rape and other sexual abuse.<sup>5</sup>

Based on that, the line of demarcation between migrant smuggling and human trafficking is becoming thinner and thinner. Such a new phenomenon, requires a new answer at the international level. The international community cannot remain indifferent to this large scale violation of human rights.

Considering the systematic features and the brutality of the abuses, amounts to crimes against humanity, and it demands proper condemnation and response from the international community.

## **2. The current legal framework**

Nowadays, as it is well known, migrant smuggling and human trafficking are classified as different transnational crimes, which are usually of transnational nature as they affect more than one State.

Some international instruments specifically deal with them. In particular some treaties are worth mentioning.

First of all, there are the two Additional Protocols to the UN Convention against Transnational Organised Crime of 15.11.2000: one to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and one against Smuggling of Migrants by Land, Sea, Air.

Another landmark treaty is the Council of Europe Convention on Action against Trafficking in Human Beings done in Warsaw on 16th May 2005.

The Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations convention against transnational organized crime defines smuggling as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the

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<sup>4</sup> United Nations Support Mission in Libya, Office of the United Nations High Commissioner for Human Rights, Joint Report “Detained And Dehumanised” Report On Human Rights Abuses Against Migrants in Libya,cit., p.18

<sup>5</sup> United Nations Support Mission in Libya, Office of the United Nations High Commissioner for Human Rights, Joint Report “Detained And Dehumanised” Report On Human Rights Abuses Against Migrants in Libya,cit., p.21

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

illegal entry of a person into a State Party of which the person is not a national or a permanent resident.” The same protocol defines illegal entry as “crossing borders without complying with the necessary requirements for legal entry into the receiving State.”

According to its Art.6, each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

- (a) the smuggling of migrants;
- (b) producing a fraudulent travel or identity document or procuring, providing or possessing such a document, when committed for the purpose of enabling the smuggling of migrants;
- (c) enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned above or any other illegal means.

Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences also attempting to commit, participating as an accomplice, organizing or directing other persons to commit such an offence.

Each State Party shall also establish as aggravating circumstances that endanger, or are likely to endanger, the lives or safety of the migrants concerned; or entail inhuman or degrading treatment, including for exploitation, of such migrants.

The Palermo Protocol on human trafficking identifies the crime of trafficking in persons as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.” According to it, each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the aforementioned conducts, when committed intentionally.

The trafficked persons qualify as victims, gaining the related rights of protection, while the smuggled persons do not qualify as such. Nevertheless, of course, they are entitled to the full generic protection of their human rights.

At the European Union level, the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims also qualify them as transnational crimes.

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

### **3. Definition of Crimes against Humanity**

Crimes against humanity have been defined in various statutes and law commissions' proposals since 1945. They each have their own distinctive feature tailored to the specific historical context during which they were drafted. For example, the Nuremberg Charter art.6 (c) first defined Crimes against humanity, mentioning namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Similarly the Charter of International Military Tribunal for the Far East Charter<sup>6</sup> and the Control Council Law No. 10 provided for the prosecution of crimes against humanity. In these first instruments the criminal jurisdiction over such crimes was territorial in nature, even if the extended to "passive personality"<sup>7</sup>.

Crimes against humanity are furtherly mentioned in the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute Art. 5, whose definition requires the element "in armed conflicts". In the International Criminal Tribunal for Rwanda (ICTR) Statute Art. 3 it is also required a discriminatory intent. The definition of "crime against humanity" in each Statute contains a list of inhumane acts, prefaced by a description of the circumstances under which the commission of those acts amounts to a crime against humanity

According to the Rome Statute of the International Criminal Court (infra ICC Statute) Article 7 some acts may be considered as crimes against humanity when they are committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"<sup>8</sup> and "pursuant to or in furtherance of a State or organizational policy"<sup>9</sup>.

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<sup>6</sup> [http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3\\_1946%20Tokyo%20Charter.pdf](http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf)

<sup>7</sup> See BASSIOUNI, M. Cherif, "Universal Jurisdiction for International Crimes: historical Perspectives and Contemporary Practice", *Virginia Journal of International Law*, Vol. 93 No. 1 (2001), pp. 79-162, at 119.

<sup>8</sup> ICC Statute Art. 7(1).

<sup>9</sup> Art. 7 of the ICC Statute is formulated as follows:

"Crimes against humanity

For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

The main important new developments of Article 7 ICC St. are the absence of a requirement of a nexus to armed conflict, the absence of a requirement of a discriminatory motive, the "wide-spread or systematic attack" criterion, and the element of *mens rea*.

**4. Does the situation in Libya fit with Art. 7 ICC Statute definition of CAH?**

The criminalised acts include “enslavement”, which means “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”<sup>10</sup>.

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under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) ‘Extermination’ includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) ‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) ‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) ‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) ‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) ‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) ‘The crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) ‘Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.”

<sup>10</sup> The ICC Statute follows Article 7 of the 1956 Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery which defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

Sub-paragraph (k) of Article 7.1 also mentions “[o]ther inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

There has been reporting on abuses committed against migrants, including imprisonment, torture, forced labor, sexual exploitation and abuse, and other inhumane acts.

The ill treatment carried out against migrants seems to fall within the “other inhumane acts” category under Article 7 as well.

So, can the situation of migrants held in Libya fit with such definition and be considered as a crime against humanity according to the ICC Statute? In order to answer this question, it has to be assessed if each of the requirements provided by Art. 7 of the ICC Statute is met.

By explicitly recognizing trafficking in persons as a form of enslavement, the ICC Statute has opened the door for the inclusion of not only sex trafficking but labor trafficking as a form of enslavement as well. Differently from slavery, in human trafficking ownership is not the goal. Human traffickers exploit for profit only some of the victim's capacities, usually their sexual or labour services.

Nevertheless, instances where a person is trafficked for purposes of labor servitude, includes subjecting the trafficked person to conditions of involuntary servitude, restricting such person's movement, physical restraint, or subjecting him to forced or compulsory labor or services.

Any systematic or widespread acts of such a nature would constitute a crime against humanity under the ICC Statute. Consequently, practices similar to slavery may constitute crimes against humanity under the ICC Statute when they meet the criteria established by it.

Unlike human trafficking, migrant smuggling occurs with the consent of the individuals and it is not carried out with the purpose of their exploitation. Anyway the division may be inappropriate, particularly when a migrant is subject to coercive exploitation during the course of his/her journey. Even if migrants initially express their consent to the journey, smugglers may use violence to subject them to their will, but without the purpose of exploiting them after the journey has ended. Once ashore in Europe, the same or other criminal organizations may offer shelter or accommodations under conditions which very much resemble forced labor. Women, especially from Nigeria and Western Africa, may be forced – physically or by other forms of coercion – to prostitution. Under these circumstances, the smuggled migrant turns out to be a victim of trafficking.

On the whole, it can be said that the condition of being enslaved can occur *de facto* in different forms. So the attention has to shift from slavery to slavery-like practices.

Trafficking in human beings, on the one hand, and slavery and enslavement as a crime against humanity, on the other, certainly do overlap, but those who equate these concepts tend to ignore that the latter imply institutionalized repression with governmental approval or even involvement. Human trafficking is a multi-faceted phenomenon that is notoriously difficult to

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

categorize. That problem is aggravated by the fact that the scope and the perpetrators of the crime are often hard to identify.

Scholars have emphasized the seriousness of trafficking, its transnational character and the prevalence of official complicity as arguments to sustain their plea for universal jurisdiction or prosecution and trial by international criminal tribunals or the International Criminal Court (ICC).

As far as slavery is concerned, its gradual abolition and the slave trade abolition was accomplished by the conclusion of bi-lateral treaties, mainly propelled by the United Kingdom and the United States, in which parties committed themselves to prosecute and inflict severe punishment on slave traders. The first multi-lateral treaty was adopted by the League of Nations in 1926<sup>11</sup>.

The 1926 Slavery Convention was still very much tailored to the 19th century's "chattel slavery", and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Geneva, 7 September 1956, entered into force on 30 April 1957, was aimed at updating it by extending the applicability of the Convention over slavery-like institutions and practices, including debt bondage and serfdom.<sup>12</sup>

New international initiatives already indicated that the existing legal framework did not suffice to counter all forms of (commercial) abuse of human beings. The major gap to be filled was that the Slavery Conventions referred to efforts to obtain permanent ownership over persons and did not cover more volatile endeavours to acquire benefits from the temporary commercial exploitation of humans<sup>13</sup>.

The qualification of trafficking in human beings as "modern slavery" is ambiguous.

On the one hand, by using the adjective "modern", it acknowledges that it is an anachronism to compare a contemporary phenomenon with a dismal institute of the past. On the other hand, it invites us to attach a similar moral opprobrium and legal consequences to

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<sup>11</sup> Article 1(1) of this Slavery Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." According to article 1(2), the slave trade includes "all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves." In other words, the article distinguishes between a static situation in which a person is reduced to a mere commodity and a dynamic

process, enumerating all those commercial acts that are inherent in legal ownership.

Article 6 of the Convention enjoins "those of the High Contracting Parties whose laws do not at present make adequate provision for the punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the present Convention to undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions."

<sup>12</sup> The Convention obliges States Parties to criminalize both the act of enslaving another person (art. 6) and "slave trade" (art. 3)—including attempts of, complicity in and conspiracy to accomplish those acts—considering slave trade as a more serious crime than the act of enslavement itself.

<sup>13</sup> Van der wilt, p. 301

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

trafficking. Those who are in favour of this equation find support in the judgment of the ICTY in the Kunarac et al. case which reveals an expanded understanding of slavery.

In Kunarac, the Statute of the International Criminal Tribunal for the Former Yugoslavia had the opportunity to explain the contours of this crime.

After having scrutinized the judgments of the Nuremberg and Tokyo Military Tribunals, relevant provisions of the Geneva Conventions, the findings of the UN International Law Commission and human rights instruments,

The Trial Chamber reiterated the classic definition of the Slavery Convention—exercise of any or all of the powers attaching to the right of ownership over a person—but observed that “enslavement as a crime against humanity” may be “broader than the traditional and sometimes apparently distinct definitions of slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law”.

The Trial Chamber identified a number of factors. Physical and psychological control—“control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape”—was an important indication of enslavement.

Secondly it stressed the relevance of the use of force, threat of force or other forms of coercion, rendering the determination of (lack of) consent or freewill of the victim irrelevant. Other important factors include duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.

As examples of exploitation, the Trial Chamber mentioned “the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship, sex and prostitution.”

Human trafficking was presented as a separate indication of enslavement.

The Appeals Chamber agreed with the Trial Chamber’s findings. It held that lack of consent does not have to be proved by the Prosecutor as an element of the crime. The Appeals Chamber conceded that duration was one factor—but not an indispensable element—of the crime.

In general terms, the Appeals Chamber drew a distinction between the “various contemporary forms of slavery” from classic “chattel slavery”.

In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with “chattel slavery”, but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of “chattel slavery” but the difference is one of degree.

Human rights issues relating to trafficking, such as slavery, forced labour and exploitation of migrant workers, have also been considered by regional courts, including the European Court of Human Rights, the Inter-American Court of Human Rights and the Court of Justice of the Economic Community of West African States.

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

Article 4 of the European Convention on Human Rights (ECHR) qualifies the protection against slavery or servitude—together with forced or compulsory labour—as an absolute right that allows no derogation. The European Court has had the opportunity to elaborate on the concept of slavery and its connection to trafficking in human beings in some cases. In *Siliadin v. France*<sup>14</sup> trafficking in human beings was considered by the European Court of Human Rights for the first time and it mentioned a new concept of slavery.. In this case the Court considered that the applicant had, at the least, been subjected to forced labour and held in servitude within the meaning of Article 4 of the Convention. However, the Court held that it could not be considered that the applicant had been held in slavery in the traditional sense of that concept.

In *Rantsev v. Cyprus and Russia*<sup>15</sup> has been especially significant in fleshing out the substantive content of several important legal obligations, including the obligation to prevent trafficking-related exploitation and the obligation to investigate cases of trafficking with due diligence.

The concept of modern slavery has been especially developed in the UK legislation<sup>16</sup>. The UK Modern Slavery Act (2015)<sup>17</sup>, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland), and the Human Trafficking and Exploitation (Scotland) Act entered into force in the UK in 2015. They have introduced new offences of human trafficking and other forms of modern slavery, as well as a raft of provisions aimed at preventing modern slavery and protecting its victims.

The criminal offences of human trafficking, slavery, servitude, forced and compulsory labour are included. The new legislation’s aim is to achieve the desired effect of driving up the number of modern slavery convictions, preventing exploitation and enhancing support for victims then its implementation needs to be closely monitored.

The concept of Modern Slavery is also taken into account in the US legislation<sup>18</sup>.

Taking into account the current smugglers/traffickers’ techniques, tactics and procedures (TTPs) adopted in Western Libya, which often include the forcible permanence in detention-like facilities (safe houses), the deprivation of the freedom to decide whether starting or not the journey towards Europe, and the exploitation of migrants’ labor to pay the journey, it seems that the definition of enslavement seems met, taking also into account the concept of modern slavery and the enlargement of its definition.

*4.1 Part of a “systematic or widespread attack against the civilian population” requisite.*

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<sup>14</sup> [http://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/siliadin\\_v\\_france\\_en\\_4.pdf](http://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/siliadin_v_france_en_4.pdf)

<sup>15</sup> [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/rantsev\\_vs\\_russia\\_cyprus\\_en\\_4.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/rantsev_vs_russia_cyprus_en_4.pdf)

<sup>16</sup> <https://www.gov.uk/government/collections/modern-slavery>

<sup>17</sup> <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>

<sup>18</sup> <https://www.state.gov/j/tip/what/>

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

Such acts have to be committed in the framework of a systematic or widespread attack against the civilian population.

The concept "widespread" requires large-scale action involving a substantial number of victims, whereas the term "systematic" requires a high degree of orchestration and methodical planning.

The jurisprudence of ICTY, ICTR, and ICC have agreed that the two elements “widespread” and “systematic” are disjunctive requirements for the purpose of the definition of crimes against humanity. It is sufficient to establish the crime has been committed when either requirement is met.

In the case Law of the ICTY in re Kunarac<sup>19</sup>, “widespread” refers to the large-scale nature of the attack. Isolated incidents of violent acts are deemed insufficient to meet this requirement. However, particular numerical threshold on the numbers of attacks or victims is not required.

ICTY, ICTR, and ICC have maintained a common understanding of “systematic” – “organized nature of the acts of violence” and “the improbability of their random occurrence.” This has been clarified in several judgements and namely in Kunarac decision, Mrksic decision<sup>20</sup>, and Harun decision<sup>21</sup>. According to some leading doctrine, the policy element is "the essential characteristic of 'crimes against humanity,'" giving these otherwise domestic crimes the requisite "international element."<sup>22</sup>

The tribunals have found that evidence of a pattern or methodical plan can be used to establish the “systematic” element. Smugglers’ practice has displayed a repetition of similar criminal conduct, namely abduction, detention in secret locations, violent beatings, torture, and killings.

According to the reports<sup>23</sup> based on interviews, the repetition and similarity of these acts against a “population” with one specific identity excludes the probability of random occurrence.

Taking into account the situation of migrants and victims of trafficking in Libya, it can be argued that the aforesaid elements of fact are occurring within a “systematic or widespread attack against the civilian population”, based on an extensive interpretation of this concept.

In a broader sense, “attack” does not need to correspond to an “armed attack” as defined under the law of armed conflict, but it can be deemed as a set of systematic actions aimed at hurting the civilian population using violence, i.e a course of conduct, or a pattern of conduct, involving the commission of acts of violence.

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<sup>19</sup> <http://www.icty.org/case/kunarac/4>

<sup>20</sup> <http://www.icty.org/x/cases/mrksic/acjug/en/090505.pdf>

<sup>21</sup> <https://www.icc-cpi.int/darfur/harunkushayb>

<sup>22</sup> M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (1992), 247

<sup>23</sup> Supra note 1

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

The “population” should in principle be understood as more than a limited and randomly-grouped set of individuals. In this respect, even if migrants represent an heterogeneous group as far as their nationality or cultural background are concerned, nevertheless they can be considered as a social group as a whole, a “community on the move”, animated by similar aims and composed by equally vulnerable individuals, which is victim of an attack .

In the case of the migration flows the attack can be deemed as systematic because it is not a matter of sporadic acts of violence, but violence and violations of human rights occur regularly as a part of the Smugglers/Traffickers’ modus operandi.

*4.2 “Pursuant to or in furtherance of a State or organizational policy” requisite.*

The “policy” element is stated in paragraph 2 of Article 7, requiring the acts to be linked to a State or organization.

According to the ICC, this means that a State or organization actively promotes or encourages such an attack against civilians. And “organizational” can be any type of organization or group that has the capacity to carry out such an attack. In its jurisprudence<sup>24</sup>, the ICC has addressed that the “policy” element does not require the plans to be formally adopted, and a specific intent or rationale is not required. Instead, it can be inferred from the circumstances, by looking at the patterns of violent acts, evidence of organized planning, and perpetrators’ utterance.

Reliable sources and interviews with victims showed that criminal organizations forces have been actively involved.

The ICC Office of the Prosecutor (OTP) is currently exploring the possibility that current migration flows coming to Libya from Sub-Saharan countries would be managed by a criminal network which was originally established during the Gaddafi’s regime and that would be still in place. In such case, this condition would be met, as the original Gaddafi’s “organizational policy” could be said as still existing.

Alternatively, “organizational policy” could be interpreted as being not necessarily that of a State or a quasi-State body. The business model of militias and other armed groups which are de facto in control of the principal Libyan ports of migrants’ departure, in association with local criminal gangs, could be well seen as a solidly-grounded “organizational policy”. Indeed the Libyan criminal organizations have strong links with criminal organizations in the countries of origin of migrants and/or countries of transit. Links have emerged with criminal organizations operating in the countries of destination too.

As the mentioned criminal acts occur in places under the control of such militia only, it can be assumed that they are linked to their policy.

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<sup>24</sup> Katanga Case The Prosecutor v. Germain Katanga ICC-01/04-01/07 <https://www.icc-cpi.int/drc/katanga>

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

4.3 *Mens rea element*

The last element of the crime concerns the mental sphere. Indeed, the conduct is to be committed by the offender “with knowledge of the attack”.<sup>25</sup>

This entails that the agent must be aware that there is an attack against the civilian population and that his or her act is a part of that attack. In the ICTY’s words, “[t]here must exist a nexus between the acts of the accused and the attack, which consists of: (i) the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with (ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part of the attack”<sup>26</sup>. According to the ICTR, the agent is aware when (s)he “understand[s] the overall context of his[/her] act”,<sup>27</sup> so that (s)he acts with “knowledge of the broader context of the attack”.<sup>28</sup> In the IHL context, the agent is deemed to act “wilfully”, when (s)he does it “consciously and with intent, i.e., with his[/her] mind on the act and its consequences, and willing the [...]”; this encompasses the concepts of ‘wrongful intent’ or ‘recklessness’, viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening”.<sup>29</sup> “This definition encompasses both the notions of ‘direct intent’ and ‘indirect intent’”.<sup>30</sup> Yet, “[p]art of what transforms an individual’s act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof”.<sup>31</sup>

Indeed, as widely noted, although money-driven, migrant smugglers and human traffickers’ business model in Libya is characterised by a profound contempt, typically entailing, *inter alia*, ethnic, inter-ethnic and racial hatred. This is more evident with black Sub-Saharan African migrants, but it can generally be extended to all irregular migrants<sup>32</sup>.

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<sup>25</sup> Elements of Crimes—International Criminal Court (2000), New York, 30 June 2000; Article 7—Crimes against Humanity, in: Christine Van den Wyngaert (ed.), *International Criminal Law; A Collection of International and Regional Instruments* (2011), 309.

<sup>26</sup> ICTY, *Prosecutor v. Dragoljub Kunarac*, Cases No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, par. 418, <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

<sup>27</sup> ICTR, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1, Judgement, 21 May 1999, par. 133, <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict95-1/trial-judgements/en/990521.pdf>.

<sup>28</sup> *Ibid.*

<sup>29</sup> ICRC Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, par. 3474, at p. 995, <https://ihl-databases.icrc.org/ihl/COM/470-750111?OpenDocument> (Commentary to Art. 85(3)(4)).

<sup>30</sup> ICTY, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Appeal Judgement, 17 July 2008, <http://www.icty.org/x/cases/strugar/acjug/en/080717.pdf>.

<sup>31</sup> Kayishema, *op. cit.*, par. 134.

<sup>32</sup> In Libya minorities remain very vulnerable. Sub-Saharan migrants are categorized as black Libyans. Their communities are at risk of genocide and mass killing (See e.g. K. Zurutuza, ‘To be black in Libya’, *The New Internationalist*, 23 June 2016, <https://newint.org/features/web-exclusive/2016/06/23/to-be-black-in-libya/>). In the

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

As a social group which is totally distinct from local societies, all irregular migrants in Libya are normally regarded by migrant smugglers and human traffickers as “commodities”. This implies a profound mental process of de-humanization, which – for the size and extension of the phenomenon – cannot be attributed to single individual perpetrators, but it is shared by all participants to local criminal organizations. When abusing and subjecting migrants to inhuman and degrading treatments of all kinds, members of Libyan criminal organizations are first and foremost asserting the inferiority of another group, which is considered less than human and thus not deserving any ethical, moral or legal (in the sense of natural law) consideration. As a consequence, migrants are typically viewed as inferior, evil, or “criminal”, i.e. acting on breach of or threatening the existing socio-political order. The wide psychological distance between members of criminal organizations (i.e. the “ruling” group) and irregular migrants (i.e. the “enslaved” group) is exacerbated by the conflict situation, in which cruelty and brutality are the rule, rather than the exception. In this context, violence, deprivation of liberty, rapes, forced labor, etc. can be said to be exercised by members of local criminal organizations with a full wrongful intent, i.e. willfully.

Willing or accepting to take part in this “attack” against irregular migrants does not prevent migrant smugglers or human traffickers to pursue an economic goal. The higher is the level of coercion or control exercised on migrants, the more profit maximization can be achieved. In this respect it can be argued that the crimes against humanity perpetrated by criminal organizations in Libya are functional to maximising the profits generated by migrants smuggling and human trafficking: *they represent the core of the business model of migrant smuggling and human trafficking networks in Libya.*

## **5. The Crimes Against Humanity Initiative and the International Law Commission (ILC) Project**

In a law-making perspective, it is especially worth noting the Crimes Against Humanity Initiative.

In 2008, it was launched to study the need for a comprehensive convention on the prevention and punishment of crimes against humanity, analyze the necessary elements of such a convention, and draft a proposed treaty<sup>33</sup>.

Such initiative is now supporting the work of the International Law Commission on the Drafting of a Convention on the Prevention and Punishment of Crimes Against Humanity. A

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Libyan history the discrimination against the Arabized black Libyans such as Tawarghans is well known. See <https://humanrightsinvestigations.org/2011/09/07/the-fate-of-the-tawarghans-and-sabha/>

<sup>33</sup> [http://law.wustl.edu/harris/crimesagainsthumanity/?page\\_id=1553](http://law.wustl.edu/harris/crimesagainsthumanity/?page_id=1553)

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

Special Rapporteur on the issues, Professor Murphy, has already submitted three Reports on the topic, as a preliminary study for the draft treaty.

Article 3 of the draft treaties contains a definition of Crimes against humanity which reproduces the one of Article 7 of the ICC Statute.

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According to the Special Rapporteur, such definition has very broad support among States, so that “every State that addressed this issue before the Sixth Committee in the fall of 2014 maintained that the Commission should not adopt a definition of “crimes against humanity” for a new convention that differs from article 7 of the Rome Statute. Moreover, any convention that seeks in part to promote the complementarity regime of the Rome Statute should use the article 7 definition so as to foster national laws that are in harmony with the Rome Statute. More generally, using the article 7 definitions would help minimize undesirable fragmentation in the field of international criminal law”<sup>34</sup>.

Nevertheless it also affirms that “from time to time the view is expressed that article 7 might be improved”. Taking into account the evolving practice and the fact that Article 7 of the ICC Statute was drafted bearing in mind the situation of the 1990’s armed conflicts (namely former Yugoslavia and Rwanda), it would be suitable to update it.

A new definition could be broader, as to include the concept of modern slavery and systematic violations of human rights such as those occurring during the migration flows from Libya.

As ICJ Judges Higgins, Buergenthal and Kooijmans famously wrote in their separate opinions for the Arrest Warrant case<sup>35</sup>: “an international indignation at such act is not to be doubted.”

## **6. Prosecution of CAH under domestic jurisdiction**

The 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity states in its preamble that “the effective punishment of ... crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of cooperation among peoples and the promotion of international peace and security”.

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<sup>34</sup> See UN General Assembly, International Law Commission, First report on crimes against humanity , By Sean D. Murphy, Special Rapporteur, A/CN.4/680, 17 February 2015

<sup>35</sup> <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=121&p3=4>

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

“Prosecution and punishment of persons for crimes against humanity may be possible before international criminal courts and tribunals, but must also operate at the national level to be fully effective.”<sup>36</sup>

According to the preamble of the Rome Statute of the International Criminal Court “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”. Due to the limited jurisdiction of international courts and tribunals, sometimes the only way to enforce international criminal law is through the use of national courts or, due to their “vicinity” to the crimes, it has to be considered as the preferable option.

Nevertheless, sometimes the international jurisdiction is the only option available, due to the fact that, for instance, the States are unwilling or unable to prosecute such crimes. In other cases, it is due to the extraordinary referral by the UN Security Council to the ICC.

This is the case of Libya, which is Libya is not a party of the Rome Statute. Anyway, following such referral<sup>37</sup>, the ICC Prosecutor is investigating about the commission of crimes against humanity.

The national laws of several States address in some fashion crimes against humanity, thereby allowing national prosecutions falling within the scope of those laws. For example, chapter 11 of the Criminal Code of Finland codifies crimes against humanity (as well as genocide and war crimes)<sup>38</sup>

Similarly, title 12 bis of the Penal Code of Switzerland codifies genocide and crimes against humanity.<sup>39</sup>

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<sup>36</sup> See UN General Assembly, International Law Commission, Second report on crimes against humanity , By Sean D. Murphy, Special Rapporteur, A/CN.4/690, 21 January 2016, p.18

<sup>37</sup> <https://www.icc-cpi.int/libya>

<sup>38</sup> Generally, Finnish criminal law is only applied to crimes committed within the territory of Finland; crimes committed in another State’s territory by a Finnish national or resident, or by a person who is apprehended in Finland and is a national or permanent resident of Denmark, Iceland, Norway or Sweden; and crimes committed in another State’s territory that are directed against Finnish nationals and are punishable by more than six months in prison. There are, however, exceptions to this general rule. Thus, pursuant to chapter 1, section 7(1) of the Criminal Code, “Finnish law applies to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland (*international offence*).” Crimes against humanity are regarded as being such an offence. See First Report (supra note 24) Criminal Code of Finland, Law No. 39/1889 (as amended 2012), *available at* <http://www.finlex.fi/fi/laki/kaannokset/1889/en18890039.pdf> (unofficial English translation).

<sup>39</sup> Swiss law extends to crimes committed in Switzerland (article 3) and to crimes committed outside Switzerland that are against the Swiss State (article 4), that are against minors (article 5), that Switzerland has undertaken to prosecute under an international agreement (article 6) or that otherwise involve an act punishable in the State where it was committed if the perpetrator is in Switzerland and, under Swiss law, the act may result in extradition, but the author is not extradited (if the perpetrator is not a Swiss national, and the crime was not committed against a Swiss national, then prosecution may only proceed if the extradition request was rejected

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

According to a study completed in July 2013<sup>40</sup> at best 54 per cent of States Members of the United Nations have some form of national law relating to crimes against humanity. The remaining Member States appear to have no national laws relating to crimes against humanity. Further, the 2013 study found that about 66 per cent of Rome Statute parties have some form of national law relating to crimes against humanity, leaving 44 per cent of Rome Statute parties without any such law. Third, for the 34 States that possessed a national law specifically on “crimes against humanity”, the 2013 study analysed closely the provisions of those laws. Of those States, only 29 per cent adopted verbatim the text of article 7 of the Rome Statute when defining the crime. As such, of the 83 States within the sample, only about 12 per cent adopted the formulation of Rome Statute article 7 in its entirety. Instead, most of the 34 States that possessed a national law specifically on “crimes against humanity” deviated from the components of article 7, such as by omitting components of the chapeau language of article 7(1); omitting some prohibited acts as set forth in article 7(1)(a)–(k); or omitting the second or third paragraphs of article 7, including the component relating to furthering “a State or organizational policy.”

Finally, the 2013 study analysed whether the 34 States that possess a national law specifically on “crimes against humanity” could exercise jurisdiction over a non-national offender who commits the crime abroad against non-nationals. The study concluded that nearly 62 per cent could exercise such jurisdiction. However, this meant that only 25 per cent of the States within the sample were able to exercise such jurisdiction over “crimes against humanity”. Further, of the 58 Rome Statute parties within the sample, 33 per cent both possess a national law specifically on “crimes against humanity” and are able to exercise such jurisdiction<sup>41</sup>.

If the principle of universal jurisdiction would apply for crimes committed in relation to migrant smuggling/human Trafficking in Libya, it seems that there are already several States already potentially able to prosecute crimes against humanity under their domestic legislation.

## **7. Conclusions**

Recognizing that such acts constitute crimes against humanity under international law is critical to galvanise international attention and a proper response by the International

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<sup>40</sup> nat.nsf; International Human Rights Law Clinic, George Washington University Law School, *Comparative Law Study and Analysis of National Legislation Relating to Crimes against Humanity and Extraterritorial Jurisdiction*(2013), updated and reprinted in part in Arturo J. Carrillo & Annalise K. Nelson, *Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction, The George Washington Int'l Law Rev.*, vol. 46, p. 481 (2014) (hereinafter GWU Clinic Study).

<sup>41</sup> See UN General Assembly, International Law Commission, Third report on crimes against humanity , By Sean D. Murphy, Special Rapporteur, A/CN.4/704, 6 March 2017

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

Community. Furthermore, it may provide legal basis for the possibility of accountability in the future.

Accordingly, a proper recognition of this purge as crimes against humanity provides possible accountability options under universal jurisdiction in other states.

The Inter-Parliamentary Conference of Malta concluded that “trafficking in human beings has become one of the most lucrative criminal activities, is the cause of the death of thousands of people every year and produces serious regional instability; commits itself to proposing to the United Nations to recognise the organised trafficking of human beings, often associated to migrant smuggling, as a crime against humanity.”<sup>42</sup>

The ICC Prosecutor stressed, in its report to the UN Security Council that is alarmed by the nature and scale of crimes allegedly committed against migrants, including women and children, as they transit through Libya and is considering initiating an investigation about State and non-State actors and militias involved in human trafficking and smuggling networks operating in Libya.<sup>43</sup>

It cannot be doubtful that serious violations of human rights occurring along the migration route are systematic of a large scale, so that they might amount to crimes against humanity.

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<sup>42</sup> Conclusions of the Inter-Parliamentary Conference for the Common Foreign and Security Policy and the Common Security and Defence Policy, Malta, 26 - 28 April 2017, para. 10

<sup>43</sup> International Criminal Court, Office of the Prosecutor, THIRTEENTH REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UNITED NATIONS SECURITY COUNCIL PURSUANT TO UNSCR 1970 (2011) , 8<sup>th</sup> May, 2017, para.s 25-26, at <https://www.icc-cpi.int/iccdocs/otp/otp-rep-unsclib-05-2017-ENG.pdf>

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*as a Crime against humanity*

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*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

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- 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).
- Article 6 of the Treaty on European Union (TEU), which gives the Charter of Fundamental.
- Rights of the European Union of 7 December 2000 the same legal value than the fundamental treaties;
- International Covenant on Civil and Political Rights of 16 December 1966;
- UN Convention relating to the Status of Refugees of 14 December 1951 and its Protocol of 1967;
- UN Convention against Transnational Organised Crime and its Additional Protocols to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and against Smuggling of Migrants by Land, Sea, Air, of 15.11.2000;
- Council of Europe Convention on Action against Trafficking in Human Beings done in Warsaw on 16th May 2005;
- Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984;
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 2 December 1949;
- International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965;
- Convention on the Rights of Persons with Disabilities of 13 December 2006;
- Convention on the Rights of the Child of 20 November 1989 and its Additional Protocols of 25 May 2005;
- Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979;
- Convention on Maritime Search and Rescue done in Hamburg on 27 April 1979
- International Convention for the Safety of Life at Sea (SOLAS) of 1 November 1974.
- UN Convention on the Law of the Sea (UNCLOS) done in Montego Bay on 10 December 1982.
- Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28.01.1981 and its Additional Protocol of 8.11.2001;
- European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment of 26.11.1987 and its two Additional Protocols of 4.11.1993;

*Non-Paper*  
*about Migrant Smuggling/Human Trafficking*  
*as a Crime against humanity*

- Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4.11.2000;
- Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanism for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person;
- Directive (No. 2011/36 / EU) of the European Parliament and of the Council of 5 April 2011 on preventing trafficking in human beings and the fight against this phenomenon and the protection of victims.
- Directive (No. 2011/92 / EU) of the European Parliament and of the Council of 13 December 2011 concerning the fight against sexual abuse and sexual exploitation of children and child pornography.