



**Submission to the Independent Fact-Finding Mission on Libya
on the EU and Member States' Responsibilities
for Libyan Abuses Against Migrants**

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Introduction

1. The Global Legal Action Network (GLAN) has undertaken, along with other NGOs, several legal interventions that challenge the harmful policies of the EU and Member States and their effects on asylum-seekers, refugees and other migrants making their way from, or through, Libya to the EU. We welcome the possibility of meeting with the FFM members and legal team to discuss these issues in detail.
2. This submission surveys key legal determinations of responsibility that we urge the FFM to consider in its analysis with a view to adopting in its findings. The arguments put forward are based on submissions (most of which have been published, and are linked below) made by GLAN along with others to various regional and international bodies, citing facts reconstructed and analysed by investigators and partner NGOs, including [Forensic Architecture](#). The substantive focus of this submission is on the EU and its Member States' separate as well as joint international responsibilities for endorsing, enabling, and contributing to the development and implementation of policies and practices of illegal pushback at the EU's external borders since the European Court of Human Rights' (ECtHR) ruling in *Hirsi Jamaa & Others v Italy*.¹ These policies and practices result in the commission by the EU and its Member States along with Libyan actors of serious abuses against asylum-seekers and other migrants, including their being summarily and violently forced back to Libya, without an individual assessment of their specific circumstances, including any international protection needs.² The border control strategies enabled through co-operation between Italy and Libya amount to illegal pushbacks in violation of human rights obligations, including the right to life, the right to leave any country including one's own, the right to asylum, and the prohibitions of ill treatment and collective expulsion. Although the EU and its Member States may argue that the principle of *non-refoulement* does not apply when transit States with which they cooperate intercept refugees on their behalf, this does not mean that such practices enable them to avoid responsibility under international law.

Informal migration cooperation and unaccountable financial support for illegal pushbacks

3. While most pushback practices are developed and implemented in a legal *vacuum*, certain EU Member States have signed Memoranda of Understanding (MoU) with non-EU States, establishing a co-operation framework on 'combatting illegal immigration'.³ For example,

¹ [Hirsi Jamaa and Others v Italy](#) App No 27765/09 (ECtHR GC, 23 February 2012).

² Violeta Moreno-Lax, '[Protection at Sea and the Denial of Asylum](#)' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 483.

³ European Parliament, [The EU Approach on Migration in the Mediterranean](#), PE 694.413 (Brussels: European Parliament, June 2021) pp 140-158. Study commissioned by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs to Violeta Moreno-Lax, Jennifer Allsopp, Evangelia (Lilian) Tsourdi, Philippe De Bruycker and Andreina De Leo.

the 2017 MoU between Libya and Italy provides the legal basis for Italian-Libyan co-operation on irregular migration. The 2017 MoU, which was renewed in February 2020 despite widespread criticism by multiple actors,⁴ is part of a longer history of European support through the development of the Libyan Coast Guard (LYCG) and the contested declaration of Libya's SAR zone. In May 2020, Malta signed a similar MoU with Libya on combatting illegal migration.⁵ EU Member States have benefited from political support under the so-called Malta Declaration,⁶ as well as from opaque and unaccountable financial support through illegally disbursed EU development and humanitarian aid funds for quasi-military border control and migration management purposes, rather than for the reduction of poverty and the delivery of assistance in the aftermath of man-made or natural disasters as mandated by the Treaty on the Functioning of the EU (Articles 208 and 214 TFEU), mismanaging them with serious consequences to human rights protection.

4. GLAN, ASGI and ARCI launched an unprecedented set of complaints and advocacy efforts in April 2020, to challenge the various illegalities under EU and international law of the EU's cooperation with LYCG through the EU Trust Fund (EUTF) funded integrated border management (IBM) programme. The submission in the form of a complaint against the Commission was made before the European Court of Auditors (ECA) in April 2020.⁷ The complaint was based on an expert opinion by Professor Dann, Dr Riegner and Ms Zagst of Humboldt and Hamburg universities, and supported by a coalition of a further 10 leading international NGOs calling for broader reform in the cooperation between the EU and its Member States, on the one hand, and Libyan actors on the other.⁸ The challenge directed at the Commission is based on four key grounds: a) the illegality of the use of development funds for non-developmental purposes such as border security; b) the mismanagement of funds for failure to guarantee fundamental rights compliance in line with specific financial instruments and other EU law; c) the manifestly illegal impacts of the external cooperation with the LYCG conducted via Italy in line with its MoU with Libya; and d) the exclusion of the European Parliament's budgetary power over the EUTF,

⁴ Yasha Maccanico, '[Italy renews Memorandum with Libya, as evidence of a secret Malta-Libya deal surfaces](#)' (Statewatch, March 2020). See also Council of Europe '[Commissioner calls on the Italian government to suspend the co-operation activities in place with the Libyan Coast Guard that impact on the return of persons intercepted at sea to Libya](#)' (January 2020).

⁵ Malta-Libya '[Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combatting Illegal Immigration](#)', (adopted 28 May 2020).

⁶ Council of the European Union, '[Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route](#)' (3 February 2017), para 6(j). See also ARCI, '[Steps in the process of externalisation of border controls to Africa, from the Valletta Summit to today](#)' (2016).

⁷ See [GLAN, ASGI and ARCI complaint](#) to the European Court of Auditors, based on and appended by a legal opinion by EU budget and constitutional law experts Professor Philipp Dann, Dr Michael Riegner and Ms Lena Zagst. Available [here](#).

⁸ [Joint statement](#) by 13 NGO coalition joint statement in support of the compliant and urging structural reform of EU Libya migration cooperation.

and the failure to ensure transparency and good administration, as required by Article 41 of the EU Charter of Fundamental Rights (CFR).

5. The ECA responded to the submission on May 8th 2020, stating that it will “carefully analyse” the submission during its annual programming process, as well as in the context of its planned follow-up to its 2018 Special Report on the EUTF.⁹ Also in May 2020, GLAN, ASGI and ARCI filed a Petition to the European Parliament’s PETI committee, annexing the complaint and opinion and requesting various Parliamentary committees to investigate and redress the misuse of EU funds by considering a range of measures from urging the ECA to address these concerns, using its budgetary powers including the ‘discharge procedure’, and considering a referral to the EU’s anti-fraud agency OLAF.¹⁰ The ECA has yet to analyse the submission in its reporting, and the Parliamentary Petition remains pending. In May 2021, the Commission provided a formal response to various Parliamentary committees involved in the Petition’s review, noting that migration management has a developmental purpose and that the ‘emergency fund’ structure of the EUTF development funds used while sidestepping its harmful impacts on the rights of migrants. The most significant issue of concern raised by our Petition and not addressed by the Commission is the effects-based impacts of the misuse of the funds resulting from the failure to guarantee compliance with fundamental rights and EU external action obligations. In sum, DG Near maintains the allegations in the Petition to be based on flawed assumptions about the rules governing the funds and has thus also dismissed the relevance of the serious abuses of rights to which such financial support contributes and, in some regards, even enables.¹¹
6. The European Commission fails to appreciate that migration management objectives, whenever included in development policy actions, must demonstrably contribute to poverty reduction in concrete terms, as per the pronouncements of the Court of Justice of the EU (CJEU).¹² The Commission’s most important argument relates to the claim that ‘the programme is designed to ... save lives at sea’ and that the ‘main objective’ in funding the LYCG is to ‘improve their capacities to execute [rescue] operations’. While these may well be the intentions, the Commission overlooks the practical effects of EU-funded actions on the ground. According to maritime conventions, rescue can only be defined as such under international and EU law when it leads to the retrieval of survivors and their delivery to a ‘place of safety’.¹³ Yet, numerous reliable sources refute that Libya may be

⁹ See [press release](#) on the Petition to the European Parliament.

¹⁰ See [text](#) of the Petition.

¹¹ Commission response to PETI, May 2021 (unpublished).

¹² CJEU, Case C-377/12, *European Commission v. Council of the European Union* [2014] ECLI:EU:C:2014:1903, paras 48-49.

¹³ International Convention on Maritime Search and Rescue, 1405 UNTS 119 (‘SAR Convention’), Annex, para 3.1.9; and International Convention for the Safety of Life at Sea, 1184 UNTS 278 (‘SOLAS Convention’), Ch V, Reg 33 (1–1).

deemed such a place,¹⁴ meaning that continued collaboration with the LYCG constitutes a violation of the maritime conventions and related human rights requirements, amounting to the sponsorship of a system of death and abuse at sea and upon disembarkation. Furthermore, the Commission asserts that it goes beyond its legal duty and conducts a ‘third party monitoring’ system to ensure ‘respect of the “do no harm” principle’. But with the relevant reports remaining confidential, it is impossible to corroborate this information and the quality of this exercise. The lack of public accessibility itself fails to comply with the demands of transparency and good administration under Article 41 CFR.

7. It bears noting that in parallel to these updates, two critical developments took place which indicate that the Commission is aware of the severity of the deficiencies of the current practice and system for third-party rights monitoring to ensure compliance with fundamental rights. In fact, no such monitoring has taken place since the inception of phase one the IBM programme in 2017, and despite the approval of its second phase in December 2018. The first development is the adoption in March 2021 of the Neighbourhood, Development and International Cooperation Instrument (NDICI) – ‘Global Europe’ for the next MFF period (2021-2027), which will subject future funding of this nature to potentially more robust fundamental rights monitoring.¹⁵ However, the instrument does not contain a robust human rights suspension clause, whereby the results of the monitoring exercise may automatically lead to the suspension or cancellation of funding, were they to confirm that it contributes to or facilitates the perpetration of human rights violations in or by the beneficiary country. The second development is the adoption in December 2020 of the Regulation on a regime of conditionality for the protection of the Union budget, which requires the EU to take “appropriate measures” when it is established that “breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way”.¹⁶ At present, the inappropriate reliance on Italian authorities, as the implementing partner for the IBM programme, to ensure the adequate management and EU-law-compliant use of the funds in projects with Libyan beneficiaries has failed, since the programme has in fact resulted in serious breaches of EU and international laws.¹⁷ Additionally, EU funds that have allegedly ended up in unofficial detention centres are currently under investigation in Italy.¹⁸ The strategic administrative

¹⁴ See e.g. UNHCR, *Position on the Designation of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea* (September 2020); Council of Europe Commissioner for Human Rights, *A distress call for human rights: The widening gap in migrant protection in the Mediterranean* (March 2021); and OHCHR, *Lethal Disregard: Search and rescue and the protection of migrants in the central Mediterranean Sea* (May 2021).

¹⁵ See [here](#).

¹⁶ Article 4, Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

¹⁷ See GLAN et al’s complaint op cit.

¹⁸ ASGI, *‘Fondo Africa sotto esame al Consiglio di Stato’* (2019). See also European Parliament, *EU External Migration Policy and the Protection of Human Rights*, PE 603.512 (European Parliament,

distance created by this arrangement between the EU and the egregious impacts of EU-funded projects has permitted the Commission's funding decisions to remain unaccountable to any formal structure, either by the European Parliament or civil society.¹⁹

8. We urge the FFM to consider these facts with a view to making a determination that the EU (through its organs and agents) and Italy incur joint and several international responsibility for wrongfully assisting the actions of Libyan actors through the funding of their equipment, training, operational and technical assistance through the IBM programme that has had severe impacts on human rights in breach of EU law and the obligations of the EU and its Member States under relevant international law. As a matter of international law, both the EU and Member States are jointly and severally responsible for aiding and assisting in the commission of an internationally wrongful act, in full knowledge of the circumstances in which such migration cooperation is taking place, even if the consequence was not explicitly intended (per Article 16, ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA); Article 14, ILC Articles on the Responsibility of International Organisations (DARIO)).²⁰ Given the gravity of the abuses to which the EU is giving effect through such financial cooperation arrangements, that most certainly amount to 'serious breaches of peremptory norms' by Libyan actors, the EU and its Member States are also responsible for both 'assisting in the maintenance' and for 'recognising as lawful' the situation created by such breaches, contrary to their obligations under Article 41(2) ARSIWA and Article 42(2) DARIO.

EU and Member State responsibilities for pushbacks by proxy

9. Following the signing of the 2017 MoU, Italy intensified capacity-building programmes for the LYCG.²¹ The EU provided Italy with extensive financial support for border management and migration control, which critically includes strengthening Libyan actors' capacity in maritime surveillance and rescue at sea.²² On the basis of this cooperation, Libya was able to notify the designation of its SAR region (SRR) - through Italy's intermediation - to the International Maritime Organization (IMO), first in July 2017, in a

September 2020) p 47 ('DROI report'). Study commissioned by the European Parliament's subcommittee on Human Rights to Violeta Moreno-Lax.

¹⁹ European Parliament, DROI report (n 18) pp 31-33. Further on the effects of 'distance creation' through externalisation regarding the EU-Italy-Libya cooperation, see Violeta Moreno-Lax and Martin Lemberg-Pedersen, '[Border-induced Displacement: The Ethical and Legal Implications of Distance-creation through Externalization](#)' (2019) *Questions of International law* 56: 5-33.

²⁰ ILC ARSIWA Commentary, Article 16, paras X-Y. Helmut Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 192-230. See also Violeta Moreno-Lax and Mariagiulia Giuffrè, '[The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows](#)', in Satvinder Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar, 2019) 81.

²¹ Including the provision of €2.5 million for the maintenance of Libyan boats and the training of their crews. See [here](#).

²² EU Commission, '[EU Trust Fund for Africa Adopts €46 Million Programme to Support Integrated Migration and Border Management in Libya](#)' (28 July 2017).

statement that was subsequently withdrawn, and then in December 2017.²³ This latter declaration was confirmed by the IMO in June 2018,²⁴ despite the fact that it fails to conform with minimum requirements in the SAR Convention, since Libya lacks the capacity to properly manage and service its SRR by responding to distress calls, coordinating rescues, and delivering survivors to a ‘place of safety’.²⁵ The EU and Italian funding and assistance of the LYCG has led to a situation whereby the LYCG would not be able to exist, nor to function, without such support. Against this background, instances of ‘contactless’ interception and illegal pushbacks of migrants under Italy’s direction, although “exercised through remote management techniques and/or in cooperation with a local administration acting as a proxy”,²⁶ such as the LYCG in this case, should nonetheless engage the orchestrating State’s human rights obligations through a functional approach to jurisdiction.

10. The case of *S.S. and Ors v Italy*²⁷ concerns the LYCG interception/rescue of a migrant dinghy on the high seas on November 6th, 2017. The LYCG was, at that point, still far from being fully operational; it was incapable of operating at a self-sustaining level, and continuously needed critical operational and other assistance, as EUNAVFOR MED and Italian sources relating to the Mare Sicuro and Nauras Operations reveal.²⁸ As the LYCG lacked effective and reliable communication systems, which impeded its capacity for the minimum level of execution of command and control, including that necessary to launch and coordinate SAR/SOLAS events, it was Italy that secured these crucial functions at the relevant time. The case “offers a paradigmatic example of the kind of policy and operational control that portrays the functional approach to jurisdiction [as] it entails a series of elements characteristic of public powers that are exercised by the Italian State—both within its territory and extraterritoriality; both directly and through the intermediation of the LYCG—that taken together generate overall effective control”.²⁹ The case, which remains pending before the Court, argues that but for Italy’s vast investment and direct involvement in SAR/SOLAS operations, including those in question in *S.S.*, the LYCG would be incapable of undertaking such rescue/pullback operations, and would not even exist as a border force. Italy (both autonomously and through EU funding) provides the vessels, the equipment, the training, the communication infrastructure, and the operational coordination that allows the LYCG to intervene at sea. Human rights violations committed

²³ See [IMO COMSAR](#).

²⁴ *Ibid.*

²⁵ Open Arms et al, [Mediterranean: As the fiction of a Libyan search and rescue zone begins to crumble, EU states use the coronavirus pandemic to declare themselves unsafe](#) (May 2020)

²⁶ Violeta Moreno-Lax, ‘[The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the “Operational Model”](#)’ (2020) *German Law Journal* 21, 389.

²⁷ Currently [pending](#) before the ECtHR. A detailed account of the facts of *S.S. and Ors v. Italy* is well documented by [Forensic Oceanography](#). See also GLAN’s [case feature](#) for further contextualisation.

²⁸ See sources cited in Moreno-Lax (n 26).

²⁹ *Ibid.*, pp 404-405.

by the LYCG at the behest of Italy in these circumstances should, therefore, be attributed to the latter and engage its responsibility under international law.

11. By operationalising the LYCG, European actors (predominantly Italy, but also Malta, the EU agency Frontex, and the EUNAVFOR MED Operation Sophia and its successor IRINI) have facilitated the interception of migrants at sea, before they could enter the waters of an EU Member State, or more broadly come within its territorial jurisdiction, depriving migrants of what Article 13(2) of the Universal Declaration of Human Rights, Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR) and Article 2(2) of Protocol No 4 to the ECHR, *inter alia*, define as the right to leave. The right to leave any country, including one's own, is inevitably and inextricably linked with the right to seek and enjoy asylum, which is enshrined not only in the Universal Declaration of Human Rights, but also (if implicitly) in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (for the very existence of refugees depends on it), and is most arguably a norm of customary international law.³⁰ Border control measures, including at sea, are subject to strict limitations under refugee law, human rights law and the law of the sea. Significantly, States cannot exonerate themselves from their international obligations by engaging countries of origin and transit in migration containment strategies to impede access to their territories by refugees and migrants. Therefore, preventing departure by sea, particularly under a written agreement providing for this, such as the Italy-Libya MoU, constitutes an undue interference with the minimum criteria of legality and legitimacy of the right to leave, that severely violates, and in some cases completely annuls, its core content. Although it is true that the right to leave is not considered an absolute right, General Comment No. 27 provides that "restrictions must not impair the essence of the right," and that "[t]he laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution."³¹ In addition, at the point of intersection between the right to leave and the principle of *non-refoulement*, no proportionality reasoning is possible anymore, and the absolute protection against removal to ill treatment precludes any interference that may put migrants in peril.³²
12. As regards EU Member State responsibility under the EU Charter, the EU Fundamental Rights Agency (FRA) has emphasised that "state responsibility may exceptionally arise when a state aids, assists, directs and controls or coerces another state to engage in a conduct that violates international obligations".³³ Even in the case where financial and/or technical 'aid or assistance' by an EU Member State or an EU agency to a third country

³⁰ Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 Eur J Int Law 591.

³¹ UN HRC, 'CCPR General Comment No. 27: Article 12 (Freedom of Movement)' (2 November 1999) CCPR/C/21/Rev.1/Add.9, para 13.

³² See further Violeta Moreno-Lax, 'Intersectionality, Forced Migration and the Jus-generation of the Right to Flee: Theorizing the Composite Entitlement to Leave to Escape Irreversible Harm', in Basak Çalı, Ledi Bianku and Iulia Motoc (eds), *Migration and the European Convention on Human Rights* (Oxford University Press, 2021) 43.

³³ See [here](#).

may not qualify as 'exercising effective control' for the purposes of applying the *Hirsi* judgment benchmark, they could still be responsible for the transnational impacts of their actions under the EU CFR, which does not follow a territorial paradigm.³⁴ EU Charter obligations apply whenever EU institutions, bodies and agencies exercise their powers according to the provisions of EU law and whenever EU Member States act within the sphere of the EU legal order 'implementing EU law' (Article 51 CFR).

13. We urge the FFM to make the determination that Libyan actors are unable and unwilling to implement the duty to rescue properly within their SAR zone. We also urge the FFM to make the determination that the EU and its Member States' involvement in enabling the LYCG to exist and to operate in a non-independent manner, facilitating the materialisation of situations where fundamental rights are violated, amounts to serious infringements of the prohibition on *non-refoulement*, and of several European and international human rights guarantees, including, *inter alia*, the right to life, the right to be free from torture, the right not be subjected to collective expulsions, the right to liberty and security, the right to leave any country, including one's own, and the right to seek and enjoy asylum from persecution. The ill treatment experienced by migrants at the hands of the LYCG is such that reaches the threshold of Article 7 ICCPR and Article 1 of the Convention Against Torture (CAT), breaching also the *jus cogens* prohibition of torture, and due to its systematic, sustained and widespread nature may well amount to atrocity crimes,³⁵ in which European actors should be considered complicit.

Criminalisation of non-state SAR operations as constructive *refoulement*

14. There is a causal link between the shrinking space for solidarity with migrants and conditions conducive to constructive *refoulement*. State efforts to oust humanitarian organisations from the Mediterranean by criminalising those engaged in SAR activities, and thereby preventing them from operating, are detrimental to the rights of migrants.³⁶ These efforts have most notably included charges against SAR NGOs related to human smuggling.³⁷ Bureaucratic obstacles have also been used to target such organisations in order to impede their work.³⁸ In Italy, a code of conduct imposed on SAR NGOs in 2017 hampers their operational capabilities and undermines humanitarian principles such as impartiality and neutrality.³⁹ The net effect of such criminalisation has been, and continues to be, the elimination of humanitarian search and rescue activities from the Mediterranean,

³⁴ European Parliament, DROI report (n 18) pp 20-21 and references therein.

³⁵ ICC Prosecutor, 'Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970(2011)' (5 May 2020).

³⁶ European Parliament (n 3) pp 92-117.

³⁷ Eugenio Cusumano and Matteo Villa, 'From "Angels" to "Vice Smugglers": The Criminalization of Sea Rescue NGOs in Italy' [2020] Eur J Crim Policy Res.

³⁸ '[Mare Liberum: Human Rights Monitoring at Peril in the Aegean](#)' (SAROBMED).

³⁹ Eugenio Cusumano, 'Straightjacketing Migrant Rescuers? The Code of Conduct on Maritime NGOs' (2019) 24 Mediterranean Politics 106.

rendering migrants *de facto* ‘rightless’,⁴⁰ further exposed to preventable death, and deprived of protection against *refoulement*.

15. At stake are also the civil and political rights of those standing in solidarity with migrants, including those providing lifesaving assistance, who have been detained on oftentimes baseless charges.⁴¹ This is exemplified by the complaint filed at the ECtHR on behalf of Salam Kamal-Aldeen, founder of the non-profit Team Humanity.⁴² The case concerns the ‘persecution by prosecution’ of humanitarian workers, who were arrested and charged with attempted smuggling, stood trial and were acquitted only following a two-and-a-half-year legal ordeal. The case challenges the reliance by Greece on sanctions and anti-smuggling regulations, including the EU Facilitation Directive,⁴³ to bring solidarity-based humanitarian action to a halt. The case’s aim was to expose the illegality of the crackdown on human rights defenders working to render assistance to persons in distress at sea. Yet, in July 2019, the Court, in a one-judge formation, held the case to be inadmissible without, however, providing any reasoning to substantiate its decision.⁴⁴
16. We urge the FFM to consider these actions with a view to making the determination that the prosecution and criminalisation of the activities of SAR NGOs renders both the EU and specific Member States internationally responsible by action and omission for obstructing and terminating the assistance provided by private actors to migrants in distress at sea, while concomitantly failing to provide an alternative means of assistance in full knowledge of the attendant consequences of its actions, which have led to serious bodily injury, death, and *refoulement*. Even though the conduct of SAR NGOs is not attributable to the EU and Member States, given the significant gaps in rescue activity filled by non-state SAR operations the EU and its Member States’ respective far-reaching and power-abusive restrictions on both non-state and state SAR operations are internationally wrongful acts for their significant dire impact on the right to life of persons seeking to make their way to Europe through one of the few channels available to them.⁴⁵

⁴⁰ Itamar Mann, ‘Maritime Legal Black Holes: Migration and Rightlessness in International Law’ (2018) *European Journal of International Law* 29(2): 347–372.

⁴¹ Carla Ferstman, Expert Council on NGO Law, [Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States](#) (December 2019); ReSoma, [Crackdown on NGOs and volunteers helping refugees and other migrants](#) (June 2019); Human Rights Watch, [‘Greece: Rescuers at Sea Face Baseless Accusations’](#) (5 November 2018). See also, Itamar Mann, ‘The Right to Perform Rescue at Sea: Jurisprudence and Drowning’ (2020) *German Law Journal* 21(3): 598-619; and Daniel Ghezelbalsh, Violeta Moreno-Lax, and Natalie Klein, ‘Securitization of Search and Rescue at Sea: The Response to “Boat Migration” in the Mediterranean and Offshore Australia’ (2018) *International and Comparative Law Quarterly* 67(2): 315-351.

⁴² See GLAN, [Salam Aldeen](#).

⁴³ European Parliament, [‘Fit for Purpose?’ The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants](#), 2018 Update.

⁴⁴ Letter of the Registry of the European Court of Human Rights, Ref. ECHR-LE11.00R ALN/gp 18.7.2019 regarding Appl No 21759/19 *Kamal-Aldeen v. Greece*.

⁴⁵ UN HRC, ‘General Comment No 36: Article 6 (Right to life)’ (3 September 2019) CCPR/C/GC/36, para 8. See also UNGA, ‘Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Unlawful death of refugees and migrants’ (15 August 2017) A/72/335.

Pushbacks as enforced disappearances of migrants

17. The EU and Member States' authorities engaged in 'migration management' programmes in the Mediterranean continuously implement a systematized practice of enforced disappearance.⁴⁶ Italy and Malta have not only denied their obligations to rescue such persons, they have also refused to investigate the disappearance of migrants destined to their shores.⁴⁷ In a pending individual complaint submitted with Fady, a Syrian refugee who received international protection and had residency in Germany when he came to Greece in 2016 to find his then 11-year-old brother who was to cross the Evros border into Europe, GLAN and the Greek NGO HumanRights360 are supporting him in seeking both individual and general remedies from the Greek authorities.⁴⁸ The complaint argues that pushback cases like Fady's – in the context of which individuals are illegally detained, deprived of protection from the law through access to remedies and asylum procedures, and summarily and often collectively expelled (in his case also re-expelled as many as 13 times) – are to be properly understood as enforced disappearances under international law.⁴⁹
18. Similar policies are arguably in operation in the Mediterranean Sea which the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions stated is an enormous mass grave, noting that "over the past decade, the Mediterranean Sea is said to have claimed the lives of 20,000 migrants, killed by a deadly combination of human traffickers' violence and greed, and States' failure to protect".⁵⁰ The EU and its Member States systematically fail to take enforced disappearances seriously, and have put policies in place that increase migrant deaths and disappearances. These include the very fact that migrants destined to Europe are forced to repeatedly reattempt their journeys from Libya due to multiple interceptions (in the form of pushbacks or pullbacks), which renders them

⁴⁶ An enforced disappearance occurs when there is: a) a deprivation of liberty; b) by or through acquiescence of government officials; c) a refusal by the government official to acknowledge the deprivation, or concealment of the fate or whereabouts of the disappeared. Article 2, International Convention for the Protection of all Persons from Enforced Disappearance. See also, [Mandate](#), UN Working Group on Enforced or Involuntary Disappearances.

⁴⁷ Some important jurisprudential developments in this regard should be drawn from the HRC's decisions in *A.S., D.I., O.I. and G.D. v. Malta and Italy*, rendered respectively on 13 March 2020 against Malta and 4 November 2020 against Italy. See also, an analysis of these decisions: Gabriella Citroni, '[No More Elusion of Responsibility](#)' (*Opinio Juris*, March 2021).

⁴⁸ See, for example, the views of the UN HRC in the following cases: *Boucherf v Algeria* Communication No 1196/2003 (30 March 2006) CCPR/C/86/D/1196/2003, para 9.2; *Sharma v Nepal* Communication No 1469/06 (28 October 2008) CCPR/C/94/D/1469/2006, para 7.4; *Sarma v. Sri Lanka* Communication No 950/00 (31 July 2003) CCPR/C/78/D/950/2000, para. 9.3. See also UN HRC, 'General Comment No 36' (n 45) para 8.

⁴⁹ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED), Article 2; Rome Statute of the International Criminal Court, Article 7, paragraph 2 (i).

⁵⁰ UNGA, 'Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Mass graves, highlighting the multitude of sites of mass killings and unlawful deaths across history and the world' (12 October 2020) A/75/384, para 9.

more vulnerable to disappearance at sea or through return to Libya where they are systematically subject to disappearance, with 3,200 persons disappeared in 2020 alone.⁵¹ The unaccountable financial and other incentive structure created by the EU increase interception, detention and exacerbate disappearances of migrants.

19. To the extent that this is relevant to the FFM's mandate, we urge it to consider the policies of both Libyan actors and their European partners in terms of their impacts on the right not to be subjected to enforced disappearances, enshrined in the UN Declaration on the Protection of All Persons from Enforced Disappearances and the UN Convention for the Protection of All Persons from Enforced or Involuntary Disappearances and part of customary international law.⁵² We encourage the FFM to indicate that European actors are liable, by enabling Libyan actors to intercept and return individuals to Libya through their border policies and practices, for a) aiding and assisting (contrary to Article 16 ARSIWA and Article 14 DARIO); and b) for assisting in the maintenance of an illegal situation created by serious breaches of peremptory norms, including enforced disappearance (per Article 41(2) ARSIWA and Article 42(2) DARIO).⁵³

EU and Member State use of private vessels to perform *refoulement*

20. Due to the increasing reliance on constructive *refoulement* and interdiction by omission,⁵⁴ seafarers are being compelled to take responsibility for the rescue of migrants. In some cases, they are circumstantially necessitated to act illegally⁵⁵ and are thus indirectly forced to bear the economic costs resulting from their undertaking of border control activities (deviation and delay linked to rescue entail significant financial ramifications), as well as to potentially be exposed to criminal and civil liability for violations of, *inter alia*, the duty to rescue.⁵⁶ Although the role of merchant ships had already become relevant in 2014, where they were increasingly called upon to support the response to the large-scale migrant crossings registered in that period, their increased mobilisation since the 2015 “refugee

⁵¹ IOM, [‘Migrants missing in Libya a growing concern’](#).

⁵² The prohibition has attained the status of jus cogens: Jeremy Sarkin, ‘Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law’, *Nordic Journal of International Law* (2012) 537-582.

⁵³ *Ibid.*

⁵⁴ ‘Constructive *refoulement*’ relates to the intentional generation of conditions such that the migrant concerned may ‘choose’ to leave and return back to the country of provenance, despite the persecution or ill treatment s/he may fear. See further Penelope Matthew, ‘[Constructive *refoulement*](#)’, in Satvinder Juss, *Research Handbook on International Refugee Law* (Edward Elgar, 2019) ch 13. ‘Interdiction by omission’ relates to strategies of non-assistance and abandonment at sea that impede access to safety and leads to death by drowning. See further, Moreno-Lax (n 2) 483.

⁵⁵ Moreno-Lax, Violeta, Ghezalbash, Daniel and Klein, Natalie, ‘[Between life, security and rights: Framing the interdiction of ‘boat migrants’ in the Central Mediterranean and Australia](#)’ (2019) 32 *Leiden Journal of International Law* 715. See also BIICL, ‘[When Private Vessels Rescue Migrants and Refugees: A Mapping of Legal Considerations](#)’ (2020) p 10.

⁵⁶ See e.g. Eugenio Cusumano, “Migrant Rescue as Organized Hypocrisy: EU Maritime Missions Offshore Libya between Humanitarianism and Border Control” (2019) *Cooperation and Conflict* 54(1): 3–24.

crisis” differs substantially in purpose and effect. Rather than being sporadically called upon to perform rescue, like the pattern that developed in the early stages of the “crisis”, merchant vessels are now increasingly and strategically co-opted to perform interdictions and undertake the *refoulement* of the persons they rescue at the behest of EU coastal States. This policy undermines fundamental rules of public international law, including the prohibition on *refoulement* and the principle of disembarkation in a ‘place of safety’, recognised under customary norms of the law of the sea.

21. The *Nivin* incident,⁵⁷ which led to the submission of the individual complaint of *S.D.G. v Italy* to the UN Human Rights Committee (HRC), is the quintessential example of this new modality of delegated containment of migrants as part of the externalisation of border control.⁵⁸ The case concerns a privatised pushback operation carried out in November 2018. In the course of the operation, MRCC Rome directed a Panamanian merchant vessel, the *Nivin*, to rescue, or arguably to intercept, a migrant boat adrift on the high seas in the Central Mediterranean, and to liaise thereafter with the LYCG *through* the Italian MRCC which acted as communication intermediary. As a result of this operation, many of the 93 survivors were prevented from escaping Libya, where they had suffered torture and abuse, and were exposed to, *inter alia*, arbitrary detention, forced labour, and inhuman and degrading treatment. In light of General Comment No. 36, the complaint argued that the conduct of Italian authorities, including their coordination of the *Nivin*, with and “on behalf of” the LYCG, instructing it to intercept and disembark Mr SDG and his fellow survivors in Libya, had major effects on the right to life of the individuals concerned, in a direct and foreseeable manner, such as to engage the responsibility of Italy under the ICCPR.
22. We urge the FFM to make the determination that the policies of re-directing merchant vessels to and of ordering them, directly or indirectly, to disembark rescued migrants in Libya are internationally unlawful. Both specific Member States and EU institutions respectively are internationally responsible under joint and several liability for the *direct* breach of their obligations under the ICCPR for the adoption of administrative decisions that have a serious transnational impact on the right to life (*per* Article 6 ICCPR) and, additionally, for the *indirect* wrongful assistance to the perpetration of serious international human rights and refugee law violations committed by Libyan actors, including severe mistreatment during interception, return to Libya exposing individuals to detention in inhuman conditions, torture, trafficking, rape, enslavement and other forms of severe ill treatment, as well as enforced disappearance.

⁵⁷ See GLAN, [Nivin](#).

⁵⁸ *SDG v. Italy*, Individual complaint submitted to the United Nations Human Rights Committee (2019). See also Forensic Oceanography, ‘[The Nivin case: Migrants’ resistance to Italy’s strategy of privatized push-back](#)’ (2019).

Aerial surveillance as assistance to *refoulement* by Libya actors

23. The *Nivin* incident also highlights another key development with respect to the modalities in which *refoulement* is being delegated or operationalised through ‘contactless’ measures. Indeed, it was a Spanish surveillance aircraft operating within the Italian-coordinated EUNAVFOR MED operation Sophia that first sighted the migrants’ boat, and passed the information on to the Italian MRCC, which in turn relayed the details to the LYCG, to conclude their interception and push-back by proxy. This is not a novel practice, as the increasing retreat of EUNAVFOR MED naval assets into a second line, and the use of air assets as a front line of early detection to enable LYCG interceptions, has been recorded as early as the summer of 2017.⁵⁹ However, it has now been established as the norm. In a letter addressed to Frontex Executive Director, the European Commission Director-General for Migration and Home Affairs confirms that “many of the recent sightings of migrants in the Libyan SRR have been provided by aerial assets of EUNAVFOR MED and were notified directly to the Libyan RCC responsible for its own region.”⁶⁰ Yet, the Commission and Frontex did not express concerns with respect to how this procedure facilitates *refoulement*, impedes access to asylum and exposes migrants to abuse by the LYCG.
24. The fact that Frontex aircrafts regularly observe vessels at sea and notify relevant MRCCs affords the EU and Member States wide-ranging knowledge of the presence of persons in distress at sea, and thus triggers their joint and several responsibility and liability for failure to respond to distress calls where they occur.⁶¹ Indeed, the obligation to render assistance to persons in danger of being lost at sea begins whenever there is knowledge of a situation of distress and on receipt of ‘a signal from any source’.⁶²
25. EU actors have been exposed for choosing not to heed such information and thus failing to send a rescue mission for days, instead delegating the interception and rescue to Libya actors and leading to the death and serious injury of many.⁶³ EU actors’ readily available access to such knowledge is key to establishing their responsibility for failing to send rescue missions to assist boats in distress in accordance with their obligations under international law. Choosing not to intervene and passing on the relevant information to the LYCG in the knowledge that the life and integrity of the persons in distress will be threatened suffices to activate the positive, due diligence obligations attaching to the rights

⁵⁹ Forensic Oceanography (n 58).

⁶⁰ See [Letter of Director-General for Migration and Home Affairs to Frontex Executive Director, Ref. Ares\(2019\)1755075](#) (18 March 2019) pp 46-47. See also European Parliament (n 18).

⁶¹ Open Arms et al, [Submission to IMO](#).

⁶² SOLAS Convention (n 13) Ch V, Reg 33(1). In this sense, see also Efthymios Papastavridis, ‘The European Convention of Human Rights and Migration at Sea: Reading the “Jurisdictional Threshold” of the Convention Under the Law of the Sea Paradigm’ (2020) German Law Journal 21(3): 417-435.

⁶³ As was the case of the 12 who died after Frontex’s aerial vehicle spotted a boat in distress on 10 April 2021. Open Arms et al, [Submission to IMO](#).

of the persons directly affected by the action concerned.⁶⁴ The ECtHR has repeatedly held that a State may incur responsibility under Article 3 of the ECHR ‘where the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known’.⁶⁵

26. We urge the FFM to consider the extent to which such aerial surveillance enables and supports Libyan actors to conduct interceptions and return individuals to an unsafe country. Irrespective of whether routine aerial presence and continuous streams of information and knowledge about extraterritorial activity constitute jurisdiction, which is most arguably, it certainly triggers Member States obligations to ensure against harm to the right to life (Article 6 ICCPR). We also urge the FFM to make the determination that this practice constitutes a breach of the obligation of *non-refoulement*, and is thus contrary not only to the obligations to which Member States are subject, including but not limited to those under the ECHR and the CFR, inclusive of the right to asylum (Article 18 CFR).

⁶⁴ *M.S.S. v. Belgium and Greece* App No 30696/09 (ECtHR [GC], 21 January 2011) paras 258–59, 263, 358–59, and 366–67; *Hirsi* (n 1) paras 118, 123, 125–26, 156–57.

⁶⁵ *Mahmut Kaya v Turkey* Application No 22535/93 (ECtHR, 28 March 2000) para 115; *Al Nashiri v Poland* Application No 28761/11 (ECtHR, 24 July 2014) para 509; *El-Masri v The Former Yugoslav Republic of Macedonia* Application No 39630/09 (ECtHR 13 December 2012) para 198.