

*Communication*  
to the Office of the Prosecutor  
of the International Criminal Court  
*Pursuant to the Article 15 of the Rome Statute*

EU Migration Policies  
in the Central Mediterranean and Libya  
(2014-2019)

“[S]erious and widespread crimes allegedly committed against migrants attempting to transit through Libya...I am deeply alarmed by reports that thousands of vulnerable migrants, including women and children, are being held in detention centres across Libya in often inhumane conditions. Crimes, including killings, rapes and torture, are alleged to be commonplace... I am similarly dismayed by credible accounts that Libya has become a marketplace for the trafficking of human beings... The situation is both dire and unacceptable... my Office is carefully examining... opening an investigation into migrant-related crimes in Libya... We must act...”

**Fatou Bensouda, ICC Prosecutor, in a statement to the UNSC, 9 May 2017**

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*“...Once they left their homeland they remained homeless, once they left their state they became stateless; once they were deprived of their human rights they were rightless, the scum of the earth.”<sup>4</sup>*

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<sup>4</sup> Hannah Arendt, 1951, *The Origins of Totalitarianism*, New York, Harcourt, Brace and Co.



## Executive Summary

1. The present communication provides the Prosecutor with evidence implicating **European Union and Member States' officials and agents in Crimes Against Humanity**, committed as part of a premeditated policy to stem migration flows from Africa via the Central Mediterranean route, from 2014 to date.
2. The evidence establishes criminal liability within the jurisdiction of the Court, for policies resulting in i) the deaths by drowning of thousands of migrants, ii) the *refoulement* of tens of thousands of migrants attempting to flee Libya, and iii) complicity in the subsequent crimes of **deportation, murder, imprisonment, enslavement, torture, rape, persecution and other inhuman acts**, taking place in Libyan detention camps and torture houses.
3. Relying on agreements concluded with Muammar Gaddafi, the European Union's border externalization policy thus collapsed together with his regime in 2011. Consequently, in 2014 the European Union resorted to a **deterrence-based migration policy**, which ignored the plight of migrants in distress at sea, in order to dissuade others in similar situation from seeking safe haven in Europe (**EU's 1<sup>st</sup> Policy**).
4. The EU's 1<sup>st</sup> Policy turned the central Mediterranean to the world's deadliest migration route. Between January 1st, 2014 and end of July, 2017, **over 14,500 people died** or were reported missing. Two incidents in one week in April 2015 alone cost the lives of 1,200 people.<sup>5</sup>
5. While migrant crossings were not reduced the death toll drastically increased. Gradually, Search and Rescue ('SAR') operations operated by NGOs took on the activities previously carried out by the EU. Consequently, in 2015 the EU renewed its border externalization policy.

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<sup>5</sup> IOM, Central Mediterranean route : Migrant Fatalities, online, <https://missingmigrants.iom.int/sites/default/files/c-med-fatalities-briefing-july-2017.pdf>, accessed 16/04/2019

6. The EU's second policy (**EU's 2<sup>nd</sup> Policy**) ousted the NGOs from the Mediterranean and dramatically deepened cooperation with the Libyan Coast Guard ('LYCG'). In a context where the European Union ('EU') and its Member States ('MS') accepted that push-backs to Libya are strictly unlawful this new configuration effectively enabled the outsourcing of this new policy to the LYCG.
7. In lieu of the lawful rescue and safe disembarkation previously operated by rescue NGOs, the LYCG became a key actor in the interception and unlawful *refoulement* of migrants attempting to flee Libya.
8. Through a complex mix of legislative acts, administrative decisions and formal agreements, the EU and its MS provided the LYCG with **material and strategic support**, including but not limited to vessels, training and command & control capabilities.
9. To maximize the number of migrants disembarking at Libyan ports the EU and its MS channeled their policies through the LYCG by directly **commanding, instructing and providing them with information, such as the location of migrant boats in distress**.
10. Without the involvement of the EU and its MS, the LYCG had no capacity or will to intercept migrants seeking to exit Libya and detain them in camps. **Without the implementation of EU's 2<sup>nd</sup> Policy, therefore, the crimes against the targeted population would not have ever occurred.**
11. Through the EU's 2<sup>nd</sup> Policy the commission of these crimes amount to a widespread and organised attack against a civilian population designed to deter immigration, the deadliest campaign the ICC has ever had jurisdiction over.
12. This widespread and systematic campaign was (and still is) directed against persons in need of international protection, at their most vulnerable moment: when they were in distress at sea, facing death by drowning.
13. In order to avoid duties arising under maritime law and human rights law, the EU orchestrated a **policy of forced transfer to detention facilities, where crimes were (and still are) committed**.

14. Between 2016 and 2018, more than **40,000 victims** were intercepted and transported to detention facilities, where various crimes within the meaning of the Rome Statute would be committed. The attempts by migrants to cross the Central Mediterranean continue, as do the disastrous consequences.<sup>6</sup>
15. EU and MS officials and agents carefully designed and meticulously implemented a highly coordinated naval border control operations, with full **awareness of the lethal consequences of their conduct**.
16. In January 2017, for example, German Chancellor Angela Merkel received a diplomatic cable from its Embassy in Niger, which described Libyan detention facilities as a place where “[e]xecutions... torture, rapes, blackmail and abandonment in the desert are the order of the day ... the most serious, systematic human rights violations... concentration-camp-like [conditions]”.<sup>7</sup>
17. In August 2017, the Italian Deputy Minister acknowledged this enterprise of collective and organized expulsion of tens of thousands migrants, orchestrated by the EU and Italy, meant **“taking them [the migrants] back to hell”**.<sup>8</sup> The ICC Prosecutor described Libya as “a marketplace for the trafficking of human beings”,<sup>9</sup> while French President Emmanuel Macron stated that it constituted “a crime against humanity”.<sup>10</sup>
18. The President of the African Union also described the situation in Libya as “shocking” and “scandalous”.<sup>11</sup> But he also insisted on identifying the potential perpetrators of these crimes:

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<sup>6</sup> Italian Institute for International Political Studies (ISPI), Estimated Migrants Departures from Libya, Online – <https://docs.google.com/spreadsheets/d/1ncHxOHix4ptt4YFXgGi9Tlbwd53HaR3oFbrfBm67ak4/edit#gid=0>, last accessed 01/06/2019

<sup>7</sup> German diplomat in an internal cable to Angela Merkel, 29 January 2017 quoted in: Deutsche Welle, 2017, “Libyan Trafficking camps are hell for refugees, diplomats say”, online, <https://p.dw.com/p/2WaEd>, accessed 18/05/2019

<sup>8</sup> Mario Giro, Deputy Minister of Foreign Affairs, Italy, 6 August 2017 quoted in: Marco Menduni, 6 August 2017, ‘Giro: “Fare rientrare quelle persone vuol dire condannarle all’inferno”’, *La Stampa*, online <https://www.lastampa.it/2017/08/06/italia/giro-fare-rientrare-quelle-persone-vuol-dire-condannarle-allinferno-SXnGzVlzfFI7fNGFCMADN/pagina.html>, accessed 31/05/2019.

<sup>9</sup> International Criminal Court, 2017, “Statement of the ICC Prosecutor to the UNSC on the Situation in Libya,” online, <https://www.icc-cpi.int/pages/item.aspx?name=170509-otp-stat-lib>, accessed 11/04/2017

<sup>10</sup> French President, Emmanuel Macron, 22 November 2017, quoted in: Pennetier, M., 2017, “France tells Libya to act over migrant “crimes against humanity”, *Reuters*, online, <https://www.reuters.com/article/us-libya-migrants-france/france-tells-libya-to-act-over-migrant-crimes-against-humanity-idUSKBN1DM1YU>, accessed 18/05/2019

<sup>11</sup> Alpha Conde, President of the African Union, 22 November 2017, quoted in: Pennetier, M., 2017, “France tells Libya to act over ‘migrant crimes against humanity’”, *Reuters*, online, <https://www.reuters.com/article/us-libya-migrants-france/france-tells-libya-to-act-over-migrant-crimes-against-humanity-idUSKBN1DM1YU>, accessed 18/04/2019

**“we must establish the responsibilities... in Libya there is no government, so the European Union cannot ... ask that country to detain refugees... the refugees are in terrible conditions... the European Union is responsible”.**<sup>12</sup>

19. In hindsight, the architects of the concerned EU policies acknowledged their wrongdoing. They described it as a “huge mistake”<sup>13</sup>, one that “cost human lives”.<sup>14</sup> But this was no mistake. Evidence provided in this communication indicates these policies were part of an **intentional plan, with full and real-time knowledge of its lethal consequences.**
20. Based on the foreknowledge of the widespread and systematic crimes committed in Libya, UN Special Rapporteur on Extrajudicial or Arbitrary Executions, Ms. Callamard, stated that “[t]he International Criminal Court should consider preliminary investigation into **atrocious crimes against refugees and migrants**”<sup>15</sup>.
21. The UN Special Rapporteur on Torture, Mr. Melzer, described the root causes of these crimes: **“migration laws, policies and practices that knowingly or deliberately subject or expose migrants to foreseeable acts or risks of torture or ill-treatment... are “conclusively unlawful”.**<sup>16</sup>
22. Mr. Melzer joined Ms. Callamard in calling the ICC-Prosecutor to **“examine whether investigations for crimes against humanity or war crimes are warranted in view of the scale, gravity and increasingly systematic nature of torture, ill-treatment and other serious human rights abuses [...] as a direct or indirect consequence of deliberate State policies and practices of deterrence, criminalization, arrival prevention, and refoulement.”**

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<sup>12</sup> Alpha Conde, President of the African Union, 22 November 2017, quoted in: Pennetier, M., 2017, “France tells Libya to act over ‘migrant crimes against humanity’”, *Reuters*, online, <https://www.reuters.com/article/us-libya-migrants-france/france-tells-libya-to-act-over-migrant-crimes-against-humanity-idUSKBN1DM1YU>, accessed 18/04/2019

<sup>13</sup> Marco Minitti, former Italian Minister of Interior, 2019, interview in *Piazza Pulita*, 12 April 2019: <http://www.la7.it/piazzapulita/rivedila7/piazzapulita-profondo-rosso-puntata-11042019-12-04-2019-268755>

<sup>14</sup> Jean-Claude Juncker, 2015, “Speech by President Jean-Claude Juncker at the debate in the European Parliament on the conclusions of the Special European Council on 23 April: ‘Tackling the migration crisis’”, European Commission, online, [http://europa.eu/rapid/press-release\\_SPEECH-15-4896\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-4896_en.htm), accessed 18/04/2019;

<sup>15</sup> Agnes Callamard, Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, 15 August 2017 in: “Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions”, United Nations General Assembly, A/72/335, online, <https://reliefweb.int/sites/reliefweb.int/files/resources/N1725806.pdf>, accessed 18/04/2019

<sup>16</sup> Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 26 February 2018 quoted in: Itamar Man et al., 2018, “Time to Investigate European Agents for Crimes Against Migrants in Libya”, *EJIL: Talk!*, online, <https://www.ejiltalk.org/time-to-investigate-european-agents-for-crimes-against-migrants-in-libya/>, accessed 18/05/2019

23. The crimes committed against migrants are well-documented, including by various EU agencies. The evidence concerning the prior knowledge of EU and Member State officials and agents with respect to the outcomes for deportees is also evidenced in their own statements and official documents.
24. The sole remaining question to be investigated by the Prosecutor is therefore the applicable mode of liability of the different actors in connection with the different crimes, and the distribution of responsibilities through the various actors involved.
25. ICC investigation on the situation in Libya has been pending for eight years. The criminal **attack against migrants has been taking place over the past five years and is still ongoing.**
26. The evidence presented in this communication concerns **the most responsible actors.** The Office of the Prosecutor is respectfully requested to hold these individuals accountable.

*“This is horrific... the hypocrisy, the cynicism of those in the European union, the European Commission but as well ... the European Council... that are pretending that they are saving lives, they know very well that in Libya there is no such thing as the Libyan Coast Guard, what there are militias, militias operated by all sort of criminals, networks... they are the one who are being paid by the European Union to pretend they are fictional Libyan Coast Guard to indeed push back the migrants that are the ones who exploit the migrants, who sell the migrants... what is tremendous is the complicity of the EU...”*

**Ana Maria Gomes, European Parliament Member, 25 February 2019**

# 1. Facts

## 1.1 Background: The Rise and Fall of EU's Gatekeeper (1998-2015)<sup>17</sup>

### 1.1.1 The rise (1998-2011)

1. Prior to the implementation of the EU Dublin Convention in 1990, Libya had relatively open borders and accepted many Sub-Saharan Africans to work in the country. However, following the adoption of the Convention and realizing the political advantage to be gained, Libya began to use migration control as a bargaining chip with the European Union.<sup>18</sup>

2. The 'Joint Communication' and 'Verbal Process' was the first agreement signed between Italy and Libya in 1998 which affirmed their intention to cooperate towards the 'prevention of and fight against illegal immigration'.<sup>19</sup> This agreement was the premise for the 2008 'Treaty of Friendship' signed by Berlusconi and Gaddafi.<sup>20</sup>

3. The second written agreement between Italy and Libya was the 2002 'Memorandum of Intent' which called for the cooperation of the police forces of the two countries in the fight against 'illegal immigration'.<sup>21</sup> Accordingly, in the early 2000's Gaddafi started recruiting less migrant workers<sup>22</sup> and started imposing discriminatory policies on immigration.<sup>23</sup>

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<sup>17</sup> See a thorough analysis in Annex IV (Section 6.4) – Expert Opinion on Libya

<sup>18</sup> Amnesty International, 2017, *Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*, p12, online, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>, accessed 25/03/2019

<sup>19</sup> Verbal Process, 4 July 1998, 'A Critical Analysis of Migration Policies in the Mediterranean: The Case of Italy, Libya and the EU', in Emanuela Paoletti, RAMSES Working Paper 12/09, April 2009, ESC, Oxford, p.14

<sup>20</sup> Ronzitti, N., 2009, The treaty on Friendship, Partnership and Cooperation between Italy and Libya: new prospects for cooperation in the Mediterranean?, *Bulletin of Italian Politics*, Vol. 1 (1) 125-133, page 126, online, [www.gla.ac.uk/media/media\\_126121\\_en.pdf](http://www.gla.ac.uk/media/media_126121_en.pdf), accessed 25/03/2019

<sup>21</sup> Memorandum of Intent, 13 December 2000, in Paoletti, E., 'A Critical Analysis of Migration Policies in the Mediterranean: The Case of Italy, Libya and the EU', p.14, RAMSES Working Paper 12/09, April 2009, ESC, Oxford

<sup>22</sup> Tsourapas G., 2017, 'Migration diplomacy in the Global South: cooperation, coercion and issue linkage in Gaddafi's Libya', *Third World Quarterly*, Vol. 38(10), p2376

<sup>23</sup> Amnesty International, 11 December 2017, *Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*, p13, online, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>, accessed 25/03/2019

4. As a result of several factors, however, crossings increased.<sup>24</sup> The 2003 agreement between Italy and Libya, which has never been made public, reportedly involved the exchange of information on migrant flows and the provision to Libya of specific equipment to control sea and land borders.<sup>25</sup>

5. Reports indicate that as of 2003, Italy started financing migration detention camps near Tripoli, Sebah and Kufra.<sup>26</sup> Also, Italy began deporting migrants arriving on Italian land to Libya, by air.<sup>27</sup>

6. Finally, in August 2004, during a meeting between Berlusconi and Gaddafi, Italy agreed to provide training, technology and equipment to “help Libya curb irregular immigration”.<sup>28</sup> According to a European Parliament Resolution from 14 April 2005, this agreement gave Libya the “task of supervising migration and [...] readmitting people returned by Italy”.<sup>29</sup>

7. Shortly after, on 11 October 2004, the EU lifted its economic sanctions and arms embargo on Libya – a move that had been campaigned for by Italy, arguing that weapons were necessary for Libya to combat African “irregular migration”.<sup>30</sup>

8. In June 2005, EU Justice and Home Affairs Council endorsed a Council Conclusion on cooperation with Libya on migration issues, including the implementation of several ad-hoc measures such as reinforcing systemic cooperation between national services responsible for sea borders, developing common Mediterranean Sea operations involving the deployment of EU

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<sup>24</sup> In 2001 5,504 migrants were intercepted in Sicily compared to 18,225 in 2002. See Monzini P., Abdel Aziz, N., Pastore, F., 2015, *The Changing Dynamics of Cross-border Human Smuggling and Trafficking in the Mediterranean*, page 33, online, [www.iai.it/sites/default/files/newmed\\_monzini.pdf](http://www.iai.it/sites/default/files/newmed_monzini.pdf)

<sup>25</sup> Paoletti, E., 2009, ‘A Critical Analysis of Migration Policies in the Mediterranean: The Case of Italy, Libya and the EU’, RAMSES Working Paper 12/09, European Studies Centre, Oxford, p.15, online, [https://www.academia.edu/413204/Emanuela\\_Paoletti\\_A\\_Critical\\_Analysis\\_of\\_Migration\\_Policies\\_in\\_the\\_Mediterranean\\_The\\_Case\\_of\\_Italy\\_Libya\\_and\\_the\\_EU](https://www.academia.edu/413204/Emanuela_Paoletti_A_Critical_Analysis_of_Migration_Policies_in_the_Mediterranean_The_Case_of_Italy_Libya_and_the_EU), accessed 25/03/2019

<sup>26</sup> Richey, Mason L., 2012, “The North African Revolutions: A Chance to Rethink European Externalization of the Handling of Non-EU Migrant Inflows.” Hankuk University of Foreign Studies: 16 February 2012. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2109199](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2109199) - quoted in Immigration Detention in Libya Global Detention Project February 2015 available online: <https://www.refworld.org/pdfid/5567387e4.pdfpg.9>

<sup>27</sup> From October 2004 to March 2006 3,043 migrants who had landed in Sicily from Libya were sent back to Libya. See Paoletti, E., ‘Relations Among Unequals? Readmission between Italy and Libya’, 2010, Middle East Institute, online, <https://www.mei.edu/publications/relations-among-unequals-readmission-between-italy-and-libya>, accessed 25/03/2019

<sup>28</sup> Ibid.

<sup>29</sup> European Parliament, 2005, “Resolution on Lampedusa”, online, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2005-0138+0+DOC+XML+V0//EN>, accessed 05/04/2019

<sup>30</sup> The Guardian, 11 Oct 2004, “EU lifts Libya Sanctions”, online, <https://www.theguardian.com/world/2004/oct/11/libya.eu>, accessed 25/03/2019; Human Rights Watch, 2006, ‘Stemming the Flow: Abuses Against Migrants, Asylum Seekers and Refugees’, Vol.18(5(E)), online, <https://www.hrw.org/report/2006/09/12/stemming-flow/abuses-against-migrants-asylum-seekers-and-refugees>, accessed 25/03/2019

vessels and aircraft. Measures also included training of Libyan officials.<sup>31</sup>

9. In this context the EU and Italy turned towards Gaddafi to stem migration flows. Italy envisioned to replicate the Albanian model from 1997 which had included joint patrols in Albanian territorial waters to *push-back* migrants crossing the sea.<sup>32</sup>

10. Accordingly, on 29 December 2007, Italy and Libya signed an agreement on the joint patrolling of coasts, ports and bays of Northern Libya to prevent irregular migration.<sup>33</sup>

11. Libya under Gaddafi was already a country with no safeguards nor mechanisms to hold the government responsible for violating rights of migrants: Libya had no domestic asylum legislation, Libya has never internationally ratified the 1951 Refugee convention, and never entered into a formal agreement with the UNHCR.

12. Yet, and whilst being perfectly aware of these facts, the EU and Italy decided to make the Libyan Regime their main partner in their border externalization strategy. Accordingly, Gaddafi started imposing more restrictions on Africans coming to Libya, including detention.

13. As part of this strategy, in January 2008, for example, Italy committed to giving 6 patrol boats to Libya and the Italian Parliament approved the allocation of €6 million Euros to the *Guardia di Finanza*, the customs police, to undertake this task.<sup>34</sup>

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<sup>31</sup> Council of the European Union, 2664th Council Meeting, Justice and Home Affairs, 2-3 June 2005, Luxembourg, 8849/05, online, [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/85255.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/85255.pdf), accessed 25/03/2019, quoted in Human Rights Watch, 2006, 'Stemming the Flow: Abuses Against Migrants, Asylum Seekers and Refugees', Vol.18(5(E)), online, <https://www.hrw.org/report/2006/09/12/stemming-flow/abuses-against-migrants-asylum-seekers-and-refugees>, accessed 25/03/2019

<sup>32</sup> Additional Protocol to the December 2007 agreement between Italy and Libya, 4 February 2009, in Hirsi Jamaa and Others v. Italy, App. No. 27765/09 Eur. Ct. H.R. (2012); Mann, I., 2013, "Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013", p54, *Harvard International Law Journal*, Vol. 54(2); Heller, C., Pezzani, L., 2018, "*Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*", p22, *Forensic Oceanography*

<sup>33</sup> Ministero dell'Interno, (2007c), Amato: via libera dell'Europa per la fornitura alla Libia di un sistema di sorveglianza elettronica delle frontiere, 18 September 2007 in Paoletti, E., 2009, 'A Critical Analysis of Migration Policies in the Mediterranean: The Case of Italy, Libya and the EU', RAMSES Working Paper 12/09, European Studies Centre, Oxford, p.15, online, [https://www.academia.edu/413204/Emanuela\\_Paoletti\\_A\\_Critical\\_Analysis\\_of\\_Migration\\_Policies\\_in\\_the\\_Mediterranean\\_The\\_Case\\_of\\_Italy\\_Libya\\_and\\_the\\_EU](https://www.academia.edu/413204/Emanuela_Paoletti_A_Critical_Analysis_of_Migration_Policies_in_the_Mediterranean_The_Case_of_Italy_Libya_and_the_EU), accessed 25/03/2019. Article 2 of the Agreement is worth quoting at length: "Italy and the "Great Socialist People's Libyan Arab Jamahiriya" undertake to organise maritime patrols using six ships made available on a temporary basis by Italy. Mixed crews shall be present on ships, made up of Libyan personnel and Italian police officers, who shall provide training, guidance and technical assistance on the use and handling of the ships. Surveillance, search and rescue operations shall be conducted in the departure and transit areas of vessels used to transport clandestine immigrants, both in Libyan territorial waters and in international waters, in compliance with the international conventions in force and in accordance with the operational arrangements to be decided by the two countries." Hirsi Jamaa and Others v. Italy, App. No. 27765/09 Eur. Ct. H.R.(2012); Mann, I., 2013, "Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013", p54, *Harvard International Law Journal*, Vol. 54(2)

<sup>34</sup> Senato della Repubblica, 2008, 281a Seduta pubblica resoconto sommario e stenografico, 26 February 2008, online, <http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=Resaula&leg=15&id=298782>, accessed 29/03/2019; Paoletti, E., 2009, 'A Critical Analysis of Migration Policies in the Mediterranean: The Case of Italy, Libya and the EU', RAMSES Working Paper

14. On 31 August 2008, Gaddafi and Berlusconi signed a **\$5 billion deal**: the ‘Treaty of Friendship’.<sup>35</sup> This money was framed as reparations for the damaging effects of colonization. Over 25 years, Italy would pay for infrastructure projects in exchange for privileged access to resources, such as oil, and collaboration in the ‘fight against illegal migration’.<sup>36</sup> The preamble of the ‘Treaty of Friendship’ says “Italy’s important contribution in bringing the embargo to an end”, acknowledging its role in the end of the EU embargo in 2004.<sup>37</sup>

15. Article 19 in the Treaty of Friendship specifically called for the implementation of the December 2007 agreement (joint patrolling) as well as the realization of a satellite surveillance system along Libya’s Southern border.<sup>38</sup>

16. According to this ‘push-back’ agreement, Gaddafi would keep refugees and migrants in Libya, the Italian authorities would return anybody leaving Libya irregularly,<sup>39</sup> and migrants would be subjected to mass detention, notably in **six detention camps that were built with Italian funds**.<sup>40</sup>

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12/09, European Studies Centre, Oxford, p.15, online, [https://www.academia.edu/413204/Emanuela\\_Paoletti\\_A\\_Critical\\_Analysis\\_of\\_Migration\\_Policies\\_in\\_the\\_Mediterranean\\_The\\_Case\\_of\\_Italy\\_Libya\\_and\\_the\\_EU](https://www.academia.edu/413204/Emanuela_Paoletti_A_Critical_Analysis_of_Migration_Policies_in_the_Mediterranean_The_Case_of_Italy_Libya_and_the_EU), accessed 25/03/2019; Heller, C., Pezzani, L., 2018, “*Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean*”, p26, Forensic Oceanography

<sup>35</sup> Amnesty International, 11 December 2017, “*Libya’s Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*”, p14, online, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>, accessed 25/03/2019

<sup>36</sup> Heller, C., Pezzani, L., 2018, “*Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean*”, p. 27, Forensic Oceanography

<sup>37</sup> Ronzitti, N., 2009, “The treaty on Friendship, Partnership and Cooperation between Italy and Libya: new prospects for cooperation in the Mediterranean?”, *Bulletin of Italian Politics*, Vol. 1(1), p125-133, online, [www.gla.ac.uk/media/media\\_126121\\_en.pdf](http://www.gla.ac.uk/media/media_126121_en.pdf) page 126, accessed 29/03/2019

<sup>38</sup> *Ibid.*; Documenti IAI, Istituto Affari Internazionali, online, <http://www.iai.it/sites/default/files/iai0909.pdf>, accessed 29/03/2019, Paoletti, E., 2009, ‘A Critical Analysis of Migration Policies in the Mediterranean: The Case of Italy, Libya and the EU’, RAMSES Working Paper 12/09, European Studies Centre, Oxford, online,

[https://www.academia.edu/413204/Emanuela\\_Paoletti\\_A\\_Critical\\_Analysis\\_of\\_Migration\\_Policies\\_in\\_the\\_Mediterranean\\_The\\_Case\\_of\\_Italy\\_Libya\\_and\\_the\\_EU](https://www.academia.edu/413204/Emanuela_Paoletti_A_Critical_Analysis_of_Migration_Policies_in_the_Mediterranean_The_Case_of_Italy_Libya_and_the_EU), accessed 25/03/2019; Tratto Di Amicizia, Partenariato e Cooperazione Tra La Repubblica Italiana e La Grande Giamahiria Araba Libica Popolare Socialista, online, [http://www.repubblica.it/2008/05/sezioni/esteri/libia-italia/testo-accordo/testo-accordo.html?refresh\\_ce](http://www.repubblica.it/2008/05/sezioni/esteri/libia-italia/testo-accordo/testo-accordo.html?refresh_ce), accessed 29/03/2019, Article 19 of the Treaty is worth quoting at length: “Collaborazione nella lotta al terrorismo, alla criminalità organizzata, al traffico di stupefacenti, all’immigrazione clandestina

1. Le due Parti intensificano la collaborazione in atto nella lotta al terrorismo, alla criminalità organizzata, al traffico di stupefacenti e all’immigrazione clandestina, in conformità a quanto previsto dall’Accordo firmato a Roma il 13/12/2000 e dalle successive intese tecniche, tra cui, in particolare, per quanto concerne la lotta all’immigrazione clandestina, i Protocolli di cooperazione firmati a Tripoli il 29 dicembre 2007.

2. Sempre in tema di lotta all’immigrazione clandestina, le due Parti promuovono la realizzazione di un sistema di controllo delle frontiere terrestri libiche, da affidare a società italiane in possesso delle necessarie competenze tecnologiche. Il governo italiano sosterrà il 50% dei costi, mentre per il restante 50% le due Parti chiederanno all’Unione Europea di farsene carico, tenuto conto delle intese a suo tempo intervenute tra la Grande Giamahiria e la Commissione Europea.

3. Le due Parti collaborano alla definizione di iniziative, sia bilaterali, sia in ambito regionale, per prevenire il fenomeno dell’immigrazione clandestina nei Paesi di origine dei flussi migratori.”

<sup>39</sup> Amnesty International, 2017, “*Libya’s Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*”, p. 14, online, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>, accessed 25/03/2019

<sup>40</sup> Heller, C., Pezzani, L., 2018, “*Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean*”, p. 28/29, Forensic Oceanography

17. On 4 February 2009, Additional Protocol to the December 2007 Agreement further specified the nature of the collaboration on migration and expanded its scope: maritime patrols were to include joint crews from the two countries in Libyan and international waters.<sup>41</sup>

18. The patrol boats promised in 2008 were delivered, and joint patrols started in May 2009. This is also when direct *refoulement* on the high-seas began.<sup>42</sup> Between 6 May 2009 and 6 November 2009, for example, 834 persons were pushed back and diverted to Libya.<sup>43</sup>

19. Between 2009 and 2010, the Italians intercepted many boats and delivered further 10 fast patrol boats to the LYCG.<sup>44</sup> In June 2010 UNHCR was briefly expelled from the country by Gaddafi under the auspices that they were ‘operating illegally’.<sup>45</sup>

20. The fall of Gaddafi marked the cessation of EU and Italy push-back and off-shore detention policy.<sup>46</sup> But as established below, the legacy of institutionalized refoulement and detention of migrants which started under Gaddafi with the ‘Treaty of Friendship’ lives on today. As the next section demonstrates, in spite of the ever worsening conditions and the unlawfulness of their policy, the European Union and Italy acted in concert to restore their Gaddafi-era migration policy, at all costs.

### 1.1.2 The fall (2011-2015)

21. During the 2011 war in Libya, the Libyan Coast Guard (LYCG) had no political will nor technical competency to participate, let alone coordinate, search and rescue (SAR) operations. In fact, **the LYCG was the enemy**: LYCG was involved in combating against NATO forces, and NATO classified and subsequently targeted LYCG assets as enemy naval assets.<sup>47</sup>

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<sup>41</sup> Ibid., p27

<sup>42</sup>Heller, C., Pezzani, L., 2018, “*Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean*”, p. 28, Forensic Oceanography

<sup>43</sup> Ibid., p.21; See also the pledge of “cooperation in the Fight against Terrorism, Organized Crime, Drug Trafficking, and Illegal Migration”, in Amnesty International, 11 December 2017, “Libya’s Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants”, p14, online, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>, accessed 25/03/2019 - The pledge of cooperation is actually Law no. 2 of 2009 on ratifying the Treaty of Friendship, Partnership, and Cooperation between the Great Socialist People’s Libyan Arab Jamahiriya and the Republic of Italy, online, [https://security-legislation.ly/sites/default/files/lois/7-Law%20No.%20%282%29%20of%202009\\_EN.pdf](https://security-legislation.ly/sites/default/files/lois/7-Law%20No.%20%282%29%20of%202009_EN.pdf), accessed 17/05/2019

<sup>44</sup> Amnesty International, 11 December 2017, “Libya’s Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants”, p14, online, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>, accessed 25/03/2019

<sup>45</sup> Ibid., p13

<sup>46</sup> Ibid., p14

<sup>47</sup> For example, during the evening of 28 March 2011, a U.S. Navy P-3C Maritime Patrol aircraft, a U.S. Air Force A-10 Thunderbolt attack aircraft and the guided-missile destroyer USS Barry (DDG-52), engaged LYCG vessel Vittoria and two smaller crafts, which were firing indiscriminately at merchant vessels in the port of Misrata: Navy News Service, 2011, “*US Navy P-3C, USAF A-10 and USS Barry Engage Libyan Vessels*”, online, [https://www.navy.mil/submit/display.asp?story\\_id=59406](https://www.navy.mil/submit/display.asp?story_id=59406), accessed 05/04/2019

22. Consequently, the equipment handed over to Libya by Italy for the implementation of EU-Italy externalized border control during the Gaddafi era was targeted, severely damaged or destroyed. In November 2012, Italian agents visited the port in Tripoli to assess the conditions of the assets Italy had handed over to Libya, found them in poor condition and sent them out of Libya until as late as 2017.<sup>48</sup>

23. On 23 February 2012, the European Court for Human Rights (‘ECtHR’) rendered its landmark ruling in the *Hirsi* case.<sup>49</sup> The ECtHR determined that Italy *must have known* the situation in Libya during the Gaddafi regime could not be considered safe, that Italy had violated the principle of *non-refoulement* by pushing migrants intercepted in the high seas back to a country they fled from and in which their lives would be at risk.<sup>50</sup>

24. Based on the situation in Libya, the ECtHR also held that the 1<sup>st</sup> Memorandum of Understanding (MoU) signed between the parties was insufficient “to ensure adequate protection against the risk of ill-treatment where... reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.”<sup>51</sup>

25. Despite the decision in the *Hirsi* case, only a month later (April 2012) Italy signed a second Memorandum of Understanding with Libya (the ‘2nd MoU’). The 2nd MoU provided, again, for the exchange of liaison officers, readmission agreement, training activities for Libyan agents and **even the recovery of detention centers.**<sup>52</sup>

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<sup>48</sup> Senato Della Repubblica, 2012, Documento XXXVIII, “Relazione sull’attività delle Forze di polizia, sullo stato dell’ordine e della sicurezza pubblica e sulla criminalità organizzata”. XXXVIII, n. 1 - TOMO II - Rel attività Forze di polizia, stato ordine e criminalità organizzata, online, <http://www.senato.it/service/PDF/PDFServer/DF/301487.pdf>, accessed 05/04/2019; Council of the European Union, 2017, “European External Action Service, EUBAM Libya Initial Mapping Report Executive Summary”, Brussels, p. 43, online, <http://statewatch.org/news/2017/feb/eu-ceas-libya-assessment-5616-17.pdf>, accessed 05/04/2019 ; Amnesty International, 11 December 2017, Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants, p14, online, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>, accessed 25/03/2019

<sup>49</sup> European Court of Human Rights, Grand Chamber, Judgment, Strasbourg, 2012, *Hirsi Jamaa and Others v Italy* (27765/09), online, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-109231%22%5D%7D>, accessed 05/04/2019

<sup>50</sup> *Ibid.*, §131 “[...] it therefore considers that when the applicants were removed, the Italian authorities knew or should have known that, as irregular migrants, they would be exposed in Libya to treatment in breach of the Convention and that they would not be given any kind of protection in that country”.

<sup>51</sup> *Ibid.*, §128. A detailed account on the legal implication within an ICL context of the decision in *Hirsi* will be provided in the legal part, section 3.2.2.2, below.

<sup>52</sup> Campesi, G., 2018, “Italy and the Militarization of Euro-Mediterranean Border Control Policies”, in Borroughs, E., Williams, K., ed., 2018, “*Contemporary Boat Migration: Data, Geopolitics and Discourses*”, London, Rowman & Littlefield.

26. About a year after Italy signed the 2<sup>nd</sup> MoU, on 22 May 2013, EU Border Assistance Mission (EUBAM) Libya operation, was launched,<sup>53</sup> with a Frontex Officer part of the Mission.<sup>54</sup>

27. But because of the situation in Libya, both EU operation and Italy's 2<sup>nd</sup> MoU failed: armed conflict, civil war, lack of government, and power divided between armed militias, city-states and tribes, prevented EU and Italy from re-imposing their externalized border control policies<sup>55</sup>. Consequently, in 2014, EUBAM mission control was moved to Tunisia due to the security situation in Libya.<sup>56</sup>

28. Severely weakened by the conflict, in 2015,<sup>57</sup> LYCG was responsible for **only 0.5%** of the 153,143 migrants who were either rescued or intercepted at sea.<sup>58</sup> As a result of the political and legal collapse of the Libyan-based EU migration policy, the EU and Italy shifted their policy of border externalization to *pre-Libyan and post-Libyan* territories.

29. One of the '*pre-Libya*' efforts was the Khartoum Process, which was initiated in November 2014 at a high-level meeting between the EU and 28 African states,<sup>59</sup> continued in November 2015 at the EU's Valletta Summit,<sup>60</sup> and resulted in the creation of the EU Trust Fund for Africa ('EUTF'). Similar to its Italian equivalent, *Fondo Africa*,<sup>61</sup> the EUTF consisted of EU 'aid' to multiple countries along the migration route to 'contribute to better *migration management* and to address the root causes' [emphasis added].<sup>62</sup> For several recipient African countries of this aid, for example,

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<sup>53</sup> Council of the European Union, 2017, "European External Action Service, EUBAM Libya Initial Mapping Report Executive Summary", online, <http://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf>, accessed 05/04/2019.

<sup>54</sup> Amnesty International, 2017, "Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants", p. 44, online, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>, accessed 25/03/2019.

<sup>55</sup> Toaldo, M., Fitzgerald, M., 2016, "A Quick Guide to Libya's Main Players", European Council on Foreign Relations, online, [http://www.ecfr.eu/mena/mapping\\_libya\\_conflict](http://www.ecfr.eu/mena/mapping_libya_conflict), accessed 05/04/2019

<sup>56</sup> European External Action Service, 2018, "EU-Libya Relations Factsheet", online, <https://eeas.europa.eu/headquarters/headquarters-homepage/en/19163/EU-Libya%20relations>, accessed 05/04/2019

<sup>57</sup> Please note this is the first year for which data is available

<sup>58</sup> Council of the European Union, 2017, "EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June - 30 November 2017", p.3; Micallef, M., 2017, "The Human Conveyor Belt: trends in human trafficking and smuggling in post-revolution Libya", The Global Initiative Against Transnational Organized Crime, p.49, online, <https://globalinitiative.net/wp-content/uploads/2017/03/GI-Human-Conveyor-Belt-Human-Smuggling-Libya-2017-.pdf>, accessed 05/04/2019

<sup>59</sup> European Union and International Centre for Migration Policy Development (ICMPD), 2016, Khartoum Process, "Milestones", online, <https://www.khartoumprocess.net/about/milestones>, accessed 05/04/2019. For a critical discussion see Statewatch News, 2015, "The 'Khartoum Process': beefing up borders in east Africa", online, <http://www.statewatch.org/news/2015/oct/khartoum-process.htm>, accessed 05/04/2019 and ARCI, 2015, "Diplomatie italienne avec l'Erythrée : sur le dos des migrants ?", Mediapart, online, <https://blogs.mediapart.fr/migreurop/blog/120815/diplomatie-italienne-avec-lerythree-sur-le-dos-des-migrants>, accessed 05/04/2019

<sup>60</sup> European Council, 2015, "Sommet de La Valette sur la migration, 11-12/11/2015", online, <http://www.consilium.europa.eu/fr/meetings/international-summit/2015/11/11-12/>, accessed 05/04/2019

<sup>61</sup> See, e.g. di Monica Ricci Sargentini, "«Uso inappropriato del Fondo Africa» Asgi e Amnesty ricorrono al Tar", 10/10/2018, *Corriere Della Serra* (Italian), [https://www.corriere.it/esteri/18\\_ottobre\\_10/lobia-italia-uso-inappropriato-fondo-africa-asgi-amnesty-ricorrono-tar-ff668262-cca3-11e8-ae88-febf99edce56.shtml](https://www.corriere.it/esteri/18_ottobre_10/lobia-italia-uso-inappropriato-fondo-africa-asgi-amnesty-ricorrono-tar-ff668262-cca3-11e8-ae88-febf99edce56.shtml), accessed 01/06/2019

<sup>62</sup> European Commission, EUTF, "EU Emergency Trust Fund for Africa", online,

Niger, the funding was not used for humanitarian purposes, but to improve the capacity of the Nigerien police and military to manage borders.<sup>63</sup>

30. The EUTF complemented existing Common Security and Defense Policies (CSDP) for long-term capacity building in Libya.<sup>64</sup> CSDP had ‘delivered tangible effect through the development of trust and credibility with key Libya interlocutors’, and the EU wanted this partnership to be better exploited with an **increased cooperation on the ground**.<sup>65</sup>

31. The EUTF would be the main financial mechanism through which the EU would later channel funds to Libyan factions in order to stem migration in the Central Mediterranean route during 2016-2017. By the end of 2018, the EU had provided the EUTF with €286 million.<sup>66</sup>

32. The ‘*post-Libya*’ efforts reflected in parallel a switch from *departure prevention* to *arrival prevention* strategy through the implementation of a deterrence-based policy of premeditated and intentional practice of non-assistance to migrant boats in distress at sea. As described below, EU agencies and agents intentionally created a lethal gap in the relevant SAR zone, in an area under the effective control of the EU and its Member States actors.

33. The purpose of intentionally distancing EU vessels from that area was twofold: to manipulate the law in bad faith in order to: (1) avoid international duties and obligations arising from EU control over the region commanded, and (2) to cause the death by drowning of innocent civilians, in order to deter and impact the behavior of others seeking to flee Libya.

34. As the next section further establishes, EU agents had foreknowledge that this policy change, specifically the decision to move from the Italian Operation Mare Nostrum to the EU Frontex JO Triton, would result in lethal consequences of thousands preventable deaths. The “Black April” incidents which took the lives of 1200 asylum seekers in one week, would become paradigmatic examples of the consequences of such change.

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[https://ec.europa.eu/trustfundforafrica/content/homepage\\_en](https://ec.europa.eu/trustfundforafrica/content/homepage_en), accessed 05/04/2019

<sup>63</sup> International Rescue Committee Report, 2018, “*Pushing the boundaries*”, p. 12, online, <https://www.rescue.org/report/pushing-boundaries-insights-eus-response-mixed-migration-central-mediterranean-route> accessed 05/04/2019

<sup>64</sup> European External Action Service, 2018, “Strategic Review on EUNAVFOR MED Op Sophia, EUBAM Libya & EU Liaison and Planning Cell”, p. 5, online, <http://www.statewatch.org/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf> , accessed 05/04/2019

<sup>65</sup>Ibid., p. 4

<sup>66</sup> European External Action Service, 2018, ‘*EU-Libya Relations Factsheet*’, online, [https://eeas.europa.eu/headquarters/headquarters-homepage\\_en/19163/EU-Libya%20relations](https://eeas.europa.eu/headquarters/headquarters-homepage_en/19163/EU-Libya%20relations), accessed 05/04/2019

## 1.2 1<sup>st</sup> EU policy: The Mediterranean (2013-2015)

### 1.2.1 Background: Mare Nostrum

#### **The Left to Die Boat (2011)**

35. On March 26<sup>th</sup> 2011, 72 migrants left Tripoli by boat with the aim of reaching Europe. After running out of fuel, the boat was left to drift for 14 days, and was eventually washed up on the Libyan shore with only 10 survivors, who were subsequently imprisoned. One of them eventually died for lack of medical care, and eventually, the 9 survivors were released after which they fled the country.<sup>67</sup>

36. Beyond the deaths themselves, the harrowing part of this event is concrete evidence showing that EU actors actively avoided rescuing the boat. Member State and NATO forces that were informed of the migrants' vessel's distress included a French military aircraft, MRCC Rome, NATO headquarters, NATO Task Force and NATO naval assets.<sup>68</sup> Specifically, upon learning of the distressed boat, the Italian and Maltese Maritime Rescue Coordination Centers "failed" to launch the necessary SAR operation. NATO actors also "failed" to react to the call for distress.<sup>69</sup>

37. Following the "incident", the Parliamentary Assembly of the Council of Europe "launched its own investigation in order to establish what happened and who might be responsible for failing to go to the rescue of these people."<sup>70</sup> In Resolution 1872 (2012), the Parliamentary Assembly held that the MRCC Rome "did not ensure that the passengers were rescued. It failed to contact the vessels which were close to the boat in distress and to request them to rescue these boat people. Since it was known that the Libyan SAR zone was not covered, Italy, as the first State to receive the distress call, should have taken responsibility for the co-ordination of the SAR operation."<sup>71</sup>

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<sup>67</sup> Parliamentary Assembly of the Council of Europe, *Resolution 1872*, 2012, § 5, online, <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=18234&lang=en>, available 05/04/2019

<sup>68</sup> Heller C., Pezzani, L. and Situ Studio, 2012, "Report on the "Left-To-Die Boat", Forensic Oceanography, p. 33 – 36, online, <http://www.forensic-architecture.org/wp-content/uploads/2014/05/FO-report.pdf>, accessed 05/04/2019

<sup>69</sup> Ibid., p. 22

<sup>70</sup> Parliamentary Assembly of the Council of Europe, *Resolution 1872*, 2012, § 3, online, <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=18234&lang=en>, accessed 05/04/2019

<sup>71</sup> Ibid., § 7

38. Resolution 1872 found a failure by “individual member States” and indicated that “[i]t was foreseeable that there would be an exodus of people fleeing the country, including by the dangerous sea route.”<sup>72</sup>

39. The Parliamentary Assembly urged States to “**fill the vacuum of responsibility for SAR zones** left by a State which cannot or does not exercise its responsibility for search and rescue, as was the case for Libya [...] In the case in question, two Maritime Rescue Coordination Centres (Rome and Malta) were aware that the boat was in distress, but neither started a SAR operation. The Rome MRCC was the first to be informed of the distress situation, and thus had a greater responsibility to ensure the boat’s rescue”.<sup>73</sup>

40. In 2011, the ‘Left to Die Boat’ incident was the exception. Years later, and expressly contrary to the recommendations laid out by the Council of Europe Parliamentary Assembly, it would become official EU policy.

### **The Lampedusa Shipwrecks (2013)**

41. In spite of amounting public pressure to resolve the situation, the migration crisis continued to escalate. As a result of regional dynamics, described by Forensic Oceanography in its *Death by Rescue* report, crossings from Libya began to increase dramatically as of Summer 2013, and were occurring in more and more precarious circumstances.

42. On 3 October 2013, in the most fatal migrant shipwreck at the time, a boat carrying 500 migrants sank less than one kilometer away from the shore of Lampedusa, claiming the lives of at least 366 people.<sup>74</sup>

43. A few days later, on 11 October 2013, a Libyan vessel shot at a boat carrying a group of 400 migrants, mainly Syrian refugees, heading towards Lampedusa. Several passengers were wounded, the vessel was damaged, and its passengers contacted MRCC Rome.<sup>75</sup>

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<sup>72</sup> Ibid., § 11

<sup>73</sup> Ibid., § 13.1.

<sup>74</sup> Heller, C., Pezzani, L., 2016, “*Death by Rescue*”, p. 3, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019.

<sup>75</sup> WatchTheMed, 2013, “*At least 366 people dead in wreck in 1km from Lampedusa*”, online, <http://watchthemed.net/reports/view/31>, accessed 08/04/2019.

44. Again, EU coordination of the SAR operation failed. By the time an Italian vessel reached the site, over 200 people had died.<sup>76</sup>

### **Mare Nostrum**

45. Following the preventable deaths of hundreds of migrants, several meetings took place at the EU Justice and Home Affairs, where ministers gathered to identify policies to prevent and better respond to future shipwrecks. But no substantial efforts were implemented following these meetings. On 18 October 2013, the Italian government launched its own SAR operation, Mare Nostrum (MN), the largest humanitarian operation in the Mediterranean.<sup>77</sup>

46. MN was charged with two objectives: “intercepting and rescuing *all* migrants’ vessels departing from the Libyan coasts” [emphasis added]<sup>78</sup> as well as “bringing to justice human traffickers and migrant smugglers.”<sup>79</sup>

47. Overall, the operation concerned an area of 70,000 square kilometers [20,408.734 squared nautical miles] of the Mediterranean Sea encompassing the SAR zones of Italy, Libya and Malta.<sup>80</sup> The initial operating budget for MN was of 9.5 million Euros per month, funded virtually solely by the Italian Government.<sup>81</sup>

### **From Mare Nostrum to Triton: Deterrence as an Organizational Policy**

48. Despite the large scale deaths, Mare Nostrum was in many ways hugely successful, rescuing 150,810 migrants over a 364-day period.<sup>82</sup>

49. However, critiques of Mare Nostrum began in summer of 2014 between Italy, Frontex, and the European Commission, when politicians representatives of EU agencies such as Frontex

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<sup>76</sup> Ibid.

<sup>77</sup> Heller, C., Pezzani, L., 2016, “*Death by Rescue*”, p. 4, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019.

<sup>78</sup> Ibid.

<sup>79</sup> Ministero della difesa, “*Mare Nostrum Operation*”, online, <http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx>, accessed 08/04/2019.

<sup>80</sup> Amnesty International, 2015, “*Europe’s Sinking Shame*” p.13, online, <https://www.amnesty.org/en/documents/eur03/1434/2015/en/>, accessed 08/04/2019.

<sup>81</sup> Slovenia was the only other European country to support the operation by sending a vessel to assist in SAR missions (see Agenzia Nazionale Stampa Associata, 2018, “Da MareNostrum a Sophia, il profilo delle missioni di salvataggio tra Italia e Ue”, *European Data News Hub*, online, <https://www.ednh.news/it/da-mare-nostrum-a-triton-il-profilo-delle-missioni-di-salvataggio-tra-italia-e-ue/>, accessed 08/04/2019).

<sup>82</sup> European Parliament, 2015, “*Resolution 2015/2660(RSP) on the latest tragedies in the Mediterranean and EU migration and asylum policies*”, § d, online, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0176>, accessed 08/04/2019.

criticized the operation for its alleged effects on the dynamics of migration.

50. The debates centered around two key issues: (1) the “pull factor” hypothesis, which criticized Mare Nostrum for motivating more migrants to arrive on the Italian coast<sup>83</sup>, and (2) the “death factor” argument, which criticized Mare Nostrum for leading smugglers to shift their strategies and organize crossings in more hazardous conditions, thus increasing the risk of death for migrants during the crossing.<sup>84</sup>

51. But statistics from Frontex Risk Analysis Quarterly for the period of July to September 2013 indicate that the most significant increase in crossings occurred starting in 2011, and then again as of Summer 2013<sup>85</sup> as result of the increase crossings by Horn of Africa and in Syrian refugees<sup>86</sup>, and the collapse of the transition process in Libya, increasing levels of violence experienced particularly by migrants along their route through Libya.<sup>87</sup> This increase thus occurred before Mare Nostrum was in effect. According to Forensic Oceanography, “[crossings] resulted from deeper regional political factors that were leading to this trend before MN. [...] the fact that MN was not the major cause is further confirmed by the comparable scale of crossings after MN.”<sup>88</sup>

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<sup>83</sup> Heller, C., Pezzani, L., 2016, “*Death by Rescue*”, p. 5, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019.

<sup>84</sup>Ibid., p. 5-7. The unfounded belief that Mare Nostrum had encouraged migrants to cross the Mediterranean was widespread. For example, on October 15<sup>th</sup>, 2014, during a governmental question period, the UK Foreign Office Minister Lady Anelya criticized search and rescue operations as an “unintended ‘pull factor’, encouraging more migrants to attempt the dangerous sea crossing and thereby leading to more tragic and unnecessary deaths,” arguing that the focus should be on “countries of origin and transit, as well as taking steps to fight the people smugglers who willfully put lives at risk by packing migrants into unseaworthy boats.” UK Parliament, 2014, “*Lords Hansard text for 15 Oct 2014: Column WA41*”, p. 2, online, <https://publications.parliament.uk/pa/ld201415/ldhansrd/text/141015w0001.htm>, accessed 27/02/2019.

This opinion was also shared by other EU politicians as well as the Italian right-wing political party Lega Nord.

<sup>85</sup> Frontex, 2014, “*FRAN Quarterly: Quarter 3: July - September 2013*”, p. 17, online, <https://data.europa.eu/euodp/en/data/storage/f/2016-03-08T125720/Fran%20Q3%202013.pdf>, accessed 27/02/2019 : “irregular migration in the Central Mediterranean increased staggeringly between the second and third quarters of 2013. Compared to detections during every other quarter in 2012 and 2013 the increase was both sudden and dramatic to a total of over 22 000 detected migrants.” Mare Nostrum, however, did not come into effect until October 2013, i.e. well after the July to September 2013 period.

<sup>86</sup> United Nations High Commissioner for Refugees: Policy Development and Evaluation Service, 2013, “*From slow boil to breaking point: A real time evaluation of UNHCR’s response to the Syrian refugee emergency*”, p. 1-21, online, <https://data2.unhcr.org/en/documents/details/37976>, 27/02/2019). Syrian refugees doubled from 1 million in March 2013 to 2 million in September 2013 – see United Nations High Commissioner for Refugees, 2019, “*Operational Portal: Refugee situations*”, p. 2, online, <https://data2.unhcr.org/en/situations/syria>, accessed 27/02/2019. The overburdened capacity of humanitarian organizations, and neighboring countries to host these refugees, pushing Syrian refugees to travel further for refuge. See United Nations High Commissioner for Refugees: Policy Development and Evaluation Service, 2013, “*From slow boil to breaking point: A real time evaluation of UNHCR’s response to the Syrian refugee emergency*”, p. 1-21, online, <https://data2.unhcr.org/en/documents/details/37976>, accessed 27/02/2019; United Nations High Commissioner for Refugees, 2019, “*Operational Portal: Refugee situations*”, p. 2, online, <https://data2.unhcr.org/en/situations/syria>, accessed 27/02/2019.

<sup>87</sup> Amnesty International, 2015, “*Libya is Full of Cruelty: Stories of abduction, sexual violence and abuse from migrants and refugees*”, p. 5, online, <https://www.amnesty.org/en/documents/mde19/1578/2015/en/>, accessed 27/02/2019. As a result, a growing number of those migrants who had attained UNHCR registration and were living in Libya left to flee across the Mediterranean – see United Nations High Commissioner for Refugees, 2013, “*External update - September 2013*”, p. 1-2, online, <https://reliefweb.int/report/libya/unhcr-libya-external-update---september-2013>, accessed 27/02/2019.

<sup>88</sup> Heller, C., Pezzani, L., 2016, “*Death by Rescue*”, p. 6, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed

52. In addition, the “more deaths” criticism against Mare Nostrum can likewise be refuted. According to FA, increase in deaths was not *causally* related to Mare Nostrum, but was related to factors that already had impact before MN: the worsening conditions in Libya, and the worsening smuggling boat conditions.<sup>89</sup> Also, MN’s scope was beyond the area of increased risk of migrant death.<sup>90</sup>

53. Finally, for the same period examined, death tolls were much higher post-Mare Nostrum in 2015 under Triton (1687 deaths), than during Mare Nostrum in 2014 (60 deaths), proving that the discursive argument that was used to dismantle a humanitarian operation turned out to be false.<sup>91</sup>

### 1.2.2 Policy: Triton

54. EU officials sought to end MN to allegedly reduce the number of crossings and deaths. However, not only the crossings were not reduced, but the death toll was 30-fold higher.

55. This was not a mistake. The evidence below establishes that EU agencies and agents were fully aware of the lethal consequences of ending Mare Nostrum, before the decision on its termination was made.

56. Likewise, the decision not to restore MN’s operation and to proceed with the policy change even after being cognizant of its ongoing lethal consequences, also demonstrates the *mens rea* of the involved actors.

57. Beyond the political considerations, financial factors also played a role in the decision to end MN.<sup>92</sup> The lack of solidarity of the European Union actors with Italy made its position more

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08/04/2019.

<sup>89</sup> Ibid., p. 7-9.

<sup>90</sup> Ibid., p. 9.

<sup>91</sup> Between January and April 2014 26 000 individuals crossing resulted in 60 deaths, and between January and April 2015 for a similar number of individuals crossing, it resulted in 1687 deaths. While it cannot be said that ending Mare Nostrum in itself directly caused deaths, after Triton replaced Mare Nostrum, the risk of dying therefore increased 30-fold with 2 deaths in 1000 crossings to 60 in 1000: “The ending of MN was thus justified on the argument that MN was the cause of more arrivals and more deaths. However, if, as we have demonstrated, increased crossings and deaths were related to deeper regional factors, discontinuing Mare Nostrum would not lead to less crossings but to more deaths at sea. This forecast was available to EU policy makers and agencies, and yet, as the following sections will show, they decided to end MN and (not)replace it with a more limited Frontex operation in all knowledge of the deadly consequences this policy would have.” Heller, C., Pezzani, L., 2016, “*Death by Rescue*”, p. 10, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019.

<sup>92</sup> Already having received additional help by the EU in November 2013 with 1.8 million Euros. See Carrera, S., Den Hertog, L., 2015, “Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean,” p. 3, *Liberty and Security*, no. 79, online, [https://www.ceps.eu/system/files/LSE\\_79.pdf](https://www.ceps.eu/system/files/LSE_79.pdf) , accessed 27/02/2019.

and more untenable. Throughout the spring and summer of 2014, Italian statements and institutional debates on having MN operating under Frontex, whilst the organization would take the lead in EU border control, took place, with no results.<sup>93</sup>

58. The new policy was envisioned to be much more limited than Mare Nostrum. Home Affairs Commissioner Malmström stated after the EU Minister of Interiors and Minister of Justice Informal Meeting on July 9, 2014 in Milan that she was discussing with Mr. Alfano, the Italian Interior Minister, a “scaled-down” version of MN, given the limits of means to support the operation.<sup>94</sup>

59. As established below, the “limits of means” was not the real reason for scaling down the extent of protection in an area under theoretical EU actors’ effective control. After Triton - the scaled-down policy that replaced MN - failed, the EU suddenly found indeed the additional means to expand the operation.

60. On August 28<sup>th</sup> 2014, Frontex issued a document setting out the plan for the future trajectory of Frontex’s pre-existing border patrol operations, Hermes and Aeneas. The proposal was to either extend Hermes, if Mare Nostrum was continued or upgraded, to a new operation -“Triton” – or to merge the operational zones of Hermes and Aeneas if Mare Nostrum was terminated.

61. By joining these two operational zones and removing Mare Nostrum, the European Union essentially carved the entire Southern part of what was previously covered by Mare Nostrum out of its operational scope, drawing the limits of Triton much closer to EU shores.<sup>95</sup>

62. The envisioned operational scope of Triton was within an area up to 30 nautical miles from the Italian coastline of Lampedusa, leaving around 40 nautical miles of key distress area off the coast of Libya uncovered.<sup>96</sup>

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<sup>93</sup> On April 16<sup>th</sup>, 2014 the Italian Ministry of Interior, Angelino Alfano announced that “Frontex will have to take on a leading role in directing and coordinating patrolling in the Mediterranean.” By June 24<sup>th</sup>, 2014, the Italian Prime Minister Matteo Renzi expressed that Italy would make a formal request at the EU Council Summit to ensure that “MN becomes an operation part of Frontex.” See Camera dei Deputati, 2014, “Resoconto stenografico dell’Assemblea Seduta”, n. 251, online, <http://www.camera.it/leg17/410?idSeduta=0251&tipo=stenografico>, accessed 27/02/2019.

<sup>94</sup> Times of Malta, 2014, “Malstrom: Frontex cannot substitute Italy’s Mare Nostrum operation”, online, <https://www.timesofmalta.com/articles/view/20140709/world/malmstrom-frontex-cannot-substitute-italys-mare-nostrum-operation.527031>, accessed 27/02/2019.

<sup>95</sup> Frontex: Operations Division Joint Operations Unit, 2014, “*Concept of reinforced joint operation tackling the migratory flows towards Italy: JO EPN-Triton: to better control irregular migration and contribute to SAR in the Mediterranean Sea*”, p. 9, online, [https://deathbyrescue.org/assets/annexes/2.Frontex\\_Concept\\_JO\\_EPN-Triton\\_28.08.2014.pdf](https://deathbyrescue.org/assets/annexes/2.Frontex_Concept_JO_EPN-Triton_28.08.2014.pdf), accessed 27/02/2019. Operation Hermes covered the areas of the Pelagic Islands and Sicily (excluding Malta), the area south of Sardinia, and included a Common Patrolling Area (CPA) which covered the east of Sicily. Operation Aeneas consisted of the operational areas of Apulia and Calabria, along the Ionian Sea coast and part of the Adriatic sea coast.

<sup>96</sup> Amnesty International, 2015, “*Europe’s Sinking Shame: The failure to save refugees and migrants at sea*”, p. 13, 23, online,

63. Triton employed significantly fewer vessels compared to MN. Whilst MN included 6 helicopters, 4 offshore patrol vessels, frigates and amphibious vessels, Triton only had one helicopter, one offshore patrol vessel and no frigates or amphibious vessels.<sup>97</sup>

64. In terms of financing, with an initial budget of 1.5—2.9 million Euros per month, it operated with on one third less of a budget than Mare Nostrum (9.5 million Euros), even though the latter was a national program, whilst Triton benefited from the support of 28 EU Member States.<sup>98</sup>

65. With a mandate as a border control operation, Triton would only be allowed to carry out SAR operations beyond the 30 nautical miles, and only if called on by the Italian Coast Guard.<sup>99</sup>

66. Hence, contrary to the practice under Mare Nostrum, the waters immediately off the coast of Libya would not be actively patrolled, severely limiting the search and rescue ability of Triton's operations to act in accordance with international human rights law, by knowingly and intentionally risking and sacrificing the lives of individuals in the High Seas, under the effective control of the EU that previously were covered by MN.

67. As described below, when planning was translated to implementation, the natural consequence of the creation of a zone lacking any form of SAR operations, a zone which happened to be the one where they were most needed – was that boats would be left to drift for a period of days from the moment of distress until a competent SAR vessel to reach them, given that Triton's vessels were now posted much further away from Libya's coast.<sup>100</sup>

68. Before the adoption of the policy still in the planning phase, EU officials did not shy away from acknowledging that Triton was an inadequate replacement for Mare Nostrum, and that the consequences of such an incomplete policy would be dire in terms of the cost of human lives.

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<https://www.amnesty.org/download/Documents/EUR0314342015ENGLISH.PDF>, accessed 27/02/2019.

<sup>97</sup> including one helicopter (as opposed to 6), two fixed-wing aircrafts (as opposed to 3), one offshore patrol vessel (as opposed to 4), and no frigates or amphibious vessels (as opposed to 1-2 and 1, respectively).

<sup>98</sup> Amnesty International, 2015, "*Europe's Sinking Shame: The failure to save refugees and migrants at sea*", p. 13, online, <https://www.amnesty.org/download/Documents/EUR0314342015ENGLISH.PDF>, accessed 27/02/2019.

<sup>99</sup> Nielson, N., 2014, "*Frontex mission to extend just beyond Italian waters*", p. 2, online, <https://euobserver.com/justice/125945>, accessed 27/02/2019).

<sup>100</sup> Heller, C., Pezzani, L., 2016, "*Death by Rescue*", p. 18, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019.

69. An internal Frontex report from 28 August 2014 acknowledged that:  
“the withdrawal of naval assets from the area, if not properly planned and announced well in advance – **would likely result in a higher number of fatalities.**”<sup>101</sup>
70. Furthermore, Frontex representatives were quoted as stating:  
“Of course, we will also do search and rescue actions, but if you don’t have enough capacity will you be there in time? **I would expect many more sea deaths the moment that Mare Nostrum is withdrawn.**”<sup>102</sup>
71. Also publicly EU officials commented that Triton was an inadequate replacement. For example, **Gil Arias**, the Frontex Interim Executive Director announced on **4 September 2014**:  
“**joint operation Triton will not replace Mare Nostrum. Neither the mandate, nor the available resources, allow for that replacement.**”<sup>103</sup>
72. Despite this public rhetoric, the EU ultimately decided to launch Triton on **1 November**, 2014, coming into full effect on **1 January 2015** after Mare Nostrum had been entirely phased out, without implementing any further compensatory policy.<sup>104</sup>
73. The fatal effects of Triton’s limited mandate, combined with the end of Mare Nostrum, were immediately observed. The Maritime Rescue and Coordination Center (MRCC) based in Rome began calling on Frontex to carry out SAR operations *outside* of the new rescue zone.<sup>105</sup>
74. In response, **Klaus Rösler**, the Frontex Director of Operations Division responded with a letter on **25 November 2014** to the Italian General Director of Immigration and Border Police, Giovanni Pinto, clarified that border control is Triton’s primary mandate by stating that it is outside the scope of Frontex to deploy assets outside of its operational area.

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<sup>101</sup>Frontex: Operations Division Joint Operations Unit, 2014, “*Concept of reinforced joint operation tackling the migratory flows towards Italy: JO EPN-Triton: to better control irregular migration and contribute to SAR in the Mediterranean Sea*”, p. 6, online, [https://deathbyrescue.org/assets/annexes/2.Frontex\\_Concept\\_JO\\_EPN-Triton\\_28.08.2014.pdf](https://deathbyrescue.org/assets/annexes/2.Frontex_Concept_JO_EPN-Triton_28.08.2014.pdf) , accessed 27/02/2019.

<sup>102</sup> Riddervold, M., and Bosilca, R. L., 2017, “*Not so humanitarian after all? Assessing EU Naval Mission Sophia*”, p.9, ARENA Working Paper, online, <https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2017/wp-5-17.pdf> , accessed 10/04/2019.

<sup>103</sup> European Parliament EPTV, 2014, “*Committee on Civil Liberties, Justice and Home Affairs*”, online, <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20140904-0930-COMMITTEE-LIBE> , accessed 27/02/2019.

<sup>104</sup> Amnesty International, 2014, “*JHA Council: Operation Triton cannot replace Operation Mare Nostrum*”, online, <https://www.amnesty.eu/news/jha-council-operation-triton-cannot-replace-operation-mare-nostrum-0792/> AND <https://euobserver.com/justice/125945> , accessed 27/02/2019.

<sup>105</sup> Heller, C., Pezzani, L., 2016, “*Death by Rescue*”, p. 15, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019.

75. Rösler further noted that only after “indication of a state of emergency” could deployment of SAR vessels be justified, implying that boats of migrants in distress at sea would not qualify as a state of emergency.<sup>106</sup>

76. According to EU agents themselves, the limited scope of Triton served the purpose of deterrence, in order to dissuade migrants from crossing the Mediterranean. Deterrence, therefore, under EU policy meant sacrificing the innocent lives of the few, in order to impact the potential future behavior of the many.

77. Frontex JO Triton 2015 Tactical Focused Assessment published on 14 January 2015 establishes the *Mens Rea* for this inhumane policy and its underlying crimes:

**“The end of Operation Mare Nostrum on 31 December 2014 will have a direct impact on the JO Triton 2014. The fact that most interceptions and rescue missions will only take place inside the operational area could become a deterrence for facilitation networks and migrants that can only depart from, the Libyan or Egyptian coast with favourable weather conditions and taking into account that the boat must now navigate for several days before being rescued or intercepted.”**<sup>107</sup>

78. The EU would quickly learn that their plan of underfunding required SAR operations under international law, would not deter individuals from making the journey. Instead of acting as a deterrence, migrant crossings continued with the number of those arriving between January and April 2015 almost equal to levels of migrant crossing between January to April 2014.<sup>108</sup>

79. EU officials were however far from discovering these effects. During the planning of their shift in operations, they had been repeatedly warned that the ending of MN would not lead to less crossings, only more deaths.

80. Tineke Strik, rapporteur for the human rights body of the Council of Europe, expressed his concerns regarding the consequences of this SAR vacuum, showing that they were predictable for anyone following the subject, stating that:

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<sup>106</sup> Ibid., p. 17.

<sup>107</sup> Frontex, 2015, “*JO Triton 2015: Tactical Focused Assessment*”, p. 2, online, [https://deathbyrescue.org/assets/annexes/7.Frontex\\_Triton%202015%20Tactical%20Focused%20Assessment\\_14.01.2015.pdf](https://deathbyrescue.org/assets/annexes/7.Frontex_Triton%202015%20Tactical%20Focused%20Assessment_14.01.2015.pdf), accessed 27/02/2019.

<sup>108</sup> Heller, C., Pezzani, L., 2016, “*Death by Rescue*”, p. 16, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019.

**“we know that [under Triton] there will be gaps and a vacuum in the territorial waters off Libya, for instance, and that is where the main accidents occur.”**<sup>109</sup>

81. As this gap in SAR abilities opened up after the implementation of Triton, Frontex was aware of its effects in terms of shifting the burden of rescue onto commercial vessels, which were forced to respond to the SAR gap created. Frontex likewise stated in its January 2015 tactical assessment of Triton that: **“facilitation networks will continue to exploit the presence of civilian merchant ships in the central Mediterranean during 2015 to reach Italy.”**<sup>110</sup>

82. Indeed, commercial vessels were quickly forced to respond to more and more distress calls the SAR gap created. Also this development has been envisioned by the responsible EU actors, as outlines in Frontex statement in its 2015 tactical assessment of Triton:

**“facilitation networks will continue to exploit the presence of civilian merchant ships in the central Mediterranean during 2015 to reach Italy.”**<sup>111</sup>

83. Not only EU and MS agencies and agents were aware of the inevitable outcome of such policy change, but also private actors have tried to warn the relevant EU bodies, in real-time, of the lethal consequences of their policy.

84. Specifically, the private sector reminded the EU that the vacuum created by shifting from MN to Triton, would be filled by occasional private actors lacking the know-how to conduct a SAR operation and whose involvement in SAR operations could have fatal results, as the Black April cases described below proved.

85. The International Chamber of Shipping (ICS) and the European Community Ship-owners Associations (ECSA) published a letter on **31 March 2015** addressed to EU heads of state, EU heads of government, and EEA member states, warning of the:

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<sup>109</sup>Davies, L., and Nelson, A., 2014, “Italy: End of ongoing sea rescue mission ‘puts thousands at risk’,” *The Guardian*, online, <https://www.theguardian.com/world/2014/oct/31/italy-sea-mission-thousands-risk>, accessed 28/02/2019; see also Grange, M., and Flynn, M., 2015 “Immigration Detention in Libya,” p. 10, *Global Detention*, online, <https://www.refworld.org/pdfid/5567387e4.pdf>, accessed 28/02/2019.

<sup>110</sup> Frontex, 2015, “*JO Triton 2015 Tactical Focused Assessment*”, p. 2, online, [https://deathbyrescue.org/assets/annexes/7.Frontex\\_Triton%202015%20Tactical%20Focused%20Assessment\\_14.01.2015.pdf](https://deathbyrescue.org/assets/annexes/7.Frontex_Triton%202015%20Tactical%20Focused%20Assessment_14.01.2015.pdf), accessed 27/02/2019.

<sup>111</sup> Frontex, 2015, “*JO Triton 2015 Tactical Focused Assessment*”, p. 2, online, [https://deathbyrescue.org/assets/annexes/7.Frontex\\_Triton%202015%20Tactical%20Focused%20Assessment\\_14.01.2015.pdf](https://deathbyrescue.org/assets/annexes/7.Frontex_Triton%202015%20Tactical%20Focused%20Assessment_14.01.2015.pdf), accessed 27/02/2019.

“terrible risk of further **catastrophic loss of life** as ever-more desperate people attempt this deadly sea crossing... **commercial ships are not equipped to undertake such large-scale rescues**”<sup>112</sup>

86. Migrants’ crossings continued at the same rate and in poor conditions, resulting in a continued need for SAR close to the Libyan coast, now lacking SAR protection previously afforded under Mare Nostrum.<sup>113</sup>

87. In numbers, the share of rescues under the Italian Navy decreased from 50 percent in 2014 to 26 percent in 2015, while the share of private sector’s commercial vessels increased to 30 percent.<sup>114</sup>

88. But gradually also the private sector followed the EU in an attempt to avoid responsibility to rescue migrants in distress at sea. In March 2015, UNHCR noted that as a result of the heavy financial losses incurred with search and rescue operations, shipping companies have started to re-route to avoid areas of heavy migrants’ boats traffic. Private vessels have also become reluctant to reveal their positions at sea.<sup>115</sup>

89. According to the Italian coast guard, in 2014, with Mare Nostrum in place, 822 merchant vessels were re-directed by MRCC Rome to search and rescue events. Of these, 254 took refugees and migrants on board, rescuing a total of 42,061 people. According to the International Chamber of Shipping, in 2015, as of the beginning of April, 111 merchant ships were diverted to search and rescue calls in the central Mediterranean. 41 of these rescued 3,809 people.<sup>116</sup> Many of these commercial vessels that were called upon by MRCC Rome to bear the burden of SAR were inadequately equipped and with crew not trained to operate SAR operations.

90. Since the end of Mare Nostrum, it was clear the means the EU provided are insufficient to tackle the multiple events in the critical SAR area: In one day, on 15 February, for example, 2,225

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<sup>112</sup> European Community Shipowners’ Associations (ECSA) and the International Chamber of Shipping (ICS), 2015, “*Letter to the Heads of State / Heads of Government of EU/EEA Member States - Humanitarian Crisis in Mediterranean Sea*”, online, <http://www.statewatch.org/news/2015/apr/eu-med-shipping-industry-letter-eu-heads-of-state.pdf>, accessed 25/02/2019.

<sup>113</sup> Heller, C., Pezzani, L., 2016, “*Death by Rescue*”, p. 17, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019.

<sup>114</sup> Of the 39250 people rescued between 1 January and 20 May 2015, 11954 individuals were rescued by commercial vessels according to: Frontex, 2015, “*Annual Risk Analysis 2015*”, p. 20, online, [https://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2015.pdf](https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf), accessed 27/02/2019.

<sup>115</sup> Amnesty International, 2015, “*Europe’s Sinking Shame: The failure to save refugees and migrants at sea*”, p. 17, online, <https://www.amnesty.org/download/Documents/EUR0314342015ENGLISH.PDF>, accessed 27/02/2019.

<sup>116</sup> Amnesty International, 2015, “*Europe’s Sinking Shame: The failure to save refugees and migrants at sea*”, p. 17, online, <https://www.amnesty.org/download/Documents/EUR0314342015ENGLISH.PDF>, accessed 27/02/2019.

people were rescued from a dozen boats. Between 11 and 14 April, almost 10,000 people were rescued in multiple operations by Italian authorities, merchant ships and Triton assets.<sup>117</sup>

91. Notwithstanding the efforts of all actors involved – the Italian coast guard, the Italian Navy, the Armed Forces of Malta, merchant vessels and, on occasion, of Triton assets and crews - it is Amnesty International (‘AI’) estimates that as many as 900 men, women and children died or disappeared at sea in the central Mediterranean in the first three and a half months of 2015.<sup>118</sup>

92. The conclusions of an examination of specific cases, examined by AI, are that the gap in search and rescue resources left by Mare Nostrum and not filled by Triton is likely to have contributed to loss of life.<sup>119</sup>

93. In the events examined, refugee and migrants’ boats could have been spotted and assisted earlier, had more numerous assets been deployed further south. Finally, the deployment of professional rescuers rather than assistance by a merchant vessel could have prevented boats in peril from capsizing.<sup>120</sup>

94. Under these conditions, the transition from MN to Triton naturally reflected a ‘death factor’ that had been anticipated by the relevant and above-cited EU agencies:<sup>121</sup> Migrant mortality

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<sup>117</sup> Amnesty International, 2015, “*Europe’s Sinking Shame: The failure to save refugees and migrants at sea*”, p. 9, online, <https://www.amnesty.org/download/Documents/EUR0314342015ENGLISH.PDF>, accessed 27/02/2019

<sup>118</sup> Amnesty International, 2015, “*Europe’s Sinking Shame: The failure to save refugees and migrants at sea*”, p. 9, online, <https://www.amnesty.org/download/Documents/EUR0314342015ENGLISH.PDF>, accessed 27/02/2019

<sup>119</sup> Amnesty International, 2015, “*Europe’s Sinking Shame: The failure to save refugees and migrants at sea*”, p. 9, online, <https://www.amnesty.org/download/Documents/EUR0314342015ENGLISH.PDF>, accessed 27/02/2019

<sup>120</sup> Amnesty International, 2015, “*Europe’s Sinking Shame: The failure to save refugees and migrants at sea*”, p. 9, online, <https://www.amnesty.org/download/Documents/EUR0314342015ENGLISH.PDF>, accessed 27/02/2019

<sup>121</sup> Heller, C., Pezzani, L., 2016, “*Death by Rescue*”, p. 17-18, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019; The International Chamber of Shipping likewise warned at the end of October 2014 that: “The shipping industry is therefore very concerned by reports that the new EU Frontex operation ‘Triton’ will have a third of the budget of the current Italian ‘Mare Nostrum’ operation which it replaces, that its primary focus will be border control, and that search and rescue operations may be reduced in international waters. It will clearly be much more difficult for merchant ships to save lives at sea without the adequate provision of search and rescue services by EU Member States.” World Maritime News, 2015, “*ICS: Rescue of all persons in distress at sea is a must*”, p. 1, online, <http://worldmaritimeweb.com/archives/141521/ics-rescue-of-all-persons-in-distress-at-sea-is-a-must/>, accessed 27/02/2019; Even further, on March 31, 2015 a coalition of shipping industry organizations wrote an open letter to the EU member states and institutions writing that: ““The humanitarian crisis in the Mediterranean Sea is spiraling out of control. [...] There is a terrible risk of further catastrophic loss of life as ever-more desperate people attempt this deadly sea crossing. [...] We believe it is unacceptable that the international community is increasingly relying on merchant ships and seafarers to undertake more and more large-scale rescues [...]. Commercial ships are not equipped to undertake such large-scale rescues [...]. In the short term, we therefore feel that the immediate priority must be for EU and EEA Member States to increase resources and support for Search and Rescue operations in the Mediterranean, in view of the very large number of potentially dangerous rescues now being conducted by merchant ships [...]. In addition to increasing SAR resources, there is also an urgent need for EU and EEA Member States to develop a political solution. [...] The shipping industry believes that the EU and the international community need to provide refugees and migrants with alternative means of finding safety without risking their lives by crossing the Mediterranean in unseaworthy boats.” European Community Shipowners’ Associations (ECSA) and the International Chamber of Shipping (ICS), 2015, “*Letter to the Heads of State / Heads of Government of EU/EEA Member States - Humanitarian Crisis in Mediterranean Sea*”, online, <http://www.statewatch.org/news/2015/apr/eu-med-shipping-industry-letter-eu-heads-of-state.pdf>, accessed 25/02/2019.

**increased 30 times**, from 2 deaths per 1000 crossings to 60 deaths per 1000 crossings, peaking in February and April 2015.<sup>122</sup>

95. For example, two events in January 22<sup>nd</sup> and February 8<sup>th</sup> 2015, resulted in an estimated 365 deaths as a result of this gap in SAR protection.<sup>123</sup> In the January case, 8 days passed before a migrant boat was detected by Malta patrol boats, one of which was under Triton's operations, and while these patrol boats came within 30 minutes of detection and saved 88 migrants, 34 migrants died from not being detected within the Triton zone soon enough.<sup>124</sup>

96. The February 8<sup>th</sup> event involved four boats, whereby as a result of *inter alia* limited availability of Triton vessels, it took up to 6.5 hours to reach some of the boats. This resulted in 330 deaths from the 420 migrants who left Libya, of which 29 of the deaths occurred from hypothermia during the 12 hour-long transport back to Lampedusa.<sup>125</sup>

97. According to UNHCR, despite the efforts of the Italian Coast Guard, Italian Navy, Malta Armed Forces, commercial ships, and Triton vessels, up to **900 migrants died** or disappeared at sea during the first three and a half months of 2015.<sup>126</sup> This is compared to **17 deaths** or persons missing while crossing reported as of mid-April 2014 under Mare Nostrum.<sup>127</sup> Comparing April 2014 and 2015, the number of drowned or missing migrants in April 2015 was **1308 compared to 42** for that same month the year before.<sup>128</sup>

98. Yet, crossings remained relatively similar with 20899 crossing as of mid-April 2014 compared to 21385 crossing as of mid-April 2015. The average number of victims per number of travelers had increased substantially, **from 1 in 50 in 2014 under Mare Nostrum to 1 in 23 in 2015 under Triton.**<sup>129</sup>

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<sup>122</sup> Heller, C., Pezzani, L., 2016, "Death by Rescue", p. 18, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019; Also found on Amnesty International, 2017, "Europe: A perfect storm: The failure of European policies in the central Mediterranean", p. 9, online, <https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF>, accessed 27/02/2019.

<sup>123</sup> Heller, C., Pezzani, L., 2016, "Death by Rescue", p. 18, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019.

<sup>124</sup> Ibid., p. 19-20.

<sup>125</sup> Ibid., p. 20-24.

<sup>126</sup> Amnesty International, 2015, "Europe's Sinking Shame: The failure to save refugees and migrants at sea", p. 9, online, <https://www.amnesty.org/download/Documents/EUR0314342015ENGLISH.PDF>, accessed 27/02/2019.

<sup>127</sup> Ibid., p. 12.

<sup>128</sup> United Nations High Commissioner for Refugees, 2015, "The sea route to Europe: Mediterranean passage in the age of refugees", p. 8, online, <https://www.unhcr.org/5592bd059.pdf#zoom=95>, accessed 27/02/2019.

<sup>129</sup> Amnesty International, 2015, "Europe's Sinking Shame: The failure to save refugees and migrants at sea", p. 12, online, <https://www.amnesty.org/download/Documents/EUR0314342015ENGLISH.PDF>, accessed 27/02/2019.

### 1.2.3 Cases: The Black Week of April

#### 1<sup>st</sup> Case

99. Various civil society organizations such as Amnesty International, Forensic Architecture and others, have thoroughly analyzed numerous specific shipwrecks. Here we have chosen to focus on the infamous “black week”, which refers to the two successive shipwrecks on **12 and 18 April 2015** in which a total of **1,200 migrants died**.<sup>130</sup>

100. In the first case, on 12 April, around 600 to 700 migrants left the port of Zuwara (Libya) on a fishing boat. Shortly after departure, the engines of the vessel encountered difficulties and water started entering the boat.<sup>131</sup> As the situation was becoming more dangerous, a distress call was issued to the Red Cross.<sup>132</sup>

101. However, it is unclear whether any specific action was undertaken by the Italian Coast Guard at the time, and who did advise the boat to continue navigating towards Lampedusa, **in an attempt to come closer to SAR vessels in the area**, as their vessel was still close to the Libyan coast.<sup>133</sup>

102. As the vessel continued northward to approach Italian coasts, it came across a supply vessel, the OOC Jaguar tug. The overloaded migrant vessel capsized as it was being approached by the other vessel. The OOC Jaguar tug eventually launched rescuing operation, but only after a “relatively long time” according to survivors.<sup>134</sup>

103. Two other tugboats, Asso Ventuno and Asso Ventiquattro, arrived on site immediately after the MRCC Rome sent out a distress call signaling the migrants’ vessel’s position.

104. Additionally, following MRCC Rome’s call requesting assistance, other assets were also deployed by the Italian Navy, the Italian Coast Guard, and a vessel financed by Frontex, the CP 324, to assist in the SAR operation.<sup>135</sup>

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<sup>130</sup> According to the UNHCR, arrivals in Italy increased from 2,238 in March 2015 to 16,063 in April of that same year. April 12<sup>th</sup> in particular saw a peak in the arrivals with a record of 3,791 people being rescued during that day alone.

<sup>131</sup> Heller, C., Pezzani, L., 2016, “*Death by Rescue*”, p. 28, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019.

<sup>132</sup> Ibid., p. 29.

<sup>133</sup> Ibid., p. 32.

<sup>134</sup> Ibid., p. 33.

<sup>135</sup> Heller, C., Pezzani, L., 2016, “*Death by Rescue*”, p. 38, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019.

105. However, these proved to be insufficient to rescue the many people on the capsized boat at sea.<sup>136</sup> Overall, a total of 145 migrants were rescued. The death toll surpassed 400 people.

## 2<sup>nd</sup> Case

106. During the 2<sup>nd</sup> shipwreck on **18 April** approximately **800** people were killed.<sup>137</sup> In conditions similar to the previous shipwreck a week earlier, as the boat began to appear unstable, passengers issued a distress call to request assistance to the MRCC in Rome. Subsequently, the Italian Coast Guard issued a call to boats present in the area and sent a Coast Guard vessel to help in SAR operations.

107. The Portuguese flag vessel *King Jacob*, a large commercial vessel, identified the presence of the migrants' boat but, as they drew near, both vessels collided leading the migrants' embarkation to capsize and sink.

108. Rescue efforts were undertaken by the Portuguese flag-vessel and the Italian Coast Guard, rescuing 28 people and retrieving 24 bodies, estimating the total of deaths to over 800 people. The Italian Coast Guard refused to share evidence regarding the SAR operation and precise unfolding of events.<sup>138</sup>

109. Because of the incapacity of commercial vessels to fulfil the gap created by the end of MN despite its replacement by Triton. In both situations, hundreds of deaths were directly attributable to the policy change that as established above had been implemented by the EU and its state actors knowing these scenarios are likely to occur.

### 1.2.4 Post-April 2015 evidence: Triton upgraded

110. After intense media scrutiny and public outcry, the events of April's black week forced European leaders to reckon with their responsibility in the deaths.

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<sup>136</sup> It should be noted that precise information on the operations during the time of the shipwreck is missing as MRCC Rome and Opielok Offshore Carriers GmbH (the supply vessel's private company) did not share all the evidence. For more information, see Heller, C., Pezzani, L., 2016, "Death by Rescue", p. 38, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019.

<sup>137</sup> Bonomolo, A., Kirchgaessner, S., 2015, "UN says 800 migrants dead in boat disaster as Italy launches rescue of two more vessels", *The Guardian*, online, <https://www.theguardian.com/world/2015/apr/20/italy-pm-matteo-renzi-migrant-shipwreck-crisis-srebrenica-massacre>, accessed 10/04/2019.

<sup>138</sup> Heller, C., Pezzani, L., 2016, "Death by Rescue", p. 41, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019.

111. Italian Prime Minister **Matteo Renzi** called for European solidarity while **Maltese PM** accused the European Union of “turn a blind eye to the plight of migrants.”<sup>139</sup> Additionally, a spokesperson for the UN Secretary General Ban Ki-Moon pointed out the need for a “robust search and rescue capacity in the Mediterranean.”<sup>140</sup>

112. On 25 April 2015 the President of the European Commission itself, **Jean-Claude Juncker**, admitted:

113. **“it was a serious mistake to bring the Mare Nostrum operation to an end. It cost human lives.”**<sup>141</sup>

114. EU policy was nonetheless by no means a mistake, as policymakers took the decision to replace Mare Nostrum by Triton in full awareness of the consequences of their acts, fully accepting that the change in policy would cause many preventable deaths, and that pursuing a policy of deterrence would lead to unnecessary deaths of those attempting to reach safety, against the responsibility of actors to uphold the interests of saving lives at sea.

115. On 23 April 2015, during an emergency summit, the European Council recognized the seriousness of the situation and planned to increase their presence in the Mediterranean as well as “reinforce internal solidarity and responsibility.”<sup>142</sup>

116. A significant part of these commitments focused on the reinforcement and expansion of Frontex’s Joint Operation Triton, which was by then presented as an answer to the humanitarian crisis the EU itself had triggered.<sup>143</sup>

117. On 29 April 2015, the European Parliament adopted a Resolution demanding a more committed response. The text adopted by the Parliament insists that SAR operations be “**effectively fulfilled and therefore properly financed**”<sup>144</sup>, while also advocating for a “permanent and

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<sup>139</sup>BBC News, 2015, “Mediterranean deaths: EU faces renewed pressure”, online, <https://www.bbc.com/news/world-europe-32376082>, accessed 10/04/2019.

<sup>140</sup> Ibid.

<sup>141</sup> Juncker, JC., 2015, “Speech by President Jean-Claude Juncker at the debate in the European Parliament on the conclusions of the Special European Council on 23 April: ‘Tackling the migration crisis’”, European Commission Press Release, online, [http://europa.eu/rapid/press-release\\_SPEECH-15-4896\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-4896_en.htm), accessed 10/04/2019

<sup>142</sup> European Council, 2015, “Special meeting of the European Council April 23rd 2015 – statement”, Press Release, online, <https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/>, accessed 10/04/2019

<sup>143</sup> Juncker, JC., 2015, “Speech by President Jean-Claude Juncker at the debate in the European Parliament on the conclusions of the Special European Council on 23 April: ‘Tackling the migration crisis’”, European Commission Press Release, online, [http://europa.eu/rapid/press-release\\_SPEECH-15-4896\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-4896_en.htm), accessed 10/04/2019

<sup>144</sup> European Parliament, 2015, “Resolution on the latest tragedies in the Mediterranean and EU migration and asylum policies”, 2015/2660 (RSP), online, <https://oeil.secure.europarl.europa.eu/oeil/popups/printficheglobal.pdf?id=655947&l=en>, accessed

humanitarian European rescue operation”, such as Mare Nostrum, “to extend its mandate for search and rescue operations.”<sup>145</sup> It also “**deplored the lack of commitment of the European Council.**”<sup>146</sup>

118. As a result of these discussions, on 13 May 2015, European Agenda on Migration translated the concern for the persisting humanitarian crisis in the Mediterranean, underlining the Member States’ commitment to adopt “**concrete steps, notably to avert further loss of life**”.<sup>147</sup>

119. It was clearly stated that the previous response deployed in the area - namely Operation Triton - was

“immediate but insufficient”<sup>148</sup> and instead, underlined the need to “**restore the level of intervention provided under (...) ‘Mare Nostrum’.**”<sup>149</sup>

120. It also put forward the proposal amended by the European Commission which tripled the budget – to the levels of MN - for the Frontex joint-operations Triton and Poseidon which allowed for a geographical expansion and increased assets for SAR and vigilance operations.<sup>150</sup>

121. On May 26th 2015, Frontex Executive Director **Fabrice Leggeri** signed the amended operation plan of the Joint Operation Triton significantly expanding Triton’s powers.<sup>151</sup> Indeed, the enlargement and reinforcing of Triton’s mandate, far from creating a “European Mare Nostrum”, helped revealing the real nature of EU objectives in the zone.

122. Several elements were immediately noted by humanitarian actors. *First*, the extended operation, which the EU claimed was an answer to the humanitarian crisis, still did not have the

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10/04/2019

<sup>145</sup> Ibid

<sup>146</sup> Ibid

<sup>147</sup> European Commission, 2015, “*Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration.*”, pg. 2, online, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf), accessed 10/08/2019

<sup>148</sup> Ibid

<sup>149</sup> Ibid p. 3

<sup>150</sup> Ibid, p. 6

<sup>151</sup> The budget was tripled, providing additional 26.25 million euros for both Triton and Poseidon Sea operations, Triton’s budget resulting in 38 million EUR for 2015 while an additional 45 million were to be provided the following year for both operations. Additionally, the operational area was also extended to 138 NM south of Sicily while additional assets such as offshore patrol vessels, helicopters and personnel were also to be mobilized for during the summer period, which was marked by a particular high migrant influx, see FRONTEX, 2015, “*Frontex expands its Joint Operation Triton*”, News Release, online, <https://frontex.europa.eu/media-centre/news-release/frontex-expands-its-joint-operation-triton-udpbHP> , accessed 10/04/2019 <https://frontex.europa.eu/media-centre/news-release/frontex-expands-its-joint-operation-triton-udpbHP>

same geographical scope as Mare Nostrum.<sup>152</sup>

123. *Second*, the upgraded Triton based itself on the premise of a border control operation, rather than a SAR operation.<sup>153</sup> So did the new operation European Union Naval Force Mediterranean (EUNAFORMED), officially launched on June 22<sup>nd</sup> 2015, which was a novel military operation at sea charged with the mandate of carrying out military action against smugglers and traffickers in Libyan territorial waters.<sup>154</sup>

124. As noted above, private sector actors attempted to avoid the financial loss rescue missions incurred, and subsequently there was a dramatic decrease in the number of commercial ships being mobilized for SAR operations, de-correlated to the number of crossings. While in the first five months of 2015, commercial vessels rescued 11,954 persons, between June and September this number reduced to 3 689 individuals (hence, dropping from 30% to 4% of all rescues).<sup>155</sup>

125. Consequently, NGOs interventions in the Mediterranean to provide life-saving assistance to migrants sharply raised, quickly making of them a “veritable civilian rescue flotilla” that fills the gap created by the EU institutions.<sup>156</sup>

126. Mainly patrolling the waters previously covered by MN, between Tripoli and Zuwara, by the end of October 2015 NGO vessels had already managed to rescue more than 18,000 individuals (7.6% of all rescued).<sup>157</sup>

127. If the 1<sup>st</sup> EU policy aspired to convey a ‘we are not there (anymore)’ message, by gradually albeit still partially filling the SAR gap, rescue NGOs communicated the humanitarian message that ‘someone is there’, complying with the duties of both safe rescue *and* safe disembarkation.

128. If EU officials were genuinely concerned by the loss of lives in the Mediterranean and wished to constructively act to avoid any further loss of lives, then they should have welcomed the presence of rescue NGOs who provided an alternative to the failure of State duties in preventing

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<sup>152</sup> Koller, E., 2017, “*Mare Nostrum vs. Triton*”, Munk School of Global Affairs, online, <https://munkschool.utoronto.ca/ceres/files/2017/10/Paper-Emily-Koller.pdf>, accessed 10/04/18

<sup>153</sup> Heller, C., Pezzani, L., 2016, “*Death by Rescue*”, p. 50, Forensic Oceanography, online, <https://deathbyrescue.org/>, accessed 08/04/2019.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.; See Italian Coast Guard data at: Forensic Oceanography, 2016, “*Forensic Oceanography Statistical Annex*,” p. 5-6, online, [https://deathbyrescue.org/assets/annexes/DeathbyRescue\\_Statistical%20annex\\_17.04.2016.pdf](https://deathbyrescue.org/assets/annexes/DeathbyRescue_Statistical%20annex_17.04.2016.pdf), accessed 10/04/2019

<sup>156</sup> Stierl, M., 2015, “*Maritime Humanitarians, Migrant Suffering and the Idea of Europe*,” Antipode (forthcoming).

<sup>157</sup> Forensic Oceanography, 2016, “*Forensic Oceanography Statistical Annex*,” p. 6, online, [https://deathbyrescue.org/assets/annexes/DeathbyRescue\\_Statistical%20annex\\_17.04.2016.pdf](https://deathbyrescue.org/assets/annexes/DeathbyRescue_Statistical%20annex_17.04.2016.pdf), accessed 10/04/2019

loss of lives and protecting the rights of individuals under their effective control.

129. The fact the EU moved to persecution by prosecution of NGOs reveals the objective of EU deterrence-based policies in the Mediterranean to stem migration flows to Europe at all costs, including the killing of thousands of innocent civilians fleeing an area of an armed conflict and located under the effective control of EU and its Member States.

130. It is in this sense that the EU shift to a new policy has to be understood. Instead of prioritizing urgent humanitarian response to tackle the loss of life of individuals under its control, the EU moved to distinguish a human category to facilitate the mistreatment of its imagined members.

131. What initially appeared to be too inhumane to be even conceivable – recalling the shocked reaction to ‘the left to die boat’ incident or the Lampedusa shipwrecks – what was at first covered up by an emphatic discourse, would be throughout the years more and more explicitly assumed.

132. As the next section demonstrates, from a withdrawal of budgets, assets and operations that characterized the policy of non-assistance in the Mediterranean (EU’s 1<sup>st</sup> Policy), the EU drastically moved to the other end by manifesting full military, strategic and tactical control, not only in High Seas or off the Libyan shores, but also in Libyan territorial waters and even on land (EU’s 2<sup>nd</sup> Policy).

133. From pretending to be powerless and without the means to allocate 9 million Euros for the continuation of an humanitarian endeavor operated by one frontline Member State, EU actors and institutions passed to a demonstration of force and the spending of tens of millions of Euros to prevent the departures, crossings and arrivals of migrants.

134. From pretending to take into account humanitarian considerations, EU actors and institutions acted more and more aggressively towards any actor that would interfere in their strategy, and at the same time chose to contract with the most aggressive actors to have them implement their unlawful and criminal strategy.

135. As the next section outlines, the new EU policy therefore conveyed a different message: ‘someone else – i.e. instead of rescue NGOs - should be there’. That ‘someone’ must be willing to fully obey EU orders to contain migration in Libya, and would be able to use whatever including unlawful means to this end.

136. EU agents were fully aware there was no possibility to stem the flows of people fleeing violence without violating international obligations. This is why in the post-*Hirsi* era, that ‘someone’ could no longer be the EU itself.

137. That ‘someone’ had to be corrupt enough to be involved with atrocious crimes EU agents would be aware of and would do whatever they could, albeit unsuccessfully, not to be directly implicated with. That someone was a militia known as the Libyan Coast Guard.

138. The next section focuses on EU 2<sup>nd</sup> policy which orchestrated the commission of the alleged atrocious crimes, this time not by omission, but by proxy. This policy had two key components: the first was the ousting of the NGOs that filled the SAR gap and failed EU 1<sup>st</sup> policy; the second was the establishment of an armed group to replace the NGOs in order to implement a widespread and systematic campaign of forced collective expulsions of those who somehow managed to flee Libya.

### 1.3 2<sup>nd</sup> Policy: Libya (2015-2018)

#### 1.3.1 Introduction: The renaissance of Border Externalization

139. The 2<sup>nd</sup> EU Policy, which is still ongoing, was framed in light of two insights: first, that migrants in Libya are so desperate to escape that the risk of dying by drowning fails to deter them; second, that mass shipwrecks such as the Black April incidents are intolerable for the public opinion. The old-new EU policy, however, would not aim to protect the life and liberty of migrants, but to ensure that killing and other crimes against them would be committed, and stay, far from public eye.

140. The Libyan 2011 uprising ended 40 years of Gaddafi's rule, and Libya became fertile ground for lawlessness: widespread violence including torture and sexual abuses, criminal activities including smuggling and human trafficking, started being largely facilitated by State institutions and non-state armed groups.<sup>158</sup>

141. In **February 2011**, the United Nations Security Council ('UNSC') unanimously referred the situation in Libya to the ICC (Resolution 1970).<sup>159</sup> And on **17 March 2011**, the UNSC demanded an immediate ceasefire and authorized **all necessary means to protect civilians** (Resolution 1973). This resolution provided the legal basis for the NATO-led military intervention launched on 19 March 2011.<sup>160</sup>

142. But armed hostilities escalated in mid-2014, further inhibiting the functioning of the domestic system of governance. Political chaos failed attempts by the EU and Italy to resort to their former push-back policy.

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<sup>158</sup> A confidential UN Panel of Experts Report from expressed concern "over the possible use of state facilities and state funds by armed groups and traffickers to enhance their control of migration routes." See The Migrant Project, "UN report accuses Libyan Security forces of colluding with smugglers and traffickers in Libya.", online <https://www.themigrantproject.org/libya-un/>, accessed 11/04/2019

<sup>159</sup> In **March 2011**, the Office of the Prosecutor ('OTP') at the ICC opened its investigation into crimes against humanity and war crimes. See: United Nations Security Council, 2011, "*Security Council Resolution 1970*", online, <http://unscr.com/en/resolutions/doc/1970>, accessed 11/04/2019 and International Criminal Court, 2019, "*Situation in Libya*", online, <https://www.icc-cpi.int/libya>, accessed 11/04/2019

<sup>160</sup> United Nations Security Council, 2011, "*Security Council Resolution 1973*", online, <http://unscr.com/en/resolutions/doc/1973>, accessed 11/04/2019

143. Given the ongoing armed conflict in Libya, it was clear to EU agencies and agents that in the post-*Hirsi* era, Member States and EU bodies including Frontex would be “fully accountable for all actions and decisions under its mandate”.<sup>161</sup>

144. Specifically, in a memo dated 7 October 2014, the European expressly acknowledged and manifested its awareness that push-backs constitute a grave violation of international law and in particular the principle of *non-refoulement*:

“as for all Frontex operation, **Triton will be operating in full respect with international and EU obligations, including respect of fundamental rights and of the principle of non-refoulement which excludes push backs.**”<sup>162</sup>

145. The situation in Libya was and is so “dire and unacceptable”,<sup>163</sup> as the ICC Prosecutor observed, that not only *refoulement* appeared inconceivable for Frontex, but on the contrary the evacuation of civilians from the country showed to be indispensable.

146. In **October 2015 the UNHCR** called all countries to allow civilians to enter their territories, underlying that no country should, once survivors succeeded fleeing Libya, disembark them in Libya which could not be considered as a place of safety:

“**As the situation in Libya remains fluid and uncertain, UNHCR calls on all countries to allow civilians ... fleeing Libya access to their territories.**”<sup>164</sup>

147. Furthermore, UNHCR clarified that it

“**does not consider that Libya meets the criteria for being designated as a place of safety for the purpose of disembarkation following rescue at sea.**”<sup>165</sup>

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<sup>161</sup> European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2011, “*Frontex Fundamental Rights Strategy*”, p. 4, online, [http://www.statewatch.org/observatories\\_files/frontex\\_observatory/2011-03-31-frontex-fundamental-rights-strategy.pdf](http://www.statewatch.org/observatories_files/frontex_observatory/2011-03-31-frontex-fundamental-rights-strategy.pdf), accessed 11/04/18

<sup>162</sup> European Commission, 2014, “*Frontex Joint Operation ‘Triton’ - Concerted efforts to manage migration in the Central Mediterranean*,” p. 2, online, [http://europa.eu/rapid/press-release\\_MEMO-14-566\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-566_en.htm), accessed 11/04/2019

<sup>163</sup> International Criminal Court, 2017, “*Statement of the ICC Prosecutor to the UNSC on the Situation in Libya*,” online, <https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib>, accessed 01/06/2019

<sup>164</sup> UNHCR, 2015, “*UNHCR Position on Returns to Libya - Update I*”, p. 13 <https://www.refworld.org/docid/561cd8804.html>

<sup>165</sup> *Ibid* p .16

148. A place of safety for disembarkation as defined by the IMO Maritime Safety Committee involves a place where the survivors’

**“safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met.”<sup>166</sup>**

149. In the case of asylum seekers rescued at sea, a place of safety is also including

**“the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened.”<sup>167</sup>**

150. This further complicated the position of EU actors, who were caught into more and more intense contradiction between their political objectives and their legal obligations.

151. Any direct contact between EU agents and survivors from Libya would have resulted in disembarkation in Europe. In the political and legal situation in which the EU was unable to resort to its push-back policy, there was only one other body the EU could contract with that would be willing to execute this policy for the EU, i.e. the Libyan Coast Guard.

152. On **17 December 2015**, facilitated by the United Nations Support Mission in Libya (‘UNSMIL’), different fractions signed the Libyan Political Agreement and established a Presidency Council with Prime Minister Serraj as the head of the Government of National Accord (‘GNA’)<sup>168</sup>.

153. The Libyan Political Agreement, however, did not cease hostilities. In **March 2016**, the Presidential Council of the GNA installed itself in Tripoli, but failed to take control of all the ministries and institutions. In the meantime, other authorities still tried to take control over infrastructures and struggled for legitimacy.<sup>169</sup>

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<sup>166</sup> International Maritime Organisation, 2004, “*Resolution MSC.167(78) – Guidelines on the treatment of persons rescued at sea.*”, Annex 34, 6.17, p. 10, online, [http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167\(78\).pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf), accessed 01/06/2019

<sup>167</sup> International Maritime Organisation, 2004, “*Resolution MSC.167(78) – Guidelines on the treatment of persons rescued at sea.*”, Annex 34, 6.17, p. 8, online, [http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167\(78\).pdf](http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf), accessed 11/04/2019

<sup>168</sup> El Yaakoubi, A., 2015, “*Libyan factions sign U.N. deal to form unity government*”, Reuters, online, <https://www.reuters.com/article/us-libya-security-idUSKBN0U00WP20151217>, accessed 14/04/2019

<sup>169</sup> Human Rights Watch, 2017, “*Libya, Events of 2016*,” online, <https://www.hrw.org/world-report/2017/country-chapters/libya>, accessed 11/04/2019

154. In the absence of effective state control over the national territory, armed groups continued to fight and commit human rights violations, and the humanitarian crisis further escalated, mounting to around 0.5 million internally displaced people (IDPs).<sup>170</sup>

155. As the ICC Prosecutor observed, the ongoing armed conflict and lack of government was leading to “[S]erious and widespread crimes allegedly committed against migrants attempting to transit through Libya...thousands of vulnerable migrants, including women and children, are being held in detention centres across Libya in often inhumane conditions. Crimes, including killings, rapes and torture, are alleged to be commonplace... credible accounts that Libya has become a marketplace for the trafficking of human beings... The situation is both dire and unacceptable... We must act...”.<sup>171</sup>

156. The ICC investigation has been pending since 2011. In the meantime, the EU kept on acting. Closing off the Central Mediterranean route required intensifying control while avoiding contact that would oblige the EU to save the lives of those fleeing Libya.

157. In order to do so, the EU adopted two-pronged strategy: (1) delegitimizing, criminalizing and ultimately ousting NGOs who remained committed safe rescue and disembarkation<sup>172</sup>; and (2) using a 3<sup>rd</sup> party that would agree to replace rescue with interception, *refoulement* and detention of those escaping Libya.

158. Evidence provided below show that EU policy to stem migration from Libya – despite the absolute prohibition on *refoulement* to Libya and the duty to facilitate access to those fleeing the country – has been successfully accomplished.

159. Through a series of pseudo-legal agreements and multiform support to the LYCG, EU agents have managed to exercise full strategic and operational control over Libyan territory, at sea and in land.<sup>173</sup>

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<sup>170</sup> Human Rights Watch, 2017, “*Libya, Events of 2016*,” online, <https://www.hrw.org/world-report/2017/country-chapters/libya>, accessed 11/04/2019

<sup>171</sup> International Criminal Court, 2017, “*Statement of the ICC Prosecutor to the UNSC on the Situation in Libya*,” online, <https://www.icc-cpi.int/pages/item.aspx?name=170509-otp-stat-lib>, accessed 11/04/2017

<sup>172</sup>Heller, C., and Pezzani, L., 2017, “*Blaming the Rescuers*”, Forensic Oceanography, online, <https://blamingtherescuers.org/>, accessed 11/04/2019

<sup>173</sup> Heller, C., and Pezzani, L., 2018, “*Mare Clausum, Italy and the EU’s undeclared operation to stem migration across the Mediterranean*”, p. 37, Forensic Oceanography, online, <http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>, accessed 11/04/2019

160. This policy is still ongoing and lets almost no survivor to reach safe haven. Between 2016-2018, 40,000 survivors that somehow managed to escape the living hell in Libya were pushed-back as a result of the EU policy that is described below, in violation of numerous legal conventions, including the Rome Statute.

### 1.3.2 The NGOs: ‘Someone Else Should Be There’

161. In response to the EU’s decision to decrease SAR operations in the Mediterranean, rescue NGOs became critical actors in responding to the “protection gap”. The presence of rescue NGOs in lieu of the EU vessels failed the deterrence-based policy aimed to create a lethal SAR gap.

162. After the termination of Mare Nostrum in 2014, NGOs stepped up to provide SAR and fill the ‘rescue gap’ in the face of the deteriorating humanitarian crisis. Migrant Offshore Aid Station (MOAS) was the first to step in, followed by the Amsterdam, Brussels and Barcelona Sections of MSF.<sup>174</sup>

163. In 2015 MOAS and MSF were joined by Sea-Watch<sup>175</sup> and in 2016 several new missions were deployed in the Mediterranean by SAR NGOs: SOS Méditerranée, Sea-Eye, Jugend Rettet, Life Boat, Proactiva Open Arms, Bootvuchtling and Safe the Children. Mission Lifeline started SAR operations in 2017.<sup>176</sup> At the peak, 12 vessels were dispatched” (see Table below)<sup>177</sup>.

**Table 1. Non-governmental providers of SAR in the Mediterranean.**

NGO	Capabilities	Period
MOAS	40 m <i>Phoenix</i>	August 2014–October 2017
MSF	51 m <i>Responder</i>	October 2015–November 2016
	50 m <i>Dignity 1</i>	May 2015–November 2016
	68 m <i>Bourbon Argos</i>	April 2015–November 2016
Sea-Watch	77 m <i>Prudence</i>	March 2017–October 2017
	27 m <i>Sea-Watch1</i>	April 2015–October 2015
	33 m <i>Sea-Watch2</i>	March 2016–October 2017
Sea-Eye	50 m <i>Sea-Watch3</i>	October 2017–
LifeBoat Project	26 m <i>Sea-Eye</i>	May 2016–October 2017
Pro-Activa	23 m <i>Minden</i>	June 2016–September 2017
SOS-Méditerranée	30 m <i>Astral</i>	June 2016–November 2016
	37 m <i>Golfo Azzurro</i>	December 2016–
	37 m <i>Open Arms</i>	March 2017–
Jugend Rettet	77 m <i>Aquarius</i>	February 2016–
Boat Refugee Foundation	37 m <i>Iuventa</i>	July 2016–August 2017
Save the Children	37 m <i>Golfo Azzurro</i>	September–November 2016
Mission Lifeline	57 m <i>Vos Hestia</i>	September 2016–November 2017
	33 m <i>Sea-Watch2</i>	October 2017–

<sup>174</sup> Cusumano, E., Pattison, J., 2018, “The Non-Governmental Provision of Search and Rescue in the Mediterranean and the Abdication of state Responsibility”, *Cambridge Review of International Affairs*, Vol. 31(1), p. 53

<sup>175</sup> *Ibid.*, p. 56

<sup>176</sup> *Ibid.*

<sup>177</sup> Forensic Oceanography, 2018, “*Blaming the Rescuers*”, online, <https://blamingtherescuers.org/report/>, accessed 05/04/2019

164. NGOs rescued one quarter of all those rescued in 2016, and one-third of all those rescued in the first three months of 2017.<sup>178</sup> As characterized by Federico Soda, Italy's director of the International Organization for Migration (IOM) –

**“The NGOs are present to fill a lifesaving gap in the absence of a state-led response to reduce the loss of lives”<sup>179</sup>.**

165. But as part of the premeditated attack on civilians fleeing the detention centers and torture houses in Libya, EU and Italian actors launched a broad political persecution against rescue NGOs, which includes intimidation, defamation, harassment, and formal criminalization.<sup>180</sup>

166. The criminalization of the rescuers was a key strategy of the overarching EU 2<sup>nd</sup> policy aimed at preventing - at all costs - the exit, let alone arrival of persons in need of international protection<sup>181</sup>, as this attack against NGOs was a precondition for ensuring the LYCG alone could push back migrants to Libya.<sup>182</sup>

### **De-legitimization**

167. Before resorting to, and in order to facilitate, meritless criminal prosecutions, Italian and EU authorities first sought to discredit NGOs in the media and popular press: NGOs were vilified and through multiple campaigns, depicted as enemies of the State.<sup>183</sup>

168. For example, FRONTEX reported an unfounded correlation stating that in 2016 “NGO presence and activities close to, and occasionally within, the 12-mile Libyan territorial waters nearly doubled compared with the previous year, totaling 15 NGO assets (14 maritime and 1 aerial). In parallel, the overall number of incidents increased dramatically”.<sup>184</sup>

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<sup>178</sup> Human Rights Watch, 2017, “EU: shifting rescue to Libya risks lives”, online, <https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives>, accessed 05/04/2019

<sup>179</sup> Hockenos, P., 2018, “Europe has Criminalized Humanitarianism”, *Foreign Policy*, online, <https://foreignpolicy.com/2018/08/01/europe-has-criminalized-humanitarianism/>, accessed 05/04/2019

<sup>180</sup> See Carrera, S., et al., 2018, “Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update (2018)”, European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, online, [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL\\_STU\(2018\)608838\\_EN](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN), accessed 05/04/2019

<sup>181</sup> Ibid.

<sup>182</sup> Amnesty International, 11 December 2017, “Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants”, p. 47, online, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>, accessed 25/03/2019

<sup>183</sup> Gennaro, A., 2017, “Ong, l'appello del relatore Onu: “Sono sotto attacco. Basta denigrare chi difende i diritti umani””, *Il Fatto Quotidiano*, online, <https://www.ilfattoquotidiano.it/2017/05/09/ong-lappello-del-relatore-onu-sono-sotto-attacco-basta-denigrare-chi-difende-i-diritti-umani/3572163/>, accessed 05/04/2019

<sup>184</sup> Frontex, 2017, “Risk analysis for 2017”, p32, online, [https://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2017.pdf](https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf), accessed 05/04/2019

169. Contrary to this statement, mortality rates crossing decreased with an increase of NGOs present. Peaks of the mortality rates coincided with a lack of deployed NGOs: “there was only one SAR NGO present in April (SOS Méditerranée) and only five in May”.<sup>185</sup>

170. Mortality rates were brought down over the summer months as NGO-assets reached peak deployment (11 SAR vessels) and NGOs’ share in rescues peaked in June with 35%. In December, when NGO progressively halted operations during the winter, mortality rates again peaked.<sup>186</sup>

171. Despite the decrease of NGO assets to 7 in November 2016, the NGO share of rescues peaked at 47%, highlighting the increased role of NGOs in filling the rescue gap left by other actors: Forensic Oceanography reports especially the decreasing share of rescues by EUNAVFOR MED and Frontex.<sup>187</sup>

172. Over time, however, and due to persecution of NGOs, their number in the Central Mediterranean dramatically decreased. From May 2018, only Sea-Watch, SOS-Méditerranée and Pro-activa remained to conduct SAR missions offshore Libya<sup>188</sup>.

173. European Union Agency For Fundamental Rights (FRA) reports that, of NGOs that previously had a presence in the Mediterranean, as per August 2018 only MSF/ SOS Méditerranée, Refugee Rescue PROEM AID (to start autumn 2018) and Proactiva Open Arms remain operational.<sup>189</sup>

174. In October 2018 Sea-Eye announced it would resume operations in the Mediterranean with two vessels.<sup>190</sup>

175. As Oscar Camps, the founder of Proactiva Open Arms, noted at the European Parliament in March 2018:

**"since 2016 there has been an ongoing campaign of persecution and criminalization of**

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<sup>185</sup> Forensic Oceanography, 2018, “*Blaming the Rescuers*”, online, <https://blamingtherescuers.org/report/>, accessed 05/04/2019

<sup>186</sup> Ibid.

<sup>187</sup> Ibid.

<sup>188</sup> Cusumano, E., Pattison, J., 2018, “The Non-Governmental Provision of Search and Rescue in the Mediterranean and the Abdication of state Responsibility”, *Cambridge Review of International Affairs*, Vol. 31(1), p63

<sup>189</sup> European Union Agency for Fundamental Rights, 2018, “*Fundamental Rights Considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations*”, online, <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>, accessed 08/04/2019

<sup>190</sup> Info Migrants, 2018, “NGO Sea-Eye to resume rescue missions”, Info Migrants, online, <https://www.infomigrants.net/en/post/12918/ngo-sea-eye-to-resume-rescue-missions>, accessed 12/04/2019

**NGOs working in the Mediterranean. At the beginning of 2016, there were 11 ships that operated in the central corridor of the Mediterranean, in 2017 this number fell to 9 and now, in 2018, there is only one".<sup>191</sup>**

176. In Italy, Carmelo Zuccaro, the chief prosecutor in Catania, spread groundless accusations that NGOs conducting SAR operations were “colluding with smugglers,” a claim which the Italian senate subsequently affirmed as a baseless, and which Zuccaro was forced to revoke<sup>192</sup>.

177. Austria’s former interior minister, Wolfgang Sobotka, to provide another example, called NGO workers “so-called helpers,” in cahoots with human traffickers, and called for their legal “punishment”.<sup>193</sup>

178. In July 2017, these defamatory accounts paved the way for Italy to impose a non-legally binding **Code of Conduct** as a disciplining measure targeting NGOs conducting SAR in the Central Mediterranean.<sup>194</sup>

179. Although the operation of rescue NGOs was already governed by at least three different multilateral maritime conventions, alongside international customary human rights and refugee law, EU ministers supported the Italian initiative.<sup>195</sup>

180. Amongst other provisions contrary to human rights, humanitarian and maritime law<sup>196</sup>, the Code of Conduct, supported by the European Commission, banned NGO vessels from entering Libyan territorial waters.<sup>197</sup> The Code also refused to grant permission to NGO vessels to disembark

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<sup>191</sup> Ansa, 2018, “NGO Ship Still Seized in Battle over 218 Migrants”, *InfoMigrants*, online, <https://www.infomigrants.net/en/post/8336/ngo-ship-still-seized-in-battle-over-218-migrants>, accessed 07/04/2019

<sup>192</sup> The Malta Independent, 2017, “*Italian Prosecutor: No NGOs-Migrant Smuggler Links Emerge*”, online, <http://www.independent.com.mt/articles/2017-05-03/local-news/Italian-prosecutor-no-NGOs-migrant-smuggler-linksemerge-6736173786>, accessed 05/04/2019

<sup>193</sup> Chase, J., 2017, “Refugee rescue NGOs reject human trafficking Charges”, online, <https://www.dw.com/en/refugee-rescue-ngos-reject-human-trafficking-charges/a-39737148>, accessed 05/04/2019

<sup>194</sup> Italy, “*Code of Conduct for NGOs Undertaking Activities in Migrants’ Rescue Operations at Sea*”, online, <https://www.avvenire.it/c/attualita/Documents/Codice%20ONG%20migranti%2028%20luglio%202017%20EN.pdf>, accessed 05/04/2019

<sup>195</sup> In a joint press release, EU ministers “welcomed the initiative of the Italian authorities to ensure that the NGO vessels involved in Search and Rescue (SAR) activities operate within a set of clear rules to be adhered to, in form of a code of conduct...” - see Press Statement Following Discussions on Central Mediterranean, “*Informal Meeting of Justice and Home Affairs Ministers*”, Government of Iceland, online, <https://www.stjornarradid.is/lisalib/getfile.aspx?itemid=634c4931-662c-11e7-941c-005056bc530c>, accessed 05/04/2019

<sup>196</sup> Amnesty International, 11 December 2017, “*Libya’s Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*”, p48, online, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>, accessed 25/03/2019

<sup>197</sup> Zalan, E., 2017, “NGOs divided by Italy’s new rescue code”, *EU Observer*, online, <https://euobserver.com/migration/138656>, accessed 05/04/2019

rescued persons at the closest port of safety.<sup>198</sup>

181. Several prominent NGOs performing rescue operations refused to sign the document.<sup>199</sup> As what can only be interpreted as punishment for non-cooperation, Italy immediately launched baseless criminal prosecutions against these rescue NGOs, particularly those that failed to acquiesce to the Code.

182. These policies became even more extreme under Matteo Salvini's leadership. The interior minister proposed a decree sanctioning SAR participants with a fine of up to 5.500 Euros per migrant saved.<sup>200</sup> In spite of UNHCR urging Italy to withdraw this decree, the Italian leader maintained its proposal.

183. A few weeks before, in November 2018, eleven UN special rapporteurs had joined their voices to denounce the fact that "the Italian Government, among others, has made it nearly impossible for NGO ships to continue rescuing migrants in the Mediterranean Sea".<sup>201</sup>

184. They added: "This has led to more migrants drowning or going missing [...] Saving lives is not a crime. Protecting human dignity is not a crime. Acts of solidarity and humanity should not be prosecuted".

### **Criminalization and Seizures of Vessels**

185. On the 17th of February 2017, this, the Public Prosecutor in Catania, threatened to open criminal investigations into SAR NGOs for their alleged facilitation of illegal immigration. This statement by a prosecutorial entity of a frontline member state was made prior to any evidence on the matter: Zuccaro himself stated that such investigation to be opened "**as soon as the occasion would present itself**".<sup>202</sup>

186. The occasion to persecute by prosecution "presented itself": Zuccaro opened an 'exploratory inquiry' which was followed by at least three other Italian Prosecutor Offices in

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<sup>198</sup> Italy, "Code of Conduct for NGOs Undertaking Activities in Migrants' Rescue Operations at Sea", online, <https://www.avvenire.it/c/attualita/Documents/Codice%20ONG%20migranti%2028%20luglio%202017%20EN.pdf>, accessed 05/04/2019

<sup>199</sup> Including, Spain's Proactiva Open Arms, Doctors Without Borders (MSF), Germany's Sea-Watch, Sea-Eye and Jugend Rettet, and France's SOS Méditerranée.

<sup>200</sup> AP, "UN tells Italy proposed decree violates migrants' rights", May 19 2019, accessed May 22 2019. [https://www.washingtonpost.com/world/europe/un-tells-italy-proposed-decree-violates-migrants-rights/2019/05/19/b8e14fea-7a25-11e9-b1f3-b233fe5811ef\\_story.html?noredirect=on&utm\\_term=.d2286968515b](https://www.washingtonpost.com/world/europe/un-tells-italy-proposed-decree-violates-migrants-rights/2019/05/19/b8e14fea-7a25-11e9-b1f3-b233fe5811ef_story.html?noredirect=on&utm_term=.d2286968515b)

<sup>201</sup> UNHCR Press Release, 21 november 2018 : <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23908&LangID=E>

<sup>202</sup> Forensic Oceanography, 2018, "Blaming the Rescuers", online, <https://blamingtherescuers.org/report/>, accessed 05/04/2019

Palermo, Cagliari and Trapani.

187. Zuccaro’s inquiry aimed at uncovering “who is behind all these humanitarian organizations that have proliferated in recent years, where all the money they have is coming from, and, above all, what game they are playing”.<sup>203</sup>

188. Days after having refused to sign the Code, in August 2017, the German nonprofit, **Jugend Rettet**, found its vessel *Iuventa* confiscated by Italian authorities and subject to criminal investigations under suspicion of assistance to illegal migration and collusion with smugglers.<sup>204</sup>

189. In July 2018 Jugend Rettet reported that the Italian public prosecutor would pursue the prosecution of individual crew members.<sup>205</sup> Since July 2018 actions have been taken against 10 former crew members.<sup>206</sup>

190. Investigations against staff members of **MSF** are also undergoing for aiding irregular migration.<sup>207</sup>

191. Investigations against **Sea-Watch** and its personnel were started for “alleged conspiracy and migrant smuggling”, and discontinued in June 2018.<sup>208</sup>

192. The public prosecutor of Sicily started an investigation into the *Vos Hestia* of the NGO **Save the Children** after an undercover agent worked on board the ship. The vessel was searched and the captain was interviewed by the deputy prosecutor of Trapani. The investigation was eventually discontinued.<sup>209</sup>

193. On 19 March 2018 vessel *Open Arms* with 218 migrants on board, operated by the Spanish NGO **Proactiva Open Arms**, was seized after it docked in Pozzallo, Sicily.

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<sup>203</sup> Ibid.

<sup>204</sup> Forensic Oceanography, 2018, “*The Iuventa Case*”, online, <https://blamingtherescuers.org/iuventa/>, accessed 05/04/2019; Jugend Rettet, Jugend Rettet Iuventa, online, <https://jugendrettet.org/en/>, accessed 07/04/2019

<sup>205</sup> Jugend Rettet, 2018, Press Statement 09.07.2018 “*Walls-up policy: Investigations against crew members of Jugend Rettet e.V.*”, online, [https://jugendrettet.org/f/files/PM\\_090718\\_ENGL\\_web.pdf](https://jugendrettet.org/f/files/PM_090718_ENGL_web.pdf), accessed 07/04/2019

<sup>206</sup> European Union Agency for Fundamental Rights, 2018, “*Fundamental Rights Considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations*”, online, <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>, accessed 08/04/2019

<sup>207</sup> European Union Agency for Fundamental Rights, 2018, “*Fundamental Rights Considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations*”, online, <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>, accessed 08/04/2019

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

194. On 16 April 2018 the vessel was released. But the public prosecutor of Catania continued investigating whether the captain and mission coordinator should face trial<sup>210</sup>: charges of “criminal association” and “facilitation of irregular migration” are still under investigation.<sup>211</sup>

195. The crew of Proactiva Open Arms’ vessel *Golfo Azzurro* also faced charges: the public prosecutor initiated criminal investigation “against persons unknown involved in migrant smuggling”. In June 2018 the investigation was discontinued by the Palermo Tribunal.<sup>212</sup>

196. July 2018, Italy’s new government arrested Claus-Peter Reisch, the captain of *Lifeline* of the NGO **Mission Lifeline**. He was charged with entering Malta’s territorial waters illegally with 234 migrants, whom he rescued on 21 June 2018.<sup>213</sup> Investigations are ongoing against the captain for “not following the orders of the Italian MRCC and entering Malta’s territorial waters illegally”.<sup>214</sup>

197. The Maltese public prosecutor began investigations into *The Sea Eye*, *Seefuchs*, and *Sea-Watch 3* (all Dutch flag-ships) in July 2018, operated by the NGO **Sea Eye** (first two vessels) and **Sea-Watch** respectively. Investigations regarded “potential issues with the registration of the ships”.<sup>215</sup> As a result the ships were not allowed to leave port for several months.<sup>216</sup>

198. Other meritless criminal prosecutions<sup>217</sup> would follow: in November 2018, for example, Italian prosecutors seized the *Aquarius*—run by SOS Mediterranee and Doctors without Borders (MSF)—for alleged anomalies in its disposal of on-board waste.<sup>218</sup>

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<sup>210</sup> Tondo, L., 2018, “Migrant-rescue boat Open Arms released by Italian authorities”, *The Guardian*, online, <https://www.theguardian.com/world/2018/apr/16/migrant-rescue-boat-open-arms-released-by-italian-authorities>, accessed 07/04/2019

<sup>211</sup> European Union Agency for Fundamental Rights, 2018, “*Fundamental Rights Considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations*”, online, <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>, accessed 08/04/2019

<sup>212</sup> Ibid.

<sup>213</sup> Hockenos, P., 2018, “Europe Has Criminalized Humanitarianism”, *Foreign Policy*, online, <https://foreignpolicy.com/2018/08/01/europe-has-criminalized-humanitarianism/>, accessed 07/04/2019

<sup>214</sup> European Union Agency for Fundamental Rights, 2018, “*Fundamental Rights Considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations*”, online, <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>, accessed 08/04/2019

<sup>215</sup> Ibid.

<sup>216</sup> SOS MEDITERRANEE, 2018, “‘Ambulances of the Sea’ are being targeted - and thousands in the Med will die because of it”, *Euronews*, online, <https://www.euronews.com/2018/12/27/ambulances-of-the-sea-are-being-targeted-and-thousands-will-die-in-the-med-because-of-it>, accessed 09/04/2019

<sup>217</sup> See Forensic Oceanography, 2018, “*Blaming the Rescuers*”, online, <https://blamingtherescuers.org/report/>, accessed 05/04/2019, demonstrating that the accusations formulated against SAR NGOs rest on “biased analysis and spurious causality links.”

<sup>218</sup> Denti, A., 2018, “Migrant Rescue Ship *Aquarius* Returns to Sea after Italy-Malta Dispute” *Reuters*, online, <https://www.reuters.com/article/us-europe-migrants-ngo/migrant-rescue-ship-aquarius-returns-to-sea-after-italy-malta-dispute-idUSKBN1KM51V>, accessed 05/04/2019

199. EU policy of ‘persecution by prosecution’, namely the attack on SAR organizations, was not limited to Italy and Malta, i.e. in connection with the deal the EU had struck with Libya. In fact, the systematic and widespread criminalization campaign had already been ongoing in Greece, following the deal the EU had struck with Turkey.

200. For example, on 14 January 2016, 3 Spanish firemen and 2 Danes working for the **NGO Proem-Aid and the NGO Team Humanity** were arrested in for helping migrants at sea. They were finally acquitted by a criminal court on the island Lesbos in May 2018.<sup>219</sup>

201. Also, in August 2018 employees of the **NGO Emergency Response Center International (ERCI)** were arrested and charged with smuggling. The Greek police made allegations that those arrested “were among 6 Greeks and 24 foreigners **from several organizations who are complicit in crimes** related to “organized migrant trafficking rings” with knowledge of “specific refugee flows,” without identifying them”.<sup>220</sup>

NGO vessel concerned	Authorities/courts involved	Type of measures/legal actions	Actions against crew members	Court decision
<b>ITALY</b>				
‘ <i>luventa</i> ’ (operated by <i>Jugend Rettet</i> )	<ul style="list-style-type: none"> <li>- Public prosecutor in Trapani (Sicily)</li> <li>- Tribunal of Trapani (Sicily)</li> <li>- Supreme Court of Cassation (Rome)</li> </ul>	<p>Ordering the ship to the port of Lampedusa (August 2017)</p> <p>Preventive seizure of the ship initiated by the prosecutor (August 2017)</p> <p>Preventive seizure confirmed by the</p>	<p>Yes</p> <p>(since July 2018 – against 10 former crew members, on account of facilitating irregular migration)</p>	<p>On the seizure of the ship = <b>Yes</b> (seizure confirmed)</p> <p>On the criminal responsibility of the crew members = case pending</p>

<sup>219</sup> Kokkindis, T., 2018, “Greek Court Acquits Foreign NGO staff of People Smuggling”, *Greek Reporter*, online, <https://greece.greekreporter.com/2018/05/08/greek-court-acquits-foreign-ngo-staff-of-people-smuggling/>, accessed 07/04/2019; See also Carleton and Garen, *How Small Bands of Rescuers Risk Prison to Save Migrants from Drowning in the Mediterranean*, online, <https://theintercept.com/2018/09/16/migrant-rescue-mediterranean-sea/>, accessed 17/04/2019 [add reference to Salam’s ECtHR case number]

<sup>220</sup> Human Rights Watch, 2018, “Greece: Rescuers at Sea Face Baseless Accusations”, online, <https://www.hrw.org/news/2018/11/05/greece-rescuers-sea-face-baseless-accusations>, accessed 07/04/2019

NGO vessel concerned	Authorities/courts involved	Type of measures/legal actions	Actions against crew members	Court decision
		Tribunal of Trapani (Sicily)  Supreme Court of Cassation rejected the objection to the seizure of the ship (April 2018)  Investigations extended to individual (former) crew members by the public prosecutor (July 2018)		
'Open Arms' (operated by ProActiva Open Arms)	<ul style="list-style-type: none"> <li>- Public prosecutor in Catania (Sicily)</li> <li>- Tribunal of Ragusa (Sicily)</li> <li>- Criminal Court of Ragusa (Sicily)</li> </ul>	<p>Pre-trial seizure of the ship in the port of Pozzallo (Sicily) by the prosecutor – because of the <a href="#">violation</a> of the IT Code of Conduct &amp; jeopardising migrants' lives (March 2018)</p> <p>Ship released following an order of the pre-trial judge at the Tribunal of Ragusa (April 2018)</p> <p>The Criminal Court of Ragusa rejected the prosecutor's appeal and confirmed the release of the ship (May 2018)</p>	<p>Yes</p> <p>(against the captain &amp; mission coordinator – on counts of "criminal association" and "facilitation of irregular migration")</p>	<p>On the lifting of the seizure of the ship = <a href="#">Yes</a> (ship released)</p> <p>On the criminal responsibility of crew members = No</p> <p>(charges under investigation)</p>

'Golfo Azzurro' (operated by ProActiva Open Arms)	<ul style="list-style-type: none"> <li>- Public prosecutor of Palermo (Sicily)</li> <li>- Tribunal of Palermo (Sicily)</li> </ul>	<p>Criminal investigations against unknown persons involved in migrant smuggling initiated by the public prosecutor</p> <p>Investigation discontinued by the Tribunal of Palermo (June 2018)</p>	<p>Yes</p>	<p><a href="#">Yes</a></p> <p>(investigation discontinued)</p>
'Vos Hestia' (operated by Save the Children)	<ul style="list-style-type: none"> <li>- Police</li> <li>- Public prosecutor in Trapani (Sicily)</li> </ul>	<p>Search on board after an undercover agent worked on the ship (October 2017)</p>	<p>No</p> <p>(investigations discontinued)</p>	<p>No</p> <p>(investigations discontinued)</p>

NGO vessel concerned	Authorities/courts involved	Type of measures/legal actions	Actions against crew members	Court decision
		Captain interviewed by the Deputy Prosecutor of Trapani		
<i>Médecins Sans Frontières</i> (no vessel, only staff subject to investigations)	- Public prosecutor in Trapani (Sicily)	Investigations against MSF staff (without specifying the details)	Yes (for aiding irregular migration)	No (investigations ongoing)
Sea Watch (no vessel concerned, only NGO staff subject to investigations)	- Public prosecutor in Palermo (Sicily)	Investigations for alleged conspiracy and migrant smuggling	Yes	<b>Yes</b> (investigations discontinued – June 2018)

<b>MALTA</b>				
'Lifeline' (operated by Mission Lifeline)	- Police - Public Prosecutor's Service	'Lifeline' impounded, while the other three vessels blocked at the port of La Valletta (end of June 2018)	<u>Yes</u> (against the captain – for <u>not following</u> orders of the Italian MRCC & entering Maltese territorial waters illegally)	No (all investigations & administrative procedures ongoing)
'The Sea Eye' (operated by Sea-Eye)		Maltese authorities <u>launched investigations</u> (July 2018) → due to potential issues with the registration of the ships (all three ships fly the flag of the Netherlands)	No	
'Seefuchs' (operated by Sea-Eye)			No	
'Sea-Watch 3' (operated by Sea-Watch)			No	
<b>GREECE</b>				
Volunteers working for the NGO 'PROEMAID' (no vessel seized)	- Public prosecutor of Mytilene (island of Lesbos) - Local court of Mytilene (island of Lesbos)	Arrest and detention of three volunteers (Spanish firefighters) (January 2016) → criminal charges and indictment (2017) Court in Mytilene (Lesvos) acquitted the	Yes (for migrant smuggling)	<u>Yes</u> (all three accused NGO volunteers acquitted)

NGO vessel concerned	Authorities/courts involved	Type of measures/legal actions	Actions against crew members	Court decision
		accused volunteers (May 2018)		
A German pensioner couple (private individuals, not associated with any NGO)	<ul style="list-style-type: none"> <li>- Local court on the island of Symi (Aegean Sea)</li> <li>- Court of Appeal of the Dodecanese</li> </ul>	<p>Boat (a recreational craft) confiscated</p> <p>Couple convicted for migrant smuggling to 16,5 years of imprisonment each by the local court in Symi</p> <p>Court of Appeal acquitted the wife and reduced the husband's prison sentence to 3,5 years (March 2017)</p>	Yes (for migrant smuggling)	<b>Yes</b> (final judgment)
Emergency Response Centre International (no vessel seized)	<ul style="list-style-type: none"> <li>- Police in Mytilene (island of Lesbos)</li> </ul>	Three NGO staff members arrested and criminal investigations started (August 2018)	Yes (for migrant smuggling)	No (investigations ongoing)

European Union Agency for Fundamental Rights, 2018, “*Fundamental Rights Considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations*”,<sup>221</sup>

202. In 2018 alone, at least 89 people were placed under investigation or prosecuted for their involvement with border crossers, as opposed to 20 prosecutions in 2017.<sup>222</sup> The steady rise in criminal persecution of humanitarian workers has had a cooling effect on the operation of rescue NGOs and, in turn, on the fact migrant arrivals to Europe have dramatically decreased, and the death toll increased.

### **The Misuse and Abuse of Laws of the Sea**

203. Along with legal and non-legal harassment, from August 2017, NGOs operating at sea began receiving specific instructions from EU agencies and agents to refrain from conducting certain rescue operations, regardless of if they were being in proximity to the boat in distress, and therefore having or not the competency to conduct a SAR operation.

<sup>221</sup> Online, <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>, accessed 08/04/2019

<sup>222</sup> French Piper, 2019, *Rescue a Refugee: Get Charged With Trafficking?*, online, <https://newrepublic.com/article/153216/rescue-refugee-get-charged-trafficking>, accessed 17/04/2019

204. These instructions intended to ensure that the LCYG would exclusively conduct the rescue, regardless of its distance from the scene, its overall competency to secure the lives of the civilians at risk, its criminal nature and the fact LYCG had never been engaged with rescue but with systematically violent interception, unlawful detention and *non-refoulement*, kidnapping and extortion, torture and abuse.<sup>223</sup>

205. While the identity of a vessel assigned to conduct SAR operation has nothing to do with the identification of a safe port to disembark the passengers rescued, EU policy was designed to precisely couple these two independent considerations: staging the scene so LYCG would intercept the targeted civilians, ensured the intercepted civilians would be pulled back to Libya, the very place they were attempting to escape and that is declared unsafe by the UNHCR and calling states to facilitate the exit of everyone from Libya by granting access to their territories.

206. For example, on 8 December 2017, the *Aquarius* was requested to move towards a vessel in distress which had been spotted by a EUNAFOR MED aircraft and an Irish warship part of the same operation. However, the *Aquarius* was overtaken by the faster EUNAFOR MED ship. Subsequently the Navy ship slowed down to let an approaching LYCG ship take over.<sup>224</sup>

207. The subsection below and Annex II (Section 6.2) depict several concrete cases of this industry of premeditated collective expulsions in which NGOs were ordered by EU agencies and agents to step aside despite being the closest most competent boat to conduct the SAR operation.

208. Thus, the installing of the LYCG as the dominant actor in the Central Mediterranean went hand in hand with the compromising of the capabilities of rescue NGOs operating in the region by delegitimizing and criminalizing their SAR activities<sup>225</sup>.

209. Since the GNA has announced its SAR zone, it has declared that **no foreign vessel could enter its SAR zone without its consent**— a ban with no basis under international law<sup>226</sup>. Furthermore, evidence gathered indicate that the LYCG are threatening and **using violence to**

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<sup>223</sup> Amnesty International, 11 December 2017, *Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*, p48, online, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>, accessed 25/03/2019

<sup>224</sup> Heller, C., Pezzani, L., 2018, “*Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*”, p75, Forensic Oceanography

<sup>225</sup> Heller, C., Pezzani, L., 2018, “*Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*”, p47, Forensic Oceanography

<sup>226</sup> Mathieu, M., 2018, “Migrants: le hold-up de la Libye sur les sauvetages en mer”, *Mediapart*, online, <https://www.mediapart.fr/journal/international/111018/migrants-le-hold-de-la-libye-sur-les-sauvetages-en-mer?onglet=full>, accessed 05/04/2019

ensure that NGO vessels do not enter the zone<sup>227</sup>.

### Recent Trends: Disembarkation Preventions, De-Flagging and other ‘Technicalities’

210. As deterrence and legal action has not reached its goal of *completely* shutting down NGO SAR missions, a new policy of disembarkation prevention is now used<sup>228</sup> as yet another means to target the ‘ambulances of the sea’.<sup>229</sup>

211. The Italian government has prevented rescue ships such as *Lifeline* (June 2018<sup>230</sup>), *Sea-Watch 3* (July 2018<sup>231</sup>) and even their own ship the *Diciotti* (in August 2018<sup>232</sup>), part of the Italian Coast Guard, from disembarking in Italian harbors.<sup>233</sup>

212. In August 2018 Gibraltar **revoked the flag** of the *Aquarius* and the ship was refused permission to dock in Marseille.<sup>234</sup> MSF and SOS Méditerranée’s rescue ship *Aquarius* “was **the last ship to save lives in the Central Mediterranean**”.

213. Panama also revoked its flag in September 2018 after what MSF called “blatant economic and political pressure from the Italian government”<sup>235</sup>.

214. In November 2018 the *Aquarius* obtained provisional flag registration from Liberia after both Gibraltar and Panama had revoked its registration. This provisional flag registration does not

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<sup>227</sup> Ibid.

<sup>228</sup> Scicluna, C., 2018, “Malta rescues 249 migrants in 24 hours; NGO boats held offshore”, *Reuters*, online, <https://www.reuters.com/article/us-europe-migrants-malta/malta-rescues-249-migrants-in-24-hours-ngo-boats-held-offshore-idUSKCN1OU0Y8>, accessed 08/04/2019

<sup>229</sup> SOS MEDITERRANEE, 2018, “‘Ambulances of the Sea’ are being targeted - and thousands in the Med will die because of it”, *Euronews*, online, <https://www.euronews.com/2018/12/27/ambulances-of-the-sea-are-being-targeted-and-thousands-will-die-in-the-med-because-of-it>, accessed 09/04/2019

<sup>230</sup> Pace, Y., 2018, “Lifeline standoff: Italian Prime Minister says migrant vessel will dock in Malta”, *Malta Today*, online, [https://www.maltatoday.com.mt/news/national/87832/lifeline\\_standoff\\_malta\\_in\\_diplomatic\\_efforts\\_to\\_avoid\\_humanitarian\\_crisis\\_on\\_migrant\\_ship\\_#.XLiXaJMzbBI](https://www.maltatoday.com.mt/news/national/87832/lifeline_standoff_malta_in_diplomatic_efforts_to_avoid_humanitarian_crisis_on_migrant_ship_#.XLiXaJMzbBI), accessed 18/04/2019

<sup>231</sup> Sea-Watch, 2018, “Sea-Watch 3 leaves Malta”, *Sea-Watch online*, <https://sea-watch.org/en/sea-watch-3-leaves-malta/>, accessed 18/04/2019

<sup>232</sup> Tondo, L., 2018, “Standoff in Italian port as Salvini refuses to let refugees disembark”, *The Guardian*, online, <https://www.theguardian.com/world/2018/aug/21/italy-refugees-salvini-refuses-coastguard-ship-docks-diciotti>, accessed 18/04/2019

<sup>233</sup> Galaski, J., 2018, “Why NGOs Have Stopped Search and Rescue Operations”, *Liberties Content*, online, <https://www.liberties.eu/en/news/why-ngos-have-stopped-their-search-and-rescue-operations/16294>, accessed 07/04/2019

<sup>234</sup> Yeung, J., 2018, “Gibraltar ship stripped of flag amid dispute over migrants stranded at sea”, *CNN*, online, <https://edition.cnn.com/2018/08/14/europe/aquarius-migrants-stranded-intl/index.html>, accessed 09/04/2019

<sup>235</sup> MSF Press Release, 2018, “*Italian Government pressures Panama to stop Aquarius Rescues on world’s deadliest maritime route*”, online, <https://www.msf.org/italian-government-pressures-panama-stop-aquarius-rescues-worlds-deadliest-maritime-route>, accessed 07/04/2019.

suffice for the vessel to resume rescue operations.<sup>236</sup>

215. On 31 January 2019, *Sea-Watch 3* was blocked in Catania due to “irregularities during technical verification of *Sea-Watch 3*’s compliance with the laws of the sea”. Johannes Bayer, Chairman of *Sea-Watch*, stated: “With the delay of our ship in the harbor, the responsibility **for further death at sea is taken, deliberately and with impunity. To hinder rescue workers is a criminal act itself**”.<sup>237</sup>

216. *Sea-Watch 3* was supposed to return to the SAR zone in the central Mediterranean on 17 March 2019 after passing inspection after maintenance on 15 March 2019. But on 2 April 2019, a new policy by the Dutch Ministry of Infrastructure and Water Management took effect, imposing stricter safety regulations on NGO ships than under the International Certification for Pleasure Crafts (ICP).<sup>238</sup>

217. As a result, “until the time the Dutch government is satisfied that we comply with more stringent technical requirements under the new regulation, *Sea-Watch* is forced to suspend its current mission and will be subjected to another series of farcical regulatory processes”<sup>239</sup>.

218. This policy does not only put further legal obstacles in the way of NGOs, hindering their life-saving actions, but also command those rescued to prolonged stays on board of ships that are not equipped to host individuals long-term, exposing the rescued persons to additional unnecessary risks.

219. The UNHCR has called for the urgent establishment of a coordinated and predictable rescue mechanism to strengthen rescue at sea, “especially with regards to disembarkation and subsequent processing” in addition to the removal of restrictions on NGOs.<sup>240</sup>

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<sup>236</sup> The Maritime Executive, 2018, “Last NGO-Run Rescue Vessel Med finds New Flag State”, *The Maritime Executive online*, <https://www.maritime-executive.com/article/last-migrant-rescue-vessel-finds-new-flag-state>, accessed 09/04/2019

<sup>237</sup> *Sea-Watch*, 2019, “UN says that criminalization has led to record death rate, while Italy blocks *Sea-Watch 3* in Catania port”, *Sea-Watch*, online, <https://sea-watch.org/en/italy-blocks-sea-watch-3-in-catania-port/>, accessed 07/04/2019

<sup>238</sup> These regulations have severe implications on NGOs capabilities to undertake SAR operations. *Sea-Watch* has documented the formation of this policy using documents obtained under the Dutch Freedom of Information Act. See: <https://www.dropbox.com/sh/y6ly0g34zafhqeb/AACMWH5twBk6y5EeCkFcURHba?dl=0> In its Memo *Sea-Watch* highlights the political foundations of this policy change rather than concerns for safety of migrants - once on board- and crew.

<sup>239</sup> *Sea-Watch*, 2019, “Dutch government blocks *Sea-Watch 3* and other NGO ships with a new policy, citing concerns for ‘safety’ while people are left to drown”, *Sea-Watch*, online, <https://sea-watch.org/en/dutch-government-blocks-sea-watch-3/>, accessed 09/04/2019

<sup>240</sup> UNHCR, “Desperate Journeys” online, <https://www.unhcr.org/desperatejourneys/#foreword>, accessed 08/04/2019

220. The **IOM** has called for the vulnerabilities of migrants on board NGO ships to be taken into consideration<sup>241</sup>. As Federico Soda, the Director of IOM Coordinating Office for the Mediterranean and Chief of Mission for Italy and Malta said:

**“Migrants arriving from Libya are often victims of violence, abuses and torture, their vulnerabilities should be timely and properly identified and addressed”**<sup>242</sup>.

221. The chairman of Sea-Watch, Johannes Bayer, has noted on the topic of disembarkation prevention and the blaming of NGOs: “It was the European governments who repeatedly delayed the disembarkation of rescued people for far too long, not us. They force us to accommodate people for weeks and then blame us for not being a hotel”<sup>243</sup>. He adds on the use of additional safety restrictions to ensure the safety of those on board:

**“In any case, it is the epitome of cynicism to use the safety of refugees as an argument to let them drown”**.<sup>244</sup>

222. In addition to prolonged stay on board NGO ships while waiting for permission to disembark, Italy’s policy of only admitting women and children - on which Interior Minister Matteo Salvini is refusing to budge<sup>245</sup> - can be considered as a kind of persecution, hidden in humanitarian discourses. According to a Sea-Eye statement:

**“To separate mothers and children from their fathers without a proper reason is active family separation and emotional torture”**.<sup>246</sup>

223. In spite of all the commentary from human right bodies, representatives, NGOs and civil society, standoffs with NGOs and migrants waiting for permission to disembark and diplomatic deadlocks continue to take place to date.

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<sup>241</sup> The Local, 2019, “Italy says Migrant Mothers, Kids Refuse to Leave German Rescue Ship”, *The Local*, online, <https://www.thelocal.it/20190406/italy-says-migrant-mothers-kids-refuse-to-leave-german-rescue-ship>, accessed 08/04/2019

<sup>242</sup> Di Giacomo, F., 2018, “IOM and UNHCR call for urgent resolution of Diciotti stand-off”, IOM online, <https://italy.iom.int/en/news/iom-and-unhcr-call-urgent-resolution-diciotti-stand>, accessed 08/04/2019

<sup>243</sup> Sea-Watch, 2019, “Sea-Watch 3 is no floating hotel”, *Sea-Watch online*, <https://sea-watch.org/en/sea-watch-3-is-no-floating-hotel/>, accessed 08/04/2019

<sup>244</sup> Ibid.

<sup>245</sup> The Local, 2019, “Italy says Migrant Mothers, Kids Refuse to Leave German Rescue Ship”, *The Local*, online, <https://www.thelocal.it/20190406/italy-says-migrant-mothers-kids-refuse-to-leave-german-rescue-ship>, accessed 08/04/2019

<sup>246</sup> Ibid.

## The Lethal Consequences of Ousting SAR NGOs

224. Multiple criminal cases against NGOs were opened during the relevant period. According to the European Agency for Fundamental Rights the shares of cases against NGO vessels or NGO personnel opened have been the following :

- I. Italy: 6 or 46,15%
- II. Malta: 4 or 30,77%
- III. Greece: 3<sup>247</sup> or 23,1%<sup>248</sup>

225. The criminalization and other means of intimidation led to sharp decrease in NGO presence. The European Union Agency For Fundamental Rights (FRA) reports that as per August 2018 only MSF/ SOS Méditerranée, Refugee Rescue PROEM AID (to start autumn 2018) and Proactiva Open Arms remain operational.<sup>249</sup>

226. As a result of EU, Italian (alongside other Member States) and Libyan hostile pressures and threats, and fearing they might be forced to hand rescued individuals to the LYCG which would return them to Libya, the following NGOs ceased their operations:

- I. Medecins Sans Frontières, in August 2017
- II. The Migrant Offshore Aid Station (MOAS), in September 2017<sup>250</sup>
- III. Germany's Sea Eye in September 2017<sup>251</sup>
- IV. Save the Children, in October 2017<sup>252</sup>

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<sup>247</sup> European Union Agency for Fundamental Rights, 2018, "*Fundamental Rights Considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations*", online, <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>, accessed 08/04/2019

<sup>248</sup> European Union Agency for Fundamental Rights, 2018, "*Fundamental Rights Considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations*", online, <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>, accessed 08/04/2019

<sup>249</sup> European Union Agency for Fundamental Rights, 2018, "*Fundamental Rights Considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations*", online, <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>, accessed 08/04/2019

<sup>250</sup> Scherer, S., 2017, "Malta-based charity group suspends Mediterranean migrant rescues" *Reuters*, online, <https://uk.reuters.com/article/uk-europe-migrants-ngo/malta-based-charity-group-suspends-mediterranean-migrant-rescues-idUKKCN1BF20P>, accessed 05/04/2019

<sup>251</sup> Amnesty International, 11 December 2017, "*Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*", p. 37, online, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>, accessed 25/03/2019

<sup>252</sup> Scherer, S., 2017, "Save the Children suspends migrant rescues in Mediterranean", *Reuters*, online, <https://uk.reuters.com/article/uk-europe-migrants-ngo/save-the-children-suspends-migrant-rescues-in-mediterranean-idUKKBN1CS23O>, accessed 05/04/2019

V. The MSF/SOS Méditerranée rescue ship Aquarius in December 2018<sup>253</sup>

227. The decreased presence of SAR NGOs had a direct impact on the death toll of maritime migration. The fatal effect of criminalizing the life-saving work of NGOs has been documented by academia and human rights bodies.<sup>254</sup>

228. Indeed, and while likely to be affected by several factors, evidence from the UNHCR shows the death rate for crossing increased substantially in 2018: **while the average for 2017 was 1 death for every 42 arrivals, in September 2018, it was 1 death for every 8 people who crossed.**<sup>255</sup>

229. Increased death at sea is not an unintended consequence, but part and parcel of strategies that hinge on deterrence to curb migration. According to UN Special rapporteur on extrajudicial, summary or arbitrary executions, **the criminalization of NGO work and**

**“the overall action plan suggest that Italy, the European Commission and EU Member States deem the risks and reality of deaths at sea a price worth paying in order to deter migrants and refugees”.**<sup>256</sup>

230. These accusations are corroborated with data. In December 2014, prior to the operations of rescue NGOs in the Central Mediterranean, 30% of rescues were undertaken by vessels deployed under EU JO Aeneas/Hermes/Triton, 40% by civilian vessels, and 30% by Italian Navy vessels.<sup>257</sup>

231. 2015 and 2016 saw a stark increase of NGOs operating in the Central Mediterranean. Between 2015 and 2016, the number of NGOs went up from 3 to 11.<sup>258</sup> At the peak, 12 vessels were dispatched<sup>259</sup>. **By November 2016 (the year with the highest number of NGOs present) SAR**

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<sup>253</sup> Hayden, S., 2018, “Refugee ship Aquarius to Stop Rescue Mission in the Mediterranean”, *Al-Jazeera*, online, <https://www.aljazeera.com/news/2018/12/refugee-ship-aquarius-stop-rescue-mission-mediterranean-181207062845983.html>, accessed 05/04/2019

<sup>254</sup> UN Special Procedures, 2018, “Joint communication of Special Procedures ahead of the informal summit of EU heads of state or government in Salzburg”, OL OTH 64/2018.; UN Human Rights Office, 2017, “*In search of dignity: Report on the human rights of migrants at Europe’s borders*”, United Nations, Geneva; Council of Europe Venice Commission Legal Experts (2018)

<sup>255</sup> UNHCR, 2018, “2,000 lives and counting: Mediterranean death toll 2018”, online, <https://www.unhcr.org/news/briefing/2018/11/5be15cf34/2000-lives-counting-mediterranean-death-toll-2018.html>, accessed 05/04/2019

<sup>256</sup> OHCHR, 2017, “Italy-EU search and rescue code could increase Mediterranean deaths, UN expert warns”, online, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21971&LangID=E>, accessed 05/04/2019

<sup>257</sup> Forensic Architecture, “*Death by Rescue*”, online, <https://deathbyrescue.org/>, accessed 09/04/2019

<sup>258</sup> Cusumano, E., Pattison, J., 2018, “The Non-Governmental Provision of Search and Rescue in the Mediterranean and the Abdication of state Responsibility”, *Cambridge Review of International Affairs*, Vol. 31(1), p56

<sup>259</sup> Forensic Oceanography, 2018, “*Blaming the Rescuers*”, online, <https://blamingtherescuers.org/report/>, accessed 05/04/2019

**NGOs were responsible for 47% of rescues.**<sup>260</sup>

232. The number of deaths of 2015 compared to 2016 increased from 2,892 to 4,581 and the mortality rate increased from 1.84 to 2.5.<sup>261</sup> Between February and April 2016, when NGO presence in the central Mediterranean was lowest, mortality rates of crossings increased to over 60%. After April, when NGOs returned to the region, mortality rates started a steep decline, nearing 0% in August, before increasing again - the steepest increase coinciding with the period October-November, when NGOs again began to leave the region.<sup>262</sup>

233. While certainly not a sole factor, the increase of persecution of NGOs goes with an increase in mortality rates in the Mediterranean: one person died or went missing for every 18 people who crossed to Europe between January and July 2018, compared to one death for every 42 people who crossed in the same period in 2017<sup>263</sup>: an increase from 2,4% to 5,6%. Finally, the mortality rate per crossing for 2018 and 2019 (up to 09/04/2019) ended up being of 2.3% and 11.1% respectively.

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<sup>260</sup> Forensic Oceanography, 2018, "*Blaming the Rescuers*", online, <https://blamingtherescuers.org/report/>, accessed 05/04/2019

<sup>261</sup> *Ibid.*

<sup>262</sup> Forensic Oceanography, 2018, "*Blaming the Rescuers*", online, <https://blamingtherescuers.org/report/>, accessed 05/04/2019

<sup>263</sup> UNHCR, 2018, "Mediterranean crossings deadlier than ever, new UNHCR report shows", *UNHCR online*, <https://www.unhcr.org/uk/news/press/2018/9/5b8935964/mediterranean-crossings-deadlier-new-unhcr-report-shows.html>, accessed 09/04/2019

### 1.3.3 The Libyan Coast Guard

#### **EUNFAVFOR MED: an ‘invitation’ and ‘something in exchange’**

234. Only a month after the “Black April” incidents, an Council of the European Union decision established Operation EUNAVFOR MED,<sup>264</sup> also known as operation Sophia, which was officially launched on 22 June 2015.

235. Like the Italian operation ‘Mare Sicuro’ launched a few months earlier, Sophia was also ostensibly aimed to disrupt the ‘business model of human smuggling and tackling networks in the Southern Central Mediterranean’.<sup>265</sup>

236. While the decision on its establishment was the primary legal source for EU and LYCG cooperation,<sup>266</sup> conducting SAR operations was not part of its mandate<sup>267</sup>.

237. Rather, one of the key tasks of EUNFAVFOR MED became to destruct the wooden boats used by refugees and migrants for the crossing.<sup>268</sup> As a result, smugglers started using cheaper and more unstable rubber dinghies which are “in need of rescue from the moment they depart”.<sup>269</sup>

238. One of the arguments often used in public discourse is the incapacity or lack of responsibility of the EU to operate further than its territorial waters.

239. On 28 January 2016 a secret report which was leaked by WikiLeaks revealed a quite different perspective with respect to its effective control and domination in the region. The report examined EUNVAFOR MED for the European Union Military Committee and the Political and

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<sup>264</sup> Council of the European Union, 2015, “Council Decision (CFSP) 2015/778, on a European Union military operation in the Southern Central Mediterranean (EUNVAFOR MED)”, Official Journal of the European Union, online, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D0778>, accessed 12/04/2019

<sup>265</sup> Council of the European Union, 2015, “Council Decision (CFSP) 2015/778, on a European Union military operation in the Southern Central Mediterranean (EUNVAFOR MED)”, Official Journal of the European Union, online, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D0778>, accessed 01/06/2019

<sup>266</sup> Skordas, A., 2018, “A ‘blind spot’ in the migration debate? International responsibility of the EU and its Member States for cooperating with the Libyan coastguard and militias”, EU Migration Law Blog, online, <http://eumigrationlawblog.eu/a-blind-spot-in-the-migration-debate-international-responsibility-of-the-cu-and-its-member-states-for-cooperating-with-the-libyan-coastguard-and-militias/>, accessed 12/04/2019

<sup>267</sup> Amnesty International, 2017, “A perfect storm: The failure of European Policies in the Central Mediterranean,” p. 11, online, <https://www.amnesty.org/en/documents/eur03/6655/2017/en/>, accessed 11/04/2019

<sup>268</sup> As of July 2018 EUNVAFOR MED had destroyed 551 assets used by smugglers including many wooden boats and engines: European External Action Service, 27 July 2018, *Strategic Review on EUNAVFOR MED Op Sophia, EUBAM Libya & EU Liaison and Planning Cell*, p28, online, <http://www.statewatch.org/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf>, accessed 14/04/2019.

<sup>269</sup> Amnesty International, 2017, *A perfect storm: the failure of European policies in the Central Mediterranean*, p. 5; see also p. 12, online, <https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF>, accessed 8/04/2019.

Security Committee of the EU was circulated confidentially within the concerned bodies.<sup>270</sup>

240. The report revealed that, already in January 2016, the leaders of the operation were pushing for a transition from operating in the High Seas (phase 2A) to **operating in Libyan Territorial Waters** (phase 2B).<sup>271</sup>

241. Under UNSCR 2259, however, in order to have the necessary legal mandate to operate in Libyan Territorial Waters, and in order to ensure Russia and China would not veto the decision, the EU needed an official invitation from the GNA.<sup>272</sup>

242. But as an invitation from a Libyan government first required a functioning government, for phase 2B to be feasible, EUNVAFOR MED included in its goals “to support in building the capacity of the Libyan Government of National Accord”<sup>273</sup> which in return would ‘invite’ the EU to operate in its waters, and later even in land (Phase 3). This triggered the following reasoning:<sup>274</sup>

**“Through the capability and capacity building of the Libyan Navy and Coastguard, the EU will be able to offer the Libyan authorities something in exchange for their cooperation in tackling the irregular migration issue, which could help secure their invitation to operate inside their territory.”<sup>275</sup>**

243. What this statement uncovered was that the EU followed long-term strategy that had not changed since the Gaddafi fall, to escape its legal duties by financing and controlling exterior executants who would bear the responsibility of its policies:

“Critical to our exit strategy is a capable and well-resourced Libyan Coastguard who can protect their own borders and therefore prevent irregular migration taking place from their shores”.<sup>276</sup>

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<sup>270</sup> European External Action Service, 27 January 2016, *Operation SOPHIA Six Monthly Report: June, 22nd to December, 31st 2015*, online <https://wikileaks.org/eu-military-refugees/EEAS/EEAS-2016-126.pdf>.

<sup>271</sup> Ibid p. 3

<sup>272</sup> Ibid p. 19 (“In order to move to phase 2 in Libyan territorial waters, we need firstly an invitation from the GNA, as the sole legitimate Government of Libya under UNSCR 2259(2015), and secondly a UN Security Council Resolution to provide the necessary legal mandate to operate. Whilst the transition to phase 2 in Libyan TTW with only a UNSCR without an invitation from the Libyan authorities is theoretically possible, it is unlikely that the UNSCR would be adopted as Russia and China have previously stated that a Libyan invitation would be required by them so as not to block the resolution”)

<sup>273</sup> European External Action Service, 27 January 2016, *Operation SOPHIA Six Monthly Report: June, 22nd to December, 31st 2015*, p.20, online <https://wikileaks.org/eu-military-refugees/EEAS/EEAS-2016-126.pdf>.

<sup>274</sup> Ibid p. 1

<sup>275</sup> Ibid p. 20

<sup>276</sup> See specifically page 3, and in general European External Action Service, 27 January 2016, *Operation SOPHIA Six Monthly Report: June, 22nd to December, 31st 2015*, online, <https://wikileaks.org/eu-military-refugees/EEAS/EEAS-2016-126.pdf>, accessed 9/04/2019.

244. As it will be demonstrated below, at that time the EU had full knowledge not only of the *Hirsi* ruling from 2012 and the UNHCR guidelines regarding Libya from 2015, but also of the current role Libyan agents played in the smuggling business, and of course the overall situation in Libya.<sup>277</sup> It nonetheless decided to pursue what it knew was an illegal strategy that would severely attain the right to life of thousands of people.

### **No Government, Criminal Militias control Libya**

245. The mandate of EUNAVFOR MED was governed by the implementation of the UN Arms Embargo (Resolution 2292) on the high seas off the coast of Libya.<sup>278</sup> The arm embargo included the following exemption:

“Affirming that ... the supplies of **non-lethal** military equipment and the provision of any technical assistance, training or financial assistance, when intended solely for security or disarmament assistance to the GNA and the national security forces **under its control**, shall be exempt from prior notification to and approval by the Committee”.<sup>279</sup>

246. As demonstrated below, the EU provided equipment, training, financial assistance and other forms of direct and indirect support that were both **lethal** and provided to units that were **not under the control** of the GNA.

247. LYCG has been made up of six sectors supposedly coordinated by the national command located in Tripoli. In practice, however, since 2011 the LYCG command in Tripoli has had little control over the different sectors, all of which have been infiltrated to different degrees by militias.

248. Once large-scale migration movement gained momentum, as early as 2013, militias infiltrated to the LYCG. By the time Italy and the EU sought to engage with LYCG, the latter had integrated militias involved in criminal activities.<sup>280</sup>

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<sup>277</sup> Frontex, 31 March 2016, *JO EPN Triton, Biweekly Analytical Update*, p 3. This same analysis is also included in Frontex, 2017, *Africa-Frontex Intelligence Community Joint Report 2016*, p18, online, [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/AFIC/AFIC\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/AFIC/AFIC_2016.pdf), accessed 8/04/2019.

<sup>278</sup> Amnesty International, 2017, *A perfect storm: the failure of European policies in the Central Mediterranean*, p15, online, <https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF>, accessed 8/04/2019.

<sup>279</sup> UNSC Resolution 2292 (2016).

<sup>280</sup> Amnesty International, *Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*, p34, online <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>, accessed 12/04/2019.

249. Beyond the lack of control of the different militias composing the LYCG, the GNA has had partial and limited control over the country. The division of the country into two competing governments has specially affected the LYCG: for example, after 2014, the units in the Eastern area started reporting to the Parliament based in Tobruq and did no longer fall under the LYCG command in Tripoli.<sup>281</sup>

250. Accordingly, as Amnesty International describes, “Italian government representatives also discussed measures to reduce irregular migratory movements with Khalifa Haftar, the head of the self-styled Libyan National Army which controls the east of the country. Haftar visited Italy on 26 September 2017 to meet with the Italian Ministers of Interior and Defense.”<sup>282</sup>

251. In any event, and as various experts noted, Libya  
“lacks the central government with sufficient control over the security apparatus, or the capacity and reach to govern its borders... Security – including ... **coastguard and customs – is provided by an ever-changing spectrum of politically allied militia groups**”.<sup>283</sup>

252. Also the UNSC Panel of Experts on Libya tasked with monitoring the sanctions determined:  
**“neither the coastguard nor the navy has been notified to the Committee as part of the security forces under the control of the Government of National Accord”**.<sup>284</sup>

253. On the 10 June 2017 the **Libya Sanctions Committee** which is tasked with overseeing the implementation of the UN arms embargo issued a report in which it raised concerns that **the beneficiaries of EU training did not fall within the permissible exemptions to the embargo**.<sup>285</sup>

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<sup>281</sup> Laessing, U., 2015, “Insight - Why Libya's coastguard struggles with migrant tide”, *Reuters*, online, <https://uk.reuters.com/article/uk-libya-security-coastguard-insight-idUKKCN0PU10020150720>, accessed 01/06/2019.

<sup>282</sup> Amnesty International, 2017, *Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*, p50, online, <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>, accessed 09/04/2019.

<sup>283</sup> Reitano, T. and Micallef, M., 2017, “The anti-human smuggling business and Libya’s political end game”, *Institute for Security Studies*, p11, online, <https://issafrica.s3.amazonaws.com/site/uploads/nar2.pdf>, accessed 11/04/2019. See also Mangan, F. and Murtaugh, C., 2014, “Security and justice in post- revolution Libya: where to turn?”, *United States Institute of Peace*, online [https://www.usip.org/sites/default/files/PW100-Security\\_and\\_Justice\\_in\\_Post-Revolution\\_Libya.pdf](https://www.usip.org/sites/default/files/PW100-Security_and_Justice_in_Post-Revolution_Libya.pdf), accessed 12/04/2019.

<sup>284</sup> The Panel of Experts on Libya, 1 June 2017, “Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011)”, United Nations Security Council, para 152, online, <https://reliefweb.int/sites/reliefweb.int/files/resources/N1711623.pdf>, accessed 11/04/2019.

<sup>285</sup> Human Rights Watch, 19 June 2017, “EU: shifting rescue to Libya risks lives”, *Human Rights Watch*, online, <https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives>, accessed 11/04/19. .

254. Finally, as of **21 August 2017**, EUNAVFOR MED was assigned the task of *monitoring* the activities of the LYCG and Libyan Navy (LN)<sup>286</sup>, and executed its obligations in a way that manifested the hierarchical power relation between the parties.<sup>287</sup>

To sum, the GNA's control of its limited section of the country had remained contingent on the loyalties of **a dozen separate militias as late as July 2018**.<sup>288</sup> The contracting of EUNAVFOR MED with the LYCG did not meet the conditions set out in the arms embargo. Yet, being a critical component in the EU migration strategy, the EU continued turning the LYCG into a “capable and well-resourced ... who can prevent irregular migration ...”.<sup>289</sup>

### **Pseudo-Legal Basis for Criminal Complicity: The MoU and Malta Declaration**

255. In **December 2016**, Mr. Marco Minniti was appointed as Italy's Minister of Interior. The common view was that Libya being be part of any EU policy is, given the situation in Libya, “a daydream” as Minniti termed it. But Minniti decided nonetheless to engage with the situation in the country. Within about two months since Minniti entered office, he concluded an agreement between Libya and Italy that would turn the lives of tens of thousands into a nightmare.<sup>290</sup>

256. A week before Italy concluded its 3<sup>rd</sup> MoU with the GNA, Libya was still considered by various EU bodies as a failed-state. On **25 January 2017**, the EUBAM Libya delegation reported to the European External Action Service that:

“due to the **absence of a functioning national Government, genuine and legitimate state structures are difficult to identify**, in particular given the dynamic and ever changing

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<sup>286</sup> EUNAVFOR MED Operation Sophia, February 2018, “Monitoring Report October 2017 – January 2018”, *Monitoring Mechanism Libyan Coast Guard and Navy*, Annex B, p3, 29, online, <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/ENFM-Monitoring-of-Libyan-Coast-Guard-and-Navy-Report-October-2017-January-2018.pdf>, accessed 11/04/19.

<sup>287</sup> Heller, C., Pezzani, L., 2018, “Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean”, *Forensic Oceanography*, p39, online, <http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>, accessed 12/04/2019.

<sup>288</sup> International Rescue Committee, 11 July 2018, *Pushing the boundaries: insights into the EU's response to mixed migration on the Central Mediterranean Route*, p11, online, <https://www.rescue.org/report/pushing-boundaries-insights-eus-response-mixed-migration-central-mediterranean-route>, accessed 11/04/2019.

<sup>289</sup> European External Action Service, 27 January 2016, *Operation SOPHIA Six Monthly Report: June, 22nd to December, 31st 2015*, p3, online, <https://wikileaks.org/eu-military-refugees/EEAS/EEAS-2016-126.pdf>, accessed 11/04/2019.

<sup>290</sup> “No one was really convinced that a real operation could be carried out in Libya. The idea was to intervene in neighboring countries, since the mainstream understanding was that Libya was structurally unstable, and so all efforts would end up wasted,” Minniti said. ‘When we said we had to relaunch the Libyan coastguard, it seemed like a daydream.’” in Politico, 10 August 2017, “Italy's Libyan ‘vision’ pays off as migrant flows drop”, *Politico*, <https://www.politico.eu/article/italy-libya-vision-migrant-flows-drop-mediterranean-sea/>, accessed 11/04/19.

landscape of loyalties”.<sup>291</sup>

257. Yet, at the very same day of **25 January 2017**, when the EUBAM reported to the EEAS on the lack of competent government in Libya, a joint EU Commission and High Representative for Foreign Affairs document was published stating (‘EU joint document’):

“... part of the answer must lie in the Libyan authorities preventing smugglers from operating, and for the **Libyan Coast Guard** to have the capacity to better manage maritime border and **ensure safe disembarkation on the Libyan coast**. Of course, the **Libyan authorities' effort must be supported by the EU and Member States** notably through training, providing advice, capacity building and other means of support. ... **Sophia and Triton could** focus on anti-smuggling activities and support to search and rescue operations further out at sea and **specialise in monitoring, alerting the Libyan authorities** and combating traffickers. Recognising the central role that the Libyan Coast Guard should play in managing the situation, building its capacity is a priority, both in terms of capabilities and equipment needs.”<sup>292</sup>

258. The EU Joint Document pointed to *direct* collaboration in the form of informing the Libyan authorities about location of survivors and outlined its strategy along four strands of *indirect* support: (1) training, (2) provision of patrolling assets, (3) declaring Libyan SAR zone and (4) establishing Maritime Rescue Coordination Centre (MRCC).<sup>293</sup>

259. Five days after the publication of the EU Joint Document, on **30 January 2017**, the German embassy in Niger authenticated reports of **executions, torture and other systematic rights abuses in camps** in Libya, noting in a diplomatic cable to Angela Merkel that authentic photos and videos substantiated reports of “**concentration camp-like conditions**”.<sup>294</sup>

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<sup>291</sup> European External Action Service, 18 January 2017, *EUBAM Libya Initial Mapping Report Executive Summary*, p 2, online <https://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf>, accessed 11/04/2019.

<sup>292</sup> European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 25 January 2017, *Joint Communication to the European Parliament, The European Council and the Council: Migration on the Central Mediterranean route: Managing flows, saving lives*, JOIN(2017) 4 final, p.6, online, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20170125\\_migration\\_on\\_the\\_central\\_mediterranean\\_route\\_-\\_managing\\_flows\\_saving\\_lives\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20170125_migration_on_the_central_mediterranean_route_-_managing_flows_saving_lives_en.pdf), accessed 12/04/2019.

<sup>293</sup> Heller, C., Pezzani, L., 2018, “Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean”, *Forensic Oceanography*, p. 39-40, online, <http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>, accessed 12/04/2019.

<sup>294</sup> Wintour, P., 30 January 2017, “German report details Libya abuses amid pressure to stem migrant flows”, *The Guardian*, online, <https://www.theguardian.com/world/2017/jan/30/german-report-libya-abuses-pressure-migrant-flows>, accessed 12/04/2019.

260. Nonetheless, a couple of days later, on **2 February 2017**, Italy and the Libyan Government of National Accord (‘GNA’) signed a **Memorandum of Understanding** (‘3<sup>rd</sup> MoU’ or ‘MoU’) aimed to “stemming illegal migrants’ flows”.<sup>295</sup>

261. **The MoU was signed by Mr. Paolo Gentiloni, President of the Council of Ministers for Italy, and Fayez Mustafa al-Serraj, President of the Presidential Council of the GNA.**<sup>296</sup>

262. The GNA agreed to take measures for ‘stemming the migrant flows to Europe’. Italy agreed “to provide technical and technological support to the Libyan institutions in charge of the fight against illegal immigration, and that are represented by the border guard and the coast guard...”<sup>297</sup>

263. The GNA, for its part, would “host” the migrants “temporarily” in camps until their return to their countries of origin. **Italy would train personnel working in the hosting centres.**<sup>298</sup>

264. The next day, on **3 February 2017**, the European Council adopted the **Malta Declaration**, emphasizing that “in Libya, capacity building is key... to acquire control over the land and sea borders and to combat transit and smuggling activities”.<sup>299</sup> The European Council supported Italy’s efforts to cooperate with Libya on migration through the implementation of the MoU.<sup>300</sup> The

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<sup>295</sup> Unlike the Turkey deal, the MoU had no resettlement mechanism in the EU or Italy to balance the policy of containment. See resettlement mechanism in the Turkey deal [explain, add reference]

<sup>296</sup> *Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic*, 2 February 2017, online, [www.governo.it/sites/governoNEW.it/files/Libia.pdf](http://www.governo.it/sites/governoNEW.it/files/Libia.pdf). An English translation of the MoU is available here: <https://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf>, accessed 12/04/2019.

<sup>297</sup> Article 1 of the MoU.

<sup>298</sup> Article 2(3) and Preamble of the MoU. As Amnesty International (in Amnesty International, *Libya’s Dark Web of Collusion Abuses Against Europe-bound Refugees and Migrants*, p44, online <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>, accessed 12/04/2019, describes it:

“Specifically, under Article 1, among other things, Italy committed to provide technical and technological support to Libyan institutions tasked with combating “clandestine migration” such as the Ministry of Defence’s border guards and coast guard, and “the competent departments of the Ministry of Interior”, which include the [Department for Combating Illegal Migration], the division responsible for managing detention centres, albeit this is not explicitly mentioned in the MoU.

Under Article 2, the parties committed, among other things, to take action with regard to the “upgrading and financing of the above mentioned reception centres already active in compliance with relevant legislation, using available Italian and EU funds”. The preamble to the MoU refers to “temporary reception camps under the exclusive control of the Libyan Ministry of Interior” rather than to reception centres. As no open reception centres or camps exist in Libya, Amnesty International considers that the MoU is referring in fact to the existing DCIM detention centres for refugees and migrants. Also under Article 2, “Italy contributes through the provision of medicines and medical equipment for the health reception centres [sic], to meet the medical needs of illegal migrants, for the treatment of transmissible and grave chronic illnesses.” Further, the parties committed to take action with regard to the “training of Libyan personnel in the above-mentioned reception centres to cope with the conditions of illegal migrants, supporting Libyan research centres operating in this sector, so that they can contribute to identify the most adequate methods to face the phenomenon of clandestine migration and human trafficking.”

<sup>299</sup> European Council, 2017, *Press statement: Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route*, online,

<https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>, accessed 12/04/2019; see also European Council, 3 February 2017, *Informal meeting of EU heads of state or government, Malta, 03/02/2017*, online, <https://www.consilium.europa.eu/en/meetings/european-council/2017/02/03/> accessed 12/04/2019.

<sup>300</sup> Amnesty International, 2017, *Europe: A perfect storm: The failure of European policies in the central Mediterranean*, p. 20,

Declaration prioritized the provision of “training, equipment and support to the [LYCG] and other relevant agencies.”<sup>301</sup>

265. On **28 August 2017** the leaders of Chad, Libya, Niger, France, Germany, Italy and Spain, and the High Representative of the Union for Foreign Affairs and Security Policy met in Versailles, France to discuss migration.<sup>302</sup> The purposes of the MoU and the Malta Declaration were confirmed during the Paris Meeting of the EU High Representative for Foreign Affairs and Security Policy, Italy’s PM, the Chairman of the Presidential Council of Libya, and other Member States (France, Germany and Spain).

266. The EU Council encouraged “efforts and initiatives from individual Member States directly engaged with Libya” and welcomed the MoU. In a Joint Statement on “[a]ddressing the Challenge of Migration”, it was agreed to pursue the return of irregular migrants to the countries of origin.<sup>303</sup> According to the Statement, ‘the Italian project to cooperate with 14 communities along migration routes in Libya is much welcomed, as are projects financed by the EU Emergency Trust Fund for Africa’.<sup>304</sup>

### **‘Migration Management’ I: EU Training of LYCG**

267. In June 2016 the European Council endorsed the European Commission’s proposal to set up the Migration Partnership Framework (MPF) with the aim to strengthen relationships with third countries to better manage migration.<sup>305</sup> Specifically, on 20 June 2016 the EUNAVFOR MED Council of the European Union’s decision was amended<sup>306</sup> to establish cooperation with LYCG,

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online, <https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF>, accessed 27/02/2019.

<sup>301</sup> In March 2017 the MoU was suspended by a Tripoli Court, but its implementation nonetheless continued. See Amnesty International, 2017, *Europe: A perfect storm: The failure of European policies in the central Mediterranean*, p. 20, online, <https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF>, accessed 27/02/2019.

<sup>302</sup> European External Action Service, 27 July 2018, *Strategic Review on EUNAVFOR MED Op Sophia, EUBAM Libya & EU Liaison and Planning Cell*, p 20, online, <http://www.statewatch.org/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf>, accessed 14/04/2019.

<sup>303</sup> 28 August 2017, *Joint Statement: Addressing the Challenge of Migration and Asylum*, p. 1, online, [http://www.governo.it/sites/governo.it/files/documenti/documenti/Notizie-allegati/governo/Parigi\\_20170828/Joint\\_Statement-20170828.pdf](http://www.governo.it/sites/governo.it/files/documenti/documenti/Notizie-allegati/governo/Parigi_20170828/Joint_Statement-20170828.pdf), accessed 12/04/2019.

<sup>304</sup> 28 August 2017, *Joint Statement: Addressing the Challenge of Migration and Asylum*, p. 4, online, [http://www.governo.it/sites/governo.it/files/documenti/documenti/Notizie-allegati/governo/Parigi\\_20170828/Joint\\_Statement-20170828.pdf](http://www.governo.it/sites/governo.it/files/documenti/documenti/Notizie-allegati/governo/Parigi_20170828/Joint_Statement-20170828.pdf), accessed 12/04/2019.

<sup>305</sup> Giuffrè, M., 20 March 2017, “From Turkey to Libya: The EU migration Partnership from bad to worse” *Eurojus.it*, online, <http://rivista.eurojus.it/from-turkey-to-libya-the-eu-migration-partnership-from-bad-to-worse/>, accessed 12/04/2019.

<sup>306</sup> Council of the European Union, *Council Decision 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA)*, online, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D0993>, accessed 12/04/2019.

including capacity-building and training of the LYCG.<sup>307</sup>

268. The training of the LYCG initially had started in 2014 through the EUBAM Libya mission. By 23 August 2016, 78 trainees of LYCG and Libyan Navy were trained on board of EUNAVFOR MED vessels.<sup>308</sup>

269. The LYCG training program had been authorized by the EU Political and Security Committee (PSC) on 30 August 2016,<sup>309</sup> and had been stepped up starting Autumn 2016<sup>310</sup> following the signing of an MoU between the Operation Commander and the Libyan Technical Committee of Experts. Training of the LYCG by Operation Sophia commenced in October 2016.<sup>311</sup>

270. As of July 2018, 213 Libyan personnel of the LYCG and LN had undergone training at sea and in member states facilities.<sup>312</sup> Training had taken place ashore in Crete, Malta and happened in Spain and Italy.<sup>313</sup>

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<sup>307</sup> Ibid.

<sup>308</sup> European External Action Service (EEAS), 23 August 2016, “Operation SOPHIA: signed the agreement on Libyan Coast Guard and Navy Training”, *European External Action Service*, online, [https://eeas.europa.eu/headquarters/headquarters-homepage/13195/eunavfor-med-operation-sophia-starts-training-of-libyan-navy-coast-guard-and-libyan-navy\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/13195/eunavfor-med-operation-sophia-starts-training-of-libyan-navy-coast-guard-and-libyan-navy_en), accessed 12/04/2019.

<sup>309</sup> Ibid.

<sup>310</sup> Heller, C., Pezzani, L., 2018, “Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean”, *Forensic Oceanography*, p. 9; 41, online, <http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>, accessed 12/04/2019; see also European External Action Service, 18 January 2017, *EUBAM Libya Initial Mapping Report Executive Summary*, p42, online <https://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf>, accessed 11/04/2019.

<sup>311</sup> European External Action Service, 27 July 2018, *Strategic Review on EUNAVFOR MED Op Sophia, EUBAM Libya & EU Liaison and Planning Cell*, p. 32, online, <http://www.statewatch.org/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf>, accessed 14/04/2019

<sup>312</sup> European External Action Service, 27 July 2018, *Strategic Review on EUNAVFOR MED Op Sophia, EUBAM Libya & EU Liaison and Planning Cell*, p. 5, online, <http://www.statewatch.org/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf>, accessed 14/04/2019. As of 21 August 2017, EUNAVFOR MED has further been assigned the task of monitoring the activities of the LYCG and Navy – a task which we should note implies a hierarchical power relation. Monitoring is considered as “an essential component of the Libyan maritime capacity building programme”, by helping to “define future training requirements, and helps the [Libyan Coast Guard and Navy] to define its equipment (including assets) shortfalls and requirements” (EUNAVFOR MED Operation Sophia, February 2018, “Monitoring Report October 2017 – January 2018”, *Monitoring Mechanism Libyan Coast Guard and Navy*, p3, online <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/ENFM-Monitoring-of-Libyan-Coast-Guard-and-Navy-Report-October-2017-January-2018.pdf>, accessed 11/04/19). The monitoring task was assigned to EUNAVFOR MED by the Council Decision of July 2017 and agreed with the Libyan authorities within an additional Annex to the 2016 Memorandum of Understanding. See European External Action Service, 27 January 2016, *Operation SOPHIA Six Monthly Report: June, 22nd to December, 31st 2015*, online, <https://wikileaks.org/eu-military-refugees/EEAS/EEAS-2016-126.pdf>, accessed 11/04/2019.

<sup>313</sup> Amnesty International, 2017, *Europe: A perfect storm. The failure of European policies in the central Mediterranean*, p20, online, <https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF>, accessed 27/02/2019; European External Action Service (EEAS), 27 October 2016, “EUNAVFOR MED Operation Sophia starts training of Libyan Navy Coast Guard and Libyan Navy”, *European External Action Service*, online, [https://eeas.europa.eu/headquarters/headquarters-homepage/13195/eunavfor-med-operation-sophia-starts-training-of-libyan-navy-coast-guard-and-libyan-navy\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/13195/eunavfor-med-operation-sophia-starts-training-of-libyan-navy-coast-guard-and-libyan-navy_en), accessed 12/04/2019. Amnesty International notes that,

“According to information provided at the At the SHADE MED Forum organized by EUNAVFORMED operation SOPHIA in Rome on 8-9 June 2017, the training has been organized to include three packages: the first package, which took place afloat on EU ships between 16 October 2016 and 13 February 2017, has been completed, delivering the training of three patrol boat crew members ;

271. While most of the trainees belonged to the Tripoli sector of the LYCG, 18.5% belonged to other sectors, including six members of the Zawiya sector, who have been known to be involved in criminal activities.<sup>314</sup>

272. The EU believed that the fastest way to stem migration depended on the training of the LYCG.<sup>315</sup> There were, however, still “**considerable concerns about the Libyan coastguard’s practices, chain of command, accountability and operational skills and methods.**”<sup>316</sup>

273. While the EU and Italy were financing, arming and essentially reconstructing the LYCG, militias were involved in all sectors of the LYCG including Tripoli, reaching a particularly high-level in Zawiya.

274. For example, a UN panel of experts indicated that Abd al-rhman Milad, known as “al-Bija”, a notorious militia leader known for his active involvement in illicit activities “**is the head of the Zawiya branch of the coast guard...**”<sup>317</sup>

275. Until the summer 2017, al-Bija ran “the most successful maritime crew with the highest

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the second package, to be delivered ashore, is ongoing, with modules completed in Crete and Malta and other modules ongoing in Spain and Italy; the third package, envisaging advanced training aboard Libyan boats and possibly in Libyan territorial waters, is for the future. The first package involved training teams from several countries – Belgium, Germany, the UK, Greece. Italy and the Netherlands, as well as from international organizations such as UNHCR and IOM, and was delivered to 93 Libyan trainees. The completed modules of the second package took place in Greece between 30 January and 9 February, for 20 senior officers, covering migration, maritime law enforcement, crime scene investigation and evidence collection, legal coastguard organization and gender awareness; and in Malta between 6 and 17 March and 27 March and 7 April, covering operational maritime law for 12 trainees; and on scene coordination for eight students. Planned modules will take place in Italy in September, for five patrol boat crews (75 students); maintainers (25 students), on topics including electrical and main engines, auxiliary machines and electronics; operation room operators (for 25 students); trainers (for eight students); deck and petty officers (for 56 students); as well as in Spain, also in September, for maintainers and on international maritime law (for 36 students).” (Amnesty International, 2017, *Europe: A perfect storm: The failure of European policies in the central Mediterranean*, p 20 fn 42, online, <https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF>, accessed 27/02/2019).

<sup>314</sup> See EUNAVFOR MED Operation Sophia, February 2018, “Monitoring Report October 2017 – January 2018”, *Monitoring Mechanism Libyan Coast Guard and Navy*, p21, online <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/ENFM-Monitoring-of-Libyan-Coast-Guard-and-Navy-Report-October-2017-January-2018.pdf>, accessed 11/04/19; EUNAVFOR MED, 18 September 2017, *Operation SOPHIA: new training modules for the Libyan Coastguard and Navy arranged in Italy*, [https://www.operationsophia.eu/wp-content/uploads/2018/04/eeas\\_-\\_european\\_external\\_action\\_service\\_-\\_operation\\_sophia\\_new\\_training\\_modules\\_for\\_the\\_libyan\\_coastguard\\_and\\_navy\\_arranged\\_in\\_italy\\_-\\_2018-04-07.pdf](https://www.operationsophia.eu/wp-content/uploads/2018/04/eeas_-_european_external_action_service_-_operation_sophia_new_training_modules_for_the_libyan_coastguard_and_navy_arranged_in_italy_-_2018-04-07.pdf), accessed 12/04/2019; see also al-Warfalli, A., 19 June 2018, “Exclusive - Sanctioned Libya coastguard commander says hits migrants to protect them”, *Reuters*, online, <https://af.reuters.com/article/worldNews/idAFKBN1JF2I0>, accessed 12/04/2019.

<sup>315</sup> On 8-9 June 2017, at the SHADE Mediterranean forum during the EUNAVFOR MED operational update, it was mentioned that “the fastest way to deliver in reducing irregular migrant flows and intercept smugglers’ activities” was training the Libyan Coastguard: Amnesty International, 2017, *Europe: A perfect storm: The failure of European policies in the central Mediterranean*, p. 21, online, <https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF>, accessed 27/02/2019.

<sup>316</sup> Amnesty International, 2017, *Europe: A perfect storm: The failure of European policies in the central Mediterranean*, p. 23, online, <https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF>, accessed 27/02/2019.

<sup>317</sup> The Panel of Experts on Libya, 1 June 2017, “Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011)”, United Nations Security Council, p133, online, <https://reliefweb.int/sites/reliefweb.int/files/resources/N1711623.pdf>, accessed 11/04/2019.

interception rate of migrant boats”.<sup>318</sup> One of the reasons of his success was his notable capacity in sinking migrant boats with firearms<sup>319</sup>.

276. Despite the well-known involvement in criminal activities of this sector of the LYCG, and despite its use of criminal means to achieve what EU bodies would qualify as “successes”, members of the LYCG’s Zawiya sector kept on being trained by the EU as part of EUNAVFOR MED.<sup>320</sup>

277. In an interview with Italian television from 2019, LYCG agents revealed the following:

“- What was your job before entering the LYCG?

**- I was part of the militias**, but among us there are also people that fought against ISIS, ex-snipers and also jailbirds and **killers, that thank to some high officials ended up on the paycheck of the LYCG**. Our bosses are all former officials of Gaddafi’s army, they’re the ones with military experience.

...

- If you now where they leave from, why don’t you stop them?

**- Traffickers have protections in the institutions. Do you know how it works? If the patrol is scheduled from 7 am to 2 pm, there’s a snitch from the office that tells the traffickers, so they scheduled the departure at 3pm. The organization only has one boss, who is a billionaire, everyone knows his name in Libya, but you’ll never hear it from me.**

- How does he plan the departures?

- He puts the money for the boat, the traffickers pick one of the passengers and downloads on his phone an app with the compass, the route, the GPS, then they tell him. “c’mon, go towards Italy and find a boat that could save you.” The one at the helm is not a trafficker, he’s a passenger like

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<sup>318</sup> Reitano, T. and Micallef, M. (2017) “The anti-human smuggling business and Libya’s political end game”, *Institute for Security Studies*, p5, online, <https://issafrica.s3.amazonaws.com/site/uploads/nar2.pdf>, accessed 11/04/2019. See also Mangan, F. and Murtaugh, C., 2014, “Security and justice in post- revolution Libya: where to turn?”, *United States Institute of Peace*, online [https://www.usip.org/sites/default/files/PW100-Security\\_and\\_Justice\\_in\\_Post-Revolution\\_Libya.pdf](https://www.usip.org/sites/default/files/PW100-Security_and_Justice_in_Post-Revolution_Libya.pdf), accessed 12/04/2019.

<sup>319</sup> Amnesty International, 2017, *Europe: A perfect storm: The failure of European policies in the central Mediterranean*, p. 22, online, <https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF> , accessed 27/02/2019; The Panel of Experts on Libya, 1 June 2017, “Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011)”, United Nations Security Council, p. 21, online, <https://reliefweb.int/sites/reliefweb.int/files/resources/N1711623.pdf>, accessed 11/04/2019

<sup>320</sup> EUNAVFOR MED Operation Sophia, February 2018, “Monitoring Report October 2017 – January 2018”, *Monitoring Mechanism Libyan Coast Guard and Navy*, Annex B, online <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/ENFM-Monitoring-of-Libyan-Coast-Guard-and-Navy-Report-October-2017-January-2018.pdf>, accessed 11/04/19.

the others.

- How do your patrols work?

- How do you expect them to work? The other day we rescued 240 migrants, 60 of them drowned. There are many dead. **When the sea is very rough, in the morning you can find bodies on the beach, 7/8 at the time, men, women, kids, one next to the other. It's impossible to recognize them because of the days in the water.** We can't identify them. We hand them to the half crescent; they bury them according to the Islamic ritual.

- How do you behave when you rescue migrants? Is it true that sometimes you beat them?

**For them it's either Europe or death, they're ready to die, beating them is useless.**

- Are you equipped to save them?

- **Hell no, we don't have the equipment or means, the patrol boats are old metal eaten by rust, every time we get on them, we're scared they may sink.** The other day a colleague called me... they had just rescued some migrants and the patrol boats went in failure. At the end, a merchant ship that was passing by rescued them all.

- What is the procedure you use to rescue migrants?

Do you want to know the truth? When we are lucky and there is a merchant ship on the way, we commute back and forth with the rubber boats between the migrants and the mercantile

- Do you save women and kids first?

- We throw the life jackets: who reaches them first is safe. I don't know what idea you have, but **on the patrol boat there are 7/8 LYCG men, while there are hundreds of migrants: even those that we manage to take out of the water often die because we are not trained first aid.**

- Do you have some kind of coordination?

- **As a rule of thumb, our unit meets the boats in distress by chance:** all of a sudden you see migrants in the sea, some drown, and some try to stay afloat. **If a communication arrives in Misrata, saying that a boat departed from Zuara, which is 350 km away, when we arrive the boat is either elsewhere or it sank. We basically intervene to retrieve the bodies.** Italy has just given us 3 patrol boats, but our coast is 2,200 km long, we would need at least 100 patrol boats like those.

**- Do Italians know about the conditions you are forced to work in?**

**- They know everything.**

**- And why don't they do something about it?**

- It's politics, my friend."<sup>321</sup>

278. At sea, the LYCG intercepted migrant boats using “aggressive and dangerous behavior, which have threatened the lives of migrants and rescue NGOs.”<sup>322</sup> The LYCG is reported, for example, to have removed the engine of boats, leaving them adrift,<sup>323</sup> to beat migrants as a matter of routine,<sup>324</sup> and to compromise SAR operations of NGOs.<sup>325</sup>

279. While being financed and trained by the EU, LYCG units including the one in Zawiya received payment by smugglers and militias, for example in return of letting boats pass or in exchange of releasing migrants from detention.<sup>326</sup>

280. While there was no EU accountability or monitoring framework to assess the conduct and performance of the LYCG to make sure they would hold up human rights standards, independent reports indicated that they operated in disregard of basic protocols, most importantly by conducting *refoulement* instead of SAR.<sup>327</sup>

281. There is no indication the EU tried to curb these behaviors. Yet, on 22-23 June 2017, the European Council highlighted that “training and equipping the Libyan Coast Guard is a key

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<sup>321</sup> Interview with LYCG agents trained in Italy, 2019, *Piazza Pulita*, 12 April 2019 (Italian, transcript on file with the authors): <http://www.la7.it/piazzapulita/rivedila7/piazzapulita-profondo-rosso-puntata-11042019-12-04-2019-268755>

<sup>322</sup> Heller, C., Pezzani, L., 2018, “Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean”, *Forensic Oceanography*, p. 39, online, <http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>, accessed 12/04/2019.

<sup>323</sup> Porsia, N., May 2017, “Human Smuggling from Libya Across the Sea over 2015-2016”, *Blaming the Rescuers*, p. 4, online, [https://blamingtherescuers.org/assets/annexes/Porsia\\_Human\\_Smuggling\\_in\\_the\\_Central\\_Mediterranean.pdf](https://blamingtherescuers.org/assets/annexes/Porsia_Human_Smuggling_in_the_Central_Mediterranean.pdf), accessed 12/04/2019

<sup>324</sup> Trew, B. and Kington, T., 14 February 2017, “Video shows Libyan coastguard whipping rescued migrants”, *The Times*, online, <https://www.thetimes.co.uk/article/video-shows-libyan-coastguard-whipping-rescued-migrants-6d8g2jgz6>, accessed 12/04/2019; See also Porsia, N., 22 February 2017, “The kingpin of Libya’s human trafficking mafia”, *TRT World*, <https://www.trtworld.com/magazine/libya-human-trafficking-mafia-in-zawiya-301505>, accessed 12/04/2019

<sup>325</sup> See the discussion of the 17 August 2016, 9 September 2016, the 21 October 2016 events in *Forensic Oceanography*, 2017, *Blaming the Rescuers*, online, <https://blamingtherescuers.org/report/>, accessed 15/04/2019 ; See also Heller, C., Pezzani, L., 2018, “Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean”, *Forensic Oceanography*, online, <http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>, accessed 12/04/2019 for 2017 events.

<sup>326</sup> United Nations Support Mission in Libya and Office of the United Nations High Commissioner for Human Rights, 13 December 2016, “*Detained and dehumanised*” *Report on human rights abuses against migrants in Libya*, pp 19-20, online, [https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised\\_en.pdf](https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf), accessed 12/04/2019, and Amnesty International, 2017, *Libya’s Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*, p8, 34, 40, online, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>, accessed 25/03/2019

<sup>327</sup> Amnesty International, 2017, *Europe: A perfect storm: The failure of European policies in the central Mediterranean*, p25, online, <https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF>, accessed 27/02/2019.

component of the EU approach and should be speeded up.”<sup>328</sup>

**‘Migration Management’ II: Financing of the LYCG, Other Militias and Detention Centers, Providing Naval Assets and Other Equipment, Operating in Libyan Territorial Land and Waters, Providing C&C Capabilities**

282. In April 2017 the European Commission announced a €90M “aid program for migrants in Libya”, with about **half going to “improving” conditions in official detention centres, assistance at disembarkation points, and “voluntary” returns.**<sup>329</sup>

283. Depending on the operational phases, five to nine vessels were deployed close to the Libyan coast, manifesting naval presence off the coast of Libya. These vessel enabled the LYCG to execute EU and Italian orders.<sup>330</sup> On 21 April 2017, Italian Minister of Interior announced that by June 2017, Italy provided the LYCG **with four fast patrol boats, with a further six boats to be delivered in the following months.**<sup>331</sup>

284. The patrol boats Italy provided to LYCG in Tripoli made it the most dominant LYCG sector: the handling of high-quality assets to this sector dramatically shifted the balance between LYCG different sectors, having the Tripoli one operating most of the pull-back missions including in winter and rough weather.<sup>332</sup>

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<sup>328</sup> European Council and Council of the European Union, 23 June 2017, ‘European Council conclusions, 22-23/06/2017’, p10, online, <https://www.consilium.europa.eu/media/23985/22-23-euco-final-conclusions.pdf>, accessed 30/05/2019

<sup>329</sup> Human Rights Watch, 2017, “EU: Shifting Rescue to Libya Risks Lives”, online, <https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives>, accessed 17/05/2019.

<sup>330</sup> European Union External Action, 2016, “European Union Naval Force – Mediterranean Operation Sophia”, online, [http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet\\_eunavfor\\_med\\_en.pdf](http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med_en.pdf)

<sup>331</sup> Italian Ministry of Interior, 2017, “Contro il traffico dei migranti: consegnate le prime motovedette alla Marina libica”, online, [www.interno.gov.it/it/notizie/contro-traffico-dei-migranti-consegnate-prime-motovedette-alla-marina-libica](http://www.interno.gov.it/it/notizie/contro-traffico-dei-migranti-consegnate-prime-motovedette-alla-marina-libica); Italian Ministry of Interior, 16 May 2017, “Minniti in Libia: fronte comune contro il traffico di migranti”, online, [www.interno.gov.it/it/notizie/minniti-libia-fronte-comune-contro-traffico-migranti](http://www.interno.gov.it/it/notizie/minniti-libia-fronte-comune-contro-traffico-migranti). Three more patrol boats were handed over in February 2018, see *Il Sole 24 ore*, 2018, “Libia e Niger: il bilancio dell’Italia e l’eredità per il prossimo governo”, online, [http://www.ilsole24ore.com/art/mondo/2018-02-24/libia-e-niger-bilancio-dell-italia-e-l-eredita-il-prossimo-governo--212523.shtml?uuiid=AEwxvQ6D&refresh\\_ce=1](http://www.ilsole24ore.com/art/mondo/2018-02-24/libia-e-niger-bilancio-dell-italia-e-l-eredita-il-prossimo-governo--212523.shtml?uuiid=AEwxvQ6D&refresh_ce=1); The four vessels were handed over to LYCG in two ceremonies, in Italy (21 April 2017) and in Libya (15 May 2017), the latter celebrated days after a widely publicized incident in which LYCG violently interrupted a SAR operated by NGO Sea Watch, intercepting migrants under gun threats and pulling them back to Libya. At the ceremony, Mr. Minniti praised the “motivation and resolve” of LYCG crews, see “Min #Minniti to the patrol boats crews: impressed by your motivation and resolve. We trust you efforts and professionalism. #Libya”, Twitter, 15 May 2017, <https://twitter.com/ItalyinLibya/status/864131903602995201> quoted in Amnesty International, 2017, *Libya’s Dark web of Collusion: Abuses Against Europe-Bound Refugees and Migrants*, p.37, online, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>; Lewis, A. and Scherer, S., 2017, “Italy tries to bolster Libyan coast guard, despite humanitarian concern”, *Reuters*, <https://uk.reuters.com/article/uk-europe-migrants-libya/italy-tries-to-bolster-libyan-coast-guard-despite-humanitarian-concern-idUKKCN18B2EN>

<sup>332</sup> EUNAVFOR MED notes that during this reporting period October 2017 to January 2018 “approximately 75% of LCG&N missions operated with “Bigliani class” patrol boats”. See European Council, 9 March 2018, “EUNAVFOR MED Op Sophia - Monitoring of Libyan Coast Guard and Navy Report October 2017 - January 2018, 9 March 2018”, p. 5, online, <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/ENFM-Monitoring-of-Libyan-Coast->

285. On **4 July 2017**, through the Commission’s Action Plan to support Italy, **46.3M** Euros went through the EUTF to support integrated border and **“migration management”** in Libya. The EU Commission proposed to “further enhance the capacity of the Libyan authorities through a 46 M Euros project prepared jointly with Italy”<sup>333</sup>.

286. On meetings in **July and August 2017** between the Italian Minister of Interior and mayors of 14 Libyan towns, Italian officials promised financial and other assistance to Libyan local authorities, in exchange for their commitment to tackle irregular migration.<sup>334</sup> The funds to be used through access to the EUTF were meant to be **‘income replacement’ for smuggling**.<sup>335</sup>

287. Italy’s Minister of Interior pledged to support the mayors by creating new economic opportunities in their territories

“if they help us in the fight against smuggling of human beings and in the **management of migration** from central Africa.” [emphasis added]<sup>336</sup>

288. According to media reports, Italy also struck a deal involving representatives of the GNA, the Anas Debashi and Brigade 48 militias, which controlled Sabratha and the smuggling business in the town at the time, as well as militias from neighboring towns.<sup>337</sup>

289. At a meeting in Sabratha, the militias committed to preventing migrants from attempting to leave and exit the country, while the **Italian authorities committed to provide them with**

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[Guard-and-Navy-Report-October-2017-January-2018.pdf](#)

<sup>333</sup> Heller, C., Pezzani, L., 2018, “Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean”, p. 45, *Forensic Oceanography*, online, <http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>, accessed 12/04/2019

<sup>334</sup> Ministero dell’Interno, 2017, “Minniti e i sindaci delle comunità libiche: i trafficanti sono un nemico comune”, p. 49, online, available

[www.interno.gov.it/it/notizie/minniti-e-i-sindaci-comunita-libiche-i-trafficanti-sono-nemico-comune](http://www.interno.gov.it/it/notizie/minniti-e-i-sindaci-comunita-libiche-i-trafficanti-sono-nemico-comune); Repubblica, 2017, “Minniti: ‘Sui migranti ho temuto per la tenuta democratica Paese’”, online, [www.repubblica.it/politica/2017/08/29/news/minniti\\_sui\\_migranti\\_ho\\_temuto\\_per\\_la\\_tenuta\\_democratica\\_paese\\_-174164861/](http://www.repubblica.it/politica/2017/08/29/news/minniti_sui_migranti_ho_temuto_per_la_tenuta_democratica_paese_-174164861/).

<sup>335</sup> Skordas, A, 2018, “A ‘blind spot’ in the migration debate? International responsibility of the EU and its Member States for cooperating with the Libyan coastguard and militias”, EU migration law blog, online, <http://eumigrationlawblog.eu/a-blind-spot-in-the-migration-debate-international-responsibility-of-the-eu-and-its-member-states-for-cooperating-with-the-libyan-coastguard-and-militias/>.

<sup>336</sup> Amnesty International, 2017, “Italy: Submission to the United Nations committee against torture.”, p52, online, [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/ITA/INT\\_CAT\\_CSS\\_ITA\\_29165\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/ITA/INT_CAT_CSS_ITA_29165_E.pdf) ;Ministero dell’Interno, 2017, “Minniti e i sindaci delle comunità libiche: i trafficanti sono un nemico comune”, p50, online, [www.interno.gov.it/it/notizie/minniti-e-i-sindaci-comunita-libiche-i-trafficanti-sono-nemico-comune](http://www.interno.gov.it/it/notizie/minniti-e-i-sindaci-comunita-libiche-i-trafficanti-sono-nemico-comune); Repubblica, 2017, “Minniti: ‘Sui migranti ho temuto per la tenuta democratica Paese’”, online, [www.repubblica.it/politica/2017/08/29/news/minniti\\_sui\\_migranti\\_ho\\_temuto\\_per\\_la\\_tenuta\\_democratica\\_paese\\_-174164861/](http://www.repubblica.it/politica/2017/08/29/news/minniti_sui_migranti_ho_temuto_per_la_tenuta_democratica_paese_-174164861/).

<sup>337</sup> Ministero dell’Interno, 2017, “Minniti e i sindaci delle comunità libiche: i trafficanti sono un nemico comune”, p. 50, online, [www.interno.gov.it/it/notizie/minniti-e-i-sindaci-comunita-libiche-i-trafficanti-sono-nemico-comune](http://www.interno.gov.it/it/notizie/minniti-e-i-sindaci-comunita-libiche-i-trafficanti-sono-nemico-comune)

**equipment, boats and salaries** channeled through the GNA.<sup>338</sup>

290. On 17 July 2017 the EU Council renewed the mandate of EUBAM Libya until the end of 2018.<sup>339</sup> On 25 July 2017, the EU Council renewed the mandate of the Sophia Operation which held validity until end of 2018.<sup>340</sup> Finally, on 28 July 2017, the 4<sup>th</sup> of July EU Commission's funding program was allocated through the EUTF to "reinforce the integrated migration and border management capacities of the Libyan authorities", in particular the LYCG.

291. The program focused on "strengthening the operational capacity of the Libyan coast guards", mostly with respect to the maritime frontier.<sup>341</sup> Among the measures to be funded by the program were training, equipment, repair and maintenance of the existing fleet; setting up basic facilities in order to provide LYCG to better organize control operations; conducting "feasibility studies for two fully-fledged control facilities in Tripoli" that would "involve the full design of an Interagency National Coordination Centre" and "assistance to the authorities in defining and declaring a Libyan Search and Rescue Region with adequate Standard Operation Procedures"<sup>342</sup>.

292. The project was also partially funded by Italy<sup>343</sup>, which diverted a 'special development aid "Africa fund" worth 200 million euro<sup>344</sup>, of which 2.5 million euro were approved on August 2017 for the maintenance of Libyan boats and training of Libyan crews<sup>345</sup>.

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<sup>338</sup> Ibid.

<sup>339</sup> EEAS, 2018, "EU-Libya relations", online, [https://eeas.europa.eu/headquarters/headquarters-homepage\\_en/19163/EU-Libya%20relations](https://eeas.europa.eu/headquarters/headquarters-homepage_en/19163/EU-Libya%20relations).

<sup>340</sup> EUR-Lex, 2017, "Council Decision (CFSP) 2017/1385 of 25 July 2017 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA)", *Official Journal of the European Union*, online, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017D1385>.

<sup>341</sup> Heller, C., Pezzani, L., 2018, "Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean", p. 46, *Forensic Oceanography*, online, <http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>, accessed 12/04/2019 6

<sup>342</sup> Heller, C., Pezzani, L., 2018, "Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean", p. 46, *Forensic Oceanography*, online, <http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>, accessed 12/04/2019; European Commission, 28 July 2017, "EU Trust Fund for Africa adopts €46 million programme to support integrated migration and border management in Libya", online, [http://europa.eu/rapid/press-release\\_IP-17-2187\\_en.htm](http://europa.eu/rapid/press-release_IP-17-2187_en.htm), accessed 30/05/2019

<sup>343</sup> Amnesty International, 2017, "Libya's Dark web of Collusion: Abuses Against Europe-Bound Refugees and Migrants", p. 45, online, available at <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>.

<sup>344</sup> Ministero degli Affari Esteri e della Cooperazione Internazionale, 2016, "Law no. 232", 11 December 2016, Article 1 c.621 [https://www.esteri.it/mae/resource/doc/2017/02/decreto\\_africa\\_0.pdf](https://www.esteri.it/mae/resource/doc/2017/02/decreto_africa_0.pdf).

<sup>345</sup> Director General for Italians abroad and migration policies, 2017, "Decree 4110/47", Italian Ministry of Foreign Affairs, (available at [http://www.asgi.it/wp-content/uploads/2017/11/Allegato\\_2.pdf](http://www.asgi.it/wp-content/uploads/2017/11/Allegato_2.pdf)).

293. On 2 August 2017, the Italy's Parliament approved the extension of the Mare Sicuro operation, sometimes called "Nauras", which was described as "international military mission in support of the Libyan Coast Guard"<sup>346</sup>, with the objective of "**protection and defence of means belonging to the Libyan Government of National Accord tasked with controlling and countering illegal immigration**".

294. Nauras aimed to provide "support to the Libyan security forces in their activities against irregular migration and human smuggling by deploying aerial and naval means and supporting **Intelligence, Surveillance and Reconnaissance capabilities**"<sup>347</sup>. In order to achieve these aims and objectives, the Italian parliament authorised **the presence of one or more assets taking part in Mare Sicuro within "Libyan internal territorial waters... in order to support Libyan naval assets"**.<sup>348</sup>

295. These means played a crucial role in LYCG interceptions which would have been rendered unsuccessful without it, in particular the use of communication equipment on board of the Italy's naval ships docked in the port of Tripoli.<sup>349</sup>

296. Accordingly, on 4 August 2017, the first Italian warship, the *Borsini* (P491), arrived in the port of Tripoli.<sup>350</sup> On 8 August 2017 arrived the *Termiti*. In December 2017 the *Capri*. And at the end of March 2018 the *Caprera*. These vessels had been "docked in the port of Tripoli with onboard materials, equipment and technical team" dedicated to facilitate LYCG operations.<sup>351</sup>

297. Eventually, **Italian personnel and assets were present and operating not only close to Libyan shores but on Libyan territory itself, including Libyan ports**. A governmental report dated 28 December 2017 reveals that activities included repairing "terrestrial, naval, and aerial assets, including infrastructures"...; establishing "Liaison Navy and Communication Centre

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<sup>346</sup> Uffici del Senato della Repubblica e della Camera dei deputati, 2017, "*Deliberazione del consiglio dei ministri in merito alla partecipazione dell'Italia alla missione interna zionale in supporto alla guardia costiera Libica (DOC CCL, n.2)*", p5, online, available at: <https://stefanoceccanti.files.wordpress.com/2017/08/dossier-parlamento-libia.pdf>

<sup>347</sup> Ibid.

<sup>348</sup> Ibid.

<sup>349</sup> Heller, C., Pezzani, L., 2018, "Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean", p.11, *Forensic Oceanography*, online, <http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>, accessed 12/04/2019

<sup>350</sup> Al Araby, M., 2017, "Italian ship arrives in Tripoli port despite threat", Al Arbiya, available at <http://english.alarabiya.net/en/News/middle-east/2017/08/04/Italian-ship-arrives-in-Tripoli-port-despite-threat.html>.

<sup>351</sup> Ministro per i rapporti con il Parlamento, 2017, "Relation analitica sulle missioni internazionali in corso e sullo stato degli interventi di cooperazione allo sviluppo a sostegno dei processi di pace e di stabilizzazione" Senato della Repubblica. <http://www.senato.it/service/PDF/PDFServer/BGT/1063681.pdf>; see also Tomassini, V. 2018 "Serraj visits Libyan naval ship fixed by Italians", *Libya Herald* (available at <https://www.libyaherald.com/2018/01/13/serraj-visits-libyan-naval-ship-fixed-by-italians/>).

(‘LNCC’), initially on board [of an Italian vessel] for the coordination of joint activities...”; providing “expert advice and capacity building for activities of control and fight against illegal migration as well as to conduct SAR operations”.<sup>352</sup>

298. But even when LNCC was “located on board of Italian warship moored in Tripoli”<sup>353</sup>, in order to enable the communication capabilities of the LYCG<sup>354</sup>, as late as 9 **March 2018** EUNAVFOR MED monitoring report stated with regard to the LYCG that

**“in the Operations Rooms ashore, the lack of effective and reliable communication systems hampers Libyan capacity for the minimum level of execution of command and control, including that necessary to coordinate SAR/SOLA events”**.<sup>355</sup>

299. On **16 April 2018**, an Italian Court determined that an Italian Navy ship present in the port of Tripoli was functioning as communication and coordination centre providing decisive contribution to the LYCG capabilities. Furthermore, the Court determined the coordination of **rescue operations by Libya was “essentially entrusted to the Italian Navy, with its own naval assets and with those provided to the Libyans”**.<sup>356</sup>

300. European ships and aircrafts operating along and off the Libyan coast had not only indirect and facilitating role but rather a direct and substantial one. They were and are providing surveillance capabilities and instructing LYCG assets to intercept migrants’ boats. Without EU coordination, vessels, training, facilities and services – it is unlikely the LYCG could have participate in interception operations at all.

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<sup>352</sup> Senato della Repubblica, 2017, “Relazione analitica sulle missioni internazionali in corso e sullo stato degli interventi di cooperazione allo sviluppo a sostegno dei processi di pace e di stabilizzazione, deliberata dal consiglio dei ministri il 28 dicembre 2017”, online

<http://www.senato.it/service/PDF/PDFServer/BGT/1063681.pdf>, accessed, 18/05/2019, The same document also confirms that the Italian customs police (Guardia di Finanza) has contributed to the training of 39 Libyan militaries in Gaeta and the repair and return of four patrol boats.

<sup>353</sup>EUNAVFOR MED, 2018, “Monitoring of Libyan Coast Guard and Navy Report”, p.26, online, available at <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/ENFM-Monitoring-of-Libyan-Coast-Guard-and-Navy-Report-October-2017-January-2018.pdf>.

<sup>354</sup> Heller, C., Pezzani, L., 2018, “Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean”, p. 49, *Forensic Oceanography*, online, <http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>, accessed 12/04/2019

<sup>355</sup> EUNAVFOR MED, 2018, “Monitoring of Libyan Coast Guard and Navy Report”, p.26, online, available at <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/ENFM-Monitoring-of-Libyan-Coast-Guard-and-Navy-Report-October-2017-January-2018.pdf>.

<sup>356</sup> Tribunale di Catania, 2018, “Sezione del Giudice per le Indagini Preliminari, Decreto di convalida e di sequestro preventivo”, online, <https://newsmagnify.it/wp-content/uploads/2018/08/Decreto-di-convalida-e-di-sequestro-preventivo-GIP-di-Catania-27-Marzo-2018.pdf>

### **‘Migration Management’ III: Establishing Libyan SAR zone and Libyan MRCC**

301. Despite the fact Italy’s Coast Guard (‘ITCG’) foresaw LYCG MRCC to be operational not before 2020, and although Italy clearly acknowledged the limited control the GNA had over its coast, waters and personnel - the EU and Italy decided to and insisted on Libya having, for the first time in history, a SAR zone and an MRCC, in an attempt to create the false impression LYCG’s criminal operations complied with maritime law.

302. The EU wanted to have the Libyan MRCC operational by 2018, an expressed wish that was described as a **‘delusional attempt by EU officials to ensure that those rescued are brought back to Libya’**.<sup>357</sup>

303. Already on 4 August 2016, in a jointly signed letter by the EU Commission and EEAS, the ITCG had been instructed to assume responsibility for leading a project to establish a Libyan Maritime Coordination Centre and support the Libyan authorities in identifying and declaring their Search and Rescue Region<sup>358</sup>.

304. On 12 June 2017, the **EU Commission** (Directorate-General Migration and Home Affairs) notified the Italian Coast Guard of the award of the grant "**Assessment of the Libyan Coast Guard legal framework and capability in terms of SAR Services**". The Grant Agreement, signed on 22 June 2017, **confirmed the Italian Coast Guard's commitment to implement** the measures specified below”.<sup>359</sup>

305. On 6 July 2017, EU Justice and Home Affairs ministers met in Tallinn, Estonia. The EU ministers further confirmed during the Tallinn meeting their support to “increase(ing) engagement with Libya and other key third countries”, “continuing to enhance the capacity of the Libyan Coast Guard”, “continuing to encourage the North Africa partners, notably Tunisia, Libya and Egypt to formally **notify their SAR areas and establish MRCCs**”. To this end, the EU ministers committed to **“stepping up coordination and delivery of all the elements contained in the Malta**

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<sup>357</sup> Amnesty International, 2017, “A perfect storm”, p.26, online, available at <https://www.amnesty.org/en/documents/eur03/6655/2017/en/>

<sup>358</sup> Heller, C., Pezzani, L., 2018, “Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean”, p.51, *Forensic Oceanography*, online, <http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>, accessed 12/04/2019

<sup>359</sup> International Maritime Organisation, 2017, “Further Development of the Provision of Global Maritime SAR Services. Libyan Maritime Rescue Coordination Centre Project”, online, p.2 paragraph 6, available at <https://www.transportstyrelsen.se/contentassets/3aba2639739e4e53afd3c7eb22f82ed6/5-inf17.pdf>

**Declaration**” by consolidating funding to the various initiatives.<sup>360</sup>

306. On **10 August 2017**, Libyan authorities in Tripoli unilaterally declared the Libyan Search and Rescue (‘SAR’) zone<sup>361</sup>, an unlawful declaration that was nonetheless supported by Italy’s foreign minister who stated that “balance is being restored in the Mediterranean.”<sup>362</sup> In the course of declaring their SAR zone, Libyan agents threatened any rescue NGOs not to enter it:

**“no foreign ship [had] the right to enter”** and Libyan navy’s spokesman stated the declaration is directed to **“NGOs which pretend to want to rescue illegal migrants and carry out humanitarian actions”**.<sup>363</sup>

307. On 10 December 2017, the GNA requested IMO to withdraw from their former declaration and on 14 December 2017 they submitted a new declaration<sup>364</sup>. However, EU border control agency (Frontex) director Fabrice Leggeri acknowledged that the Libyan SAR zone had not been internationally recognized.<sup>365</sup> **The declaration of Libya’s SAR zone was eventually validated only in June 2018.**<sup>366</sup>

308. Few weeks prior to the Libyan declaration, the **ITCG estimated that LYCG MRCC would be operational only in 2020.**<sup>367</sup> Even Libya itself acknowledged that LYCG “capacities ashore ... does not allow properly carrying out the institutional tasks as MRCC”.<sup>368</sup>

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<sup>360</sup> EU2017.EE, 2017, “Informal meeting of Justice and Home Affairs ministers. Press statement following discussions on Central Mediterranean”, p1, online, available at <https://www.stjornarradid.is/lisalib/getfile.aspx?itemid=634c4931-662c-11e7-941c-005056bc530c>.

<sup>361</sup> To obtain a SAR zone a request must be given to the IOM see: International Maritime Organization (IMO), 1979, International Convention on Maritime Search and Rescue, online, <https://www.refworld.org/docid/469224c82.html>, accessed 18/05/2019

<sup>362</sup> Euroobserver, 2017 “Italy backs Libya as NGOs chased out of Mediterranean”, online, <https://euobserver.com/migration/138736>.

<sup>363</sup> Rescued by foreign boats, including NGOs, in the Libyan SAR zone is lawful under the Law of the Sea. See eNews Channel Africa (ENCA), 2017, “Libya navy blocks foreign ships from migrant ‘rescue’ zone”, online, available at <https://www.enca.com/africa/libya-navy-blocks-foreign-ships-from-migrant-rescue-zone>.

<sup>364</sup> Heller, C., Pezzani, L., 2018, “Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean”, *Forensic Oceanography*, online, <http://www.forensic-architecture.org/wp-content/uploads/2018/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>, accessed 12/04/2019 p.52

<sup>365</sup> During a recent hearing, Leggeri stated that “Je ne considère pas comme acquise la zone SAR de la Libye” in European Parliament, LIBE: Committee Meeting, 27 March 2018, LIBE/8/08388 - FRONTEX - the European Border and Coast Guard Agency ; see also Barbara Spinelli, B, 2018, “Themis, la nuova missione di Frontex, restringe il limite operativo delle responsabilità italiane” (available at <http://barbara-spinelli.it/2018/03/27/themis-la-nuova-missione-frontex-restringe-limite-operativo-delle-responsabilita-italiane/>).

<sup>366</sup> European External Action Service (EEAS), 2018, “Strategic Review on EUNAVFOR MED Op Sophia, EUBAM Libya & EU Liaison and Planning Cell”, p.15, online, available <http://www.statewatch.org/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf>

<sup>367</sup> Italian Coast guard presentation “Libyan Maritime Rescue Coordination Centre Project, Shade Med briefing, Rome, 23 November 2017.

<sup>368</sup> EUNAVFOR MED Operation Sophia, 2018, “Monitoring of Libyan Coast Guard and Navy”, annex C, online, available at <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/ENFM-Monitoring-of-Libyan-Coast-Guard-and-Navy-Report-October-2017-January-2018.pdf>.

309. Yet, on 15 December 2017, not Libya but rather Italy submitted a communication to the SNCR at the IMO which concerned “Libyan Maritime Coordination Centre Project”, as the executive summary stated:

“This document provides information on the Libyan Maritime Rescue Coordination Centre (LMRCC) Project, **an initiative run by the Italian Coast Guard and funded by the European Commission**”, and concluded that **“The Italian Coast Guard is playing a key role in strengthening the capacity of the relevant Libyan authorities”**.<sup>369</sup>

310. In June 2018, the Libyan SAR zone was recognised by the IMO, albeit much debate still takes place as to its validity, let alone its misuse to provide semblance of legal legitimacy to the cooperation with the LYCG and to falsely present interceptions and push-backs as ‘rescue’ operations.

### **Back to Hell - Mens Rea and Ongoing Actus Reus of Key Suspects**

311. On 6 August 2017, two days after the first Italian ship docked in Tripoli and four days before Libya unilaterally declared its SAR zone, Italy’s deputy minister of foreign affairs, Mr. Mario Giro, stated the following:

**“taking them [the migrants] back to Libya, at this moment, means taking them back to hell.”<sup>370</sup>**

312. Also the Italian Interior Minister Minniti was aware of the lethal consequences of EU and Italian policy. On 15 August 2017, he admitted that **“there is an issue... of the living conditions of those who are saved by the Libyan Coast Guard and taken back to Libya”**.<sup>371</sup>

313. On 22 November 2017, France demanded a UNSC session on human trafficking in Libya and raised the possibility of international sanctions on the country. French Foreign Minister Jean-

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<sup>369</sup> International Maritime Organisation, 2017, “Further Development of the Provision of Global Maritime SAR Services. Libyan Maritime Rescue Coordination Centre Project”, online, available at <https://www.transportstyrelsen.se/contentassets/3aba2639739e4e53afd3c7eb22f82ed6/5-inf17.pdf>

<sup>370</sup> Marco Menduni, 6 August 2017, ‘Giro: “Fare rientrare quelle persone vuol dire condannarle all’inferno”’, *La Stampa*, online <https://www.lastampa.it/2017/08/06/italia/cronache/giro-fare-rientrare-quelle-persone-vuol-dire-condannarle-allinferno-SXnGzVlzfF1fNGFCMADN/pagina.html>, accessed 31/05/2019.

<sup>371</sup> La Repubblica, 2017, “Migranti, Minniti: “Condizioni di chi è riportato in Libia sono mio assillo”, online, [https://video.repubblica.it/cronaca/migranti-minniti-condizioni-di-chi-e-riportato-in-libia-sono-mio-assillo/282714/283328?refresh\\_ce](https://video.repubblica.it/cronaca/migranti-minniti-condizioni-di-chi-e-riportato-in-libia-sono-mio-assillo/282714/283328?refresh_ce), accessed 18/04/2019

Yves Le Drian stated that **“Libyan authorities... have been alerted several times”**,<sup>372</sup> and French President Emmanuel Macron himself acknowledged that trafficking of human beings in Libya amounts to **“a crime against humanity”**.<sup>373</sup>

314. African Union President Alpha Conde accused the EU of encouraging the Libyans to keep migrants in Libya despite there being no government:

**“we must establish the responsibilities... [i]n Libya there is no government, so the European Union cannot choose a developing country and ask that country to detain refugees (...) when it doesn’t have the means to do so...[t]he refugees are in terrible conditions ... [t]he European Union is responsible”**.<sup>374</sup> (emphasis added – OS)

315. On 7 December 2017 the UNSC convened. In its resolution (SC/13105), the UNSC expressed

**“grave concern about reports of migrants being sold into slavery in Libya... condemned such actions as heinous abuses of human rights and possible crimes against humanity, and called for those responsible to be held to account”**.<sup>375</sup>

316. In a presidential statement (S/PRST/2017/24), the UNSC **“urged the Libyan authorities and all Member States to comply with their obligations under international law**, including international human rights law and international refugee law, and stressed the need to transfer detainees to State authority.<sup>376</sup>

317. **In the meantime, the objective of EU criminal policy had been apparently accomplished: Between July 2017 and July 2018 there has been an 86% decrease in the**

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<sup>372</sup> The Associated Press, 22 November 2017, “Slave sale video prompts France to push for UN meeting on trafficking of migrants”, *Canadian Broadcasting Corporation*, online, <https://www.cbc.ca/news/world/france-un-libya-migrant-trade-1.4414142>, accessed 31/04/2019

<sup>373</sup> News Wires, 22 November 2017, “France calls UN Security Council meeting over Libya slave auctions”, *Reuters*, online, <https://www.france24.com/en/20171122-france-calls-un-security-council-meeting-libya-slave-auctions-macron>, accessed 31/05/2019.

<sup>374</sup> Pennetier, M., 2017, “France tells Libya to act over ‘migrant crimes against humanity’”, *Reuters*, online, <https://www.reuters.com/article/us-libya-migrants-france/france-tells-libya-to-act-over-migrant-crimes-against-humanity-idUSKBN1DM1YU>, accessed 18/04/2019

<sup>375</sup> United Nations, 7 December 2017, “Security Council Presidential Statement Condemns Slave Trade of Migrants in Libya, Calls upon State Authorities to Comply with International Human Rights Law”, online, <https://www.un.org/press/en/2017/sc13105.doc.htm>, accessed 31/05/2019.

<sup>376</sup> UNSC, 2017, “Security Council Presidential Statement Condemns Slave Trade of Migrants in Libya, Calls upon State Authorities to Comply with International Human Rights Law”, *SC/1305*, online, <https://www.un.org/press/en/2017/sc13105.doc.htm>, accessed 18/04/2019

**number of migrants reaching Italy from Libya.**<sup>377</sup>

318. The EU knows the reason of their “success” was their cooperation with the LYCG and that any ‘revision of ongoing activities [would] have to be carefully assessed’.<sup>378</sup> In fact, these ‘ongoing activities’ only intensified, orchestrated by the same actors cited above as acknowledging the lethal consequences of their decision-making.

319. On the 26 June 2018 Emmanuel Macron, President of **France** said that  
‘the capacity to close this route [between Libya and Italy] is the most efficient response [to the migration challenge] **and the most human**’.<sup>379</sup>

320. Macron called for further reinforcement of the cooperation with Tripoli, accusing NGO’s of being smugglers.<sup>380</sup> On 21 February 2019, **France confirmed the provision of six boats to the LYCG.**<sup>381</sup>

321. On 27 June 2018 the Interior Minister of Italy, Matteo Salvini said that **Italy** would donate 12 patrol boats to the Libya and would continue to train the LYCG.<sup>382</sup>

322. At the 28 June 2018 European Council Discussion on Migration, the council decided to continue to support the LYCG with ‘political leaders prioritising its operation, stating that all vessels were to “respect the applicable laws and not obstruct the activities of the LYCG”’.<sup>383</sup>

323. The same day Tripoli announced their SAR zone and the creation of a Libyan MRCC, which

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<sup>377</sup> European External Action Service, 2018, “Strategic Review on EUNAVFOR MED Op Sophia, EUBAM Libya & EU Liaison and Planning Cell”, p. 13, online, <http://www.statewatch.org/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf> , accessed 18/05/2019

<sup>378</sup>European External Action Service, 2018, “Strategic Review on EUNAVFOR MED Op Sophia, EUBAM Libya & EU Liaison and Planning Cell”, p. 13, online, <http://www.statewatch.org/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf> , accessed 18/05/2019

<sup>379</sup> Mathieu, M., 2018, “Les migrants paient le prix fort de la coopération entre l'UE et les garde-côtes libyens”, *Mediapart*, online, <https://www.mediapart.fr/journal/international/280618/les-migrants-paient-le-prix-fort-de-la-cooperation-entre-lue-et-les-garde-cotes-libyens?onglet=full>, accessed 18/05/2019

<sup>380</sup> Mathieu, M., 2018, “Les migrants paient le prix fort de la coopération entre l'UE et les garde-côtes libyens”, *Mediapart*, online, <https://www.mediapart.fr/journal/international/280618/les-migrants-paient-le-prix-fort-de-la-cooperation-entre-lue-et-les-garde-cotes-libyens?onglet=full>, accessed 18/05/2019

<sup>381</sup> Mathieu, M., 2019, “La France offre des hors-bord aux Libyens pour bloquer les migrants”, *Mediapart*, online, <https://www.mediapart.fr/journal/international/220219/la-france-offre-des-hors-bord-aux-libyens-pour-bloquer-les-migrants>, accessed 18/05/2019

<sup>382</sup> Unclear whether these boats to be delivered on top of the vessels that were already supplied. See ANSA, 2018, “Italy to donate 12 patrol boats to Libya (2)”, *ANSA*, online, [http://www.ansa.it/english/news/politics/2018/06/27/italy-to-donate-12-patrol-boats-to-libya-2\\_50fd3373-b797-4347-a7bf-fb04c8ea79a7.html](http://www.ansa.it/english/news/politics/2018/06/27/italy-to-donate-12-patrol-boats-to-libya-2_50fd3373-b797-4347-a7bf-fb04c8ea79a7.html), accessed 18/05/2019

<sup>383</sup> International Rescue Committee, 2018, “Pushing the boundaries: insights into the EU’s response to mixed migration on the Central Mediterranean Route”, p. 15, online, <https://www.rescue.org/report/pushing-boundaries-insights-eus-response-mixed-migration-central-mediterranean-route>, accessed 18/05/2019

was approved by the IMO, and Italy handed over the responsibility for SAR operation in this area to the Libyans.<sup>384</sup>

324. On 18 July 2018 the High Representative of the EU received a letter from the Minister of Foreign Affairs of Italy which stated that Italy could no longer accept the exclusive disembarkation of people rescued at sea by the Operation.<sup>385</sup>

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<sup>384</sup>Mathieu, M., 2018, “Migrants: le hold-up de la Libye sur les sauvetages en mer”, *Mediapart*, online, <https://www.mediapart.fr/journal/international/111018/migrants-le-hold-de-la-libye-sur-les-sauvetages-en-mer?onglet=full>, accessed 18/05/2019

<sup>385</sup> European External Action Service, 2018, “Strategic Review on EUNAVFOR MED Op Sophia, EUBAM Libya & EU Liaison and Planning Cell”, p. 13, online, <http://www.statewatch.org/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf> , accessed 18/05/2019

By the Operation they mean Triton/Themis who has the same operating guidelines until a review + Operation Sophia who followed Triton guidelines for disembarkation

#### 1.3.4 Concrete Events

325. It is estimated that in **2015** the LYCG had intercepted only **0.5%** (about 800 persons) of the overall 153,143 people who were rescued or intercepted in the Mediterranean Sea. As a result of increased EU and Italian policy, the LYCG was responsible for **11%** interceptions in **2016**, and **18%** in **2017**. In **August and September 2017** alone, LYCG interceptions accounted for **39%** of all rescued or intercepted migrants. In 2018 they ranged, monthly, between **35.7%** and **73.2%**.<sup>386</sup>

326. **In the period 2016-2018, EU and Italy, via the LYCG, intercepted and pushed-back to Libya more than 40,000 persons.** In the month of September 2018, out of 1,066 crossings, 22% are estimated to be dead (or missing), 66.9% were forcibly transferred back to Libya by the LYCG (or others), and only 11.2% disembarked in Europe.<sup>387</sup>

327. The former section provided evidence for EU and Italy **indirect** involvement with the alleged crimes by providing funds, equipment, training and other multiform support for capacity building of the Libyan militia LYCG and other armed groups implicated with crimes against migrants.

328. The cases discussed below are outlined in detail in Annex II (Section 6.2). They provide evidence for **direct** involvement of EU and Italian agents each and every interception, detention and push-back operation LYCG is involved in.

329. EU and Italian agents had a key role orchestrating, commanding and coordinating these unlawful operations as part of clear strategy whereby the EU, Italy and other Member States actively avoid SAR and *non-refoulement* obligations to ensure the push-back of tens of thousands civilians fleeing persecution. These operations targeted men, women and children, survivors of the camps in Libya who managed to flee the country.

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<sup>386</sup> For up-to-date data, see Italian Institute for International Political Studies (ISPI), Estimated Migrants Departures from Libya, Online – <https://docs.google.com/spreadsheets/d/1ncHxOHIx4ptt4YFXgGi9TIbwd53HaR3oFbrfBm67ak4/edit#gid=0>, last accessed 01/06/2019; See also data at IOM data on ‘rescues’ in: <http://www.globaldtm.info/libya/>

<sup>387</sup> Italian Institute for International Political Studies (ISPI), Estimated Migrants Departures from Libya, Online – <https://docs.google.com/spreadsheets/d/1ncHxOHIx4ptt4YFXgGi9TIbwd53HaR3oFbrfBm67ak4/edit#gid=0>, last accessed 01/06/2019

330. As established in the previous section, already in 2014 Frontex declared the exclusion of push-backs which were declared unlawful in the ECtHR *Hirsi* decision. Furthermore, as also noted above, as early as 2015 the UN declared Libya as unsafe and called all countries to assist persons fleeing the country to facilitate their exit from a region the suspects themselves described as ‘hell’.

331. Dozen documented cases discussed below and in further detail Annex II reveal however a recurrent pattern in which **Italian and EU naval agents detect migrants’ boats, passed on information such as location of these boats to the LYCG, and then coordinated the interception, detention, and ultimately *refoulement* of the survivors back to Libyan ports.**

332. In a typical scenario, **the Italian MRCC would sometime request a rescue NGO to intervene, only to then hand off the rescue operation to the LYCG which was assigned “on-scene command”, regardless its location and competence.** The ensemble of cases described in Annex II reveal “the distinct and recurrent operational patterns are evidence of a systematic, rather than episodic nature of the events.”<sup>388</sup>

333. The 1<sup>st</sup> case concerns a SAR operation led by an NGO following a request by MRCC Rome. The operation was violently interrupted by the LYCG, which intercepted at gunpoint, detained and pulled-back the survivors to Libya.

334. The 2<sup>nd</sup> case concerns a case in which Italian vessel refrained from engaging in rescue or notifying NGO vessel of the need in SAR, and instead provided the LYCG with information which resulted in the interception, detention and push-back and detention of 213 survivors in the Tajoura detention center in Tripoli.

335. The 3<sup>rd</sup> case describes another case in which several Italian vessels were witnessing a boat in distress, refrained from engaging in SAR operation, and instead contacted the LYCG requesting it - despite being 2 hours away - to intervene. When the LYCG intercepted the boat passengers, 40 survivors jumped off the LYCG vessel. The 100 survivors which remained detained on board of the LYCG were pulled back and detained in Libya.

336. The 4<sup>th</sup> case follows the pattern in which MRCC alerts rescued a NGO vessel, but later, under the supervision of two Italian vessels, the LYCG “assumed” on scene command, forcing the

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<sup>388</sup> Heller, C., Pezzani, L., 2018, “*Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean*”, p. 13, Forensic Oceanography

NGO to stand-by and witness 200 survivors intercepted, detained on board, and transferred to the Tajoura detention center in Libya.

337. The 5<sup>th</sup> case reiterates the pattern in which MRCC Rome requests an NGO to head towards a boat in distress, announcing later that LYCG has taken charge of the situation, asking the rescue NGO to remain at a distance, while the LYCG intercepts, detain and pull-back the survivors.

338. The 6<sup>th</sup> case also follows an order by MRCC Rome to a rescue NGO to remain on “standby” whilst charging the LYCG with the coordination of two rescue operations. Assistance proposed by the NGO would be denied by the LYCG.

339. The 7<sup>th</sup> case also describes a detection by an aircraft of EUNAVFOR MED operation which requested a rescue NGO to approach the vessel. While the NGO headed towards the boat in distress, it was overtaken by EUNAVFOR MED operation Navy ship, which ensured that the LYCG vessel would reach the boat in distress. Between 209 and 260 survivors would be intercepted, detained on board, and brought to detention centers in Tripoli.

340. The 8<sup>th</sup> case is another case demonstrating the privileging of LYCG interception despite the presence of Italian, NGO and merchant vessels on the scene. Here too MRCC first informed the NGO vessel with the boat’s location provided by Italian Navy asset, only to later notify that LYCG would arrive to the scene in about an hour. The LYCG intercepted, detained and transferred to detention in Tripoli 262 survivors.

341. The 9<sup>th</sup> event again commences with MRCC Rome ordering rescue NGO to search for a boat in distress. When the NGO vessel was 100m from the boat in distress, the LYCG arrived and ordered the NGO to leave the area. The LYCG proceeded to escort the NGO boat away from the scene *before* intercepting the migrant boat, MRCC Rome instructed the NGO to comply with the LYCG instructions, and migrants were pulled back to Libya.

342. The 10<sup>th</sup> case also starts with MRCC Rome calling a rescue NGO and providing location of boat in distress. Here too, the LYCG arrived one hour later and instructed the NGO to leave the area. MRCC directed the NGO vessel towards a 2<sup>nd</sup> boat, but information provided being erroneous, LYCG also intercepted that boat.

343. In the 11<sup>th</sup> case, MRCC was informed that a military drone taking part in the EUNAVFOR MED operation had spotted a dinghy. MRCC forwarded this information to a rescue NGO and the

LYCG. While the NGO and another commercial vessel were navigating towards the boat, an Italian Navy ship docked in Tripoli informed MRCC Rome that the LYCG was about to leave the port of Tripoli and to assume responsibility for the rescue. The LYCG communicated to MRCC Rome that it requested the NGO to stay out of sight of the migrants.

344. In the same case, two more boats were spotted by aircraft and naval asset of EUNAVFOR MED operation. The LYCG communicated to MRCC it would take responsibility asking NGO vessels to keep out. When the NGO was in the course of SAR operation of the third (or fourth) boat in distress, an LYCG vessel arrived, stopped the NGO RHIBs and started to threaten them, requiring them to hand the survivors over to them. While the LYCG did manage to take some of the migrants onboard its vessel, these people managed to flee by jumping in the water and reaching Open Arm's RHIBs.

345. The NGO vessel pressed the emergency anti-piracy button seeking MRCC Rome help. The latter directed more than once the Italian Navy to intervene and protect the NGO vessel, but it refused. Later, an Italian judge would determine that the intervention of the Libyan patrol vessels happened “under the aegis of the Italian navy ships present in Tripoli”. Upon disembarkation in Italy, the NGO vessel would be seized by Italian police and two crew members accused of criminal conspiracy and aiding illegal migration.

346. In the 12<sup>th</sup> case, MRCC Rome requested a rescue NGO to direct itself towards a boat with an estimated 120 people. Whilst the NGO was first to arrive on the scene, MRCC informed that LYCG was to coordinate the operation and that the NGO vessel should standby.

347. The 13<sup>th</sup> case on 6 November 2017 and is known as the ‘sea watch’ case. GLAN submitted an application concerning this case to the ECtHR (pending).<sup>389</sup> A detailed and visual reconstruction of the turn of events of the interaction between the various actors, has been produced by Forensic Oceanography and can be accessed here: <https://forensic-architecture.org/investigation/seawatch-vs-the-libyan-coastguard> .

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<sup>389</sup> *S.S. and Others v. Italy*, ECtHR, Appl. 21660/18 (pending)

#### 1.4 Human Rights Situation in Libya

348. As of today, militias affiliated with both the Government of National Accord (GNA), backed by the United Nations and based in Tripoli, and the Libyan National Army, which is linked to the Interim Government based in Tobruk, continue to clash and indiscriminately carry out attacks in populated areas.<sup>390</sup>

349. A confidential UN Panel of Experts Report from 2017 establishes that most smuggling and trafficking groups have links to official security institutions.<sup>391</sup> Indeed, the Panel expressed concern:

**“over the possible use of state facilities and state funds by armed groups and traffickers to enhance their control of migration routes.”<sup>392</sup>**

350. On 26 February 2011, the United Nations Security Council (‘UNSC’) unanimously referred the situation in Libya to the ICC (Resolution 1970). In March 2011, the Office of the Prosecutor (‘OTP’) at the ICC opened its investigation into crimes against humanity and war crimes.<sup>393</sup>

351. On 17 March 2011, the UNSC adopted Resolution 1973, which demanded for an immediate ceasefire and authorized all necessary means to protect civilians. It provided the legal basis for the NATO-led military intervention launched on 19 March 2011.<sup>394</sup>

352. Armed hostilities escalated in mid-2014, further inhibiting the functioning of the domestic system of justice. The ongoing violence and lack of central authority have given rise to an economic crisis, in which smuggling was rampant.<sup>395</sup>

353. This political climate has resulted in the death of civilians, abductions of political opponents, arbitrary detentions, torture, ill-treatment of detainees, and abuses of human rights.

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<sup>390</sup> France 24, 2019, “Explosions rock Tripoli as battle rages outside Libyan capital”, *France 24*, online, <https://www.france24.com/en/20190421-tripoli-libya-haftar-gna-lna-gaddafi-russia-trump>, accessed, 18/04/2019

<sup>391</sup> United Nations Security Council, 2017, “Interim Report of the Panel of Experts Established Pursuant to Resolution 1973 (2011) Concerning Libya”, online, <https://undocs.org/S/2017/466>, accessed 18/04/2019

<sup>392</sup> Ibid.

<sup>393</sup> United Nations Security Council, 26 February 2011, *Resolution 1970 (2011)*, online, [https://www.nato.int/nato\\_static\\_fl2014/assets/pdf/pdf\\_2011\\_02/20110927\\_110226-UNSCR-1970.pdf](https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2011_02/20110927_110226-UNSCR-1970.pdf), accessed 05/04/2019; International Criminal Court, February 2011, *Situation in Libya ICC-01/11*, online, <https://www.icc-cpi.int/libya>, accessed 05/04/2019

<sup>394</sup> United Nations Security Council, 17 March 2011, *Security Council Resolution 1973 (2011) [on the situation in the Libyan Arab Jamahiriya]*, online, <https://www.refworld.org/docid/4d885fc42.html>, accessed 05/04/2019

<sup>395</sup> Eaton, T., 2018, “Libya’s War Economy Predation, Profiteering and State Weakness”, *Chatham House*, online, <https://www.chathamhouse.org/sites/default/files/publications/research/2018-04-12-libyas-war-economy-eaton-final.pdf>, accessed 18/04/2019

354. On 27 March 2015, the United Nations Human Rights Council initiated an investigation by the Office of the High Commissioner of Human Rights (OHCHR) into human rights abuses and violations in Libya.<sup>396</sup>

355. The first of such panel documents attacks on civilians, destruction of civilian homes, bombing hospitals, arbitrary detention with torture and ill-treatment, no access to trial and unlawful killings.<sup>397</sup>

356. ‘Migrants’ and refugees are particularly vulnerable in situations of political instability and violence. Their situation is aggravated by the fact they cannot access residence permits, excluding them from social security mechanisms and basic services such as health care. This exposes them to the risk of being arrested for irregular stay.<sup>398</sup>

357. On 17 December 2015, facilitated by the United Nations Support Mission in Libya (UNSMIL), different fractions signed the Libyan Political Agreement and established a Presidency Council with Prime Minister Serraj. The Libyan Political Agreement, however, did not cease hostilities.

358. In March 2016, the Presidential Council of the GNA installed itself in Tripoli, but failed to take control of all the ministries and institutions as other authorities still tried to take control over infrastructures and struggled for legitimacy.<sup>399</sup>

359. In the absence of effective state control over the national territory, armed groups continued to fight and commit human rights violations, and the humanitarian crisis escalated, mounting to **around 0.5 million internally displaced people (IDPs)**.<sup>400</sup>

360. As of **October 2016**, the UN Office for the Coordination of Humanitarian Affairs reports **2.44 million people in need of humanitarian assistance and protection**.<sup>401</sup> The UN further

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<sup>396</sup> United Nations Human Rights Council, 7 April, 2015, *Technical assistance and capacity-building to improve human rights in Libya: Resolution adopted by the Human Rights Council, A/HRC/RES/28/30*, online, <https://undocs.org/A/HRC/RES/28/30>, accessed 05/04/2019

<sup>397</sup> Human Rights Watch, January 2016, *World Report 2016 – Libya*, p378-386, online, [https://www.hrw.org/sites/default/files/world\\_report\\_download/wr2016\\_web.pdf](https://www.hrw.org/sites/default/files/world_report_download/wr2016_web.pdf), accessed 05/04/2019

<sup>398</sup> United Nations High Commissioner for Refugees, September 2018, *UNHCR position on returns to Libya (Update II)*, p11, online, <https://www.refworld.org/docid/5b8d02314.html>, accessed 05/04/2019

<sup>399</sup> Human Rights Watch, January 2017, *World Report 2017 – Libya*, p403-404, online, [https://www.hrw.org/sites/default/files/world\\_report\\_download/wr2017-web.pdf](https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf), accessed 05/04/2019

<sup>400</sup> Ibid., p407

<sup>401</sup> Amnesty International, 24 February 2016, *Amnesty International Report 2015/16 – Libya*, p232, online, <https://www.amnesty.org/en/latest/research/2016/02/annual-report-201516/>, accessed 05/04/2019

estimated that at least **680,000 migrants and asylum seekers live in Libya outside of detention centers**,<sup>402</sup> including about **29,370 unaccompanied children**.<sup>403</sup>

361. Libyan law criminalizes undocumented entry, stay and exit, punishable by imprisonment and forced labor and does not specify the maximum period for immigration detention.<sup>404</sup> As such, immigration detention in Libya can be indefinite.<sup>405</sup>

362. The Department for Combating Illegal Migration (DCIM), under the Libyan Ministry of Interior, is responsible for operating the official detention centers which hold thousands of men, women and children in prolonged arbitrary and unlawful detention<sup>406</sup>. According to Human Rights Watch

**“most centers are under the effective control of whichever armed group controls the neighborhood where a center is located.”**<sup>407</sup>

363. According to the OHCHR,

**“Torture and ill-treatment are systematic in detention facilities across Libya, particularly in the initial period of detention and during interrogations. Most commonly used methods of torture include beatings with various objects such as metal bars and water pipes, flogging on the soles of the feet, suspension in stress position, burning with cigarettes or hot rods, and the administration of electric shocks. Some detainees have been beaten to death.”**<sup>408</sup>

364. According to Human Rights Watch, in July 2018, there were between **8,000-10,000** people in *official* detention centers, compared to April 2018, where an estimated 5,200 were being held.<sup>409</sup>

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<sup>402</sup> United Nations Security Council: Secretary-General, 31 August 2018, *Report of the Secretary-General: implementation of resolution 2380 (2017): U.N. Doc. S/2018/807*, p. 9, online, <http://undocs.org/S/2018/807>, accessed 05/04/2019

<sup>403</sup> Human Rights Watch, January 2019, *No Escape from Hell - EU Policies contribute to abuse of migrants in Libya*, online, <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>, accessed 05/04/2019

<sup>404</sup> United States Department of State, 27 June 2017, *2017 Trafficking in Persons Report - United States of America*, p431-433, online, <https://www.state.gov/j/tip/rls/tiprpt/2017/index.htm>, accessed 05/04/2019

<sup>405</sup> Prolonged detention of adults and children other than the period strictly necessary to carry out a lawful deportation and without access to judicial review is considered “arbitrary” and is prohibited under international law. See Amnesty International, 11 December 2017, *Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*, p21, online, <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>, accessed 05/04/2019

<sup>406</sup> Ibid.

<sup>407</sup> Human Rights Watch, January 2019, *No Escape from Hell - EU Policies contribute to abuse of migrants in Libya*, online, <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>, accessed 05/04/2019

<sup>408</sup> United Nations Office of the High Commissioner for Human Rights, April 2018, *Abuse behind bars: Arbitrary and unlawful detention in Libya*, p 5, online, [https://www.ohchr.org/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful\\_EN.pdf](https://www.ohchr.org/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful_EN.pdf), accessed 10/04/2019

<sup>409</sup> Human Rights Watch, January 2019, *No Escape from Hell - EU Policies contribute to abuse of migrants in Libya*, p6, online,

This conservative figure was raised by other observers to 20 000 in 2019<sup>410</sup>. An **unknown** number are held in *informal* detention centers and warehouses under the control of smuggling networks and militias.<sup>411</sup>

365. According to Human Rights Watch,

**“While some of the detainees in DCIM centers were arrested in raids on smuggler camps, private homes, and in stops on the streets, the increase in interceptions at sea by the LYCG is swelling numbers at the centers and contributing to greater overcrowding and deteriorating conditions.”**<sup>412</sup> [emphasis added]

366. Indeed, as of October 2018 only 6 out of 16 disembarkation points on the coasts of Libya were equipped with UNHCR services for first aid, identification of people in need of humanitarian assistance, unaccompanied children and vulnerable people.<sup>413</sup>

367. As the previous section attests, migrants intercepted by the Libyan Coast Guard are typically transferred immediately to DCIM detention centers or to private houses and farms, where they often are subjected to forced labor, rape and sexual violence.<sup>414</sup>

368. This situation had been of public knowledge for years. Public reports, journalistic coverage, NGOs statements and official institutions had been warning on the dire, inhuman and illegal conditions migrants were enduring back under Gaddafi regime, and their worsening since its fall. Thousands of articles covered the ‘indescribable’<sup>415</sup> living conditions, ‘widespread rape and

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<https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>, accessed 05/04/2019

<sup>410</sup> “Libya: 20,000 migrants held in detention centers”, January 29 2019, Middle East Monitor <https://www.middleeastmonitor.com/20190129-libya-20000-migrants-held-in-detention-centres>

<sup>411</sup> United Nations Security Council: Secretary-General, 31 August 2018, *Report of the Secretary-General: implementation of resolution 2380 (2017): U.N. Doc. S/2018/807*, p. 9, online, <http://undocs.org/S/2018/807>, accessed 05/04/2019

<sup>412</sup> Human Rights Watch, January 2019, *No Escape from Hell - EU Policies contribute to abuse of migrants in Libya*, p16, online, <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrantslibya>, accessed 05/04/2019

<sup>413</sup> United Nations High Commissioner for Refugees, 3 November 2018, *Libya: Activities at Disembarkation, monthly update: October 2018*, online, <https://data2.unhcr.org/en/documents/details/66621>, accessed 05/04/2019

<sup>414</sup> United Nations Support Mission in Libya and United National Human Rights Office of the High Commissioner, “*Detained and dehumanized*”: *Report on human rights abuses against migrants in Libya*, p. 19, online, [https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised\\_en.pdf](https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf) accessed 05/04/2019

<sup>415</sup> Davis, S., and Wright, R., 2019, “Conditions in Libyan detention camp ‘indescribable’, says detainee”, Euronews, online, <https://www.euronews.com/2019/04/10/conditions-in-libyan-detention-camp-indescribable-migrant-says-thecube>, accessed 01/06/2019

torture<sup>416</sup>, arbitrary executions<sup>417</sup>, famine<sup>418</sup> and other inhuman acts<sup>419</sup> to which, according to governmental statements, more than 20 000 ‘migrants’ have been exposed.<sup>420</sup>

369. The inhumane conditions of these detention centers have been well documented by UN bodies and reputable human rights organizations. As these international organizations such as UNHCR and IOM and certain NGOs have access, albeit limited, to some detention centers to provide assistance to the migrants, there is robust documentation revealing the inhumane and degrading conditions of these centers.

370. According to the United Nations, the detention centers lack latrines, running water, and washing facilities. Hygiene conditions are such that many report proliferations of scabies, skin infections and respiratory problems. Access to medical assistance is almost non-existent.<sup>421</sup> Medical assistance is also not accessible to women giving birth, who suffer complications and in many instances have died.<sup>422</sup>

371. In July 2018, Human Rights Watch visited four centers: Ain Zara and Taijoura (Tripoli), Zuwara (near the border with Tunisia), and the center in the area of al-Karareem (Misrata).<sup>423</sup>

372. The Misrata detention center held 472 detainees at the time of the visit by Human Rights Watch. HRW documented conditions of overcrowding and lack of hygiene: lack of cleaning supplies, blankets and mattresses. *All* the interviewees reported collective punishments and **physical abuses by the guards. Guards also beat women, including pregnant, and subjected men to electric shocks.**<sup>424</sup>

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<sup>416</sup> Chynoweth, S., 2019, “More Than One Million Pains: Sexual Violence Against Men and Boys on the Central Mediterranean Route to Italy”, Women’s Refugee Commission, online, <https://www.womensrefugeecommission.org/images/zdocs/Libya-Italy-Report-03-2019.pdf>, accessed

<sup>417</sup> Lederer, E., 2018, “Medical group says many migrants killed in Libya escape”, Associated Press, online, <https://www.apnews.com/c2988354eeb6416a834a02f1497e572d>, accessed 01/06/2019

<sup>418</sup> Guerin, O., 2017, “Libya migrants: Inside a detention camp - hot, airless, overcrowded”, BBC, online, <https://www.bbc.com/news/av/world-africa-41194000/libya-migrants-inside-a-detention-camp-hot-airless-overcrowded>, accessed 01/06/2019

<sup>419</sup> Hayden, S., 2019, “The EU’s deal with Libya is sentencing refugees to death”, The Guardian, online, <https://www.theguardian.com/commentisfree/2019/feb/05/eu-deal-libya-refugees-libyan-detention-centres>, accessed 01/06/2019

<sup>420</sup> Middle East Monitor, 2019, “Libya: 20,000 migrants held in detention centers”, online, <https://www.middleeastmonitor.com/20190129-libya-20000-migrants-held-in-detention-centres>, accessed 01/06/2019

<sup>421</sup> United Nations Support Mission in Libya and United National Human Rights Office of the High Commissioner, “*Detained and dehumanized*”: Report on human rights abuses against migrants in Libya, p. 19, online, [https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised\\_en.pdf](https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf) accessed 05/04/2019

<sup>422</sup> Ibid.

<sup>423</sup> Human Rights Watch, January 2019, “No Escape from Hell - EU Policies contribute to abuse of migrants in Libya”, online, <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrantslibya>, accessed 05/04/2019

<sup>424</sup> Ibid.

373. The Zuwara detention center held 590 detainees. Men were overcrowded and had to take turns to lay down in the room. The rooms lacked appropriate ventilation and, notwithstanding the heat, the detainees were rarely allowed to go out in the courtyard. Detainees report also a **lack of water, beatings by the guards**, and police directorate had stolen their money and passports at the time of the arrest.<sup>425</sup>

374. The Tajoura center in Tripoli held 1,100 detainees at the time of the visit. **The majority of them were intercepted at sea while trying to reach Europe.** Protests were going on at the time of the visit: 600 Sudanese were on hunger strikes. Two women tried to commit suicide. Two other women that were having seizures were not assisted in any way. Women reported that were sexually assaulted and beaten by the guards.<sup>426</sup>

375. At the time of the visit, there were 706 detainees in the Ain Zara detention center. According to the director, **they were all intercepted at sea.** Sanitary conditions were dire, only 15 out of the 40 latrines worked, and there were only two toilets for 100 women. Lack of ventilation caused the diffusion of tuberculosis and scabies. In the absence of psychological care, detainees developed depression and other mental diseases.<sup>427</sup>

376. During clashes that happened in Tripoli in last August, the guards abandoned the center, leaving detainees without food, water and protection. **100 Somalis were abducted by unidentified men.**<sup>428</sup>

377. Centers which are exceptionally notorious for human rights violations and abuses are the centers of Surman, al-Khoms, Shuhada Al-Nasr, Abu Salim, and Tarik al-Shouk.<sup>429</sup>

378. In 2018, the IOM reported that 29,370 unaccompanied children were present in Libya, but the real number is likely to be higher. Children, accompanied and non, have separate facilities in the detention centers. Detention centers lack infant care facilities and baby formula, so infants, are forced to eat the same low-quality food as adults.<sup>430</sup>

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<sup>425</sup> Ibid.

<sup>426</sup> Ibid.

<sup>427</sup> Ibid.

<sup>428</sup> Ibid.

<sup>429</sup> United Nations Support Mission in Libya and Office of the High Commissioner of Human Rights, 20 December 2018, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, online, <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>, accessed 05/04/2019

<sup>430</sup> Human Rights Watch, January 2019, *No Escape from Hell - EU Policies contribute to abuse of migrants in Libya*, online, <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrantslibya>, accessed 05/04/2019

379. While the European Union indirectly continues funding detention centers in Libya and cooperating with Libyan fractions and militias in the pull-back operations that detain fleeing migrants on board of the vessels and upon disembarkation in detention centers, its institutions have over the years expressed full knowledge of the situation and in particular “concerns” for the inhuman conditions of the detention centers and the violations of human rights that happen there.

380. Already in November 2012, the European Parliament adopted a Resolution in expressing concerns on the conditions on migrants in Libya:

**“...the living conditions and treatment of migrant detainees in detention centres...” and “deep concern about the extreme conditions of detention to which foreign persons, including women and children, are subjected – many of them victims of sexual and gender-based violence – and about their lack of recourse to an adequate legal framework and protection, causing indefinite detention and no possibility of appeal against deportation.”**<sup>431</sup>

381. More than four years later, the situation remained dire. In January 2017, the High Representative of the Union for Foreign Affairs and Security Policy recognized that the conditions of detention centers are unacceptable and do not meet international human rights standards, and **recalled the EU duty to fight against torture, ill-treatment, inhumane treatment and extortion.**<sup>432</sup>

382. A leaked report by the European Union Border Assistance to Libya (EUBAM), dated January 25, 2017, clearly stated the violations of human rights **happening in the detention centers in Libya, including torture, sexual abuses, forced prostitution, slavery and ill-treatment.**<sup>433</sup>

383. In April 2018, the Parliamentary Assembly of the Council of Europe, with Resolution 2215 (2018), suggested the **dismantlement of the detention centers.** It stated its concerns for human rights violations in the country, especially migrants and refugees’ rights. It invited the State parties

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<sup>431</sup> European Parliament, 22 November 2012, “European Parliament Resolution on the situation of migrants in Libya (2012/2879(RSP)”, online, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0465+0+DOC+XML+V0//EN&language=EN>, accessed 05/04/2019

<sup>432</sup> European Commission: High Representative of the Union for Foreign Affairs and Security Policy, 25 January 2017, *Joint communication to the European Parliament, the European Council and the Council - Migration on the Central Mediterranean route: Managing flows, saving lives*, p10, online, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20170125\\_migration\\_on\\_the\\_central\\_mediterranean\\_route\\_-\\_managing\\_flows\\_saving\\_lives\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20170125_migration_on_the_central_mediterranean_route_-_managing_flows_saving_lives_en.pdf), accessed 05/04/2019

<sup>433</sup> European External Action Service, 25 January 2017, *EUBAM Libya Initial Mapping Report Executive Summary*, online, <http://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf>, accessed 05/04/2019

to only cooperate with the Libyan Coast Guard **if it respected human rights**, and to make sure that they received a training on the subject.<sup>434</sup>

384. As detailed above, despite the continuous reports on the grave human rights abuses, the EU provided funds, equipment and training to the GNA's Ministry of Interior to enable its operation.

385. On 12 April 2017, the High Representative of the Union for Foreign Affairs and Security Policy Federica Mogherini announced that the European Union Trust Fund for Africa (EUTF) had adopted a program worth **€90 million** for the "protection" of migrants and **improving migration management** in Libya. The program envisioned assistance in urban areas, **detention centers and dismemberment points**.<sup>435</sup>

386. On **6 July, 2018**, Federica Mogherini announced that the program was renewed with the addition of **€90.5 millions**.<sup>436</sup> To be sure, these budgets were not provided to dismantle notorious camps where migrants are being abused on a daily basis, but rather to 'improve' their management, which, in other terms, means, preserving their existence.

387. European funding to Libyan authorities have not stopped or reduced in any way the crimes committed in detention. On the contrary, this funding has assisted to maintain these sites, instead of pushing for their dismantlement, which would have been the natural consequence had the EU not intervened.<sup>437</sup>

388. Officials and institutions of the European Union openly acknowledge the abuses of migrants in the Libyan detention centers. As mentioned, in **January 2017**, the German ambassador in Niger, Dr Bernd von Münchow-Pohl, wrote a letter to the Ministry of Foreign Affairs stating that **the conditions in Libyan detention centers are worse than in concentration camps**.<sup>438</sup>

389. In the same month, Chancellor Angela Merkel said that the EU could not strike with Libya

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<sup>434</sup> European Parliamentary Assembly, 25 April 2018, "Resolution 2215 (2018): The situation in Libya: Prospects and role of the Council of Europe", online, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24738&lang=en>, accessed 05/04/2019

<sup>435</sup> European Commission, 12 April 2017, "EU Trust Fund for Africa adopts €90 million programme on protection of migrants and improved migration management in Libya", online, [http://europa.eu/rapid/press-release\\_IP-17-951\\_en.htm](http://europa.eu/rapid/press-release_IP-17-951_en.htm) accessed 06/04/2019

<sup>436</sup> European Commission, 6 July 2018, "EU Trust Fund for Africa: additional €90.5 million to strengthen border management and protection of migrants in North Africa", online, [https://ec.europa.eu/trustfundforafrica/all-news-and-stories/eu-trust-fund-africa-additional-eu905-million-strengthen-border-management-and\\_en](https://ec.europa.eu/trustfundforafrica/all-news-and-stories/eu-trust-fund-africa-additional-eu905-million-strengthen-border-management-and_en) accessed 06/04/2019

<sup>437</sup> Amnesty International, 11 December 2017, *Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*, p43, online, <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>, accessed 06/04/2019

<sup>438</sup> Wintour, P., 30 January 2017, "German report details Libya abuses amid pressure to stem migrant flows", *The Guardian*, online, <https://www.theguardian.com/world/2017/jan/30/german-report-libya-abuses-pressure-migrant-flows>, accessed 06/04/2019

a deal similar to the one with Turkey until the political situation will not be more stable. But a deal was struck nonetheless.<sup>439</sup>

390. In September 2017, a spokesperson for the European Union External Action Service declared:

**“We are completely aware of the unacceptable, often scandalous, even inhumane conditions in which migrants are treated in reception camps in Libya.”**<sup>440</sup>

391. In November 2017, **Dimitri Avamopoulos, the EU Migration Commissioner**, declared: **“We are all conscious of the appalling and degrading conditions in which some migrants are held in Libya.”**<sup>441</sup>

392. As recalled, in November 2017, following the release by the CNN of a video showing **slaves auctions**, or reselling of migrants’ debt, in Zuwara, Castelverde, Sabratah, Garyan, Alrujban, Alzintan, Kabaw, and Gadamis<sup>442</sup>, following which **French President Emmanuel Macron** defined the abuses on migrants as **“a crime against humanity.”**<sup>443</sup>

393. **The Dutch Minister of Foreign Trade and Development Cooperation** Sigrid Kaag visited detention centers in Tripoli in March 2018 and stated she was horrified by the conditions in which migrants are forced to live, adding she supported the UNHCR in its proposal of **closing the detention centers** in favor of alternative receiving facilities.<sup>444</sup>

394. In December 2018, the Council of the European Union again expressed its ‘concerns’ regarding the violations of human rights and international humanitarian law. It also stated the necessity of overcoming the situation of the detention centers as it is right now. It reaffirmed its objective of ensuring the protection of migrants and refugees and fighting human trafficking.<sup>445</sup>

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<sup>439</sup> Ibid.

<sup>440</sup> Euractiv and AFP, 8 September 2017, “MSF accuses EU of fueling migrant abuses in Libya”, online, <https://www.euractiv.com/section/justice-home-affairs/news/msf-accuses-eu-of-fuelling-migrant-abuses-in-libya/>, accessed 06/04/2019

<sup>441</sup> Euractiv and AFP, 24 November 2017, “EU working without ‘letup’ to help migrants in Libya”, online, <https://www.euractiv.com/section/justice-home-affairs/news/eu-working-without-letup-to-help-migrants-in-libya>, accessed 06/04/2019

<sup>442</sup> Elbagir, N., Razek, R., Platt, A., and Jones, B., November 2017, “People for sale: Where lives are auctioned for \$400”, *Cable News Network*, online, <https://edition.cnn.com/2017/11/14/africa/libya-migrant-auctions/index.html>, accessed 06/04/2019

<sup>443</sup> Wintour, P., and Chrisafis, A., 30 November 2017, “Voluntary evacuation planned for migrants as Libya battles slavery claims”, *The Guardian*, online, <https://www.theguardian.com/world/2017/nov/29/voluntary-evacuation-planned-for-migrants-in-libya-detention-camps>, accessed 06/04/2019

<sup>444</sup> Pieters, J., 29 March 2018, “Dutch Minister horrified by conditions in Libyan detention centers”, *NL Times*, online, <https://nltimes.nl/2018/03/29/dutch-minister-horrified-conditions-libyan-detention-centers>, accessed 06/04/2019

<sup>445</sup> Council of the European Union, December 10 2018, *Council conclusions on Libya*, online,

395. At no point the EU responsibility for the preservation of these camps was acknowledged. The collaboration with the LYCG, as established above, has not ceased either. Despite the well-documented evidence for the commission of atrocious crimes in Libya and specifically in the detention centres where most of the 40,000 intercepted migrants were brought to, this collaboration only intensified.

396. In fact, ‘collaboration’ is inaccurate and misleading term: the EU orchestrated, directly and indirectly, the interception and detention of all 40,000 individuals that have somehow managed to escape the hell on earth Libya had become for them in the past years.

397. As the witness statement indicated, for the purpose of ensuring EU would take no survivors, the EU rebuilt a mercenary group and reconstructed a militia that is equally involved in human trafficking and smuggling. Yet, the EU chose to outsource acts and omissions EU agents were perfectly aware are unlawful and amount to crimes within the jurisdiction of the Court.

398. This militia has been disguised as a sovereign entity in the form of a national coast guard, in order to create the false impressions that the crimes committed are in line with international laws of the sea and under Libya’s state sovereign prerogative.

399. International law of the seas, however, even when manipulated and circumvented in the most cynical and cruel way, does not allow for incompetent boats of criminals to conduct SAR operations, nor to disembark persons rescued in unsafe ports.

400. International Human Rights and Refugee Law provide for absolute prohibition on *refoulement* – be it push-back by proxy or pull-back - of any individual under States’ effective control, to a place which risks her life, liberty and any other basic human right.

401. Finally, while grave breaches of international humanitarian and human rights law may amount to crimes within the meaning of the Rome Statute, International Criminal Law is an independent normative source and framework.

402. As this section has demonstrated, the crimes committed by EU agents in complicity with Libyan agents, are part and parcel of a premeditated program and are pursuant to an organizational policy to stem migration flows from Libya.

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<http://data.consilium.europa.eu/doc/document/ST-15028-2018-INIT/en/pdf>, accessed 06/04/2019

403. The next section provides the ICL legal framework that constitutes these acts and omissions as crimes within the jurisdiction of the respectful Court.

## 2. Law

404. The migration policy of the European Union and Member States vis-à-vis Libya and the Central Mediterranean should be understood as a policy of systematic and widespread attack of a pre-targeted population.

405. This policy was designed and is implemented by the European Union, comprised of the European Council, the Council of the European Union, the European Commission and its administrative agencies, including in particular its border agency Frontex.

406. As the European Union acts on behalf of its State Members, responsibility also extends to the heads of government, high-civil servants and political leaders involved in the decision-making of the organization. Specifically, and based on the facts presented above, the Italian authorities acted in many circumstances in an autonomous perspective and should be independently held responsible.

407. The investigation opened by the Prosecutor on the situation in Libya and any preliminary examination that may be opened in connection with the present communication, will have the responsibility to establish in more detail the individual responsibilities of EU and its Member States' officials and agents in this matter.

408. As opposed to the identification of suspects, the Prosecutor herself has already identified the targeted civilian population. The Prosecutor termed its members as 'migrants', a terminology we follow here. Migrants and asylum seekers are a group by virtue of their migration and asylum seeking, with the additional element that they are crossing by sea. They constitute, therefore, a multitude, a (civilian) population, and are attacked as such.

409. The category of 'migrants' has been created in order to be categorically attacked. Indeed, discursive reification often precedes the commission of mass crimes. It is common, in the context of widespread violence, that political authorities create a "de facto" enemy in order to facilitate the violence committed against it.

410. The said population is consisted of people of diverse gender, nationality, motivations, resources, ideologies and cultures, to a single common circumstance, namely the fact that they are not present in their habitual residence. Thus, they dehumanized to become the 'other', a foreigner, stranger, alien body to the polity. This (dis)qualification often occurs through a semantic process

of homogenization.<sup>446</sup>

411. This regrouping to a single semantic category over the years has created a catch-all terminology that allows for widespread and systematic persecution policies against this particularly vulnerable group of millions of civilians.

412. Such reduction of a hugely diverse population to a single defining aspect has been accompanied by discrimination, physical and moral violence, deprivation of rights and systematic attacks in the public sphere, paving the road for the commission of crimes depicted below against individuals included in this category, their justification, and their use for political gain.

413. The present communication focuses on two policies the EU implemented in the past five years, which served a common goal: to stem migration flows from Africa. While the methods and tactics of these policies differed, according to the political and legal situation in Libya, they shared one fundamental strand: they both targeted a group of civilians in its most vulnerable moment, i.e. when its members were completely helpless, in distress at sea.

414. The *first* part of this section establishes the procedural elements of the present case (Section 3.1), demonstrating the crimes are within the jurisdiction of the court (Section 3.1.1), that they are admissible (Section 3.1.2) and that their investigation serves the interests of justice (Section 3.1.3).

415. The *second* part of this legal section analyzes the substantial law, i.e. establishing the alleged crimes meet the elements required by the Rome Statue (**Section 3.2**) with respect to both the 1<sup>st</sup> EU policy of committing crimes by omission (Section 3.2.1), and the 2<sup>nd</sup> EU policy of committing crimes jointly with and through others (Section 3.2.2).

416. Both sections first provide the contextual element required for the commission of crimes against humanity, namely the overall attack pursuant to the policy of the European Union, then move to discuss the applicable underlying crimes, and finally set out the potential and alternative modes of liability pertaining to their commission.

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<sup>446</sup> Semelin, J., 2005, *Purifier et Détruire*, Paris, Editions de Seuil, pp. 87-92

## 2.1. Procedure

417. This section establishes the procedural elements of both EU's 1st and 2nd policies. While the alleged crimes committed under both policies meet all procedural requirements, where necessary the discussion on certain elements such as gravity and jurisdiction are treated separately. While each policy concerns different forms of criminal conduct (e.g. the first typically by omission, the second typically by co-perpetration) and subsequently differs type of crimes, both policies respond to the same situation and temporal scope.

418. Whether the procedural elements completely overlap is a matter for legal interpretation. The result of the analysis may lead to various procedural outcomes: a decision both policies are covered by the UNSC-based investigation on the situation in Libya<sup>447</sup>; or a decision that crimes committed pursuant to EU's 2<sup>nd</sup> policy fall within the mandate of the ongoing investigation, while crimes committed pursuant to EU's 1<sup>st</sup> Policy requires the opening of an independent preliminary examination, on the basis of, for example, personal jurisdiction.

419. In any event, the analysis below establishes that the procedural requirements of jurisdiction, admissibility and the interests of justice, with respect to both policies, are met.

### 2.1.1. Jurisdiction

420. For the purpose of temporal jurisdiction, all the alleged crimes in this case were committed from 2013 to date, that is, after the entry into force of the Rome Statute for each of the European Member States, in line with Article 11 of the Rome Statute.<sup>448</sup>

421. While war crimes may also be established in the context of the ongoing armed conflict in Libya, for the purpose of subject-matter jurisdiction, this communication focuses on crimes against humanity in accordance with Article 5 and Article 7 of the Rome Statute.

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<sup>447</sup> Directly or indirectly by way of extension. See, e.g., decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18, 6 September 2018

<sup>448</sup> See ICC, Parties to the Rome Statute, online, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx), accessed 03/05/2019

422. The exercise of jurisdiction in this case can draw on the already pending investigation on the situation in Libya, whose mandate is based on a UNSC referral that authorizes the extension of the current investigations to the matters addressed by this communication.

423. It can also be triggered by the Prosecutor herself, by virtue of her *proprio motu* powers set out in Article 15 of the Rome Statute, in the frame of a new investigation, notably vis-à-vis crimes committed during Joint Operation Triton, pursuant to EU's 1<sup>st</sup> Policy.

424. In the present case, jurisdiction can be established by several alternative paths: based on the suspects being nationals of states party to the Rome statute, based on UNSC referral and even based on territorial jurisdiction, to the extent that the crimes were committed in an area under the effective control of states party to the Rome Statute.

(i) Personal Jurisdiction

425. All individuals potentially concerned by this communication are subject to the jurisdiction of the Court as nationals of a State party to the Rome Statute, and their potential involvement in the alleged crimes should be examined at least within a framework of preliminary examination.<sup>449</sup>

426. Personal jurisdiction is and will remain the main source of jurisdiction of the present communication, covering both policies and thus requiring the opening of a new, specific *proprio motu* investigation on the matter. Alternative paths are nonetheless presented in case that, for budgetary or other reasons, the Office of the Prosecutor would decide to proceed otherwise.

427. The fact that some of these nationals acted in their capacity as public officials and agents of an organization of which their states are members has no impact on their liability, let alone when the organization itself entered into cooperation agreement with the ICC, as further detailed below.

428. All European Union State members have individually ratified the Rome Statute and have thereby rendered their nationals subject to the jurisdiction of the Court, in accordance with Article 12(2)(b) of the Rome Statute.

429. Furthermore, as per Article 12(2)(a) of the Rome Statute, jurisdiction extends to acts committed on board of a vessel where the state of registration of that vessel is a State party. This means that crimes, including by omission (EU's 1<sup>st</sup> policy) or certain elements of them that took

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<sup>449</sup> Chapter XVIII, Rome Statute.

place on an EU Member State flag vessel (EU's 2<sup>nd</sup> policy), may also fall within the jurisdiction of the Court.

430. As established in the factual section, EU and Italy are responsible for the equipping, training, and coordination of the LYCG.<sup>450</sup> Accordingly, criminal acts and omissions committed by the LYCG agents may also fall under the jurisdiction of EU Member States as they exerted effective control over the said agents through clearly defined policies. While Libyan agents as co-perpetrators are not nationals of State party to the Rome Statute, their EU co-perpetrators are. Even if Libyan agents may be considered to have the principal share in the commission of the crimes, o-perpetration and complicity do not require the main authors to fall under the *rationae personae* jurisdiction of the Court.

(ii) UNSC referral

431. Resolution 1970 of the United Nations Security Council referred the Libyan situation to the International Criminal Court on 26 February 2011.<sup>451</sup> This referral concerns the whole Libyan territory, with no time limit, starting on 15 February 2011. It has not been contradicted since by any further legal text and should therefore be considered valid and of full legal effect.

432. UN Security Council decisions trigger jurisdiction over the territories of states that are non-parties to the Rome System. Such jurisdiction has full effect and serves to bring the said territories under the judicial control of the Rome Statute. It is hence established that, by default, any individual suspected of committing a crime covered by the Rome Statute on Libyan territory, as of 15 February 2011, is subject to the jurisdiction of the Court.

433. Procedural aspects aside, UN Security Council resolutions have the same jurisdictional value as any other mechanism authorizing the ICC to enter into action in a said situation. Yet, UNSC referrals nonetheless have a specific moral weight, as they signify that the international community has agreed that the situation of concern is of such importance that it deserved a special resolution triggering the competence of the International Criminal Court.

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<sup>450</sup> Heller, C., Pezzani, L., 2018, "*Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*", p99, Forensic Oceanography

<sup>451</sup> Security Council Resolution 1970, 2011, online, <http://unscr.com/en/resolutions/doc/1970>, accessed 16/04/2019

434. To be adopted, UNSC referrals have indeed not only to obtain a majority of votes in the said arena, but also to avoid any veto from one of its five permanent members, granting a universal approbation. Not only this approbation was obtained, but the resolution was adopted unanimously, all fifteen members of the Council voting in favor of the referral.

435. The UNSC referrals grant the Prosecutor the possibility to immediately open an investigation, without having to ask for prior authorization of the Pre-Trial Chamber. This procedural consequence demonstrates that the drafters of the Statute considered that the existence of such a referral conveys a particular legitimacy to any proceedings triggered through this mechanism.

436. The perspective, according to which a ‘new’ investigation is unnecessary as crimes against migrants in Libya fall within the mandate of the UNSC referral, appears to be shared with the Office of the Prosecutor of the ICC. In the past two years, the OTP is analyzing with respect to at least some of the crimes described in the present communication. In a statement to the UN Security Council on 9 May 2017, the Prosecutor noted:

**“... My Office continues to collect and analyse information relating to serious and widespread crimes allegedly committed against migrants attempting to transit through Libya. My Office is collaborating and sharing information with a network of national and international agencies on this issue (...) I take this opportunity before the Council to declare that my Office is carefully examining the feasibility of opening an investigation into migrant-related crimes in Libya should the Court's jurisdictional requirements be met. We must act to curb these worrying trends.”<sup>452</sup>**

437. The Prosecutor has acknowledged the widespread nature of the crimes committed against migrants in Libya, specifically those committed in detention centers. The Prosecutor also announced she is already engaged in various investigative acts such as sharing information and collaborating with network of national and international entities on the matter. Finally, the Prosecutor notified she is considering investigating the matter, apparently within the mandate of the UNSC referral.

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<sup>452</sup> Fatou Bensouda, Prosecutor of the ICC, 9 May 2017, “Statement to the United Nations Security Council on the Situation in Libya”, <https://www.icc-cpi.int/pages/item.aspx?name=170509-otp-stat-lib>

438. The Prosecutor reiterated her position in her statement to the UN Security Council on 8 November 2017, noting “**reports of unlawful killings, including the execution of detained persons; kidnappings and forced disappearances; torture; prolonged detentions without trial or other legal process; and arbitrary detention, torture, rape, and other ill-treatment of migrants in official and unofficial detention centres**”. The Prosecutor also stressed the need to continue inquiries into “**alleged crimes against migrants transiting through Libya**”.<sup>453</sup>

439. Thus, the Office of the Prosecutor considers that the crimes referred to in this communication are included in the scope of the UNSC referral and already fall within its mandate.

(iii) Territories of State Party and effective control over territory and persons

440. While many of the victims of the alleged crimes are dying or abused in high seas or even Libyan territorial waters, certain factual and legal elements of the crimes may take place over the territory of a state party to the Rome Statute and may subsequently trigger the jurisdiction of the Court. These elements may include, for example, the decision-making processes taking place in Brussels, the reception of the distress calls at the MRCC in Rome, Italy, and the location of EU and MS vessels, for instance Frontex vessels are part of JO Triton, which are located in EU MS territorial waters, and the decision to refrain from rendering assistance is in part taken over the territory of these flag-vessels.

441. Furthermore, the EU exercises *de facto* a complete effective control over the Mediterranean routes used by civilians to escape violence. As the factual section demonstrated, during the entire period of time relevant to the present case, the EU and its MS exercised full functional and effective control over the Central Mediterranean.

442. As the factual section established, the Central Mediterranean is constantly and completely surveilled and patrolled by the coast guards and other bodies of frontline member states, alongside numerous vessels, aircrafts radars and C&C centers that are part of several maritime operations of EU agencies and in particular its border control agency Frontex.

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<sup>453</sup> ICC, 2017, “Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)”, §31, §41, online, [https://www.icc-cpi.int/Pages/item.aspx?name=otp\\_lib\\_unsc](https://www.icc-cpi.int/Pages/item.aspx?name=otp_lib_unsc), accessed 16/04/2019

443. The EU and, more specifically, some of its main Member States, also became cardinal actors of the military intervention in Libya. The control of the organization and of its state members over the concerned Libyan territories followed diverse trends over the years but remains dominant, and includes siding with certain parties to the armed conflict and exercising parts of sovereign powers that was beforehand attributed to the Libyan State.<sup>454</sup>

444. The different policies and their respective consequences over the relevant period are the best proof to the complete control the EU exercised over the Central Mediterranean and parts of Libya: when Mare Nostrum was operational, the Italian operation successfully tackled the humanitarian crisis of maritime migration; when the EU decided to terminate Mare Nostrum and to create the SAR gap under JO Triton, the death toll increased accordingly, as envisioned; when the EU and Italy decided to oust rescue NGOs that filled the lethal SAR gap and to contract instead with the LYCG that would disembark all migrants fleeing Libya by sea, the EU succeeded in preventing arrivals to Europe almost completely.

445. It is based on this extent of control that the President of the European Commission Jean-Claude Juncker stated, in its State of the Union, that **“Europe has a collective responsibility to put an end to the scandalous [Libyan] situation that cannot made to last [...] We must urgently improve migrants’ living conditions in Libya”**, describing the living conditions in **“detention or reception centers”** as **“inhumane”**.<sup>455</sup>

446. Juncker's statement acknowledges both the ability and the responsibility of the European Union and its main State. In the present case the nature and extent of the failure to act (with respect to EU's 1<sup>st</sup> Policy), the avoidance from complying with fundamental human rights duties, attributes criminal liability to actors who had effective control over the relevant territory and persons, or acted as accomplices to actors who had effective control over the said situation.

447. In this context, the responsibility of President Juncker claimed is not only political or moral, but also legal, and from an individual perspective falls within the boundaries of the Rome Statute.

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<sup>454</sup> See factual section 1.3.1

<sup>455</sup> Juncker, 2017, State-of-the-union address, “We only have two choices”, *The European*, online, <https://www.theeuropean-magazine.com/jean-claude-juncker--2/12771-state-of-the-union-jean-claude-junckers-address>, accessed 03/05/2019

448. The effective control is established through the factual analysis of the situation, based on internal and public documents, the behavior of the actors, and their declarations. Whilst acts have demonstrated their direct impact over the said situations, declarations of EU officials have established a clear knowledge of this impact, namely the capacity to influence the situation in Libya and control over its land and waters.

449. This awareness includes the EU actors' effective control of the high seas that separate the EU from Libya. While recognized as international waters, they were effectively and functionally controlled by EU and Member States forces.

450. The strategy followed by the EU consisted the externalization of maritime and human rights obligations that comes with its effective control over the said zones to non-state actors, para-state actors and foreign partners, in a (failed) attempt to avoid exposure to these legal responsibilities.

451. This strategy was a known secret. On 7 October 2017, for example, in a statement made by Johannes Hahn, European Commissioner for European Neighbourhood Policy and Enlargement Negotiations, on behalf of the European Commission, the Commissioner noted:

“Given the complex situation in Libya, a number of measures have been put in place to ensure the good delivery and proper monitoring of implementation. Beyond the regular monitoring and reporting obligations applicable to organisations benefiting from EU support, the programmes adopted for Libya include the possibility to conduct ad hoc monitoring of the Actions. These regular and exceptional assessments will allow for an informed opinion on whether the conditions on the ground for the proper implementation of the activities are met. Should this not be the case, the Commission will not refrain from suspending the activities involved.”<sup>456</sup>

452. This statement is one example of both the extent of control over the situation and the strategy of the European Union to delegate the implementation of its policies to third-parties, coerced by a tight *cahiers de charges*, in order to evade any legal responsibility and sovereignty-wise conflict with the Libyan authority, whilst pretending to be attentive to human rights.

453. This kind of assumed delegation, however, does not affect jurisdiction or responsibility. On

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<sup>456</sup> Hahn, 2017, “Answer to Parliamentary Question given by Mr Hahn on behalf of the Commission”, online, [http://www.europarl.europa.eu/doceo/document/E-8-2017-004251-ASW\\_EN.html](http://www.europarl.europa.eu/doceo/document/E-8-2017-004251-ASW_EN.html), accessed 16/04/2019

the contrary: it shows a clear awareness of the legal risks engaged by the organization and its agents, and the concomitant will to avoid such consequences without changing their pattern of behavior.

454. As discussed above, Italy had started providing monetary and material support in order to enhance Libya's capacity to 'curb irregular migration', namely to implement Italy and EU's will, already during the Gaddafi era. The Joint Communication, Verbal Process (1998), the Memorandum of Intent (2002), the 2007 and 2009 agreements and the Treaty of Friendship (2008) between Libya and Italy established an official push-back policy.<sup>457</sup>

455. Although the means provided in the period 1998-2011 were damaged during the 2011 War and while the LYCG was considered to be an enemy, the EU tried to resort to its push-back policy almost immediately. For example, shortly after and in violation of the ECtHR decision in *Hirsi*, the **2<sup>nd</sup> MoU (2012)** envisioned the exchange of liaison officers, a readmission agreement, training for Libyan agents and the recovery of detention facilities.<sup>458</sup>

456. In this context, the EU overall strategy to entirely close off the Mediterranean, which took off with terminating operation **Mare Nostrum** and launching operation **Triton (2014)**, was later complemented with using the LYCG as a 3<sup>rd</sup> party-proxy to *refouler* migrants to Libya.

457. Accordingly, in 2016 **EUNVAFOR MED** increased training for Libyan agents. Furthermore, **the 3<sup>rd</sup> MoU (2017) and the Malta Declaration (2017)** pledged more material support and set out a comprehensive strategy of support in order to provide: (1) training, (2) provision of patrolling assets, (3) declaring Libyan SAR zone and (4) establishing Maritime Rescue Coordination Centre (MRCC).<sup>459</sup>

458. Based on the nature and extent of this involvement, the European Union, both as an organization and as an agglomeration of States, exercised effective control over the relevant territory of the Mediterranean and the operations of the LYCG.

459. Accordingly, the LYCG's actions can be understood not only as having been facilitated by EU's support during the relevant period, but authorized and only permitted by this support, given that the concerned Libyan actors were and still are by no means autonomous actors, let alone sovereign, and could not have acted without the said support.<sup>460</sup>

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<sup>457</sup> See Section 1.1

<sup>458</sup> See Section 1.1.2 paras 23 and following

<sup>459</sup> See Section 1.3.1

<sup>460</sup> For example, the fact that after the 2011 war Libya and the LYCG did not have the material capacity to engage in SAR nor in interception operations as a matter of policy as an autonomous actor; without EU material and monetary support the LYCG would

## 2.1.2. Admissibility

### 2.1.2.1. Complementarity

460. Although Resolution 1970 grants the ICC jurisdiction over acts committed on Libyan territory, the complementary nature of the Court means that States have preference over the court in terms of prosecution of their nationals who committed crimes relevant to this case - whether they have taken place on Libyan territory, the high seas, or national territory of an EU Member State.

461. However, no EU Member state has opened an investigation into the crimes against humanity described below and which resulted from the concerned EU's migration policies. This inaction on the part of European domestic justice systems paves the way to a *proprio motu* action of the Office of the Prosecutor.

462. Indeed, surprising as it might appear in a situation which produced more than 40 000 victims and thousands of deaths, and while there were several criminal cases against personnel of humanitarian NGOs, no criminal procedure of any kind linked in any way to the present case was opened by any of the 28 European Union States, nor by authorities in the Libyan territory.

463. This lack of action extends to investigations, prosecutions and convictions. The only known actions taken by national jurisdictions were related to human smugglers, thus negating the political dimension of the situation and its broader policy-driven context.

464. Whether the inactivity of domestic jurisdictions is the result of a lack of willingness or of incapacity is irrelevant. Indeed, the lengthy timeframe of the situation – five years – clearly shows that this lack of action cannot be attributed to a temporary deficiency, and must be provoked either by a structural inability or a systemic unwillingness to act.

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not have been able re-engage in said policy; at the time of the conclusion of the 3rd MoU (2017) – the contractual basis of the alleged crimes – the EU still considered Libya a failed state without an identifiable government structure; in June 2017 the LYCG was not even considered under the effective control of the Government of National Accord (GNA); even if it had been under the GNA's control due to well-documented instability in Libya the GNA would not have been able to provide sufficient support to re-build and expand the LYCG's capacity; the use of communication equipment on board of Italian naval ships was key to the LYCG's capacity; although in 2017 Libyan authorities in Tripoli announced (unilaterally) a SAR zone, the ICTG and the MRCC Rome indicated at the time that they thought its creation would take at least 18 months and depended on wider institution building which did not occur.

465. The Office of the Prosecutor and the Court have been clear: “The absence of national proceedings, i.e. domestic inactivity, is sufficient to make the case admissible. The question of unwillingness or inability does not arise and the Office does not need to consider the other factors set out in article 17.”<sup>461</sup>

466. Where the State is and has been inactive, a putative willingness or ability to investigate or prosecute does not render the case inadmissible. The ICC is precluded from investigation only if “one or more national criminal justice systems are genuinely investigating or prosecuting the crimes in question.”<sup>462</sup>

467. The lack of *criminal* proceedings in connection with the concerned EU’s migration policies is the consequence of an active strategy implemented to avoid the acknowledgement of any responsibility by high level civil servants and political actors of the EU institutions and its state members, thus reinforcing the need for an ICC action.

468. Furthermore, since the ECtHR decision in *Hirsi*, which referred to Italian migration push-back policy to Libya during the Gaddafi’s era, there has been neither *non-criminal* judicial review and decision of the legality of EU policies as a whole. To date, *non-criminal* challenges to current EU migration policies are limited and include constitutional, administrative, and human rights matters.<sup>463</sup>

469. The situation extends to the Libyan authorities. It has been established that no political actor or high level civil servant has ever been prosecuted in relation to the adoption and implementation of EU’s 2<sup>nd</sup> Policy.

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<sup>461</sup> ICC, Office of the Prosecutor, 2013, Policy Paper on Preliminary Examinations, p12 online, <https://www.icc-cpi.int/itemsDocuments/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf>, accessed 03/05/2019

<sup>462</sup> See Katanga AC, ¶¶ 1, 2, 75, 78 (Sept. 25, 2009); Prosecutor v Bemba, Case No. ICC-01/05-01/08-962, Decision on the Admissibility and Abuse of Process Challenges, ¶ 107 (Oct. 19, 2010); Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to art. 19(2)(b) of the Statute, ¶ 40 (Aug. 30, 2011); Ruto, Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, Case No. ICC-01/09-01/11-307, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to art. 19(2)(b), ¶ 41 (Aug. 30, 2011)

<sup>463</sup> See constitutional challenge in Italy: di Monica Ricci Sargentini, “«Uso inappropriato del Fondo Africa» Asgi e Amnesty ricorrono al Tar”, 10/10/2018, *Corriere Della Serra* (Italian), [https://www.corriere.it/esteri/18\\_ottobre\\_10/lobia-italia-uso-inappropriato-fondo-africa-asgi-amnesty-ricorrono-tar-ff668262-cca3-11e8-ae88-febf99edce56.shtml](https://www.corriere.it/esteri/18_ottobre_10/lobia-italia-uso-inappropriato-fondo-africa-asgi-amnesty-ricorrono-tar-ff668262-cca3-11e8-ae88-febf99edce56.shtml), accessed 01/06/2019; See human rights law under the regional ECHR: *S.S. and Others v. Italy*, ECtHR, Appl. 21660/18; the French administrative action: “France delivers boats to Libya : NGOs demand justice !”, 25<sup>th</sup> of April 2019 <http://www.migreurop.org/article2915.html>

470. Furthermore, as far as Libyan proceedings are concerned, the continuing non-international armed conflict<sup>464</sup>, the complicity of certain state and non-state actors in illegal smuggling of migrants<sup>465</sup> as well as their role in operating migrants' detention facilities<sup>466</sup> indicate that Libyan judicial system is both unable and unwilling to prosecute crimes committed by nationals or aliens.

471. Since the Security Council referral of February 26 2011 via Resolution 1970 to the Prosecutor of the ICC, which highlighted these circumstances, there has been no serious change in the factual situation which could in turn change the interpretation made by the international community at the time.<sup>467</sup>

472. As mentioned above, the agreement of cooperation and assistance between the EU as an organization and the ICC, which entered into force in May 2006<sup>468</sup>, affirms a mutual recognition between the said institutions and creates an obligation of accountability for the EU concerning the acts of its actors.

#### 2.1.2.2. Gravity

473. The conduct described in **Section 2** and qualified as crimes against humanity in Section 3.2 is of sufficient gravity, as per Articles 17(1)(d) and 53(1)(c), to justify exercising the Court's jurisdiction.

474. The nature and scale of the crimes at issue are of such severity both quantitatively and qualitatively. Their systematic and recursive nature, as well as their precedent-setting scale, require an urgent and deterrent action by the Court.

475. In the context of a *situation*, as opposed to a case, the Prosecutor should consider gravity "against the backdrop of the likely set of cases or 'potential cases,' that would rise from investigating the situation, evaluating not only the qualitative and quantitative elements of the alleged crimes, but also those who bear the greatest responsibility for the crimes alleged."<sup>469</sup>

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<sup>464</sup> Rulac, online, <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-libya#collapse4accord>, accessed 16/04/2019

<sup>465</sup> Amnesty International, 2017, "*A perfect storm: the failure of European policies in the Central Mediterranean*", p13, online, <https://www.amnesty.org/en/documents/eur03/6655/2017/en/>, accessed 16/04/2019

<sup>466</sup> Human Rights Watch, 2019, "*No Escape from Hell - EU Policies contribute to abuse of migrants in Libya*", online, <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>, accessed 16/04/2019

<sup>467</sup> Security Council Resolution 1970, 2011, online, <http://unscr.com/en/resolutions/doc/1970>, accessed 16/04/2019

<sup>468</sup> Council of the European Union, 2006, "*Council Decision of 10 April 2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance; OJ L 115 of 28/04/2006*", p.49

<sup>469</sup> *Situation in the Republic of Kenya*, Pre-trial Chamber II, "Decision Pursuant to art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", 31 March 2010, ICC-01/09, §58.

476. While the analysis of gravity is flexible,<sup>470</sup> it seems that even with the most restrictive approach,<sup>471</sup> the present case cannot remain unprosecuted without hampering the deterrent role of the Court,<sup>472</sup> let alone be considered as a ‘peripheral case’<sup>473</sup> or one that concerns ‘insignificant crimes’.<sup>474</sup>

477. The OTP’s criteria for gravity are “relating to the scale, nature, manner of commission and impact of the crimes.”<sup>475</sup> Whilst responding to a systematic pattern, the scale of the crimes in the present case is extremely broad both temporally (2013-2018) and spatially, spreading over Libyan soil and territorial waters, the Mediterranean high seas and frontline member states’ territories, with victims from all over Africa.<sup>476</sup> The death toll amounts to many thousands, and the number of victims of crimes against humanity other than murder amounts to more than 40,000.<sup>477</sup>

478. The chronicity and systematicity of the crimes are also important elements to assess. In this context, the gravity of the present case stems not only from the spread over time but also from the continuity during that period, the persistence of abuses resulting from the criminal policies, and the systematic repetition of patterns that show the necessity to intervene, prosecute and sanction.

479. The nature of the crimes and the extent and severity of damage to the victims are inconceivable. From death by drowning or executions to sexual violence passing by abduction, torture and negation of basic rights, its extent gives a glance over the worst actions humanity can

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<sup>470</sup> See, e.g., *Prosecutor v Abu Garda*, 2010, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, §28-34 (Feb. 8, 2010) online, , [https://www.icc-cpi.int/CourtRecords/CR2010\\_00753.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_00753.PDF), accessed 03/05/2019; Pre-trial Chamber II, ICC-01/09, Decision Pursuant to art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, § 55-62 , online, (Mar. 31, 2010), [https://www.icc-cpi.int/CourtRecords/CR2010\\_02399.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF)., [https://www.icc-cpi.int/CourtRecords/CR2012\\_01006.PDF](https://www.icc-cpi.int/CourtRecords/CR2012_01006.PDF) accessed 03/05/2019

<sup>471</sup> Office of the Prosecutor, 2017, “Statement of ICC Prosecutor, Fatou Bensouda, on the Situation on registered vessels of the Union of the Comoros et al.”, online, [https://www.icc-cpi.int/Pages/item.aspx?name=171130\\_OTP\\_Comoros](https://www.icc-cpi.int/Pages/item.aspx?name=171130_OTP_Comoros), accessed 03/05/2019

<sup>472</sup> *Situation in the Democratic Republic of Congo*, Appeals Chamber, “Decision on the Prosecutor’s Application for Warrants of Arrest art. 58”, 13 July 2006, ICC-01/04, § 69-79

<sup>473</sup> *Situation in the Republic of Kenya*, Pre-trial Chamber II, “Decision Pursuant to art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, 31 March 2010, ICC-01/09, § 56

<sup>474</sup> *Situation in the Democratic Republic of Congo*, Appeals Chamber, “Decision on the Prosecutor’s Application for Warrants of Arrest art. 58”, 13 July 2006, ICC-01/04 § 40

<sup>475</sup> ICC, Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, § 32, online, [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf), accessed 03/05/2019. See also ICC, *Office of the Prosecutor, 2013, Policy Paper on Preliminary Examinations*, § 59-66 online, <https://www.icc-cpi.int/itemsDocuments/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf>,

online, [https://www.legaltools.org/uploads/tx\\_ltpdb/OTP\\_-\\_Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-2.pdf](https://www.legaltools.org/uploads/tx_ltpdb/OTP_-_Policy_Paper_Preliminary_Examinations_2013-2.pdf), accessed 03/05/2019; *Situation in Georgia*, Pre-Trial Chamber I, “Decision on the Prosecutor’s request for authorization of an investigation”, 2016, 27 January 2016, ICC-01/15-12, § 51

<sup>476</sup> *Situation in the Republic of Kenya*, Pre-trial Chamber II, “Decision Pursuant to art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, 31 March 2010, ICC-01/09, § 62

<sup>477</sup> Compare with, e.g. *Situation in Georgia*, Pre-Trial Chamber I, “Decision on the Prosecutor’s request for authorization of an investigation”, 2016, 27 January 2016, ICC-01/15-12, § 26

produce.<sup>478</sup>

480. The manner in which these crimes have been committed is the result of a systematization of impunity set up through a complex structure of power with diverse types of State and non-State actors, and a combination of co-perpetrators at different levels operating both within and outside an area of armed conflict. This apparatus allowed the executors to act without fear of retaliation, and to the planners to be certain that they would never face any kind of accountability.

481. The co-perpetrators include senior politicians and high-level public servants of the most powerful actors in the region, the EU and its Member States, who have initiated, designed, organized and advocated for the establishment of EU's migration policies pursuant to which the crimes were committed. In their capacity as public officials, they used legislative, administrative and military capabilities and competencies to create the conditions for the implementation of the policy and the commission of the crimes.

482. At the other end, the executors inside the Libyan territory included members of different armed groups implicated in illicit activity and responsible for executing the policies planned by the European actors. They exercised violence inherent to the crime of deportation, and enabled the subsequent crimes taking place in detention facilities and torture houses. Finally, as the annexed witness statement attests, LYCG agents themselves are involved in human trafficking and smuggling to Europe.

483. The number and type of victims is by far sufficient to meet the gravity requirement, not only in terms of overall situation, but also in terms of specific events. Cases presented in this communication, which amount to several hundred victims per event, meet both the requirement of repetitive scheme that constitutes the overall strategy, and the minimal threshold *per se*.

484. Each of the described interception events is at least equating, for example, the Katanga case, which concerned the most indirect mode of liability, finding the accused guilty of complicity in the frame of a single legitimate military attack that triggered the death of 30 civilians.<sup>479</sup>

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<sup>478</sup> ICC, Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, § 38, online, [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf), accessed 03/05/2019

<sup>479</sup> Jugement en application de l'article 74 du Statut (Chambre de première instance II, Affaire Katanga, ICC-01/04-01/073436, 7 march 2014)

485. Even if the number of victims had not been considered sufficient to meet the threshold of gravity *per se* – whether in the frame of the overall situation or in the case of the single cases this communication presents – the impact of the crimes and level of responsibilities go “beyond the suffering of the direct and indirect victims”, and are significant enough to push for prosecution.<sup>480</sup>

486. The fact the populations targeted were vulnerable civilians, including many women and children, the fact that this targeting happened in their worst moment of vulnerability, the fact the targeting was organized, set up and partially executed by some of the most structured powers in the world - are only few of the many arguments that could be brought on to establish that not only the gravity threshold is met, but that we are probably confronted with the gravest crimes that were committed during this period within the meaning of the Rome Statute.

487. Gravity must also be evaluated regarding the objectives that triggered the commission of the crimes, and their potential legitimacy. The official purpose of the EU’s 1st policy was to cause the death of some in order to deter others from crossing the Mediterranean, while the deterrence effect of EU’s 2nd policy was embedded in the cruel attack on the said civilian population, increasing not only the death rate of the crossings but blocking the possibility to flee Libya by establishing industrial-scale collective forced expulsions, straight to the hands of traffickers and abusers in Libyan detention facilities. .

488. It appears therefore impossible to argue that the gravity threshold has not be met in the current situation. This assessment is applicable to the overall situation, to the specific events detailed by the present communication, and the liability of the concerned individuals the authors believe should be prosecuted.

489. IOM reports 14,500 dead and presumed dead (missing) over the period January 2014 - July 2017 in the Central Mediterranean route.<sup>481</sup> The fatality of crossings to Europe is still increasing. Compared to 2016’s 1 in 88 in 2017 1 migrant in 36 attempting to cross perished<sup>482</sup> and the proportion of deaths in 2018 compared to 2019 (as of May 3<sup>rd</sup>) is **1.7% vs. 11.17%**<sup>483</sup>.

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<sup>480</sup> *Situation of the Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia*, Pre-trial Chamber I, “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation”, 16 July 2015, ICC-01/13-34, § 48, Prosecutor v. Abu Garda (ICC-02/05-02/09-243-Red) Pre-Trial Chamber I (8 February 2010), para. 31.

<sup>481</sup> IOM, Central Mediterranean route : Migrant Fatalities, online, <https://missingmigrants.iom.int/sites/default/files/c-med-fatalities-briefing-july-2017.pdf>, accessed 16/04/2019

<sup>482</sup> Ibid.

<sup>483</sup> IOM Missing Migrants Project, online, <https://missingmigrants.iom.int/region/mediterranean>, accessed 16/04/2019

490. EU's 2<sup>nd</sup> policy is still ongoing, despite full knowledge of conditions awaiting migrants in Libya and despite condemning these conditions as, for example, "concentration-camps-like conditions".<sup>484</sup> Indeed, the relatively low rate of arrivals to Europe is in correlation with the drastic increase in number of interceptions and *refoulement* to Libya by the LYCG.<sup>485</sup>

491. Finally, the targeted civilian population is attacked at the most helpless moment of their lives: when they are in distress at sea, at a serious and concrete risk of dying by drowning. It is at this moment that EU officials and agents committed crimes by omission (1st policy) or, jointly with or through the LYCG, decided to deport them back to the hell from they have just fled.<sup>486</sup>

### 2.1.3. Interests of Justice

492. In deciding whether to initiate an investigation the Prosecutor also has to consider whether or not the opening of such investigation would serve the "interests of justice", as provided in Article 53 of the Rome Statute.<sup>487</sup>

493. Article 53 makes the investigation's consistency with the interests of justice a statutory legal parameter governing the exercise of prosecutorial discretion. The interests of justice are determined with reference to

"the overarching objectives underlying the Statute: the effective prosecution of **the most serious international crimes, the fight against impunity** and the prevention of mass atrocities. All of these elements concur in suggesting that, at the very minimum, an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame". (emphasis added)<sup>488</sup>

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<sup>484</sup> Wintour, P., "German report details Libya abuses amid pressure to stem migrant flows", *The Guardian*, online, <https://www.theguardian.com/world/2017/jan/30/german-report-libya-abuses-pressure-migrant-flows>, accessed 16/04/2019

<sup>485</sup> Italian Institute for International Political Studies (ISPI), Estimated Migrants Departures from Libya, Online – <https://docs.google.com/spreadsheets/d/1ncHxOHIx4ptt4YFXgGi9TIbwd53HaR3oFbrfBm67ak4/edit#gid=0>, last accessed 01/06/2019

<sup>486</sup> Marco Menduni, 6 August 2017, 'Giro: "Fare rientrare quelle persone vuol dire condannarle all'inferno"', *La Stampa*, online <https://www.lastampa.it/2017/08/06/italia/giro-fare-rientrare-quelle-persone-vuol-dire-condannarle-allinferno-SXnGzVlzfFI7fNGFCMADN/pagina.html>, accessed 31/05/2019.

<sup>487</sup> Article 53(1)(c) of the Rome Statute

<sup>488</sup> *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", 12 April 2019, ICC-02/17-33, §88-89.

494. The concerned nationals are member of state parties considered to be among the most powerful ones, let alone when acting in concert as part of a supranational structure. Two of these Member States, for example, are permanent members of the UN Security Council. Needless to say, the duty to end impunity with regard to the most serious crimes should be equally enforced on all States actors, regardless of their reputation, power, and support in the Rome System.

495. Interests of justice are to be considered only in case a *new* investigation is opened. As argued above, there are strong chances the Prosecutor would not need to open one in the present case, given the already pending investigation on the situation in Libya, *and* the possibility to conduct preliminary examination of events in the high seas (with respect to 1<sup>st</sup> Policy's crimes) in order to complete it.

496. But insofar as the Prosecutor would find otherwise, and prefer opening a new investigation in order to reinforce the legitimacy of its action, article 53 requires weighing the substantial reasons that would authorize such a refusal to investigate against the "gravity" and the "interests of the victims".<sup>489</sup>

497. In September 2007 the Office of the Prosecutor issued a paper entitled "Policy Paper on the Interests of Justice".<sup>490</sup> It clearly specifies that only "exceptional circumstances" could justify the use of the interests of justice argument in order to decline investigating a case, and that this reasoning is exceptional "in nature". The distinction with the interests of peace is further specified, restraining the scope of action of the OTP in this matter.

498. The requirement is negative: substantial reasons not to investigate in the interests of justice are required, and there is a presumption in favor of investigations.

499. In this case, it is impossible to imagine that the interests of the victims would be served by deciding not to further investigate and prosecute on-going criminal policies that still produce considerable casualties and are within the jurisdiction of the Court.

500. Specifically, the time-lapse between the alleged crimes and the present communication is minimal, as the latter concerns crimes committed in the past five years. Furthermore, during this period a pending investigation, as opposed to the case regarding the situation in Afghanistan, is

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<sup>489</sup> *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", 12 April 2019, ICC-02/17-33, §87

<sup>490</sup> Office of the Prosecutor, 2007, "*Policy paper on the interests of justice*", online, <https://www.legal-tools.org/doc/bb02e5/pdf/>, accessed 16/04/2019

already in place, which means the interest of justice has been already established. Finally, the present communication is concerned with crimes that are still ongoing.

501. Furthermore, investigating the evidence presented in this communication does not require any cooperation or even ‘boots on the ground’ in a dangerous situation. Unlike investigation of crimes committed by Libyan agents that necessarily calls for gathering evidence in Libya, here, in order to determine whether to prosecute the alleged perpetrators, no such need arises.

502. With respect to crimes attributed to the EU’s 1st policy, they were committed exclusively by European perpetrators on the high seas and not in Libya, without the involvement of forces not party to the Rome Statute.

503. With regard to the underlying crimes that resulted from the EU’s 2nd policy, these crimes are not likely to be disputed at all: as Section 2 demonstrated, numerous EU bodies and officials, including the perpetrators themselves, acknowledge that crimes against humanity are committed in Libya. **The only remaining question to resolve relates to the identity of the most responsible perpetrators**, which requires intense investigations in the European apparatus and State members bureaucracies.

504. The only issue to assess is indeed not a factual one but a legal one, i.e. whether EU officials and agents who designed, orchestrated, coordinated, and participated in the EU’s policy to stem migration flows in the Central Mediterranean by contracting with the LYCG and the GNA are complicit in the alleged crimes. This analysis is purely a legal matter as it pertains to the *mens rea* and modes of liability applicable to the suspects.

505. Unlike most of the situations and cases that were or currently are under consideration by Court, the relevant evidence and potential relevant suspects are available and within reach of the Prosecution's investigative efforts and activities.

506. While a decision to investigate may bear consequences on the financial sustainability of the Court, taking into account such extraneous and cynical considerations would have a detrimental impact on the credibility and impartiality of the Court.

507. It should be noted that the European Union itself has entered into an agreement of cooperation and assistance between the EU and the International Criminal Court, that entered into force in May 2006, following a decision of the EU Council, which decided the matter on the basis

of its prerogatives of exclusive competence. No reservations were added to that agreement.<sup>491</sup>

508. This agreement adds up to the full recognition of the ICC's jurisdiction by each Member State of the European Union, which extends the jurisdiction of the Court to nationals of any EU Member State, providing for an institutional recognition of the ICC by the EU, and vice-versa.

509. This is of crucial importance in a context in which the choices of the Office of the Prosecutor, and more broadly of the International Criminal Court – as suggested by the Pre-Trial Chamber decision on Afghanistan<sup>492</sup> – are at least partially determined by its capacity to implement their jurisdictional power – in other terms, to secure cooperation – which is granted by the agreement.

510. Article 2 of the EU-ICC agreement mentions that “for the purposes of this agreement, ‘EU’ shall mean the Council of the European Union, the Secretary General/High Representative and the General Secretariat of the Council, and the Commission of the European Communities”. It thereafter specifies: “‘EU’ shall not mean the Member States in their own right”. These specifications recognize the existence of the European Union as a subject of law, including for the International Criminal Court.

511. This mutual recognition by these institutional actors is of extraordinary importance as it creates specific duties for the European Union itself in its relations with the International Criminal Court.

512. This recognition shall be interpreted as creating specific and reinforced obligations for its agents in their relation to the Court, the implementation of its norms and jurisprudence and therefore the respect of the legal order it creates in the overall exercise of their functions. It is therefore granting the International Criminal Court the power to act without concern as to issues related to its capacity to investigate or to enforce its decisions.

513. Indeed, the EU-ICC agreement does not only deal with technical points relating to cooperation, such as the waiver of immunities, but also provides for the necessity for the EU to defend and abide by the values of the Rome Statute (Article 6). Being a strong organization that is

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<sup>491</sup> Council of the European Union, 2006, “*Council Decision of 10 April 2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance*; OJ L 115 of 28/04/2006”, p.49.

<sup>492</sup> *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan”, 12 April 2019, ICC-02/17-33.

established on respect to the rule of law, is presumably expected to fully cooperate with the Court.

514. Thus, not only does the Court undoubtedly has jurisdiction over the individuals involved, but the specific legal, moral and political proximity between the European Union and the International Criminal Court should incite a strengthened scrutiny of the actions of the EU by the Court, let alone with respect to the actions of its civil servants.

515. The agreement shows that both the Court and the European Union have a special interest in ensuring that the law of the Rome Statute is enforced within European Union institutions and upon its agents.

## 2.2.Substance

### 2.2.1 1st Policy: High Seas (2013-2015)

516. Following the political crisis in Libya (2011), and the legal implications of the ECtHR decision in *Hirsi* (2012), between 2013 and 2015 EU migration policy moved from border externalization to a policy intended to directly deter migrants from crossing the Central Mediterranean (EU's 1st Policy).

517. Section **3.2.1.1** provides the contextual elements of this widespread and systematic attack directed against a civilian population. Section **3.2.1.2** analyzes the crimes committed as part of this attack. Finally, Section **3.2.1.3** examines the potential modes of liability applicable to the perpetrators of the alleged crimes.<sup>493</sup>

#### **2.2.1.1 Widespread, Systematic Attack, Pursuant to an Organizational Policy**

518. Crimes listed under Article 7 of the Rome Statute constitute crimes against humanity insofar as they are “committed as part of a (i) attack, that is, (ii) widespread or systematic (iii) directed against any civilian population, (iv) with knowledge of the attack”, (v) “pursuant to or in furtherance of a State or organisational policy to commit such attack”, and with (vi) nexus between the crimes and the attack.<sup>494</sup>

#### **Attack**

519. “A course of conduct involving the multiple commission of acts”, an attack within the meaning of Article 7 may encompass any kind of mistreatment of the civilian population in question that is either widespread or systematic.<sup>495</sup>

520. In the present case, the termination of Operation Mare Nostrum and its replacement with Joint Operation Triton is the decision that triggered the attack, pursuant to *de facto* EU's 1st Policy.

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<sup>493</sup> This section provides the required elements of the alleged crimes committed pursuant to EU's 1st Policy, within the meaning of the Rome Statute and under the jurisdiction of the ICC. To avoid repetition, a comprehensive legal analysis of the normative framework governing crimes against humanity within the meaning of Article 7, see next legal section, **Section 3.2.2** (EU's 2nd Policy).

<sup>494</sup> UN General Assembly, 17 July 1998, Rome Statute of the International Criminal Court (last amended 2010), online, <https://www.refworld.org/docid/3ae6b3a84.html> (“Rome Statute”), accessed 11/04/2019

<sup>495</sup> Article 7(2) of the Rome Statute; See also Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Appeals Chamber, “Judgment”, 12 June 2002, IT-96-23 & IT-96-23/1-A, §86.

In contrast with Operation Mare Nostrum, Triton was not primarily tasked with Search and Rescue (SAR) operations but with “deterrence objectives”, was provided with much fewer means and resources, and its operational scope did not cover the critical SAR area where most of migrants boats are likely to be in distress.<sup>496</sup>

521. The consequence of this decision was the creation of a lethal SAR gap, in an area in the Mediterranean that is under the effective control of the European Union, in which thousands would drown.

522. This evolution was consciously planned and executed. Given the inability to externalize ‘migration management’ to Libya, the EU decided to turn on its head the jurisprudence of the main legal organ that governs the conduct of the EU and its Member States with respect to international human rights law: the ECHR *Hirsi* decision.

523. The objective of this new policy was to sacrifice the lives of many in order to impact the behavior of many others. Building on the lethal act of deterrence, namely punishing one to discourage others, this policy was unlawful *per se*, regardless its underlying outcome.

524. The death toll drastically increased. In two incidents in one week in April 2015, for example, 1200 civilians lost their lives by drowning.

525. Pursuant to this policy the European Union, its border agency Frontex, and its Member States, committed multiple prohibited acts and omissions that caused the death of thousands of migrants in distress at sea, and the serious injury and unnecessary suffering of many others.

### **Widespread or Systematic**

526. An alternative rather than cumulative requirement,<sup>497</sup> the present attack under EU’s 1<sup>st</sup> Policy meets both criteria, reinforcing the admissibility of the case and the necessity to investigate the alleged crimes.

527. The widespread nature of the attack stems from the number of its victims, its duration over time and its geographical scope. Thousands of casualties and many more victims that were

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<sup>496</sup> See 1.2.2 of the factual section of the present communication, wherein the full details of the Triton policy and its consequences are explained..

<sup>497</sup> The drafters of the Rome Statute considered whether the criteria of systematicity and widespreadness should be cumulative or alternative and eventually decided to follow the ad-hoc International Criminal Tribunals in setting the criteria to be alternative. See United Nations International Commission Law Commission, 2015, “Chapter VII: Crimes Against Humanity”, *Report of the International Law Commission, Sixty-seventh Session*, p.60-63, online, <http://legal.un.org/ilc/reports/2015/english/chp7.pdf>, accessed 17/05/2019.

unnecessarily injured and suffered as a result of this ‘killing by omission’ policy.

528. Being an omission-based attack, its widespread nature can be learned by the extent of means and resources that were mobilized and then removed and left unavailable for the naval operation Triton to conduct rescues, whilst maintaining effective control over the zone, consequently producing the high number of casualties.

529. The attack has been coordinated on an exceptionally large-scale. Over 9,492 civilians are estimated to have died or have been declared missing from 2014 to the end of May 2016, 1,200 alone in one week in April 2015.<sup>498</sup> As a result of the shift to Triton, the probability of dying at sea **increased 30-fold**, from 2 deaths in every 1,000 crossings to 60 in 1,000.<sup>499</sup>

530. The spatial and temporal scope of the attack also indicates its widespread nature. Geographically, the scope of the attack refers the entire Central Mediterranean area that is under the effective control of the EU and its Member States including, but not limited to, the high seas.<sup>500</sup>

531. Temporally, the attack commenced upon the termination of operation Mare Nostrum and its substitution with operation Triton at the end of 2014. It lasted until the end of 2015,<sup>501</sup> when rescue NGOs gradually filled the SAR gap, failed EU’s 1<sup>st</sup> policy, and obliged the EU to drop its policy of non-assistance, resorting instead a new form of border externalization, i.e. of push-back by proxy (EU’s 2<sup>nd</sup> Policy, Section 3.2.2).

532. The attack has been also systematic. The attack was organized, implemented and effectively conducted by a highly structured apparatus of power, namely the European Union - considered as including the European Council, the Council of the European Union, the European Commission and its administrative agencies – and of course its agents and officials.<sup>502</sup>

533. This apparatus acted on behalf and following the instructions of its Member States’ officials and representatives, thus extending the alleged criminal responsibility to the heads of government

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<sup>498</sup> Global Migration Data Analysis Centre, June 2016, "The Central Mediterranean route: Deadlier than ever", *Data Briefing Series*, Issue No.3, online, [https://publications.iom.int/system/files/pdf/gmdac\\_data\\_briefing\\_series\\_issue3.pdf](https://publications.iom.int/system/files/pdf/gmdac_data_briefing_series_issue3.pdf), accessed 11/04/2019

<sup>499</sup> See paragraphs 104-108 of this communication where the approximate death toll is described

<sup>500</sup> Effective control of European Union’s agencies over the area, including the relevant SAR zone, has been exercised by various means. See factual section, paragraph 414; Effective control over the region may also be learned from the exercise of such control by EU and Italian agencies and agents prior to Triton operation, i.e. in the course of operation Mare Nostrum. See Factual section 2.2.1

<sup>501</sup> Operation Mare Nostrum ended on 31 December 2014 and Triton was officially started operating on 1 January 2015. See factual section paragraphs 89, 93

<sup>502</sup> See *Prosecutor v Dario Kordić and Mario Čerkez*, Appeals Chamber, “Judgment”, 17 December 2004, IT-95-14/2, §94 where it was held that “‘widespread’ refers to the large-scale nature of the attack and the number of victims, whereas ‘systematic’ refers to ‘the organised nature of the acts of violence and the improbability of their random occurrence.’” See also *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeals Chamber, “Judgment”, 12 June 2002, IT-96-23 & IT-96-23/1-A at §94 and *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v the Prosecutor (Media case)*, Appeals Chamber, “Appeals Judgment”, 28 November 2007, ICTR-99-52-A, §920.

involved in the decision-making. These governmental bodies and public servants created the legislative and administrative frameworks that legally enabled the attack.<sup>503</sup>

534. The planned and premeditated character of the attack was the result of actions taken pursuant to a highly coordinated policy of institutions within the European Union acting in concert to withdraw from Mare Nostrum and to adopt Joint Operation Triton.<sup>504</sup>

535. The extremely organized nature of the attack can be also deduced by the repetition of the acts, the recurrence of the adopted behaviors and their perfect matching with the abstract and legal structures adopted by the relevant bodies of the European Union.

536. Accordingly, in the relevant period, there was no substantial exception to the behavior of the different actors participating in the elaboration and execution of the EU's 1<sup>st</sup> Policy. In spite of the clear dramatic consequences triggered by the adopted policy, its execution was pursued without any modification.

537. Thus, the attack was widespread and took the lives of thousands, solely for the purpose of changing the behavior of migrants in similar situations. The attack was also systematic as it was committed by a multinational apparatus through the exercise of effective control over the Mediterranean Sea and its maritime routes, notably through the adoption of transcontinental policies over migratory issues.

### **Directed Against Civilian Population**

538. For the purposes of article 7, the potential civilian victims can be “of any nationality, ethnicity or other distinguishing features”,<sup>505</sup> so long as the attack in question is directed primarily against them and so long as they are not a “randomly selected group of individuals”.<sup>506</sup>

539. As noted above, ‘civilian population’ within the meaning of Crimes Against Humanity does not require a high level of homogenization. The fact that these are a multitude suffices. Migrants and asylum seekers are a group by virtue of their migration and asylum seeking, with the additional

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<sup>503</sup> See factual section paragraphs 68-108

<sup>504</sup> Ibid

<sup>505</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08, §76

<sup>506</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08, §76-77. See also *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeals Chamber, “Judgment”, 12 June 2002, IT-96-23 & IT-96-23/1-A, § 90: “[T]he use of the word ‘population’ does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian ‘population,’ rather than against a limited and randomly selected number of individuals.”

element that they are crossing by sea. They constitute, therefore, a multitude, a (civilian) population, and they are attacked as such.

540. The relevant civilian population which was targeted in this case is not random: it was constituted in the public sphere as a group of civilians distinguished from the rest of the population by the targeting powers, with the objective of violating their rights to life, to seek asylum, to leave their countries of origin or transit. Distinguishing them from the rest of “acceptable” human beings appeared as an essential behavior to later justify their discrimination and targeting.

541. Hundreds of thousands of asylum seekers, refugees, migrants and other individuals in need of international protection seeking to cross the Mediterranean during the period 2014-2015 were therefore progressively dehumanized and reduced to the category “migrants”.

542. As it has been seen before, this reduction allowed for the adoption of very specific patterns directed at targeting this newly created “population”, and direct the attack exclusively and specifically against it. In other words, the policy of non-assistance applied only to migrant boats in distress, never to a commercial or a tourist boat, for example.

543. As in any mass violence process, the process of reification was not linear. Liberal and democratic counter-forces opposing this process created institutional resistances that made it incomplete. Nonetheless, the delegation of migratory policies to the EU level, and especially to the European Council, triggered the failing of many of the safeguards that should have limited the increasing banalization of hate speech and violent acts.

544. The complexity of actors in the political, administrative and bureaucratic process of the European Union made the anti-migration sentiment difficult to control. In the aftermath of an economic crisis, political leaders progressively turned to discourses against minorities, and more particularly to the most vulnerable ones, to the extent that even the most “progressivists” governments could no longer use the matter for political gains.

545. The omnipresence of fear and disqualifications regarding the “problem” of “migrants” made impossible any rational debate over the matter. As many experts suggested the reality of the “crisis” was far from the importance it had been given in the public sphere, but the polarization over the subject made the issue virtually impossible to be deliberated.

546. In this frame of anxiety and generalized fear, triggered by economic insecurity and a risk of societal decomposition, genocidal-like discourses appeared, attracted attention and infiltrated the

public sphere, national institutions and public media.<sup>507</sup>

547. Any genocidal discourse roots itself in the targeting of a real or fantasized minority, through the invention of a hidden plot that would pose an existential threat for the majority. The existence of an existential threat authorizes the commission of institutional or non-institutional violence in order to protect the majority from the fantasized minority, chosen by authors of these theories because of its vulnerability.

548. Whilst each country was affected at different levels, at the European level EU institutions had to structurally integrate this climate and looking for “solutions” in order not to become the scapegoats themselves. The “existential threat” played a role at this level, and the fear of disintegration of the EU system justified and legitimized the adoption of each time more repressive and inhumane policies that would progressively pave the way to the commission of crimes against humanity, whilst pretending to act “in defense of European values”.

549. The omnipresence of destructive discourses naturally translated itself in the adoption of various legislative and administrative acts, countless political and diplomatic statements, and migration policies directed against migrants, as witnessed in Australia and the European Union.<sup>508</sup>

550. The democratic regime and liberal nature of the European Union played an important role in the apparent dissemination of the responsibility of the actors, without actually disseminating it in any way. If the roots of the criminal behavior of the actors who took the decisions are varied, the

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<sup>507</sup> The most significant of these discourses was authored by a French intellectual, Renaud Camus, who conceived and popularized the theory of the “*grand remplacement*”. The text of Renaud Camus soon became foundational for part of the institutional political forces of the EU, influencing governments and pushing opponents to toughen their discourse, and adopt perspectives that would allow for EU’s 1<sup>st</sup> and 2<sup>nd</sup> policy to be adopted and maintained without resistance. In parallel, extremist and terrorist groups seized on his work to justify their commission of acts of violence, including massacres committed thousands of kilometers from Europe, as in the Christchurch attack. Renaud Camus’s “*grand remplacement*” pretended to expose a hidden plot through which sub-saharian and muslim migrants, were aiming to replace the “indigenous” “white and Christian” European population. This type of discourses was a comfortable exit strategy to politicians trying to shift attention from political failures such as the handling of the economic crisis. Theories such as that of Renaud Camus, their relatively widespread reception and acceptance, including at national media such as the French national radio, shows the porosity between institutional and non-institutional extremism during this period. It is only the most radical example of an almost infinite variety of hate-speech and hate mongering adopted through all possible means all over the public sphere in the European Union at the time, in a context of violent geopolitical tensions that required for the use of extreme methods against scapegoats and suppressed moderate forces.

<sup>508</sup> As per the definition of “directed against” set out in *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeals Chamber, “Judgment”, 12 June 2002, IT-96-23 & IT-96-23/1-A, §90; See also GLAN, “The Situation in Nauru and Manus Island: Liability for crimes against humanity in the detention of refugees and asylum seekers”, Communiqué to the Office of the Prosecutor of the ICC, 14 february 2017.

highly structured and efficient functioning of the EU institutions and its State members verticalized processes and allows for a perfect tracking of the decision-making.

551. If the overall climate that has brought to the adoption of criminal policies has been the fruit of different factors that only historians will be able to evaluate, those responsible to materialize this climate in acts and omissions should not be able to evade their liability based on their political or bureaucratic mandate.

552. As the factual section established, Commissioners and Heads of State were aware of the criminal dimension of the policies adopted by the European Union. This awareness, relating to the gravest crimes, in a context in which any of them could at any point resist or prevent their adoption or execution, only increases their responsibility.

553. This reasoning extends to all the high-civil servants and political leaders who made themselves accomplices of the adoption and execution of these policies. The events described above and legally qualified below happened in the self-proclaimed best-informed, most educated, liberal and politically advanced continent in the world. The high-complexity of its decision making shall not discourage prosecutions, but on the contrary, encourage to extend the scope of the investigations.

554. To summarize, the facts set out in the first section of the present communication can only be understood as constituting a policy of systematic and widespread attack of a pre-targeted population. The civilian population, composed of individuals of different nationalities, races, religions and socioeconomic backgrounds, was “created” ex nihilo with this objective. Diverse political agendas concurred, consciously or not, to annihilate any institutional resistance, and to progressively accept the adoption of the violent policies against the said population.

### **With Knowledge of the Attack**

555. EU officials and agents were not only aware. This was both their intention, and the direct consequence of their decision to move from Mare Nostrum to Triton, namely to assign a drastically smaller budget and fewer vessels for SAR, to locate them farther away so they would not be assigned command over the rescue, and that in any event would be too far and slow to effectively respond.

556. The European Union actors had full knowledge of the attack, given that it was carried out pursuant to their own policy. This policy included legislative and administrative decisions which were made with foreknowledge of this policy’s lethal consequences, but also political and public

discourses which were used to justify or disguise them.

557. The undisputed evidence presented above, relying on internal EU documents and statements made by its agents and officials, establish the awareness of both the deterrent intention of the policy and the fact that the implementation of the envisioned policy would result in a significant increase in death toll.<sup>509</sup>

558. In 2014, for example, Frontex had reported it would expect a higher death rate at sea after the withdrawal of Mare Nostrum. Moreover, European institutions were aware of the risks and deadly consequences of their policy even before it came into effect.<sup>510</sup> The following year, as the limitations of Triton were resulting in the deaths of thousands of migrants, its shortcomings were denounced by the European Parliament.<sup>511</sup>

559. EU and Italy's decision to end Mare Nostrum were made on the basis of justifications which was known to be unfounded at the time of abandoning the operation:<sup>512</sup> Mare Nostrum was not what encouraged asylum seekers to cross the Mediterranean<sup>513</sup> and was not leading to more deaths on the Mediterranean.<sup>514</sup>

560. But even if these presumptions had not been false, or even if these presumptions had been false but the policymakers had genuinely believed them at the time of their decision-making, these officials and agents made themselves nonetheless implicated themselves with the crimes described below.

561. This is so because the rationale underlying their decision making remained their knowledge of deterrent purpose of the attack, that is, the *intentional* cause of harm to an individual or a number of individuals, in order to impact the behavior of others in similar situation.

562. In this case, causing harm literally meant the sacrifice of life. Not of one, or of a few, but of thousands of helpless persons in distress at sea. EU policymakers, politicians, legislators and bureaucrats, were aware of both the intent to deter and the prediction that, at least in the short term,

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<sup>509</sup> For the various documents and statements establishing the *mens rea* of the potential suspects, see section 1.2.4 of the present communication.

<sup>510</sup> See paragraphs 86-88 for specific statements by EU actors before Triton came into effect.

<sup>511</sup> See paragraphs 81-82, and 85 for specific statements by the European Parliament on the limitations of Triton, as well as more generally paragraphs 86-99 for additional evidence of the EU's knowledge of Triton's shortcomings.

<sup>512</sup> See paragraphs 14, 33, 45-8, 54, and 56 of the factual section of the present communication

<sup>513</sup> See paragraphs 70-71 of the factual section of the present communication. In fact, the increase was a result of other factors, namely the increase in Syrian refugees seeking to join Europe from Libya, due to the deteriorating political situation in Syria, and the collapse of the transition process in Libya, increasing levels of violence in the country and thus driving refugees living in Libya to attempt to flee to Europe via the Mediterranean

<sup>514</sup> See paragraph 71 of the factual section of the present communication which demonstrate clearly that the increase in migrant deaths on the Mediterranean was in fact due to external factors such as the worsening political conditions in Libya which increased the number of migrants seeking a way out of Libya, and the worsening smuggling boat conditions which increased their death rate

many casualties are expected. Ultimately, 1,200 people had to die in one week for the suspects to acknowledge, in hindsight, that the decision to end Mare Nostrum was “a serious mistake” one that “cost human lives”.<sup>515</sup>

### **Pursuant to an Organizational Policy**

563. The “attack” described above was carried out pursuant to an organizational policy to stem migration flows from Africa.

564. The threshold for determining whether the organization in question qualifies as an organization for the purposes of the “organizational policy” requirement in section 7(2)(a) of the Rome Statute, is whether a group “has the capability to perform acts which infringe on basic human values”.<sup>516</sup>

565. The ICC therefore adopts a wide interpretation of the meaning of an organization, which goes beyond a single non-state actor or armed group and can include a group or institution with sufficient capacity to perform acts which infringe on basic human values.

566. The European Union, its agencies and the States associated with its actions, meet the jurisprudential threshold over this matter, as these entities make up perhaps the most elaborate apparatus of power of the modern era - precisely the type of power and structure for which international criminal law has been created and which is envisaged in ICL jurisprudence.

567. The “policy” commenced with the decision to end Operation Mare Nostrum and to replace it with Operation Triton. As an official EU operation, the attack was systematic, directed against most of the tens of thousands civilians seeking to reach European soil, its consequences were also widespread. As described above, in comparison to Mare Nostrum, the financial,<sup>517</sup> material,<sup>518</sup> and geographical<sup>519</sup> scope of Operation Triton was significantly reduced, and the foreseen outcome of a higher number of fatalities was a known secret.<sup>520</sup>

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<sup>515</sup> See factual section paragraphs 10, 122.

<sup>516</sup> *Situation in the Republic of Kenya*, Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, 31 March 2010, ICC-01/09, §90.

<sup>517</sup> See paragraph 64 of this communication where the reduced budget of Operation Triton is detailed

<sup>518</sup> See paragraph 63 of this communication where the reduction in operational capacities is detailed

<sup>519</sup> See paragraphs 60-62 of this communication where the reduced geographical scope of Operation Triton is detailed.

<sup>520</sup> See EU Home Affairs Commissioner Malmström’s statement in paragraph 58 of this communication as well as the full Frontex Triton plan: Frontex: Operations Division Joint Operations Unit, 28 August 2014, “Concept of reinforced joint operation tackling the migratory flows towards Italy: JO EPN-Triton: to better control irregular migration and contribute to SAR in the Mediterranean Sea,” online, [https://deathbyrescue.org/assets/annexes/2.Frontex\\_Concept\\_JO\\_EPN\\_Triton\\_28.08.2014.pdf](https://deathbyrescue.org/assets/annexes/2.Frontex_Concept_JO_EPN_Triton_28.08.2014.pdf), accessed 07/04/2019). And Frontex internal documents: Frontex, 14 January 2015, “JO Triton 2015: Tactical Focused Assessment,” p. 2, online, [https://deathbyrescue.org/assets/annexes/7.Frontex\\_Triton%202015%20Tactical%20Focused%20Assessment\\_14.01.2015.pdf](https://deathbyrescue.org/assets/annexes/7.Frontex_Triton%202015%20Tactical%20Focused%20Assessment_14.01.2015.pdf), accessed 07/04/2019. Another example for the real-time knowledge of the lethal implications of the transitions from Mare Nostrum to Triton is visually summarized in the joint press conference of Italian Minister Alfano and Home Affairs Commissioner Cecilia Malmström: while journalists repeatedly raise doubts and questions on whether EU JO Triton would overlap Italian Mare Nostrum, both the EU Commissioner and the Italian Minister end up by stating: Triton will not replace Mare Nostrum, but will substitute it.

568. The down-scaling of Joint Operation Triton and the abandonment of Mare Nostrum left boats to drift sometimes for days without assistance in a zone under the effective control of the European Union, the latter failing to assist tens of thousands of asylum seekers in distress and causing the consequent death of thousands of them in the period of 2014 – 2015.<sup>521</sup>

569. This course of conduct was intended to avoid international maritime, human rights and refugee law duties and obligations. Fortunately, this course of conduct has been acknowledged and addressed in the Rome Statute, that is, with respect to individual liability, beyond the framework of State duties to prevent and protect and responsibilities for internationally wrongful act.

570. As the Elements of Crimes of the Rome Statute establish, a policy pursuant to or in furtherance of a State or organization, may be implemented through acts but also, in exceptional circumstances, through “**a deliberate failure to take action**”, “**which is consciously aimed at encouraging such attack**”.<sup>522</sup>

571. Indeed, EU’s policy of inaction, or of ‘killing by omission’, is not “inferred solely from the absence of governmental or organization action”.<sup>523</sup> Rather, the attack itself reflects by no means a failure to act, an inaction or an omission. On the contrary, the attack pursuant to EU’s 1<sup>st</sup> policy is characterized by a series of identifiable acts, concrete decisions and positive statements which, taken together, form the legislative and administrative framework for an attack under which the omission-based crimes occurred.

### **Nexus between the individual act(s) and the attack**

572. As the ensemble of elements presented above illustrates, a direct link connects the attack and the individual acts and omissions. The multiple acts and omissions to refrain from conducting SAR operations and rendering assistance to migrants in distress at sea are the bread and butter of the decision to end Mare Nostrum and to launch Joint Operation Triton. They are the essential components that carry out the attack as an organized, widespread, systematic campaign against civilian population. They constitute the crimes against humanity of murder, torture and other

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As the factual section above demonstrated, this was not a mistake of translation between the different European languages used in EU institutions. This semantic confusion reveals the knowledge these Organizational and State actors had with respect to their decision-making. See Visit of Angelino Alfano, Italian Minister for the Interior and President in office of the Council of the EU, to Cecilia Malmström: joint press conference, 27 august 2018 (<https://audiovisual.ec.europa.eu/en/video/I-092070>) and Audition of Home Affairs Commissioner Cecilia Malmström by the European Parliament Committee on civil liberties, justice and home affairs, 3 September 2018 (<http://www.europarl.europa.eu/ep-live/fr/committees/video?event=20140903-1430-COMMITTEE-LIBE>)

<sup>521</sup> See paragraph 104-108, and the Black Week of April case in section 2.2.3 of this communication.

<sup>522</sup> ICC Elements of Crimes, article 7, footnote 6.

<sup>523</sup> Ibid

inhuman acts within the jurisdiction of the Court.

### 2.2.1.2. Underlying Crimes

573. The underlying crimes described hereunder refer to crimes committed pursuant to EU's 1<sup>st</sup> Policy systematically directed against the "civilian population" as part of the "attack", as defined above. For each of the crimes discussed below, European Union's officials and agents were fully aware of the circumstances of their commission, including of the fact their commission was part of the overall attack.

**(i) Murder: European Union officials and their agents knowingly caused the death of members of a civilian population, within the meaning of article 7(1)(a) of the Rome Statute**

574. European Union officials and their agents committed the act referred to in article 7(1)(a) which, in the context set out above, constitutes a crime against humanity. The Rome Statute Elements of Crimes isolate three elements of this crime:

- I. The perpetrator killed, or **caused the death** of, one or more persons;
- II. The conduct was committed as part of a widespread or systematic attack directed against a civilian population;
- III. The perpetrator knew that the conduct was part of, or intended the conduct to be part of, a widespread or systematic attack against a civilian population.<sup>524</sup>

Element one: causing the death of one or more persons

575. As appears from the above wording, "killing" is interchangeable with "causing the death of",<sup>525</sup> which indicates that a positive act is not necessarily required. Rather, the *actus reus* requirement of the offence can be equally met by causing the death by omission.<sup>526</sup>

576. With respect to EU's 1<sup>st</sup> Policy, EU agents caused the death of thousands by (1) failing to fulfill (2) a legal duty to act, i.e. the duty to render assistance to civilians in life-risking situation under European Union and Member States' effective control.

577. The duty to act was previously acknowledged and, at least in part, fulfilled by the implementation of the Italian operation Mare Nostrum over the critical SAR zone. In these circumstances, the EU and Italy's decision to end MN without providing any alternatives to the

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<sup>524</sup> ICC Elements of Crimes, p.5.

<sup>525</sup> ICC Elements of Crimes, p.5, fn 7.

<sup>526</sup> See article ICC Elements of Crimes p.5, fn 7; see for example the responsibility of commanders and other superiors provided for in article 28 of the Rome Statute.

individuals whose right to life was previously protected by the EU and its Member States, establish both the failure to fulfill the legal duty to act, and the awareness of the duty and of its failure.

**(1) Omission: Failure to Act**

578. ICC Elements of Crimes informs judges on the interpretation of Article 6, 7, and 8 of the Rome Statute. They provide the legal basis for the equal footing of acts and omissions, insofar the failure to act is deliberate, is part of the attack and reflects State or Organizational Policy: **“Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack.”**<sup>527</sup>

579. Exceptional circumstances are required to consider that a policy has been implemented by an attack composed of multiple omissions that would nonetheless amount to the high threshold of an atrocious crimes. Alongside typical examples such as famine and starvation, the deliberate failure to take action vis-à-vis the death of thousands by drowning, while being aware of the contribution of such inaction to the attack, is a paradigmatic example for the circumstances the drafters envisioned.

580. The drafting history affirms that “it was clear that a majority of delegations had concerns about a blanket requirement of action. **Delegations did not want to exclude situations where a State or organization deliberately encouraged crimes through inaction. In essence, it was realized that there could indeed be a policy of encouragement without tangible action.**”<sup>528</sup>

581. It seems the drafter of the elements of crimes relied on the *Travaux Préparatoires* of the Rome Statute. In 1995, a Committee of Experts recognized that **“[a]n omission of an act is punishable under this Statute if the person was under a pre-existing legal duty to prevent the harm. Such a duty can in particular arise out of a statutory or contractual responsibility for the safety of the person concerned, or from antecedent dangerous and illegal conduct”**.<sup>529</sup>

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<sup>527</sup> See ICC Elements of Crimes, p.5, fn 6.

<sup>528</sup> Robinson, D., 2001, The Elements of Crimes Against Humanity, in R. S. K., Lee and F., Håkan (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, NY: Transnational, p57, 75.

<sup>529</sup> Art. 33(d) of the Draft of the Rome Statute, reprinted in Association Internationale de Droit Penal (AIDP) et al. (eds), July 1995 (Siracusa and Freiburg im Breisgau), *Draft Statute for an International Criminal Court*, p44, online, <https://www.legal-tools.org/en/browse/record/39a534/>, accessed 15/04/2019

582. An accompanying commentary to the 1996 Draft Code of Crimes Against the Peace and Security of Mankind recalled that **responsibility encompasses both acts and omission**.<sup>530</sup> Later in 1998, the Working Group on General Principles of Criminal Law proposed that omission may be liable if an individual **“failed to perform an act that he has an obligation to perform in order to prevent the resulting crime”**.<sup>531</sup>
583. International Criminal Law jurisprudence continued developing the concept of omission in various contexts. The normative point of departure seems to be the underlying rationale of *Dolus eventualis*, which refers to any establishment of guilt when an individual knows the consequences of her conduct, whether an act or omission.
584. The ICC Pre-Trial Chamber, for example, found this principle may be applied if an individual is **“aware of the risk that the objective elements of the crime may result from his or her actions or omissions”**.<sup>532</sup>
585. The interchangeability of act and omission has been confirmed by other case law<sup>533</sup>, for example in *Galic*: **“the omission of an act where there is a legal duty to act, can lead to individual criminal responsibility under Article 7(1) of the Statute.”**<sup>534</sup>
586. A legal duty could be framed as a duty under criminal law, or as any legal duty to act. Where the perpetrator is vested with a public function, it makes sense to apply a legal duty to act to prevent, protect and punish crimes committed under its effective control. This is indeed the same rationale, *mutatis mutandis*, that governs any form of superior responsibility.
587. In *Rutaganira*, the ICTR considered that “international law also places upon **a person vested with public authority a duty to act in order to protect human life**”<sup>535</sup> and that accordingly, “all public authorities have a duty not only to comply with the basic rights of the human person, but also to ensure that these are complied with, which implies **a duty to act in order to prevent any violation of such rights**”.<sup>536</sup>

<sup>530</sup> UN General Assembly, 23 July 1999, *Report of the International Law Commission*, A/54/10, p21, online, [http://legal.un.org/ilc/documentation/english/reports/a\\_51\\_10.pdf](http://legal.un.org/ilc/documentation/english/reports/a_51_10.pdf), accessed 15/04/2019

<sup>531</sup> UN doc. A/CONF.183/C.I/WG.GP/L.1

<sup>532</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber, “Decision on the confirmation of charges”, 29 January 2007, ICC-01/04-01/06. §352; Badar, M. E., 2009, “Dolus Eventualis and the Rome Statute Without It?”, *New Criminal Law Review: An International and Interdisciplinary Journal*, Vol. 12, No. 3, p442.

<sup>533</sup> *Prosecutor v Stanislav Galic*, Appeals Chamber, “Judgement”, 30 November 2006, IT-98-29-A, §149.

<sup>534</sup> *Prosecutor v Stanislav Galic*, Appeals Chamber, “Judgement”, 30 November 2006, IT-98-29-A, §175.

<sup>535</sup> *The Prosecutor v Vincent Rutaganira*, Trial Chamber III, “Judgment and Sentence”, 14 March 2005, ICTR-95-1C-T, §78.

<sup>536</sup> *The Prosecutor v Vincent Rutaganira*, Trial Chamber III, “Judgment and Sentence”, 14 March 2005, ICTR-95-1C-T, §79.

588. Omission hinges on the victim being under the effective control of the perpetrator. This necessarily means the perpetrator's ability to act otherwise than she did, in a manner that could have avoided the commission of the crime.
589. This duty to act is temporally unlimited. The fact the EU and its Member States decided to terminate Mare Nostrum, for example, does not necessarily mean their duty to react to distress calls of migrants at sea has been terminated.
590. In *Mrkšić*, the ICTY found "Šljivančanin had a **continuing legal duty to protect the prisoners of war...**", arguably even "after the order to withdraw the JNA troops"<sup>537</sup>, because "all state agents who find themselves with custody of prisoners of war owe them a duty of protection".<sup>538</sup>
591. The duty to protect the rights of individuals is neither not to a situation of custody. It extends to any individual under State's jurisdiction or control.<sup>539</sup>
592. The duty to act is neither limited to situation of armed conflict, such as the treatment of POWs. What matters is the nature of the right that has been deprived and the respective crime that may have been committed. For example, failing to act to prevent famine of individuals under State's control, knowing such inaction would cause the deaths of these individuals and is part of an attack against that civilian population, may constitute a crime against humanity of murder.<sup>540</sup>
593. Just as a legal duty exists vis-à-vis prisoners of war under international humanitarian law<sup>541</sup>, so it did with EU agents and member State agents, who owed a continuing duty to migrants under international human rights law: the lives of both could have been saved, based on the effective control of the perpetrator.
594. Finally, there is no requirement that "the investment of responsibility was made through explicit delegation" such as through formal legislative enactment or a superior order. What matters is whether a State agent has *de facto* control over the potential victims.<sup>542</sup>

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<sup>537</sup> *The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Appeals Chamber, "Judgement", 5 May 2009, IT-95-13/1-A, §68.

<sup>538</sup> *The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Appeals Chamber, "Judgement", 5 May 2009, IT-95-13/1-A, §73.

<sup>539</sup> See article 2, International Covenant on Civil and Political Rights

<sup>540</sup> See for example, Marcus, D., "Famine Crimes in International Law", 2003, *The American Journal of International Law*, Vol. 97, No. 2, p. 245-28 and Eide, A., 2005, "Famine", in L. Dinah Shelton (ed.), *Encyclopedia of Genocide and Crimes Against Humanity*, Vol. 1, Detroit, MI: Macmillan Reference USA, p. 343-350.

<sup>541</sup> *The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Appeals Chamber, "Judgement", 5 May 2009, IT-95-13/1-A, §80.

<sup>542</sup> *The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Appeals Chamber, "Judgement", 5 May 2009, IT-95-13/1-A, §73.

595. ICTY and ICTR jurisprudence consistently highlight that the crime against humanity of murder (and other crimes) can be committed by either act or omission. In the *Akayesu*, *Rutaganda* and *Musema* judgments, for example, the Tribunal required that “[t]he death resulted from an unlawful act or omission of the Accused or a subordinate”.<sup>543</sup>
596. In *Kavishema and Ruzindana* Trial Chamber, crimes against humanity are referred to as “acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity”<sup>544</sup>, and that the crime of murder could be caused by a “premeditated act or omission”.<sup>545</sup>
597. Where the mode of liability is a form of accessory liability, the concerned conduct is typically subtler or more passive, such as encouragement or moral support, and is thus often carried out through omission. In the context of aiding or abetting, for instance, it is required the conduct, whether an act or omission, would have a **substantial effect upon the perpetration of the crime**.<sup>546</sup>
598. Omissions that constitute aiding and abetting can also take place in a different location than that of the principal crime (e.g. in EU territorial waters, or even in Brussels or Rome).<sup>547</sup> Thus,

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<sup>543</sup> *The Prosecutor v. Alfred Musema*, Trial Chamber, “Judgement and Sentence”, 27 January 2000, ICTR-96-13-A, §215.; see also *Akayesu* in paras 589-590

<sup>544</sup> *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Trial Chamber II, “Judgement”, 21 May 1999, . ICTR-95-1-T, §148-151.

<sup>545</sup> *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Trial Chamber II, “Judgement”, 21 May 1999, . ICTR-95-1-T, §136-140.

<sup>546</sup> *The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Appeals Chamber, “Judgement”, 5 May 2009, IT-95-13/1-A, §81; Case law drawn from paragraph 81: case law references: *The Prosecutor v. Ferdinand Nahimana et al.*, Appeals Chamber, “Judgement”, 28 november 2007, ICTR-99-52-A, §482; *The Prosecutor v. André Ntagerura et al.*, Appeals Chamber, “Judgement”, 7 July 2006, ICTR-99-46-A, §370 fn 740; *The Prosecutor v. Tihomir Blaškić*, Appeals Chamber, “Judgement”, 29 July 2004, IT-95-14-A, §47, 45, 48; *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Appeals Chamber, “Judgement”, 9 May 2007, IT-02-60-A, §127; *The Prosecutor v. Emmanuel Ndinabahizi*, Appeals Chamber, “Judgement”, 6 January 2007, ICTR-01-71-A, §117; *The Prosecutor v. Blagoje Simić*, Appeals Chamber, “Judgement”, 28 November 2006, IT-95-9-A, §85; *The Prosecutor v. Mitar Vasiljević*, Appeals Chamber, “Judgement”, 25 February 2004, IT-98-32-A, §102; *The Prosecutor v. Zejnil Delalic et al.*, Appeals Chamber, “Judgement”, 20 February 2001, IT-96-21-A, §352; *The Prosecutor v. Duško Tadic*, Appeals Chamber, “Judgement”, 15 July 1999, IT-94-1-A, §229. The conduct of omission may be temporally and geographically independent from the principal crime. An alternative framing of the conduct of non-assistance may consider the principal crime to be the act of smuggling in unworthy boats. In this scenario, the prohibited omission could have been considered as occurring before (e.g. intentionally positioning Frontex vessels far from the critical SAR zone) or during (refraining from rendering assistance once a mayday call is received) the principal crime (e.g. smugglers consciously sending migrants in unsafe boats) has been perpetrated.

<sup>547</sup> *The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Appeals Chamber, “Judgement”, 5 May 2009, IT-95-13/1-A, §81; Case law drawn from paragraph 81: case law references: *The Prosecutor v. Ferdinand Nahimana et al.*, Appeals Chamber, “Judgement”, 28 november 2007, ICTR-99-52-A, §482; *The Prosecutor v. André Ntagerura et al.*, Appeals Chamber, “Judgement”, 7 July 2006, ICTR-99-46-A, §370 fn 740; *The Prosecutor v. Tihomir Blaškić*, Appeals Chamber, “Judgement”, 29 July 2004, IT-95-14-A, §47, 45, 48; *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Appeals Chamber, “Judgement”, 9 May 2007, IT-02-60-A, §127; *The Prosecutor v. Emmanuel Ndinabahizi*, Appeals Chamber, “Judgement”, 6 January 2007, ICTR-01-71-A, §117; *The Prosecutor v. Blagoje Simić*, Appeals Chamber, “Judgement”, 28 November 2006, IT-95-9-A, §85; *The Prosecutor v. Mitar Vasiljević*, Appeals Chamber, “Judgement”, 25 February 2004, IT-98-32-A, §102; *The Prosecutor v. Zejnil Delalic et al.*, Appeals Chamber, “Judgement”, 20 February 2001, IT-96-21-A, §352; *The Prosecutor v. Duško Tadic*, Appeals Chamber, “Judgement”, 15 July 1999, IT-94-1-A, §229.

even if there had been no direct relation between the conduct of EU agents and the principal act leading to the drowning of civilians (e.g. being sent in unworthy boats by smugglers) under their control, indirect actions would have sufficed for establishing criminal liability.

599. Knowledge of the crime and the capability to act otherwise are the two key elements for establishing criminal liability by omission. In case of aiding and abetting, the perpetrator has to have the means to comply with its legal duty to act,<sup>548</sup> and he “must know that his omission assists in the commission of the crime of the principal perpetrator and must be aware of the essential elements of the crime which was ultimately committed by the principal.”<sup>549</sup>

600. It is perfectly conceivable that a complicity to the commission of a crime of whose author has not been determined in Court shall be prosecuted. In the Katanga case, the identity of the principal perpetrators remained vague and undefined, nonetheless allowing for the conviction of Germain Katanga as an accessory, on the lesser defined count of individual criminal responsibility.<sup>550</sup>

601. To conclude, awareness to the likelihood of causing the death in case of failure to intervene is sufficient to be implicated to some degree with a crime against humanity of murder, as long as there was a previous control or capacity to act, in an official or other way, in the commission of the act. As noted in *Mrkšić*, “the only reasonable inference is that Šljivančanin must have been **aware** that the TOs and paramilitaries would likely kill the prisoners of war and that **if he failed to act**, his omission would assist in the murder of the prisoners.”<sup>551</sup>

602. Not only the European Union and its State member actors were aware, but they had the capacity to act, as demonstrated by their previous pattern of conduct. They willingly refused to do so, therefore assuming subsequent criminal responsibility.

603. While ICL jurisprudence on omission is typically associated with either superior responsibility or accessory liability such as aiding and abetting, there is no legal or other reason why the fulfillment of the *actus reus* of crimes enumerated in Article 7 by omission would have a different legal meaning or receive different treatment when other modes of liability are concerned.

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<sup>548</sup> *The Prosecutor v. André Ntagerura et al.*, Appeals Chamber, “Judgement”, 7 July 2006, ICTR-99-46-A, §333

<sup>549</sup> *The Prosecutor v. Naser Orić*, Appeals Chamber, “Judgement”, 3 July 2008, IT-03-68-A, §43

<sup>550</sup> See Judgment pursuant to article 74 of the Statute, Katanga Case, 7 March 2014, ICC-01/04-01/07-3436-tENG

<sup>551</sup> *The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Appeals Chamber, “Judgement”, 5 May 2009, IT-95-13/1-A, §63. Emphasis added.

## (2) The Legal Duty

604. The interchangeability of acts and omissions has been applied to situations which concerned a legal duty to prevent crimes and protect the most fundamental human rights, namely life and liberty.

605. The Tribunal in *Blaškić* found the defendant guilty of omitting the prevention of the use of civilians as human shields,<sup>552</sup> the Tribunal in *Mucić* found the defendant liable by omission with regard to unlawful confinement of civilians,<sup>553</sup> and the *Krnojelac* case found the defendant guilty through omission due to the poor treatment of prisoners.<sup>554</sup>

606. The present case concerns the legal duty to protect the right to life. This duty is based, in the exceptional circumstances of the present case, on various normative frameworks: international maritime, human rights and refugee law.

607. According to international maritime law conventions, to which all the relevant EU Member States are party to, EU and MS agencies and agents have a duty to render assistance to boats in distress, to conduct safe SAR Operation and to ensure the survivors are disembarked in a safe port.

608. The duty to render assistance to those in distress at sea **without regard to their nationality, status or the circumstances in which they are found**. This is a longstanding maritime tradition as well as an obligation enshrined in international law.<sup>555</sup>

609. **Any vessel in a position to be able to provide assistance**, on receiving information from any source that persons are in distress at sea, has to proceed with all speed to their assistance.<sup>556</sup>

610. The duty to disembark those rescued in ‘a place of safety’ is also unconditional. State parties are obliged to “... ensure that assistance [is] provided to any person in distress at sea ... regardless of the nationality or status of such a person or the circumstances in which that person is found” and to “... **provide for their initial medical or other needs, and deliver them to a place of safety**”<sup>557</sup>.

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<sup>552</sup> *Prosecutor v. Timohir Blaškić*, Appeals Chamber, “Judgement”, 29 July 2004, IT-95-14-A, §670.

<sup>553</sup> *The Prosecutor v. Zejnir Delalić et al.*, Trial Chamber, “Judgement”, 16 November, 1998, IT-96-21-T, supra note 6, §1145.

<sup>554</sup> *Prosecutor v. Milorad Krnojelac*, Trial Chamber II, “Judgement”, 15 March 2002, IT-97-25-T, supra note 311, §134.

<sup>555</sup> See The 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (hereafter ‘UNCLOS’), Article 98(1). See also the UN High Commissioner for Refugees (UNHCR), *Rescue at Sea. A Guide to Principles and Practice as Applied to Refugees and Migrants*, January 2015, available at: <https://www.refworld.org/docid/54b365554.html>, accessed 1 June 2019.

<sup>556</sup> The 1974 INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA (hereafter ‘SOLAS CONVENTION’), Regulation V/33.1.

<sup>557</sup> 1979 INTERNATIONAL CONVENTION ON MARITIME SEARCH AND RESCUE (SAR CONVENTION), Chapter 2.1.10 and Chapter 1.3.2.

611. Under International Human Rights law, the EU and its MS have a duty to protect individuals under their effective control, without discrimination. Specifically, EU and Member States' bear a duty to protect individuals' rights to life, dignity, liberty, asylum, as well as a right to exit a country. These rights are enshrined in various international and regional human rights law instruments to which the EU and Member States are party to, including provisions that in part are considered to be customary.<sup>558</sup>
612. Finally, under refugee law, the EU and its MS have a duty to comply with the principle of *non-refoulement*, the prohibition on penalization of refugees for their irregular way of entry and stay, as well as a duty to screen asylum requests of migrants in need of international protection on an individual basis.<sup>559</sup>
613. Public authorities have a legal duty under international law to act in order to prevent any violation of the basic rights of persons, and a concrete duty to act in order to protect human life.<sup>560</sup>
614. Any state has a duty to prevent the commission of crimes against individuals under their jurisdiction or control, to protect the potential victims of such crimes and to investigate and punish the commission of these crimes.<sup>561</sup>
615. In this context, migration policies that intentionally fail to save lives over a zone in which effective control was held, is no different than any other failed response to humanitarian, even natural challenges, such as famine: "When famine still occurs, it is either a result of deliberate action intended to cause starvation, serious mismanagement, bad or nonresponsive government failing to respond adequately to natural disasters, or lack of sufficient international cooperation in redressing a threatening situation. **Some provoked famines may legally be characterized as genocide or crime against humanity.**"<sup>562</sup>

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<sup>558</sup> See below footnote 633 for a number of international and regional human rights instruments EU Member States are party to.

<sup>559</sup> See Convention Relating to the Status of Refugees, signed on the 28 July 1951 and entry into force on 22 April 1954, United Nations Treaty Series, vol. 189, p.137, in particular articles 31 and 33.

<sup>560</sup> European Court of Human Rights, 2019, "Guide on Article 2 of the European Convention on Human Rights: Right to life", *Council of Europe*, online, [https://www.echr.coe.int/Documents/Guide\\_Art\\_2\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf), accessed 19/04/2019

<sup>561</sup> On State duty to prevent and protect in connection with Genocide, see *BOSNIA AND HERZEGOVINA v. SERBIA AND MONTENEGRO*, ICJ, Judgement, 26 February 2007, paragraphs 379 onwards. Available at: <http://www.worldlii.org/cgi-bin/download.cgi/cgi-bin/download.cgi/download/int/cases/ICJ/2007/2.pdf>

<sup>562</sup> Eide, A., 2005, "Famine", in L. Dinah Shelton (ed.), *Encyclopedia of Genocide and Crimes Against Humanity*, Vol. 1, Detroit, MI: Macmillan Reference USA, p. 343-350.

616. In certain circumstances, therefore, States' own duty to prevent crimes against and protect the rights of individuals under their effective control may be formulated as an inter-state or multistate duty, which is applicable to the EU as an organization in the present case.
617. Considered 'secondary rules', international state responsibility was codified by the International Law Commission ('ILC') in 2001 with the Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA'). The ARISWA sets the general conditions under international law for the State to be considered responsible for wrongful acts and omissions. The 'primary rules' or the content of the breach of an international obligation gives rise to responsibility are included in customary international human rights law and treaties.<sup>563</sup>
618. States act through organs and agents. Any state official even at the local or municipal level, may commit an internationally wrongful act attributable to the state. However, attribution to the State is not only limited to regular organs of the State. Conduct carried out by others who are authorized to act by the state or who act under its control or direction can be attributed to the State.<sup>564</sup>
619. States' duty to prevent and protect percolates to and is materialized by State officials and agents. Accordingly, a failure to comply with a legal duty to act may trigger not only State's responsibility for its wrongful acts, but also be the basis for individual criminal liability.
620. To conclude, the European Union and its Member States agents and officials arbitrarily deprived and failed to protect the inherent right to life in the sense of the International Covenant on Civil and Political Rights, "of[...] persons on whose enjoyment of the right to life it exercises power or effective control, [including] persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner." It therefore violated its " obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life" and to "respect and protect the lives of individuals who find

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<sup>563</sup> International Law Commission, 2001, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), chp.IV.E.1 (hereafter 'ARISWA'); see in particular to the present case, articles 40(2) and 41.

<sup>564</sup> See ARISWA, articles 4 and 8; With regard to attribution of responsibility for an action of a third state, of control of one state over the other, and of conduct of people who are exercising elements of governmental authority in the absence or default of the official authorities see, respectively, articles 16, 17 and 9.

themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea...”<sup>565</sup>

621. This violation of a legal obligation may constitute individual criminal responsibility through omission under the regime of International Criminal Law, as the *Galic* Appeal’s decision of the ICTY determined.

Element two: The conduct was committed as part of a widespread or systematic attack directed against a civilian population

622. In the present case, the factual section has established the significant number of deaths of asylum seekers and other individuals reduced to the term of “migrants” whilst attempting to cross the Mediterranean by boat over the period 2014-2015, during which the European Union’s Mare Nostrum policy was withdrawn in favor of Operation Triton.

623. These deaths were a direct consequence of the European Union policy: the European Union was in a position to assist the persons in question, and thus to prevent their deaths.

624. Nevertheless, the EU deliberately chose to severely restrict Frontex’s SAR operations under Triton Operation whilst not providing for an alternative solution for the migrants, in an area in which it had exclusive and effective control of, and thereby implicated its agents, *a minima*, with murder by omission.

625. The multiple occasions of shipwrecks where EU agencies and agents refrained from rendering assistance and rescuing migrants from the risk of drowning was a conduct resulting of and committed as part of the widespread and systematic attack against this civilian population.

626. As set out above, the Central Mediterranean was and still is under the effective control of the EU, manifested by the various means of surveillance and patrols, by the fact the MCCR of the relevant SAR zone is based in an EU’s frontline Member State’s capital (Rome, Italy) and by the various military and other naval operations the EU is operating in the region to combat terrorism, smuggling and irregular migration.

627. In fact, the precedent operation Mare Nostrum, which patrolled off the Libyan shores, covered the critical SAR area, and was successful in rendering assistance in accordance with

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<sup>565</sup> Human Rights Committee, 2018, “General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life”, CCPR/C/GC/36, §63, online, [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1\\_Global/CCPR\\_C\\_GC\\_36\\_8785\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf), accessed 19/04/2019

international laws of the sea, manifests the extent and scope of EU's functional and effective control over the Central Mediterranean.

628. The number of vessels acting on the zone, whether military, civilian or State-owned, did not decrease. What varied was the missions they were attributed and their capacity and willingness to assist people in distress.
629. Likewise, the subsequent EU's migration policy (EU's 2<sup>nd</sup> Policy), analyzed in the next Section 3.2.2, equally demonstrates the authority and control of the European Union over the relevant operational SAR area.
630. The EU kept on patrolling and monitoring the region by aircrafts, boats, radars, employ command and control facilities, commanding and coordinating operations of other maritime forces (such as the LYCG), and at times specifically engaged in interceptions and SAR operations.
631. Choosing not to exercise the control does not render such control ineffective. The premeditated plan to *a priori* located EU's vessels in a position that would ostensibly avoid maritime and human rights duties did not diminish the effective control over the area nor relieved the EU from the said international obligations. As noted above, it did constitute a failure to act which, when causing the foreseeable death of thousands, constitutes a crime against humanity.

Element three: The perpetrator knew that the conduct was part of, or intended the conduct to be part of, a widespread or systematic attack against a civilian population.<sup>566</sup>

632. The prohibited acts and omissions were undertaken knowingly and intentionally by European Union officials and agents under the frame of an overall policy of which the objective, which was to deter crossings at all costs, was known and shared.
633. The lethal consequences of their actions were known by their authors. Based on the evidence presented in the present communication which involve the highest governmental and administrative levels at the EU, the requisite *mens rea*, while having to be determined on an individual basis and in a course of a thorough criminal investigation, should be at least presumed for all the EU agents mentioned in the frame of the current examination.

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<sup>566</sup> ICC Elements of Crimes, p.5.

634. Mens rea may be established “by way of inference from other facts in evidence... **Any words of or conduct by the accused which point to or identify a particular state of mind** on his part is relevant to the existence of that state of mind. **It does not matter whether such words or conduct precede the time of the crime charged, or succeed it.** Provided that such evidence has some probative value, the remoteness of those words or conduct to the time of the crime charged goes to the weight to be afforded to the evidence, not its admissibility.”<sup>567</sup>
635. As has been established by the factual section of this policy, EU agents were well aware, before, during and after of the fact that their actions would lead to a significantly higher death rate of migrants.<sup>568</sup>
636. Frontex internal reports and other undisputed evidence demonstrate that *before* Triton was operational, the EU was already fully aware the operation would result in more casualties than when Mare Nostrum was in force, and the acknowledgment of its deterrent purpose.
637. *During* the operation and even as the death rate dramatically increased, the EU ignored calls by commercial and private maritime sector that had to engage in rescue without having the competence and know-how to conduct SAR operations, a consequence which *per se* caused more deaths in the Mediterranean.
638. Finally, only *after* the lethal consequences of ending Mare Nostrum were acknowledged, notably after the Black April incidents, EU officials admitted the termination of Mare Nostrum and its replacement with Triton were “a tragic mistake that cost human lives”.
639. While these actions and statements establish the required *mens rea*, as noted above EU’s 1<sup>st</sup> Policy was nothing but mistake. The factual section clearly indicates that the policy of ‘killing by omission’ was a result of EU’s inability to renew its border externalization policy. Instead, the EU moved to a policy whose purpose was precisely this: to cause the death of some migrants in order to deter others from crossing the Mediterranean.<sup>569</sup>
640. It would later become clear that narrowing the scope of SAR did not have a deterrent effect but rather led to the same number of crossings and an increase in migrant deaths.<sup>570</sup> Such actions

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<sup>567</sup> *Prosecutor v Slobodan Milosevic*, Appeals Chamber, “Reasons for decision on refusal to order joinder”, 18 April 2019, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, §31.

<sup>568</sup> For specific quotes from Frontex reports and officials before Operation Triton see paragraphs 86 and 87 of this communication. For evidence of knowledge during Operation Triton see paragraphs 94 and 97 of this communication.

<sup>569</sup> See paragraph 129 of this communication for specific statements by Frontex.

<sup>570</sup> See paragraphs 107 and 108 of this communication for further details.

resulted in multiple cases in which vessels in distress, were identified and located, but could not be rescued in time or properly resulting in the death of thousands of civilians.<sup>571</sup>

**ii. Torture: European Union officials and agents knowingly caused the torture of members of a civilian population within the meaning of Article 7(1)(f) of the Rome Statute:**

641. The fact that the EU's 1<sup>st</sup> Policy did not cover the critical SAR zone and refrained from rendering assistance to migrants in distress at sea meant, in many cases, that other boats in proximity, mostly commercial and other private-sector vessels, were pushed to try and conduct the rescue. Because these boats did not have the required know-how for the operation of complex SAR operations, many people lost their lives.<sup>572</sup>

642. In a similar fashion to the *intentional* nature by which the death of those who drowned was caused, here too EU official and agents intentionally inflicted severe and unnecessary pain and suffering, both physical and mental, upon persons under the control of EU, within the meaning of Article 7(2)(e) of the Rome Statute.

643. As the factual section established, EU agents had knowledge that their omission which was causing the pain and suffering, amounts to torture within the meaning of the Rome Statute, and was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population, in order to scare them and deter them and other persons to try to migrate.<sup>573</sup>

644. Consequently, by failing to comply with the legal duty to render assistance to persons in need of international protection who were in distress at sea in zones under their control, and by doing so with the intent to pursue a political objective, EU agents committed the crime against humanity of torture.

**iii. Other Inhumane Acts: European Union and Member States' officials and agents knowingly committed other inhuman acts within the meaning of article 7(1)(k) of the Rome Statute**

645. The serious injury and great suffering caused to the countless migrants who nonetheless survived the shipwrecks, may also constitute, if not qualified as torture, as "...inhumane acts..."

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<sup>571</sup> See section 1.2.3 documenting the most striking evidence of this in April's black week.

<sup>572</sup> See paragraphs 103 and 535 above

<sup>573</sup> See paragraphs 39, 52, 53, 93

intentionally causing great suffering, or serious injury to body or to mental or physical health ” within the meaning of Article 7(1)(k) of the Rome Statute.

646. Article 7(1)(k) is a residual provision. Drafters of the Rome Statute wanted to secure the possibility of holding individuals accountable for future crimes against humanity, i.e. crimes against humanity that were not invented at the time the Statute was drafted.

647. The omissions in rendering assistance to migrants in distress at sea pursuant to a multinational migration policy appears to establish a new category of organized crimes against vulnerable migrants that the drafters of the Statute had not envisioned. Yet, this category of crimes requires the same threshold of the other crimes listed crimes in terms of its nature, scale and gravity.<sup>574</sup>

648. To be sure, the injury, suffering and harm caused as a result from the refusal of EU agencies and agent to render assistance is more than “temporary unhappiness, embarrassment or humiliation”<sup>575</sup>, as required by jurisprudence. On the contrary, and while not required to constitute the crime, the victims who had found themselves in a life-threatening situation due to circumstances out of their control, suffered long-term effects.<sup>576</sup>

649. To provide further content to the offence, it has been acknowledged that guidance can be derived from norms prohibiting inhumane treatment under international human right and humanitarian law<sup>577</sup>, serious violations of international customary law and basic rights<sup>578</sup>.

650. As argued above, the conduct of EU officials and agents involves a grave violation of basic norms of international human rights, refugee and maritime law. Specifically, the conduct of EU agents failed to comply with the duty to conduct competent rescue and safe disembarkation, alongside the duty to protect the lives of individuals under States’ control and the prohibition on the penalization of irregular entry of asylum seekers, which further support the alleged commission of inhumane acts within the meaning of article 7(1)(k).

651. This is so particularly in light of the *Hirsi* 2012 EctHR judgment. Instead of complying with the decision of the European Court, namely to comply with the duty of *non-refoulement* and to

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<sup>574</sup> *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chuiatanga*, Pre-Trial Chamber I, “Decision on the confirmation of charges”, 30 September 2008, ICC-01/04-01/07.

<sup>575</sup> *Prosecutor v Radislav Krstic*, Trial Chamber I, “Trial Judgement”, 2 August 2001, IT-98-33

<sup>576</sup> *Prosecutor v Milan Lukić and Sredoje Lukić*, Trial Chamber III, “Trial Judgement”, 20 July 2009, IT-98-32/I

<sup>577</sup> See, for example, Article 35 of 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, available at: <https://ihl-databases.icrc.org/ihl/WebART/470-750044?OpenDocument>

<sup>578</sup> *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chuiatanga*, Pre-Trial Chamber I, “Decision on the confirmation of charges”, 30 September 2008, ICC-01/04-01/07.

review asylum claims of migrants rescued at sea, the EU did everything to circumvent the decision.

652. Because the point of departure in *Hirsi* was that the physical encounter triggers the international human rights and refugee law obligations, the EU carefully designed and shaped its policy to avoid any such encounter.
653. It is against this backdrop that the EU's 1<sup>st</sup> Policy of non-assistance, and in particular the decision to move from Operation Mare Nostrum to Triton, was formed as an attack within the meaning of the Statute, and the omission to conduct rescues on multiple occasions, constituted the crimes described.
654. To conclude, with respect to migrants who have not died by drowning and survived their shipwreck despite EU's 1<sup>st</sup> Policy, EU officials and agents, based on the evidence provided above, inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act, as part of a widespread or systematic attack directed against a civilian population.
655. Such act or omission was of a character similar to other crimes referred to in article 7 of the Statute, with awareness of the factual circumstances that established the character of the act, as well as of the conduct being part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

### **2.2.1.3 Modes of Liability**

656. The attack against a civilian population, described above, implicates European Union officials, agents and representatives, as well as European Union Member State actors.
657. These individuals participated in formulating the necessary policy and ensuring its implementation thereof, in order to prevent a population grouped under the term of "migrants" from accessing the territory of Member States of the European Union.
658. In so doing, EU agents specifically failed to protect asylum seekers in need of assistance on the Mediterranean Sea, despite the European Union and Member States' legal duties to do so. Their participation in the attack against a civilian population took the forms that have been described above.

659. As this communication has detailed, their actions and omissions have been intentional and with knowledge of their consequences and have, at varying degrees, served the overall purpose of the attack: to deter human beings from crossing the Mediterranean and exercising their basic rights to life, safety and asylum, whilst trying to consciously avoid any legal responsibility in internal or international bodies to this end.
660. Under Article 25 of the Rome Statute, the ICC has jurisdiction over public officials, ranging from those who orchestrated and developed the European Union's policies, to the individual officials who took the necessary actions to implement that policy.
661. Such individuals should be held liable as direct or indirect perpetrators (co-perpetrators or perpetration by means). The Prosecutor states in her Policy Paper on Case Selection and Prioritisation that through her investigations she will work to ensure prosecution against those "most responsible" for the crimes in question.
662. It is contended here that the Prosecutor should not only investigate those who directly perpetrated these crimes but also the complex structures of abuse, which were designed to avoid responsibility through their complexity. The broadness of the modes of criminal responsibility under the Rome Statute should ensure that responsibility of all actors is traced.
663. **Direct (individual) perpetration** refers to when the individual carries out all elements of the offence. An example in the present case would be the employees of Frontex, the Italian Maritime Rescue Coordination Centre, or European Union Member State's SAR operational executives, who deliberately failed to react appropriately to provide assistance to migrants' vessels in distress on the Mediterranean Sea in the mentioned situations, despite a legal duty to do so, thus directly causing the death of the asylum seekers who were not rescued and ultimately died. These individuals may in many cases be public officials.
664. This responsibility by nature extends to the policy-makers and hierarchical superiors that formulated, instructed and ordered those policies, effecting a political plan developed by the European Council, the Council of the European Union and the European Commission in application of the political will of the heads of State and ministers of several EU Member States.
665. The EU had the ability but no political will to instruct Frontex to intervene beyond EU territorial waters, to remain committed to covering the critical SAR area that was previously covered by Italy and remained under EU's effective control, and therefore put an end to the humanitarian crisis born from the adoption of EU's 1<sup>st</sup> policy. As the then President of the

European Commission, Jean-Claude Juncker admitted in a statement following the Black April's incidents: "**Frontex could intervene in international waters tomorrow, if that were the general will**".<sup>579</sup>

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<sup>579</sup> Juncker, JC., 2015, "*Speech by President Jean-Claude Juncker at the debate in the European Parliament on the conclusions of the Special European Council on 23 April: 'Tackling the migration crisis'*", European Commission Press Release, online, [http://europa.eu/rapid/press-release\\_SPEECH-15-4896\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-4896_en.htm), accessed 10/04/2019

## 2.2.2 2nd Policy: Libya (2015-2019)

666. The European Union and Member States' officials and agents (hereafter also 'EU agents') knowingly committed crimes against humanity<sup>580</sup> within the meaning of the Rome Statute<sup>581</sup> pursuant to the EU's Organizational and Italy's State migration policies in the Central Mediterranean and Libya (hereinafter, as defined below, 'EU's 2<sup>nd</sup> Policy').

667. These policies constitute a widespread and systematic attack, directed against tens of thousands civilians *hors de combat* attempting to flee Libya, and were designed to block and deter immigration to the EU. The next section establishes the contextual elements of the crimes committed, before identifying the prohibited acts entailing individual criminal liability and, finally, the applicable modes of criminal liability.

### 2.2.2.1 Widespread, Systematic Attack against Civilians

668. Through detailed policies which orchestrate and command countless interception operations and via multiform material support to the LYCG, EU actors have been involved in the commission of countless and diverse crimes against humanity against migrants fleeing Libya.

669. Individuals commit crimes against humanity if they knowingly commit one or more of the acts listed under article 7(1) of the Rome Statute, **“when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”**

670. This section establishes the EU's 2<sup>nd</sup> policy amounts to (i) an *attack* (ii) of a *widespread and systematic* nature, (iii) directed *against civilian population* seeking to flee Libya, (iv) pursuant to an organizational policy, (v) whose agents have *knowledge* of the attack.

### Attack

671. Under Article 7(2)(a) of the Rome Statute, an attack is defined as “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.**”

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<sup>580</sup> As noted in Section 3.1 (Jurisdiction), while war crimes may also be established in the context of the ongoing armed conflict in Libya, for the purpose of subject-matter jurisdiction, this communication focuses on crimes against humanity in accordance with Article 5 and Article 7 of the Rome Statute

<sup>581</sup> UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: <https://www.refworld.org/docid/3ae6b3a84.html> (hereinafter “the Rome Statute”).

672. An attack pursuant to a policy is understood to refer to a campaign or a series of operations directed against a specified target and involving the multiple commission of acts referred to in the Rome Statute.<sup>582</sup> As opposed to war crimes, to qualify the acts as crimes against humanity, the attack need not be military in nature, nor need it have a nexus to an armed conflict.<sup>583</sup> It may even be “nonviolent in nature”.<sup>584</sup>

673. It suffices that the campaign or operation and the multiple commission of acts that characterize it is carried out against the civilian population to constitute an attack.<sup>585</sup> As the previous section regarding the **EU’s 1<sup>st</sup> Policy** demonstrated, according to ICC jurisprudence the prohibited conduct could take the form not of acts at all, but of omissions, namely through a policy of multiple deliberate failures to act.<sup>586</sup>

674. Beside the commission of the said acts, there is no additional requirement for the existence of an ‘attack’.<sup>587</sup> The *sole* requirement is that an Organization or State policy would actively promote or encourage such an attack against a civilian population.<sup>588</sup>

675. The act of a State (or a coalition of States), “exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.”<sup>589</sup>

676. In the present case, the **EU’s 2<sup>nd</sup> Policy** from 2015 to date constitutes an attack within the meaning of article 7 of the Rome Statute. The said attack is constituted of (i) conspiring jointly with or through a consortium of militias (LYCG) to commit (ii) multiple acts and omissions against migrants fleeing Libya, (iii) pursuant to EU’s organizational and Italy’s immigrations policies to stem migration flows in the Central Mediterranean route.

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<sup>582</sup> ICC Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 14 June 2014, paragraphs 22 and following.

<sup>583</sup> See *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeals Chamber, “Judgment”, 12 June 2002, IT-96-23 & IT-96-23/1-A at §86 and *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v the Prosecutor (Media case)*, Appeals Chamber, “Appeals Judgment”, 28 November 2007, ICTR-99-52-A, §916.

<sup>584</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeals Chamber, “Judgment”, 12 June 2002, IT-96-23 & IT-96-23/1-A, § 86; see also *Akayesu TC* at 581.

<sup>585</sup> Report of the Preparatory Commission for the International Criminal Court: Addendum 2, UN Doc PCNICC/2000/1/Add.2 (2 November 2000) 9 (‘ICC Elements of Crimes’) at p5; *Prosecutor v Bemba* (ICC) PTC-II Case No. ICC-01/05-01/08, 15 June 2009, ¶85§84

<sup>586</sup> ICC Elements of Crimes, footnote 6

<sup>587</sup> *Bemba*, ¶§75

<sup>588</sup> ICC Elements of Crimes, ¶ §3 of the Introduction to Article 7

<sup>589</sup> *Prosecutor v Jean-Paul Akayesu TC*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, ¶ §581. (‘Akayesu TC’)

677. The EU's 2<sup>nd</sup> Policy included multiple naval operations and manifested a course of conduct composed of both legislative, executive and administrative acts, as well as active participation in the commission and facilitation of the prohibited acts themselves.

678. Conducting interception in lieu of rescue and *refoulement* instead of safe disembarkation, EU agents were complicit in and had preexisting knowledge that their actions would lead to the commission of various crimes against the civilian population including persecution, deportation, imprisonment, murder, enslavement, torture, rape, and other inhumane acts within the meaning of the Rome Statute.

679. These multiple acts and omissions have a direct link to and are part of the overall attack. In the absence of the EU's 2<sup>nd</sup> policy to resume its unlawful push-back policy, relying on the manpower of the LYCG to intercept and detain the targeted population, the crimes against the target population – civilians fleeing Libya in distress at sea – could not have taken place.

680. Indeed, the mass, collective and forced expulsions to the camps where atrocious crimes take place begin first with the migrants' detention on board of LYCG vessels, and continues upon disembarkation and transfer to detention centers and torture houses in Libya.

681. In the present case, Organizational policy is pursued by persons who act as *de jure* officials and agents of the organization, i.e. EU and its Member States. Indeed, while the Rome Statute does not provide definitions of the terms "policy" or "State or organizational",<sup>590</sup> jurisprudence suggests a criteria of capacity, that the concerned EU agents had, to perform acts which infringe the most basic human values.<sup>591</sup>

682. While *not* required to constitute a crime against humanity, the present attack has *military* characteristics as it occurs within the context of a protracted *armed conflict*. Indeed, according to the UNSC the situation in Libya is considered a “non-international armed conflict”, to which the GNA and consortium of militias known as the LYCG are party to.

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<sup>590</sup> Kenya Investigation Decision Situation in the Republic of Kenya, PTC II, ICC-01/09, §84, online, <https://www.legal-tools.org/doc/338a6f/pdf/>, accessed 20/05/2019

<sup>591</sup> Kenya Investigation Decision Situation in the Republic of Kenya, PTC II, ICC-01/09, §90, online, <https://www.legal-tools.org/doc/338a6f/pdf/>, accessed 20/05/2019. While the present communication focuses on criminal liability of EU and Italian agents, it should be noted these suspects are acting in complicity with Libyan agents and mercenaries, who act as de-facto officials or persons whose actions are attributable to the mother-organization, the EU, and its diverse organs. For a detailed discussion on the applicable modes of liability, see Section 1.2.2.3.

683. The UNSC has also authorized the use of international military force in Libya, which was the basis for NATO's international military intervention in the country, and its enforced arm embargo in Libya ever since.

684. In February 2011, the UNSC also referred the situation in Libya to the International Criminal Court (ICC), the investigation includes crimes against humanity and war crimes, and is still pending.<sup>592</sup>

685. In this context, the Prosecutor also "continues to collect and analyse information relating to serious and widespread crimes allegedly committed against migrants attempting to transit through Libya".<sup>593</sup> According to the Prosecutor, "thousands of vulnerable migrants, including women and children, are being held in detention centers across Libya in often inhumane conditions. Crimes, including killings, rapes and torture, are alleged to be commonplace."<sup>594</sup>

686. Thus, the present communiqué seeks to urge the ICC to recognize the role of EU actors in the commission of the crimes already recognized by the Prosecutor. Indeed, despite the "dire and unacceptable" situation on the ground, as the Prosecutor described it, the EU nonetheless moved forward with its joint venture with the LYCG.

687. Despite the fact LYCG agents were individually sanctioned for being involved in systematic abuses and crimes, EU continued LYCG's financing, training and support.<sup>595</sup> Despite the fact that Italy's provision of formerly-military boats to the LYCG in several occasions may have violated the arms embargo, the EU persistently and efficiently pursued its cooperation with the LYCG to stem migration flow from Libya.<sup>596</sup>

688. The lethal use of vessels provided to the LYCG implicates both the providers and the recipients of these vessels with atrocious crimes as these vessels were and are still used to intercept and forcibly transport tens of thousands migrants to detention camps and torture houses operated by LYCG and allied armed groups, party to the military internal conflict. .

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<sup>592</sup> Security Council Resolution 1970, 2011, online, <http://unscr.com/en/resolutions/doc/1970>, accessed 16/04/2019; ICC, Situation in Libya, ICC-01/11, online, <https://www.icc-cpi.int/libya>, accessed 20/05/2019

<sup>593</sup> ICC, 9 May 2017, "Statement of the ICC Prosecutor to the UNSC on the Situation in Libya", §25, online, <https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib>, accessed 20/05/2019

<sup>594</sup> Ibid., §26

<sup>595</sup> See factual section 1.3.3, §274 onwards

<sup>596</sup> See Factual section 1.3.3 The LYCG, §253.

689. The Italian boats transferred to the LYCG are today transformed and used by the LYCG for military purposes, as part of hostilities that *inter alia* lethally attack detained migrants and commit further crimes against them.<sup>597</sup>
690. Indeed, even though at least on one occasion the UN Security Council rejected a transfer of a vessel by EU member state (Malta) to the LYCG,<sup>598</sup> the pattern of cooperation did not change. France, an EU Member State, continues to fiercely defend its intention to hand over additional vessels to the LYCG in coming months.<sup>599</sup>
691. The attack, therefore, may be considered to have military aspects based on the existence of an armed conflict in general, the affiliation of LYCG agents as members of para-State armed groups, the lethal use not under a control of a sovereign government of LYCG vessels in the context of the arm embargo, and reports that detained migrants were and are militarily attacked as well as forced to participate in combat between militias.<sup>600</sup>
692. Specifically, in the course of the interception of migrants in distress at sea, the active participation of EU military units includes providing key information such as the location of migrant boats in distress, giving orders to the LYCG in connection with the interception and *refoulement* of the boats, and providing material support to the capacity-building of the LYCG. Member States' military vessels are also providing command and control capabilities to the LYCG.<sup>601</sup>
693. Beyond the violent nature of the prohibited acts taking place on Libyan soil, which is analysed in the next section, the violent nature of the attack is also entrenched in the phase from interception to disembarkation, in the course of the mass *refoulement*.

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<sup>597</sup> See, e.g., Nello Scavo, *Avvenire*, 20 April 2019 (Italian), <https://www.avvenire.it/attualita/pagine/libia-nessuno-pattuglia-mare-sar>, last accessed 01/06/2019

<sup>598</sup> See, e.g., Mario Micallef, "United States stops Malta request so that vessel is returned to Libyan coast guard" 9 September 2018, <https://www.tvm.com.mt/en/news/united-states-stops-malta-request-so-that-vessel-is-returned-to-libyan-coast-guard/>, last accessed 01/06/2019

<sup>599</sup> See, for example, the French administrative legal action: "France delivers boats to Libya : NGOs demand justice!" (press release), 25<sup>th</sup> of April 2019 <http://www.migreurop.org/article2915.html>, last accessed 01/06/2019

<sup>600</sup> See, e.g., Libya: Detained Migrants at Risk in Tripoli Clashes, Human Right Watch, 25 April 2019, online, <https://www.hrw.org/news/2019/04/25/libya-detained-migrants-risk-tripoli-clashes>, last accessed 01/06/2019

<sup>601</sup> See factual paragraphs 245 and onwards

694. The decision to refrain from directly engaging in a life-saving missions and to instruct instead a 3<sup>rd</sup> party to intercept boats in distress and return them to a place where violence prospers constitutes *per se* a form of a violent attack.<sup>602</sup>

695. Furthermore, forced push-back is by definition violent. In numerous cases asylum seekers manifested their unwillingness to return to Libya by jumping off LYCG vessels, preferring to risk their lives than to return to Libya to inevitably become victim to atrocious crimes.<sup>603</sup> The unnecessary deaths, injury and suffering in the course of LYCG interception operations also underscore the violent nature of the attack, as do the handcuffing, beating, gunpoint threats, removal of boats' engines and the confiscation of migrants' property on board.<sup>604</sup>

696. The attack is launched in the context of an on-going armed conflict that is subject to the ICC investigation, the arms embargo and the sanctions regime. As such, it has at minimum military elements, as it involves both multinational, state and non-state military forces: NATO, EU and Member States' forces, Libyan para-state forces, non-state criminal armed groups and militias.

### **Widespread and Systematic**

697. EU agents, jointly with and through Libyan militias, knowingly intercepted, *refouled*, detained and subsequently exposed civilians to numerous atrocious crimes, in a manner constituting widespread and systematic attack.

698. Under the Rome Statute, the attack need be *either* widespread *or* systematic.<sup>605</sup>

699. The term 'widespread' refers to the plurality of victims<sup>606</sup> and the **large-scale** nature of the attack.<sup>607</sup> Whereas the term 'systematic' refers to a pattern<sup>608</sup> or methodical **plan**<sup>609</sup>, one that reflects "the **organised** nature of the acts of violence and the improbability of their random

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<sup>602</sup> See factual section 2.3.3 describing EU action to designate the LYCG as responsible to intercept migrants at high seas and return them to detention centers in Libya. Section 2.3.4 also details specific cases with the LYCG where migrants faced violence upon their interception and further detention in Libya.

<sup>603</sup> See §54, 80, 340 and 349 of the factual section

<sup>604</sup> See factual sections section 2.3.4, §281, 283, 338.

<sup>605</sup> Article 7(1) of the Rome Statute

<sup>606</sup> *The Prosecutor v Clément Kayishema and Obed Ruzindana*, Trial Chamber II, "Judgement", 21 May 1999, ICTR-95-1-T, §123

<sup>607</sup> *The Prosecutor v Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic*, Appeals Chamber, "Judgement", 12 June 2002, IT-96-23& IT-96-23/1-A, §94. See also "Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", Pre-trial Chamber II, 31 March 2010, ICC-01/09, §95.

<sup>608</sup> *The Prosecutor v Bosco Ntaganda*, Pre-Trial Chamber II, "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda" 9 June 2014, ICC-01/04-02/06, ),§24

<sup>609</sup> *The Prosecutor v Duko Tadić*, Trial Chamber, "Opinion and Judgement", 7 May 1997, IT-94-1-T, §648.

occurrence.”<sup>610</sup> The idea is that prohibited acts and omissions should follow “a regular **pattern** on the basis of a common **policy** involving substantial public and private resources.”<sup>611</sup>

700. In the present case the attack is *both* widespread and systematic. The attack against the civilian population seeking to exit Libya is widespread in that it is massive and protracted: in the past 3 years (2016-2018) it has involved at least 40,000 civilians.<sup>612</sup>

701. In the frame of EU’s 2<sup>nd</sup> policy, all the survivors intercepted were immediately detained and exposed to the atrocious crimes taking places in detention centers and torture houses in Libya, i.e. murder, imprisonment, enslavement, torture, rape, persecution and other inhumane acts.<sup>613</sup>

702. Furthermore, the legislative, administrative and political decisions enabling this policy and the commission of the alleged prohibited acts are still in force and continue to affect many more victims given that the situation is still ongoing to date.<sup>614</sup>

703. The attack was and remains systematic in that it is pursuant to the EU’s organizational and Italy’s state policies to contain the flux of migrants from Libya. The plan commands an operational pattern of preventing rescue by non-LYCG vessels for one cruel and unlawful purpose: to ensure disembarkation will take place in Libya.

704. This pattern in which rescue NGOs are prevented from and EU units are refraining from conducting rescue and instead LYCG is used to deport the fleeing migrants, establishes the organized character of the alleged crimes against migrants in Libya.<sup>615</sup>

705. The policy vis-à-vis migrants intercepted by LYCG is highly coordinated, involving various types of actors, spanning over a period of several years, and has successfully accomplished its objective to stem migration flows from Libya, with about 90% drop in arrivals – **but not of crossings**, making the Mediterranean Sea the largest contemporary cemetery of the world.

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<sup>610</sup> *The Prosecutor v Dario Kordić and Mario Čerkez*, Appeals Chamber, “Judgement”, 17 December 2004, IT-95-14/2-A§94; *The Prosecutor v Tihomir Blaškić*, Appeals Chamber, “Judgement”, 29 July 2004, IT-95-14-A, §101; “Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, Pre-trial Chamber II, 31 March 2010, ICC-01/09, §96; *The Prosecutor v Laurent Gbagbo*, Pre-Trial Chamber I, “Decision on the confirmation of charges against Laurent Gbagbo”, 12 June 2014, ICC-02/11-01/11, §223.

<sup>611</sup> *The Prosecutor v Jean-Paul Akayesu*, Trial Chamber I, “Judgement”, 2 September 1998, ICTR-96-4-T, §580.

<sup>612</sup> See factual section §6, 20, 253, 330, and 487

<sup>613</sup> See factual section 2.4 detailing the conditions of detention in Libya.

<sup>614</sup> See §399.

<sup>615</sup> See section 1.3. in the present communication

706. Furthermore, the population and territorial spread of EU's 2<sup>nd</sup> policy encompasses a large territorial area, impacts a substantial population, and reveals an identical pattern of response to shipwrecks in the entire Central Mediterranean.

707. The EU 2<sup>nd</sup> policy to push-back civilians attempting to leave Libya, orchestrated at the highest levels of government and requiring considerable funds, is a key component of both EU and Member States' official migration policy.

708. The prohibited acts committed as part of the EU's 2<sup>nd</sup> Policy are thus by no means isolated or random. They are the direct and necessary consequences of a policy imposing a migrants' maritime blockade, which is in grave breach of maritime and human rights law.

### **Directed against any civilian population**

709. The Rome Statute requires that the concerned acts be 'directed against'<sup>616</sup> any civilian population'. Here, migrants risking their lives in an attempt to flee Libya between 2015-2019 are the civilian population against which the attack is directed.

710. For the purposes of Article 7, a civilian population can be "of any nationality, ethnicity or **other distinguishing features**" so long as the attack is directed **primarily against them** and so long as they are not a "randomly selected group of individuals."<sup>617</sup>

711. The requirement is to establish that enough individuals were targeted in the course of the attack, or that the attack was directed against a defined group, rather than against a limited and randomly selected number of individuals.<sup>618</sup>

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<sup>616</sup> As per the definition of "directed against" set out in *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeals Chamber, "Judgment", 12 June 2002, IT-96-23 & IT-96-23/1-A, §90.

<sup>617</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Pre-Trial Chamber, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, ICC-01/05-01/08, §76-77. See also *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeals Chamber, "Judgment", 12 June 2002, IT-96-23 & IT-96-23/1-A at § 90: "[T]he use of the word 'population' does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian 'population,' rather than against a limited and randomly selected number of individuals." *Situation in the Central African Republic, in the case of the Prosecutor v Jean-Pierre Bemba Gombo*, "Decision on the Confirmation of Charges", 30 September 2008, ICC-01/04-01/07, § 399;

*Situation in the Republic of Kenya in the case of the Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, "Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, ICC-01/09-02/11, 23 Jan. 2012, § 110; *The Prosecutor v Duško Tadic*, T Chamber, "Judgement", 7 May 1997, IT-94-1-T, §635

<sup>618</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeals Chamber, "Judgment", 12 June 2002, IT-96-23 & IT-96-23/1-A, §90; *The Prosecutor v Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, ICC-01/05-01/08, §76-77

712. In the present case, the EU's 2<sup>nd</sup> policy targets a deliberately selected group of civilians with distinguished features: individuals fleeing Libya. An extremely vulnerable civilian and diverse population that presents no threat or danger, is unarmed, is not combatants, does not take any part in hostilities and is composed of individuals with no other common characteristic other than their desire to avoid violence.<sup>619</sup>

713. The EU's 2<sup>nd</sup> policy targets this population by commanding the LYCG to intercept, *refouler*, detain and, upon disembarkation, expose this population to various atrocious crimes. This group of individuals is not random. The attack is '*directed*' against that population, that has been defined and categorized as such for political gain as we have shown above, in that it is the primary target thereof.

714. In fact, it is the only population existing in the concerned zone '*against*' which EU and Member States are operating jointly with and through the LYCG. Finally, the attack is not incidental. Migrants fleeing Libya are intentionally targeted for political gain. They are by no means merely collateral damage.<sup>620</sup>

715. The attack is not limited in number: while it is not required that the *entire* population be targeted, the EU's 2<sup>nd</sup> policy is directed against virtually all migrants crossing the Mediterranean Sea from Libya to the EU since 2015. While not all of the population is intercepted by the LYCG – some are fortunate enough to be saved by rescue NGOs or other vessels – the entire population is *targeted*, of which a significant portion is intercepted: In June, July, August and September 2018, for example, 49%, 73.2%, 41.8% and 66.9% were respectively intercepted and deported back to Libya.<sup>621</sup>

### **Pursuant to an Organizational or State policy**

716. To qualify as an "organization" for the purposes of the "organizational policy" under Section 7(2)(a), an organization must have "the capability to perform acts which infringe on

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<sup>619</sup> *Situation in the Republic of Kenya*, Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", 31 March 2010, ICC-01/09, §82.

<sup>620</sup> *Prosecutor v Katanga & Chui*, Trial Chamber II, "Decision on an Amicus Curiae Application and on the Requete tendant a obtenir presentations des temoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorites neerlandaises aux fins d'asile", 9 June 2011, ICC-01/04-01/07-3003

<sup>621</sup> Italian Institute for International Political Studies (ISPI), Estimated Migrants Departures from Libya, Online – <https://docs.google.com/spreadsheets/d/1ncHxOHIx4ptt4YFXgGi9TIbwd53HaR3oFbrfBm67ak4/edit#gid=0>, last accessed 01/06/2019

basic human values.”<sup>622</sup> As demonstrated above, the EU and its Member States, along with the relevant agencies, easily meet this jurisprudential threshold, and are currently one of the most complex and developed power structure in the world.<sup>623</sup> Directed by the European Council and its guidelines, the European Commission delegated the implementation of these policies to EU agencies such as Frontex and sub-contractors like the LYCG.

717. In order to establish individual criminal liability of officials and agents, the specific interactions between the European commissioners, the European Council, the European Commission, the Council of the European Union, the European Parliament, the various EU and national agencies and of course the Libyan bodies involved, require in-depth investigation, one that only the Office of the Prosecutor of the International Criminal Court has the powers and means to conduct.

### **With Knowledge of the Attack**

718. Under the Rome Statute, *mens rea* is required not only with regard to the commission of the prohibited acts themselves, but also to have “knowledge” they are committed as part of the attack.<sup>624</sup> Here, the EU had full knowledge that the acts were committed as part of the attack, given that it was carried out pursuant to its own policy, as set out above.

719. EU agents were aware of the dire human rights situation and the conditions awaiting migrants sent back to Libya, as demonstrated by, amongst many other examples set out above, the statements of the Italian Italy’s deputy minister of foreign affairs, Mr. Mario Giro, in 2017 to the effect that “taking them [the migrants] back to Libya, at this moment, means taking them back to hell.”<sup>625</sup>

720. Legally, EU officials were at this stage aware of the ECHR’s 2012 decision in *Hirsi*,<sup>626</sup> in which the Court made it clear that the practice of push-back migrants back to Libya violated

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<sup>622</sup> *Situation in the Republic of Kenya*, Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, 31 March 2010, ICC-01/09, §90.

<sup>623</sup> See corresponding discussion in previous section 3.2.1 (EU’s 1st Policy)

<sup>624</sup> In line with the test for the nexus between the act and the attack set out in *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Appeals Chamber, “Judgment”, 12 June 2002, IT-96-23 & IT-96-23/1-A, §90.

<sup>625</sup> Marco Menduni, 6 August 2017, ‘Giro: “Fare rientrare quelle persone vuol dire condannarle all’inferno”’, *La Stampa*, online <https://www.lastampa.it/2017/08/06/italia/giro-fare-rientrare-quelle-persone-vuol-dire-condannarle-allinferno-SXnGzVlzftFI7fNGFCMADN/pagina.html>, accessed 31/05/2019.

<sup>626</sup> *Hirsi Jamaa and Others v Italy*, European Court of Human Rights, Grand Chamber, “Judgment”, 23 February 2012, 27765/09.

international refugee and human rights law, and in particular the customary principle of *non-refoulement*, prohibiting to return individuals to countries where they could be at risk.

#### 2.2.2.2 Underlying crimes

721. This section establishes the various crimes committed as part of the attack against migrants trying to escape Libya.
722. EU agents committed these crimes in complicity with Libyan militias' agents. Specifically, the EU funded, trained, equipped and otherwise supported the Libyan Coast Guard. The EU also commanded, coordinated, supervised and ultimately enabled most of the LYCG's interception operations. Had the EU and Italy not contracted with the GNA and provided the capacity-building means discussed in the factual section, the LYCG would have never been able to conduct a single interception operation. Consequently, the commission of the subsequent crimes in Libya would have been prevented.
723. Beyond the crime of deportation, the involvement of EU agents extends to the crimes committed as a consequence of the said deportation, first and foremost because EU agents had full knowledge that the push-back is routinely followed, upon disembarkation, by the commission of the atrocious crimes listed hereunder.
724. The attack of widespread and systematic *refoulement* by the LYCG is at the core of and pursuant to the EU's 2<sup>nd</sup> policy. It is accompanied by the awareness of the crimes described below, which are committed as part of this attack.
725. The extent of involvement and awareness should be determined on a casuistic basis (as opposed to the *situation* as a whole) and should draw on the applicable mode of liability, which will be analyzed in the below.
726. The multiple prohibited acts and omissions may be divided into two categories: the *first* are crimes committed between interception and disembarkation, jointly with or through the LYCG; the *second* are crimes taking place after disembarkation, typically committed in detention compounds, by co-perpetrators that may include militias other than the LYCG.
727. The first category of prohibited acts and omissions includes but is not limited to death caused as a result of refraining from conducting rescue operations (murder), violence exercised

in the course of, or that is an inherent part of, the *refoulement* (torture and other inhuman acts) and detention on board of LYCG vessels (imprisonment).

728. In the context of the EU's 2<sup>nd</sup> Policy, however, the present communication focuses on the second category of crimes, namely on crimes committed upon disembarkation in Libya, predominantly those which were committed in detention camps, torture houses and other places of detention in Libya, where the deportees are routinely abducted by the LYCG and its allies.<sup>627</sup>

729. As already established, EU agents were aware of *all* the crimes discussed below.<sup>628</sup> For example, as set out above, European Union officials were aware as early as 2012 of the unacceptable human rights conditions in Libya.<sup>629</sup> Numerous Inter-Governmental bodies including the UN, UNSC, UNHCR, OHCHR, ICC (OTP) and the IOM, as well as civil society organizations, publicly reported the inhumane situation in Libya, and the atrocious crimes committed against migrants, including those implicating the LYCG.

730. Amongst other examples, in September 2017, a spokesperson for the European Union External Action Service declared that they were “completely aware of the unacceptable, often scandalous, even inhumane conditions in which migrants are treated in reception camps in Libya”.

731. In a 2017, the European Union Border Assistance to Libya reported on the human rights violations occurring in Libyan detention centers, including torture, sexual abuses, forced prostitution, slavery and ill-treatment.<sup>630</sup>

732. Despite being aware of these atrocities, the European Union continued to work with, fund, instruct and otherwise work in conjunction with the Libyan Coastguard in order to ensure the interception of boats carrying asylum seekers attempting to cross the Mediterranean, and the subsequent return of such asylum seekers to Libya, where they would be exposed to the crimes detailed below.

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<sup>627</sup> See section 1.4 of the present communication

<sup>628</sup> See paragraphs 381-388 of the present communication

<sup>629</sup> See paragraph 374 of the present communication

<sup>630</sup> See paragraphs 381-388 of the present communication for a full description of the facts establishing the European Union's knowledge of the ongoing crimes being committed in Libya.

**i. Persecution: EU and Member States’ officials and agents knowingly committed the crime of persecution within the meaning of Article 7(1)(h) of the Rome Statute:**

733. Persecution is the typical embodiment of mass and systematic policies of inhumane treatment, and is understood to reflect the multiple infringement of fundamental rights, especially of individuals perceived as ‘foreign bodies.’<sup>631</sup>

734. Persecution is at the core of the EU’s 2<sup>nd</sup> policy: a systematic targeting of the most vulnerable civilian populations, at their most helpless moment: crossing the Mediterranean in overcrowded boats, facing real risk of death by drowning. Persecution in this context includes refraining from rescuing, causing either death or deportation coupled with detention, and subsequently exposing the migrant population to other forms of crimes against humanity as analyzed below.

735. The objective of the persecution is to stem migration flows from Libya, no matter the costs, and above all to ensure that death and other forms of suffering would not happen in the Mediterranean – as was the case during the **EU’s 1<sup>st</sup> Policy** – but in Libya, out of sight for Europeans and *ostensibly* out of the reach of international law.

736. For the crime of persecution, the ICC’s Elements of Crimes provides the following elements:<sup>632</sup>

- I. The perpetrator **severely deprived**, contrary to international law, one or more persons of **fundamental rights**.
- II. The perpetrator targeted such person or persons by **reason of the identity of a group or collectivity or targeted the group or collectivity as such**.
- III. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or **other grounds that are universally recognized as impermissible** under international law.
- IV. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.

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<sup>631</sup> *The Prosecutor v. Duško Tadic*, T Chamber, “Judgement”, 7 May 1997, IT-94-1-T, §697

<sup>632</sup> ICC Elements of Crimes, p. 10

- V. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- VI. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Element one: Severely deprived, contrary to international law, one or more persons of fundamental rights.

737. According to international criminal law jurisprudence, a wide range of acts may constitute persecution, however, they must be of a similar gravity to other prohibited acts under crimes against humanity. Persecutory acts may include legislative, executive, administrative and contractual acts that create a system of cruel, inhumane degrading and discriminatory treatment.
738. Here, the EU and its Member States created such legal apparatus to implement their immigration policy, for example by concluding MoUs with the GNA, by having the EU Operation Sophia train the LYCG, by allowing Member States (Italy, Malta, France, the Netherlands) to provide boats that were used to deport and detain migrants, by having Italian operation Mare Sicuro use its military vessels in order to provide communication and other capacities to the LYCG while docking at Libyan ports and territorial waters, and so on.<sup>633</sup>
739. Refraining from rescuing persons in life-risking situations, unlawful *refoulement*, complicity of arbitrary indefinite detention, torture and other forms of abuse, trafficking and forced labor, penalization of *prima facie* refugees: all of these acts and omissions amount to a severe deprivation of fundamental rights.<sup>634</sup>

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<sup>633</sup> See factual 2.3.3 of the present communication

<sup>634</sup> International Military Tribunal (Nuremberg Judgment), Judgment and Sentences (Nuremberg Judgment), 1 October 1946, (1947) 41 AJIL. 172, 247 (beating and torture identified as persecution); *Prosecutor v Kordic*, Appeals Chamber, “Judgement”, 17 December 2004, IT-95-14/2-A, § 106; *Prosecutor v Stakic*, Appeals Chamber, “Judgement”, 22 March 2006, IT-97-24-A, §105–09. (upholding persecution conviction for torture); *Prosecutor v Tihomir Blaškić*, Trial Chamber I, “Judgement”, 3 March 2000, IT-95-14, §226; *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Jospović, Dragan Papić and Vladimir Sentić*, Trial Chamber II, “Trial Judgement”, 14 January 2000, IT-95-16 §600-05; *Prosecutor v Naletilic’*, Trial Chamber, “Judgement”, 31 March 2003, IT- 98-34-T, § 682. (Mar. 31, 2003); *The Prosecutor v Dragan Nikolić*, Trial Chamber, “Judgement”, 18 December 2003, IT-94-2, §119 (conviction of persecution for torture); *Prosecutor v Simicc*, Appeals Chamber, “Judgement”, 21 November 2006, IT-95-9-A, § 106 (for persecution based on unlawful arrests and detention); *Prosecutor v Tihomir Blaškić*, Trial Chamber, “Judgement”, 3 March 2000, IT-95-14, §234 (“The unlawful detention of civilians, as a form of the crime of persecution, means unlawfully depriving a group of discriminated civilians of their freedom . . . unlawfully depriving a group of discriminated civilians of their freedom’ is unlawful detention amounting to persecution.”); *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Jospović, Dragan Papić and Vladimir Sentić*, Trial Chamber II, “Trial Judgement”, 14 January 2000, IT-95-16, §629 (‘organised detention’); *Prosecutor v Naletilic’*, Trial Chamber, “Judgement”, 31 March 2003, IT- 98-34-T, §

740. Whilst the EU and its Member States are all parties to various international and regional instruments in which these fundamental rights are secured, they violate them or were accomplices to these violations in order to achieve their political goals.<sup>635</sup>

Element Two: Targeted by Reason of the Identity of the Group or Collectivity; or the Group or Collectivity was targeted as such

741. This criterion reflects the discriminatory intent that is required for the crime of persecution. While persecutory acts may be committed against individuals, this is by virtue of their belonging to a group or collectivity. Either the individuals affected are treated in a discriminatory fashion because of their belonging to this group or the group as such is targeted.<sup>636</sup>

742. In the present case, as explained, it is both: individuals targeted by the EU come from heterogenic backgrounds, nationalities, races, religions and so on. They are dehumanized and reduced to a single category of ‘migrants’ for the purpose of targeting them, based on their presumed intention to seek safe haven in Europe.

743. Preventing individuals from exercising their right to seek asylum, to save their lives, to secure their liberty regardless their social condition, is a ground universally and sufficiently recognized to be impermissible, not only by civilization purposes, but by law.

744. Whether defined objectively or subjectively, i.e based on the subjective notions of the perpetrators, migrants in need of international protection in distress at sea are identifiable as a

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642 (‘organised detention of civilians’); *Prosecutor v Milan Babic*, Trial Chamber, “Judgement”, 29 June 2004, IT-03-72-S, §50 *France and ors v Göring (Hermann) and ors*, Nuremberg tribunal, “Judgment and Sentence”, 1946, 22 IMT 203, 41 AJIL 172 (convicting Von Schirach for deportation of Jews from Vienna as a crime against humanity); *Attorney General v Eichmann*, Supreme Court of Israel, 29 May 1962, 36 ILR 277); *Prosecutor v Stakic*, Appeals Chamber, “Judgement”, 22 March 2006, IT-97-24-A, §105 (as a crime against humanity); *The Prosecutor v. Blagoje Simić*, Appeals Chamber, “Judgement”, 28 November 2006, IT-95-9-A; See *Prosecutor v Tihomir Blaškić*, Appeals Chamber, “Judgement”, 29 July 2004, IT-95-14, §155 (inhumane treatment and deprivation of adequate food and water); *The Prosecutor v Dragan Nikolić*, Trial Chamber, “Judgement”, 18 December 2003, IT-94-2, §119 (conviction of persecution for subjecting victims to inhumane conditions); *Prosecutor v Vidoje Blagojević and Dragan Jokić*, Trial Chamber I, “Trial Judgement”, 17 January 2005, IT-02-60 §620 (finding that cruel and inhumane treatment constitutes persecution).

<sup>635</sup> See, in general and for example, Charter of Fundamental Rights of the European Union (2000); United Nations Convention against Torture (1987), International Covenant of Civil and Political Rights (1966), European Convention on Human Rights, (1953), or the Convention on the Rights of the Child (1990).

<sup>636</sup> *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Jospović, Dragan Papić and Vladimir Santić*, Trial Chamber II, “Trial Judgement”, 14 January 2000, IT-95-16

§ 773 (“Persecution can consist of the deprivation of a wide variety of rights, whether fundamental or not, derogable or not.”). See *Prosecutor v Tihomir Blaškić*, Trial Chamber I, “Judgement”, 3 March 2000, IT-95-14, §235 (“[T]he perpetrator of the acts of persecution does not initially target the individual but rather membership in a specific . . . group.”).

separate group, as they nonetheless were englobed in the widespread targets of EU's immigration policy, through its mercenaries and militias such as the LYCG.<sup>637</sup>

745. The discriminatory element means that only due to their status, or more accurately lack of status, this group is subjected to attack which includes deportation, detention, abuse and mistreatment and sometimes also death. Only because the group members attempted to exit a warzone were they subject of the attack.<sup>638</sup>

Element three: Targeting was on Political, Racial, National, Ethnic, Cultural, Religious, Gender, or Other Grounds that are Universally Recognized as Impermissible under International Law

746. International criminal law jurisprudence has acknowledged that the grounds for targeting the persecuted group can be negative, at least specifically in the context of nationality.<sup>639</sup> Being an alien not in country of habitual residence, being asylum seeker or stateless person is not a permissible ground for discrimination under international law.

747. The customary and non-derogative nature of fundamental rules of the protection of refugees and asylum seekers, such as the rule of non-refoulement and the prohibition on penalizing their irregular entry or stay (and in this case, even their *exit*) – reflects the universality of the impermissibility of such grounds of discrimination.

Element Four: The Conduct was Committed in Connection with Other Prohibited Acts

748. This communiqué provides evidence for various crimes against humanity within the meaning of the Statute including: deportation, imprisonment, enslavement, torture, rape and other inhuman acts. As these acts were committed with discriminatory intent, they rise to the crime of persecution as indicated under Article 7 of the ICC.

Element five: The conduct was committed as part of a widespread or systematic attack directed against a civilian population

749. As discussed above, the persecutory conduct is by definition committed as part of the said widespread and systematic attack.

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<sup>637</sup> Triffterer, O. and Ambos, K., 2016, *Rome statute of the international criminal court: a commentary note* 73, 3<sup>rd</sup> Edition

<sup>638</sup> K. Ambos & S. Wirth, 'The Current Law of Crimes Against Humanity,' 13 CRIM. L. F. 1, 82 (2002).

<sup>639</sup> *Prosecutor v Miroslav Kvočka*, Trial Chamber I, "Judgement", 2 November 2001, IT-98-30/I TC § 195

Element Six: The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

750. Persecution requires a twofold *mens rea*: *First*, awareness of the underlying acts that constitute fundamental violations of human rights is required. Accordingly, it is governed by the general requirement of intent and knowledge.<sup>640</sup> This general requirement covers intentional acts ranging from legislation and administrative measures to direct and concrete physical violence in violation of fundamental human rights.

751. *Second*, perpetrators must know their wrongdoing is part of an attack pursuant to EU organizational and Member States' immigration policy in the Central Mediterranean.

752. It should be noted in this context, that the requirement is *not* to have an intention to persecute. Surely, not all EU agents had the intention to commit the crimes *in a persecutory manner* or to persecute refugees as a consequence of their policy.

753. The threshold is more limited: they must merely have the intention to implement the overall attack against that civilian population. EU agents were fully aware of the overall characteristics of the EU's 2<sup>nd</sup> immigration policy, which have been qualified here as constituting an attack.

**ii. Deportation or forcible transfer: European Union agents knowingly deported and/or forcibly transferred a civilian population within the meaning of article 7(1)(d) of the Rome Statute**

754. Deportation or forcible transfer is defined in article 7(2)(d) as “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”

755. The Rome Statute Elements of Crimes isolate five elements of this crime:

- I. The perpetrator deported or **forcibly transferred, without grounds permitted under international law**, one or more persons to another State **or location**, by expulsion or other coercive acts.

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<sup>640</sup> Article 30(1) of the Rome Statute

- II. Such person or persons were **lawfully present in the area** from which they were so deported or transferred;
- III. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence;
- IV. The conduct was committed as part of a widespread or systematic attack directed against a civilian population;
- V. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>641</sup>

756. The distinction between deportation and forcible transfer has been treated by the ICC Pre-Trial Chamber, establishing that deportation is to be distinguished from forcible transfer as it requires a transfer from one State to another, whilst forcible transfer requires a transfer from one location to another.<sup>642</sup>

757. ICC Pre-Trial chambers further established that deportation or forcible transfer were an open conduct crime”, leaving open grounds on the determination of the objective elements of the crime<sup>643</sup>.

758. While forcible is not restricted to physical force, this case concerns the exercise of such force immediately upon interception persons in distress at sea. The displacement is also coerced in the sense that the alternative was essentially death by drowning.

Element one: The deportation or forcible transfer from another location of one or more persons in violation of international law

759. As explained by the ICTY, ‘the displacement of persons is only illegal where it is forced, i.e., not voluntary.’ As the ICTY further provides, “an apparent consent induced by force or threat of force should not be considered real consent.”<sup>644</sup>

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<sup>641</sup> ICC Elements of Crimes, p. 6-7.

<sup>642</sup> See Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, ICC-RoC46(3)-01/18, 6 september 2018, paragraphs 50 and following and “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 21 January 2012, ICC-01/09-01/11-373.

<sup>643</sup> “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 21 January 2012, ICC-01/09-01/11-373, para 242 and following.

<sup>644</sup> *Prosecutor v Blagoje Simić et al.*, Trial Chamber, “Trial Judgement”, 17 October 2003, It-95-9, § 125; *See also Prosecutor v Milorad Krnojelac*, Trial Chamber II, “Trial Judgement”, 15 March 2002, IT-97-25, § 475, fn. 1435.

760. As set out in the factual section, the Libyan Coastguard, as a matter of policy, **forcibly transfers** all asylum seekers intercepted in various locations in the Mediterranean Sea<sup>645</sup> - be it international waters or Libyan territorial waters - **to other locations** in Libyan soil.<sup>646</sup>
761. Once in Libya, they are forcibly transferred from disembarkation points directly to detention camps or private houses and farms. This forced transfer is **without grounds permitted under international law**.
762. The policy of collective and forced expulsion is unlawful under several international and regional instruments.<sup>647</sup> This is even more so when the destinations of these expulsions are unsafe ports, also constituting a violation of the laws of the sea.<sup>648</sup>
763. Italy's push-back policy to Libya has already been declared to be unlawful under international human rights law in the case *Hirsi v. Italy* from the European Court of Human Rights.<sup>649</sup>
764. Under *Hirsi*, the ECHR held that international obligations continue to apply during maritime operations, that the exercise of effective control triggers jurisdiction and subsequent duties and obligations over the rescued persons, that Libya – already during the Gaddafi's era – cannot be considered as a safe country for deportation and that, consequently, Italy's push-back policy constituted a violation of the prohibition of collective expulsion and inhumane and degrading treatment.<sup>650</sup>
765. Rather than respect the ECtHR judgment, and in order to avoid overt violations of the *Hirsi* decision, the EU refined its practice of push-back *by proxy* through the EU's 2<sup>nd</sup> policy. In this context, the EU knowingly and systematically breached customary principles of *non-*

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<sup>645</sup> No requirement that 'presence' extends to a certain duration. See *Prosecutor v Vujadin Popović et al.*, Trial Chamber, "Trial Judgement", 10 June 2010, IT-05-88, § 899–900

<sup>646</sup> See factual section 2.3.3

<sup>647</sup> Collective expulsions of non-citizens are impermissible under Article 13 of the International Covenant on Civil and Political Rights and article 4 of the 4<sup>th</sup> protocol of the European Convention on Human Rights. In both the international and regional instrument, the requirement of personal decision precludes any measure of collective or mass expulsion. See *Sharifi and Others v. Italy and Greece*, European Court of Human Rights, "Chamber Judgement", 21 October 2014, 16643/09

<sup>648</sup> Paragraph 6.12 and 6.17 of the Resolution MSC.167(78): "Guideline on the Treatment of Persons Rescued at Sea" – adopted 20 May 2004 and see also SOLAS convention

<sup>649</sup> *Hirsi Jamaa and Others v Italy* (27765/09), p. 73, online, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-109231%22%7D>, accessed 19/05/2019

<sup>650</sup> *Hirsi Jamaa and Others v Italy* (27765/09), p. 73, online, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-109231%22%7D>, accessed 19/05/2019

*refoulement*, which prohibits deportation towards a state where there is a real risk of serious violations of human rights.

766. Set out in Article 33 of the Refugee Convention, the principle of *non-refoulement* is considered today a principle of customary international law. Originally applying only to refugees within the meaning of Article 1(a)(2) of the Refugee Convention, it is widely accepted today this principle covers all persons including asylum seekers, let alone when the concerned population is a particular social group that is under a threat of persecution.<sup>651</sup> The ICC itself has acknowledged the principle of non-refoulement.<sup>652</sup>

767. The principle of non-refoulement cannot be derogated from when there is a real risk of torture, inhuman or degrading treatment.<sup>653</sup> In the present context, as has been shown, there is a direct risk for asylum seekers, who may be exposed to killing, detention, torture and other radical forms of inhumane treatment.

768. Beyond the principle of freedom of navigation, the EU's 2<sup>nd</sup> policy to refrain from conducting an SAR mission and to instead let the LYCG intercept migrant boats in distress at sea is was and remains a cynical exploitation of helpless persons in life-risking situation and a violation of the duty to render assistance by the closest competent boat.

769. Finally, using the LYCG to ensure that disembarkation would take place in Libya violated and violates EU's duty to ensure disembarkation in safe ports under the laws of the sea.<sup>654</sup> If the 2012 *Hirsi* decision was not enough, as it was based on events that took place during the Gaddafi regime, in 2015 the UNHCR reiterated that Libya was unsafe, calling all countries not only to refrain from disembarking migrants in Libyan ports, but to facilitate their exit by granting access to their own territories.<sup>655</sup>

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<sup>651</sup> Chetail, Vincent, Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law (September 17, 2012). Human Rights and Immigration, Collected Courses of the Academy of European Law, pp. 19-72, R. Rubio-Marin, ed., Oxford: Oxford University Press, 2014.; Criminal Justice, Borders and Citizenship Research Paper No. 2147763. Available at SSRN: <https://ssrn.com/abstract=2147763>

<sup>652</sup> *Prosecutor v Katanga & Chui*, Trial Chamber II, , "Decision on an Amicus Curiae Application and on the Requete tendant a obtenir presentations des temoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorites neerlandaises aux fins d'asile", 9 June 2011 ICC-01/04-01/07-3003 §64

<sup>653</sup> As torture is a peremptory (*jus cogens*) norm.

<sup>654</sup> The United Nations Convention of the Law of the Seas (UNCLOS)

<sup>655</sup> UNHCR Position on Returns to Libya, Update 1, October 2015, paragraph 32 <https://www.refworld.org/pdfid/561cd8804.pdf>, confirmed in September 2018, paragraph 41 <https://www.refworld.org/pdfid/5b8d02314.pdf>.

770. Even today, as hostilities escalate and migrants detained in Libya are fired upon, forced to participate in fighting, suffering from lack of food, water and medicine – the UNHCR is actively engaged in evacuating migrants from Libya.<sup>656</sup>

771. For these reasons the removal of persons fleeing Libya and their **forced transfer** to Libyan soil is with **no permitted ground** and prohibited under international law.

Element two: Lawful presence in the area at time of transfer

772. The asylum seekers in question were lawfully present in the area from which they were forcibly transferred – be it Libyan waters or high seas - in that they were fleeing persecution and seeking asylum, as permitted under international law.

773. The presence of the asylum seekers and their decision to flee is protected under international refugee and human rights law, regardless of location. Specifically, the deportees had a right under international law to exit Libya.<sup>657</sup>

774. Given EU’s effective control over the situation at the time of interception, the deportations violated asylum seekers’ most fundamental, internationally protected human rights: dignity, life, liberty, physical and mental health, and their right to exit and seek asylum.

775. Furthermore, insofar as migrants were located and intercepted on high seas, they enjoyed the principle of the freedom of navigation, a principle of both treaty and customary international law.<sup>658</sup>

776. Even when the asylum seekers are located in Libyan territorial waters, the lawfulness of their presence is determined by international law: by definition, asylum seekers’ entry and stay are lawful and cannot be penalized – which overrules any domestic law with respect to the civilian population at hand.

777. Had it been otherwise, and would the domestic determination prevail, the crime of deportation of ‘unlawfully’ present individuals could be conducted with impunity, and,

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<sup>656</sup> UNHCR, 2019, “UNHCR evacuates hundreds of detained refugees in Libya to safety”, online, <https://www.unhcr.org/news/press/2019/4/5cc09a824/unhcr-evacuates-hundreds-detained-refugees-libya-safety.html>, accessed 19/05/19 and UNHCR, 2019, “UNHCR evacuates refugees in Libya to Niger amid Tripoli fighting”, online, <https://www.unhcr.org/news/press/2019/4/5cb8a06e7/unhcr-evacuates-refugees-libya-niger-amid-tripoli-fighting.html>, accessed 19/05/2019

<sup>658</sup> see, The United Nations Convention of the Law of the Seas (UNCLOS), article 87(1)(a).

tautologically, asylum seekers would not be protected by the principle of non-refoulement and the prohibition on penalization for irregular entry and stay of asylum seekers.<sup>659</sup>

Element three: Perpetrators had awareness of factual circumstances establishing lawful presence of population

778. The EU is an extremely efficient bureaucratic system with a great level of respect for the rule of law. Undoubtedly, its institutions did study, evaluate and acknowledge the legality of the presence of the population. As many public declarations and documents produced in this communication attest, that the situation remained under careful analysis during the whole period, including by the legal services of the organization.

Element four: The conduct was committed as part of a widespread or systematic attack

779. Element four can be established with reference to the contextual section above. The European Union's conduct with respect to the interception operations of 'migrants' on the Mediterranean formed part of the wider "attack", as it has been defined in the present communication.

Element five: Perpetrators have the requisite knowledge

780. As discussed previously, European Union officials and agents are aware of the factual circumstances surrounding the deportation and forcible transfer of asylum seekers. The EU and its state actors are one of the best-informed organizations in the world, and the circulation of the information produced by this organized structure, within its administrative, executive and political institutions, has set an example all over the world. The media environment within the EU is one of the most extensive in the world and produced an intensive coverage of the situation, publishing tens of thousands of articles on the matter, thus granting a considerable circulation of information. It was thus impossible to ignore or be unaware of the situation.

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<sup>659</sup> see Articles 31 and 33 of the The Convention Relating to the Status of Refugees (1951); See also Chetail, Vincent, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law* (September 17, 2012). Human Rights and Immigration, Collected Courses of the Academy of European Law, pp. 19-72, R. Rubio-Marin, ed., Oxford: Oxford University Press, 2014.; Criminal Justice, Borders and Citizenship Research Paper No. 2147763. Available at SSRN: <https://ssrn.com/abstract=2147763>

**iv. Unlawful imprisonment: European Union officials and agents knowingly caused the imprisonment of members of a civilian population in contravention of the fundamental rules of international law, within the meaning of article 7(1)(e) of the Rome Statute:**

781. European Union officials and agents committed the act referred to in article 7(1)(e), namely “imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law”, which, in the context set out above, constitutes a crime against humanity. The Rome Statute Elements of Crimes isolate five elements of this crime:

- I. “The perpetrator **imprisoned** one or more persons or otherwise severely deprived one or more persons of physical liberty;
- II. The gravity of the conduct was such that it **was in violation of fundamental rules of international law**;
- III. The perpetrator was aware of the factual circumstances that established the gravity of the conduct;
- IV. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
- V. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread systematic attack directed against a civilian population.”<sup>660</sup>

Element one: Imprisonment or other severe deprivations of liberty

782. The conduct of European Union officials and their agents has led to the imprisonment or deprivation of asylum seekers’ physical liberty. This first element contains two sub-elements, namely that the perpetrator has (i) imprisoned one or more persons, or (ii) otherwise severely deprived one or more persons of their physical liberty.

783. Together these two elements cover many different forms of detention, such as detention in ghettos or concentration camps. The ICTY has held that “**any form of arbitrary physical deprivation of liberty** of an individual may constitute imprisonment”<sup>661</sup> and that deprivation

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<sup>660</sup> ICC, Elements of Crimes, p. 5

<sup>661</sup> *Prosecutor v Milorad Krnojelac*, Trial Chamber, “Judgment”, 15 March 2002, IT-97-25-T, §112.

is “arbitrary” when it occurs “**without due process of law**” and when prisoners **are deprived of “access to the procedural safeguards regulating their confinement”**.<sup>662</sup>

784. Detention may also be considered arbitrary when the *conditions* of detention amount to torture or cruel, inhuman or degrading treatment as in the present case. The formal status of the detention or the nature of the facility where prisoners are held is not relevant *per se*, and a wide range of types and conditions which deprive liberty may constitute imprisonment within the meaning of the statute.

785. The key requirement for qualifying deprivation of liberty is that detainees are unable to leave. This detention condition is nonetheless insufficient *per se* to qualify it as severe, and furthermore as a crime against humanity.

786. In determining whether a deprivation of liberty is “severe,” the length and conditions of detention, evidence that victims were cut off from the outside world, and evidence that detention was part of a series of repeated detentions have been considered as relevant factors.

787. The ICTY noted for example that the lack or insufficient supply of water, food and medical care, physical and sexual violence, unhygienic conditions, overcrowding facilities as factors of severity, all of which are applicable in the present case.<sup>663</sup>

788. In the present case, the factual section of this communication provides well-documented evidence of individuals being imprisoned or otherwise severely deprived of their liberty, with neither due process of law nor procedural safeguards regulating their confinement therein. This includes both official GNA’s prisons and informal places of detention operated by militias or other NSAGs.

789. The process of individuals who are intercepted on the Mediterranean Sea and are returned to Libya is systematic and entirely arbitrary. Libyan law criminalizes undocumented immigration and does not specify a maximum period of detention for such crime. Most of individuals targeted through these processes are *de facto* imprisoned by militias, as the expert opinion annexed to this communication attests.

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<sup>662</sup> *Prosecutor v Dario Kordić and Mario Čerkez*, Trial Chamber, “Judgment”, 26 February 2001, IT-95-14/2-T, §279 and following.

<sup>663</sup> *Prosecutor v Tihomir Blaškić*, Trial Chamber, “Judgement”, 3 March 2000, IT-95-14-T, § 679, 681, 692 693; *The Prosecutor v Blagoje Simić*, Trial Chamber, “Judgement”, 17 October 2003, IT-95-9-T, § 775; *Prosecutor v Kordić & Čerkez*, Trial Chamber III, “Judgement”, 20 August 2006, IT-95-14, § 774, 777, 790, 795;

790. Detention in Libyan centers is therefore “prolonged” and “arbitrary” under ICL standards, let alone given their ‘concentration camps-like conditions, as EU Member State’s official describe them in an internal cable.<sup>664</sup>

791. As set out above, the European Union and leaders of its Member States were fully aware that individuals who were returned to Libya would be placed in detention camps or otherwise be deprived of their physical liberty.

Element two: In violation of the fundamental rules of international law

792. EU’s 2<sup>nd</sup> policy enabled the arbitrary imprisonment or severe deprivation of individuals, in violation of fundamental rules of international law. “Fundamental” rules are well-established legal norms, including norms contained in treaties or custom. They constitute the basic, essential rules governing the deprivation of liberty. The rules of international law relating to the rights of detainees include rules in relation to the fairness of the *procedure* as well as rules relating to the *conditions* of imprisonment.<sup>665</sup>

793. The imprisonment and detention of individuals by militias for an indefinite time and outside any legal protection violates the fundamental right to be free from arbitrary detention. For example, it violates article 9 of the International Covenant on Civil and Political Rights (ICCPR) which provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him and that anyone arrested or detained on a criminal charge shall be brought promptly before a judge.<sup>666</sup>

794. The detention of individuals in Libya clearly intervenes in violation of these fundamental rules of international law, both because of the lack of any due process rights, and due to the conditions therein.

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<sup>664</sup> See paragraph 1 of the present communication

<sup>665</sup> Christopher K Hall “Article 7 Crimes against Humanity” in Otto Triffeter (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (C H Beck, 2 ed, 2008) 159, 201.

<sup>666</sup> ICCPR, article 9.

Element three: Perpetrator had requisite awareness of the factual circumstances that established the gravity

795. As established by the facts set out in this communication, European Union officials, agents and political leaders were fully aware of the lack of due process rights in the detention camps in Libya as well as of the human rights violations taking place within the camps.

796. The European Parliament, in a Resolution from November 2012, denounced the lack of legal protection for migrants in Libyan camps, which caused their detention to be indefinite.<sup>667</sup>

797. The High Representative for Foreign Affairs recognized in 2017 that the situation in the centers did not meet human rights standards, and a leaked report of EUBAM reported these facts in the same year<sup>668</sup>.

798. The Council of Europe, with Resolution 2215 (2018), even endorsed the dismantlement of the camps given the human rights abuses taking place within them. “Concerns” were also expressed by the Council of the EU (2018) and the European Union External Action Service (2018).

799. The degrading conditions were also acknowledged by individual actors, such as German Chancellor Angela Merkel, German ambassador in Niger Dr Bernd von Münchow-Pohl, French President Emmanuel Macron, the EU Migration Commissioner Dimitri Avamopoulos, and Dutch Minister of Foreign Trade and Development Cooperation Sigrid Kaag.<sup>669</sup>

Element four: The conduct was committed as part of a widespread or systematic attack

800. Element three can be established with reference to the contextual section above. The European Union’s conduct with respect to the interception operations of individuals on the Mediterranean formed part of the wider “attack”, as it has been defined in the present communication.

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<sup>667</sup> See para 374 of present communication.

<sup>668</sup> Council of the European Union, 2017, “*European External Action Service, EUBAM Libya Initial Mapping Report Executive Summary*”, online, <http://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf>, accessed 05/04/2019.

<sup>669</sup> See paragraphs 380-402 of the present communication

Element five: Perpetrators have the requisite knowledge

801. As discussed previously, European Union officials and agents are aware of the factual circumstances surrounding the unlawful imprisonment and deprivation of physical liberty of asylum seekers.

**iii. Murder: European Union officials and their agents knowingly caused the death of members of a civilian population, within the meaning of article 7(1)(a) of the Rome Statute**

802. European Union officials and their agents committed the act referred to in article 7(1)(a), namely “murder”, which, in the context set out above, constitutes a crime against humanity.

803. The Rome Statute Elements of Crimes isolate three elements of this crime:

- I. The perpetrator killed, **or caused the death** of, one or more persons;
- II. The conduct was committed as part of a widespread or systematic attack directed against a civilian population;
- III. The perpetrator knew that the conduct was part of, or intended the conduct to be part of, a widespread or systematic attack against a civilian population.<sup>670</sup>

Element one: Causing the deaths of one or more persons

804. Deaths of migrants in the detention centers has been widely reported. As the Prosecutor has noted in her statement to the UNSC, “**Crimes, including killings... are alleged to be commonplace**”.<sup>671</sup>

805. As set out in the factual section, there is evidence of detainees being routinely executed by the militias running the detention centers, simply because they cannot pay ransom and the militias want to make room for others who may provide a better source of income.<sup>672</sup>

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<sup>670</sup> ICC Elements of Crimes, p. 5.

<sup>671</sup> ICC, 2017, “Statement of ICC Prosecutor, Fatou Bensouda, before the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)”, online, <https://www.icc-cpi.int/Pages/item.aspx?name=161213-otp-stat-uns-c-darfur>, accessed 19/04/2019

<sup>672</sup> Wintour, P., 30 January 2017, “German report details Libya abuses amid pressure to stem migrant flows”, *The Guardian*, online, <https://www.theguardian.com/world/2017/jan/30/german-report-libya-abuses-pressure-migrant-flows>, accessed 12/04/2019.

806. Death from being beaten, from injuries related to torture, or from contracting fatal illnesses due to the dire hygiene conditions in the camps and lack of access to medical assistance, has also been documented.<sup>673</sup>
807. Furthermore, in numerous cases migrants drown in the course of LYCG interception. Often, migrants jump off the LYCG boat out of despair, essentially preferring suicide over falling again into the hands of the LYCG and other militias.<sup>674</sup>
808. In many cases, EU in complicity with LYCG caused the death of migrants due to the incompetent and violent manner in which LYCG conducted the operation.<sup>675</sup> There were also reports of LYCG leaving migrants in distress at sea to die.<sup>676</sup>
809. All these types of deaths fall under the definition of murder under article 7(1)(a) of the Rome Statute. European Union officials, therefore, caused the deaths of countless asylum seekers after being deliberately intercepted at sea, detained on board of LYCG vessels and ultimately sent back to detention camps or torture houses in Libya.
810. The European Union was fully aware of the consequences of their collaboration with the LYCG, namely that asylum seekers who were intercepted and returned to Libya would be *detained* in the said camps.<sup>677</sup>
811. UN bodies, civil society organizations, researchers and scholars, expert NGOs, and even European Union institutions themselves have published countless reports on the criminal nature of the militias composing what the EU refers as the LYCG, as well as the appalling conditions in the camps and the frequent deaths therein were legion.

Element two: The conduct was committed as part of a widespread or systematic attack

812. Element two can be established with reference to Section 3.2.2.1 above. The European Union's conduct with respect to the interception operations of asylum seekers on the Mediterranean formed part of the wider "attack", as it has been defined in the present communication.

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<sup>673</sup> See section 1.4

<sup>674</sup> See section 4.2, 13<sup>th</sup> Case

<sup>675</sup> See section 4.2

<sup>676</sup> See section 1.3.3 and 4.2

<sup>677</sup> See section 1.4 of the present communication

Element three: Perpetrators have the requisite knowledge

813. As previously discussed, European Union officials and agents are aware of the factual circumstances surrounding the killings of asylum seekers intercepted, detained and pulled-back by the LYCG, namely that the killing of the said civilian population is part of the attack as described above.

**iv. Enslavement: European Union officials and agents knowingly caused the enslavement of members of the civilian population within the meaning of article 7(1)(c) of the Rome Statute**

814. European Union officials and their agents committed the act referred to in article 7(1)(c), namely “enslavement”, which, in the context set out above, constitutes a crime against humanity.

815. Under article 7(2)(c) of the Rome Statute, enslavement is “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.”

816. According to the Elements of Crimes, the crime against humanity of enslavement has three general elements:

- I. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as **by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;**
- II. The conduct was committed as part of a widespread or systematic attack directed against a civilian population;
- III. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>678</sup>

Element one: The perpetrator exercised .... of powers attaching to the right of ownership

817. Upon interception by the Libyan Coast Guard, asylum seekers are detained and subsequently transferred to detention centers, or sent to private compounds, houses and farms,

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<sup>678</sup> ICC Elements of Crimes, p. 6.

where they are exposed to human trafficking and subjected to forced labor, torture, rape and sexual violence.<sup>679</sup>

818. There have also been instances of human “auctions” of the asylum seekers who are returned to Libya.<sup>680</sup> As described above, these auctions were termed by French President Macron as a crime against humanity to which, as president of the African Union argued, the EU is responsible for.<sup>681</sup>

819. In the present case, it can be shown with reference to the facts that European Union officials’ actions were part of the commission of the crime of enslavement, based on their involvement in LYCG *refoulement* and their foreknowledge of the atrocious consequences of this mass and forced expulsions’ industry.

820. Furthermore, while not the focus of the present submission and argument, there is credible evidence of EU and Member States funding – such as the EUTF and Fondo Africa, through third parties, to the operations of Libyan detention centers.<sup>682</sup>

821. As established above, sending tens of thousands of the most vulnerable persons back to Libya meant an expulsion to an area of armed conflict and detention in inhuman conditions, situation that has been described by the perpetrators themselves as a living hell for migrants.

822. One of the known consequences of such *refoulement* is the that of human trafficking. In Libya many of the deportees are sold, auctioned or forcibly transferred to locations in which they were subject to slavery in the form of ongoing forced labor and exploitation.

823. As set out above, the European Union and leaders of its Member States were fully aware that asylum seekers who were returned to Libya would face the very real possibility of being enslaved<sup>683</sup>.

824. The expert opinion and witness statement annexed to the present communication,<sup>684</sup> as well as the various reports discussed in the factual section,<sup>685</sup> support the ICC prosecutor’s statement

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<sup>679</sup> See section 1.4 of the present communication

<sup>680</sup> See section 1.4 of the present communication

<sup>681</sup> See paragraphs 307 and 308

<sup>682</sup> See section 1.1.1 of the present communication

<sup>683</sup> *V.F. v France*, European Court of Human Rights, “Decision on the Admissibility”, 29 November 2011, Application no. 7196/10 – Court ruled that France had the duty to not deport her as she was at risk of trafficking. *Rantsev v. Cyprus and Russia*, European Court of Human Rights, 7 January 2010

<sup>684</sup> See Annexes 5.1 and 5.3

<sup>685</sup> See section 1.4

according to which there are “**credible accounts that Libya has become a marketplace for the trafficking of human beings**”.<sup>686</sup>

825. To conclude, the enslavement of migrants pushed back to Libya typically includes human trafficking often forced labor, and sometimes the selling or lending of persons between criminal militias.

826. Once migrants are detained in Libya upon disembarkation, they are obliged to pay sums of money in exchange for their liberation or facilitation of their exit from Libya. The traffickers use torture and sexual abuse to extort family relatives. Until ransom is collected, migrants stay in the custody of their kidnappers.<sup>687</sup> Evidence collected indicates that some of the detainees are forced to work for third parties on a daily basis and the payment for their work is collected by their captors.<sup>688</sup>

827. As described above, the trafficking includes an absolute deprivation of liberty over significant period of time, and characterized by various forms of abuse such as sexual enslavement.<sup>689</sup>

828. Trafficking of persons intercepted and detained by the LYCG manifests ongoing ownership and exploitation. The power attaching to the right of ownership is exercised in the course of trafficking in persons including women and children, within the meaning of Article 7(2)(c) of the Rome Statute.

829. Finally, the enslavement often includes the selling, lending or bartering of the civilian population, while they are entirely stripped of their liberty, for the purposes of forced labor.

Element Two: The conduct was committed as part of a widespread or systematic attack

830. The European Union’s conduct with respect to the interception operations of asylum seekers on the Mediterranean formed part of the wider “attack”, as it has been defined in the above section.

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<sup>686</sup> International Criminal Court, 2017, “*Statement of the ICC Prosecutor to the UNSC on the Situation in Libya*,” online, <https://www.icc-cpi.int/pages/item.aspx?name=170509-otp-stat-lib>, accessed 11/04/2017

<sup>687</sup> See above section 1.4

<sup>688</sup> See above section 1.4

<sup>689</sup> See section 1.4 of this present communication

Element three: Mental element (*mens rea*)

831. European Union officials and agents were and are aware of the factual circumstances surrounding the enslavement of asylum seekers, as established in Section 2.4 of this brief.

**v. Torture: European Union officials and agents knowingly caused the torture of members of a civilian population within the meaning of article 7(1)(f) of the Rome Statute:**

832. “Torture” is defined in Article 7(2)(e) as “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.”

833. The Elements of Crimes isolate five elements

- I. The perpetrator inflicted severe **physical or mental pain or suffering** upon one or more persons;
- II. Such person or persons were **in the custody or under the control** of the perpetrator;
- III. Such pain or suffering did not arise only from, and **was not inherent in or incidental to, lawful sanctions**;
- IV. The conduct was committed as part of a widespread or systematic attack directed against a civilian population;
- V. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>690</sup>

Element one: Infliction of severe physical or mental pain or suffering

834. There is no strict definition of what constitutes “severe” physical or mental pain or suffering but it is accepted that it requires “an important degree of pain and suffering”.<sup>691</sup>

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<sup>690</sup> ICC Elements of Crimes p. 5

<sup>691</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08, § 19

835. Inflicting severe physical pain or suffering through act or omission may include various forms of physical violence which are common in Libyan detention centers and torture houses such as beating and hitting.<sup>692</sup>
836. Other forms of violence acknowledged as torture that apply to the Libyan detention camps are extreme sexual and physical assault, inadequate medical supplies, insufficient food and water, crowded conditions, sleep deprivation and declining mental and physical health, especially when inflicted upon extremely vulnerable population such as the attacked civilian population as defined in this case.<sup>693</sup>
837. As the factual section of this communication makes clear, torture is inflicted in various stages of the attack pursuant to the EU's 2<sup>nd</sup> policy to push-back migrants fleeing Libya in distress at sea.
838. Commanding the LYCG to conduct interception operations in lieu of rescue operations by a competent SAR vessel inflicts physical and mental pain and suffering, causing unnecessary death and injury.
839. Detention on board of LYCG vessels in many cases involves exercise of violence towards the survivors inflicts physical and mental pain and suffering. The deportation to unsafe Libyan points of disembarkation, back to the zone of armed conflict the deportees escaped from amounts to torture.
840. Moreover, the kidnapping and imprisonment *per se* as well as the inhumane conditions in detention camps and torture houses constitutes torture within the meaning of the Rome Statute.<sup>694</sup>

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<sup>692</sup> *The Prosecutor v Enver Hadžihasanović & Amir Kubura*, Trial Chamber, "Judgement", 15 March 2006, IT-01-47-T, § 1180, 1279-280, 1191, 1681; *The Prosecutor v. Mile Mrkšić et al.*, Trial Chamber, "Judgement", 27 September 2007, IT-95-13/1-T, § 526-28; *Prosecutor v Idriz Balaj et al.*, Trial Chamber, "Judgement", 3 April 2008, IT-04-84-T, 3 April 2008, § 187-88; *The Prosecutor v Dragan Nikolić*, Appeals Chamber, "Judgement", 4 February 2005, IT-94-2-A, § 40; *The Prosecutor v Milorad Krnojelac*, Trial Chamber, "Judgement", 15 March 2002, IT-97-25-T § 231, 233, 250, 255; *The Prosecutor v Jean-Paul Akayesu*, Trial Chamber, "Judgement", 2 September 1998, ICTR-96-4-T, § 411-13, 680; *Selmouni v France*, European Court of Human Rights, "Judgement (Merits)", 28 July 1999, Application No. 25803/94, §11-15, 17-20, 98, 102; *The Prosecutor v Dragan Nikolić*, Trial Chamber, "Judgement", 18 December 2003, IT-94-2, §190, 196-199; See also *Amnesty International et al. v Sudan*, African Commission on Human and People's Rights, "Decision", 1999, Communication Nos. 48/90, 50/91, 52/91, 89/93, § 5; See *The Prosecutor v. Miroslav Kvočka et al.*, Trial Chamber, "Judgement", 2 November 2001, IT-98-30/1-T, § 148, 149

<sup>693</sup> See paragraph 669

<sup>694</sup> See section 1.4 and Annex 2 13<sup>th</sup> case

841. Furthermore, the actual torture, including sexual abuse, in the Libyan camps – in order to press the detainees and extort their family members to pay ransom in exchange for their liberation or for any other reason – is routine and systematic.

842. Widespread torture in Libyan detention centers is a fact which has been well-documented by international NGOs and institutions, including *inter alia* Human Rights Watch and the United Nations High Commissioner for Human Rights.

843. This was also well-known within the European Union itself, as set out in full in the introduction to this section on underlying crimes and in the factual section of the present communication.<sup>695</sup>

Element two: In the custody or under the control of the perpetrator

844. Migrants intercepted in the Mediterranean are initially under the effective control of EU and MSs' agents, namely the co-perpetrators. Upon interception by the LYCG they are under the custody of the LYCG, to whom the European Union is at least accomplice, and once they disembark in Libya, they may fall (or be sold) to the hands of other Libyan militias' members who operate the detention camps and other places of detention.

Element three: Pain or suffering not incidental to lawful sanctions

845. Given that the torture takes place in the context of unlawful and arbitrary detention against an innocent civilian population, the pain or suffering in the present case does not arise from, and is in no way inherent in or incidental to, lawful sanctions.

846. As described above, these torturous acts and conditions violate international law, including various international and regional treaties and conventions to which the EU and its Member States are party, as well as a customary international prohibition of the status of jus cogens.

847. This illegality cannot be defended by reference to Libyan domestic law. The punitive and sadistic function of the detention *per se*, let alone the physical and mental abuse taking place in the detention centers, are done to make profit from human trafficking from which Libyan agents benefit. Finally, torture alongside the commission of other crimes, has a deterrent effect which is in line with EU's overall policy to stem migration flows from Libya.

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<sup>695</sup> See paras 368, 374, 376 of the present communication.

Element four: The conduct was committed as part of a widespread or systematic attack

848. Element four can be established with reference to the contextual section above. The conduct of European Union officials and agents with respect to the interception operations of asylum seekers on the Mediterranean formed part of the wider “attack”, as it has been defined in the present communication, and was pursuant to the EU’s 2<sup>nd</sup> Policy.

Element five: Perpetrators have the requisite knowledge

849. As discussed previously, European Union officials and agents are aware of the factual circumstances surrounding the torture of asylum seekers deported back to Libya’s detention camps.

850. In any event, “[t]o prove the mental element of torture, it is therefore sufficient that the perpetrator intended the conduct and that the victim endured severe pain or suffering.”<sup>696</sup>

851. There is no special requirement of perpetrator knew that the harm was severe. Moreover, with respect to torture as a crime against humanity, as opposed to torture as a war crime, no ‘specific purpose’ is required.<sup>697</sup>

852. EU and Italy’s legislative, administrative and contractual measures which produced severe pain or suffering were intentional. Knowledge of the produced harm, as mentioned above, while not necessary, existed in this case.

853. Moreover, both the physical acts and the legislative and executive acts were part of the inhumane migration policy, which qualified above as an overall attack against the civilian population. The European, whether co-perpetrators or accomplices, were aware of this.

**vi. Rape and other forms of sexual violence: European Union officials and agents knowingly caused the rape and other forms of sexual violence of members of a civilian population within the meaning of Article 7(1)(g) of the Rome Statute**

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<sup>696</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08, §194; See also § 4 of the General Introduction to the ICC Elements of Crimes provides: “With respect to mental elements associated with elements involving value judgment, such as those using the terms . . . ‘severe’, it is not necessary that the perpetrator personally completed a particular value judgment unless otherwise indicated.”

<sup>697</sup> ICC Elements of Crimes p. 7

854. European Union officials and their agents committed the act referred to in article 7(1)(g) of the Rome Statute, namely **rape, sexual slavery and any other form of sexual violence of comparable gravity**, which, as provided in the context set out above, constitutes a crime against humanity.

855. The Rome Statute Elements of Crimes gives four elements:

- I. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
- II. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent;
- III. The conduct was committed as part of a widespread or systematic attack directed against a civilian population;
- IV. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>698</sup>

Element one: the commission of rape and other forms of sexual violence

856. Details of rape and sexual violence against asylum seekers detained in Libyan camps or sold to private homes in Libya are well-documented, as noted in the factual section above.

857. Women are routinely and systematically victims of sexual violence committed *inter alia* by the guards of the detention centers, both the official ones and those under the control of militias.

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<sup>698</sup> ICC Elements of Crimes p. 8.

<sup>699</sup> See paras 367, 373, 375 of the present communication.

858. This situation is reported in every detention center international organizations, such as Human Rights Watch, have access to. In the Tajoura detention center in Tripoli, for example, two women tried to commit suicide after having been sexually assaulted by the guards.<sup>700</sup>

Element two: commission by force, threat of force or coercion

859. The rape, sexual slavery and other forms of sexual violence of similar gravity in Libyan detention camps, torture houses and other places of detention were committed by force.

860. Closely related to the exercise of ownership over the detained migrants which amounts to sexual slavery, the alleged crimes are taking place for no purpose other than the crime itself, or for the purpose of using the crime to extort the detainees to pay the ransom that is demanded in exchange for the liberation of the prisoner.

861. In fact, in the circumstances of the case at hand, where the victims of such horrific sexual abuse lack any legal status or political authority, the commission of the alleged offence also complies with all the alternatives to the use of force: fear of violence, duress, detention, psychological oppression or abuse of power, taking advantage of a coercive environment, without the possibility whatsoever to give a genuine consent.

Element three: The conduct was committed as part of a widespread or systematic attack

862. Element three can be established with reference to the contextual section above. The European Union's conduct with respect to the interception operations of asylum seekers on the Mediterranean formed part of the wider "attack", as it has been defined in the present communication.

Element four: Perpetrators have the requisite knowledge

863. As discussed previously in detail, European Union officials and agents are aware of the factual circumstances surrounding the sexual violence inflicted on asylum seekers. As reported in the factual section, for example, in 2012 the European Parliament adopted a Resolution expressing its concerns for the conditions of migrants in the Libyan detention centers, especially of children and women, often victims of sexual violence.<sup>701</sup>

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<sup>700</sup> See para 367 of the present communication.

<sup>701</sup> European Parliament, "Resolution of 22 November 2012 on the situation of migrants in Libya (2012/2879(RSP)", online, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0465+0+DOC+XML+V0//EN&language=EN>, accessed 19/05/2019

**vii. Other Inhuman Acts: European Union and Member States’ officials and agents knowingly committed other inhuman acts within the meaning of article 7(1)(k) of the Rome Statute:**

864. Article 7(1)(k) speaks of “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”
865. Article 7(1)(k) is a residual provision. Consequently, if acts can be charged under existing enumerated crimes, the use of the residual provision and charging as ‘other inhumane act’ is impermissible.<sup>702</sup> This means that in order to invoke Article 7(1)(k), at least one element should be materially distinct from the other enumerated acts.
866. But while ‘other inhumane acts’ is a residual provision, it is not a catch-all one. The drafters of the Rome Statute were aware of the ambiguity and uncertainty created as a result of legislating an unknown atrocious crime which may arise ‘*nullum crimen sine lege*’ concerns.
867. Accordingly, the provision was interpreted in a restrictive manner, and it is understood to require that crimes must have a similar nature, scale and gravity to the other listed crimes in order to fall under this provision.<sup>703</sup>
868. The ICC’s residual provision is not new. It echoes similar provisions in other ICL statutes of ad-hoc tribunals. For example, the ICTY Statute requires “wilfully causing great suffering, or serious injury to body or health”,<sup>704</sup> which was expanded to include moral suffering or harm that is not permanent or irremediable.<sup>705</sup>
869. For an inhumane act that causes great suffering or injury to qualify as a crime against humanity, it must be more than “temporary unhappiness, embarrassment or humiliation”<sup>706</sup>. While it is not necessary that the victim suffered long-term effects, long-term effects can be relevant to assess seriousness of the act.<sup>707</sup>

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<sup>702</sup> *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali*, Pre-Trial Chamber II, “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to art. 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-02/11, § 40

<sup>703</sup> *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chuiatanga*, Pre-Trial Chamber I, “Decision on the confirmation of charges”, 30 September 2008, ICC-01/04-01/07.

<sup>704</sup> Article 8(2)(a)(iii) Rome Statute; Article 2(c) ICTY Statute

<sup>705</sup> *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic*, Trial Chamber, “Trial Judgement”, 16 November 1998, IT-96-21-T

<sup>706</sup> *Prosecutor v Radislav Krstić*, Trial Chamber I, “Trial Judgement”, 2 August 2001, IT-98-33

<sup>707</sup> *Prosecutor v Milan Lukić and Sredoje Lukić*, Trial Chamber III, “Trial Judgement”, 20 July 2009, IT-98-32/I

870. To date, the ‘other inhumane acts’ that have been considered to be crimes against humanity include the following diverse crimes: forcible transfers<sup>708</sup>, forced marriages<sup>709</sup>, enforced disappearances<sup>710</sup>, deliberate sniping and shelling of civilians<sup>711</sup> and enforced prostitution.<sup>712</sup>
871. To provide further content to the offence, it has been acknowledged that **guidance can be derived from norms prohibiting inhumane treatment under international human right and humanitarian law<sup>713</sup>, serious violations of international customary law and basic rights.**<sup>714</sup>
872. Just as grave breaches of international humanitarian law amount to war crimes in armed conflict’s context, so do grave violations of international human rights law may constitute a crime against humanity in a non-armed conflict context, let alone when such armed conflict does govern or at least strongly impact the attack and its underlying crimes.
873. Certain prohibited acts committed as part of an attack pursuant to State or Organization’s immigration policy may therefore constitute a new atrocious crime that does not fall within the enumerated crimes against humanity, but does fall within the meaning of ‘other inhuman acts’ that cause great suffering or serious injury to its victims.
874. The violation of basic norms of international human rights law, international refugee law, international maritime law and, in particular, of the principle of *non-refoulement* that is a fundamental rule of international customary law, further support such interpretation.
875. In this context, the fact the alleged crimes were committed after the ECtHR decision in *Hirsi* was rendered, has both factual and legal implications substantiating the EU immigration policy not only as a grave breach of customary international human rights and refugee law, but as one that constitute an atrocious crime.
876. Factually, the evidence provided demonstrate that the situation in Libya for migrants is by far worse than it was during the Gaddafi regime. Legally, EU officials and agents must have

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<sup>708</sup> *Prosecutor v Vidoje Blagojević and Dragan Jokić*, Trial Chamber I, “Trial Judgement”, 17 January 2005, IT-02-60

<sup>709</sup> *Prosecutor v Brima, Kamara and Kanu*, Appeals Chamber, “Appeals Judgement”, 22 February 2008, SCSL-2004-16-A

<sup>710</sup> *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Jospović, Dragan Papić and Vladimir Santić*, Trial Chamber II, “Trial Judgement”, 14 January 2000, IT-95-16

<sup>711</sup> *Prosecutor v Sanislav Galić*, Trial Chamber I, “Trial Judgement”, 5 December 2003, IT-98-29

<sup>712</sup> *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Jospović, Dragan Papić and Vladimir Santić*, Trial Chamber II, “Trial Judgement”, 14 January 2000, IT-95-16

<sup>713</sup> The language ‘suffering’ and ‘injury’ echoes article 35 of the Geneva convention, which prohibits the unnecessary use of force even against combatants

<sup>714</sup> *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chuiatanga*, Pre-Trial Chamber I, “Decision on the confirmation of charges”, 30 September 2008, ICC-01/04-01/07

been aware to the ECtHR ruling with respect to the unlawfulness of practices of push-backs and pull-backs.

877. The ICC's Elements of Crimes provides the following elements:<sup>715</sup>

- I. The perpetrator inflicted **great suffering, or serious injury to body or to mental** or physical health, by means of an inhumane act.
- II. Such act was of a character (nature and gravity) **similar to any other act** referred to in article 7, paragraph 1, of the Statute.
- III. The perpetrator was aware of the factual circumstances that established the character of the act.
- IV. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- V. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Element one: great suffering, or serious injury to body or to mental or physical health

878. Insofar as such treatment does not amount to torture, the policy to refrain from rescue and disembarkation in safe ports and instead to recruit and direct an armed group to intercept vulnerable civilians in distress at sea, in order to deport and detain them back to a country they fled from constitutes "other inhumane acts".

879. 'Other inhumane acts' may also be found in any violence incurred in the course of this interception, i.e. while in detention on board of LYCG vessels, as well as on board of rescue NGOs who cannot disembark as a result of EU and Member States' policy to close their ports to persons in distress that are in need of international protection.

880. Finally, any inhumane treatment the deportees are facing after their disembarkation in Libya, such as conditions and degrading treatment in detention centers, trafficking and forced labor, and various forms of exploitation, abuse and extortion, may also fall within the meaning of Article 7(1)(k) insofar as they do not meet the requirements of other listed Article 7 crimes.

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<sup>715</sup> ICC Elements of Crimes p.12

Element two: ‘of a character **similar to any other act** referred to in article 7’

881. All the above mentioned acts and omissions convey an inhumane character analogous and of similar gravity to the inhumane acts proscribed by the other sub-categories of Article 7. The prohibition of inhumane and degrading treatment is established in numerous human rights and international humanitarian law instruments and has been recognized as part of general international law.<sup>716</sup>
882. In all of these instruments, such treatment is coupled with the prohibition on torture, signaling their similarly enshrined status in the international legal system. It is a fundamental human right from which no derogation is permitted, and is recognized as a customary rule.<sup>717</sup>
883. The prohibition of “other inhumane acts” criminalizes cruel, inhumane and degrading treatment, as long as it is of a similar severity and gravity as other prohibited acts in Article 7: while torture requires ‘severe physical or mental pain or suffering’, other inhumane acts require ‘great suffering, or serious injury to body or to mental or physical health.’
884. The above-mentioned jurisprudence supports the finding that the *refoulement*, detention in a concentration camps-like conditions and other atrocious acts causing great suffering or serious injury to deported migrants in Libya qualify as ‘other inhumane acts.’
885. This is in particular so given the particular vulnerability of the target population: children, women and men who are foreigners in Libya with no political power or legal status, indefinitely detained, abused and trafficked.
886. In these circumstances and given the nature of the victims, it takes very little to constitute inhumane and degrading treatment that by its nature and gravity has an immediate, direct impact

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<sup>716</sup> Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights (“no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment”), Article 3 of the European Convention on Human Rights, Article 5 of the Inter-American Convention on Human Rights, Article 5 of the African Charter on Human and Peoples’ Rights, Common Article 3 to the Geneva Conventions, Article 4 of Additional Protocol II to the Geneva Conventions as well as, particularly, in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

<sup>717</sup> See, e.g., General Comment adopted by the Human Rights Committee under article 40, § 4, of the ICCPR, No. 24, U.N. Doc. CCPR/C/21/Rev.1/Add.6, 11 November 1994, § 8. setting out the ‘fundamental’ rules of human rights from which no derogation is permitted: ‘... a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons...’

on the physical or mental well-being of the prisoners,<sup>718</sup> let alone when such inhumane acts are systematic and serious, as in the present case.<sup>719</sup>

887. Overcrowding of cells, the absence of bedding and basic hygiene leading to diseases, the deprivation of ‘adequate food, shelter, medical assistance, and minimum sanitary conditions’ may contribute and, in the present case, constitute in the present case ‘other inhumane acts’.

888. Finally, sexual violence, physical and psychological abuse and intimidation, inhumane treatment, and deprivation of adequate food and water – all are common in Libyan places of detention – have been recognized as constituting other inhumane acts.<sup>720</sup>

Elements three, four and five: The perpetrator was aware of the factual circumstances that established the character of the act; the conduct was committed as part of a widespread or systematic attack directed against a civilian population; the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

889. The analysis of these elements is essentially identical to that of other crimes against humanity, as described above, in terms of the crime being part of the attack and that the intention or awareness that the acts be part of the overall attack on the civilian population.

890. The requirement that the acts “intentionally caus[e]” suffering should not be interpreted as imposing a higher threshold than the general one of Article 30(2) of the Statute. Awareness of the consequences of the action suffices.<sup>721</sup>

891. While awareness that the consequence “will occur in the ordinary course of events” as per Article 30(2)(b) has been interpreted by the Court to refer to “virtual certainty,”<sup>722</sup> this is satisfied in this instance.

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<sup>718</sup> *Prosecutor v Galić*, Trial Chamber I, 5 December 2003, IT-98-29-T, §153

<sup>719</sup> *Prosecutor v Kupreškić*, Trial Chamber, 14 January 2000, IT-95-16-T, §566.

<sup>720</sup> *The Prosecutor v. Juvénal Kajelijeli*, Trial Chamber I, “Judgement and Sentence”, 1 December 2003, ICTR-98-44A-T, § 916 and *Prosecutor v Thomas Blaškić*, Appeals Chamber, “Judgement”, 29 July 2004, IT-95-14-A, 154

<sup>721</sup> *The Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, “Decision on the confirmation of charges against Laurent Gbagbo”, 12 June 2014, ICC-02/11-01/11, § 235-36

<sup>722</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change”, 1 December 2014, ICC-01/04-01/06 A 5, § 447

### 2.2.2.3 Modes of Liability

892. The attack against a civilian population, described above, implicates European Union and Member States' officials, agents and representatives. These individuals participated in formulating the necessary policy and ensuring the implementation thereof, with the objective of pushing back migrants attempting to flee Libya between 2015 to the present day.

893. Once disembarked in Libya, the deportees were forcibly transferred and detained in various detention facilities, where they – tens of thousands of children, women and men – were held in unspeakably inhumane conditions, and were victims of various atrocious crimes within the meaning of the Rome Statute. These events were organized in the frame of a common plan.

894. These individuals therefore participated in the attack against a civilian population. As this communication has detailed, their actions have been intentional, taken with knowledge of their consequences and have, at varying degrees, served the overall purpose of the attack: to prevent individuals from leaving Libya in an attempt to reach the territory of Member States of the European Union.

895. The potential modes of liability of EU agents may be divided into two parts. The *first* part includes the entire enterprise of laws, regulations, policies, and decisions that enabled the operations through which the LYCG was funded, trained and equipped in order to falsely present it as a sovereign and competent national coast guard with the legitimacy and capability to conduct SAR operations in accordance with maritime and human rights law<sup>723</sup>. This process was accompanied by an effective control over its actions through the determination of its goals and the distribution of its means, and, through it or through other venues, of the concerned territories and seas.

896. The *Second* part is formed by the involvement of EU agencies and agents in interception and pull-back operations in the period 2016-2018. This kind of complicity includes the entire process, i.e. the reception of the distress call by some European body such as MRCC in Rome or by EU or MS body, unit or vessel, and the on-scene coordination of the operation as outlined in Section 2.3.2.

897. EU concrete involvement refers to multiple acts and omissions aimed to prevent NGOs or other efficient forces from being involved in SAR operations that would result in lawful disembarkation in safe ports, that is, on EU soil. Instead, EU agents acted directly to ensure LYCG

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<sup>723</sup> See section 1.3.3 in this present communication

would be assigned command over the situation, including the provision of the migrant boats' locations and real-time assistance and guidance.

898. The direct acts and omissions were part and parcel of the overall official EU immigration policy to stem migration flows from Libya by ensuring all intercepted migrants would not disembark in European ports but in Libya.

899. As discussed below, EU agents had foreknowledge of the crimes migrants are exposed to in Libya and awareness they are the inevitable, immediate and direct consequences of their acts and omissions.

900. In other words, had the migrants not been pushed back to Libya, these crimes could not have happened. Without the EU and Italy orchestrating and coordinating LYCG operations, migrants would not have been pushed back to Libya, as the LYCG could not have had the technical capabilities nor the political will to intercept migrants seeking to reach Europe.

901. This section analyses the potential scope of modes of liability that may be attributed to EU agents involved in EU migration policies in the Mediterranean and Libya, and subsequently evaluates the extent of their responsibility.

### **Article 25 Liability for Public Officials**

902. Under Article 25(3)(a), any “natural person” who commits a crime within the jurisdiction of the court shall be held “criminally responsible and liable” if she (a) “[c]ommits such a crime whether as an individual, **jointly with another or through another** person, regardless of whether that other person is criminally responsible.”

903. Consequently, the Rome Statute broadly recognises at least three types of liability: direct (individual) perpetration, co-perpetration, and perpetration by means (that is, perpetration through another).

904. The ICC has **jurisdiction over public officials**, ranging from those who orchestrated and developed the European Union's border externalisation policies, to the individual officials who implemented that policy on the ground. Such individuals should be held liable as direct or indirect perpetrators.

905. The Prosecutor states in her Policy Paper on Case Selection and Prioritisation that through her investigations she will work to ensure **prosecution against those “most responsible”** for the

crimes in question.<sup>724</sup>

906. In the context of the present case, this rule means the Prosecutor should not only investigate those who directly perpetrated these crimes, namely Libyan agents, members of various militias and pseudo-governmental bodies, but also the complex structures of power that designed the policy with the objective to avoid criminal liability for its rulers that structured and nourished their action.

907. These structures refer to the actors enabling while being aware of the crimes, commanding the direct perpetrators to commit the crimes for political gain, while violating the most fundamental principles that defines humanity as such: the duty to rescue a dying person, the duty to protect a persecuted person.

908. As analyzed below, the broadness of the modes of criminal responsibility under the Rome Statute ensures that the responsibility of all actors is traced.

#### **i) Direct Perpetration**

909. The “first and foremost” form of perpetration<sup>725</sup> may be attributed to EU and Italian agents in connection with crimes committed by omissions, i.e. by inaction or a failure to act. In a similar fashion to the alleged crimes committed pursuant to EU’s 1<sup>st</sup> Policy, as described in **Section 3.2.1**, EU agents *physically* carried and carry out the offence in a manner that satisfies the definitional material and mental elements of the offence.

910. Legally, once the EU established a system in which the only options proposed to the targeted population are either to drown or being intercepted by the LYCG, it became impossible for EU actors to avoid liability regarding the faith of the targeted individuals: both alternatives amount to acts and omissions constituting crimes against humanity under the Rome Statute.

911. In the context of the facts and prohibited acts discussed above, an example would include the perpetration of an act of murder by omission (causing the death of migrants in distress at sea as a result of not saving them knowing the LYCG is incompetent to conduct SAR operation), torture by omission (causing the injury and mental harm as a result of this conduct), which in parallel constitute a persecutory violation of a fundamental human rights., and so on.

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<sup>724</sup> Office of the Prosecutor, International Criminal Court, 15 September, 2016, *Policy on Case Selection and Prioritisation*, online, [https://www.icc-cpi.int/itemsdocuments/20160915\\_otp-policy\\_case-selection\\_eng.pdf](https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf).

<sup>725</sup> *The Prosecutor v. Duško Tadic*, Appeals Chamber, “Judgement”, 15 July 1999, IT-94-1-A, §188

912. This mode of liability appears to be applicable to EU and Italian agents who found themselves on scene or directly participated in the so-called “rescue” operations that brought individuals to be taken into custody by their accomplices of the LYCG.

## ii) Co-perpetration

913. In terms of section 25(3)(a), a crime can be committed jointly with another person, regardless of whether that other person is criminally responsible. This form of liability is known as “co-perpetration”.

914. The following objective elements of co-perpetration must be established:

- I. The accused “must be part of a **common plan or an agreement** with one or more persons”;
- II. The accused and the other co-perpetrator “must carry out **essential contributions in a coordinated manner** which result in the fulfilment of the material elements of the crime.”<sup>726</sup>

915. The above objective elements must be accompanied by the following subjective elements:

- I. “The co-perpetrators’ **mutual awareness** that implementing the common plan will result in the fulfillment of the material elements of the crimes; and yet ... they carry out their actions with the **purposeful will** (intent) to bring about the material elements of the crimes, **or are aware that in the ordinary course of events, the fulfillment of the material elements will be a virtually certain consequence of their actions.**”<sup>727</sup>
- II. The accused’s “awareness of the factual circumstances enabling him or her to **control the crime with the other co-perpetrator.**”<sup>728</sup>

916. Under this mode of liability, the prosecution must therefore show that the crime is “**the result of the combined and coordinated contributions of those involved, [...]. None of the participants’ exercises, individually, control over the crime as a whole but, instead, the control of the crime is collective... Therefore, the prosecution does not need to demonstrate that the contribution of the accused, taken alone, caused the crime; rather, the responsibility of the**

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<sup>726</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Pre-Trial Chamber, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08, §350.

<sup>727</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Pre-Trial Chamber, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08, § 370.

<sup>728</sup> *The Prosecutor v Jean-Pierre Bemba Gombo*, Pre-Trial Chamber, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08, §371. See also *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber, “Decision on the confirmation of charges”, 29 January 2007, ICC-01/04-01/06.

**co-perpetrators for the crimes resulting from the execution of the common plan arises from mutual attribution, based on the joint agreement or common plan.**<sup>729</sup> [emphasis added]

917. The idea is that “the sum of the coordinated individual contributions of a plurality of person results in the realisation of all the objective elements of a crime, **any person making a contribution can be held vicariously responsible for the contributions of all the others**, and as result, can be considered as principal to the whole crime.”<sup>730</sup>

918. The elements of co-perpetration described above can essentially be subsumed under three broad headings: an essential contribution to the crime (i); evidence of a common plan (ii); and lastly intent and awareness of the perpetrators of the consequences of their actions and of their essential contribution to the crime (iii).

### **Essential contribution**

919. The first requirement is that the “co-perpetrator performs an essential role in accordance with the common plan, and it is in this sense that his contribution, as it relates to the exercise of the role and functions assigned to him, must be essential”.<sup>731</sup>

920. The administratively complex organisation of the European Union’s conduct in developing and implementing its border externalisation policy, as described above, meets the requirement of ‘essential contribution’ at different levels of the European Union, as well as through the involvement of officials in the governments of the European Union’s Member States.

921. As it has been demonstrated, without this policy and the implementation thereof by European Union officials and their agents, the crimes listed herein could not have taken place. The role of relevant EU agents was therefore essential, and contributed in a highly coordinated manner in the fulfillment of the crimes, through numerous legislative, executive, administrative, bureaucratic acts, at both EU and Member States levels, to advance the said policy and its underlying crimes.

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<sup>729</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “Judgment pursuant to Article 74 of the Statute”, 14 March 2012, ICC-01/04-01/06, §994.

<sup>730</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber, “Decision on the confirmation of charges”, 29 January 2007, ICC-01/04-01/06, §326

<sup>731</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “Judgment pursuant to Article 74 of the Statute”, 14 March 2012, ICC-01/04-01/06, §1000.

### A common plan

922. The development and implementation of the European Union's border externalization policy to contract with the Libyan Coastguard and the GNA, operating in conjunction with them or providing them with the necessary support to intercept migrants in distress at sea and push them back to Libya, directly and indirectly, constituted a complex common plan, which required systematic cooperation and coordination.

923. Public officials, especially those with the highest positions of authority within the European Union, participated in the plan. They can qualify as co-perpetrators to the extent that they made an "essential contribution" to the plan.

924. The coordinated manner in which EU agents fulfilled their essential role of contributing to the implementation of the policy and the commission of the crimes, was part of an overall common plan between Libyan fractions and EU and Italian officials, one that prolonged a decade-long co-organization of the migratory policies over the Mediterranean zone between the Libyan State and the European Union's actors.

925. This common plan relied upon various formal, official and publicly accessible agreements and declarations, such as the Italian-GNA's MoU, the EU Malta Declaration and EU decisions internalizing these plans and agreements, for example with respect to the mandate of Operation Sophia to train LYCG personnel.

926. Other agreements, decisions and contracts were made to implement the said common plan, for example the provision of vessels to the LYCG, funding of detention centers through third parties via the EUTF, and so on.

927. The common plan need not be expressly spelled out, but may "be inferred from the subsequent concerted action of the co-perpetrators."<sup>732</sup> Also, the co-perpetrators may initially plan "to achieve a non-criminal goal" but "are **aware (a) of the risk** that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime and **(b) accept such an outcome.**"<sup>733</sup>

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<sup>732</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber, "Decision on the confirmation of charges", 29 January 2007, ICC-01/04-01/06. §345

<sup>733</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber, "Decision on the confirmation of charges", 29 January 2007, ICC-01/04-01/06. §344

928. In the present case, the plan was expressly spelled out, and, in any case, could have been easily inferred from the observation of the concerted manner in which the EU, Italy and the LYCG operate together and in tandem vis-à-vis both migrants in distress and rescue NGO vessels daring to comply with their maritime duties.

929. The administratively complex organization of a comprehensive deterrent transportation and detention system required essential contributions at different levels of government of both EU and Member States, as well as through the involvement of third parties such as Libyan militias and civil society organizations.

930. Without legislation authorizing forced and collective expulsions on an industrial scale that is complemented by indefinite detention, these crimes could not have been committed. The formulation of the collective expulsion practice, which qualifies as the prohibited act of deportation, has functioned as a starting point for the detention practices.

931. The conclusion of the agreements with the GNA and LYCG on the one hand, and the imposition of the Code of Conduct on and the institution of criminal proceedings against most of the NGOs operational in the relevant SAR zone on the other hand, were therefore crucial for the successful implementation of the attack pursuant to the EU's 2<sup>nd</sup> policy.

#### **Intent and awareness of consequences, and of essential contribution**

932. This has been discussed at length above: the relevant European Union and Member State's officials and agents were aware of the consequences of their conduct and each official must have been aware of the essential contribution he or she was making to the common plan.

933. More importantly, the relevant EU agents had awareness of their control over the crime, in the sense that (1) they were fully aware that structurally, without the joint venture and agreements with the GNA and LYCG, the systematic and widespread attack on the civilian population could not have taken place.

934. In addition, EU agents were aware that insofar as the atrocious crimes were not *a priori* envisioned as being part of the joint agreement and plan with their Libyan counterparts, they were in a position of effective control and command which enabled to require them to cease their conduct by instructing them, or simply by ending the joint agreement, which would have immediately brought an end to the crimes and therefore dislocated the complicity or co-perpetration scheme.

935. In addition, (2) EU agents had full control over each and every instance in which LYCG had been given command to intercept migrant boats in distress at sea. They therefore could have prevented each and every crime committed as a result of these interceptions.

936. EU agents were therefore aware that implementing the common plan to stem migration flows from Libya by deporting intercepted migrants in distress at sea back to Libyan soil would result in their immediate and indefinite detention, and systematic exposure – with virtually no exception – to the various crimes described above.

937. Furthermore, and even if it was to be considered that the alleged suspects didn't manifest a purposeful will, in any event it cannot be disputed that they were at least aware that in the ordinary course of events, the fulfillment of the material elements of the above mentioned crimes would be a virtually certain consequence of their actions, as all migrants deported back to Libya are detained in facilities and are victims of some if not all the described above crimes.

938. This undisputed fact is based on the suspects' own statements with respect to the material elements of the crimes: the detention centers having a concentration camp-like condition, deportation to Libya seen as a living hell, the LYCG being a criminal militia not under the control of the Libyan government, LYCG interceptions being violent and incompetent, the trafficking of detained migrants constituting a crime against humanity, and so on.

939. Indeed, as with the case of the EU's 1<sup>st</sup> Policy, the architects of the EU's 2<sup>nd</sup> Policy admitted in hindsight EU's wrongdoing for allegedly enabling the systematic commission of atrocious crimes.

940. In a recent televised interview, the former Italian Minister of Interior, Mr. **Marco Minniti**, stated the following [emphasis added]:

- Journalist: “Where you aware of the situation showed in the video?”

- **Minniti: I've never thought that the LYCG could conduct search and rescue operations by itself in the central Mediterranean...**

...

- Journalist: So, you're saying that the mission used to be an integrated one.

- Minniti: Yes, it was an integrated one: there was Triton, which then became Themis, and there was operation Sophia. This has changed. **The Italian coast guard does not operate anymore in the**

**Central Mediterranean.** It is not a case that now the issue is who answers the phone. **The Italian coast guard used to be the one answering the phone,** and then it decided who could intervene. **The LYCG is not prepared to have a coordinating function in the central Mediterranean...**

- Journalist: Indeed, they do not answer very often...

- Minniti: Only to make an example: it is expected that a command and control center of the LYCG is established, **but it will take years. It is not possible, it was not possible, it was a huge mistake.**

- Journalist: So today we are sentencing to death those who call the LYCG to be rescued?

- Minniti: **We have undoubtedly weakened that system. Since the moment we closed the ports, the NGOs are having a hard time to operate. Let me add that we arrived at the huge paradox of having a maritime military operation, operation Sophia, which has been extended for six months, but it does not operate in the sea. It is the first time we have a naval operation that does not operate in the sea.**

- Journalist: What you are saying is very serious because it means we are letting these poor people drown because if there are three patrol boats as the guys in the video were saying, but even if they were 5 or 10, with the coast being 2,200 km long and the SAR zone being 350,000 km<sup>2</sup>, how can they do it?

- Minniti: You are a little unlucky, because I know Libya. I have repeating for months the things that I have just said. If you remember, I said the exact same things a few months ago sitting on this same chair, before your video on La Spezia.

- Journalist: In general, do you think that considering Libya as an interlocutor and as a safe port, and you were doing this already as ministry of the interior...

- Minniti: No, **I have never considered Libya as a safe port because it is not.**

- Journalist: Well, if we give them a SAR zone with their own patrol boats, it means considering them as a safe port...

- Minniti: No, there is a little difference: **Libya cannot be considered as a safe port because it has never signed the Geneva Conventions...**, in 68 years the international community has never managed to let them sign it: first there was a king, then a dictator, then different governments. We never convinced them to sign it. So, this is not the point. The point is to understand that we have no

credit with Libya, the international community has a huge debt with Libya for a simple reason: **Libya became what it is now after 8 years of dramatic instability caused by the international military intervention** which went there to take down the dictator. Now, I do not miss the dictator, however when the international community intervenes to take down a dictator it must have an idea of what to build afterwards and this had not been done.

- Journalist: What is going on in Libya now? Haftar is going towards Tripoli, what is the real risk, also for us?

- Minniti: A very simple thing is happening: **in the past 8 years we had a continuous instability.** What the international community had tried to do, Italy and EU included, was to try to govern the instability. This is impossible...

- Journalist: Was it the right government to recognize?

- Minniti: **...Italy had to understand a very simple thing: deal with Libya was in its own interest.** Instead, what we did, was making immigration a topic that caused conflict within Europe.”<sup>734</sup>

941. The EU commissioner for migration, Dimitris Avramopoulos, accepted the conditions in detention centers were dire and that they should be shut down, but only acknowledged that the EU’s 2<sup>nd</sup> Policy that systematically brought individuals to these detention centers was ‘a contradiction’.<sup>735</sup>

942. To sum, the role of the EU as an organization was essential and was part of a common plan and agreements to allow for the commission of the alleged crimes, as part of an attack pursuant to EU’s organizational and Italy’s state policies.

943. EU agents did not individually exercise full control over the crime as a whole. But their essential role and contribution meant they had control to the extent that without its exercise the crimes could not have been committed: without the complex and systematic maritime and land system of transportation of helpless, vulnerable detained population to Libyan camps, this population would have never been exposed to the crimes committed in these camps.

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<sup>734</sup> Marco Minniti, former Italian Minister of Interior, 2019, interview in *Piazza Pulita*, 12 April 2019 (Italian, transcript on file with the authors): <http://www.la7.it/piazzapulita/rivedila7/piazzapulita-profondo-rosso-puntata-11042019-12-04-2019-268755>

<sup>735</sup> Frei, M., 2019, “Torture and shocking conditions: the human cost of keeping migrants out of Europe”, *Channel 4*, online, <https://www.channel4.com/news/torture-and-shocking-conditions-the-human-cost-of-keeping-migrants-out-of-europe>, accessed 19/04/2019

944. Thus, even if the contribution of EU agents did not directly implicated them in the commission of the crime, their responsibility for the crimes stems from the execution and the mutual attribution of the common plan and joint agreements with the GNA and LYCG: generally financing, equipping, training, legalizing, and otherwise building the capacity of the consortium of militias known together as the LYCG; and specifically orchestrating, coordinating, commanding, collaborating and supervising LYCG's interception operations, and ensuring rescue NGOs step aside.

**iii) Indirect (co-)perpetration**

945. Article 25(3)(a) recognizes the possibility of perpetration through an agent, whether the agent him or herself is guilty or not. This is a type of "indirect" or "vertical" perpetration intended to encapsulate the control exercised over individuals or an organization by people in positions of leadership and refers to situations where the accused **"has control over the will of those who carry out the objective elements of the offence"**.<sup>736</sup>

946. The essential elements of this form of liability can be summarized as follows:<sup>737</sup>

- I. A crime was committed by a person or persons other than the perpetrator;
- II. The perpetrator **controlled subordinates through an organized structure of power, such that subordinates are interchangeable;**
- III. The perpetrator **used the direct perpetrator as a tool or an instrument to commit the relevant crime;**
- IV. The perpetrator acted with intent with respect to the commission of the crime;
- V. The perpetrator was aware of the factual circumstances enabling them to exercise control over the crimes through another person;
- VI. **The perpetrator intended to use such person or persons as instruments or tools to commit the relevant crime.**

947. In the present case, high level officials but also agents on the ground within the European

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<sup>736</sup> *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chuiatanga*, Pre-Trial Chamber I, "Decision on the confirmation of charges", 30 September 2008, ICC-01/04-01/07, §488.

<sup>737</sup> *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chuiatanga*, Pre-Trial Chamber I, "Decision on the confirmation of charges", 30 September 2008, ICC-01/04-01/07.

Union and Italian Member State, maintained overall control over the crimes: they could stop each crime from being committed, simply by not letting the LYCG conduct the interception and instead conduct lawful rescue and disembarkation in accordance with maritime law.

948. More broadly, the relationship between EU and Italy agencies and forces and the LYCG and allied militia and DCIM members manifests organized structure of power in which the LYCG was subordinated to EU agencies operating in the Mediterranean, for example Frontex in connection with operation Sophia, or Italian Coast Guard in connection with operation Mare Sicuro.

949. Acting as mercenaries recruited to commit prohibited acts and omissions the EU sought to avoid committing directly due to its awareness of their unlawfulness, LYCG agents were interchangeable with any other militia members.

950. The flawed and unlawful legalization of LYCG as a sovereign national coast guard in charge of a SAR zone monitored by its own, albeit unfunctional MRCC,<sup>738</sup> the training of LYCG agents in Italy as part of EU JO EUNAVFOR MED operation,<sup>739</sup> the channeling of funds to both the LYCG and detention centers through 3<sup>rd</sup> parties,<sup>740</sup> the provision of vessels and other material support,<sup>741</sup> all these elements provide the required evidence that the LYCG as direct perpetrator was instrumentally used to commit the above described crimes.

951. Finally, the evidence collected indicate the relevant EU and MS officials and agents had the awareness of their capacity to exercise control over the crime through the LYCG's agents with the clear intention the crimes would be instrumentally committed through them: EU and MS agents had control over the will of LYCG agents who carried out the objective elements of the alleged offences

952. EU and Italy's officials and agents may be therefore held criminally responsible for the actions of individuals on the ground in Libya's detention centers, whether these individuals are LYCG agents, members of allied militias or DCIM agents.

953. Needless to say, the objective legal categorization of what is ultimately an individual and collective state of mind, may encounter a combined model involving several modes of liability with

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<sup>738</sup> See, e.g., Sea-Watch International, 18 January 2019: [https://twitter.com/seawatch\\_intl/status/1086317888896671750](https://twitter.com/seawatch_intl/status/1086317888896671750) ;

<sup>739</sup> Interview with LYCG agents trained in Italy, 2019, *Piazza Pulita*, 12 April 2019 (Italian, transcript on file with the authors):<http://www.la7.it/piazzapulita/rivedila7/piazzapulita-profondo-rosso-puntata-11042019-12-04-2019-268755>

<sup>740</sup> See paragraphs 29 and following of the present communication EUTF

<sup>741</sup> See paragraphs 277, 283, 313 in this present communication.

respect to various actors at different level of seniority.

954. For example, control over the EU as an organisation may be shared, and indirect perpetration may be combined with co-perpetration. Likewise, interception operation ‘on the ground’ may manifest collaboration rather than commander-subordinates relationship (co-perpetration). Finally, at the official political level EU-GNA relationship may amount to perpetration by means.

955. In any event, in the present case the requirements for an essential contribution to a common plan which includes common control over “an organized and hierarchical apparatus of power” guaranteeing “almost automatic compliance”, is met insofar as the EU-LYCG relationship is concerned.<sup>742</sup>

956. To conclude, the most responsible actors in the European Union, share horizontal liability of co-perpetrators. In addition, through their involvement in the commission of prohibited acts and omissions through their agents on the ground, they acted as indirect co-perpetrators. Same rationale applies to the relationship between EU agents ‘on the ground’ and LYCG commanders and subordinates, as the next sections clarify.

#### iv) Command responsibility

957. Article 25(3)(b) of the Rome Statute provides for criminal responsibility for persons who, **for the purposes of facilitating the commission of a crime, orders, solicits or induces the commission of such a crime which in fact occurs or is attempted.**

958. Command responsibility thus refers to instances in which “a person in a **position of authority instructs another person to commit an offence**”.<sup>743</sup> Such order “may be proven through direct or circumstantial evidence”.<sup>744</sup>

959. **A causal link between the order and the perpetration of the crime is necessary but it**

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<sup>742</sup> *Prosecutor v Ruto et al.*, Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to art. 61(7)(a) and (b) of the Rome Statute”, January 23 2012, ICC-01/09-01/11, § 292 and see also *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08-424, §350-511 and *The Prosecutor v. Germain Katanga*, Pre-Trial Chamber II, “Decision on the confirmation of charges”, 14 October 2008, ICC-01/04-01/07-717, §500-14

<sup>743</sup> *Prosecutor v Fatmir Limaj, Haradin Bala, Isak Musliu*, Trial Chamber II, “Judgment”, 30 November 2005, IT-03-66, §514.

<sup>744</sup> *Prosecutor v Stavle Strugar*, Trial Chamber II, “Judgment”, 31 January 2005, IT-01-42-T, §331; *Prosecutor v Timohir Blaškić*, “Judgement”, 3 March 2000, IT-95-14-T, §281.

**“need not be such as to show that the offence would not have been perpetrated in the absence of the order”.**<sup>745</sup>

960. The person who orders the act should simply have “the awareness of the **substantial likelihood that a crime will be committed in the execution of that order**”.<sup>746</sup>

961. As established above, in the present case European Union and Member States’ officials and agents, for the purpose of facilitating the alleged crimes, solicited and instructed LYCG agents, to commit the crimes referred to in the previous section.

962. The financial, political and contractual relationship reflect the inherent disparity of power between the GNA and Libyan militias on the one hand and EU and Italian governmental bodies on the other hand, to the extent that EU and Italian agents were in a position of authority to structurally and systematically command LYCG agents to commit the alleged offences.

963. While the alleged offences in Libya could have taken place against migrants even in the absence of EU and Italian officials’ instructions and orders, **they could not have been taken place against the defined civilian population**, i.e. had those migrants who succeeded in fleeing Libya would not have been deported back.

964. To put it in other words, unless the EU and the GNA had conspired to implement such policy, and without LYCG agents complying and thereby making themselves accomplices to these crimes, the targeted population would not have been victim to the crimes in question.

965. It has been established that there was therefore a direct causal link between the crimes and orders given by EU and Italian officials at the highest political level, as well as the orders given by their agents ‘on the ground’, that is in the Mediterranean in the course of interception operations. Such orders were given with awareness of the certainty, let alone ‘substantial likelihood’, that these orders would be followed by the execution of the crimes.<sup>747</sup>

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<sup>745</sup> *Prosecutor v Stavle Strugar*, Trial Chamber II, “Judgment”, 31 January 2005, IT-01-42-T, §332.

<sup>746</sup> *Prosecutor v. Timohir Blaškić*, Appeals Chamber, “Judgement”, 29 July 2004, IT-95-14-A, §42.

<sup>747</sup> See Annex 2, 9<sup>th</sup> case among others

v) **Superior responsibility**

966. The hierarchical structures within and between the European Union and the Libyan Coastguard and other Libyan agents in implementing the European Union’s border externalisation policies can also be addressed through the superior-subordinate relationship envisaged in article 28 of the Rome Statute.

967. Superior responsibility here applies to the conventional superior-subordinate relationship, namely between EU superior and EU subordinates as well as between LYCG superiors and their subordinates. In addition, it applies with respect to the relationship between EU agents and LYCG members who were *de facto* under EU command and supervision.

968. Jurisprudence understandably focuses on military commanders. But superior responsibility is not limited to a military command<sup>748</sup> and extends to any superior-subordinate relationship, even if the exercise of civil authority differs, so long as the subordinate is under the effective authority or control of the superior.<sup>749</sup>

969. European Union officials and agents are “superior” officers, indirectly liable for crimes “committed by subordinates” under their “effective authority and control”. In the circumstances of the present case, European Union officials and agents, as “superior” officers “either knew or consciously disregarded information” indicating that “the subordinates were committing” the crimes described in the previous section.<sup>750</sup>

970. As demonstrated above the alleged crimes were within the effective responsibility and control of the relevant EU agents, who “**failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission** or to submit the matter to the competent authorities for investigation and prosecution.”<sup>751</sup>

971. Effective control is the point of departure for both military and civilian superiors. A position of “**formal or informal hierarchy** to the perpetrator, suggested by the superior’s *de jure* position and evidence, for example, by the issuance of orders.”<sup>752</sup>

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<sup>748</sup> See Article 28(a) of the Rome Statute

<sup>749</sup> As required by Article 28(b) of the Rome Statute.

<sup>750</sup> Ibid

<sup>751</sup> Ibid

<sup>752</sup> *Prosecutor v Halilovic*, Appeals Chamber, “Judgement”, 16 October 2007, IT-01-48-A, §59 and *Prosecutor v. Ignace Bagilishema*, Trial Chamber, “Judgement”, 7 June 2001, ICTR-95-1A-T, § 43

**vi) Aiding and abetting**

972. In addition to principal liability of public officials, the Prosecutor is tasked with identifying those bearing accessory liability. Aiding and abetting is provided under Article 25(3)(c) of the Rome Statute, which establishes criminal responsibility for a person who, for the purposes of facilitating the commission of a crime, aids, abets or otherwise assists in its commission or its attempted commission, **including providing the means for its commission.**

973. Aiding and abetting covers instances where the accused intentionally carries out an act or acts consisting of practical assistance encouragement or moral support to the principal offender.<sup>753</sup> This includes the allowing of resources under one's responsibility to be used for the commission of crimes.<sup>754</sup> The assistance must have had a "substantial effect" on the commission of the crime.<sup>755</sup>

974. However, "**proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime**, or proof that such conduct served as a condition precedent to the commission of the crime, **is not required**... [The conduct] may occur before, during, or after the principal crime has been perpetrated, and ... the location at which [it] takes place may be removed from the location of the principal crime."<sup>756</sup>

975. Acts specifically knowingly directed to assist or encourage or even morally support with substantial effect upon the perpetration of the crime, render the aider and abettor criminally liable.<sup>757</sup>

976. EU and Member State agents can be understood to be armed soldiers standing by victims and preventing them from escaping.<sup>758</sup> EU and Member State officials have also provided the GNA, DCIM and LYCG with tens of millions of Euros to be used for the commission of the alleged crimes.<sup>759</sup> Both types of conduct were recognized as constituting accessory liability.

977. This section has described a variety of contributions by European Union officials and agents. The most responsible decision-makers among them should bear principal responsibility. However, in the alternative, their actions should be recognised as substantive and significantly

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<sup>753</sup> See, amongst others, *Prosecutor v Vidoje Blagojević and Dragan Jokić*, Trial Chamber I, "Judgement", 17 January 2005, IT-02-60-T, §726.

<sup>754</sup> *Prosecutor v Radislav Krstić*, Appeals Chamber, "Judgement", 19 April 2004, IT-98-33-A, §137.

<sup>755</sup> *Prosecutor v Naser Orić*, Trial Chamber II, "Judgement", 30 June 2006, IT-03-68-T, §283.

<sup>756</sup> *Prosecutor v. Timohir Blaškić*, Appeals Chamber, "Judgement", 29 July 2004, IT-95-14-A, §48. Emphasis added.

<sup>757</sup> *The Prosecutor v. Duško Tadić*, Appeals Chamber, "Judgement", 15 July 1999, IT-94-1-A, §229.

<sup>758</sup> *The Prosecutor v. Mitar Vasiljević*, Appeals Chamber, "Judgement", 25 February 2004, IT-98-32-A, §134

<sup>759</sup> *Supra*, 630

serving the purpose of the overall attack on the civilian population of migrants through the facilitation of the prohibited acts discussed above.

978. As set out in full in the factual section of this communication, substantial assistance was provided by the European Union to the Libyan Coastguard, in the form of financing, training of LYCG personnel, provision of vessels, equipment, services and general “capacity-building”.<sup>760</sup>

979. This assistance had a substantial effect on the commission of the crimes, detailed above, by the Libyan agents, in that it substantially contributed to the ability of the LYCG to intercept migrant boats and implement their *refoulement* to Libya, where they were immediately detained in detention centers and were the victims of the prohibited acts discussed in the underlying crimes section above.

980. Without the assistance provided by the European Union, the Libyan Coastguard would likely not have been able to carry out the interception operations of asylum seekers’ boats at all. Their assistance thus not only substantially contributed, but to a large degree rendered possible the commission of the underlying crimes of which the asylum seekers were victim.

981. The rendering of this assistance by European Union officials and agents was clearly intentional, as the details of the European Union’s policy and communications with regard thereto makes clear.

982. It is illustrated by, amongst many other examples, (i) the EU Council’s 2016 decision to establish cooperation with LYCG, including capacity-building and training of the LYCG; and (ii) the EU Council’s adoption of the Malta Declaration in February 2017, which supported Italy’s efforts to cooperate with Libya on migration and prioritized the provision of training, support and services to the LYCG.<sup>761</sup>

983. This aid was provided despite the incontestable fact that the European Union had knowledge of the human rights situation in Libya, and especially within Libyan detention centers. Furthermore, the European Union was not only acting with intent with respect to its own actions but also with respect to furthering the actions of the principal offender, namely the LYCG.

984. In this regard, European Union officials were fully aware of the treatment of the migrants by the Libyan Coastguard and the fact that migrants would be taken by the Libyan Coastguard to

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<sup>760</sup> For a full account of the assistance rendered by the European Union to the Libyan Coastguard, see paras 238, 240-249, 452-455 of the present communication.

<sup>761</sup> For a full account, see paras 240-249 of the present communication.

an unsafe port in Libya, where they would face immediate detention in the detention centers, a form of unlawful imprisonment in which murder, sexual assault, torture and other crimes were known by the European Union agents and officials to be common.<sup>762</sup>

985. It is therefore clear that the European Union's intention with respect to its actions included full knowledge of the crimes to be committed against asylum seekers in Libya. Moreover, it can be inferred from the European Union's continued application of its migration policy and the fact that it continued to assist the Libyan Coastguard, despite the extensive knowledge it had about the unlawful deaths of and other atrocious crimes against migrants caused by the LYCG, that it accepted the criminal result of its conduct.<sup>763</sup>

986. While not required by law, there is a causal relationship between the conduct of the EU and its agents and the commission of the crimes by others. Again, while not required, the conduct of EU officials and agents was a condition precedent to the commission of the crimes with respect to migrants who were pushed back to Libya (as opposed to all migrants detained in Libya).

987. Finally, as permitted by the Rome Statute, the acts and omissions that constitute criminal responsibility for facilitating crimes, are committed in a different location from the location of the principal crimes.

988. For the purpose of facilitating the commission of the crimes described above, European Union and Member States' officials and agents aided and abetted and otherwise assisted in their commission, including but not limited to providing the means for their commission, within the meaning of Article 25(3)(c) of the Rome Statute.

989. The potential applicable modes of liability analysed above are argued in the alternative, but also may be applicable in parallel to different perpetrators at various level of involvement, awareness and responsibility.

990. To be sure, EU and Member States' officials and agents did not, for most of them, *personally* execute the established-above crimes. However, they conceived them and organized their implementation.

991. Their implication made them liable for these crimes. They paid, trained, equipped otherwise

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<sup>762</sup> See in particular paragraphs 1, 156, 218-225, 255, 357-376 of the present communication.

<sup>763</sup> As per the test laid down in *Prosecutor v Naser Orić*, Trial Chamber II, "Judgement", 30 June 2006, IT-03-68-T, §288.

supported and ultimately used someone else to commit the crimes *for them*. As established above, that third party, the LYCG, was a consortium of militias for the time being affiliated with the GNA, composed of para-state units from different regions of Libyan territory, reconstructed in the post-Gaddafi era to produce the impression that it was a legitimate, unified, hierarchical entity that functions as a national, sovereign coastguard of a functioning state.

992. Even if the LYCG had not been mercenaries controlled by one of the two governments of a failed state, whose individuals are implicated in criminal activities and were sanctioned by the UNSC committee, EU agents would have been equally criminally liable for their crimes for which they had full foreknowledge.

993. This is so because without the EU's reinvention of the LYCG, as described above, it would not exist as the most dominant actor in the Central Mediterranean hunting migrants at sea. Prior to the EU and Italy's attack on migrants pursuant to its policy, the LYCG was not functional. It was hardly ever engaged in such illicit activity and did not have the political will and financial incentive to do so.

994. It should also be noted that even if the EU's policies were implemented with the objective of stabilising the region and building sustainable peace in Libya, and even if the first step – rather than the last – towards accomplishing such worthy intentions was to construct a naval unit that would exercise its violence on any foreigner trying to leave the country – EU agents remain liable for their crimes of which they were fully aware, as they were nonetheless committed as part of the attack against migrants seeking to flee Libya.

995. Material, legal, moral and symbolic support shielded the criminal conspiracy between the parties and was provided, apart from the specified material assistance, in the form of the international, political and diplomatic symbolic capital or reputation of the EU as an organization that abides by the rule of law, as an entity that shares its ethos with other inter-governmental bodies such as the UN or the ICC.

996. The moral support is also reflected in the normative framework that 'legalized' the otherwise unlawful conspiracy to systematically and persistently atrociously attack a group of vulnerable civilians, namely the EU decisions adopted in connection with the EU's 2<sup>nd</sup> policy, through agreements and contracts concluded with Libyan counterparts and subordinates.

997. In terms of material support, EU and Member State organs and agencies had to finance the LYCG's reconstruction and the post-Gaddafi recovery, build its capabilities, train its personnel and equip it with the necessary means and resources.

998. Despite the resources invested in the LYCG, however, the latter still failed to fulfil its mission. Consequently, EU and Member State bodies had to further extend and concretize the forms of assistance, way beyond merely aiding and abetting, in order to ensure that the LYCG would be competent to execute the crimes set out above. This often meant accompanying the LYCG in the course of the interception operations themselves, despite the reluctance of the EU and Member States to do so, given their awareness of the criminal consequences of these operations.

999. But the policy's objectives were to be accomplished at all costs. EU vessels and aircrafts assisted the LYCG by providing information on migrant boats' locations, guidance in connection with their interception, providing command and control capabilities, providing communication devices through EU and Member States' vessels, and ultimately coordinating the overall operation to ensure rescue NGOs could not assume command over the rescue.

1000. As an Italian Court already noted<sup>764</sup>, the dynamic relationship between the EU and the LYCG demonstrated a hierarchical relationship: the LYCG as subordinate to EU and Italian command and control. This establishes a commander-like mode of liability<sup>765</sup>.

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<sup>764</sup> Tribunale di Catania, 2018, "Sezione del Giudice per le Indagini Preliminari, Decreto di convalida e di sequestro preventivo", online, <https://newsmagnify.it/wp-content/uploads/2018/08/Decreto-di-convalida-e-di-sequestro-preventivo-GIP-di-Catania-27-Marzo-2018.pdf>

<sup>765</sup> Article 28(a) of the Rome Statute

### 3. Summary

1001. The evidence provided to the Prosecutor is diverse and includes an expert opinion on the situation of migrants in Libya ; a victim statement confirming, for the first time to the best of our knowledge, the involvement of the Libyan Coast Guard ('LYCG') in smuggling, trafficking and detention of migrants; internal documents of high-level EU organs, framing the commission of multiple Crimes Against Humanity within the context of a predefined plan executed pursuant to a policy aimed at stemming migration flows of Africans ; statements by policymakers, made before, during and after the commission of the crimes, that establish their awareness of the lethal consequences of their decisions and implicate them in the alleged crimes; and reports by civil society organizations on the "dire and unacceptable" human rights situation in Libya.

1002. This communication consciously avoided a detailed and comprehensive account of the involvement of EU and Member States' officials in the complex chain of decisions regarding migration and in the different programs and operations implementing these decisions. Nonetheless, the evidence enables the identification of the individuals most responsible, including directors of Frontex, EU Commissioners, and a former Italian Minister of Interior.

1003. Our focus on the highest echelon of EU and Member States' officials is due to both lack of resources and the lack of information in the materials sufficient to identify lower level EU and Member States officials involved in the decision-making and implementation processes. We trust the Office of the Prosecutor ('OTP'), given its domain expertise and significant resources, will take up this task.

1004. Likewise, we leave it to the OTP to investigate the Libyan networks and agents involved in crimes against migrants, and their relation to the EU and Member States' officials. The evidence provided establishes the LYCG as a para-state organ infiltrated by militias but, here too, the authority, domain expertise and significant resources of the Prosecutor should be used to engage in further inquiries on lower levels of involvements. It is our understanding, based on former statements of the Prosecutor to the UN Security Council that, over the past two years, the OTP has been continuously processing these aspects of the crimes as part of the eight-years UNSC-based investigation on the situation in Libya.

1005. The purpose of this communication is therefore to provide evidence and argument that would hold the most responsible actors for what until now was framed merely as ‘grave human rights violation’, a conduct that ‘is not in accordance with the laws of the sea’ or, more commonly, a ‘tragedy’. In other words, anything but what it was: a series of crimes against humanity, within the meaning of the Rome Statute, under the jurisdiction of this Court. The UN Special Rapporteurs cited in this communication already called for an ICC investigation. The Prosecutor made it clear she is aware of the crimes committed in Libya against ‘migrants’. This communication requests the OTP not to overlook the architects and designers that orchestrated the attack against perhaps the most vulnerable population on earth, and to act promptly in order to put an end to an ongoing situation that is governed by a regime of impunity.

1006. This document is a result of two-years pro-bono clinical project, comprised of a group of lawyers and dozen students. Given the current geopolitical situation in Libya and the Central Mediterranean, and after having established the required elements of the crimes under the Rome Statute, we revert at this stage to the OTP. We call the legal community to take this submission as an invitation to further develop factual basis and legal framework laid out in this communication, in order to assist the OTP in its essential work.

1007. There is a psychological difficulty to perceive the EU, a fully democratic regime with perhaps the most developed liberal polity, as a criminal organization. There are material consequences and professional risks in arguing it. There is violence in using such a terminology against people that resemble us, and that represent us. There is also a heavy moral weight in considering ourselves as citizens of a political space that has made itself the perpetrator of acts we wished would never happen again nowhere, let alone in Europe.

1008. But the Mediterranean is full with thousands of bodies, men women and children, and in Libya there are few thousands still living migrants detained in ‘concentration camps-like’ camps, with insufficient food and water. They do not ask Europe to train their guards, nor to improve the ventilation of these camps. They ask Europe to save their lives, by not sending them back to the place they fled from, refusing to rescue them, assisting those who torture and detain them.

1009. This is not a natural disaster, nor a human ‘tragic mistake’. These are crimes against humanity who have been committed by individuals who must now be held accountable. EU and Member States officials and agents are no different from any other non-European individual. They deserve the same rigorous treatment, and to face the consequences of their acts and omissions.

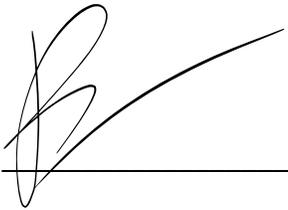
1010. We therefore respectfully request the Prosecutor to impartially investigate these nationals of States party to the Rome Statute and prosecute the most responsible of them.

Paris, June the 3<sup>rd</sup>, 2019

*omer shatz*

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Omer Shatz



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Dr. Juan Branco

## 4. Annexes

### 3.1 Victim Statement<sup>766</sup>

#### **A Note by the Authors of the Communication:**

**The signed version of the victim statement (and translator) is on file with the authors. OTP is invited to contact the authors in order to receive the full name and contact details of the witness.**

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I am \_\_\_\_\_ years old, I was born in \_\_\_\_\_, I am from North Darfur, the Berti tribe.

On 17 July \_\_\_\_\_ at midnight, my wife and me were taken to a dock with many fishing boats, boarded one of them, with water and fuel, and were taken to the embarkation point, where other migrants were waiting.

Ropes were thrown to the migrants and they boarded the boat. The smugglers, their names are Abdelbasit and Fakri, said they will escort us for 2 hours in order not to be intercepted by “pirates” or others.

We were 86 migrants, all Sudanese. The boat was too heavy. Abdelbasit jumped in and started driving while a small escort dinghy driven by Fakri was following, doing ‘reconnaissance’ ahead and coming back.

They escorted us for ½ hour until Fakri came next to our boat:

“- Abdelbasit, get in, quick!

- What should we do?” I asked

“- Continue further.”

Before departure, Abdelbasit told us: “if you’re intercepted, say you belong to Ammo.”

And they fled. Then, after a short while, we were approached by a larger boat, armed with a Dushka machine-gun and RPGs, with eight men in uniform, who bumped into our boat, which made migrants scream.

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<sup>766</sup> signed version with full names on file with the authors.

Two of the gunmen jumped on our boat: “We are the Libyan Coast Guard. We are the government. We know you are going to Europe. Return toward Libya!”

Immediately upon interception, they asked us:

“- Who’s your smuggler?”

- Ammo!

- Give me his phone.

- I don’t have his phone.

- Can’t be.”

They told a Sudanese guy controlling the compass, the lamp and the mobile phone with contact numbers, that they will throw him to the sea if he doesn’t give the phone number. He then gave Abdelbasit’s phone. They called him and when he answered they asked: “Are you Ammo?” He then switched off his phone.

We reversed towards Libya. There were massive waves. One of the gunmen took the helm and began to steer. Then he got tired. Because their boat was faster, they threw us a rope and asked us to hold it.

On the way back, they intercepted 4 other boats. In the early morning, when we reached Zawiya, however, only 3 boats were left. The two other boats had been released because they had reached a deal with the Libyan Coast Guard, or knew them. While our boat carried only Sudanese, the other two other boats had different African nationalities.

We were brought to Zawiya, and were transferred to a prison where we were kept in containers next to a multistory building. The guards told us: “Each one of you has to pay 2,000 LYD, and we will bring you to the point [where] you’ll be rescued. Pay or if you don’t have money, here is a phone, call your family so that they send us money. An agent can collect money in Tripoli. Whoever fails to pay, we will transfer him to Osama’s prison.”<sup>767</sup>

We were detained for 15 days, my wife and I were separated. I do not want to talk about what happened to her. Eventually, my wife managed to call her brothers who sent money to get us out.

The 15 days were very difficult. We had a cup of water a day. If we asked more, they gave us less than a cup of water, “so that you do not disturb us asking to go to the toilet”. Food was also disgusting.

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<sup>767</sup> Known also as Al-Nasr detention centre

They hired some of us as workers to local employers, for 35 LYD per day, warning the employers: “Don’t let them run away!” They returned those workers in the evening, and they were getting the money for their work.

After 15 days they put us back at sea, we were sent on the same wooden boat, with two other dinghies. Only the migrants from our boat and the two other boats who were able to pay, were on board of the boats.

**The boat that escorted us was the same Libyan Coast Guard’s boat that intercepted us in the first time. The armed men who were on the Libyan Coast Guards’ boat were the same armed men who were on the boat when we were intercepted the first time.**

They escorted us for two or three hours, until the light of the city became faded. When we passed the Sabratha offshore oil facility with its flashlight, they told us: “here is not safe, if we leave you, you will have to pay once again”. They continued further then at some point said: “just continue that way”, and they returned with their boat.

In the morning the other two boats were not with us anymore and I don’t know what happened to them. The waves were so high, and people began panicking. As I said earlier, we were 87 on our boat – the same passengers who were with us when we were intercepted in the first time, except 4 people who could not pay. In the morning we discovered they were replaced by 5 Libyans who were on the boat.

“- Who are you?

- We are Libyans and want to go to Europe. We boarded with you Sudanese people, because you, unlike West Africans, won’t throw us at sea.”

We were spotted a boat far away. A helicopter came around.

The rescue boat<sup>768</sup> came, threw jackets at us, took the children, the women, then the men. They disembarked us in Trapani.

Attorney: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

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<sup>768</sup> The Aquarius



Translator Declaration:

I, \_\_\_\_\_, confirm to have accurately translated the above witness statement from Arabic to English.

Full Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

## 3.2 2<sup>nd</sup> Policy Cases

### **1st Case: 10 May 2017**

1. On 10 May 2017, a rescue operation led by the NGO Sea Watch (“SW”) off the Libyan coast is violently interrupted by the LYCG. Although the Italian MRCC initially receives the distress call from SW and requests the NGO to intervene, it subsequently Rome-based MRCC informs SW that the LYCG had assumed the coordination of the rescue.

2. When the LYCG patrol boat (Al Kifah (206)) comes dangerously close to its vessel, SW is forced to retreat. The LYCG proceeds to intercept migrants at gunpoint, detain them on board, and pull them back to Libya.<sup>769</sup>

### **2<sup>nd</sup> Case: 27 September 2017 – 213 detained, pulled back and detained**

3. On 27 September 2017, the Italian Navy warship (Andrea Doria) notifies the LYCG of the position of two distressed migrant boats. The Italian warship chooses not to inform the rescue NGO vessels Lifeline and Seefuchs.

4. During the time it takes the LYCG to reach the two boats, the Italian warship refrains from rescuing the migrants, only providing minimal assistance until the LYCG arrives on the scene.

5. Following the information provided by EU agents and agencies, the LYCG subsequently intercepts 213 migrants from the two boats, detain them on board, and brings them back to the Tajoura Detention Center in Tripoli.

### **3<sup>rd</sup> Case: 11 October 2017 – 100 detained, pull back and detained**

6. A month later, in a similar case, on 11 October 2017, a boat with approximately 154 people leaves the Libyan coast in early morning.

7. At 7:22 UTC, the migrant boat is spotted drifting off the Libyan coast. In the near vicinity is an Italian helicopter flying toward the boat as well as an Italian Navy vessel (Andrea Doria) which is part of the Mare Sicuro operation.

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<sup>769</sup> Sea-Watch, 10 May 2017, “Libyan navy is risking lives of Sea-Watch crew and refugees during illegal return operation”, online, <https://sea-watch.org/en/libyan-navy-is-putting-sea-watch-crew-and-refugees-into-danger-during-an-illegal-return-operation/>, accessed 06/04/2019; Sea-Watch, 11 May 2017, “Sea-Watch demands independent investigation of the illegal return of an overcrowded wooden boat”, online, <https://sea-watch.org/en/pm-sea-watch-demands-independent-investigation-of-the-illegal-return-of-an-overcrowded-wooden-boat/>, accessed 06/04/2019

8. At 7:30 UTC, the IMRCC is notified of the presence of the migrant boat in distress and at 7:55 UTC, the Italian Navy vessel requests the LYCG vessel (Al Kifa) to intercept the migrant boat. The LYCG reports that it is 30.5NM away, and would thus need 2 hours to reach the distressed boat. At this time, the Italian Navy vessel is much closer to the migrant boat – only 12.9NM away. Nonetheless, the Italian Navy does not engage in rescue.

9. At 8:23 UTC, the IMRCC informs the NGO vessel from Save the Children of the position of the migrant boat. The NGO confirms it had been assigned by MRCC Rome to rescue the vessel and estimates it will reach the boat in 2 hours.

10. At 8:29 UTC, the Italian Navy vessel orders the LYCG to approach the migrant boat with maximum speed, and at 8:50 UTC, reiterates again to the LYCG: “We are waiting for you to perform interception”.

11. According to available evidence, the Italian Navy vessel approaches the migrants’ vessel although remains at a distance but using a RHIB until the arrival of the LYCG.

12. Eventually, the LYCG takes control of the rescue operation, pulling the migrants’ boat toward its patrol vessel. In response, certain passengers begin jumping toward the Italian RHIB, knowing that they would otherwise returned to Libya.

13. At 12:30 UTC, 42 people fall into the water from the vessel of the LYCG. The Andrea Doria intervenes to rescue them.

14. According to the Libyan Navy’s Facebook post, 40 people were taken to Italy, while the remaining 100 passengers were brought to Libya and brought to a detention center.

**4<sup>th</sup> Case: 31 October 2017, 200 detained, pulled back and detained**

15. On 31 October 2017, the MRCC alerts the vessel Aquarius of the NGO SOS Méditerranée of two migrant boats in distress with 200 people on board off the Libyan coast. Despite this alert, the LYCG assumes on scene command, and the Aquarius is forced to stand by while the migrants are pulled-back, despite the presence of the Italian warship and a military helicopter.

16. No details regarding the communication between Italian and EU actors and the LYCG have been released. According to the Libyan Navy Facebook, the 200 intercepted passengers are

eventually brought back to the Tajoura Detention Center.<sup>770</sup>

**5<sup>th</sup> Case: 23 November 2017**

17. On 23 November 2017, two migrant boats are intercepted and pulled-back despite the presence of the NGO vessel Open Arms. MRCC Rome initially requests the rescue NGO to direct itself towards a first vessel in distress, but then changes the original plan, and directs the NGO toward a second boat instead.

18. At 7:41 UTC Open Arms contacts MRCC Rome for an update but is told that the LYCG has taken charge of the first boat in distress.

19. Between 8:00-8:30 UTC the passengers of the second boat are brought on board Open Arms while its RHIBs are directed towards the first boat.

20. At 8:40 UTC MRCC Rome requests that Open Arms remain at a distance from the first boat in distress, and at 8:45 UTC Open Arms establishes visual contact with the boat.

21. Ten minutes later, Open Arms witnesses the LYCG vessel approaching the first boat. MRCC Rome orders Open Arms to remain at its position. The LYCG contacts Open Arms via radio, also requesting that it remain at a distance of 6 NM.

22. Open Arms watches as the LYCG detaining and bringing all passengers up to its deck and heads back towards Libya.

**6<sup>th</sup> Case: 24 November 2017**

23. A day later, in the morning of 24 November 2017, a migrant boat is discovered in international waters east of Tripoli, 25 NM from the coast. A second boat is spotted soon after.

24. MRCC Rome orders the Aquarius, from the NGO SOS Méditerranée, to remain on “standby” while charging the LYCG with the coordination of the two rescue operations.

25. During the standby operations, the weather conditions deteriorate, increasing the risk of shipwreck. The Aquarius’ offer of assistance is denied by the LYCG.

26. The LYCG ultimately intercepts the two boats, and pulls them back to Libya.

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<sup>770</sup> As cited in Heller, C., Pezzani, L., 2018, *Mare Clausum: Italy and the EU’s undeclared operation to stem migration across the Mediterranean*, p73, Forensic Oceanography

**7<sup>th</sup> Case: 8 December 2018 – 209-260 detained on board, pulled back and detained**

27. On 8 December 2017, a military aircraft from the EUNAVFOR MED operation spots a boat in distress in international waters, 35 NM from the Libyan coast. An Irish warship which is part of the same operation is also present in the vicinity.

28. The Aquarius vessel from the NGO SOS Méditerranée is requested to approach the vessel in distress. While it is heading toward the boat, the Aquarius is overtaken by a faster EUNAVFOR MED Navy ship, which subsequently slows down, allowing the LYCG vessel to reach the rubber boat.

29. Upon reaching the scene, the Aquarius is informed by the MRCC Rome that the LYCG was assuming coordination of the rescue.

30. The same day, the LYCG announces on Facebook that it has “rescued” 209 migrants on two boats, who were brought to detention centers in Tripoli. The Italian coast guard puts the figure at 260 people.

**8<sup>th</sup> Case: 15/12/2017 – 262 migrants detained, pulled back, and detained**

31. On 15 December 2017, another rescue operation proves the Italian strategy of privileging LYCG interception to ensure migrants’ pull back, despite the presence of Italian warship, NGO and merchant ships.

32. At 11:53 UTC, the Aquarius receives a distress signal from MRCC Rome, and is instructed to direct itself toward the migrant boat. At 12: 35 UTC, MRCC Rome informs the Aquarius of additional information on the boat’s location, provided by a helicopter of the Italian Navy deployed as part of the Mare Sicuro operation.

33. One hour later, the MRCC Rome informs the NGO that the Libyan Navy vessel Ibn Ouf is directing itself towards the boat in distress and would reach it within approximately one hour.

34. At 15:37 UTC, MRCC Rome informs the NGO that the LYCG had assumed coordination of the boat, and directs the NGO to another vessel in distress, in support of the rescue coordinated by the Italian Navy ship Rizzo, which has assumed on scene command: “The fact that the Rizzo assumed On Scene Command confirms the Italian ship’s proximity to the area in which the various

SAR cases were unfolding.”<sup>771</sup>

35. At 16:03, the Aquarius establishes radio contact with the Rizzo helicopters, and at 16:41, the crew of the Aquarius hears the Italian Navy providing the LYCG with coordinates of the vessel in distress. At 19:18, the Aquarius reaches the boat and conducts the rescue operation in collaboration with RHIB of the Rizzo. All passengers are brought safely on board the NGO vessel.

36. According to the LYCG Facebook post, 262 migrants from two different boats in distress had been intercepted and detained by the LYCG and brought back to a detention center in Tripoli.

#### **9<sup>th</sup> Case: 27 January 2018**

37. In the evening of 27 January 2018, the MRCC Rome orders the Aquarius of SOS Mediterranée to search for a boat in distress in international waters west of Tripoli. Four hours later, the boat is located NM off the Libyan coast.

38. When the NGO vessel is 100m from the migrant boat and ready to intervene, the LYCG approaches and orders the NGO to leave the area.

39. The LYCG then proceeds to escort the NGO boat away from the scene before intercepting the migrant boat.

40. MRCC Rome confirms to the NGO that LYCG had assumed “on scene command” of the operation and should comply with their instructions.

41. LYGC subsequently intercepts two rubber boats, detain the migrants and pulling them back to Libya.

#### **10<sup>th</sup> Case: 31 January 2018**

42. On 31 January 2018 at 5:50 am, the MRCC Rome calls the NGO Open Arms indicating a boat in distress, instructs the NGO to head to the north of Tripoli and await further updates.

43. One hour later, a LYCG vessel approaches the NGO Open Arms and instructs them to leave the area.

44. At 8:13 am, MRCC calls Open Arms regarding another boat in distress, 63 NM east of Open Arms position, and at 9:30 am, MRCC calls again to notify the NGO that the LYCG would assume

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<sup>771</sup> Heller, C., Pezzani, L., 2018, *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, p77, Forensic Oceanography

coordination of the operation within the next 2 hours.

45. The NGO approaches the position of the migrant boat and lowers its RHIBs shortly after 10:00. At this time, the crew of the NGO reports that they only see a smoke column and the LYCG vessel leaving the scene with the migrants detained on board. According to Forensic Architecture's Report, "[i]n this incident, the NGO was provided with contradictory and erroneous instructions that ultimately enabled the LYCG to pull-back the passengers to Libya."<sup>772</sup>

### **11<sup>th</sup> Case: 15 March 2018**

46. On 15 March 2018, the rescue NGO Proactiva Open Arms succeeded in averting a case of pull-back by LYCG. As a result, the NGO was later criminalized and its ship seized by the Italian judiciary. . According to Forensic Architecture's Report, "[d]espite the pull-back not materialising, this incident provides crucial insights into the collaboration between the European state actors, in particular the Italian Navy, and the LYCG."<sup>773</sup>

47. At 4:21, the Operations Centre of the Italian Navy (CINCPNAV) informed the Italian MRCC that a military drone taking part in the EUNAVFOR MED operation had spotted a dinghy 40 NM North-East of Tripoli. It also mentioned that it had informed the crew of the Italian Navy ship Capri docked in Tripoli as part of the extension of the Mare Sicuro operation.

48. At 4:50, MRCC Rome communicated the position of the migrants' boat to the Open Arms and requested it to proceed to assess the situation. It also informed the LYCG, and asked what they intended to do.

49. At 5:37 the crew of the Capri informed MRCC Rome that the patrol boat of the LYCG was about to leave the port of Tripoli to reach the migrants' boat and was ready to assume responsibility for the rescue. MRCC Rome responded that the Open Arms, as well as the commercial vessel Sound of Sea, were also navigating towards the boat.

50. At 6:46 the LYCG communicated to MRCC Rome, who passed on the message to the Open Arms, that it was formally assuming responsibility for this SAR event, and that it requested the NGO to stay out of sight of the migrants. The LYCG also called the Open Arms via VHF radio, asking to report to them if any boat was spotted.

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<sup>772</sup> Ibid., p. 79

<sup>773</sup> Ibid., p. 80

51. Between 7:20 and 7:57, two more migrants' boats were spotted by an Italian Navy helicopter under EUNAVFOR MED. Shortly after, the LYCG communicated to MRCC Rome that it was taking responsibility also for these two other boats and asked again that NGO vessels keep out of sight. Open Arms told MRCC Rome that it would continue searching for the three boats to assess their conditions.

52. At 9:26, the Open Arms informed MRCC Rome that it had spotted one of the three migrants' boats. As the LYCG did not respond to their calls and the boat was taking in water, Open Arms initiated the rescue operation and then directed itself to the next target, while the LYCG was intervening in another SAR event.

53. The logbook of the Open Arms reports that a fourth boat in distress had been spotted and then rescued by them shortly before 11:00, albeit the document of the Italian judiciary makes no mention of this event.<sup>774</sup>

54. Around 14:00, the RHIBs of the Open Arms found the third (or fourth) boat in distress and started normal rescue procedures. Shortly after they had finished handing over life vests and taken some of the migrants onboard, the LYCG patrol boat Ras Jadir arrived on scene and the situation became immediately very tense. The LYCG crew stopped the Open Arms RHIBs and started to threaten them to hand the migrants over to them.

55. LYCG then went to retrieve an empty rubber boat that was drifting nearby and used it to try to approach the migrants' boat, which had in the meantime resumed navigation to escape. While the LYCG did manage to take some of the migrants onboard its vessel, these people managed to flee by jumping in the water and reaching Open Arm's RHIBs.

56. "Hectic communication took place throughout this confrontational event, with the Open Arms pressing its emergency anti-piracy button SSAS (Ship Security Alert System) and asking for MRCC Rome's help, and the latter redirecting their requests to their flag state's MRCC (Spain). MRCC Rome also requested at least twice the intervention of the Italian Navy to protect the NGO's safety, but they refused claiming that they could not interfere with the operations of a sovereign state's assets. Meanwhile, however, the Italian Navy ship Capri continued to operate as a crucial and active relay of information between Italian and Libyan authorities to facilitate the interception,

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<sup>774</sup> Ibid., p81

with the pre-trial investigating judge of Sicilian town of Catania going as far as to affirm that the intervention of the Libyan patrol vessels happened “under the aegis of the Italian navy ships present in Tripoli”. In the end, the Open Arms managed to rescue all migrants of this last boat, with embarkation ending around 5:30. The whole confrontation with the LYCG lasted for 3.5 hours.”<sup>775</sup>

57. On the following day, a stand-off ensued between the Open Arms and the Italian MRCC regarding the disembarkation point of the rescued migrants. As the ship was finally granted access to the port of Pozzallo in the early morning of 17 March, it was seized by the Italian police and two members of its crew were accused of “aiding and abetting illegal migration” as well as “criminal conspiracy”. The boat was released only one month after the events, but the two crew members still remain under investigation.<sup>776</sup>

### **12<sup>th</sup> Case: 31 March 2018**

58. On 31 March 2018 Aquarius of SOS Méditerranée was involved in a partial pull-back some 23 NM from the Libyan coast.<sup>777</sup>

59. MRCC Rome requested the NGO to direct itself towards a boat with an estimated 120 people. While the Aquarius arrived on the scene first, at approximately 11:00, its crew was informed by MRCC Rome that the LYCG would coordinate the rescue, and that the Aquarius should standby and not engage.

60. However, as the NGO witnessed a deterioration in the situation, with the overcrowded rubber boat taking in water, it negotiated with MRCC Rome, LYCG headquarters and the LYCG vessel on its way to the scene, to allow the Aquarius to stabilize the situation by giving out lifejackets to all people on board, and to assess their medical conditions.

61. While doing so, the MSF nurse on board the Aquarius fast speed rescue boat (RHIB) identified 39 medical and vulnerable cases – including one newborn, pregnant women, children and their families – who were evacuated immediately to the Aquarius.

62. However, at 13:52 the LYCG orders the Aquarius to move away from the scene, leaving dozens of people still on the rubber boat. At 14:09, X remaining passengers were pulled-back by

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<sup>775</sup> Heller, C., Pezzani, L., 2018, *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, p. 81-82, Forensic Oceanography

<sup>776</sup> *Ibid.*, p. 82

<sup>777</sup> Medecins Sans Frontieres (MSF), 1 April 2018, “Mediterranean: MSF Evacuates 39 Vulnerable People From Packed Rubber Boat”, online, <https://www.msf.org/mediterranean-msf-evacuates-39-vulnerable-people-packed-rubber-boat>, accessed 06/04/2019

the LYCG.

**13<sup>th</sup> Case: 6 November 2017 – Sea Watch Case - 778**

63. On 6 November 2017, the NGO Sea Watch (“SW”) and the Libyan Coast Guard are involved in a confrontational rescue operation leading to the deaths of 20 migrants and resulting in 47 passengers being ultimately intercepted, detained and pulled back to Libya.<sup>779</sup>

64. The SW succeeds in rescuing 59 passengers and bringing them safety to Italy. The case is indicative of a system under which EU and Italian failure to comply with international maritime and human rights law leading to preventable, criminal deaths of individuals.

65. The deaths resulted due to a clash of aims: on the one hand, the NGO seeking to effectively save lives and bring migrants to safety, on the other the LYCG’s mission to intercept, detain and pull-back under the orders of the EU and Italian commanders and agreements. A visual reconstruction of the incident is available here:<sup>780</sup>

66. On 6 November 2017, a boat with 150 migrants leaves Tripoli around midnight. As the migrants’ boat travels further away from Libya, the sea becomes more turbulent causing water to enter the boat. At this point, the migrant boat contacts the Italian Coast Guard for assistance.

67. At 5:53 and 6:01, the Italian coast guard sends a distress signal to all vessels transiting in the area, indicating that the migrant boat had departed from Tripoli. These signals are received by the rescue NGO Sea Watch vessel, which had been present just outside the Libyan continuous zone. The SW vessel quickly adapts its course to reach the migrant boat.

68. At this point, MRCC Rome fails to clearly establish whether SW or LYCG should assume the role of “on-scene commander” in accordance with obligations arising under the 1979 International Convention on maritime search and rescue.<sup>781</sup>

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<sup>778</sup> A case has been brought in front of the European Court of Human Rights, see: European Council on refugees and Exiles, 2018, “Case against Italy before the European Court of Human Rights will raise issue of cooperation with Libyan Coast Guard”, online, <https://www.ecre.org/case-against-italy-before-the-european-court-of-human-rights-will-raise-issue-of-cooperation-with-libyan-coast-guard/>, accessed 19/05/2019 see also Heller, C. et al., 2019, “‘It’s an Act of Murder’: How Europe Outsources Suffering as Migrants Drown”, *New York Times*, online, <https://www.nytimes.com/interactive/2018/12/26/opinion/europe-migrant-crisis-mediterranean-libya.html>, accessed 19/05/2019

<sup>779</sup> The 6 November 2017 incident is important for its evidentiary proof documented in the Forensic Architecture report and composed of direct testimonies, audio recordings, video footage, logbook and distress signals, and a leaked EUNAVFOR MED internal report.

<sup>780</sup> Forensic Architecture and Forensic Oceanography, 2018, “Mare Clausum: The Sea Watch vs Libyan Coast Guard Case, 6 November 2017”, online, <https://www.forensic-architecture.org/case/sea-watch/>, accessed 06/04/2019

<sup>781</sup> Heller, C., Pezzani, L., 2018, *Mare Clausum: Italy and the EU’s undeclared operation to stem migration across*

69. According to EUANVFOR MED's internal report and Brigadier Masoud Abdel Samad, (LYCG), the Libyan Patrol Boat was tasked by the Libyan Operation Room as "On Scene Coordinator".<sup>782</sup>

70. Despite this, SW following the instructions of the Italian coast guard, had effectively assumed many of the tasks of the "On Scene Coordinator" (OSC). As it approached the migrant boat, SW was never informed by the Italian MRCC or the LYCG that the LYCG was instead charged with the role of On Scene Coordinator.<sup>783</sup>

71. At 6:00, the Italian coast guard determines the exact location of the migrant boat and communicates this information to SW at 6:31, while also warning them that the LYCG is present in the area and the SW should thus proceed with caution.

72. At 6:44, the Italian coast guard communicates the migrant vessel's exact coordinates to all vessels in the vicinity. At 7:34, the SW receives a call from the LYCG, instructing the SW to leave the scene, repeated several times in an aggressive tone. SW, however, confirms it is proceeding toward the migrant's boat per MRCC Rome's instructions.

73. Around 8:05, the migrants' boat begins to deflate, causing passengers to fall overboard; at least 20 people are unable to swim back to the boat. A Portuguese aircraft in the vicinity sends down life jackets.

74. At 8:24, SW informs MRCC in Rome that it is in the vicinity of the migrant boat along with the LYCG patrol vessel and a French Army ship (EUNAVFOR MED operation). Despite the presence of the LYCG ship, the Italian coast guard directs the SW to intercept the target.

75. At 8:45, the military aircraft circles back towards the migrant's boat and throws down life jackets to the passengers along with an inflatable raft. The available evidence shows that the migrants' boat had already deflated and many people had drowned before this time.

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*the Mediterranean*, p89, 94, Forensic Oceanography; See 5.7.1 of the International Convention on Maritime Search and Rescue: United Nations, 27 April 1979, International Convention on maritime search and rescue, 1979 (with Annex), Vol. 1405, I-23489, p131, online, <https://treaties.un.org/doc/Publication/UNTS/Volume%201405/volume-1405-I-23489-English.pdf>, accessed 06/04/2019

<sup>782</sup> EUNAVFORMED, February 2018, *Monitoring Report: October 2017 – January 2018*, pC3, online, <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/ENFM-Monitoring-of-Libyan-Coast-Guard-and-Navy-Report-October-2017-January-2018.pdf>, accessed 06/04/2019; as quoted in Heller, C., Pezzani, L., 2018, *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, p94, Forensic Oceanography

<sup>783</sup> "The SW and the LYCG were thus left to resolve their conflicting imperatives of rescue and interception on their own while the operation was already underway." According to Heller, C., Pezzani, L., 2018, *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, p. 94, Forensic Oceanography

76. At 8:50 the Frontex surveillance aircraft Osprey 01 flies over the SAR event, transmitting live video footage to Frontex HQ in Warsaw and Rome. Frontex communicates with the Italian MRCC who responds that no further involvement of Osprey 01 was required. The Frontex aircraft thus leaves the incident.

77. At 9:04, the LYCG establishes radio contact with SW indicating that LYCG is now responsible for the rescue. The SW denies this, telling the LYCG that they are in charge of the rescue under orders from MRCC.

78. Around 9:30, during the rescue operation by the SW crew, the LYCG begins throwing objects at the NGOs RHIB operators, obstructing the rescue operation and forcing the SW RHIBs to retreat which causes a second person to drift in the water and slowly die.

79. By 09:30, there were almost no migrants left in the rubber boat. On the deck of the patrol vessel, the LYCG attempted to regain control over the captured passengers by cordoning them off with a rope and repeatedly beating them.

80. Despite this, some migrants still attempted to escape. Unable to establish order, the video shows that at 09:36 the LYCG increased the patrol boat's speed to rapidly leave the scene. Seizing his last chance, one more passenger desperately jumped overboard. The LYCG departed despite him still hanging on the ladder outside of the ship.

81. Only after the Italian military helicopter repeatedly radioed the LYCG vessel to stop, did the crew slow down and pull the person on board. The violence and carelessness exercised by the LYCG had become so excessive, that even the Italian military, which has on other occasions rather facilitated and supported the LYCG's activities, had to try and contain it.

82. SW succeeded in rescuing 59 people and brought them safely to Europe, and also recovered the body of a dead child belonging to one of the survivors. However, more than 20 people died, before and during the rescue, a figure which is corroborated by the sighting of 22 dead people in the water by the Italian Helicopter at 09:15:05, which it communicated via radio to SW.

83. The LYCG succeeded in detaining and pulling back 47 intercepted migrants on board, which would eventually face detention and violence in Libya.

84. "In April 2018, nearly six months after the events, as we complete our reconstruction, we finally establish contact with the survivors who were pulled-back to Libya. Upon arrival, they were

held captive in Tripoli's Tajoura detention centre for one month in cells with hundreds of people and given scarce food or water. They describe being beaten three to four times a week by Libyan guards armed with ropes and pipes.

85. "While some of the survivors were released and deported to their countries of origin, others were sold to a captor. He tortured them to extract ransom from their families, who were unable to pay. The survivors we spoke to eventually escaped their captivity and remain in hiding in Libya, where they fear being kidnapped or imprisoned again."<sup>784</sup>

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<sup>784</sup> According to interviews carried out by Forensic Architecture and as quoted in Heller, C., Pezzani, L., 2018, "*Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*", p. 98, Forensic Oceanography

### 3.3 Expert Opinion on Migration Situation in Libya and the Central Mediterranean

#### A Note by the Authors of the Communication:

**Because the expert is currently present in Libya, a signed version with his signature and CV will be submitted to the Court upon his return to Europe, by July, 1<sup>st</sup>, 2019.**

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I have been researching migration in both countries of origin and transit (and to a lesser extent arrival) since about two decades, with a focus on migration between sub-Saharan Africa (Horn of Africa, Sahel) and Libya, and a focus on asylum seekers displaced by conflicts in their countries of origin, notably Sudan.

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#### **1. A Short History of Migration in Libya**

It is important to remember that under Qaddafi, many sub-Saharan migrants were traveling to Libya without any intention to continue forward to Europe. Qaddafi's Libya had important needs of foreign manpower in various sectors: oil, services (health), construction, industrial farms and livestock breeding, and even armed forces. It made Libya attractive for "seasonal" or "circular" migrants, mostly from neighboring countries (Chad, Niger, Sudan), but also from more remote West African countries (Mali, Ghana, Nigeria) and from the Arab world (Egypt, etc.). It could be **estimated that about 2 million migrants were living in Libya prior to the revolution.**

Among them were also "political refugees", although Qaddafi's **Libya did not recognize the right of asylum, the status of refugee or the Geneva convention.** However, it was a host country for political opponents, in particular armed opponents, from all sub-Saharan neighboring countries (notably Chadian Tubu and Arab rebels, Nigerien Tubu and Tuareg rebels, Malian Tuareg rebels), but also from the rest of the world. Foreign opponents were able to find financial and military support in Libya, could or had to fight as Libyan proxies in various countries, were sometimes integrated into Libyan armed forces, and could even obtain the Libyan nationality.

The sub-Saharan presence also served Qaddafi's Pan-African stance, although it ran counter to deep xenophobic or racist prejudices within the Libyan population. As a result of the latter, deadly anti-Blacks riots took place in 2000. The regime did not react, and may even have encouraged them. Qaddafi also treated sub-Saharan migrants in an increasingly unstable way in order to blackmail their countries of origin, knowing those were benefitting from the remittances sent by the migrants. Libya also used the sub-Saharan migrants to blackmail Europe, in particular Italy, in order to negotiate its reintegration within the international community.

This whole process took years and many stages. In 2000, the UN stopped enforcing an air traffic embargo on Libya.

**In 2008, Qaddafi and Italy's Berlusconi signed a Treaty of Friendship with a strong focus on migration control, which was one of the first milestones of current EU policies of "externalization" or sub-contracting EU borders' control to states outside the EU. The Treaty inspired the March 2016 EU-Turkey agreement, which itself inspired new agreements between the EU and Libya.**

As early as the early 2000s, **Italy activated or even built migrant detention centers** on Libyan soil, which at the time appeared to be essentially aiming at deporting migrants back to their countries of origin. Libya then set up a policy of expulsion which corresponded to a European but also to a Libyan demand, with a population, as mentioned above, highly xenophobic in spite of manpower needs. **The detention-expulsion system within Libya was also fed by deportations from Italy to Libya.**

During the 2011 revolution, Sudanese rebels hosted in Libya by Qaddafi, but also sub-Saharan migrants in general, appeared to side with the regime, and some fought on the loyalist side. This aggravated further the Libyan racism and led to targeted violence against sub-Saharan migrants by anti-Qaddafi forces and supporters. Many sub-Saharan migrants then fled Libya, before progressively returning, since they still found few economic opportunities in their countries of origin, and since Libya after the revolution was still, and still is to some extent, a place where migrants can find work and earn more money than at home, eventually sending part of their wages to their family at home.

As mentioned above, Libyan remittances were, under Qaddafi, a crucial source of income for various sub-Saharan countries. It is worth noting that it is much less the case today, since now **many sub-Saharan households are paying ransoms to Libyan human traffickers, sometimes selling**

**land and contracting debts, in order to release their hostage relatives in Libya.**

**As a result, many migrants who did not intend to travel to Europe, end up boarding on boats, because they are tired with the situation, or pushed by relatives in or outside Libya, who are tired of paying for them. Some even find themselves on a boat unwillingly, having paid to be set free but not necessarily to travel to Europe. For instance, most Sudanese migrants, until recent years, only intended to travel to Libya, but are recently increasingly aiming at Europe.**

## **2. Current Situation in Libya**

**According to UN figures, about 700,000, mostly sub-Saharan, migrants currently live in Libya.** However, there is no proper registration system and those estimates are rather conservative, with many believing actual numbers might be much higher, with probably more than one million, or even more, sub-Saharan migrants currently living in Libya.

The three sub-Saharan countries bordering Libya (Niger, Chad, Sudan) have always been and are still said to be the main origin countries of migrants in Libya. Representatives of each of their embassies and communities estimate their respective community to number between 250,000 and 500,000 people, which would put the total population for those three nationalities in Libya between 750,000 and 1,5 million people. For migrants from those three countries, the main destination remains Libya. Only a few thousand Sudanese cross the Mediterranean each year.

Among migrants from those three countries are people who have been residing in Libya since many years, sometimes prior to 2011, and are well settled in the country. They play an important role in helping newcomers from their nationality or community – newcomers from Sudan will often find support in specific neighborhoods and Sudanese restaurants. But there are also Sudanese smugglers or intermediaries, migrants (from Sudan, Eritrea, Ethiopia, Nigeria, Ghana) who became migrant intermediaries or traffickers, and migrants (Sudanese, West African) who are forced to work as guards or torturers in clandestine centers where migrants are detained and tortured for ransom.

Older communities from neighbouring countries, whose main aim is to work in Libya, see themselves as better protected. **This is partly true since Libyan legal customs inherited from the Qaddafi era penalize first those who try to cross the Mediterranean: those must be arrested and detained** as it is considered that they will necessarily try to cross again.

**Many among nationals from neighbouring and other countries who do not wish to cross still**

**manage to find work in Libya before returning home. But even for them, risks of kidnapping and arrest have been increasing.**

Until recently, for instance, Nigerien migrants thought themselves as immune from kidnapping risks faced by sub-Saharan migrants from other countries; they recently realised that even sub-Saharan communities with an old and strong presence in Libya were not spared.

**Another Qaddafi-inherited legal situation is the persistence of the lack of an asylum law, with refugee status and Geneva convention still to be recognized, and the United Nations High Commission for Refugees (UNHCR)'s activities in Libya only tolerated and still not fully legal.**

However, some countries or communities are considered as eligible to asylum and can be registered as asylum seekers by UNHCR in the hope of being resettled in a safe country (in Europe or North America).

Seven countries or communities are concerned: three Arab countries (Syria, Iraq, Palestine), even though their residents are considered as being less at risk in Libya than sub-Saharan migrants, and four sub-Saharan countries or communities (Somalia, Eritrea, Sudan but only the Darfur region, Ethiopia but only the Oromo community). In addition to those seven countries and nationalities, two new countries (Yemen and South Sudan) were added recently to the list.

By May 2019, this system allowed UNHCR to register 57,000 migrants. The majority of those registered are Syrian (41%), followed by Sudanese (19%) and Eritrean (15%) nationals. However, it is estimated that no more than 14% of the Sudanese living in Libya have been registered, while 91% of the Eritreans are believed to have been registered.

**Some asylum seekers have been registered since years, and some have been registered several times – sometimes registering again after having been arrested or kidnapped for months.** The system is extremely slow. At the current pace, the UNHCR would need thirty years to evacuate from Libya the 57,000 already registered.

While a few have been directly resettled to Europe or North America, most (about 1,500 a year) transit through Niger, where they are interviewed by officials of resettlement countries. The transit is slow, and UNHCR in Niger justified it by the supposed need of a “relaxation” period which can last months. However, it seems this, and the fact the system is ‘stuck’, is mostly due to the fact resettlement countries accept too limited numbers of people, and too slowly.

Both Niger and the UNHCR in Niger also appear to be reluctant to host more than 1,500 migrants in Niger, and afraid it could encourage direct flows toward Niger, including from Libya. Already in 2018, about 2,000 Sudanese travelled from Libya to Niger, whose cases were addressed very slowly, precisely because of this fear of a “pull factor” from Libya to Niger.

For those migrants who are not registered by UNCHR, the main exit from Libya is through the IOM (International Organization for Migration), which organizes voluntary returns.

However, **IOM officials themselves recognize those returns are not really “voluntary”, notably when they concern migrants detained in detention centers, for whom IOM’s “voluntary return” is sometimes the only chance to be set free, at least without paying money.**

**IOM’s voluntary returns are also much more quick and efficient than UNHCR’s resettlements. About 20,000 migrants in 2017 and 16,000 in 2018 were returned home by IOM. They, however, included people from countries or communities eligible to UNHCR registration – Sudanese from Darfur, Eritreans, Somalians – in spite of well-established risks for those migrants when returned home – cases of Sudanese returned to Sudan and arrested upon return have been documented.**

### 3. Detention

There are **about 15 operational “official” migrant detention centers** recognized by the Directorate for Combating Illegal Migration (DCIM) of the Interior Ministry of the Tripoli-based, Government of National Accord (GNA), formed in 2015 and internationally recognized.

Other detention centers, in particular in southern Libya, are recognized, and the DCIM personnel are paid, by the DCIM, but not operational. There are also DCIM-recognized detention centers in eastern Libya, in areas under control of the rival “interim government” and the so-called Libyan National Army (LNA) forces under Khalifa Haftar, but most operational detention centers (13 in May 2019) are in and around Tripoli and in north-western Libya, in the area mostly, at least nominally, under control of the GNA and affiliated militias.

**The situation is evolving – detention centers are regularly opening and closing, including after reports of serious abuses or because of fighting in Tripoli, but then often re-opening.**

Beyond “nominal” control, the DCIM’s control over those detention centers varies considerably. Some detention centers date from the Qaddafi-era, including some who were built by Italy, and are

still managed by DCIM-personnel. **Others have been created by militias post-2011 and then recognized by the DCIM.**

**The emblematic case is that of the Al-Nasr detention center in Zawiya, west of Tripoli, created by the local Al-Nasr revolutionary *katiba*, and recognized by the DCIM before being closed after reports of serious abuses. A DCIM officer told me: “Now it’s a big mess. Some detention centers on the coast are controlled by militias and are part of the smuggling networks”.**

United Nations agencies (UNHCR, IOM) and some international NGOs have access to detention centers and provide some relief to detained migrants. Their presence is relatively welcome by guards who see them as providers of international legitimacy. **The EU says it is not funding the DCIM and the detention centers, however it is indirectly funding them, including through NGOs operating there, and thus also giving them a level of international recognition, albeit indirectly.**

**Nevertheless, the detention centers reply to a double-demand: one one hand, a European demand, even if there is no known direct funding;** on the other, a Libyan demand for controlling migration.

Migration control, and the DCIM, has become one of the symbols of what should be a functional Libyan state, and thus replies to a widespread and growing need of state within Libya, in a fashion which is not damaging for the Libyans. DCIM also pays salaries to Libyan civil servants who sometimes want to work to justify those salaries.

**By May 2019, more than 5,000 migrants were detained in detention centers in Libya. Numbers varied considerably between 3,000 and a peak of 20,000 in 2017, but were mostly between 3,000 and 6,000 at a given moment in time.**

By May 2019, the main operational detention centers were four detention centers in Tripoli, where 2,200 migrants were detained (500-600 migrants in each), often at close vicinity of current fighting zones; in addition, more than 800 migrants were detained in the mountain town of Zintan. **About three quarters of detained migrants are believed to be eligible to UNHCR registration, based on their nationalities and communities.**

**In principle, only migrants intercepted at sea by the Libyan Coast Guard (LCG) are detained in the main detention centers on the coast. But in fact, when the centers are empty, migrants, including some with legal documents allowing them to reside in Libya, are arrested to fill the detention centers.** According to a Libyan human rights activist, “when a detention center is empty,

they have to refill it. So they send forces to the streets to collect migrants. It's like hunting.”

There are different possibilities to be released from detention centers. Migrants' embassies or communities' representatives can intervene and help migrants to regularize their status. Corruption of detention centers' administration or guards is common. Libyan employers, or sometimes smugglers who would send the migrants to the sea in exchange for money (in which case released migrants will most likely board or board again on a boat), can also act as guarantors for migrants. Else, IOM's or to a lesser extent UNHCR's processes detailed above can allow migrants to get out of Libya.

**There are reports of violence within detention centers, including beatings, torture for ransom, sexual abuses, forced labour, and migrants being sold to traffickers (who then submit them to torture for ransom, forced labour and prostitution).**

**According to a Libyan human rights activist, “DCIM are just legal traffickers, like a militia with a state disguise. A detention center is a place in which to destroy people's dreams. It's a place of human trafficking, forced labour, and sexual abuse, controlled by militias blackmailing the GNA, the European Union and the international community.”**

**On various occasions, migrants, in particular Sudanese, have been forcibly recruited within detention centers by Libyan armed forces, in order to fight on their side, as well as to load, clean and transport weapons, repair and clean military vehicles, remove dead bodies from the battlefield, cook, bring food and clean for the soldiers. This took part in particular during several rounds of fighting between rival forces in Tripoli, in August-September 2018, December 2018-January 2019, and April-May 2019.**

It is crucial to distinguish between detention centers and transit hubs managed by smugglers (also violent but whose aim is to smuggle migrants in exchange for a payment) and torture centers (whose aim is only to extract money).

**There are many centers, small or big, where kidnapped migrants are detained and tortured for ransoms. Their locations appear to be strongly linked with the absence of the state or of state-like authorities:** they are found in particular in areas inhabited by the losers of the 2011 revolution, areas loyal to the Qaddafi regime and who do not feel part of neither the GNA nor the rival LNA (Libyan National Army) - Beni Walid, Worshefena, Shwereif, Mizda, Brak al-Shatti, as well as further south, Kufra, Um el-Araneb and Rebyana, are such areas.

**Beni Walid is generally considered as the “capital” of migrant trafficking or kidnapping. It is**

believed about a dozen of hangars are scattered over the town's outskirts, with several hundred or thousand migrants detained in each – 15,000 migrants may be permanently detained in Beni Walid. They include migrants who did not pay yet for their trip to Beni Walid and have a debt to pay, or whose debt was resold to the traffickers, but also migrants who already paid their trip, and whose “debt” is fictitious. They include migrants whose journey goes through Beni Walid, and others who have been kidnapped far away – in Sebha in southern Libya, or on the coast further north, in Tripoli streets, and in the detention centers themselves. Some migrants have been kidnapped multiple times.

The practice of torturing for ransom spread, originally from Egyptian Sinai, to Libya, and there are reports it is now spreading further west in Algeria, Mali, etc. The spread has been facilitated by technological evolutions, including fund wires and social networks (WhatsApp, Facebook).

Horn of Africa migrants appear to be the first victims of torture for ransom in Libya. This phenomenon originates in earlier Eritrean migration toward Egypt and the Sinai, where kidnappings for ransom of Eritrean migrants led the Eritrean diaspora in Europe and North America to organize in order to pay ransoms to release their nationals.

As a result, the myth that Eritreans are rich is widely spread within Libya, so that kidnapped Eritreans are asked to pay higher ransoms and in US dollars; they also suffer from multiple kidnappings. This “model” extended to Ethiopians (Libyans do not always distinguish between both nationalities and call both *Habasha*, “Abyssinians” in Arabic), Somalis and to a lesser extent Sudanese. Libyan and foreign bandits operating in Libya “steal” and resell Eritrean migrants. Some smugglers even refuse to transport Eritreans as they say this is increasing risks for their convoys to be attacked.

#### **4. The sea**

Migrant smuggling across the Mediterranean also saw an evolution. Under Qaddafi, migrants were smuggled on old wooden fishing boats, which were then lost after the trip; sometimes smugglers were on board, and complicities in Italy were allowing their quick release from detention and return home in order to organize a new trip. The wooden boats have now been replaced by dinghies, carrying around a hundred migrants, and steered by migrants themselves. Some smugglers provide migrant “captains” with satellite phones or GPS.

The main departure points are situated on Libya's north-western coast, between Zuwara and Khoms. They have constantly evolved. Zuwara was a main departure point until 2015, when, after deadly shipwrecks, the local population reportedly reacted and expelled the smugglers. Those moved to Sabratha and Zawiyah where they associated to local smugglers.

**By 2016, main Zawiyah revolutionary militias were recognized as 'Libyan Coast Guard' ('LCG') by the GNA and opened a migrant detention center which was also recognized, together with a local relief NGO – prior to this, since 2014, they were also recognized as Petroleum Facilities Guards in charge of the local refinery.**

The Zawiyah militias' move toward becoming official anti-migration forces were made in anticipation of political recognition and financial support from both the GNA and international players, which they eventually obtained, notably as LCG.

**According to UN reports and testimonies, they however remained involved in smuggling, notably, migrants, while in the meantime taxing rival smugglers or sometimes fighting those who refused to pay them, notably in Sabratha.**

**In Sabratha, migrant smuggling kept flourishing until mid-2017, when the GNA and Italy reportedly directly negotiated with the town's main smuggler and militia leader. His forces were then recognized as anti-smuggling forces by the GNA, a shift which provoked a war between them and rival smugglers and militias, during which migrants were forcibly recruited to fight. After this war, remaining smugglers reportedly moved away from Sabratha to departure points east of Tripoli, such as Garabuli and Khoms.**

The GNA, created by an agreement signed in Morocco in December 2015 and recognized by the international community, only succeeded in setting foot in Tripoli in March 2016.

**As early as August 2016, the European Union signed a Memorandum of Understanding with the GNA, which allowed the EU, beginning in October, to train the LCG. In February 2017, a new Memorandum of Understanding was signed by the GNA and Italy, imitating the EU-Turkey deal and resurrecting the Qaddafi-Berlusconi treaty.**

**This allowed the EU and Italy to strengthen their cooperation with the LCG, including with funding, training, provision of intelligence and equipment. Prior to this, in 2013, the Netherlands had already supplied the LCG with 8 patrol boats. In 2017 and 2018, Italy supplied or promised more patrol boats – the exact number of those actually delivered is uncertain. However, in September 2018, a similar boat transfer by Malta was blocked by the**

**United Nations Security Council in application of its arms embargo on Libya established by resolution 1970 (2011) and elaborated by resolution 2174 (2014).**

**Regardless of this new development, in February 2019, the French Defence minister promised six speedboats to the GNA's Navy for intercepting migrants and "reinforcing the military capacity of the Libyan Navy".** Several NGOs, including Amnesty International and Médecins Sans Frontières, contested the decision at court.

**All those boats transfers, even if the boats were disarmed, should be considered as transfers of military equipment violating the UN arms embargo on Libya – not the least because the boats have been or risk being used for violent migrants interceptions violating maritime law, leading to further violence and abuses for intercepted migrants brought back to Libya; but also because the boats have been or are likely to be re-armed in order to be used in the protracted civil war in Libya.**

In April-May 2019, there were reports that, due to the conflict between armed forces loyal to the GNA and those under the LNA, **LCG forces under the GNA equipped with military equipment, including heavy machine guns, vessels which had been formerly donated to them, disarmed, by the Italian government; those forces announced diverting those vessels from their original mission of intercepting migrants, to take part to the current fighting.**

The LCG is formally part of the Libyan Navy, operating under the GNA's Defence Ministry. **There are also LCG units in LNA-controlled areas in eastern Libya, but those appear to still receive GNA funding, even though they are not under GNA control.** However, the LCG operating in western Libya, where lie the main migrant departure points, is much more involved in migrants' interceptions at sea. The GNA's Interior Ministry also have "Coastal Security" forces, whose operations – including reportedly migrants' interceptions – are coordinated with the LCG, but appear to be limited to Libyan territorial waters, while the LCG operates much further away in international waters.

**The LCG can hardly be considered as a government-controlled regular force, since they include militias formed at the time of the revolution and later. There are multiple reports on their violence against migrants during interceptions at sea, including beatings and killings with firearms.**

**They are known do disrespect international standards for rescue at sea, including by proceeding to risky boardings and towings of migrant boats. More generally, they can only bring back intercepted migrants to Libya, although the country is not considered safe, notably by the UN.**

**Further, intercepted migrants are generally imprisoned in the DCIM detention centers described above, where their detention time is indefinite. However, it appears that not all migrants intercepted by the LCG are imprisoned in official detention centers. Indeed, the LCG are also involved in migrant trafficking and smuggling. There are testimonies of migrants who were intercepted by the LCG then jailed in secret prisons managed by the LCG, where they were tortured until they could pay a ransom to get released.**

**Those migrants who had paid were then brought back on boats and escorted by the LCG themselves toward Europe. Smugglers also reportedly successfully paid bribes to LCG in order to avoid interceptions.**

**Finally, some LCG units also used their boats for various illegal or war activities, including migrant smuggling, fuel trafficking and fighting.**

**In July 2018, Abderrahman Milad aka “Bija”, the commander of the LCG unit in Zawiya, was put under sanctions (travel ban and assets freeze) by the UN Security Council, notably for abuses against migrants. Prior to this, his forces had been the recipient of one of the boats Italy supplied to the LCG, and some of their members reportedly benefitted from the EU EUNAVFOR MED/Sophia Operation training program.**

**The LCG have also been accused of treatening and shooting at international rescue boats and fishing boats. Incidents at sea appeared notably linked to the fact the LCG seem to consider their newly recognized Search And Rescue (SAR) zone as Libya’s territorial waters, against maritime law.**

**This SAR zone was recognized in June 2018, following EU and Italy’s encouragements for the GNA to declare it, allowing Italy to prioritize the LCG as recue actors rather than non-Libyan boats.**

**The results of this policy aiming at empowering the LCG while in the meantime discouraging state navies, commercial vessels and NGOs, the latter repeatedly accused of being smugglers’ accomplices, to rescue migrants, are obvious.**

The Central Mediterranean Route became the main migrant route toward Europe in **2016**, after the EU-Turkey deal closed the Eastern Mediterranean Route. Italy then registered a peak **at arrivals with 181,000 migrants**.

In **2018, only 15,000 migrants reportedly crossed** from Libya to Italy, about the same number than those who were intercepted by the LCG.

**Interceptions by the LCG drastically increased from 0.5% in 2015 to 50% in 2018. The mortality at sea on the Central Mediterranean Route increased as well, from 0.2% in 2014 to 4% in 2018, and 2019 figures will likely be above 10%.**

Migrant routes diverted west of Libya, with the Western Mediterranean Route between Morocco and Spain becoming the main route to Europe, with about half of the crossings in 2018.

**As Europe tried to solve the so-called migration crisis in haste, before Libya had built a proper state exerting control over regular armed forces and over the Libyan territory, Europe-supported militias which have long been impeding state building and continuously fight each other, including with military equipment supplied to them by Europe for migration control. As a result, Libya is less than ever a “safe country”, not the least for the hundred of thousand sub-Saharan migrants who are stranded there.**

[full name] [signature] [date] [CV attached]