EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS

ECCHR

Article 15 Communication to the Office of the Prosecutor of the International Criminal Court

Re: Situation in Libya – Commission of Crimes Against Migrants and Refugees: Interceptions at Sea as Crimes Against Humanity

PUBLIC REDACTED VERSION

Submitted by
the European Center for Constitutional and Human Rights (ECCHR)
on
29 November 2022

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EXECUTIVE SUMMARY

I. Introduction

1. The European Center for Constitutional and Human Rights (ECCHR) files this Communication to the Office of the Prosecutor (OTP) of the International Criminal Court (ICC or the Court) under Article 15 of the Rome Statute. In the context of the atrocious crimes committed against migrants, refugees, and asylum seekers (hereinafter migrants and refugees) in Libya, as already documented in a previous Communication,[1] this Communication concludes that their interception while in distress in the Central Mediterranean Sea, and their return to and systematic detention in Libya, amount to crimes against humanity. More precisely, the Communication argues that the interceptions and returns, rather than "sea rescue" operations, are crimes against humanity in the form of the severe deprivation of physical liberty (Article 7(1)(e) of the Rome Statute), committed as part of the widespread and systematic attack against migrants and refugees in Libya. The Communication also shows that the ICC has jurisdiction over these crimes in the context of the ongoing investigation into the Situation in Libya.
2. The Communication details 12 exemplary incidents of the interception of migrants and refugees at sea and their return to and detention in Libya between 2018 and 2021. The incidents present a particularly clear and detailed picture of the cooperation between European Union agencies (particularly the European Commission, EUNAVFOR MED, and Frontex) and Member States (including Italy and Malta) with Libyan actors, on both the policy and operational levels, with regard to the interception of migrants and refugees at sea for the purpose of their return to and detention in Libya. The Communication presents information and evidence, drawn from publicly available data, as well as first-hand materials from sea rescue organizations, which point to the alleged criminal liability of specific individuals, namely high-ranking officials of EU Member States and EU agencies. These individuals are alleged to have acted according to a common plan that resulted in the commission of the crimes at stake and, therefore, are indicated as co-perpetrators under Article 25(3)(a) of the Rome Statute.
3. This Communication to the ICC builds on and extends the scope of the previous Article 15 Communication filed by ECCHR, together with the International Federation for Human Rights (FIDH) and Lawyers for Justice in Libya (LFJL), in November 2021. While that Communication focused on individual criminal liability of high-ranking actors in Libya for alleged crimes against humanity perpetrated against migrants and refugees in the context of detention and transit on Libyan territory, this Communication adds new factual evidence and

[1] ECCHR, FIDH, and LFJL Art. 15 Communication to the ICC, November 2021, full redacted version available at: https://www.ecchr.eu/fileadmin/user_upload/Redacted_Art_15__Communication_to_the_ICC_on_crimes_against_refugees_and_migrants_in_Libya.pdf

legal analysis with respect to the interception at sea and return to Libya of migrants and refugees fleeing Libyan territory.

4. In collecting the evidence which forms the basis of this Communication, ECCHR worked in collaboration and exchange with several civil society organizations. In particular, the sea rescue organization Sea-Watch has provided valuable first-hand documentation accumulated during their civil rescue operations at sea and monitoring in the air. Over the course of multiple interactions, Sea-Watch also provided important insight into and assessment of the factual circumstances based on their extensive sea rescue experience. Other sea rescue and civil society organizations, including Initiative Watch the Med – Alarm Phone, Open Arms, Border Forensics, Frag den Staat, and Human Rights Watch, as well as several investigative journalists, provided crucial information on the collaboration between Libyan actors and officials of EU agencies and Member States and on the complex network of actors jointly involved in aspects of border management. Additional information was collected and analyzed from reliable public reports and open-source data.
5. The 12 exemplary incidents included in the Communication expose the multiplicity of entities and actors from EU Member States and EU agencies involved in the alleged common plan with internationally recognized Libyan authorities to intercept migrants and refugees at sea and contain them on Libyan territory. This common plan has been enacted through the implementation of interceptions and returns of migrants and refugees fleeing Libya by sea, along with other border and migration management measures. Based on the materials and analysis presented in the Communication, a number of high-ranking officials from EU Member States and EU agencies are identified, along with evidence demonstrating each of these individuals' essential contributions to the common plan. Based on this, the Communication argues that there are reasonable grounds to believe that the identified individuals can be held criminally responsible, together with Libyan actors, as co-perpetrators of the crime of severe deprivation of physical liberty of migrants and refugees as a crime against humanity.
6. The list of alleged perpetrators and corresponding mode of liability analyzed herein focuses on high-level officials and is not exhaustive. This does not exclude that the conduct outlined in this Communication may be qualified as other crimes under the Rome Statute or that alternative modes of liability, namely accessory modes of liability, such as aiding and abetting, may be established for the individual criminal responsibility of actors involved in interceptions of migrants and refugees at sea and their return to Libya. ECCHR urges the Prosecutor to open an investigation into these crimes and into the individual criminal responsibility of all relevant suspects.

II. Background

7. For years, the Central Mediterranean route has been considered one of the world's deadliest migration routes. Since 2014, over 20,000 migrants and refugees have died or gone missing on the Central Mediterranean route alone.[2] While this tragedy has many intersecting causes, the decision of EU agencies and Member State governments to prioritize border control and migration management over sea rescue in the Mediterranean in recent decades has likely played a key role. Since the early 2000s, the EU and certain EU Member States have enacted migration management policies seeking to combat so-called "illegal migration"[3] to Europe. This has included evolving policies of engagement with Libyan authorities and entities to stem increasing migration flows from Libya to Europe. The Communication traces the evolution of these cooperative policies in three main phases: (1) before 2011; (2) from 2011 to 2015; and (3) from 2016 to the present.
8. Prior to the 2011 uprising in Libya, when there was a still functioning central government, EU agencies, as well as individual Member States (such as Italy), engaged directly with the Gaddafi regime to manage increased migration flows from Libya to Europe. During 2011 – 2015, due to the volatile internal situation in Libya and the lack of a unified national government, it was difficult for EU Member States and EU agencies to effectively engage with Libya. Hence, while still making some efforts to maintain cooperation with internationally recognized Libyan authorities, their efforts shifted to migration management approaches that focused on curbing the movement of migrants and refugees both before entering Libyan territory and after leaving Libyan territory, e.g., by sea. From 2016 onwards, EU agencies and Member States began to significantly increase their provision of material, capacity-building, and operational support to Libyan actors, such as the so-called Libyan Coast Guard (hereinafter "scLCG"), to contain migrants and refugees in Libya, inter alia, through their interception at sea and return to Libyan territory. As detailed in the Communication, the operational support provided has included giving distress location information to the scLCG and even coordinating interceptions in specific incidents. Such support shows the decisive role officials of EU Member States and EU agencies play in interceptions at sea and the subsequent return of migrants and refugees to Libya.
9. The transformation of this engagement with Libya by EU Member States and EU agencies has largely been driven by the latter's interest in avoiding the legal obligations triggered when people seeking protection arrive on EU Member States' territory or within their respective scope

[2] Missing Migrants Project, *Migration within the Mediterranean*, figures updated as of 12 November 2022, https://missingmigrants.iom.int/region/mediterranean

[3] A UN General Assembly resolution in as early as 1975 has stated that the term "illegal" should not be used to refer to migrants in an irregular situation. *See* United National General Assembly, Thirtieth Session, Resolution No. 3449, 9 December 1975, https://digitallibrary.un.org/record/189610?ln=en. Other institutions, such as the UN Office of the High Commissioner for Human Rights, the European Parliament, the Council of Europe Parliamentary Assembly, and the Council of Europe Commissioner for Human Rights, have also urged for a shift away from this language.

of responsibility at sea. Beyond support to and cooperation with Libyan authorities for interceptions and returns, these interests have also driven other policy shifts by EU Member States and EU agencies. These have included increasingly withdrawing from direct engagement in sea rescue activities in the Mediterranean and taking a range of actions to deter civil sea rescue organizations and commercial ships from disembarking rescued migrants and refugees on European territory.

III. Jurisdiction

10. ECCHR submits that the commission of crimes against humanity, namely the severe deprivation of physical liberty of migrants and refugees in violation of fundamental rules of international law, occurring during interceptions at sea and their subsequent return to and detention in Libya, falls under the jurisdiction of the ICC, based on the referral of the United Nations Security Council (UNSC) to the Court.
11. UNSC Resolution 1970 (2011) referred the situation in the Libyan Arab Jamahiriya (now State of Libya) on 15 February 2011 to the ICC. The territorial jurisdiction of the ICC encompasses the whole territory of the State of Libya, including the mainland and territorial waters. It also includes vessels in international waters flying a Libyan flag, such as those operated by the scLCG or Libya-flagged merchant vessels.
12. Resolution 1970 does not limit the temporal jurisdiction of the Court and, thus, covers crimes committed from 15 February 2011 onwards, as long as they are sufficiently connected with the situation as referred to by the UNSC.
13. In terms of personal jurisdiction, Resolution 1970 covers the conduct of Libyan nationals, as well as nationals of ICC States Parties potentially involved in the commission of international crimes in the Libyan context. The Resolution only exempts nationals, current or former officials, or personnel of non-States Parties in relation to operations established or authorized by the UNSC in Libya, unless such exclusive jurisdiction has been waived by the State. As such, nothing precludes the OTP from investigating the responsibility of nationals of States Parties allegedly involved in the commission of crimes against migrants and refugees in the Libyan context, as is the case with the nationals of Italy, Malta, France, Belgium, and Spain identified as alleged co-perpetrators in this Communication, along with Libyan nationals.
14. In regard to individuals that are officials of EU agencies, they generally enjoy immunity from legal proceedings for acts performed in their official capacity, including after they have ceased to hold office.[4] However, under Article 12 of the agreement concluded by the EU and ICC

[4] Protocol (No 7) on the Privileges and Immunities of the European Union, 26 October 2012, Art 11(a), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FPRO%2F07.

defining their terms of cooperation and assistance, the EU is obliged to waive immunity according to the relevant rules of international law to allow the Court to exercise its jurisdiction.[5]

15. Finally, Resolution 1970 does not restrict the Court's subject matter jurisdiction. In his latest report to the UNSC, the ICC Prosecutor reiterated that crimes against migrants and refugees are part of his Office's investigative focus on the Situation in Libya and that "the Office's preliminary assessment is that these crimes may constitute crimes against humanity and war crimes."[6] This Communication submits additional facts and analysis regarding alleged crimes against humanity against migrants and refugees in the context of the ongoing Situation in Libya, satisfying the necessary link for subject matter jurisdiction.

IV. Severe Deprivation of Physical Liberty as a Crime Against Humanity

16. This Communication argues that the interceptions of migrants and refugees at sea and their return to and detention in Libya constitute crimes against humanity. To qualify as crimes against humanity, the alleged criminal conduct must occur as part of a widespread or systematic attack against a civilian population. This Communication argues that the interception of migrants and refugees at sea and their return to and detention in Libya constitute part of the widespread and systematic attack against migrants and refugees in Libya since 2011, as already identified in the previous 2021 Communication.[7]

17. Since 2011, a broad criminal system has developed in Libya aimed at the exploitation of migrants and refugees and enacted through their subjection to violence and inhumane living, detention, and transport conditions. The crimes committed against migrants and refugees – including unlawful detention, torture, murder, persecution, sexual violence, enslavement, and other inhumane acts – are not singular or isolated but, rather, constitute part of a course of conduct.[8] The attack is systematic in that it follows clear patterns and the crimes are committed in pursuance of an apparent policy, implemented by Libyan State and non-State actors alike. While grounded foremost in Law No. 19 of 2010, which authorizes the detention and forced

[5] International Criminal Court, Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, 10 April 2006, ICC-PRES/01-01-06, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf.

[6] OTP, Twenty-Fourth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011), 9 November 2022, para. 68, https://www.icc-cpi.int/sites/default/files/2022-11/2022-11-09-otp-report-unsc-libya-eng.pdf.

[7] ECCHR, FIDH, and LFJL Art. 15 Communication to the ICC, November 2021, para. 389 ff.

[8] ECCHR, FIDH, and LFJL Art. 15 Communication to the ICC, November 2021, para. 393; UN Security Council, Panel of Experts on Libya, Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011), 5 September 2018, para. 48, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/243/84/PDF/N1824384.pdf?OpenElement; and UN Security Council, Panel of Experts on Libya, Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011), 27 May 2022, p. 15-17, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/334/41/PDF/N2233441.pdf?OpenElement.

labor of migrants and refugees, such a policy is also evident through other agreements and patterns of conduct. The attack is widespread, as it is directed against thousands of migrants and refugees of different nationalities, religions, genders, and racial and ethnic groups across the entire Libyan territory and – through interceptions and returns – also at sea, not only within Libyan waters but also extending into international waters, including the Libyan, Maltese, and Italian Search and Rescue (SAR) zones.

18. Interceptions at sea of migrants and refugees fleeing Libya for the purpose of returning them to Libyan territory are part of this course of conduct. The interceptions and returns are widespread and carried out in a systematic manner, evident in their well-documented repetition and patterns of conduct. Once intercepted at sea and deprived of their liberty, it is virtually certain that migrants and refugees will be returned to Libya and put into detention facilities through "a systematic transfer" and remain there for indefinite periods of time, while subjected to intolerable conditions.[9] In this way, interceptions and returns form part of the broader system of exploitation and abuse in which migrants and refugees are the main "commodity."
19. With knowledge of the above, EU agencies and Member States continued to conclude various resolutions, strategies, and agreements with Libyan authorities and entities enmeshed in this system of exploitation and abuse, such as the scLCG. In the framework of such agreements, they have provided Libyan actors with material, capacity-building, and operational support, including the location of migrants and refugees in distress at sea, for conducting interceptions, returns, and detention.
20. The Communication argues that the severe deprivation of migrants and refugees' physical liberty, under the coordination of Libyan actors and officials of EU Member States and EU agencies, begins from the point when they are intercepted at sea, and continues as they are returned to Libya, where they are systematically placed in detention facilities. This deprivation of liberty is to be considered severe because it violates fundamental rules of international law, including the right to be free from arbitrary detention, the right to a fair trial, and the principle of non-refoulement.
21. International treaties, such as the International Covenant on Civil and Political Rights (ICCPR), protect the right to be free from arbitrary detention and the right to a fair trial. These protections are breached, as the apprehension of migrants and refugees at sea is not the result of a conviction for an offense and entails no legal option for them to refuse or challenge the deprivation of their liberty. Even if it were to be accepted that the interceptions are rescue operations carried out in fulfillment of the international law of the sea and search and rescue regulations, the lack of procedural guarantees for the migrants and refugees during their subsequent return,

[9] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya* (Advanced Unedited Version), A/HRC/48/83, 1 October 2021, para. 68, https://reliefweb.int/report/libya/report-independent-fact-finding-mission-libya-ahrc4883-enar.

disembarkation, and detention in Libya demonstrates the contrary. The inhumane conditions in detention centers and the commission of other crimes against humanity in these settings also make the deprivation of liberty unjustified and disproportionate.

22. The principle of non-refoulement – which prohibits States from returning individuals to a country where they risk being subjected to ill-treatment or other human rights abuses – is also violated during interceptions and returns to Libya. As laid out in this Communication, the principle of non-refoulement, a substantive legal principle, is an important element of both international search and rescue law and international refugee law. It is also included in international human rights law[10] and is considered to be customary international law.[11] As such, the non-refoulement principle should be regarded as a fundamental rule of international law that is relevant for the assessment of the severe deprivation of physical liberty, including in the context of the interception of migrants and refugees at sea and their return to and detention in Libya.

V. Co-Perpetration as the Mode of Liability

23. In accordance with the OTP's strategic approach, this Communication focuses on high-ranking officials of EU Member States and EU agencies, as well as Libyan actors, that are the "most responsible"[12] and analyses their mode of liability in terms of co-perpetration. In line with the standards set by Article 25(3)(a) of the Rome Statute and ICC jurisprudence, the analysis lays out documentation relevant for establishing the common plan element, as well as the essential contribution and mental elements of specific individuals. The Communication assesses available documentation that indicates the existence of a common plan between EU agencies' and Member States' officials and Libyan actors to intercept migrants and refugees fleeing via the Central Mediterranean route, with the aim of containing them in Libya. The essential contributions provided by the alleged co-perpetrators include, on the one hand, the establishment of frameworks of cooperation between EU officials and internationally recognized Libyan authorities, such as Memoranda of Understanding, and on the other hand, the provision of material, capacity-building, and operational support, including information on the location of migrants and refugees in distress at sea obtained through surveillance activities.

[10] Human Rights Committee, General comment No. 36, CCPR/C/GC/36, 3 September 2019, para. 31, https://www.refworld.org/docid/5e5e75e04.html

[11] *See* UN High Commissioner for Refugees (UNHCR), The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, https://www.refworld.org/docid/437b6db64.html; and European Commission, Migration and Home Affairs, Non-Refoulement, https://home-affairs.ec.europa.eu/pages/glossary/non-refoulement_en

[12] OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, para. 42, https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

24. The list of alleged co-perpetrators includes former and present Maltese Prime Ministers, the Armed Forces of Malta (AFM) Head of Plans and Intelligence, a former Special Envoy of the Office of the Prime Minister, and members of the Rescue Coordination Center (RCC) Malta and the AFM; Italian former Ministers of the Interior, the former Chief of Staff of the Minister of the Interior, the Commander General of the Italian Coast Guard, the Commander of Maritime Rescue Coordination Center (MRCC) Rome, and members of the Italian MRCC; the Operation Commander and the Force Commander of EUNAVFOR MED Operation Sophia, crew members of EUNAVFOR MED aerial and naval assets; Frontex former Executive Director, former Head of Surveillance Sector, former Head of Situation Center (FSC) and Head of Situational Awareness and Monitoring Division, and officials participating in Joint Operation Themis, the FSC, or Multipurpose Aerial Surveillance (MAS); former High Representative of the Union for Foreign Affairs and Security Policy, former European External Action Service (EEAS) Deputy Secretary General, former Chairperson of the EU Political and Security Committee (PSC); former Prime Minister and Defense Minister of Libya's Government of National Accord (GNA), current Prime Minister and Defense Member of Libya's Government of National Unity (GNU), a GNA Foreign Minister, GNA Interior Minister, GNA Deputy Prime Minister, former GNA Minister of Defense, former and current Head of the Directorate for Combating Illegal Migration (DCIM), members of the scLCG, and members of militias and armed groups operating nominally under the DCIM, and the crew of Libyan merchant vessels involved in interceptions.
25. The list of alleged perpetrators and the modes of responsibility provided herein are not exhaustive. Due to the opaque nature of European agencies like Frontex, it is crucial that the ICC uses its investigative powers to obtain information and evidence that cannot be gained by civil society actors or by national prosecutors. Annex III contains a detailed list of suggested additional evidence to be gathered by the OTP, and the OTP is urged to conduct further investigation into the identified and unidentified individuals involved in the alleged crimes.

VI. Admissibility and Interests of Justice

26. This Communication further elaborates on the admissibility of the cases included therein, pursuant to Art. 17(1) of the Rome Statute. It is evident that both Libyan and European national authorities have failed to investigate these acts and prosecute those responsible.
27. Libya lacks appropriate legislation regarding international crimes and its justice system has been weakened by a decade of ongoing armed conflict and the absence of unitary and recognized institutions. Regarding crimes against migrants and refugees, the Libyan judiciary has limited its inquiry strictly to smuggling and trafficking, which fails to address the widespread and systematic nature of these crimes, as well as the gravity of the conduct.

28. As for the European national authorities, ECCHR welcomes the efforts and progress of the Joint Team investigating crimes against migrants, composed of the OTP, Europol, and national authorities in Italy, the Netherlands, United Kingdom, and Spain.[13] Most recent extraditions of suspects involved in crimes against migrants and refugees in Libya have focused on the crime of trafficking.[14] While an important first step in guaranteeing victims' and survivors' right to justice, investigating and prosecuting these only as transnational crimes does not encompass the grave and systematic context of violence against migrants and refugees as well as the involvement of officials of EU agencies and Member States.
29. For the incidents considered in this Communication, Malta and Italy have been identified as the main relevant domestic fora. In Malta, authorities have only opened one inquiry into an interception at sea since the country's 2002 incorporation of the Rome Statute into its national laws.[15] This inquiry lacked impartiality and a thorough assessment of the facts and of the alleged involvement of Maltese authorities.[16] In general, it has been observed that the "Maltese police and judiciary may have failed to investigate reports of human rights violations deriving from the actions of the government and the AFM [Armed Forces of Malta] to prevent the arrival of refugees and migrants in the past."[17] As such, the Maltese authorities' inability and unwillingness to investigate and prosecute is clear.
30. In Italy, the legal system currently lacks appropriate legislation on crimes against humanity as international crimes that could fully capture the widespread and systematic nature of these crimes. Thus, the effectiveness and appropriateness of prosecution of such crimes against migrants and refugees, including the severe deprivation of physical liberty, is compromised.[18] To date, Italian judicial authorities have received two criminal complaints regarding one of the interceptions included among the incidents in this Communication, which, so far, have resulted in no indictments. For other interceptions at sea that did trigger legal proceedings against Italian officials in Italy, none led to accountability, as the prosecutors in charge either decided not to proceed with indictments or requested dismissals, despite abundant evidence indicating criminal

[13] OTP, Twenty-Fourth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011), 9 November 2022, para. 70 ff., https://www.icc-cpi.int/sites/default/files/2022-11/2022-11-09-otp-report-unsc-libya-eng.pdf.
[14] OTP. Statement of ICC Prosecutor, Karim A.A. Khan QC: Office of the Prosecutor joins national authorities in Joint Team on crimes against migrants in Libya, 7 September 2022, https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-office-prosecutor-joins-national-authorities-joint-0
[15] Amnesty International, *Malta: Waves of impunity - Malta's human rights violations and Europe's responsibilities in the central Mediterranean*, September 2020, p. 16, https://www.amnesty.org/en/documents/eur33/2967/2020/en/.
[16] InfoMigrants, *Maltese prime minister cleared of migrant death-related homicide charges*, 1 June 2020, https://www.infomigrants.net/en/post/25109/maltese-prime-minister-cleared-of-migrant-deathrelated-homicide-charges.
[17] Amnesty International, *Malta: Waves of impunity – Malta's human rights violations and Europe's responsibilities in the central Mediterranean*, September 2020, p. 16, https://www.amnesty.org/en/documents/eur33/2967/2020/en/.
[18] *See* Italian Penal Code, Articles 605 and 606.

responsibility. This shows the Italian authorities' inability and unwillingness to investigate and prosecute.

31. In addition, this Communication assesses the scale, nature, and manner of commission of the crimes, as well as their impact, concluding that the gravity criterion under the Rome Statute has been fulfilled.
32. Finally, there is no reason to believe that opening an investigation and prosecuting officials of EU Member States and EU agencies for the crimes committed against migrants and refugees at sea would not serve the interests of justice. On the contrary, the involvement of the Maltese and Italian authorities, as well as officers of the EU agencies, including the EU Commission, EUNAVFOR MED, and Frontex, in the commission of grave crimes against migrants and refugees speaks to the paramount importance of investigating and prosecuting the individuals within these entities. The assessment of these responsibilities is a fundamental part of the pursuit of justice for the victims of crimes against humanity. Not addressing the responsibilities of these actors for the crimes perpetrated would not only encourage impunity, but also raise suspicion of the double standards applied to Western leaders vis-à-vis those from Global South countries. The lack of investigation and prosecution, rather than the contrary, would clearly be against the interests of justice.
33. These cases must be addressed by the ICC, as it is the best placed institution to conduct a thorough and complete investigation into the complex network of collaboration between European and Libyan actors and the resulting unlawful practices, including the commission of crimes against humanity. Besides the commendable efforts of national prosecutors and the Joint Team in investigating crimes against migrants, only the ICC can properly deal with the structural dimension of the crimes committed beyond the responsibility of low-level perpetrators and hold accountable those at higher echelons, whose potential immunity could bar prosecution in domestic courts. In this respect, the ICC is the only possible avenue for breaking the cycle of impunity and assessing the individual criminal responsibility of high-level perpetrators.
34. In light of the documentation submitted with this Communication and upon thorough analysis, ECCHR respectfully requests the Prosecutor to urgently proceed with the investigation and prosecution of those responsible for the grave crimes, under the ICC jurisdiction, committed against migrants and refugees in Libya, in particular during and after their interceptions at sea.

I. Introduction and Methodology

A. Introduction

1. The European Center for Constitutional and Human Rights (ECCHR), based on first-hand documentation provided by Sea-Watch e.V. (hereinafter "Sea-Watch") and other civil society organizations, file this Communication to the Office of the Prosecutor (OTP) of the International Criminal Court under Article 15 of the Rome Statute. The Submitting Party requests that, in the context of the ongoing investigation into the Situation in Libya, the Prosecutor urgently investigate the alleged responsibilities for the commission of grave crimes under the jurisdiction of the Court against migrants, refugees, and asylum seekers (hereinafter "migrants and refugees"). Such responsibilities, as detailed in the Communication, include those of individuals acting as officials of EU agencies and EU Member States.

2. In November 2021, ECCHR, together with Lawyers for Justice in Libya (LFJL) and the International Federation for Human Rights (FIDH), already submitted a long and detailed Communication to the OTP under Article 15 of the Rome Statute (hereinafter "2021 Communication") documenting alleged crimes against humanity and war crimes committed, in particular, by Libyan actors against migrants and refugees. As the 2021 Communication described, a complex system of exploitation and abuse of migrants and refugees currently exists in Libya.[19] As part of this system, the 2021 Communication outlined patterns of violence against migrants and refugees in the context of detention by Libyan authorities and associated actors, including the infliction of physical and mental pain through these conditions and in the course of captivity and transit.[20]

3. In its most recent report to the United Nations Security Council (UNSC) on November 2022, the Prosecutor of the ICC reiterated that "the Office's preliminary assessment is that these crimes may constitute crimes against humanity and war crimes."[21] Similarly, in its October 2021 report, the United Nations Independent Fact-Finding Mission on Libya (FFM) also found reasonable grounds to believe that crimes against humanity are being committed against migrants and refugees in Libya.[22] In June 2022, the FFM on Libya reported that it had

[19] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021.
[20] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, Sections III.A.1.i and III.C.1., respectively.
[21] Office of the Prosecutor (OTP), *Twenty-Fourth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970* (2011), 9 November 2022, para. 68, https://www.icc-cpi.int/sites/default/files/2022-11/2022-11-09-otp-report-unsc-libya-eng.pdf.
[22] *See generally*, Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya* (Advanced Unedited Version), A/HRC/48/83, 1 October 2021, https://reliefweb.int/report/libya/report-independent-fact-finding-mission-libya-ahrc4883-enar.

identified "clear patterns of human rights violations and abuses against migrants in places of detention," as well as evidence that provides the FFM with reasonable grounds to believe that crimes against humanity have been committed in several places of detention in Libya.[23]

4. Within this context, with the present Communication, the Submitting Party aims to bring to the Prosecutor's attention in particular the role played by individuals acting as officials of EU agencies and EU Member States in the severe deprivation of liberty of migrants and refugees. Such a deprivation begins with the migrants and refugees' interception at sea and continues throughout their subsequent return, disembarkation, and detention in Libya.

1. Terminology and Structure of the Communication

5. For the purposes of this Communication, a migrant is a person that stays outside their country of origin, who is not an asylum seeker or a refugee; a refugee is "a person who has fled their own country because they are at risk of serious human rights violations and persecution there"; and an asylum seeker is "a person who has left their country and is seeking protection from persecution and serious human rights violations in another country, but who hasn't yet been legally recognized as a refugee."[24] Throughout the Communication, the terms "migrants and refugees" are used in a broad sense to also include asylum seekers. Where "asylum seekers" are not explicitly mentioned in the report, they should be understood as covered by the terms "migrants and refugees."

6. "Interception" is defined as the physical act of apprehending migrants and refugees fleeing Libya via the Central Mediterranean route for the purpose of returning them to Libya, an unsafe place, without conducting any individual assessment of their situation.[25]

7. Based on these definitions, Section II provides a thorough background on the development of EU agencies' and EU Member States' policies for border and migration management with Libya over the years to illustrate how they have increasingly withdrawn from direct engagement in sea rescue activities in the Central Mediterranean. Instead, it shows how

[23] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya A/HRC/50/63*, 27 June 2022, paras. 33-41 and 69, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya.

[24] *See* Amnesty International, *Refugees, asylum-seekers and migrants*, https://www.amnesty.org/en/what-we-do/refugees-%20asylum-seekers-and-migrants/.

[25] While there are other definitions available for the concept of interception, these do not fit the particularities of the Libyan context because they are framed too narrowly. *See e.g.*, "interception is defined as encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination." UNHCR, Interception of asylum-seekers and refugees: The international framework and recommendations, Executive Committee of the High Commissioner's programme,18th Meeting of the Standing Committee, EC/50/SC/CPR.17, 9 June 2000, para. 10, https://www.unhcr.org/4963237411.pdf.

certain EU agencies and EU Member States have cooperated with Libyan actors[26] through different material, financial, and operational means to ensure that migrants and refugees are returned to Libya before they are able to seek protection from within the territory of EU Member States. The transformation in policy consists of three phases: (1) before the 2011 Libyan uprising; (2) from 2011 to 2015; and (3) since 2016. During the third phase, EU Member States and EU agencies have aimed to return migrants and refugees to Libya by increasing capacity-building and coordination support to Libyan actors, especially maritime actors such as the so-called Libyan Coast Guard (scLCG),[27] to avoid their legal obligations under international and European law.

8. As to the legal framework, in addition to the Rome Statute, it is necessary to examine the EU Member States' and EU agencies' policies for border and migration management with Libya in light of international search and rescue (SAR) laws, as well as international refugee and human rights law, in order to fully comprehend and accurately assess the implications of such policies. Section II argues that the current policies of EU agencies and EU Member States for border and migration management with Libya are incompatible with these bodies of law. Most importantly, the interceptions at sea of migrants and refugees with the purpose of returning them to Libya cannot be regarded as "rescue" operations because they return individuals directly to a country where their lives and safety are *ipso facto* at risk: migrants and refugees are *de facto* criminalized in Libya and, hence, vulnerable to arbitrary detention at any moment. These interceptions mark the beginning of a severe deprivation of liberty that continues upon disembarkation in Libya, where intercepted migrants and refugees are systematically and arbitrarily detained, and forced (again) into the system of exploitation and abuse already documented in the 2021 Communication. The return of migrants and refugees to Libya is of course not only unjustifiable under international SAR laws, but is also in violation of human rights and refugee law, particularly the principle of non-refoulement.

9. Against this background, Section III provides further factual details on 12 exemplary incidents from 2018 to 2021 that reflect the complex web of collaboration between EU agencies, EU Member States, and Libyan actors, exposing the decisive role of officials of EU agencies and EU Member States in the severe deprivation of liberty of migrants and refugees that amounts to an alleged crime against humanity. The incidents are grouped according to the relevant European individuals involved in the interceptions, namely officials of Malta,

[26] The term "Libyan actors" includes Libyan officials of the internationally recognized government, members of the scLCG, and members of Libyan militias or armed groups who have coopted Libyan institutions or have taken over the control of detention facilities.

[27] In this communication, the use of the term so-called Libyan Coast Guard is intended to show that this is not a unified or functional authority but, rather, an aggregation of various militias.

Italy, EUNAVFOR MED, Frontex, and other EU agencies.[28] The Communication will show how these individuals provide essential contributions, in the form of communication infrastructure, distress location information, equipment, training, and funding to Libyan actors, to the latter's ability to locate and intercept migrants and refugees and bring them back to Libya. Moreover, the Communication shows that officials of EU agencies and EU Member States frequently contribute to the operations for the interception of migrants and refugees fleeing Libya and their return thereto.

10. Section III also demonstrates that the deprivation of liberty is a continuous act that occurs in different stages. It begins with the interception of migrants and refugees at sea. Then, it continues with their forced transfer to and disembarkation on Libyan territory. Thereupon, it carries on with the systematic transfer of the disembarked migrants and refugees to detention facilities inside Libya,[29] as made clear by years of reliable reporting from international bodies and agencies, including UNHCR,[30] as well as documentation by humanitarian, human rights, and other civil society organizations.[31] The 2021 Communication also established that migrants and refugees are severely deprived of liberty during **transits within Libya** and at **detention facilities**.[32]

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[28] In some of these incidents, other European actors have been at play too, albeit with lesser contributions. Therefore, the incidents have been included under the subsection of the European entity that the Submitting Party believes played the strongest role.

[29] On the routine aspect of the transfers in Libya, *see* Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 33-34, https://www.amnesty.org/en/documents/mde19/4439/2021/en//.

[30] For activities from 2021 onward, *see UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation – Rescued Individuals by Destination*, https://data2.unhcr.org/en/dataviz/211?sv=0&geo=0. For the preceding years, *see UNHCR, Activities at Disembarkation*, https://app.powerbi.com/view?r=eyJrIjoiMWFiMTk3NDMtNDE0NS00NzIwLWFiMGMtODg0OWJiYjU0MDhjIiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9. *See also* UNHCR, *UNHCR Position on the Designation of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea*, September 2020, para. 9, https://www.refworld.org/pdfid/5f1edee24.pdf.

[31] *See e.g.*, Sally Hayden, *My Fourth Time, We Drowned: Seeking Refuge on the World's Deadliest Migration Route*, 29 March 2022; Sara Creta, *Libya detention centre blast exposes dangerous conditions for refugees*, Middle East Eye, 9 July 2021, https://www.middleeasteye.net/news/libya-detention-centre-blast-exposes-dangerous-conditions-refugees; Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, https://www.amnesty.org/en/documents/mde19/4439/2021/en//; Sally Hayden, *Notorious human trafficker sentenced to life in prison in absentia in Ethiopia*, The Irish Times, 16 June 2021, https://www.irishtimes.com/news/world/africa/notorious-human-trafficker-sentenced-to-life-in-prison-in-absentia-in-ethiopia-1.4595262; Sara Creta, *Respinti all'inferno*, Domani, 29 April 2021, https://www.editorialedomani.it/longform/migranti-libia-torture-respingimenti-frontex-europa-italia-ghbpk0qo; Médecins sans Frontières (MSF), *Trading in Suffering: Detention, Exploitation and Abuse in Libya*, 23 December 2019, https://www.msf.org/libya%E2%80%99s-cycle-detention-exploitation-and-abuse-against-migrants-and-refugees; Tim Eaton, *Libya's War Economy: Predation, Profiteering and State Weakness*, Chatham House, April 2018, https://www.chathamhouse.org/sites/default/files/publications/research/2018-04-12-libyas-war-economy-eaton-final.pdf; and Amnesty International, *Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*, 11 December 2017, https://www.amnesty.org/en/documents/mde19/7561/2017/en/.

[32] ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, p. 133-137, paras. 436-449.

11. The deprivation of liberty continues in these centers, where migrants and refugees are unable to formally contest or escape their detention. In addition to the lack of judicial processes available to them, practically, the only ways to get out of detention are to pay ransoms, to attempt to escape while risking their lives, including through subsequent attempted sea crossings, or to accept repatriation to their home countries, again often risking their lives.[33] The continued deprivation of liberty in detention centers in Libya also ensures that migrants and refugees can be further exploited by performing forced labor and abused by being subjected to other crimes against humanity, as detailed in the 2021 Communication.[34] As such, migrants and refugees returned to Libya remain deprived of their liberty as soon as they are intercepted at sea, becoming "endlessly trapped between the sea and detention."[35]

12. Based on these factual circumstances, Section IV proceeds with the legal analysis by arguing that the incidents included in Section III fall under the jurisdiction of the Court and share the contextual element of the crimes against humanity, as documented in the 2021 Communication. The legal analysis continues with the qualification of the specific incidents as acts of the crime against humanity of severe deprivation of physical liberty, showing that the material elements for this crime are fulfilled. Firstly, it is argued that the severe deprivation of physical liberty begins with the apprehension of migrants and refugees as part of the interceptions at sea and is continuous throughout their transfer, disembarkation and ultimate placement in detention facilities. Secondly, this deprivation of liberty is in violation of fundamental rules of international law, including the principle of non-refoulement, the right to be free from arbitrary detention, and the right to a fair trial.

13. Building on this analysis of the incidents as crimes against humanity in the form of severe deprivation of physical liberty, Section V analyzes the alleged criminal responsibility for these crimes of a number of individuals. Notwithstanding the many actors involved at different levels, in accordance with the OTP's strategic approach, this Communication focuses on high-ranking officials of EU Member States and EU agencies that are the "most responsible"[36] as alleged co-perpetrators of the crimes at stake. It is necessary to point out that the list of alleged perpetrators and the modes of responsibility analyzed herein are not exhaustive. The OTP shall conduct further investigation into the responsibility of the identified and unidentified individuals involved.

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[33] Amnesty International, *No one will look for you: Forcibly Returned from Sea to Abusive Detention in Libya*, July 2021, p. 30-34, https://www.amnesty.org/en/documents/mde19/4439/2021/en/.

[34] ECCHR, FIDH, LFJL Article 15 Communication, November 2021 and Amnesty International, *No one will look for you: Forcibly Returned from Sea to Abusive Detention in Libya*, July 2021, p. 36, https://www.amnesty.org/en/documents/mde19/4439/2021/en/

[35] MSF, *Migrants in Libya: "We were able to make their time in that horrible place slightly better."*, 2 April 2019, https://www.msf.org/providing-care-people-trapped-libyan-detention-centres-migration-libya.

[36] OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, para. 42, https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

14. Section VI elaborates on admissibility and interests of justice. The assessment of complementarity includes Libya, Italy, and Malta and concludes that both Libyan and European domestic authorities have failed to investigate these acts as potential crimes against humanity or to prosecute those responsible. In addition to the lack of appropriate legislation pre-dating the 2011 uprising, the Libyan justice system has been weakened by a decade of ongoing armed conflict and political instability. Regarding crimes against migrants and refugees, the Libyan judiciary has limited its inquiry strictly to smuggling and trafficking, which fails to address the widespread and systematic nature of these acts, as well as their gravity, and thus also fails to hold the perpetrators of these alleged crimes accountable.

15. As for Malta and Italy, which have been identified as the main fora for the incidents considered, both countries have proven unable and/or unwilling to investigate and prosecute crimes against humanity against migrants and refugees intercepted at sea and returned to Libya, in particular when European nationals have been involved.

16. Therefore, the ICC is the only institution positioned to conduct a thorough and full-fledged investigation into the complex net of responsibilities between officials of EU Member States and EU agencies, on the one hand, and Libyan actors, on the other hand, and the resulting crimes against humanity. The Submitting Party respectfully requests the OTP to expand the scope of its current investigation on the Situation in Libya to include the crime against humanity of severe deprivation of liberty against migrants and refugees intercepted at sea, returned, and detained in Libya. The investigation should include the alleged responsibility of officials of EU Member States and EU agencies involved in the incidents as documented in this Communication.

B. Methodology

17. This Communication is based on operational documentation and factual and legal research conducted by various organizations and individuals over the years. Specifically, the Germany-based non-governmental sea rescue organization Sea-Watch has provided valuable first-hand documentation accumulated during their rescue operations at sea since 2015, and their monitoring observations in the air over the Central Mediterranean since 2017. Sea-Watch currently conducts its airborne operations with two civil monitoring aircraft, *Seabird 1* and *Seabird 2*, and also, until earlier in 2022, employed the aircraft *Moonbird*.[37] All of these aircraft are and have been operated together with the Swiss organization Humanitarian Pilots Initiative (HPI). During airborne operations, their crew documents human rights violations

[37] Sea-Watch, *Seabird 1 & Seabird 2*, https://sea-watch.org/mission/airborne/; *Moonbird*, https://sea-watch.org/mission/moonbird/

and reports information on boats in distress to authorities and vessels able to assist.[38] Additionally, Sea-Watch currently conducts civil rescue operations with several maritime rescue vessels, including *Sea-Watch 5*, *Aurora*, and in the past, with *Sea-Watch 1*, *Sea-Watch 2*, and *Sea-Watch 4*.

18. Annex I of this Communication contains the main evidence for the incidents documented in Section III, as provided by Sea-Watch and other civil society organizations. [REDACTED]

19. Besides Sea-Watch, several other sea rescue and civil society organizations, as well as investigative journalists, have provided crucial information on the collaboration between officials of EU Member States and EU agencies, as well as Libyan actors, and on the complex network of European entities that work together on border management. These include Initiative Watch the Med – Alarm Phone (hereinafter "Alarm Phone"), Mediterranea, SOS MEDITERRANEE, Open Arms, Border Forensics, Frag den Staat, Amnesty International, Human Rights Watch, and Lighthouse Reports. Given the sensitive character of some of the evidence provided by these organizations for the purposes of this Communication, the Submitting Party likewise requests the OTP to not share any of this confidential evidence with national authorities or other members of the Joint Team, unless the provider of the organization expressly authorizes it.

20. The Communication also draws on additional information collected and analyzed from authoritative reports and publicly available data. This includes reports and statements from UN bodies, such as the UN High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), the Office of the UN High Commissioner for Human Rights (OHCHR), the Independent Fact-Finding Mission on Libya (FFM), the UN Special Rapporteur on the human rights of migrants, the UN Support Mission in Libya (UNSMIL), and the UN Panel of Experts on Libya.

21. As part of this data, the present Communication relies on the disembarkation data gathered by UNHCR and IOM, which provides key insights into the disembarkation and transfer to detention centers of migrants and refugees in Libya.[39] While the data of UNCHR and IOM is not exhaustive, as they do not have a permanent presence at disembarkation points, it is indicative of the large number and consistent pattern – i.e., systematicity – of migrants and refugees being disembarked and transferred to arbitrary detention in Libya.

[38] Since 2020, Sea-Watch regularly publishes reports of the documented distress cases, which also point to the violations committed by Libyan and European actors. *See* https://sea-watch.org/category/sea-watch-air/factsheets/

[39] For activities for 2021 onward, *see UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation – Rescued Individuals by Destination*, https://data2.unhcr.org/en/dataviz/211?sv=0&geo=0. For the preceding years, *see* UNHCR, *Activities at Disembarkation*, https://app.powerbi.com/view?r=eyJrIjoiMWFiMTk3NDMtNDE0NS00NzIwLWFiMGMtODg0OWJiYjU0MDhjIiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9

22. Other sources include EU internal reports, documents, or datasets obtained through publicly available platforms or Freedom of Information Access (FOIA) requests.[40] Particularly via Frag den Staat, who supported the request of an investigative journalist, the Submitting Party was able to obtain access to the Frontex Joint Operations Reporting Application (JORA).[41] Frontex uses the database to document events that took place at the EU's external borders. The data available to Frag den Staat includes the period from September 2016 until September 2021. The Submitting Party analyzed it using key variables, such as detection date, reporting country, and disembarkation place, in order to assess Frontex' involvement in interceptions at sea in Section III.

23. Nonetheless, the Submitting Party stresses the opaque nature of the operations of some European agencies (particularly Frontex), which makes it difficult for civil society organizations to obtain information through publicly available sources and FOIA requests.[42] This also highlights the crucial importance of the ICC's investigative powers, through which it may be able to obtain confidential information otherwise unattainable. In light of this challenge, Annex III of this Communication includes a list of suggested evidence for further investigation of the incidents and determination of individual responsibilities.

II. Background

24. This section first provides a brief summary of the armed conflict and current political situation in Libya and its development since 2011, as well as the situation of migrants and refugees. It then gives an overview of the relevant legal framework, particularly with regard to the severe deprivation of liberty as a crime against humanity under the Rome Statute as alleged in this Communication. The international legal rights and obligations form the basis for an accurate and comprehensive understanding of how exactly EU Member States and EU agencies have crafted "border management" policies with Libya that attempt to evade their international legal obligations. This section then lays out the transformation of EU Member States' and EU agencies' border management policies with Libya over the years to illustrate how they have shifted their means and strategies toward preventing and deterring migrants and refugees from seeking protection in Europe, while avoiding their international legal obligations. This is

[40] Frag den Staat, *Informationsfreiheitsanfragen*, https://fragdenstaat.de/anfragen/

[41] Frag den Staat, *Censored_20210906_PAD-2021-00248_JORA2_incidents_20160914.xlsx*, obtained by Frag den Staat on 9 May 2022, https://aleph.occrp.org/entities/82905946.4a47b9c818650e08156a51cdb97f7ee3714d90c9

[42] *E.g.*, both Sea-Watch and Human Rights Watch have submitted requests for information to Frontex about Frontex's activities on 30 July 2021 regarding an incident in which Frontex was likely involved (Incident 8 in Section III), and both of these organizations' requests were rejected. Human Rights Watch, *EU's Drone Is Another Threat to Migrants and Refugees*, 1 August 2022, https://www.hrw.org/news/2022/08/01/eus-drone-another-threat-migrants-and-refugees and Sea-Watch, *Sea-Watch takes Frontex to court*, 28 April 2022, https://sea-watch.org/en/sea-watch-takes-frontex-to-court/.

followed by a discussion on the application of the above-mentioned legal framework, which shows how returning migrants and refugees in distress at sea to Libya violates international law.

A. Situation in Libya

1. The Armed Conflict and Current Political Landscape in Libya

25. The 2021 Communication to the OTP by ECCHR, FIDH, and LFJL already provided a detailed account of the armed conflict in Libya and its development since 2011.[43] This Communication is premised on the previous one and will only briefly summarize the situation and its latest developments since November 2021.

26. The fall of the Gaddafi regime in 2011 led to a fragmentation in power that eventually contributed to the emergence of an armed conflict in Libya, which has remained ongoing to this day. The current situation of migrants and refugees is significantly linked to the events of 2011. Although the General National Congress (GNC) was formed in the summer of 2012 after national elections, it was unable to establish control over the whole of Libya, resulting in political fragmentation and continued conflict among the official army and associated law enforcement and security forces, various armed groups, and militias.[44]

27. After much delay, the current interim governing body in Libya, the Government of National Unity (GNU) – formerly the Government of National Accord (GNA) – was appointed by the Libyan Political Dialogue Forum (LPDF) in Geneva in February 2020.[45] The GNU was mandated to create conditions and circumstances conducive to elections scheduled on 24 December 2021. However, on 22 December 2021, the High National Elections Commission announced that elections had been postponed, citing difficulties related to legislative inadequacies and eligibility of candidates.[46] In February 2022, Libya's Tobruk-based House of Representatives appointed former Interior Minister Fathi Bashaga as the new prime minister.[47] As the incumbent prime minister Abdel Hamid Dbeibeh refused to step down, political tension

[43] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, paras. 23-33.
[44] David D. Kirkpatrick, *Libyans Vote in First Election in More Than 40 Years*, The New York Times, 7 July 2012, https://www.nytimes.com/2012/07/08/world/africa/libyans-vote-in-first-election-in-more-than-40-years.html.
[45] UNSMIL, *Roadmap "For the Preparatory Phase of a Comprehensive Solution"*, 19 November 2020, https://unsmil.unmissions.org/sites/default/files/lpdf_-_roadmap_final_eng_0.pdf.
[46] UNSMIL, *Statement from the Special Advisor to the Secretary-General on Libya*, 23 December 2021, https://unsmil.unmissions.org/statement-special-adviser-secretary-general-libya.
[47] Al Jazeera, *Libya: Tobruk parliament names new PM, fuelling division*, 10 February 2022, https://www.aljazeera.com/news/2022/2/10/libya-tobruk-parliament-names-new-pm-fueling-divisions.

once again escalated and led to armed confrontations in Tripoli in May 2022 between militias loyal to the two leaders. These armed confrontations have continued into September 2022.[48]

2. Situation of Migrants and Refugees

28. As the 2021 Communication already described in detail, Libya's conflict economy has developed a complex smuggling and human trafficking network that constitutes a brutal system of exploitation and abuse of migrants and refugees.[49] Because Libya is not a party to the 1951 Refugee Convention and has not recognized the Office of the United Nations High Commissioner for Refugees (UNHCR), refugee protection based on international law is difficult to enforce on Libyan territory and with respect to the extraterritorial actions of Libyan nationals, despite the customary law status of certain principles.

29. Before the fall of the Gaddafi regime, human smuggling proliferated and was "an entirely State-controlled industry."[50] In 2010, Libya adopted Law No. 19 of 2010, which criminalized the irregular entry, stay, and exit of migrants and allowed infinite detention without due process or access to effective remedies.[51] Together with other laws,[52] Libya's legal framework for migrants and refugees lacks an asylum system and largely fails to recognize refugee status.[53]

[48] Al Jazeera, *Libyan parliament swears in new PM as crisis deepens*, 3 March 2022, https://www.aljazeera.com/news/2022/3/3/libyan-parliament-swears-in-new-pm-as-crisis-deepens; Al Jazeera, *Libya's Bashagha says will base his rival gov't in Sirte*, 17 May 2022, https://www.aljazeera.com/news/2022/5/17/libyan-rival-pm-leaves-tripoli-after-clashes-between-forces; Al Jazeera, *Fighting between rival militias rocks Libya's capital Tripoli*, 11 June 2022, https://www.aljazeera.com/news/2022/6/11/fighting-between-rival-militias-rocks-libyas-capital-tripoli (local media identifying militias as the Nawasi Brigade loyal to Bashagha and the Stability Support Force loyal to Dbeibah); Al Jazeera, *Several killed in clashes between Libyan armed groups in Tripoli*, 22 July 2022, https://www.aljazeera.com/news/2022/7/22/several-dead-in-clashes-between-libyan-security-forces; Arab News, *Libyan armed groups clash in Tripoli*: reports, 6 August, 2022, https://www.arabnews.com/node/2137131/middle-east; Federica Saini Fasanotti, *Two prime ministers further destabilize Libya*, GIS (Geopolitical Intelligence Services) Reports, 11 August 2022, https://www.gisreportsonline.com/r/libya-prime-ministers/; and *Clashes rock outskirts of Libyan capital*, Reuters, 3 September 2022, https://www.reuters.com/world/africa/clashes-rock-outskirts-libyan-capital-2022-09-03/.

[49] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021.

[50] Mark Micallef, *The Human Conveyor Belt: Trends in Human Trafficking and Smuggling in Post-Revolution Libya*, GI-TOC, March 2017, p. 4, https://globalinitiative.net/wp-content/uploads/2017/03/GI-Human-Conveyor-Belt-Human-Smuggling-Libya-2017-.pdf.

[51] Law No. 19 of 2010 on Combatting Illegal Immigration, 28 January 2010, https://security-legislation.ly/en/law/32174.

[52] Such as Law No. 6 of 1987 on Organizing the Entry, Residence and Exit of Foreigners in Libya and its amendment Law No. 2 of 2004 (increased fines for breaching Law No. 6 of 1987 and new penalties for crimes of smuggling and any form of assistance to irregular migrants).

[53] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, para. 53.

30. Since the 2011 uprising, various armed groups and militias entered the smuggling and trafficking business and seized control of the main migration routes in Libya.[54] Moreover, as several armed groups and militias were integrated into Libya's official security apparatus between 2011 and 2014, State functions and resources became further intertwined with the illicit industry.[55] The lack of a centralized government and the scramble for power and resources have incentivized State and non-State actors to turn to smuggling and trafficking as an alternative means of revenue, and more organized and structured networks emerged.[56] Migrants and refugees get trapped in these networks and are subjected to indefinite detention where they are exploited and abused in various ways – including killings, deaths due to diseases caused by inhumane detention conditions, torture, enslavement and forced labor, sexual violence, discrimination, and forced involvement in the armed conflict – many of which amount to crimes against humanity.[57] They are also vulnerable to being kidnapped by armed groups and criminal gangs and extorted for ransom payments, and are often sold and resold from one intermediary to another, each one demanding a new ransom payment.[58]

31. Key actors participating in the detention of migrants and refugees include officials of the Directorate for Combating Illegal Migration (DCIM) and different armed groups and militias associated with this institution, including members of the al-Nasr Brigade, the al-Dabbashi militia, and the al-Khoja militia (the leader of which was made the head of the DCIM in

[54] Tim Eaton, *Libya's War Economy: Predation, Profiteering and State Weakness*, Chatham House, April 2018, https://www.chathamhouse.org/sites/default/files/publications/research/2018-04-12-libyas-war-economy-eaton-final.pdf.

[55] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, para. 36.

[56] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, p. 22-25.

[57] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, p. 36-200. *See also generally*, UpRights, Adala for All, and StraLi, Article 15 Communication on War Crimes and Crimes Against Humanity Committed Against Migrants and Asylum Seekers in Libya, 17 January 2022; UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/50/63, 27 June 2022, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya; UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/48/83, 1 October 2021, https://www.ohchr.org/sites/default/files/2021-11/A-HRC-48-83-AEV-EN.docx; UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Follow-up Report of the Independent Fact-Finding Mission on Libya (Advanced Unedited Version)*, A/HRC/49/4, 23 March 2022, https://www.ohchr.org/sites/default/files/2022-03/A_HRC_49_4_AUV.pdf; Sally Hayden, *My Fourth Time, We Drowned: Seeking Refuge on the World's Deadliest Migration Route*, 29 March 2022; Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, https://www.amnesty.org/en/documents/mde19/4439/2021/en//; Médecins sans Frontières (MSF), *Trading in Suffering: Detention, Exploitation and Abuse in Libya*, 23 December 2019, https://www.msf.org/libya%E2%80%99s-cycle-detention-exploitation-and-abuse-against-migrants-and-refugees; Tim Eaton, *Libya's War Economy: Predation, Profiteering and State Weakness*, Chatham House, April 2018, https://www.chathamhouse.org/sites/default/files/publications/research/2018-04-12-libyas-war-economy-eaton-final.pdf; and Amnesty International, *Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*, 11 December 2017, https://www.amnesty.org/en/documents/mde19/7561/2017/en/.

[58] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, para. 71.

December 2021[59]). Other well-known smugglers and traffickers, such as "Kidane" and "Welid," have also operated unofficial detention facilities between roughly 2014 and 2018.[60] On October 2022, "Welid" was extradited to the Netherlands on charges of trafficking.[61]

32. Adding to the above information previously submitted to the Court through the 2021 Communication, this Communication now focuses on interceptions of migrants and refugees at sea and their return to Libya, which the Submitting Party argues are an essential component of the international crimes committed against migrants and refugees and which constitute crimes against humanity under the Court's jurisdiction.

The So-Called Libyan Coast Guard

33. The most relevant Libyan actor in these interceptions at sea is the so-called Libyan Coast Guard (scLCG), a branch of the Libyan Navy under the Ministry of Defense. Other branches of the Libyan Navy, as well as the General Administration for Coast Security (GACS), a Libyan law enforcement agency under the Ministry of the Interior operating within Libyan territorial waters, play a minor role in this system by also conducting returns to Libya, although on a smaller scale. The Stabilization Support Apparatus (SSA) (established in January 2021 by then former GNA Primer Minister Fayez Al-Sarraj, to protect Libyan State institutions and officials as well as national security[62]) has also become increasingly engaged.[63]

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[59] Ian Urbina, *Despite Calls for Reform, Libya Appoints Notorious Militia Leader to Handle Migrants*, The Outlaw Ocean Project, 22 December 2021, https://www.theoutlawocean.com/investigations/the-secretive-prisons-that-keep-migrants-out-of-europe/subsequent-coverage/despite-calls-for-reform-libya-appoints-notorious-militia-leader-to-handle-migrants/.

[60] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, paras. 679-710 and Sally Hayden, *Notorious human trafficker sentenced to life in prison in absentia in Ethiopia*, The Irish Times, 16 June 2021, https://www.irishtimes.com/news/world/africa/notorious-human-trafficker-sentenced-to-life-in-prison-in-absentia-in-ethiopia-1.4595262.

[61] Eritrea Hub, *Tewelde Goitom – Eritrea's notorious people trafficker – in Dutch court today*, 6 October 2022, https://eritreahub.org/tewelde-goitom-eritreas-notorious-people-trafficker-in-dutch-court-today The extradition was the result of the successful collaboration between the members of the Joint Team of crimes against migrants in Libya. OTP, *Statement of ICC Prosecutor, Karim A.A. Khan QC: Office of the Prosecutor joins national authorities in Joint Team on crimes against migrants in Libya*, 7 September 2022, https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-office-prosecutor-joins-national-authorities-joint-0

[62] The Libya Observer, *Al-Sarraj establishes "Stability Support Apparatus" in Libya's capital*, 18 January 2021, https://www.libyaobserver.ly/news/al-sarraj-establishes-stability-support-apparatus-libyas-capital and State of Libya – Presidential Council, Stability Support Apparatus, https://ssa.gov.ly/en/about-us/.

[63] *See* UN Security Council, *Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya*, S/2022/427, 27 May 2022, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf. Though not the focus of this Communication, the Libyan SSA has also been found to have become a key actor in the interception of migrants at sea and their subsequent detention in Libya since its creation in January 2021. The FFM has collected evidence regarding places of detention run by SSA from former detainees, their families, and former SSA members, which provides "reasonable ground to believe that individuals are systematically arbitrarily detained, forcibly disappeared, and tortured." There has also been evidence of prisoner transfers between secret prisons run by SSA and Mitiga prison. *See* Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/50/63, 27 June 2022, paras. 39 and 74, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya and Amnesty International, *Libya: Hold Stability Support Authority militia leaders to account*, 4

34. Like many other Libyan State institutions, the scLCG has become intertwined with militias and armed groups and has worked in close coordination with the smuggling and trafficking networks in Libya.[64] For example, according to Amnesty International, in the course of 2020, the scLCG handed migrants and refugees to a militia (under the command of Emad al-Tarabulsi) that ran an unofficial detention facility in the Tobacco Factory in Tripoli.[65] The Zawiya Refinery Coast Guard, a branch of the scLCG led by Abd Al-Rahman Milad, also known as "Bija," is reported to return migrants and refugees intercepted at sea to the al-Nasr detention center.[66]

35. Several institutions and organizations have documented the scLCG's use of reckless and dangerous forms of threats and violence against migrants and refugees during interceptions. In particular, Sea-Watch has documented incidents of violent interceptions at sea initiated by the scLCG since 2017. Such violence has taken the form of (1) physical attacks – circling, roping in, or ramming migrant boats;[67] beating people in distress with bullwhips or sticks;[68] shooting directly at people in distress on boats or in the water;[69] or firing "warning shots" into the air and water while endangering people in distress;[70] and (2) intimidation and/or interference through verbal threats or dangerous maneuvers of the scLCG boats.[71] Illustrating this behavior, the scLCG once shot at an Italian patrol boat under the mistaken impression that the Italian vessel

May 2022, https://www.amnesty.org/en/latest/news/2022/05/libya-hold-stability-support-authority-militia-leaders-to-account/.

[64] Mark Micallef et al., *Conflict, Coping and Covid: Changing human smuggling and trafficking dynamics in North Africa and the Sahel in 2019 and 2020*, GI-TOC, April 2021, p. 29, available at: https://globalinitiative.net/wp-content/uploads/2021/06/GI-TOC-Changing-human-smuggling-and-trafficking-dynamics-in-North-Africa-and-the-Sahel-in-2019-and-2020.pdf and UNSMIL and OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 20 December 2018, p. 6, https://www.ohchr.org/sites/default/files/Documents/Countries/LY/LibyaMigrationReport.pdf.

[65] Amnesty International, *"Between life and death": Refugees and Migrants trapped in Libya's cycle of abuse*, 24 September 2020, p. 22, https://www.amnesty.org/en/documents/mde19/3084/2020/en/.

[66] *See* UNSC, Panel of Experts on Libya, *Final Report of the Panel of Experts on Libya established pursuant to resolution 1973* (2011), S/2017/466, June 2017, available at https://digitallibrary.un.org/record/1288668?ln=en.

[67] Sea-Watch, Airborne Monthly Factsheet, June 2021, p. 6-8, Cases Z and AB, https://sea-watch.org/wp-content/uploads/2021/08/Airborne_Factsheet_June-2021.pdf.

[68] Sea-Watch, *Episodes of Violence by the so-called Libyan Coast Guard and Libyan Coastal Security at sea*, p.7 and 8, Cases 06.11.2017 and 21.10.2016.

[69] Sea-Watch, Airborne Monthly Factsheet, November 2021, p. 6, Case V, https://sea-watch.org/wp-content/uploads/2022/02/Airborne_Monthly_Factsheet_November-2021.pdf; Sea-Watch, Airborne Monthly Factsheet, June 2021, p. 8, Case AB, https://sea-watch.org/wp-content/uploads/2021/08/Airborne_Factsheet_June-2021.pdf (a video recording of this specific case is also available at https://twitter.com/MVLouiseMichel/status/1483861110470107140?s=20); Sea-Watch, Episodes of Violence by the so-called Libyan Coast Guard and Libyan Coastal Security at sea, p.1 and 2, Cases 10.01.2020 and 23.07.2020;

[70] Sea-Watch, Episodes of Violence by the so-called Libyan Coast Guard and Libyan Coastal Security at sea, p.5, Case 23.05.2017.

[71] Sea-Watch, Airborne Monthly Factsheet, November 2021, p. 6, Case V, https://sea-watch.org/wp-content/uploads/2022/02/Airborne_Monthly_Factsheet_November-2021.pdf; Sea-Watch, Airborne Monthly Factsheet, October 2021, p. 5, Case N, https://sea-watch.org/wp-content/uploads/2022/01/Airborne_Monthly_Factsheet_October-2021.pdf; Sea-Watch, Episodes of Violence by the so-called Libyan Coast Guard and Libyan Coastal Security at sea, p.1-2, Case 25.06.2020; and Sea-Watch, Airborne Monthly Factsheet, December 2021 – January 2022, p. 3, Case E, https://sea-watch.org/wp-content/uploads/2022/03/Airborne_Monthly_Factsheet_December-2021_January-2022.pdf.

was a boat carrying migrants and refugees.[72] Additionally, Sea-Watch documented the scLCG's (armed) interference with various NGOs' rescue operations (including jumping on board, firing shots at, seizing, and verbally threatening to sink the NGOs' boats).[73] Libyan officers were also seen jumping on board migrant boats and robbing migrants and refugees of their personal belongings at gun point.[74]

36. Other sources have also documented violence by the scLCG. For example, the UN Panel of Experts reported Bija committing acts of violence himself, including sinking migrants' and refugees' boats.[75] A leaked EUNAVFOR MED Operation Irini report, signed by then-Operation Commander Stefano Turchetto, also observed "excessive use of physical force" by the scLCG against migrants and refugees.[76] Similarly, Frontex's Serious Incident Reports (SIRs) also noted multiple occasions where Frontex's aircraft have witnessed and recorded on video instances of physical violence by the scLCG against people in distress during interceptions at sea.[77]

37. As such, the scLCG and the interceptions and returns of migrants and refugees it conducts at sea constitute a part of the system of exploitation and abuse of migrants and refugees in Libya. The FFM found the scLCG's conduct to "form part of a pattern characterized by dangerous operations at sea followed by a systematic transfer to a detention centre where migrants are kept for an indefinite period and where they are subjected to intolerable conditions that cause

[72] Sea-Watch, Episodes of Violence by the so-called Libyan Coast Guard and Libyan Coastal Security at sea, p.5-6, Case 23.05.2017 (2).

[73] Sea-Watch, Airborne Monthly Factsheet, February 2021, p. 4, Case M, https://sea-watch.org/wp-content/uploads/2021/04/Airborne_Monthly_Factsheet_February_2021.pdf; Sea-Watch, Episodes of Violence by the so-called Libyan Coast Guard and Libyan Coastal Security at sea, p.1, 4-5, and 6-8, Cases 12.02.2021, 26.10.2019, 10.05.2017, 07.08.2017, 15.08.2017, 26.09.2017, 06.11.2017, 24.04.2016, 17.08.2016, and 21.10.2016.

[74] Sea-Watch, Episodes of Violence by the so-called Libyan Coast Guard and Libyan Coastal Security at sea, p.5, Case 23.05.2017 and Nikolaj Nielsen, *Libyan police lieutenant: 'Coast guard are smugglers'*, EUobserver, 5 July 2021, https://euobserver.com/migration/152337.

[75] UN Security Council, *Final Report of the Panel of Experts established pursuant to resolution 1973* (2011) concerning Libya, S/2022/427, 27 May 2022, para. 105, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf.

[76] European External Action Service (EEAS), *Libyan Coast Guard and Navy monitoring / Four months report August – November 2021*, p. 9, 4 January 2022, https://www.documentcloud.org/documents/21185907-libyan-coast-guard-and-navy-monitoring-four-months-report-august-november-2021.

[77] For example, during an incident on 2 June 2022, a Frontex surveillance aircraft monitored the interception of the boat, during which it recorded on video the scLCG slapping, hitting on the head of, and kicking the people in distress it intercepted both prior to and immediately after they were boarded onto the scLCG vessel. *See* Frontex, Fundamental Rights Office, *Final SIR Report*, 12634/2022 – SIR Cat.1 – FSC Aerial Surveillance 2022, 2 August 2022. In another incident, on 15 September 2021, a Frontex surveillance aircraft also recorded on video the scLCG using excessive force during the interception, such as dangerously maneuvering its vessel and circling the migrant boat in distress, creating waves and using a hose spraying water in the direction of people in distress, and holding an item shaped like a pistol and pointing it in the direction of the migrant boat and firing (presumably) bullets in the direction of migrants. *See* Frontex, Fundamental Rights Office, *Final SIR Report*, 13489/2021 – SIR Cat.1 – FSC Aerial Surveillance 2021, 28 October 2022.

suffering and prompt them to utilise any means of escape, including paying money."[78] The German Human Rights Commissioner Luise Amtsberg also stated that the scLCG's activities are directly connected with the system of abuse to which migrants are exposed after being returned to Libya, citing this as grounds for the German government's decision, based on its human rights obligations, to cease cooperation with it.[79]

38. While Libyan actors, and in particular the scLCG, used to profit primarily from extortion payments for the ultimate transit of migrants and refugees to Europe, they now also profit from maintaining the indefinite detention of migrants and refugees within Libya, as further clarified below. This happened as a consequence of the fact that officials of EU Member States and EU agencies changed tactics to avoid legal obligations triggered by those seeking protection, which they sought to avoid by containing migrants and refugees in Libya and enlisting other actors to carry out interceptions and returns of Europe-bound migrants and refugees at sea. Detention centers and other places of captivity in Libya have since become more important sources of revenue, as Libyan actors may receive State funding for the operation of official DCIM centers, in addition to the profits previously (and still) gained from the trafficking, exploitation, and extortion of migrants and refugees.[80] Between places of detention in Libya, the deprivation of physical liberty of migrants and refugees continues as they are sold and resold from one intermediary to another, each demanding a new ransom payment, and are unable to break free from the vicious cycle.[81] As such, "[t]he human smuggling industry has gone from monetisation of movement to monetisation of captivity."[82]

39. While in captivity and detention, migrants and refugees suffer severe human rights abuses that amount to crimes against humanity, as already thoroughly detailed in the 2021 Communication,[83] as well as in the FFM 2021 Report.[84] In June 2022, the FFM also identified

[78] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya* (Advanced Unedited Version), A/HRC/48/83, 1 October 2021, para. 68, https://reliefweb.int/report/libya/report-independent-fact-finding-mission-libya-ahrc4883-enar.

[79] German Federal Foreign Office, Statement by Human Rights Commissioner Luise Amtsberg on maritime rescue efforts in the Mediterranean, 29 July 2022, https://www.auswaertiges-amt.de/en/newsroom/news/amtsberg-maritime-rescue-efforts/2545076.

[80] The Global Initiative and Clingendael, *The Human Conveyor Belt Broken – assessing the collapse of the human smuggling industry in Libya and the central Sahel*, March 2019, p. 6, 29, 40-44, and 90, https://globalinitiative.net/wp-content/uploads/2019/04/Global-Initiative-Human-Conveyor-Belt-Broken_March-2019.pdf.

[81] Médecins sans Frontières (MSF), *Trading in Suffering: Detention, Exploitation and Abuse in Libya*, 23 December 2019, https://www.msf.org/libya%E2%80%99s-cycle-detention-exploitation-and-abuse-against-migrants-and-refugees.

[82] Sarah Carabott, *How Libya's human smuggling industry evolved to cash in on captivity*, Times of Malta, 23 May 2021, https://timesofmalta.com/articles/view/how-libyas-human-smuggling-industry-evolved-to-cash-in-on-captivity.873859.

[83] ECCHR, FIDH, and LFJL, Article 15 Communication, November 2021.

[84] *See generally*, Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya* (Advanced Unedited Version), A/HRC/48/83, 1 October 2021, https://reliefweb.int/report/libya/report-independent-fact-finding-mission-libya-ahrc4883-enar.

"clear patterns of human rights violations and abuses against migrants in places of detention" and collected evidence that provides the FFM with reasonable grounds to believe that crimes against humanity have been committed in several places of detention.[85]

40. Significantly, the FFM found that "little has been done by Libyan authorities to reform their practices and address these crimes, or by their international partners, including Italy and Malta who have cooperation agreements with Libya in the field of migration control."[86] The FFM also noted that "[t]he SSA's recent involvement, in the second half of 2021, in migrant detention and exploitation highlights how persistent impunity perpetuates cycles of violence and encourages new actors to engage in such activities in their pursuit of further legitimacy and funds."[87]

41. Officials of EU Member States and EU agencies are directly involved in this system and, hence, in these crimes. EU Member States' and EU agencies' border management policies with Libya create incentives for interceptions and returns of migrants and refugees into the system of captivity, exploitation, and abuse that has developed precisely around their return to and containment in Libya. The interception and return of migrants and refugees to Libya by the scLCG carried out to date would not have been possible without the involvement of officials of EU Member States and EU agencies, through the material support given to the scLCG and their operational contributions to interceptions at sea.

B. Relevant Legal Framework for Assessing EU Member States' and EU Agencies' Border Management Policies with Libya

42. Before elaborating on the transformation of EU Member States' and EU agencies' policies over the years and their contributions to the situation of migrants and refugees in Libya, it is necessary to lay out the relevant legal framework, i.e., international human rights, refugee, and search and rescue (SAR) law. The application of these bodies of law to EU Member States' and EU agencies' border management policies with Libya is essential to the subsequent legal analysis of the crime of severe deprivation of physical liberty and the ensuing responsibility as co-perpetrators of the individuals involved.

1. International Search and Rescue (SAR) Laws

[85] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya* A/HRC/50/63, 27 June 2022, paras. 33-41 and 69, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya.

[86] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/50/63, 27 June 2022, para. 70, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya.

[87] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/50/63, 27 June 2022, para. 78, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya.

43. All States, including all EU Member States mentioned in this Communication, have a duty to assist people in distress at sea. According to the UN Convention on the Law of the Sea (UNCLOS), every State shall require the master of a ship flying its flag to render assistance to any person found at sea in danger of being lost.[88] Every coastal State shall also "promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighboring States for this purpose."[89]

44. In connection with this duty to render assistance, the International Convention on Maritime Search and Rescue (SAR Convention) allows States to draw up search and rescue regions (SAR regions or SAR zones).[90] A SAR zone is an area within which the corresponding State (or its Rescue Coordination Committee, RCC) has the capacity to conduct search and rescue operations and the authority to coordinate such operations.[91] This does not mean, however, that the corresponding State has the *only* authority to coordinate operations. While the SAR Convention does not specify how exactly to determine the coordinating RCC, according to the International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual, the RCC first contacted must coordinate the rescue until the "responsible" RCC (the one that is responsible for the SAR zone) becomes responsive and takes over.[92] Moreover, the declaration of a SAR zone is unilateral; there is no pre-assessment mechanism by the International Maritime Organization (IMO) on whether an RCC is in fact capable of conducting SAR operations in accordance with international laws in its declared SAR zone.[93]

45. Finally, under international maritime law, disembarkation following a sea rescue is to occur in a predictable manner and in conditions that ensure the protection of the human rights of those rescued, including the principle of non-refoulement.[94] In determining a place of safety for

[88] The UN Convention on the Law of the Sea (UNCLOS), Art. 98 (1).
[89] The UN Convention on the Law of the Sea (UNCLOS), Art. 98 (2).
[90] International Convention on Maritime Search and Rescue (1979), Annex, Chapter 2, 2.1.4 and 2.1.5, https://treaties.un.org/doc/Publication/UNTS/Volume%201405/volume-1405-I-23489-English.pdf.
[91] International Convention on Maritime Search and Rescue (1979), Annex, Chapter 2, 2.1.1-2.1.9, https://treaties.un.org/doc/Publication/UNTS/Volume%201405/volume-1405-I-23489-English.pdf.
[92] IAMSAR Manual, Vol II, Section 3.6, http://www.icscc.org.cn/upload/file/20190102/Doc.9731-EN%20IAMSAR%20Manual%20-%20International%20Aeronautical%20and%20Maritime%20Search%20and%20Rescue%20Manual%20Volume%20II%20-%20Mission%20Co-ordination.pdf.
[93] For accountability after the declaration of a SAR zone, an IMO Member State may file a complaint to the IMO, which may trigger an audit procedure, but this is unlikely to happen in the Libya context – EU Member States that are also IMO Member States are not likely to file such a complaint, since they are the main actors pushing for the establishment of the Libyan SAR zone.
[94] IMO, Resolution MSC.155(78), Adoption of Amendments to the International Convention on Maritime Search and Rescue (1979), 20 May 2004, Annex 5, www.refworld.org/docid/432acad44.html; IMO, Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea, 20 May 2004, www.refworld.org/docid/432acb464.html; and International Convention on Maritime Search and Rescue (1979), Annex, Chapter 1, 1.3.2., https://treaties.un.org/doc/Publication/UNTS/Volume%201405/volume-1405-I-23489-English.pdf. *See also*, UNHCR and IOM, *Proposal for a Regional Cooperative Arrangement Ensuring*

persons rescued at sea (including by military and commercial vessels), coordinating authorities must consider the need to avoid disembarkation in territories where the persons' lives and freedoms would be threatened[95] – Libya, as declared by many international organizations and further elaborated below, is not a place of safety under this standard.[96]

2. International Refugee Laws & the Non-Refoulement Principle

46. Under international refugee law, Article 33 of the Convention Relating to the Status of Refugees (the Refugee Convention) has established that no contracting State may expel or return a refugee to a State that cannot guarantee their safety of life and freedom.[97] All the EU Member States mentioned in this Communication are parties to this international treaty, making Article 33 binding on them. Although Libya is not a party to the Refugee Convention, the principle of non-refoulement has become customary international law[98] and is thus equally binding on Libya.

47. The non-refoulement principle under international human rights law is even broader since it may also require the protection of migrants not entitled to refugee status.[99] Moreover, under

Predictable Disembarkation and Subsequent Processing of Persons Rescued-at-Sea, 27 June 2018, p.2, https://bit.ly/2Oi1UJX.

[95] IMO, Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea, 20 May 2004, para. 6.17, www.refworld.org/docid/432acb464.html. *See also*, Council of Europe, Commissioner for Human Rights, Letter to Prime Minister of Malta, 5 May 2020, https://bit.ly/3cJwqch; UNHCR, UNHCR and IOM Joint Statement: International Approach to Refugees and Migrants in Libya Must Change, 11 July 2019, https://bit.ly/3e2ULtJ.

[96] *See e.g.*, UNHCR, *UNHCR Position on the Designation of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea*, September 2020, para. 33, https://www.refworld.org/pdfid/5f1edee24.pdf; IOM, *IOM and UNHCR Condemn the Return of Migrants and Refugees to Libya*, 17 June 2021, https://www.iom.int/news/iom-and-unhcr-condemn-return-migrants-and-refugees-libya; UN Secretary-General, *Implementation of resolution 2437 (2018) – Report of the Secretary-General to the UN Security Council, S/2019/711*, 5 September 2019, paras. 53 and 65, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/263/95/PDF/N1926395.pdf?OpenElement; Council of Europe, Commissioner for Human Rights, *Lives saved. Rights protected: Bridging the protection gap for refugees and migrants in the Mediterranean*, June 2019, p. 21, https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87; and European Court of Human Rights, *Hirsi Jamaa and others v. Italy* (Application no. 27765/09), Grand Chamber, 23 February 2012, https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Original%20judgment%20-%20HIRSI%20JAMAA%20AND%20OTHERS%20v.%20ITALY.pdf.

[97] Convention Relating to the Status of Refugees (1951 Refugee Convention), 28 July 1951, Article 33, https://www.refworld.org/docid/3be01b964.html.

[98] *See* UN High Commissioner for Refugees (UNHCR), *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, https://www.refworld.org/docid/437b6db64.html ("UNHCR considers that the principle of non-refoulement has acquired a normative character and constitutes a rule of international customary law"), and European Commission, Migration and Home Affairs, *Non-Refoulement*, https://home-affairs.ec.europa.eu/pages/glossary/non-refoulement_en ("[t]he principle of non-refoulement is a part of customary international law and is therefore binding on all States, whether or not they are parties to the Geneva Refugee Convention and Protocol");

[99] Human Rights Committee, General comment No. 36, CCPR/C/GC/36, 3 September 2019, para. 31, https://www.refworld.org/docid/5e5e75e04.html.

international law, the prohibition of torture and other cruel, inhuman or degrading treatment prevents States from returning individuals to States where there is a risk that they would be in danger of being subjected to such treatment, as also consistently affirmed by the jurisprudence of the European Court of Human Rights (ECtHR).[100] In the Libya context, returning migrants and refugees to Libya is returning them to precisely such conditions, as has been made clear in the 2021 Communication, as well as in a range of reliable public documentation.[101]

C. EU Agencies' and EU Member States' Border Management Cooperation Policies with Libya

48. This section traces the strategies of EU agencies and EU Member States in their collaboration with internationally recognized Libyan authorities in relation to border management. Underlying this entire collaboration is the interest of EU agencies and Member States to avoid legal obligations triggered by those seeking protection once on EU Member States' territory or under their control at sea. In particular, such a goal can be seen in the reliance of EU agencies and Member States on other actors (first and foremost, the Libyan international recognized government, the DCIM, and the scLCG) to carry out interceptions and returns of migrants and refugees to Libya. The collaboration strategies can be divided into three phases: (1) before 2011; (2) from 2011 to 2015; and (3) from 2016 to the present.

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[100] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Article 3, and *Ilias and Ahmed v. Hungary*, Application No. 47287/15, European Court of Human Rights, paras. 125-126.

[101] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, p. 36-200 ; UpRights, Adala for All, and StraLi, Article 15 Communication on War Crimes and Crimes Against Humanity Committed Against Migrants and Asylum Seekers in Libya, 17 January 2022; UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/50/63, 27 June 2022, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya; UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Follow-up Report of the Independent Fact-Finding Mission on Libya (Advanced Unedited Version)*, A/HRC/49/4, 23 March 2022, https://www.ohchr.org/sites/default/files/2022-03/A_HRC_49_4_AUV.pdf; UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/48/83, 1 October 2021, https://www.ohchr.org/sites/default/files/2021-11/A-HRC-48-83-AEV-EN.docx; Sally Hayden, *My Fourth Time, We Drowned: Seeking Refuge on the World's Deadliest Migration Route*, 29 March 2022; Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, https://www.amnesty.org/en/documents/mde19/4439/2021/en//; Amnesty International, *"Between life and death": Refugees and Migrants trapped in Libya's cycle of abuse*, 24 September 2020, p. 22, https://www.amnesty.org/en/documents/mde19/3084/2020/en/; Médecins sans Frontières (MSF), *Trading in Suffering: Detention, Exploitation and Abuse in Libya*, 23 December 2019, https://www.msf.org/libya%E2%80%99s-cycle-detention-exploitation-and-abuse-against-migrants-and-refugees; UNSMIL and OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 20 December 2018, p. 6, https://www.ohchr.org/sites/default/files/Documents/Countries/LY/LibyaMigrationReport.pdf; Tim Eaton, *Libya's War Economy: Predation, Profiteering and State Weakness*, Chatham House, April 2018, https://www.chathamhouse.org/sites/default/files/publications/research/2018-04-12-libyas-war-economy-eaton-final.pdf; and Amnesty International, *Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*, 11 December 2017, https://www.amnesty.org/en/documents/mde19/7561/2017/en/.

1. Before 2011: Direct Engagement with the Libyan Government

49. Before the 2011 uprising, the EU, as well as individual Member States (such as Italy), cooperated directly with the Gaddafi regime to stem increased migration flows from Libya to Europe.

50. At the EU level, the Council of the European Union decided to "embark upon a policy of engagement with Libya" in October 2004, after concluding that "cooperation with Libya in the field of migration was both essential and urgent."[102] Such engagement entailed a technical mission to Libya to examine arrangements for "combating illegal[103] migration" to Europe; further measures also included providing training to and sharing best practices with Libyan actors regarding migration management and the removal of what were called "illegal" migrants.[104]

51. With EU approval and support, Italy, particularly incentivized as a primary entry point into Europe to prevent migrants and refugees from leaving Libya and reaching Italy, was at the forefront of EU Member States in establishing collaboration on migration management with Libya. Building on early agreements with Libya in the 1990s,[105] Italy entered into a written Memorandum of Intent with Libya in 2000, which came into effect in December 2002.[106]

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[102] Council of the European Union, 2664th Council Meeting Press Release, Justice and Home Affairs, 8849/05 (Presse 114), 2-3 June 2005, p. 15, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/85255.pdf.

[103] A UN General Assembly resolution in as early as 1975 has stated that the term "illegal" should not be used to refer to migrants in an irregular situation. *See* United National General Assembly, Thirtieth Session, Resolution No. 3449, 9 December 1975, https://digitallibrary.un.org/record/189610?ln=en. Other institutions, such as the UN Office of the High Commissioner for Human Rights, the European Parliament, the Council of Europe Parliamentary Assembly, and the Council of Europe Commissioner for Human Rights, have also urged for a shift away from this language. *See* United Nations, Office the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights at International Borders, 2014, p. iv, 12 (Guideline 1(4)), https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf; European Parliament, Resolution of 14 January 2009 on the situation of fundamental rights in the European Union, P6_TA(2009)0019, para. 159, https://www.europarl.europa.eu/doceo/document/TA-6-2009-0019_EN.html; Council of Europe Parliamentary Assembly, Resolution 1509 (2006), 27 June 2006, para. 7, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17456; and Letter from the Council of Europe Commissioner for Human Rights to the Greek Minister of Shipping, Maritime Affairs and the Aegean, CommHR/MB/sf 003-2013, 14 February 2014, https://rm.coe.int/16806db7e0.

[104] Council of the European Union, 2664th Council Meeting Press Release, Justice and Home Affairs, 8849/05 (Presse 114), 2-3 June 2005, p. 16-19, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/85255.pdf.

[105] *See* Verbal Process, 4 July 1998, *discussed in* Emanuela Paoletti, *A Critical Analysis of Migration Policies in the Mediterranean: The Case of Italy, Libya and the EU*, RAMSES Working Paper 12/09, April 2009, p.14, https://www.academia.edu/413204/Emanuela_Paoletti_A_Critical_Analysis_of_Migration_Policies_in_the_Mediterranean_The_Case_of_Italy_Libya_and_the_EU.

[106] Memorandum of Intent, 13 December 2000, *discussed in* Emanuela Paoletti, *A Critical Analysis of Migration Policies in the Mediterranean: The Case of Italy, Libya and the EU*, RAMSES Working Paper 12/09, April 2009, p.14, https://www.academia.edu/413204/Emanuela_Paoletti_A_Critical_Analysis_of_Migration_Policies_in_the_Mediterranean_The_Case_of_Italy_Libya_and_the_EU.

Subsequently, Italy provided migration management training, technology, and equipment to Libya in exchange for an agreement to readmit people returned by Italy;[107] from 2007 to 2010, it also agreed with Libya on the joint patrolling of coasts, ports, and bays in northern Libya, with approval from the Internal Affairs Council of the EU, and provided Libya with patrol boats (a total of 16 boats delivered in different phases, including after 2011), as well as funding, training, and technical support.[108] During this time, Italy also aimed to set up a satellite surveillance system along Libya's southern border, 50% of the cost of which would come from the EU.[109] Furthermore, Italy funded migration detention camps in Libya near Tripoli, Sebah, and Kufra, in an effort to prevent people from onward movement through Libya.[110]

52. In 2004, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (subsequently the European Border and Coast Guard Agency – Frontex[111]) was also established[112] to promote, coordinate, and develop European border management and identify migratory patterns by monitoring borders and sharing information with EU Member States.[113] Frontex also subsequently coordinated joint operations (elaborated in Section II.B.2) and rapid border interventions to assist Member States

[107] *See* European Parliament, "Resolution on Lampedusa", P6_TA(2005)0138, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2005-0138+0+DOC+XML+V0//EN.

[108] Ministero Dell'Interno, Amato: via libera dell'Europa per la fornitura alla Libia di un sistema di sorveglianza elettronica delle frontiere, 18 September 2007, https://www1.interno.gov.it/mininterno/export/sites/default/it/sezioni/sala_stampa/notizie/_sottosegretarioxprecedenti/__ministro/0957_2007_09_18_Amato_Consiglio_AAII_Ue.html_109962302.html; Senato della Repubblica, 281a Seduta pubblica resoconto sommario e stenografico, 26 February 2008, http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=Resaula&leg=15&id=298782; and Amnesty International, *Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*, 11 December 2017, p. 14, https://www.amnesty.org/en/documents/mde19/7561/2017/en/.

[109] Law No. (2) of 1377 FDP/2009 AD on ratifying the Treaty of Friendship, Partnership, and Cooperation between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Italy, Article 19 (2), https://security-legislation.ly/sites/default/files/lois/7-Law%20No.%20%282%29%20of%202009_EN.pdf.

[110] Mason Richey, *The North African Revolutions: A Chance to Rethink European Externalization of the Handling of Non-EU Migrant Inflows*, 16 February 2012, p. 35, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2109199 and Paolo Cuttitta, *Readmission in the Relations between Italy and North African Mediterranean Countries*, Middle East Institute, 1 August 2010, https://www.mei.edu/publications/readmission-relations-between-italy-and-north-african-mediterranean-countries#ednref33.

[111] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016, on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2016:251:FULL&from=EN.

[112] Council of the European Union, Council Regulation (EC) No. 2007/2004 of 26 of October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R2007&from=EN.

[113] Frontex, Origin & Tasks, https://frontex.europa.eu/about-frontex/who-we-are/origin-tasks/.

at Europe's external borders, by deploying vessels, aircraft, vehicles, and technical equipment provided by Member States.[114]

53. During this time, although the EU Member States and EU agencies provided funding, training, and equipment to Libya, they still were aware of their own responsibility, particularly for "undertaking humanitarian efforts to try and prevent loss of life in the Mediterranean."[115] The Council of the European Union concluded that EU Member States, among themselves, should "reinforce systematic operational cooperation between the respective national services responsible for the sea borders,"[116] as opposed to blurring the understanding of such obligations and delegating sea rescue activities to Libyan actors. Finally, during this period, EU Member States directly returned migrants and refugees to Libyan territory, either by air or at sea,[117] as opposed to the subsequent policy and practice of having them returned by other actors through interceptions at sea.[118]

2. 2011 – 2015: Stopping Migrants on the Libyan-Mediterranean Route

54. During this period, due to the volatile internal situation in Libya and the lack of a unified national government, it was difficult for EU Member States and EU agencies to effectively engage with Libya and further their cooperation.[119] The boats gifted to Libya by Italy were also either destroyed or severely damaged in the war.[120] EU Member States' and EU agencies' border management policies with Libya shifted focus to managing migration before migrants and refugees entered Libya in the first place, or after they departed Libya, e.g., by sea.[121]

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[114] Frontex, Origin & Tasks, https://frontex.europa.eu/about-frontex/who-we-are/origin-tasks/.

[115] Council of the European Union, 2664th Council Meeting Press Release, Justice and Home Affairs, 8849/05 (Presse 114), 2-3 June 2005, p. 16, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/85255.pdf.

[116] Council of the European Union, 2664th Council Meeting Press Release, Justice and Home Affairs, 8849/05 (Presse 114), 2-3 June 2005, p. 18, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/85255.pdf.

[117] Forensic Oceanography, *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, May 2018, p. 25-26, https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf.

[118] *E.g.*, Italy deported migrants back to Libya by air: Emanuela Paoletti, *Relations Among Unequals? Readmission between Italy and Libya*, Middle East Institute, 1 August 2010, https://www.mei.edu/publications/relations-among-unequals-readmission-between-italy-and-libya.

[119] Council of the European Union, European External Action Service (EEAS), EUBAM Libya Initial Mapping Report Executive Summary, 5616/17, 25 January 2017, p.2, https://www.statewatch.org/media/documents/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf, and Mary Fitzgerald and MattiaToaldo, *A Quick Guide to Libya's Main Players*, European Council on Foreign Relations, http://www.ecfr.eu/mena/mapping_libya_conflict.

[120] Forensic Oceanography, *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, May 2018, p. 32, https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf.

[121] *See e.g.*, European Union and International Centre for Migration Policy Development (ICMPD), Khartoum Process, "Milestones", 2016, https://www.khartoumprocess.net/about/milestones; European Council, "Sommet de La Valette sur la migration, 11-12/11/2015", 2015,

55. To accomplish these changed goals, new cooperation agreements with Libya were made. For example, Italy signed two Memoranda of Understanding (MoU) with Libya in 2011 and 2012, respectively. The 2011 MoU was signed with the Libyan National Transitional Council and aimed to extend the obligations of the previous Gaddafi regime to control migratory flows.[122] The 2012 MoU was concluded between then-Italian Interior Minister Anna Maria Cancellieri and her Libyan counterpart Fawzi Abdulaal to combat irregular migration from Libya and provide training on border control, information exchange, and "the creation of a system of data management for civil registries."[123] This took place despite the European Court of Human Rights decision earlier that year that found Italy to be in violation of its human rights obligations in intercepting and returning migrants and refugees at sea back to Libya, and also represents a key juncture in the shift in strategy of EU Member States and EU agencies in their border management with Libya to the next phase, which manifested after a few years of adjustment in planning documents and their implementation (elaborated in Section II.C.3.a).[124]

56. At the EU level, the Council of the EU decided in May 2013 to launch EUBAM Libya, a civilian mission under the European External Action Service's (EEAS) Common Security and Defense Policy (CSDP).[125] The mission's objectives at the time were "to support the Libyan authorities to develop capacity for enhancing the security of Libya's land, sea and air borders in the short term and to develop a broader integrated IBM [Integrated Border Management] strategy in the longer term."[126] Under the initial Council Decision, training, mentorship, and support for

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http://www.consilium.europa.eu/fr/meetings/international-summit/2015/11/11-12/; Corriere Della Serra, *di Monica Ricci Sargentini, "Uso inappropriato del Fondo Africa» Asgi e Amnesty ricorrono al Tar"*, 10 October 2018, https://www.corriere.it/esteri/18_ottobre_10/lobia-italia-uso-inappropriato-fondo-africa-asgi-amnesty-ricorrono-tar-ff668262-cca3-11e8-ae88-febf99edce56.shtml; and European Commission, EUTF, "EU Emergency Trust Fund for Africa", https://ec.europa.eu/trustfundforafrica/content/homepage_en.

[122] Delphine Perrin, *Is it time for Italy to resume cooperation with Libya in the field of migration?*, Migration Policy Centre Blog, 7 May 2012, https://blogs.eui.eu/migrationpolicycentre/is-it-time-for-italy-to-resume-anti-immigration-cooperation-with-libya/.

[123] Delphine Perrin, *Is it time for Italy to resume cooperation with Libya in the field of migration?*, Migration Policy Centre Blog, 7 May 2012, https://blogs.eui.eu/migrationpolicycentre/is-it-time-for-italy-to-resume-anti-immigration-cooperation-with-libya/.

[124] European Court of Human Rights, *Hirsi Jamaa and others v. Italy* (Application no. 27765/09), Grand Chamber, 23 February 2012, https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Original%20judgment%20-%20HIRSI%20JAMAA%20AND%20OTHERS%20v.%20ITALY.pdf.

[125] Council of the European Union, Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D0233&from=EN and EEAS, EUBAM Libya, *About the EU Border Asistance Mission in Libya (EUBAM)*, 15 September 2021, https://www.eeas.europa.eu/eubam-libya/about-eu-border-assistance-mission-libya-eubam_en?s=327.

[126] Council of the European Union, Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya), Article 2, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D0233&from=EN.

strengthening Libya's border services and institutional operational capabilities were provided.[127]

57. Regarding the treatment of migrants and refugees arriving to Europe via the Libyan-Mediterranean route, EU Member States and EU agencies shifted back-and-forth between non-assistance to people in distress in the Central Mediterranean Sea to stem migration flows to Europe and conducting search and rescue operations in response to strong criticism in the wake of soaring migrant and refugee deaths at sea. For example, in 2013, following an initial non-assistance practice, the Italian Navy launched Mare Nostrum, a costly but effective search and rescue operation with an explicit humanitarian goal that "deployed Italian warships close to the Libyan coast with the priority of saving lives at sea."[128] It was terminated a year later after the EU refused to provide additional funding, upon Italy's request, and was blamed for being a "pull factor" for increased migration flows,[129] even though statistics did not support this claim.[130] Subsequently, on the EU level, Frontex started Operation Triton in 2014 as a joint operation with Italy. However, different from Mare Nostrum, Triton was in fact primarily a mission to combat crime and ensure border security within a much smaller rescue area – which was also farther away from Libyan shores – that was not expressly described as a search and rescue operation.[131] This led to more migrant and refugee deaths in the Mediterranean Sea, a result expected even by Frontex itself.[132]

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[127] Council of the European Union, Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya), Article 3, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D0233&from=EN.

[128] Forensic Oceanography, *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, May 2018, p. 34, https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf.

[129] Forensic Oceanography, *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, May 2018, p. 34, https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf.

[130] IOM, *IOM Applauds Italy's Life-Saving Mare Nostrum Operation: "Not a Migrant Pull Factor"*, 31 October 2014, https://www.iom.int/news/iom-applauds-italys-life-saving-mare-nostrum-operation-not-migrant-pull-factor; Elia Steinhilper and Rob J. Gruijters, *A Contested Crisis: Policy Narratives and Empirical Evidence on Border Deaths in the Mediterranea*n, Sociology, Vol. 52, Issue 3, p. 515-533, p. 534, 2018; https://www.repository.cam.ac.uk/handle/1810/287245; Tobia Pietz, *A European "Mare Nostrum" instead of Operation Sophia 2.0*, Euroactiv, 12 September 2019, https://www.euractiv.com/section/justice-home-affairs/opinion/a-european-mare-nostrum-instead-of-operation-sophia-2-0/.

[131] Frontex, Joint Operation Triton (Italy), 10 October 2016, https://frontex.europa.eu/media-centre/news/focus/joint-operation-triton-italy--ekKaes; European Commission, *Frontex Joint Operation "Triton" – Concerted efforts to manage migration in the Central Mediterranean*, 7 October 2014, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_566; European Commission, Statement by the EU Commissioner Cecilia Malmström on operation Triton, 7 October 2014, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_14_302; BBC News, *Operation Triton: Europe's Mediterranean border patrol*, 13 November 2014, https://www.bbc.com/news/world-africa-30039044l and Elia Steinhilper and Rob J. Gruijters, *A Contested Crisis: Policy Narratives and Empirical Evidence on Border Deaths in the Mediterranea*n, Sociology, Vol. 52, Issue 3, p. 515-533, p. 532, 2018; https://www.repository.cam.ac.uk/handle/1810/287245.

[132] Frontex, Operations Division, Joint Operations Unit, Concept of reinforced joint operation tackling the migratory flows towards Italy: JO EPN-Triton, Reg. No. 2014/JOU, 28 August 2014, p. 6, https://www.proasyl.de/wp-content/uploads/2014/12/JOU_Concept_on_EPN-TRITON__2_.pdf ("It is has to be

58. Due to this and after the particular loss of over a thousand lives in two shipwrecks in April 2015,[133] the European Council concluded that the EU would "mobilise all efforts at its disposal to prevent further loss of life at sea and to tackle the root causes of the human emergency" and "decided to strengthen [the EU's] presence at sea."[134] However, it chose to do so not by increasing sea rescue operations, but by re-tasking existing missions to anti-trafficking and smuggling operations, and even creating new missions for this. For example, the Italian Navy started the Mare Sicuro operation in March 2015, but shifted the focus from lifesaving to anti-trafficking and anti-smuggling activities.[135] The EU initiated EUNAVFOR MED Operation Sophia, an anti-smuggling military operation, in June of the same year.[136] Operation Triton also expanded in terms of its operational area and equipment, such as vessels and aircraft.[137] As a result, a significant European presence at sea was established, though "in a way that prioritized the security aims over that of rescuing migrants,"[138] which has drawn criticism from various actors including NGOs.[139]

3. 2016 and After: Collaboration with the scLCG for the Interception of Migrants and Refugees at Sea

59. Faced with increased flows of migrants and refugees, EU Member States and EU agencies again tightened border management policies in relation to Libya beginning in 2016.[140] The current policy is designed to support Libyan actors in ensuring that migrants and refugees stay in Libya, regardless of the consequences on their lives and safety. In order to achieve this, certain EU Member States and EU agencies have, on one hand, increased capacity-building support to

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stressed that the withdrawal of navel assets from the area, if not properly planned and announced well in advance, would likely result in a higher number of fatalities.").

[133] Forensic Architecture, Death by Rescue: The Lethal Effects of Non-Assistance at Sea, https://forensic-architecture.org/investigation/death-by-rescue-the-lethal-effects-of-non-assistance-at-sea.

[134] Council of the European Union, Special meeting of the European Council, 23 April 2015 – statement, 23 April 2015, https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/#:~:text=The%20European%20Union%20will%20mobilise,people%20from%20dying%20at%20sea.

[135] Ministero Della Difese, Marina Militare, Operazione Mare Sicuro (OMS), https://www.marina.difesa.it/cosa-facciamo/per-la-difesa-sicurezza/operazioni-in-corso/Pagine/MareSicuro.aspx.

[136] Forensic Oceanography, *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, May 2018, p. 34, https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf.

[137] Frontex, *Frontex expands its Joint Operation Triton*, 26 May 2015, https://frontex.europa.eu/media-centre/news/news-release/frontex-expands-its-joint-operation-triton-udpbHP.

[138] Forensic Oceanography, *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, May 2018, p. 34-35, https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf.

[139] *See e.g.*, Amnesty International, *Europe's response: "Face-saving not a life-saving operation"*, 24 April 2015, https://www.amnesty.org/en/latest/news/2015/04/face-saving-not-a-lifesaving-operation/.

[140] Forensic Oceanography, *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, May 2018, p. 35-36, https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf.

Libyan actors, especially sea rescue actors, such as the scLCG, or those in charge of running detention centers. On the other hand, they have also provided operational contributions enabling the scLCG to perform interceptions of migrants and refugees at sea and return them to Libya.

a. The *Hirsi* Decision

60. EU Member States and EU agencies developed the current model, as opposed to reviving their previous efforts to directly return migrants and refugees to non-EU countries, in large part due to the 2012 *Hirsi Jamaa* decision by the European Court of Human Rights (ECtHR). This fundamental decision confirmed that direct refoulement to Libya on the high seas contravenes State obligations under the European Convention on Human Rights.

61. The decision was triggered by an operation conducted by Italian military vessels which intercepted and returned around 200 people from Somalia and Eritrea back to Libya, where they had initially departed.[141] Twenty-four of these individuals brought a case against Italy before the ECtHR. In 2012, the ECtHR found that Italy had violated the non-refoulement principle and the prohibition of collective expulsion by returning the asylum-seekers to Libya, where the ECtHR found a real risk of ill-treatment for migrants, including asylum-seekers, in part due to consistent documentation of "systematic" arrest and detention in inhuman conditions.[142] The ECtHR clarified that anyone intercepted must have access to an individualized procedure and to remedies to challenge the decision to return them to their country of departure,[143] and that obligations remain even when individuals are intercepted in international waters.[144]

62. Instead of fostering compliance with their international legal obligations as clarified by the ECtHR, the *Hirsi* decision had a perverse effect on EU Member States' strategies of intercepting and returning migrants and refugees to Libya. They developed a strategy "consisting in the inducement by countries of destination of countries of transit, so that the latter exert the

[141] European Court of Human Rights, *Hirsi Jamaa and others v. Italy* (Application no. 27765/09), Grand Chamber, 23 February 2012, https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Original%20judgment%20-%20HIRSI%20JAMAA%20AND%20OTHERS%20v.%20ITALY.pdf.
[142] European Court of Human Rights, *Hirsi Jamaa and others v. Italy* (Application no. 27765/09), Grand Chamber, 23 February 2012, https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Original%20judgment%20-%20HIRSI%20JAMAA%20AND%20OTHERS%20v.%20ITALY.pdf, §§125-126.
[143] European Court of Human Rights, *Hirsi Jamaa and others v. Italy* (Application no. 27765/09), Grand Chamber, 23 February 2012, https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Original%20judgment%20-%20HIRSI%20JAMAA%20AND%20OTHERS%20v.%20ITALY.pdf.
[144] European Court of Human Rights, *Hirsi Jamaa and others v. Italy* (Application no. 27765/09), Grand Chamber, 23 February 2012, https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Original%20judgment%20-%20HIRSI%20JAMAA%20AND%20OTHERS%20v.%20ITALY.pdf.

necessary control in the former's stead and/or for their benefit."[145] The ultimate goal is to "eliminate any physical contact" between migrants and refugees and the EU (or its Member States) in order to ostensibly "sever any jurisdictional link with EU countries, in an attempt to elude any concomitant responsibility."[146]

b. Building the Capacity of the Libyan Maritime Actors

63. As a result of the *Hirsi* decision, EU Member States and EU agencies have increasingly engaged with internationally recognized Libyan authorities to provide support to build up the maritime capacity of Libyan actors. In December 2016, the European Council underlined the need to enhance support for the scLCG, including through EUNAVFOR MED Operation Sophia, stating that "[t]he intention is to further intensify these efforts alongside the training of the Coast Guard that is being provided."[147] In January 2017, the European Commission and High Representative of the Union for Foreign Affairs and Security Policy submitted to the European Parliament a joint communication, stating that "[i]t is clear that as of spring 2017, if no further action is taken, uncontrolled irregular migration flows along the Central Mediterranean route will continue."[148] The joint communication identified the GNA as "a crucial partner in this endeavor" and declared that "[t]he EU will strengthen efforts to improve the capacity of the GNA."[149] In the same joint communication, it was recognized that the scLCG should play "a central role" in managing maritime borders and ensuring safe disembarkation on the Libyan

[145] Violeta Moreno-Lax and Mariaguilia Giuffré, *The Raise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows*, Research Handbook on International Refugee Law (Edward Elgar, Forthcoming; S. Juss ed.), 31 July 2017, p. 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009331.

[146] Violeta Moreno-Lax and Mariaguilia Giuffré, The Raise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows, Research Handbook on International Refugee Law (Edward Elgar, Forthcoming; S. Juss ed.), 31 July 2017, p. 4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009331.

[147] European Commission, Communication from the Commission to the European Parliament, the European Council and the COuncil, Second Progress Report: First Deliverables on the Partnership Framework with third countries under the European Agenda on Migration, COM (2016) 960 final, 14 December 2016, https://eur-lex.europa.eu/resource.html?uri=cellar:903bad1d-dfee-11e7-9749-01aa75ed71a1.0020.02/DOC_1&format=PDF.

[148] European Commission, 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, 25 January 2017, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017JC0004&from=EN.

[149] European Commission, 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, 25 January 2017, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017JC0004&from=EN.

coast;[150] there was also a specific section entitled "stepping up support to the [scLCG]," as building its capacity is "a priority, both in terms of capabilities and equipment needs."[151]

64. Soon after, presumably following such EU guidelines, then-Italian Minister of the Interior Marco Minniti traveled to Libya to begin negotiations with then-Prime Minister of the GNA Fayez Al-Sarraj in January 2017 regarding a MoU with Libya.[152] During this visit, Minniti also reopened the Italian embassy in Tripoli and stated that it would function as the coordination center for all migration projects between Italy and Libya.[153] The MoU was officially signed in February 2017. Under the MoU, highlighting the importance of controlling Libyan sea borders in ensuring the reduction of irregular migratory flows,[154] Italy would provide "technical and technologic 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 of the Ministry of Defence and by the competent bodies and departments of the Ministry of Home Affairs."[155] Moreover, solutions to the issue of "clandestine migrants crossing Libya to reach Europe by sea" are identified primarily through "the provision of temporary reception camps in Libya, under the exclusive control of the Libyan Ministry of Home Affairs."[156] The mandate of Operation Mare Sicuro was also amended in December 2017 to include the provision of direct capacity-building assistance to the scLCG, including "intelligence, surveillance, and reconnaissance capabilities."[157]

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[150] European Commission, 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, 25 January 2017, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017JC0004&from=EN.

[151] European Commission, 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, 25 January 2017, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017JC0004&from=EN.

[152] Rai News, *Immigrants, Minniti in Libya: first step for a new cooperation*, 9 January 2017, https://www.rainews.it/archivio-rainews/articoli/Immigrati-Minniti-in-Libia-primo-passo-per-nuova-cooperazione-ceb31db3-caaa-4edd-8f06-e1a33a63e59f.html?refresh_ce.

[153] Rai News, *Immigrants, Minniti in Libya: first step for a new cooperation*, 9 January 2017, https://www.rainews.it/archivio-rainews/articoli/Immigrati-Minniti-in-Libia-primo-passo-per-nuova-cooperazione-ceb31db3-caaa-4edd-8f06-e1a33a63e59f.html?refresh_ce.

[154] 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 [English translation], 2 February 2017, Preamble, https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

[155] 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 [English translation], 2 February 2017, art. 1(C), https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

[156] 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 [English translation], 2 February 2017, Preamble, https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

[157] Ministero Della Difese, Marina Militare, Operazione Mare Sicuro (OMS), https://www.marina.difesa.it/cosa-facciamo/per-la-difesa-sicurezza/operazioni-in-corso/Pagine/MareSicuro.aspx and Uffici del Senato della Repubblica e della Camera dei deputati, *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, 28 July 2017, p5, https://stefanoceccanti.files.wordpress.com/2017/08/dossier-parlamento-libia.pdf.

65. To implement the MoU and the mandate, in May 2017, Italy began providing the Libyan Navy and the scLCG with new and repaired patrol boats, with four repaired Bilgiani patrol boats inaugurated in the presence of Marco Minniti and Fayez Al-Sarraj.[158] Three more patrol boats were handed over in February 2018.[159] More boats were delivered between August and November 2018 while Matteo Salvini was Interior Minister,[160] as well as in November 2019 by the new Italian government formed in September that year.[161] Besides the scLCG and Libyan Navy, in October 2020, GACS also received two boats (P-300 and P-301) from Italy and used them in several interception operations during the following year.[162]

66. The Italian boats and accompanying communications equipment have been crucial to the scLCG's operational capabilities. In its November 2018 "Six Monthly Report," EUNAVFOR MED assessed the Libyan Navy and scLCG naval assets and recognized the centrality of the Italian assets to the scLCG fleet: "The most capable ships belong to the IT-built Bigliani class (4 assets, 75% operational) and to the IT-built Corrubias class (2 assets, 100% operational) similar to the Bigliani class."[163] In February 2018, a EUNAVFOR MED monitoring report acknowledged 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/SOLAS events."[164] In an

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[158] Italian Ministry of the Interior, *Contro il traffico dei migranti: consegnate le prime motovedette alla Marina libica*, 21 April 2017, www.interno.gov.it/it/notizie/contro-traffico-dei-migranti-conseg-nate-prime-motovedette-alla-marina-libica and Italian Ministry of the Interior, *Minniti in Libia: fronte comune contro il traffico di migranti*, 16 May 2017, www.interno.gov.it/it/notizie/minniti-libia-fronte-comune-contro-traffico-migranti.

[159] *See* Gerardo Pelosi, Libia e Niger: il bilancio dell'Italia e l'eredità per il prossimo governo, 24 ORE, 25 February 2018, http://www.ilsole24ore.com/art/mondo/2018-02-24/libia-e-niger-bilancio-dell-italia-e-l-eredita-il-prossimo-governo--212523.shtml?uuid=AEwxvQ6D&refresh_ce=1.

[160] Financial Times, *Italy donates 12 more vessels to Libya to stem migration*, 7 August 2018. www.ft.com/content/391ed012-9a28-11e8-9702-5946bae86e6d and Safa Alharathy, *Libyan Coast Guard receives new vessel from Italy*, The Libya Observer, 26 November 2018, https://www.libyaobserver.ly/inbrief/libyan-coast-guard-receives-new-vessel-italy

[161] Alessandra Zinti, *Libia, festa della Marina: l'Italia consegna dieci nuove motovedette*, Republica, 4 November 2019, https://www.repubblica.it/cronaca/2019/11/04/news/libia_festa_della_marina_l_italia_consegna_dieci_nuove_motovedette-240197745/?fbclid=IwAR2eIAWRXPPtKGZuD44PQqjZGioGzyZGxNrnCRmnLxG_Vi-Uc59-C-4aQOw.

[162] *See e.g.*, Libyan Ministry of the Interior, Facebook post, 8 October 2020, https://facebook.com/Ministry.of.Interior.libya/posts/3362879630475372/; GACS, Facebook post, 17 May 2021, https://facebook.com/GACS.LIBYA/posts/2998346363781052; GACS, Facebook post, 11 May 2021, https://facebook.com/GACS.LIBYA/posts/2993050150977340; GACS, Facebook post, 31 March 2021, https://facebook.com/GACS.LIBYA/posts/2962301027385586 (in Arabic).

[163] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 20, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf, citing EUNAVFOR MED Operation Sophia - Six Monthly Report 1 June - 30 November 2018, Part A, 18 January 2019, p. 13.

[164] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 29, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf, citing EUNAVFOR MED Operation Sophia - Monitoring of Libyan Coast Guard and Navy Report October 2017 - January 2018, 9 March 2018, p. 26.

Italian case concerning an incident on 15 March 2018, the pre-trial investigating judge of Ragusa observed that the Italian Navy ship *Capri*, docked in the port of Tripoli, was functioning as a communication and coordination center that provided a decisive contribution to the scLCG's command and control capabilities, and that the coordination of maritime operations by Libya is "essentially entrusted to the Italian Navy, with its own naval assets and with those provided to the Libyans."[165]

67. The scLCG has used the boats in many incidents – for instance, in Incident 3 (described in Section III below), the Libyan patrol boat used, *Sabratha 654*, is a ship (class Bigliani) used by the Guardia di Finanza that Italy gave to Libya.[166] Italy has also been partially responsible for its financing and maintenance ever since.[167] Other boats donated by Italy and used in interceptions (including several incidents in Section III) include *Ubari* (Incidents 2 and 9) and *Fezzan* (Incidents 4, 6, 10, and 11).[168]

68. In 2020, Malta also concluded an MoU with Libya. Under the Malta-Libya MoU, the Maltese government would finance two coordination centers staffed with both Maltese and Libyan individuals, in Valletta and Tripoli respectively, to coordinate activities aimed at suppressing irregular immigration across the Mediterranean.[169] Moreover, Malta would propose funding towards additional maritime assets necessary for the interception of and follow-up on human trafficking activities in the search and rescue region in the Mediterranean basin.[170] The official statement from the Maltese Office of the Prime Minister explicitly stated that these aims would be principally resolved through "addressing and stopping human trafficking, rather than focusing just on relocation of migrants to other countries."[171]

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[165] Tribunale di Ragusa, R.G. GIP 1182/18, Decreto di rigetto di richiesta di sequestro preventivo, 16 April 2018.

[166] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 29, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf, citing EUNAVFOR MED Operation Sophia - Monitoring of Libyan Coast Guard and Navy Report October 2017 - January 2018, 9 March 2018, p. 26

[167] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 29, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf, citing EUNAVFOR MED Operation Sophia - Monitoring of Libyan Coast Guard and Navy Report October 2017 - January 2018, 9 March 2018, p. 26.

[168] Safa Alharathy, *Libyan Coast Guard receives new vessel from Italy*, The Libya Observer, 26 November 2018, https://www.libyaobserver.ly/inbrief/libyan-coast-guard-receives-new-vessel-italy and Naval Post, *Italy sends Libya boat "Fezzan"*, 22 October 2018, https://navalpost.com/italy-sends-libya-boat-fezzan/.

[169] Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combatting Illegal Immigration, 28/05/2020, https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf, arts. 1-3.

[170] Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combatting Illegal Immigration, 28/05/2020, https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf, art. 5.

[171] Statement by the Office of the Prime Minister, 28 May 2020, https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/May/28/pr201016.aspx.

69. On the EU level, EUBAM Libya's mandate has been extended to 2023, with its amended objectives still emphasizing capacity-building efforts in the area of border management, and with a budget of 84,850,000 euros for a two-year period alone (from 1 July 2021 to 30 June 2023).[172] The EU Internal Security Fund has also provided financial support amounting to 1.8 million euros to the scLCG during 2017 and 2018.[173]

70. Moreover, EUNAVFOR MED operations have shifted to a similar approach. Originally set up as "a military crisis management operation contributing to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean" in May 2015,[174] EUNAVFOR MED's mission and mandate was specifically amended in June 2016 to include the provision of training and capacity-building to the so-called Libyan Coast Guard and Navy.[175] This addition was "underpinned by the objective to use [Operation] Sophia to contribute to the reduction of overall trafficking activities through the Central Mediterranean and enhance the [scLCG]'s ability to perform search and rescue activities in Libya's SAR area of responsibility."[176] The training of the Libyan actors was seen as "the fastest way to deliver in reducing irregular migrant flows and intercept smugglers' activities."[177] The Political and Security Committee (PSC) of the Council of Europe formally authorized the start of the training of the Libyan personnel in August 2016, the official decision for which was signed by then-PSC Chairperson Walter Stevens.[178] In October 2016, under Operation Sophia and an MoU between the Operation Commander, Rear Admiral Enrico Credendino, and the Libyan technical

[172] Council of the European Union, Council Decision (CFSP) 2021/1009 of 18 June 2021 amending Decision 2013/233/CFSP on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021D1009&qid=1629820283768&from=EN.

[173] European Parliament, Parliamentary question – E-004208/2020(ASW), Answer given by Olivér Várhelyi on behalf of the European Commission, 5 October 2020, https://www.europarl.europa.eu/doceo/document/E-9-2020-004208-ASW_DE.html.

[174] Council of the European Union, Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D0778&from=EN.

[175] Council of the European Union, Council Decision (CFSP) 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), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D0993&from=EN.

[176] Council of the European Union, European External Action Service (EEAS) to the Political and Security Committee and Delegations, Strategic Review on EUNAVFOR MED Operation Sophia, EUBAM Libya & EU Liaison and Planning Cell, 27 July 2018, para. 73, https://www.statewatch.org/media/documents/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf.

[177] Amnesty International, *Europe: A perfect storm: The failure of European policies in the central Mediterranean*, July 2017, p. 21, https://www.amnesty.org/download/Documents/EUR0366552017ENGLISH.PDF, citing the EUNAVFOR MED operational update at the SHADE Mediterranean forum on 8-9 June 2017.

[178] Council of Europe, Political and Security Committee Decision (CFSP) 2016/1635 of 30 August 2016 on the commencement of the capacity building and training of the Libyan Coast Guard and Navy by the European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) (EUNAVFOR MED/3/2016), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D1635&from=EN.

Committee of Experts,[179] training began on board two EUNAVFOR MED assets on the high seas.[180] It has been established that EUNAVFOR MED's training was provided to individuals who had been known to be involved in criminal activities, including in the commission of crimes against humanity as outlined in this Communication, such as members of the scLCG from the Zawiya sector[181] – various sources have indicated that Abd al-Rahman Milad (alias "al-Bija"), a militia leader known for his criminal activities, was the head of the Zawiya branch of the coast guard.[182]

71. Subsequently, Operation Sophia was replaced by Operation Irini on March 2020. Although the mandate has changed to the implementation of the UN arms embargo on Libya, capacity-building and training of the so-called Libyan Coast Guard and Navy remains one of Operation Irini's tasks.[183] In October 2021, the EU still "aims to continue strengthening the capacity of the [so-called Libyan Coast Guard] and Navy and the General Administration for Coastal Security (GACS)…through provision of equipment and training, in close cooperation with key Member States."[184]

Declaration of the So-Called Libyan SAR Zone and Libyan MRCC

72. The EU Member States were critical in establishing the so-called Libyan SAR zone and the corresponding Libyan MRCC (sometimes referred to as the Joint Rescue Coordination Center – JRCC), a key step in framing Libya's interceptions at sea (along with the EU Member States and EU agencies' role in facilitating them) as seemingly legitimate endeavors. In August 2016, the EU Commission and EEAS jointly signed a letter to the Italian Coast Guard, and instructed the Italian Coast Guard to lead a project to establish a Libyan MRCC and support the Libyan

[179] Council of the European Union, European External Action Service (EEAS) to the Political and Security Committee and Delegations, Strategic Review on EUNAVFOR MED Operation Sophia, EUBAM Libya & EU Liaison and Planning Cell, 27 July 2018, para. 110, https://www.statewatch.org/media/documents/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf.

[180] European Union External Action, *EUNAVFOR MED Operation Sophia starts training of Libyan Navy Coast Guard and Libyan Navy*, 27 October 2016, https://www.eeas.europa.eu/node/13195_en.

[181] EUNAVFOR MED Operation SOPHIA, Monitoring Report October 2017 – January 2018, February 2018, Annex B, https://www.politico.eu/wp-content/uploads/2019/02/ENFM-Monitoring-of-Libyan-Coast-Guard-and-Navy-Report-October-2017-January-2018.pdf.

[182] *See e.g.*, UN Security Council, Panel of Experts on Libya, Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011), 1 June 2017, p. 14-15 and 21, https://reliefweb.int/sites/reliefweb.int/files/resources/N1711623.pdf and ECCHR, FIDH, LFJL Art. 15 Communication to the ICC, November 2021.

[183] Council of Europe, Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED Irini), Arts. 1-4, https://www.operationirini.eu/wp-content/uploads/2020/04/200401-CD-IRINI-in-OJ.pdf.

[184] EU Commission Services, Operationalization of the Pact – Action plans for strengthening comprehensive migration partnerships with priority countries of origin and transit – Draft Migration Action Plan: Libya, 7 October 2021, p.2, https://migration-control.info/wp-content/uploads/2021/10/Libya.pdf.

authorities in identifying and declaring their SAR zone.[185] In January 2017, the EU further declared that it would provide financial support to the Italian Coast Guard for this project.[186] Specifically, according to its submission to the International Maritime Organization (IMO), Italy is to "support and assist the relevant Libyan authorities in identifying and declaring their Search and Rescue Region" and draw up "a detailed project based on the assessment, aimed at establishing a fully operational Maritime Rescue Coordination Centre."[187] Notably, the so-called Libyan MRCC was supposed to be fully operational by 2020;[188] however, as will be demonstrated by the incidents described in Section III, the so-called Libyan MRCC has not achieved this goal. Yet, the EU Member States and EU agencies have treated the Libyan maritime actors as if they were fully operational, even before 2020.

73. Such clear support for the declaration of the so-called Libyan SAR zone is therefore not based on the objective readiness of the Libyan actors' capacity to conduct sea rescue operations. Instead, it offers EU agencies and Members States another avenue for avoiding their legal obligations to Europe-bound migrants and refugees in distress at sea. With the seemingly legitimate Libyan SAR zone and MRCC established, officials of EU Member States and EU agencies now claim that they are required by law to share distress information with the scLCG, while also acknowledging that Libya is not a place of safety for the return of rescued migrants and refugees. This glaring paradox is entirely self-created and sustained by certain EU agencies and Member States for the purpose of brushing off their responsibilities.

74. To be clear, even a capable Libyan SAR zone and MRCC would not change the fact that Libya is not a place of safety and that intercepting and returning migrants and refugees to Libya violates the non-refoulement principle under international law. The following paragraphs elaborating on the scLCG's lack of capacity are meant to illustrate how the declaration of the so-called Libyan SAR zone and MRCC is in essence a premeditated component and indicator of the "common plan" to contain migrants and refugees in Libya, including through interceptions and returns (as further elaborated in Section V on modes of liability), rather than

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[185] Forensic Oceanography, *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, May 2018, p. 51, https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf.

[186] European Commission, 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, 25 January 2017, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017JC0004&from=EN.

[187] International Maritime Organization, Sub-Committee on Navigation, Communications and Search and Rescue (NCSR), 5th Session, Agenda item 16, Further Development of the Provision of Global Maritime SAR Services, Libyan Maritime Rescue Coordination Centre Project, Submitted by Italy, NCSR 5/INF.17, 15 December 2017, https://cdn.theoutlawocean.com/media/pdf/further-development-of-the-provision-of-global-maritime-sar-services-december-2017-italian-submission-to-imo.pdf.

[188] International Maritime Organization, Sub-Committee on Navigation, Communications and Search and Rescue (NCSR), 5th Session, Agenda item 16, Further Development of the Provision of Global Maritime SAR Services, Libyan Maritime Rescue Coordination Centre Project, Submitted by Italy, NCSR 5/INF.17, 15 December 2017, https://cdn.theoutlawocean.com/media/pdf/further-development-of-the-provision-of-global-maritime-sar-services-december-2017-italian-submission-to-imo.pdf.

suggest that better capacity of the scLCG would make intercepting and returning migrants and refugees to Libya acceptable.

75. The so-called Libyan SAR zone was first declared in August 2017, despite the scLCG's evident lack of capacity. Earlier that year, the European Commission observed that the scLCG "faces complex training needs, ranging from basic seamanship and an ability to operate safely at sea, to conducting the full range of law enforcement tasks expected of a coastguard, including effective control of Libya's international search and rescue zone."[189] The European Commission also stated that "[a]longside the capability of the [scLCG], there is a broader lack of patrolling assets."[190] The provision of patrol boats by Italy starting in May 2017 was aimed to remedy this particular problem, but the delivery of four patrol boats three months before the declaration of the so-called Libyan SAR zone was hardly able to resolve the issue, as evinced by the continued incapability of the scLCG after the initial declaration of the so-called Libyan SAR zone, as well as reported statements by Libyan officials saying they were in need of "far more equipment than the vessels being delivered by Italy."[191]

76. Subsequent to the declaration of the so-called Libyan SAR zone, the scLCG's capacity to conduct maritime operations has remained lacking, as will be shown by the specific incidents detailed in the following sections. Moreover, a Council of Europe report explicitly notes "clear limitations in terms of capacity, and particularly in the case of Libya, in their ability to rescue and disembark migrants in a way that respects their human rights and obligations under international maritime law."[192] Specific "problematic" instances include: being unresponsive to distress calls; instructing NGOs to refrain from rescuing people and wait for the scLCG, even when NGOs were already on-scene or closer in proximity than the scLCG to the distress situation, or even threatening NGOs to leave the scene; conducting interceptions "in a manner that put lives at risk"; and coordinating operations that invariably resulted in disembarkation in Libya.[193] In fact, the IOM and UNHCR have called for reconsiderations of Libya's so-called

[189] European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament, The European Council and the Council, "Migration on the Central Mediterranean route: Managing flows, saving lives", Brussels, 25.1.2017 JOIN(2017) 4 final, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017JC0004&from=EN.

[190] European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament, The European Council and the Council, "Migration on the Central Mediterranean route: Managing flows, saving lives", Brussels, 25.1.2017 JOIN(2017) 4 final, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017JC0004&from=EN.

[191] Aidan Lewis and Steve Scherer, *Italy tries to bolster Libyan coast guard, despite humanitarian concern*, Reuters, 15 May 2017, https://www.reuters.com/article/us-europe-migrants-libya-idUSKCN18B2E5.

[192] Council of Europe, Commissioner for Human Rights, *Lives saved. Rights protected: Bridging the protection gap for refugees and migrants in the Mediterranan*, June 2019, p. 24, https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87.

[193] Council of Europe, Commissioner for Human Rights, *Lives saved. Rights protected: Bridging the protection gap for refugees and migrants in the Mediterranan*, June 2019, p. 21, https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87.

SAR zone and its capabilities to conduct safe SAR operations.[194] More importantly, the Council of Europe has stated that "the declaration by Libya of an SRR [Search and Rescue Region, same as SAR zone] has not negated the need for increasing search and rescue capacity by member states";[195] "[n]either the declaration by Libya of an SRR nor the establishment of the JRCC can justify member states' RCCs taking action that would ultimately endanger the lives of persons in distress at sea or lead to their disembarkation in a port that cannot be considered a place of safety."[196]

77. Most recently, the German Human Rights Commissioner Luise Amtsberg stated in July 2022:[197]

> "Libya has declared a Search and Rescue (SAR) zone in which it is legally obliged to save people from drowning. However, the actions of the Libyan coastguard have shown time and again that Libya is not conforming with human rights standards in the fulfilment of this mandate. International law and human rights are being repeatedly violated at sea and on land. The Libyan coastguard is therefore not a reliable partner for the European Union. … [I]t is essential for the German Government to fulfil the promises made in its coalition agreement by campaigning for a state-coordinated, European maritime rescue programme."

78. Libyan authorities have also deliberately attempted to abuse the so-called SAR zone for Libya's benefit. Libya first attempted to declare its so-called SAR zone on 10 August 2017, when Libyan authorities in Tripoli defended it as if it was Libyan territory, to the point that they banned entry of vessels and aircraft from sea rescue NGOs,[198] even though a SAR zone is in no way related to sovereign territory.[199] According to Sea-Watch, this practice still continues, as Libyan actors have ordered Sea-Watch to leave the so-called Libyan SAR zone in several incidents.[200]

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[194] IOM, *IOM, UNHCR Call for Urgent Action after 45 Die in Largest Recorded Shipwreck off Libya Coast in 2020*, 19 August 2020, https://www.iom.int/news/iom-unhcr-call-urgent-action-after-45-die-largest-recorded-shipwreck-libya-coast-2020.

[195] Council of Europe, Commissioner for Human Rights, *Lives saved. Rights protected: Bridging the protection gap for refugees and migrants in the Mediterranan*, June 2019, p. 24, https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87.

[196] Council of Europe, Commissioner for Human Rights, *Lives saved. Rights protected: Bridging the protection gap for refugees and migrants in the Mediterranan*, June 2019, p. 21, https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87.

[197] German Federal Foreign Office, Statement by Human Rights Commissioner Luise Amtsberg on maritime rescue efforts in the Mediterranean, 29 July 2022, https://www.auswaertiges-amt.de/en/newsroom/news/amtsberg-maritime-rescue-efforts/2545076.

[198] eNews Channel Africa (ENCA), *Libya navy blocks foreign ships from migrant "rescue" z*one, 10 August 2017, https://www.enca.com/africa/libya-navy-blocks-foreign-ships-from-migrant-rescue-zone..

[199] International Convention on Maritime Search and Rescue (1979), Annex, Chapter 2, 2.1.7, https://treaties.un.org/doc/Publication/UNTS/Volume%201405/volume-1405-I-23489-English.pdf.

[200] *See e.g.*, Sea-Watch, *Airborne Monthly Factsheet February – March 2022*, p. 2-4, https://sea-watch.org/en/airborne-monthly-factsheet-february-march-2022/ and Tweet by Sea-Watch International, 18 November 2021 at 9:48 PM, https://twitter.com/seawatch_intl/status/1461436158639067148?s=20&t=GQlnwhnuqBmhr77sartjAw.

Moreover, on 10 July 2017, the President of the Libyan Ports & Maritime Transport Authority informed the IMO that the Libyan government considered the Tripoli Flight Information Region (as adopted by the International Civil Aviation Organization) to be identical to the so-called Libyan SAR zone.[201]

79. Still, many officials of EU Member States and EU agencies have treated the scLCG as fully capable of SAR activities, as will be detailed by the incidents described in Section III. As mentioned above, it has been used as a convenient excuse that makes it easier for EU Member States and EU agencies to avoid their international legal obligations to provide sea rescue assistance, despite the fact that even a capable scLCG would not resolve the issue that Libya is not a place of safety and that it violates international law to return migrants and refugees to Libya. The legal conundrums of this are clearly exposed in Frontex's Serious Incident Reports (SIRs) – more than one SIR explicitly acknowledged the non-refoulement principle and the fact that Libya is not a place of safety, yet still resorted to an alleged justification that Frontex is required to share distress information with all relevant MRCCs, including the so-called Libyan MRCC.[202]

80. Moreover, EU Member States' and EU agencies' support to the scLCG has continued. For example, in April 2020, the Italian Ministry of the Interior ordered an Italian shipyard to build six small patrol vessels to be donated to Libya;[203] in 2021, Italy delivered a mobile MRCC, financed with EU funds and installed in containers, to Tripoli to further equip the scLCG for the interception and return of migrants and refugees to Libya.[204]

Operational Contributions by EUNAVFOR MED and Frontex to the Interception of Migrants and Refugees

81. On the operational level, besides individual State support from Italy and Malta geared towards interceptions and materialized within the specific incidents that will be elaborated in Section III, on the EU level, it has been observed that EUNAVFOR MED coordinates interceptions with the scLCG by increasingly relying on air assets to enhance "early detection," which is then followed by scLCG interceptions, as opposed to directly conducting rescue with its naval

[201] Forensic Oceanography, *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, May 2018, p. 52, https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf.

[202] *See* Frontex, Fundamental Rights Office, *Final SIR Report, 12634/2022 – SIR Cat.1 – FSC Aerial Surveillance 2022*, 2 August 2022 and Frontex, Fundamental Rights Office, *Final SIR Report, 13489/2021 – SIR Cat.1 – FSC Aerial Surveillance 2021*, 28 October 2022.

[203] Ministero dell'Interno, Direzione Centrale Immigrazione e Polizia delle Frontiere, Decreto del Direttore Centrale, 16 April 2020, https://www.poliziadistato.it/statics/02/dm-aggiudicazione-prot..pdf.

[204] Matthias Monroy, *EU development aid: Italy is gifting more surveillance technology to the Libyan coastguard*, 7 December 2021, https://digit.site36.net/2021/12/07/eu-development-aid-italy-is-gifting-more-surveillance-technology-to-the-libyan-coastguard/.

assets.[205] The UN Secretary-General observed that EUNAVFOR MED's air assets "have played a critical role in reporting incidents to relevant Maritime Rescue Coordination Centres," but "UNHCR notes that many of the vessels in distress observed by the operation were disembarked in Libya, in contradiction with its advisory on the matter."[206]

82. In addition to EUNAVFOR MED, Frontex has been critical in providing aerial surveillance through various operations as well. Within Frontex Aerial Surveillance Services (FASS), the overarching framework contract under which Frontex leases airplanes, the agency has two areas of aerial surveillance service – Joint Operations and Multipurpose Aerial Surveillance (MAS).[207] On the Joint Operations side, Frontex has been collaborating with Italy. Replacing the aforementioned Operation Triton, Operation Themis began in February 2018 to "[support] Italy with border control, surveillance and search and rescue in the Central Mediterranean."[208] With "an enhanced law enforcement focus" and "a significant security component,"[209] Frontex co-finances vessels and aircraft provided by both Italy and other Member States and contracts aircraft for the operation.[210] Although command of Operation Themis lies with the Italian Ministry of the Interior,[211] Frontex deploys officers and coordinates the operation from its headquarters in Warsaw.[212] The coordinating officers of Frontex serve as contact points between Frontex and Italy and foster cooperation and coordination among Italy and other participating Member States;[213] Frontex is also informed of every action related to border surveillance.[214] Specifically regarding SAR operations, command is shifted to the competent MRCC, which

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[205] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 26, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf, citing EUNAVFOR MED Operation Sophia - Six Monthly Report 1 December 2018 –31 May 2019, 9 July 2019, p. 4 and Daniel Howden, Apostolis Fotiadis, and Antony Loewenstein, *Once migrants on Mediterranean were saved by naval patrols. Now they have to watch as drones fly over*, The Guardian, 4 August 2019, https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu.

[206] UN Secretary-General, Implementation of resolution 2437 (2018) – Report of the Secretary-General to the UN Security Council, S/2019/711, 5 September 2019, para. 16, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/263/95/PDF/N1926395.pdf?OpenElement.

[207] European Parliament, Answer to Parliamentary Question E-003553/2019, p. 2.

[208] Frontex, Main Operations – Operation Themis (Italy), https://frontex.europa.eu/we-support/main-operations/operation-themis-italy-/.

[209] Frontex, Main Operations – Operation Themis (Italy), https://frontex.europa.eu/we-support/main-operations/operation-themis-italy-/.

[210] Tweet by FRONTEX on 2 June 2020, https://twitter.com/frontex/status/1267753535623626753.

[211] Frontex, Main Operations – Operation Themis (Italy), https://frontex.europa.eu/we-support/main-operations/operation-themis-italy-/.

[212] Frontex, Main Operations – Operation Themis (Italy), https://frontex.europa.eu/we-support/main-operations/operation-themis-italy-/; Frontex, *Operational Plan (Main Part) JO Themis 2020*, Sections 4.3 and 7.1. Obtained through Frag den Staat, https://fragdenstaat.de/dokumente/149853-oplan-themis-2020-main-partpdf/ ; and Tweet by FRONTEX on 2 June 2020, 11:42 PM, https://twitter.com/frontex/status/1267753535623626753.

[213] European Union, Regulation (EU) No 1168/2011, Art. 3b(5), 3c(2), and 3c(3), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R1168&from=EN.

[214] Frontex, *Operational Plan (Main Part) JO Themis 2020*, Section 4.3.1. Obtained through Frag den Staat, https://fragdenstaat.de/dokumente/149853-oplan-themis-2020-main-partpdf/

plans, coordinates, and executes the operation.[215] This means that Frontex provides aerial surveillance support to the MRCC(s) involved in a SAR operation, as will be described in Section III regarding specific incidents.

83. Under MAS, a surveillance operation in European border areas, Frontex assets collect data, including real-time videos, and transmit it to Frontex's European Monitoring Team (EMT) located in Warsaw, which monitors, processes, and relays the data to Member States, International Coordination Centers, as well as the competent MRCC (including the so-called Libyan MRCC).[216] The data also enters EUROSUR, the central information exchange platform and service provider for surveillance of European borders.[217] Originally started as a pilot project in March 2017, MAS became a full operation in June of the same year and contributes to pre-frontier area monitoring (including in parts of the so-called Libyan SAR zone and Libyan territorial waters[218]) and SAR operations.[219] In 2020, MAS detected 175 distress incidents, 119 of which were located in the so-called Libyan SAR zone.[220] In these cases, the EMT notified the so-called Libyan MRCC, as well as the Tunisian, Maltese, and Italian MRCCs.[221] MAS also detected imminent departures from the Libyan coast.[222] Notably, Malta works with Frontex

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[215] Frontex, *Operational Plan (Main Part) JO Themis 2020*, Section 4.3.2, 7.1, 8.1, and Annex 6, obtained through Frag den Staat, https://fragdenstaat.de/dokumente/149853-oplan-themis-2020-main-partpdf/; Frontex, *Annual report on the implementation of Regulation (EU) 656/2014 of the European Parliament and of the Council of May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex. (2018)*, Warsaw, 19/02/2020, p. 6, https://data.consilium.europa.eu/doc/document/ST-6294-2020-INIT/en/pdf; and Frontex, Types of Operations – Search and Rescue, https://frontex.europa.eu/we-support/types-of-operations/search-rescue/.

[216] European Parliament, Answer to Parliamentary Question E-003553/2019, 14 January 2020, p. 2-3, https://www.europarl.europa.eu/RegData/questions/reponses_qe/2019/003553/P9_RE(2019)003553(ANN)_XL.pdf; European Parliament, Answer to Parliamentary Question E-003297/2021, 31 January 2022, p. 1, https://www.europarl.europa.eu/RegData/questions/reponses_qe/2021/003297/P9_RE(2021)003297(ANN01)_XL.pdf; and European Parliament, Answer to Parliamentary Question E-002654/2019, 8 January 2020, https://www.europarl.europa.eu/doceo/document/E-9-2019-002654-ASW_EN.html.

[217] European Union, Commission Implementing Regulation (EU) 2021/581 of 9 April 2021 on the situational pictures of the European Border Surveillance System (EUROSUR), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R0581&from=EN and FRONTEX, Situational Awareness and Monitoring – Information Management, https://frontex.europa.eu/we-know/situational-awareness-and-monitoring/information-management/;

[218] Frontex, 1st Marisa Workshop – EUROSUR Fusion Services, 14 June 2018, p.11, https://www.marisaproject.eu/newsletter/1st%20Workshop/02-Frontex%20MARISA%20workshop.pdf and European Parliament, Answer to Parliamentary Question E-002654/2019, 8 January 2020, https://www.europarl.europa.eu/doceo/document/E-9-2019-002654-ASW_EN.html.

[219] European Parliament, Answer to Parliamentary Question E-003297/2021, 31 January 2022, p.1, https://www.europarl.europa.eu/RegData/questions/reponses_qe/2021/003297/P9_RE(2021)003297(ANN01)_XL.pdf.

[220] European Parliament, Answer to Parliamentary Question E-003297/2021, 31 January 2022, p. 2, https://www.europarl.europa.eu/RegData/questions/reponses_qe/2021/003297/P9_RE(2021)003297(ANN01)_XL.pdf.

[221] European Parliament, Answer to Parliamentary Question E-003297/2021, 31 January 2022, p. 2, https://www.europarl.europa.eu/RegData/questions/reponses_qe/2021/003297/P9_RE(2021)003297(ANN01)_XL.pdf.

[222] Council of the European Union, Frontex report on the functioning of EUROSUR – Part I, 15 February 2018, No. 6215/18, p.19, https://data.consilium.europa.eu/doc/document/ST-6215-2018-INIT/en/pdf.

under MAS. The cooperation involves providing drones and planes, as well as Malta's international airport for MAS activities.[223]

84. Moreover, Frontex and EUNAVFOR MED Operation Irini exchange information and coordinate their operations. Building on the close exchange between Operation Irini's predecessor missions and Frontex,[224] Operation Irini has now signed a working agreement with Frontex in 2021 on information exchange concerning their assets, the coordinated use of satellite imagery, and other assets of joint interest.[225] The agreement includes mutual support in developing risk analyses and the exchange of experts[226] – an expert from EUNAFVOR MED Operation Irini currently works at Frontex headquarters.[227] As such, the various EU Member States and EU agencies not only interact with the Libyan actors, but also with one another.

D. Application of International Legal Standards to EU Member States' and EU Agencies' Border Management Policies with Libya

85. The current border management policies of EU Member States and EU agencies with Libya are incompatible with the international legal standards and obligations laid out above. First, as will be detailed in Sections III and V below, in all incidents coordinated by individuals of EU Member States (all of which are parties to the SAR Convention) and EU agencies, the relevant RCCs in Europe insisted on the scLCG's coordinating authority, despite the fact that they had been simultaneously contacted and that the scLCG was unresponsive to distress calls. These

[223] European Parliament, Answer to Parliamentary Question E-003553/2019, 14 January 2020, p. 2, https://www.europarl.europa.eu/RegData/questions/reponses_qe/2019/003553/P9_RE(2019)003553(ANN)_XL.pdf; European Parliament, European Parliament, Answer to Parliamentary Question E-004149/2021, 20 October 2021, p.1, https://www.europarl.europa.eu/RegData/questions/reponses_qe/2021/004149/P9_RE(2021)004149(ANN01)_XL.pdf; Times of Malta, *EU Border Agency Frontex to Deploy Drone from Malta in €100m Mission*, 3 May 2021, https://timesofmalta.com/articles/view/eu-border-agency-frontex-to-deploy-drone-from-malta-in-100-million.869113; Matthias Monroy, *First Test in Malta: Frontex Drones Approaching*, 3 May 2021, https://digit.site36.net/2021/05/03/first-test-in-malta-frontex-drones-approaching/; *Scramble, FRONTEX Heron in Maltese Markings*, 6 May 2021, https://scramble.nl/military-news/frontex-heron-in-maltese-markings. The procurement statement listed Malta as a possible operation zone: TED, Contract Award Notice 2018/S 007 – 010629, 11 January 2018, https://ted.europa.eu/udl?uri=TED:NOTICE:10629-2018:TEXT:EN:HTML.

[224] David Fernández-Rojo, *Frontex and Migrant Smuggling*, Konrad Adenaruer Stiftung, No. 470, December 2021, p.4, https://www.kas.de/documents/252038/11055681/Frontex+and+Migrant+Smuggling.pdf/9699d780-1081-426c-df45-4134ecd74820.

[225] Frontex, Working Agreement between the European Border and Coast Guard Agency (Frontex) and EUNAVFOR MED Irini, 15 January 2021, Section 3, Article 1, https://www.statewatch.org/media/1770/eu-frontex-op-irini-working-agreement-15-1-21.pdf.

[226] Frontex, Working Agreement between the European Border and Coast Guard Agency (Frontex) and EUNAVFOR MED Irini, 15 January 2021, Section 3, Articles 3 and 5, https://www.statewatch.org/media/1770/eu-frontex-op-irini-working-agreement-15-1-21.pdf.

[227] European Parliament, Answer to Parliamentary Question E-000338/2021, 15 March 2021, p. 2, https://www.europarl.europa.eu/RegData/questions/reponses_qe/2021/000338/P9_RE(2021)000338(ANN01)_XL.pdf.

RCCs have avoided their sea rescue responsibilities even when the people in distress have been located in their own SAR zones. Furthermore, officials of EU agencies and Member States have provided distress location information to the scLCG even in cases where the migrants and refugees in distress are within the SAR zone of an EU Member State rather than in Libya, thus violating their international maritime law obligations.

86. As such, notwithstanding the scLCG's continuing incompetence described in the sections above, the EU Member States and EU agencies took advantage of a grey area in international law on maritime search and rescue – the lack of any pre-assessment mechanism regarding whether an RCC is in fact capable of conducting SAR operations in its declared SAR zone – and has deflected its own obligations by acting as if Libya has a SAR zone within which it is able to coordinate rescue activities.

87. Second, based on both international human rights law and refugee law, returns of migrants and refugees to Libya violates the non-refoulement principle because Libya is not a place of safety, given that those returned are exposed to the real risk of ill-treatment (including torture). This has been stated by several regional and national courts. As mentioned above, already in 2012, in *Hirsi Jamaa*, the European Court of Human Rights (ECtHR) concluded that forcing a vessel with migrants on board to return to Libya violates the non-refoulement principle.[228] Several Italian national tribunals have also ruled that Libya cannot be considered as a safe place.[229] For instance, in April 2018, in determining whether sea rescue NGO Open Arms was justified in rescuing people in distress at sea and disembarking them in Italy during an incident on 15–16 March 2018, the Tribunal of Ragusa found that reports issued by both international NGOs and Italian parliamentary commissions highlight that the situation in detention facilities in Libya is marked by serious human rights violations, including limited access to food and sanitary assistance, abuse, rape, and forced labor. On this basis, it determined that there is no evidence of the existence of a place of safety in Libyan territory able to receive rescued migrants and refugees and guarantee the respect of their fundamental rights.[230]

88. International organizations have similarly deemed Libya an unsafe place for disembarkation. For example, the UNHCR does not consider Libya a place of safety for the purpose of disembarkation following rescue at sea, due to its "volatile security situation in general and the

[228] European Court of Human Rights, *Hirsi Jamaa and others v. Italy* (Application no. 27765/09), Grand Chamber, 23 February 2012, https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Original%20judgment%20-%20HIRSI%20JAMAA%20AND%20OTHERS%20v.%20ITALY.pdf.

[229] *See e.g.*, Tribunale di Napoli, Sentenza N. 1643/21, depositata il 30/12/2021, p. 28; Tribunale di Ragusa, R.G. GIP 1182/18, Decreto di rigetto di richiesta di sequestro preventivo, 16 April 2018; Tribunale di Roma, Decree 8290/2018, 20 April 2018; Tribunale di Roma, Decree 7886/2018, 11 May 2018; and Tribunale di Roma, Decree [redacted], 15 December 2020.

[230] Tribunale di Ragusa, R.G. GIP 1182/18, Decreto di rigetto di richiesta di sequestro preventivo, 16 April 2018.

particular protection risks for foreign nationals (including arbitrary and unlawful detention in substandard conditions in State-run detention centres, and reports of serious violations and abuses against asylum-seekers, refugees and migrants by, among others, militias, traffickers and smugglers)."[231] This position has been reiterated in a joint statement by the IOM and UNHCR, following an incident where a Gibraltar-flagged ship handed over more than 270 migrants to the scLCG in June 2021.[232] The two organizations explicitly stated that Libya cannot be considered a safe place.[233] Similarly, the UN Secretary-General asserted that Libya does not meet the criteria for being designated as a place of safety or as a safe third country for the purpose of disembarkation.[234]

89. Furthermore, the fact that Libya is unsafe for migrants and refugees is known to European officials. For example, Italian Minister of the Interior Marco Minniti admitted on 15 August 2017 that "there is an issue of primary importance, and that is the issue of the living conditions of those who are saved by the [so-called Libyan Coast Guard] and taken back to Libya."[235] In an interview published by the Italian newspaper *La Stampa* on 6 August 2017, the Deputy Minister of Foreign Affairs Mario Giro, signaling partial disagreement with decisions of the government, stated: "Our ships will keep collecting migrants. Preferably, also those present in boats blocked by the [so-called Libyan Coast Guard], when our ships are in a condition to do so. Because taking them back to Libya, at this moment, means taking them back to hell."[236] Finally, in response to a letter from Amnesty International to Italy's Prime Minister Paolo Gentiloni, in which Amnesty International expressed concern about the human rights violations in Libya's detention centers and the negative consequences of Italy's cooperation with Libya on border control, Ambassador Mariangela Zappia, Diplomatic Councilor to the Prime Minister,

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[231] UNHCR, *UNHCR Position on the Designation of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea*, September 2020, para. 33, https://www.refworld.org/pdfid/5f1edee24.pdf.

[232] IOM, *IOM and UNHCR Condemn the Return of Migrants and Refugees to Libya*, 17 June 2021, https://www.iom.int/news/iom-and-unhcr-condemn-return-migrants-and-refugees-libya.

[233] IOM, *IOM and UNHCR Condemn the Return of Migrants and Refugees to Libya*, 17 June 2021, https://www.iom.int/news/iom-and-unhcr-condemn-return-migrants-and-refugees-libya.

[234] UN Secretary-General, Implementation of resolution 2437 (2018) – Report of the Secretary-General to the UN Security Council, S/2019/711, 5 September 2019, paras. 53 and 65, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/263/95/PDF/N1926395.pdf?OpenElement.

[235] La Repubblica, *Migranti, Minniti: "Condizioni di chi è riportato in Libia sono mio assillo"*, 15 August 2017, https://video.repubblica.it/cronaca/migranti-minniti-condizioni-di-chi-e-riportato-in-libia-sono-mio-assillo/282714/283328. (Original quote in Italian: "Nel momento in cui dovesse stabilizzarsi il dato dell'azione di controllo delle acque territoriali libiche da parte della guardia costiera, si pone una questione di grandissimo rilievo, e cioe' il tema delle condizioni di vita di coloro che vengono salvati dalla guardia costiera e riportati in Libia. Come voi sapete questo e' l'assillo personale mio, ed e' l'assillo dell'Italia.")

[236] La Stampa, *Giro: "Fare rientrare quelle persone vuol dire condannarle all'inferno"*, 14 August 2017, https://www.lastampa.it/cronaca/2017/08/14/news/giro-fare-rientrare-quelle-persone-vuol-dire-condannarle-all-inferno-1.34431931/. (Original in Italian: "Le nostre navi continueranno a raccogliere i migranti. Sarebbe auspicabile, anche quelli ospitati da imbarcazioni bloccate dalla Guardia costiera libica, quando le nostre imbarcazioni siano in condizione di poterlo fare. Perché riportarli in Libia, in questo momento, vuol dire riportarli all'inferno.")

wrote to Amnesty International on 3 November 2017: "We are on the front line for the improvement of living conditions in the reception centres for migrants in Libya – whose problems have been well known to us for a long time – in co-operation with the main actors and international agencies."[237]

90. The knowledge is also reflected in Italy's parliamentary sessions. For instance, it has been repeatedly stated in two separate sessions in August 2018 (before the occurrence of the incidents involving Italian authorities in Section III.A.2) that Libya is not a safe place, which has been confirmed by Italian judges, as well as the UN and the European Commission, and that returning migrants and refugees to Libya is a violation of non-refoulement.[238] Public documentation of the violence and abuse against migrants and refugees in Libya, the violence of the scLCG, Italy's provision of patrol boats to the scLCG and the Italy-Libya MoU, as well as the UN High Commissioner's condemnation of EU-Libya cooperation, were also mentioned.[239] On 21 November 2018, MP Erasmo Palazzotto posed questions regarding Incident 6 starting on 7 November 2018 to the Minister of Foreign Affairs during a parliamentary session, noting that the people in distress intercepted by the *Nivin* were resisting the return to Libya, where they had been tortured and abused for months; that there are no safe ports in Libya; and that the Italian MRCC's involvement in this incident is "a violation of international conventions and places a serious responsibility on Italy."[240] In support of his question, MP Palazzotto referred to the NAVTEX message from the Italian MRCC to the commander of the *Nivin* ship ordering the commander to reverse course, to intercept the people in distress, and to return them to Libya.[241] He also observed the "persistent attempt to conceal the responsibilities" that Italy has with regard to the violations of international conventions on maritime rescue and human rights, as

[237] Amnesty International, *Libya's dark web of collusion: Abuses against Europe-bound refugees and migrants*, December 2017, p. 58, https://www.amnesty.org/en/documents/mde19/7561/2017/en/. (Original in Italian: "Siamo inoltre in prima linea per il miglioramento delle condizioni di vita dei centri di accoglienza dei migranti in Libia – la cui criticita' ci e' da tempo ben nota – in cooperazione con i principali attori ed agenzie internazionali.")

[238] Italian Chamber of Deputies, Discussioni, Resoconto stenografico. XVIII legislatura, seduta n.38, 3 August 2018, pp. 2, 11-12, 14-15, 18-19, https://documenti.camera.it/leg18/resoconti/assemblea/html/sed0038/stenografico.pdf and Italian Chamber of Deputies, Discussioni, Resoconto stenografico. XVIII legislatura, seduta n.39, 6 August 2018, p. 10, https://documenti.camera.it/leg18/resoconti/assemblea/html/sed0039/stenografico.pdf.

[239] Italian Chamber of Deputies, Discussioni, Resoconto stenografico. XVIII legislatura, seduta n.38, 3 August 2018, pp. 2, 11-12, 14-15, 18-19, https://documenti.camera.it/leg18/resoconti/assemblea/html/sed0038/stenografico.pdf and Italian Chamber of Deputies, Discussioni, Resoconto stenografico. XVIII legislatura, seduta n.39, 6 August 2018, p. 10, https://documenti.camera.it/leg18/resoconti/assemblea/html/sed0039/stenografico.pdf.

[240] Italian Chamber of Deputies, Discussioni, Resoconto stenografico. XVIII legislatura, seduta n.88, 21 November 2018, pp. 37-38, https://documenti.camera.it/leg18/resoconti/assemblea/html/sed0088/stenografico.pdf.

[241] Italian Chamber of Deputies, Discussioni, Resoconto stenografico. XVIII legislatura, seduta n.88, 21 November 2018, pp. 37-38, https://documenti.camera.it/leg18/resoconti/assemblea/html/sed0088/stenografico.pdf.

well as the setting up of detention centers (which are "real concentration camps").[242] In two sessions in April 2019, immediately following Incident 5 (starting on 10 April 2019), more recent public documentation of the violence and abuse against migrants and refugees in Libya, the violence by the scLCG during interceptions, and Italy's support to the scLCG were again brought up.[243]

91. It should be underscored that the obligations stemming from international human rights, refugee, and maritime laws may apply extraterritorially as long as a State has effective control over the migrants and refugees. In the realm of international maritime law, in *A.S. and others v. Italy*, the Human Rights Committee established a jurisdictional link to Italy, even though the concerned vessel was positioned in the Maltese SAR zone, because a relationship of dependency was found between Italy and the people in distress based on the facts that: the Italian MRCC was the first contact of the people in distress; an Italian vessel was located in proximity to the distress scene; and the Italian MRCC had been involved in the rescue operation.[244] The Human Rights Committee additionally found that Italy had not respected its "duty to respond in a reasonable manner to calls of distress" and "duty to appropriately cooperate with other states undertaking SAR operations."[245]

92. Non-refoulement may also apply extraterritorially under international human rights and refugee laws. In respect of human rights obligations under the International Covenant on Civil and Political Rights, the Human Rights Committee has stated that the non-refoulement principle applies to "those within the power or effective control of the forces of a State Party acting outside its territory."[246] Similarly, in *Hirsi Jamaa*, the ECtHR found that the European Convention on Human Rights is applicable not only within a State's territory, but also wherever a State has effective control over a person, including on the high seas.[247] Moreover, a State's human rights obligations include a well-established duty of due diligence in preventing mistreatment by third parties, including private actors or other States operating within their

[242] Italian Chamber of Deputies, Discussioni, Resoconto stenografico. XVIII legislatura, seduta n.88, 21 November 2018, pp. 37-38, https://documenti.camera.it/leg18/resoconti/assemblea/html/sed0088/stenografico.pdf.
[243] Italian Chamber of Deputies. Discussioni, Resoconto stenografico. XVIII legislatura, seduta n.162, 12 April 2019, pp. 5-6, https://documenti.camera.it/leg18/resoconti/assemblea/html/sed0162/stenografico.pdf.
[244] Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning Communication No. 3042/2017*'**'***, CCPR/C/130/D/3042/2017, 28 April 2021, Para. 7.8, https://atlas-of-torture.org/en/entity/l34merrley.
[245] Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning Communication No. 3042/2017*'**'***, CCPR/C/130/D/3042/2017, 28 April 2021, Para. 7.8, https://atlas-of-torture.org/en/entity/l34merrley.
[246] Human Rights Committee, General comment No. 31, CPR/C/21/Rev.1/Add.13, 26 May 2014, para 10, https://www.refworld.org/docid/478b26ae2.html.
[247] European Court of Human Rights, *Hirsi Jamaa and others v. Italy* (Application no. 27765/09), Grand Chamber, 23 February 2012, https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Original%20judgment%20-%20HIRSI%20JAMAA%20AND%20OTHERS%20v.%20ITALY.pdf.

effective control.[248] It follows that when a State provides substantial support or assistance to another State to conduct SAR operations, the assisting State has a minimum responsibility to take actions to mitigate the risk of human rights violations by the State performing the operations.[249]

93. The UNHCR has also stated that the principle of non-refoulement applies wherever a State exercises jurisdiction, including where it exercises effective control in the context of search and rescue operations outside its territory.[250] Moreover, "[w]here a State's coordination or involvement in a SAR operation, in view of all the relevant facts, is likely to determine the course of events, UNHCR's view is that the concerned State's negative and positive obligations under applicable international refugee and human rights law, including non-refoulement, are likely to be engaged."[251]

94. While EU Member States and EU agencies refrain from conducting interceptions and returning migrants and refugees to Libya on their own, they still play a central role in these interceptions and returns by cooperating with Libyan actors. As will be further analyzed in Section V, without the support and coordination of officials from EU Member States and EU agencies, the Libyan actors would not have been able to conduct the interceptions. As observed by Forensic Oceanography, the Libyan actors, in receiving distress information for interceptions, rely on a communication infrastructure that has been provided by EU Member States and EU agencies.[252] "While the EU and Italy have tried to generate the impression that communication and coordination is occurring *between* the agencies of distinct sovereign states, in fact communication and coordination always remain firmly *within* Italian and EU hands,"[253] and the

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[248] *See generally*, Committee against Torture, General Comment No. 2, CAT/C/GC/2, 24 January 2008, paras. 17-19, https://www.refworld.org/docid/47ac78ce2.html and Human Rights Committee, General comment No. 31, CPR/C/21/Rev.1/Add.13, 26 May 2014, para. 8, https://www.refworld.org/docid/478b26ae2.html; Human Rights Committee, General comment No. 36, CCPR/C/GC/36, 3 September 2019, para. 22, https://www.refworld.org/docid/5e5e75e04.html.

[249] Human Rights Committee, General comment No. 36, CCPR/C/GC/36, 3 September 2019, para. 63, https://www.refworld.org/docid/5e5e75e04.html and OHCHR and Global Migration Group, Recommended Principles and Guidelines on the Protection of the Human Rights of Migrants in Vulnerable Situations, 2018, Principle 4, https://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf.

[250] UNHCR, UNHCR Position on the Designation of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea, September 2020, para. 34, https://www.refworld.org/pdfid/5f1edee24.pdf and UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para. 43, https://www.unhcr.org/4d9486929.pdf.

[251] UNHCR, UNHCR Position on the Designation of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea, September 2020, para. 34, https://www.refworld.org/pdfid/5f1edee24.pdf.

[252] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 33, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[253] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 33, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

same can be said about Malta, Frontex, and EUNAVFOR MED. "Libyan officials do play a role, but are dependent on equipment," training, funding, and guidance "given by or belonging to Italy and the EU. In this context, the [scLCG] act [sic] according to a script that has been written by others, aiming to prevent migrants from crossing the sea."[254]

95. Additionally, the UN Special Rapporteur on the human rights of migrants notes that "ultimate responsibility lies with States coordinating search and rescue activities in the [Mediterranean] region to refrain from requesting or authorizing disembarkation in Libya, and that such operations should be suspended without delay,"[255] and reminds States of their "duty to provide prompt, adequate and effective search and rescue services…Any search and rescue unit receiving information about a distress incident should take immediate action if in a position to assist."[256] He reiterates that "any agreement with Libyan authorities that involves the take-back of migrants rescued or intercepted at sea should be revoked and European States should provide adequate and efficient search and rescue services in line with international human rights obligations and the laws of the sea."[257] In fact, an Italian people's tribunal went even further to suggest that such a violation can be criminal in the context of Libya: in observing that the responsibility of certain institutional representatives might emerge, as they have signed agreements with Libyan entities that have committed (and keep committing) atrocious crimes towards migrants and refugees, the people's tribunal stated that it should not be hard to argue in favor of a collective criminal responsibility on the side of Italian institutional representatives, in terms of causality, awareness, and precise identification of specific crimes that integrate ministerial criminal offences in Italian criminal law.[258]

96. Therefore, the creation of the so-called Libyan SAR zone and MRCC orchestrated by officials of EU Member States and EU agencies does not release them from their legal responsibilities, and the determinant role of EU Member States and EU agencies in intercepting and returning migrants and refugees to Libya is a violation of international maritime, human rights, and refugee law.

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[254] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 33, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[255] Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, *Human rights violations at international borders: trends, prevention and accountability*, A/HRC/50/31, 26 April 2022, para. 65, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/328/57/PDF/G2232857.pdf?OpenElement.

[256] Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, *Human rights violations at international borders: trends, prevention and accountability*, A/HRC/50/31, 26 April 2022, para. 79, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/328/57/PDF/G2232857.pdf?OpenElement.

[257] Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, *Human rights violations at international borders: trends, prevention and accountability*, A/HRC/50/31, 26 April 2022, para. 53, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/328/57/PDF/G2232857.pdf?OpenElement.

[258] Tribunale permanente dei popoli, Sessione Sulla Violazione Dei Diritti Delle Persone Migranti E Rifugiate (2017-2018), Palermo, 18-20 dicembre 2017, Sentenza: https://www.questionegiustizia.it/data/doc/1607/tpp_palermo_migranti_sentenza_def_ita.pdf.

III. Factual Analysis – Interceptions at Sea and Detention in Libya

97. The widespread and systematic exploitation, violence against, and mistreatment of migrants and refugees in Libya amounting to crimes against humanity, as thoroughly documented in the 2021 Communication, persist to this day. As part and parcel of the same system of exploitation and abuse of migrants and refugees in Libya, the facts outlined in this section focus on interceptions in the central Mediterranean Sea of boats carrying migrants and refugees and their subsequent return to and detention in Libya. Twelve exemplary incidents of the detention of migrants and refugees beginning with such interceptions and returns are presented, with particular attention given to the acts and omissions of various European actors during the course of these incidents, in line with the collaborative policies with Libya described in Section II.

98. UN bodies, including the FFM, the Panel of Experts on Libya, and UNSMIL, along with human rights organizations and media reports have continued to document the grave and inhumane situation of migrants and refugees intercepted at sea and returned to Libya.[259] The 2021 Communication also described several crimes against migrants and refugees after interception at sea and the return to Libya, including subsequent detention by Libyan authorities and associated actors, as well as infliction of physical and mental pain through the conditions of captivity and transit.[260] It also described how such interceptions and returns are enmeshed in the prevailing system of migrant exploitation and abuse in Libya, briefly touching upon the role of European actors in contributing to such conduct.

99. This section provides further detail on this conduct by documenting 12 specific incidents between 2018 and 2021 that demonstrate the complex web of relations between European and Libyan actors in the interception, disembarkation, and detention in Libya of migrants and refugees. The incidents are exemplary rather than exhaustive and show that disembarkations of

[259] UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, para. 45, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf; UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/50/63, 27 June 2022, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya; UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Follow-up Report of the Independent Fact-Finding Mission on Libya (Advanced Unedited Version)*, A/HRC/49/4, 23 March 2022, https://www.ohchr.org/sites/default/files/2022-03/A_HRC_49_4_AUV.pdf; United Nations Support Mission in Libya, 25 August 2021, Report of the General Secretary, S/2021/752, paras. 50-54, https://unsmil.unmissions.org/sites/default/files/s_2021_752_-_sg_report_on_unsmil_-_25_aug_21_002.pdf; Medecins Sans Frontiers (MSF), *Out of Libya: Opening safe pathways for migrants stuck in Libya,* 20 June 2022, https://www.msf.org/out-libya-opening-safe-pathways-migrants-stuck-libya; Amnesty International, *Report 2021/2022: The State of the World's Human Rights,* p. 234-238, https://www.amnesty.org/en/location/middle-east-and-north-africa/libya/report-libya/; Human Rights Watch, *World Report 2022, Libya*, https://www.hrw.org/world-report/2022/country-chapters/libya.

[260] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, Sections III.A.1.i and III.C.1., respectively.

migrants and refugees in Libya following an interception systematically lead to their transfer to detention facilities in Libya. These acts are inextricably linked to the broader cycle of violence occurring in detention centers, effectively maintaining and reproducing the exploitation of migrants and refugees in Libya, and are thus a precondition for the commission of other crimes against them.

100. This section describes the incidents in two parts, reflecting the different yet interconnected character of the acts involved. The first part describes the starting point of the incidents with the interceptions at sea and the subsequent return of migrants and refugees, involving Libyan actors and collaboration with Maltese, Italian, Frontex, and/or EUNAVFOR MED officials, respectively. The second part details the factual circumstances of migrants and refugees after they were disembarked in Libya, showing that interceptions, returns, and detentions are all part of the same continuous operative process.

A. Interceptions at Sea

101. A wide array of actors are involved in the interceptions of migrants and refugees at sea with the purpose of returning them to Libya. These actors often argue that they are conducting SAR operations when, in fact, this conduct is the beginning of a series of actions which, together with the return to, disembarkation, and detention in Libya, may amount to crimes against humanity. During the interceptions themselves, further violence and cruel and degrading mistreatment of migrants and refugees has also been documented, including beatings, shootings, or maneuvers risking their lives. [261]

102. According to UNHCR's operational data, in 2021 a total of 32,425 migrants and refugees were intercepted by Libyan actors in 235 operations, and as of 30 September 2022, 16,733 migrants and refugees were intercepted in 196 operations.[262] To conduct these interceptions at sea, both Libyan and European actors are involved to ensure that migrants are returned to and detained in Libya. On the Libyan side, the UN Panel of Experts on Libya has noted an operational

[261] For instance, Sea-Watch documented an incident on 30 June 2021 in which the scLCG fired shots at a boat with 50 migrants and refugees aboard. Sea-Watch, *So-called Libyan Coast Guard firing shots at migrant boat in distress*, 5 July 2021, https://sea-watch.org/en/libyan_coast_guard_shots_fired/. *See also* UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, para. 53 and Appendix C to Annex 24, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf; Amnesty International, *No one will look for you: Forcibly returned from sea to abusive detention in Libya*, 15 July 2021, https://www.amnesty.org/en/documents/mde19/4439/2021/en/, p. 27; Sea-Watch, Episodes of Violence by the so-called Libyan Coast Guard and Libyan Coastal Security at sea.

[262] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://app.powerbi.com/view?r=eyJrIjoiNTg0ZDE1NmEtOWE5My00YmNkLTk4ODQtZjk4NzkyMWY4OGQyIiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9. The data gathered by UNHCR is not exhaustive, as it only includes disembarkations in which UNHCR or its partners were present. It is likely that the number of interceptions and migrants and refugees pulled back to Libya is higher.

fragmentation of those conducting the interceptions, between the scLCG, responsible for most interceptions, as well as GACS, the Libyan Navy, and most recently, the SSA.[263]

103. On the European side, interceptions at sea with the purpose of returning migrants and refugees to Libya often involve Maltese and Italian government officers and personnel of the States' RCCs and Coast Guards, as well as Frontex and EUNAVFOR MED personnel – who in their majority are deployed by EU Member States. While not always materially involved in the actual performance of the operation, the actions of these officers are essential to ensuring that the interceptions and returns indeed occur, as the incidents below indicate.

104. In regard to the conduct of Frontex personnel, it is important to note that this agency collaborates constantly with the other European actors by relaying border surveillance information (including the position, photos, or videos of boats in distress). With Italy, this collaboration is evinced in Joint Operation Themis (see Section II). To a lesser extent, interceptions at sea and the return of migrants and refugees back to Libya also involve merchant vessels or oil platforms in the Central Mediterranean.

105. Below, the incidents presented are grouped into subsections according to the European authority that the Submitting Party believes had the strongest involvement.[264] In some of these incidents, other European actors have been involved, albeit with a lesser contribution, which is also included in the description of the respective incidents. Each incident description includes an analysis of the extent of the collaboration between the specific European authorities and the scLCG, as much as publicly available information allows. Nonetheless, the Submitting Party calls upon the OTP to further investigate and collect evidence to determine the extent of this involvement and its consequences for individual criminal responsibility of the involved officers and agents.

1. Incidents Involving Maltese Authorities

[263] UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, para. 52, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf. Although neither of the incidents below involve the SSA for interceptions at sea, it is worth noting that this group has been increasingly getting involved in interceptions at sea, allegedly with the support of the Libyan Navy. UNHCR's data provide a similar finding, with the scLCG conducting most of the interceptions in 2021 and 2022, further showing the rapid increase of the operations conducted by the SSA in 2022. *See* Samy Magdy, *A new Libyan force emerges, accused of abusing migrants*, AP News, 22 July 2022, https://apnews.com/article/middle-east-africa-libya-migration-7ec5d993bffc1dff597ccd1697a85b5d.

[264] In some of these incidents, other European actors have been at play too, albeit with a lesser contribution, which is detailed in the description of each incident. Depending on the OTP's further investigation, it may be that these European actors had a smaller or larger contribution therein.

Incident 1, starting on 13 April 2020 – Interception coordinated by Maltese authorities

106. A group of migrants and refugees, reportedly 63 people in total, including seven women and two children, departed from Garabulli, Libya, in a white rubber boat on the night of 9 April 2020.[265] Between 10 and 12 April, a Frontex aircraft patrolling the Central Mediterranean spotted the boat (in precarious condition), along with three other boats, and alerted the MRCCs of Italy, Malta, Libya, and Tunisia.[266]

107. During the night between 10 and 11 April, the migrants and refugees contacted Alarm Phone, reported that the boat was leaking and shared their GPS position with Alarm Phone at 01:52 CEST.[267] In turn, on 11 April at 03:41 CEST, Alarm Phone alerted the Italian MRCC, RCC Malta, and the scLCG.[268] On 11 April at 09:20 CEST, Alarm Phone reached the scLCG by phone, who responded that they could not conduct any rescue action due to COVID-19 and that they were in contact with Italy and Malta.[269] During this time, Alarm Phone sent eight additional emails to the authorities updating the GPS position of the boat, as provided by the passengers, and tried repeatedly to call the Italian MRCC, the RCC Malta, and the scLCG, but these authorities failed to respond.[270] Contact with the boat in distress was maintained by Alarm Phone until 12 April 12:50 CEST, after which time contact could not be re-established.[271] The last GPS position received by Alarm Phone placed the boat in the Maltese SAR zone.[272]

108. On 13 April, Frontex confirmed that out of the initially four spotted boats, two were still in the Maltese SAR zone.[273] Meanwhile, on the evening of that day, Italy and Malta sent out air

[265] [REDACTED]
[266] Frontex press statements released on 13 April to ANSA Rome (agency launch 16:14LT), cited in: Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/ ; OLAF – European Anti-Fraud Office, *Final Report Case No OC/2021/0451/A1*, February 2022, p.17, https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/ The report was originally confidential, but it was leaked to Frag den Staat, Der Spiegel, and Lighthouse Reports, who on 13 October 2022, published it online after redacting personal data.
[267] Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/.
[268] [REDACTED]; Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/.
[269] Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/.
[270] [REDACTED]; Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/.
[271] Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/.
[272] [REDACTED]. The website https://watchthemed.net shows the position of the boat inside the Maltese SAR zone.
[273] Newsbook, *"They will drown" – NGO Chaplain tells Maltese Authorities*, 13 April 2020, https://newsbook.com.mt/en/they-will-drown-ngo-chaplain-tells-maltese-authorities/

reconnaissance flights.[274] The boat in distress was spotted again in the Maltese SAR zone.[275] On 14 April at 00:28 CEST, RCC Malta sent out a NAVTEX to all boats stating:

[REDACTED]

According to Alarm Phone, "the GPS position matched an estimated drifting pattern of the boat in distress with around 55 people on board."[276]

109. Shortly after, a Portuguese-flagged cargo ship, *Ivan*, passed by and stopped one mile away from the boat in distress.[277] Due to the weather and sea conditions, *Ivan* was not able to rescue the migrants and refugees. RCC Malta ordered it to stay at the scene and monitor the boat in distress until rescue arrived.[278] According to survivors in touch with Alarm Phone, during this time, three migrants jumped into water to reach *Ivan*, and the other four threw themselves into sea out of desperation.[279] To no avail, Alarm Phone attempted to contact both the crew of *Ivan*, the Portuguese and Italian MRCCs, and other merchant vessels in the area to rescue the migrants.[280]
110. An unidentified air asset, likely deployed by the Armed Forces of Malta (AFM), was on-scene during the entire operation, allegedly giving orders to the *Ivan* and the *Dar Al Salam 1* merchant vessel that would eventually conduct the rescue operation.[281] People also shouted for help and made signs to the aircraft, even holding up a baby on board to show their distress. A survivor told Alarm Phone: "The aircraft saw us for sure because it flashed us with a red light. Shortly after another boat came out of nowhere and picked us up."[282]
111. Eventually, on 14 April around 05:00 CEST, under the coordination of RCC Malta, the migrants were taken aboard by the Libyan-flagged fishing boat *Dar Al Salam 1* in Malta's SAR zone and

[274] According to Alarm Phone and Sea -Watch, Italy and Malta sent out aircraft due to increasing pressure from several actors – such as another boat of migrants in distress being taken on board of the *Aita Mari*. However, Italy seemed to be unaware of this pushback, as their several air surveillance missions did not render any results. Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/. See also, Tweet by Sergio Scandura, https://twitter.com/scandura/status/1249818368275812352?s=20&t=Mc1IDe2YhKbM1ij21IckIQ including the flight tracks of several Maltese aircraft.
[275] Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/.
[276] Tweet by Sergio Scandura, 14 April 2020, https://twitter.com/scandura/status/1249879307813564422?s=20&t=RPh49ws06E-n6EAYEB0ukA
[277] Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/.
[278] Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/.
[279] Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/.
[280] [REDACTED].
[281] Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/.
[282] It is unclear whether the witness was referring to the AFM aircraft, but that is Alarm Phone's interpretation. Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/.

returned to Tripoli.[283] *Ivan* was then ordered to leave.[284] The *Dar Al Salam 1* was previously docked in Malta and left the port only after instructed by Maltese authorities to conduct the operation.[285] Five people were dead before rescue, and seven others were reported to be missing at sea.[286] A list of their names is included in Annex I.B.

112. The 51 survivors were disembarked at the Tripoli Naval Base Abu Sitta and, afterwards, placed in the **Tariq al-Sika** detention center,[287] "where they were held in indefinite detention in inhumane conditions and some were subjected to forced labour."[288]

113. Another Maltese private vessel carrying 30 tons of food and drink accompanied the fishing vessel to Libya.[289] The cargo was for distribution in detention centers in Libya, and (undisclosed) sources from the scLCG said that they facilitated matters to allow the boat sent by the Maltese government to arrive in Tripoli.[290]

114. Subsequently, the Maltese government issued an official statement confirming that it coordinated the interception and return of migrants and refugees with the scLCG and that there were European aircraft present at the scene, including Malta's own AFM aircraft.[291] In a phone

[283] Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/.
[284] Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/.
[285] Times of Malta, *Neville Gafà says he coordinated migrant pushback 'under Libyan jurisdiction'*, 19 May 2021, https://timesofmalta.com/articles/view/neville-gafa-says-he-coordinated-migrant-pushback-under-libyan.873103.
[286] Amnesty International, *Malta: Waves of impunity – Malta's human rights violations and Europe's responsibilities in the central Mediterranean*, September 2020, p. 7, https://www.amnesty.org/en/documents/eur33/2967/2020/en/. For a list of names and nationalities of those missing or deceased, see [REDACTED].
[287] Amnesty International, *Malta: Waves of impunity – Malta's human rights violations and Europe's responsibilities in the central Mediterranean*, September 2020, p. 7, https://www.amnesty.org/en/documents/eur33/2967/2020/en/ and UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://app.powerbi.com/view?r=eyJrIjoiMWFiMTk3NDMtNDE0NS00NzIwLWFiMGMtODg0OWJiYjU0MDhjIiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9.
[288] Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 26, https://www.amnesty.org/en/documents/mde19/4439/2021/en//.
[289] TVM, *Immigrants' rescue: Maltese Government asked private boats to help out and also sent food and drink to Libya*, 22 April 2020, www.tvm.com.mt/en/news/immigrants-rescue-maltese-government-asked-private-boats-to-help-out-and-also-sent-food-and-drink-to-libya/, and Avvenire, *Inchiesta. Malta, la "flotta fantasma" contro i profughi. Frontex scarica sugli Stati*, 23 April 2020, https://www.avvenire.it/attualita/pagine/malta-svelato-il-nome-del-barcone-fantasma-e-frontex-accusa-gli-stati-li-abbiamo-informati-ma-soccorsi-spettano-a-loro.
[290] TVM, *Immigrants' rescue: Maltese Government asked private boats to help out and also sent food and drink to Libya*, 22 April 2020, www.tvm.com.mt/en/news/immigrants-rescue-maltese-government-asked-private-boats-to-help-out-and-also-sent-food-and-drink-to-libya/, and Avvenire, *Inchiesta. Malta, la "flotta fantasma" contro i profughi. Frontex scarica sugli Stati*, 23 April 2020, https://www.avvenire.it/attualita/pagine/malta-svelato-il-nome-del-barcone-fantasma-e-frontex-accusa-gli-stati-li-abbiamo-informati-ma-soccorsi-spettano-a-loro.
[291] Statement by the Government of Malta, 15 April 2020, https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/April/15/pr200673en.aspx.

call between Alarm Phone and the scLCG on the morning of 11 April, the Libyan officer also claimed to be in contact with Malta and Italy.[292]

115. Two criminal cases and one constitutional case were brought before Maltese national courts (see Section VI.A for the complementarity analysis) and provide more insight on the coordination between Maltese authorities and Libyan actors. During these proceedings, a former Maltese government official, Neville Gafà, maintained he was asked by the government to arrange for the return of the people to Libya.[293] Gafà has also claimed that for about three years, he was involved in operations aimed at preventing migrant boats from reaching the Maltese SAR region using a group of private vessels – a system based on an agreement with the Libyan Home Affairs Ministry and the scLCG, under the instructions of the Maltese Office of the Prime Minister [294] (see below Section V).

116. According to the Times of Malta, this agreement establishing "mutual cooperation" was negotiated between Maltese and Libyan authorities, with Neville Gafà posing as an intermediary and "special envoy of Prime Minister Joseph Muscat."[295] The Times of Malta has further reported that as part of this agreement, a meeting was held on 18 June 2019 involving Maltese ambassador to Libya Charles Saliba, who led the meeting, Libyan deputy Prime Minister Ahmed Maiteeq, and Maltese Colonel Clinton O'Neill (head of plans and intelligence at the AFM).[296] Moreover, the owner of the merchant vessel *Dar Al Salam 1*, Carmelo Grech, testified in May 2021 that the Maltese government (specifically the AFM) had paid him on three or four occasions for fuel to return refugees and migrants to Libya.[297]

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[292] Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/.

[293] New York Times, *Latest Tactic to Push Migrants From Europe? A Private, Clandestine Fleet*, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html.

[294] Newsbook, *The government uses Gafa' to co-ordinate pushback*, 29 April 2020, https://newsbook.com.mt/en/the-government-uses-gafa-to-co-ordinate-pushback/#:~:text=Former%20OPM%20operative%20Neville%20Gafa,who%20gave%20him%20these%20instructions; Times of Malta, *Exposed: Malta's secret migrant deal with Libya*, 10 November 2019, www.timesofmalta.com/articles/view/exposed-maltas-secret-migrantdeal-with-libya.748800; Malta Today, *Neville Gafà reveals controversial secret migration pact with Libya*, 23 February 2020, www.maltatoday.com.mt/news/national/100529/neville_gaf_reveals_controversial_secret_migration_pact_with_libya#.XxCqgihKjIV; and Manuel Delia, *Now we know*, 30 April 2020, www.manueldelia.com/2020/04/now-we-know/.

[295] Times of Malta, *Exposed: Malta's secret migrant deal with Libya*, 10 November 2019, https://timesofmalta.com/articles/view/exposed-maltas-secret-migrant-deal-with-libya.748800.

[296] Times of Malta, *Exposed: Malta's secret migrant deal with Libya*, 10 November 2019, https://timesofmalta.com/articles/view/exposed-maltas-secret-migrant-deal-with-libya.748800.

[297] Malta Today, *Malta government paid for Libya pushbacks "three to four" times, shipper reveals*, 19 May 2021, https://www.maltatoday.com.mt/news/national/109738/malta_government_paid_for_libya_pushbacks_three_to_four_times_shipper_reveals#.Yf0qzfXMJok. OHCHR also expressed concern over Maltese MRCC using commercial ships for pushbacks: OHCHR, Press briefing note on Migrant rescues in the Mediterranean, 8 May 2020, https://www.ohchr.org/en/press-briefing-notes/2020/05/press-briefing-note-migrant-rescues-mediterranean?LangID=E&NewsID=25875. *See also* Mandates of the Special Rapporteur on the human rights of migrants; the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special

117. Finally, at a press conference, Malta's Prime Minister Robert Abela himself denied that Gafà was personally "coordinating" the operation but confirmed that Gafà was asked by government representatives to reach out to his Libyan contacts regarding the people in the boat in distress.[298]

Incident 2, starting on 10 February 2021 – Interceptions by the scLCG coordinated by a Maltese aircraft

118. Besides the incident described above, there are other interception incidents indicative of the involvement of Maltese authorities in the interceptions at sea of migrants and refugees with the purpose of returning them back to Libya. For example, on 10 February 2021 (hereinafter **Incident 2**), the crew of Sea-Watch's civil monitoring aircraft, *Seabird*, spotted two boats in distress [REDACTED]. Before Sea-Watch's crew was also able to spot that second boat, it overheard via VHF radio communication several exchanges, [REDACTED] likely in reference to the two boats described above.[299] [REDACTED] Sea-Watch's crew observed the interception by *Ubari* of the second boat with 110 persons on board and reported this to UNHCR and IOM officers.[300]
119. [REDACTED] Sea-Watch's crew overheard four other exchanges between the Maltese aircraft and *Ubari* [REDACTED] likely referring to the coordinates of the first boat with 20 persons on board.[301] During these exchanges, the aircraft also ordered *Ubari* to head west and inquired *Ubari* about its change of direction while it was heading south.[302] [REDACTED] the crew of *Seabird* observed how *Ubari* intercepted the first boat.[303] All migrants and refugees intercepted were brought to Libya.[304]

Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, AL MLT 2/2020, 9 December 2020, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25753; Times of Malta, *Anger as Neville Gafà says he coordinated Libya pushback on OPM orders*, 30 April 2020, https://timesofmalta.com/articles/view/neville-gafa-says-he-coordinated-libya-pushback-on-opm-orders.788951; New York Times, *Latest Tactic to Push Migrants From Europe? A Private, Clandestine Fleet*, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html; Associated Press, *Malta defends its use of private vessels to rescue migrants*, 1 May 2020, https://apnews.com/article/371696d67ceb8f38b61a50283ceb825a; The Guardian, *Exclusive: 12 die as Malta uses private ships to push migrants back to Libya*, 19 May 2020, https://www.theguardian.com/global-development/2020/may/19/exclusive-12-die-as-malta-uses-private-ships-to-push-migrants-back-to-libya.

[298] Newsbook, *Watch: PM denies Gafa coordinating rescue; says he was asked to use contacts*, 1 May 2020, www.newsbook.com.mt/en/watch-pm-denies-gafa-coordinating-rescue-says-he-was-asked-to-use-contacts/; and TVM, *Immigrants' rescue: Maltese Government asked private boats to help out and also sent food and drink to Libya*, 22 April 2020, www.tvm.com.mt/en/news/immigrants-rescue-maltese-government-asked-private-boats-to-help-out-and-also-sent-food-and-drink-to-libya/.

[299] [REDACTED]

[300] [REDACTED]

[301] [REDACTED]

[302] [REDACTED]

[303] [REDACTED]

[304] Sea-Watch, *Airborne Monthly Factsheet*, February 2021, p. 3-4, Cases K and L, https://sea-watch.org/wp-content/uploads/2021/04/Airborne_Monthly_Factsheet_February_2021.pdf.

120. It is to be noted that the patrol boat *Ubari* is one of the vessels donated by Italy as described in Section II.C.3. The unidentified aircraft is likely an asset of Maltese authorities. Based on aircraft tracking observations available on Twitter, only one aircraft belonging to the AFM was operating in the same area on that day, leading to believe that it was this Maltese aircraft that coordinated the interceptions.[305] The Submitting Party respectfully suggests that the OTP obtains direct information from the AFM and any other authority (including Frontex) in order to identify the specific aircraft involved in this interception.
121. UNHCR's operational data shows that on that day, a total of 209 migrants and refugees were intercepted and returned to Libya by the scLCG, all of which were disembarked at the Tripoli Naval Base.[306] It is thus likely that the approximately 130 migrants and refugees from the two boats described above are included in this figure. The data also indicates that the majority of the migrants and refugees (171 in total) were transferred to the **Al Mabani** detention center, while the rest were taken to "other" undisclosed locations.[307]

Incident 3, starting on 14 July 2020 – Interception by the scLCG with the coordination of Maltese authorities

122. On 14 July 2020 (hereinafter **Incident 3**), the crew of *Moonbird*, Sea-Watch's civil monitoring aircraft, overheard an aircraft calling the scLCG patrol boat *Ras Jadir* several times, giving it directions on which way to go [REDACTED].[308] Based on Sea-Watch's assessment, it is likely that an AFM aircraft was involved in coordinating the interception of a migrant and refugee boat.[309]
123. [REDACTED] Publicly available information on Twitter indicates that an interception of 86 migrants and refugees by *Ras Jadir* took place on this date, and includes an image seemingly taken through aerial surveillance.[310]

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[305] Tweet by Sergio Scandura, 10 February 2021, https://twitter.com/scandura/status/1359573725662896130?s=20&t=3rqnxMTRueXeAYLuV1xu5Q; Sea-Watch, *Airborne Monthly Factsheet, February 2021*, p. 3-4, Cases K and L, https://sea-watch.org/wp-content/uploads/2021/04/Airborne_Monthly_Factsheet_February_2021.pdf.
[306] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://data2.unhcr.org/en/dataviz/211?sv=0&geo=0
[307] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://data2.unhcr.org/en/dataviz/211?sv=0&geo=0
[308] [REDACTED] Sea-Watch, *Airborne Monthly Factsheet*, July 2020, p. 4-5, https://sea-watch.org/wp-content/uploads/2020/08/2007-sea_watch_airborne-factsheet.pdf.
[309] Sea-Watch, *Airborne Monthly Factsheet*, July 2020, p. 4-5, https://sea-watch.org/wp-content/uploads/2020/08/2007-sea_watch_airborne-factsheet.pdf; Sea-Watch, *Crimes of Malta* 04, 6 October 2020, https://sea-watch.org/en/crimes-of-malta-04/
[310] Tweets by Rob Gowans, 14 July 2020, https://twitter.com/rgowans/status/1283085313796182027?s=20&t=N9oYTD2hw_To9GKdEwa3bg, https://twitter.com/rgowans/status/1283085313796182027/photo/1, https://twitter.com/rgowans/status/1283118760522657794?s=20&t=N9oYTD2hw_To9GKdEwa3bg, https://twitter.com/rgowans/status/1283141639163314178?s=20&t=N9oYTD2hw_To9GKdEwa3bg. The

124. This information is corroborated with UNHCR's operational data, which shows that on this date, 86 male migrant and refugees were intercepted by the scLCG, returned to Libya, and disembarked at the Tripoli Naval Base.[311] The same database shows that the migrants and refugees were released after disembarkation, [312] which is a rare instance possibly due to the effects of the COVID-19 pandemic at that time. As Section III.B below explains, in the vast majority of the cases, migrants and refugees are transferred to detention facilities after their disembarkation.

Incident 4, starting on 18 October 2019 – Interception at sea by the scLCG coordinated by Maltese authorities

125. The last incident involving Maltese authorities started on 18 October 2019 (hereinafter **Incident 4**), about six months before Incident 1, with a similar interception of approximately 50 migrants and refugees, including ten women and five children. [313] According to the information the migrants and refugees provided to Alarm Phone, the boat departed in the early morning of 18 October from Libya. [314] At 12:09 UTC (14:09 CEST), the migrants and refugees were in distress and contacted Alarm Phone, who, in turn, informed the Maltese authorities.[315] Shortly after, in a call at around 14:40 CEST, officers of the RCC Malta confirmed receiving the email and stated they would handle the situation.[316] Over the course of the day, Alarm Phone continued to provide updated positions of the boat to the RCC Malta, who did not respond anymore and did not launch a rescue operation.[317] Moreover, Alarm Phone was informed that the migrants and refugees in the boat had seen a helicopter circling above them and taking photos of them at around 19:00 CEST.[318] At 21:30 CEST, a duty officer of the RCC Malta informed Alarm Phone that the boat

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Submitting Party has not been able to verify the origin or the authenticity of the images provided by this Twitter user.

[311] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://app.powerbi.com/view?r=eyJrIjoiMWFiMTk3NDMtNDE0NS00NzIwLWFiMGMtODg0OWJiYjU0MDhjIiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9

[312] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://app.powerbi.com/view?r=eyJrIjoiMWFiMTk3NDMtNDE0NS00NzIwLWFiMGMtODg0OWJiYjU0MDhjIiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9

[313] Amnesty International, *Malta: Waves of impunity – Malta's human rights violations and Europe's responsibilities in the central Mediterranean*, September 2020, p. 10, https://www.amnesty.org/en/documents/eur33/2967/2020/en/, citing Alarm Phone, *Back to the Libyan Warzone – How Malta Instructed Libyan Authorities to Intercept 50 Migrants within the Maltese SAR Zone*, 23 October 2019, https://alarmphone.org/en/2019/10/23/back-to-the-libyan-warzone/.

[314] [REDACTED]

[315] [REDACTED]

[316] [REDACTED]

[317] [REDACTED] Tweet by Alarm Phone, 18 October 2019, https://twitter.com/alarm_phone/status/1185216460848848897?s=20&t=lZZZTmkoRvewQ9hBbdOpaw

[318] [REDACTED]

was intercepted by the scLCG patrol boat *Fezzan* (donated by Italy[319]) in the Maltese SAR zone.[320] According to public information on Twitter, the migrants were returned to Libya, disembarked at the Tripoli Naval Base before being transferred to the **Tariq al-Sikka** detention center on 19 October 2019.[321]

126. In the call between the RCC Malta duty officer and Alarm Phone, the officer also confirmed that an AFM helicopter was involved in the operation through its monitoring of the situation.[322] However, the Submitting Party has not been able to verify this information. Instead, publicly available information on Twitter showed that different aircraft from EUNAVFOR MED, Italy, and Frontex were operating that day within the Libyan and Maltese SAR zones.[323] The Submitting Party thus calls upon the OTP to further confirm and identify the aircraft and the extent of its involvement in the interception and return of the 50 migrants and refugees in this incident.

2. Incidents Involving Italian Authorities

Incident 5, starting on 10 April 2019 – Interception at sea by the scLCG coordinated by Italian authorities

127. On 10 April 2019 [REDACTED], 20 migrants and refugees, including two women and two children, about 20 nautical miles off the coast of Zuwara, contacted Alarm Phone, asking for help, as their engine had been lost in the water and eight persons had gone missing in the water.[324] Alarm Phone first transmitted information to the Italian MRCC and then to the crew of Sea-Watch's civil monitoring aircraft, *Moonbird,* the Tunisian MRCC, and the Maltese RCC.[325]

128. When Sea-Watch's crew contacted the Italian MRCC regarding any open cases in the area, an officer confirmed that there was one case "under the coordination of Libyan authorities" and

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[319] Naval Post, *Italy sends Libya boat "Fezzan"*, 22 October 2018, https://navalpost.com/italy-sends-libya-boat-fezzan/.
[320] [REDACTED]
[321] Tweets by Rob Gowans, 18 – 19 October 2019, https://twitter.com/rgowans/status/1185489612183080960, https://twitter.com/rgowans/status/1185502146147618817
[322] Alarm Phone, *Back to the Libyan Warzone – How Malta Instructed Libyan Authorities to Intercept 50 Migrants within the Maltese SAR Zone*, 23 October 2019, https://alarmphone.org/en/2019/10/23/back-to-the-libyan-warzone/
[323] Tweets by Sergio Scandura, 18 - 19 October 2019, https://twitter.com/scandura/status/1185156570499485696, https://twitter.com/scandura/status/1185339604930584577?s=20&t=lZZZTmkoRvewQ9hBbdOpaw, https://twitter.com/scandura/status/1185341665483153409?s=20&t=lZZZTmkoRvewQ9hBbdOpaw, https://twitter.com/scandura/status/1185341665483153409?s=20&t=lZZZTmkoRvewQ9hBbdOpaw
[324] [REDACTED]
[325] [REDACTED]; Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 13, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.

that they were in contact with the scLCG and awaiting further information from them.[326] The Italian MRCC later repeatedly stated that the coordinating authority was the scLCG,[327] despite being the first MRCC contacted.[328] Meanwhile, Alarm Phone tried contacting the scLCG, but was unable to reach anyone – even when one phone call finally got through, the scLCG hung up after saying they did not speak English.[329]

129. Available evidence indicates that the Italian MRCC was not simply in contact with the scLCG and awaiting further information on sea rescue operations; instead, it actively communicated with and in the name of the scLCG. This is evident by the NAVTEX message sent by the Italian MRCC, which reads:

    [REDACTED]

130. That the Italian MRCC was collaborating with the scLCG and the Libyan MRCC (sometimes referred to as the JRCC) and that Italian officers were aware of the full situation is apparent from other evidence collected by Sea-Watch and Alarm Phone. [REDACTED]

131. Despite the fact that the message called for vessels in the area to provide assistance, in reality, none of the vessels in the area intervened, despite the attempts of Sea-Watch to contact the vessels that could rescue the migrants.[330] Added to the fact that the Libyan MRCC and the scLCG were unreachable to Sea-Watch and Alarm Phone, this leads to the conclusion that indeed the collaboration between the Italian authorities and the scLCG did not have the goal of making sure that either merchant vessels or civil sea rescue organizations rescued the migrants and refugees but, rather, was aimed at ensuring that the migrants and refugees were intercepted and returned to Libya.

132. Eventually, at 20:05 CEST, the Italian MRCC informed Alarm Phone that the scLCG had found the boat and intercepted the migrants and refugees, who, presumably, were returned to Libya.[331] Currently, neither the Submitting Party, nor Alarm Phone or Sea-Watch, have information on the scLCG vessel that performed the interception at sea. Therefore, it is requested that the OTP obtain this information from the involved authorities as part of its investigative activities.

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[326] [REDACTED]
[327] [REDACTED] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 13-14, https://eu-libya.info/.
[328] IMO, Resolution MSC.167(78), Guidelines on the treatment of persons rescued at sea, art. 6.7.
[329] Case 1 – Video 1 at 02:00 in Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, https://eu-libya.info/.
[330] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 14, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.
[331] [REDACTED]

133. UNHCR's operational data confirms that the interception of 19 migrants and refugees effectively occurred on 10 April 2019.[332] This data further indicates Zuwara as the disembarkation point and that all migrants and refugees were transferred to the eponymous detention center. Nonetheless, according to this source of information, the interception was performed by GACS and not the scLCG. An investigation by the OTP shall obtain information from the Libyan authorities and UNHCR to clarify who performed the interception, as well as the nature of the communication between the Libyan and Italian authorities.
134. This incident indicates that the collaboration with Libyan actors can involve more than one European authority at a time. In this case, two EUNAVFOR MED air assets were also involved, pointing to the multiplicity of actors, both Libyan and European, which collaborate to intercept migrants and refugees at sea with the purpose of returning them to Libya. After *Moonbird* sent a Mayday Relay [REDACTED], the French EUNAVFOR MED aircraft *Falcon 50* responded almost immediately with "copy" and proceeded to the position.[333] *Moonbird* then observed the *Falcon 50* circling and dropping life rafts in the area.[334] Later, in a conversation with the Italian MRCC, an officer informed Sea-Watch's ground crew that a Spanish EUNAVFOR MED aircraft, *Cotos 45*, was on-scene, which *Moonbird* also spotted.[335] The involvement and contribution of EUNAVFOR MED air assets in this interception, including the collaboration with the Italian MRCC and the scLCG, is an element that the OTP should further investigate.
135. Moreover, the Tunisian Coast Guard was notified, and it only stated that it would coordinate with the Libyan MRCC and the Italian MRCC.[336] The Maltese RCC was also later contacted, but it refused Alarm Phone's request to reach out to commercial vessels in the vicinity.[337] The refusal of Italian and Maltese RCCs to provide direct assistance and their decision to wait instead

[332] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://app.powerbi.com/view?r=eyJrIjoiMWFiMTk3NDMtNDE0NS00NzIwLWFiMGMtODg0OWJiYjU0MDhjIiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9.

[333] Case 1 – Video 1 at 03:23 in Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, in https://eu-libya.info/.

[334] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 14, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.

[335] Case 1 – Video 1 at 04:24, 04:35 in Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, in https://eu-libya.info/.

[336] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 13, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.

[337] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 14, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.

for the scLCG to perform the interception is a pattern that has been documented by Sea-Watch (and other sea rescue organizations).[338]

136. Lastly, it is worth noting that the Italian MRCC conduct of acting "on behalf of" the scLCG is not unique to this incident. Rather, **Incident 6** (see below) and other cases documented by Sea-Watch indicate a similar pattern of conduct.[339]

Incident 6, starting on 7 November 2018 – The Nivin case

137. The above incident is not an isolated case of Italian officials' collaboration with the scLCG in the interceptions at sea of migrants and refugees. Another case in point is the *Nivin* case on 7 November 2018 (hereinafter **Incident 6**), where the Italian MRCC instructed a merchant vessel, the *Nivin*, to intercept a boat in distress "on behalf of" the scLCG, with the purpose of returning the migrants and refugees aboard back to Libya.[340] The position of the boat in distress was sent from EUNAVFOR MED to the Italian MRCC.[341] The scLCG then directed the *Nivin* towards the Port of Misrata in Libya, where it arrived on 10 November. Upon arrival, the 91 captured passengers refused to disembark.[342] On 14 November, after threats of violence by Libyan armed actors, several migrants and refugees, including a woman and her four-month-old baby, agreed to disembark the boat and were transferred to the **Karareem** detention center in Misrata.[343]

138. Libyan armed actors violently removed the 81 remaining migrants and refugees from the vessel on 20 November, using tear gas and rubber bullets, as well as live ammunition.[344] The majority

[338] See most recently, Sea-Watch, *Airborne Factsheet July 2022*, Distress case K, p. 3,7, https://sea-watch.org/wp-content/uploads/2022/09/202207_Airborne_Monthly_Factsheet.pdf; and UNHCHR, *Lethal Disregard: Search and rescue and the protection of migrants in the central Mediterranean Sea*, May 2021, p. 10-11, https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf

[339] For instance, Sea-Watch, *Airborne Factsheet February 2021*, Distress case Y on 21.02.2021, https://sea-watch.org/airborne-monthly-factsheet-february-2021/ and Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 14.

[340] Email date 07.11.2018 at 19:39 UTC from the Italian MRCC to Merchant Vessel Nivin, cited in: Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 61-62, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[341] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 62, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[342] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 61-68, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[343] Francesca Manocchi, *Libya forcibly removes migrants from ship after 12-day standoff*, Middle East Eye, 20 November 2018, https://www.middleeasteye.net/news/libya-forcibly-removes-migrants-ship-after-12-day-standoff as cited in Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 71, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf

[344] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 69-74, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

of the migrants and refugees were then transferred either to the **Karareem or to the Zlitan** detention centers; 27 were transferred to the **Karareem Anti-Crime Department**, while between 8 and 11 were taken to a hospital in Misrata.[345] Prior to his transfer to **Zlitan**, one of the detained migrants reported to Forensic Oceanography that he was questioned, tortured, and mistreated by Libyan security forces in an unknown location in Misrata, allegedly because of his role in communicating the incident to the media.[346]

139. It was also determined that there was a merchant vessel heading towards Malta that was at approximately the same distance to the migrants' position at one point during the time the Italian MRCC was in contact with the *Nivin*, but the Italian MRCC chose the *Nivin*, which was headed towards Libya rather than a European destination.[347]

140. This incident has been documented by written correspondence from the Italian MRCC stating that it was contacting the *Nivin* "on behalf of" the scLCG and that the *Nivin* should contact the scLCG through the Italian MRCC.[348] There are also email exchanges between the *Nivin* and the scLCG, cc'ing different units of the Italian military, EUNAVFOR MED, and the Malta RCC.[349] Such coordination has been further corroborated by a report signed by Bassm Sbat, the captain of the *Nivin* and by testimonies from survivor witnesses and MSF personnel.[350] Moreover, scLCG official Commodore Masoud Abdalsamd confirmed that an scLCG officer initially went on board the Italian warship docked in Tripoli to contact the *Nivin* using Italian communication equipment.[351] He also stated that the distress boat was first found by a EUNAVFOR MED aircraft (Spanish) and that this information was given to the scLCG even before Alarm Phone received distress information from the migrants.[352]

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[345] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 73, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[346] Testimony of SDG, in Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 73, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[347] Forensic Oceanography, *The* Nivin *Case: Migrant's resistance to Italy's strategy of privatized push-back*, December 2019, p. 61, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[348] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 62, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[349]Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 63, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[350] Forensic Oceanography, *The* Nivin *Case: Migrant's resistance to Italy's strategy of privatized push-back*, December 2019, p. 54, 60, and 67, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[351] Forensic Oceanography, *The* Nivin *Case: Migrant's resistance to Italy's strategy of privatized push-back*, December 2019, p. 64, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[352] Forensic Oceanography, *The* Nivin *Case: Migrant's resistance to Italy's strategy of privatized push-back*, December 2019, p. 55, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

141. Finally, in a letter from the Director-General of the EU Commission's Migration and Home Affairs department, Paraskevi Michou, to Frontex's then-Executive Director, Fabrice Leggieri, the Director-General stated that although Italy cannot be considered a neighboring MRCC because it does not border the Libyan SAR zone, it is "supporting the (so-called) Libyan Coast Guard a lot in particular in acting during the SAR event as a 'communication relay.'"[353]

3. Incidents Involving EUNAVFOR MED

Incident 7, starting on 2 May 2019 – Interceptions at sea by the scLCG coordinated by EUNAVFOR MED

142. The interception of two boats on 2 May 2019 (hereinafter **Incident 7**) by the scLCG was primarily coordinated by an EUNAVFOR MED air asset, although Maltese authorities – and possibly the Italian MRCC – also contributed to the interceptions.
143. On 2 May 2019, at 13:48 UTC, Sea-Watch's ground crew contacted the Italian MRCC to find out if there were any open cases with which it could assist.[354] The Italian MRCC duty officer informed Sea-Watch's ground crew about two distress cases being coordinated by Libyan actors who, reportedly, had everything "under control."[355] The officer also mentioned that they were informed about the situation and in contact with the scLCG.[356]
144. The civil monitoring aircraft *Colibri* arrived at the scene of one of the distress cases around 14:00 UTC and saw two European air assets: first, the EUNAVFOR MED aircraft *Seagull 19*[357] and later on, an AFM aircraft *Mission06* (AS1126).[358] Sea-Watch's crew also overheard [REDACTED] that *Seagull 19* was already in direct contact with the scLCG and that a Libyan patrol boat *Sabratha 654* (donated by Italy, see Section II) was heading towards one of the boats in distress, a white rubber boat with around 80 people on board.[359] [REDACTED] *Sabratha 654*

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[353] European Commission, Directorate-General for Migration and Home Affairs, Letter to Frontex Executive Director, 2019, p.2, https://www.statewatch.org/media/documents/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf.
[354] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 17, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.
[355] [REDACTED], Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 17
[356] [REDACTED]
[357] [REDACTED]
[358]Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 17, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.
[359] Alarm Phone, *Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 18, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.

would arrive almost half an hour later at the distress position initially provided by *Seagull 19* via VHF.[360]

145. During the entire operation, Sea-Watch's crew observed *Seagull 19* flying over the area and acting as the on-scene command.[361] In a communication [REDACTED], Sea-Watch's crew asked *Seagull 19* to confirm if it was indeed the on-scene coordinator, and *Seagull 19* responded, "More or less, yes."[362] Later, [REDACTED] after asking *Seagull 19* if it could "confirm to me that you are coordinating with Libyan Patrol Boat?" *Seagull 19* responded, "Affirm."[363]
146. [REDACTED] *Seagull 19* provided the exact positions of both distress boats, and *Sabratha 654* arrived on-scene for one of the distress boats immediately after.[364] It was observed by *Colibri* that *Sabratha 654* started chasing the rubber boat, which to Sea-Watch's crew was a clear indication that the boat was trying to get away, most likely to prevent migrants and refugees from being intercepted and returned back to Libya.[365] [REDACTED]
147. Shortly thereafter, [REDACTED], *Seagull 19* relayed the position of the second boat, with around 100 migrants and refugees on board, before reporting to be off-task.[366] It was at this moment that the Maltese took over and provided important contributions to the scLCG to make sure that this second boat was intercepted and returned to Libya.[367] [REDACTED] Sea-Watch's crew called the RCC Malta and asked if they knew of the interceptions by the scLCG, a duty officer responded that "we are aware" that the Libyans were the coordinating authority and that "we are helping the coordination by the [so-called] Libyan Coast Guard," and that their aircraft

[360] [REDACTED] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 18, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.
[361] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 19, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.
[362] [REDACTED]; Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 19, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.
[363] [REDACTED]; Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 19, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.
[364] [REDACTED]: Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 19, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.
[365] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 19, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.
[366] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 19, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.
[367] [REDACTED]

was in the area monitoring the situation.[368] [REDACTED] The duty officer insisted that the Libyans were those in charge of the situation.[369] [REDACTED]

148. [REDACTED] The officer confirmed that both vessels had been intercepted by the scLCG and that their aircraft had observed the second interception.[370]

149. It can then be assumed that all the migrants and refugees aboard the two boats, around 180 in total, were intercepted and brought back to Libya by the scLCG. On 3 May 2019, *Sabratha 654* disembarked 161 migrants and refugees at the Alkhums port, where they were subsequently transferred to the **Alkhums** detention center, also referred to as the **Khoms Souq al Khamis** center.[371]

150. Notably, on the day of these two interceptions, *Mare Jonio*, a ship run by the NGO Mediterranea – Saving Humans, had declared to the Italian MRCC that it was available to render assistance to the two boats in distress.[372] The Italian MRCC received several offers from *Mare Jonio* to reach the two boats in distress and prevent migrants being returned to Libya by the scLCG.[373] In the evening of the day of the incidents, *Mare Jonio* again asked the Italian MRCC for an update on the situation of the two cases and received a written reply that included a brief description of the facts regarding the way the boats had been intercepted.[374] In that reply, the Italian MRCC stated that the two rubber boats had been spotted by "an airborne patrol" and were "in the Libyan area of competence."[375] It also stated that distress positions had been reported to the "competent authorities" in Tripoli, who took over the coordination of the operations and sent a naval asset to the area.[376]

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[368] [REDACTED]
[369] [REDACTED]
[370] [REDACTED]
[371] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://app.powerbi.com/view?r=eyJrIjoiMWFiMTk3NDMtNDE0NS00NzIwLWFiMGMtODg0OWJiYjU0MDhjIiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9 and Tweet by Rob Gowans, 3 May 2019, https://twitter.com/rgowans/status/1124353350181576704?s=20&t=RJDyXRbWv5tACXc6tUQIPQ.
[372] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 17 and footnote 37, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.
[373] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 17, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.
[374] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 17, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.
[375] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 17, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.
[376] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 17, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.

151. Although this Communication only includes one incident in which EUNAVFOR MED was in charge of coordination, EUNAVFOR MED's participation in interceptions at sea is not an isolated instance, as also evinced in Incidents 5 and 6. In fact, in the aforementioned letter from the Director-General of the EU Commission's Migration and Home Affairs department to Frontex's executive director, the Director-General explicitly stated that "[t]he results of the monitoring mechanism implemented by EUNAVFOR MED Operation Sophia is [sic] encouraging and has [sic] confirmed the appropriate employment of Libyan personnel."[377] In the same letter, the Director-General also stated that although EUNAVFOR MED Headquarters is not a SAR services body, many of the sightings of migrants in the Libyan SAR zone had been provided by aerial assets of EUNAVFOR MED and "were notified directly to the Libyan RCC responsible for its own region."[378] Such statements confirm EUNAVFOR MED's direct and exclusive relay of information to the Libyan actors, as well as its involvement in interceptions at sea with the purpose of returning migrants and refugees back to Libya. EUNAVFOR MED engages in such actions regardless of the fact that Libya is not considered a safe place for disembarkation, that its Libyan MRCC is mostly unresponsive, and that the Italian and/or Maltese authorities should have also been informed according to relevant SOLAS and International Civil Aviation Organization (ICAO) regulations.[379]

4. Incidents Involving Frontex

152. The incidents described below indicate Frontex's involvement in the interception of migrants at sea performed by the scLCG. The *modus operandi* of Frontex is relatively similar for all incidents: mostly through the use of its air surveillance assets (such as the *Heron* drone or its *Osprey 1* and *3* airplanes) Frontex provides essential information to the scLCG, which then conducts the interceptions and returns migrants and refugees back to Libya. The information, usually including the position and/or images of boats in distress, is shared either directly through radio communication or sometimes even through WhatsApp messages.

Evidence on the direct communication between the scLCG and Frontex

[377] European Commission, Directorate-General for Migration and Home Affairs, Letter to Frontex Executive Director, 2019, p.2, https://www.statewatch.org/media/documents/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf.
[378] European Commission, Directorate-General for Migration and Home Affairs, Letter to Frontex Executive Director, 2019, p.2, https://www.statewatch.org/media/documents/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf.
[379] According to Chapter V, reg. 33, SOLAS, all capable RCCs are to be informed of a distress case.

153. German organization Frag den Staat has obtained evidence regarding the direct communication via WhatsApp messages between Frontex and the scLCG between 18 May and 14 June 2021.[380] In the transcript of the messages, most of the information was removed by Frontex, as the agency classified it as "sensitive operational data."[381] Nonetheless, it is possible to see an exchange of messages between Frontex and a +218 number – the country code for Libya. Given the context, it is possible to infer that this is a number belonging to a Libyan actor, likely the scLCG. In different exchanges on 18 May, 27 May, 11 June, 12 June, and 14 June 2021, audios, photos, positions, sightings of boats, or possible distress cases are shared, from which the collaboration between the two entities in interceptions at sea can be inferred.

154. For instance, on 14 June 2021, the following messages were sent:

> "[14/06/2021, Text Removed - Sensitive Operational Information] Text Removed - Reporting Tools: Good morning sir. We have a boat adrift pos Text Removed - Sensitive Operational Information. Boat adrift. People poring *[sic]* water. Please acknowledge this message.
>
> [14/06/2021, Text Removed - Sensitive Operational Information] Text Removed - Reporting Tools: <attached:00000065-PHOTO-2021-06-14-07-09-23.jpg>"[382]

155. It is possible to infer that Frontex shared the position of a boat, with "pos" referring to the abbreviation used in this context to share the GPS coordinates of a boat; the sensitive information removed thereafter is likely to contain the exact coordinates of the boat in distress. The photo, shared in the message that followed, probably refers to the same boat.

156. A reply from the scLCG to these messages is not found in the document made available to Frag den Staat. Nonetheless, according to Frontex's JORA database, several interceptions by the scLCG occurred on 14 June 2021.[383] For this date, the database includes a total of five incidents in which Libya was both the country of departure and of disembarkation.[384]

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[380] Through a FOIA request of 29 April 2021, *Frag den Staat* obtained several documents with WhatsApp messages between Frontex officers and the scLCG. *See* Frag den Staat, WhatsApp-Nachrichten an die libysche Küstenwache [WhatsApp messages to the Libyan Coast Guard], 29 April 2021, https://fragdenstaat.de/anfrage/whatsapp-nachrichten-an-die-libysche-kustenwache/#nachricht-635374 The document referred to here is entitled "chat_02 – Redacted – Notepad". In its response, Frontex alleged that they could not deliver all the requested information, as it contains sensitive operational data. Hence, in the documents sent to *Frag den Staat* most of the information has been deleted. Nonetheless, from the date of the messages and using the information left in the messages, it was possible to identify incidents, which are here corroborated through the information available in public sources and in the JORA Database.

[381] Frag den Staat, WhatsApp-Nachrichten an die libysche Küstenwache [WhatsApp messages to the Libyan Coast Guard], Attachment "_chat_02 - Redacted – Notepad", https://fragdenstaat.de/dokumente/141605-chat_02-redacted-notepad/

[382] Frag den Staat, WhatsApp-Nachrichten an die libysche Küstenwache [WhatsApp messages to the Libyan Coast Guard], Attachment "_chat_02 - Redacted – Notepad", https://fragdenstaat.de/dokumente/141605-chat_02-redacted-notepad/

[383] The JORA database was further filtered by reporting country (Italy) and country of departure (Libya).

[384] It should be noted that in three of these five incidents, a Frontex asset operating under the MAS service detected the boats. These refer to Incident Id. 631456 (Incident Nr. 443920); Incident Id. 631465 (Incident Nr. 443924); and Incident Id. 631498 (Incident Nr. 443930).

157. For all the other dates where an exchange of messages is visible in Frag den Staat's documentation, there are matching incidents in the JORA Database regarding boats departing from and disembarking in Libya and which confirm Frontex's involvement:

- For 18 May 2021, there is one incident involving a wooden boat with 70 migrants and refugees.[385]
- For 27 May 2021, there are three incidents, the first one involving a wooden boat with 80 migrants and refugees, the second another wooden boat with 100 migrants and refugees, and the third a fiberglass boat with 100 migrants and refugees.[386] On this date, information on Twitter indicates that the scLCG vessel *Ras Jadir* intercepted around 300 migrants who were later disembarked at the Tripoli Naval Base and transferred to DCIM authorities.[387]
- For 11 June 2021, the JORA Database includes eight different incidents, each one involving a wooden boat carrying between 12 and 94 migrants and refugees each.[388] Similarly as on 27 May 2021, the same Twitter user reported that the scLCG vessel *Ras Jadir* intercepted approximately 350 migrants in several operations, who likewise were disembarked at the Tripoli Naval Base and taken to DCIM authorities.[389]
- Lastly, for 12 June 2021, six incidents are included in the JORA Database, involving two rubber boats and four wooden boats, each one carrying between 10 and 90 migrants and refugees.[390] That day, a Frontex drone was seen orbiting over the Libyan SAR Zone, along with Sea-Watch's civil monitoring aircraft, *Seabird*, an Italian Coast Guard air asset, and a US Navy aircraft. [391] Additionally, two different interceptions of migrants and refugees were reported on Twitter that day: one in which a "Libyan Navy Base Security PB" intercepted 60 migrants and refugees and disembarked them at the Tripoli

[385] Frontex, JORA Database, as obtained by Frag den Staat on 9 May 2022, Incident Id. 609767 (Incident Nr. 440609) https://aleph.occrp.org/entities/82905946.4a47b9c818650e08156a51cdb97f7ee3714d90c9
[386] Frontex, JORA Database, as obtained by Frag den Staat on 9 May 2022, Incident Id. 616261 (Incident Nr. 441545); Incident Id. 616791 (Incident Nr. 441597).
[387] Tweets by Rob Gowans, 27 May 2021, https://twitter.com/rgowans/status/1398006116802572290, https://twitter.com/rgowans/status/1398275186508578816?s=20&t=tNgI287VLXjH8VwtuRJyMQ and https://twitter.com/rgowans/status/1398275191940292608?s=20&t=tNgI287VLXjH8VwtuRJyMQ
[388] Frontex, JORA Database, as obtained by Frag den Staat on 9 May 2022, Incident Id. 628244 (Incident Nr. 443413); Incident Id. 628275 (Incident Nr. 443417); Incident Id. 628306 (Incident Nr. 443423); Incident Id. 628843 (Incident Nr. 443510); Incident Id. 628845 (Incident Nr. 443511); Incident Id. 628848 (Incident Nr. 443512); Incident Id. 628852 (Incident Nr. 443513); Incident Id. 628855 (Incident Nr. 443514).
[389] Tweets by Rob Gowans, 27 May 2021, https://twitter.com/rgowans/status/1403778010231214086, https://twitter.com/rgowans/status/1403778014828273664?s=20&t=GW9otulGWt_Rh1D49ICAKg
[390] Frontex, JORA Database, as obtained by Frag den Staat on 9 May 2022, Incident Id. 628884 (Incident Nr. 443524); Incident Id. 628898 (Incident Nr. 443528); Incident Id. 628908 (Incident Nr. 443530); Incident Id. 629060 (Incident Nr. 443569); Incident Id. 629064 (Incident Nr. 443570); Incident Id. 629072 (Incident Nr. 443571).
[391] Tweet by Sergio Scandura, 12 June 2021, https://twitter.com/scandura/status/1403675674456604672?s=20&t=GW9otulGWt_Rh1D49ICAKg

Naval Base, where they were later transferred to DCIM authorities; [392] the second one by an unidentified scLCG vessel, which disembarked 119 migrants and refugees at the Dahla Port and transferred them to the Criminal Investigation Department in Zawiya.[393]

158. Moreover, for the preceding days, Frontex admitted that its surveillance activities had led to the identification of 19 boats with approximately 800 migrants and refugees aboard and that it had continued to "provide assistance."[394]

159. The Submitting Party respectfully suggests for the OTP to request that Frontex provide a complete copy of these and other existing messages to the scLCG, in order to determine who the individuals receiving these messages were; to access the content of such messages, along with any audio, photos, videos, or attachments included therein; and to assess the extent of the contribution made by Frontex in these interceptions at sea performed by the scLCG.

Incident 8, starting on 30 July 2021 – Interception at sea by the scLCG involving Frontex

160. On the morning of 30 July 2021, *Seabird's* ground crew observed, through open sources, several orbits of a Frontex drone in the so-called Libyan SAR zone, suggesting the existence of boats in distress.[395] [REDACTED] *Seabird* spotted a blue wooden boat with around 20 people in distress on board in a position within the Maltese SAR zone.[396] *Seabird* further observed the scLCG patrol boat *Ras Jadir* – already with around 50 migrants and refugees aboard, presumably from a previous interception. [REDACTED] Following the rules of the SAR Convention and in accordance with relevant regulations, Sea-Watch informed the Maltese RCC [REDACTED][397] At that moment, Sea-Watch's rescue boat, *Sea-Watch 3*, was the closest vessel with a rescue capacity in the area at 5 nautical miles.[398] Notwithstanding the rules of the SAR Convention and SOLAS regulations,[399] *Sea-Watch 3* was never alerted by the authorities about the case nor asked to rescue the migrants and refugees in distress.[400]

161. *Sea-Watch 3* witnessed and *Seabird* documented the interception.[401] [REDACTED]

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[392] Tweet by Rob Gowans, 12 June 2021, https://twitter.com/rgowans/status/1403780056942583811
[393] Tweet by Rob Gowans, 12 June 2021, https://twitter.com/rgowans/status/1403780060016939011
[394] Tweet by Frontex, 15 June 2021, https://twitter.com/Frontex/status/1404815436261335041
[395] [REDACTED].
[396] [REDACTED]
[397] [REDACTED]
[398] [REDACTED]
[399] SOLAS Regulation 33 (2)
[400] [REDACTED]; Sea-Watch, *Airborne Monthly Factsheet*, July 2021, Distress case AG, pp. 5-6. https://sea-watch.org/wp-content/uploads/2021/09/Airborne_Monthly_Factsheet_July-2021.pdf
[401] [REDACTED]

162. Information available on Twitter indicates that the *Ras Jadir* returned the migrants and refugees back to Libya, disembarking them at the Tripoli Naval Base.[402] This information coincides with UNHCR's operational data, which registered six interceptions involving 884 migrants and refugees that included the Tripoli Naval Base, the Azzawiya Oil Refinery Port, and the Tripoli Commercial Port as disembarkation points. Although there is no specific information on where the 50 migrants and refugees intercepted in this incident were sent, UNHCR's data points to the detention centers of **Al Mabani, Azzawiya Stabilitzation Support Apparatus (SSA), and Abu Salim**, as the facilities where they were most likely transferred.[403]

Frontex involvement in this incident

163. As described above, Sea-Watch's crew tracked a Frontex drone in the area using open sources.[404] Based on an analysis of flight tracking data and other available information, Human Rights Watch and Border Forensics believes that the Frontex *Heron* drone was conducting surveillance operations off the coast of Libya, during which it presumably spotted the boat in distress at least two times before the interception but did not alert the *Sea-Watch 3*, nor other vessels present in the area.[405] Furthermore, according to the analysis by Human Rights Watch and Border Forensics, "the drone's flight path suggests it was monitoring the boat's trajectory."[406]
164. The JORA Database confirms that a Frontex asset was involved in interceptions on this date. The Database registered eight incidents on 30 July 2021, departing from and disembarking in Libya.[407] One of these, Incident Id. 687197 (Incident Nr. 451664), matches the description of a wooden boat and 20 persons on board. Thus, it is likely that this incident refers to the interception described above. According to JORA, the detection of the boat occurred with a Frontex asset as part of Joint Operation Themis and the MAS.
165. Nonetheless, it remains to be clarified how the information from Frontex was communicated to the scLCG to conduct the interception. Sea-Watch, with the support of Frag den Staat, sent a Freedom of Information Access request to Frontex, in which they asked for all the relevant

[402] Tweet by Rob Gowans, 31 July 2021, https://twitter.com/rgowans/status/1421382498291003392?s=20&t=N9oYTD2hw_To9GKdEwa3bg.
[403] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://data2.unhcr.org/en/dataviz/211?sv=0&geo=0.
[404] [REDACTED]
[405] Human Rights Watch and Border Forensics, forthcoming December 2022. The organizations will publish a thorough investigation on the alleged role of Frontex aerial surveillance in the interceptions at sea conducted on this date. [Ed. https://www.hrw.org/video-photos/interactive/2022/12/08/airborne-complicity-frontex-aerial-surveillance-enables-abuse]
[406] Judith Sunderland and Lorenzo Pezzani, *EU's Drone is Another Threat to Migrants and Refugees: Frontex Aerial Surveillance Facilitates Return to Abuse in Libya*, 1 August 2022, https://www.hrw.org/news/2022/08/01/eus-drone-another-threat-migrants-and-refugees.
[407] Frontex, JORA Database, as obtained by Frag den Staat on 9 May 2022, https://aleph.occrp.org/entities/82905946.4a47b9c818650e08156a51cdb97f7ee3714d90c9

information regarding Frontex's operations in the Central Mediterranean on 30 July, including the communications between the agency and the Libyan, Maltese, and Italian authorities.[408] As is its standard practice, Frontex refused to provide this information on the grounds that it contained sensitive operational information. However, Frontex did mention that they had identified 73 documents and raw data in a database that were related to Sea-Watch's request.[409] Among these were 36 documents on the communication exchanges between Frontex and Libyan, Italian, and Maltese authorities on that specific day alone. In view of this refusal, Sea-Watch took the case to the General Court of the European Union to obtain the release of this information.[410] A decision is still awaited.

166. The Submitting Party thus calls upon the OTP to obtain the 73 documents and all other relevant information from Frontex to assess the degree of involvement of this agency and its members in the interception described below.

Incident 9, starting on 21 April 2021 – Interception at sea by the scLCG involving Frontex

167. On 20 April 2021, two boats departed Al Kohms, Libya, heading north. The first boat (hereinafter Boat 1) was a white rubber boat and had approximately 100 passengers, including 30 women and 15 children;[411] the second one (hereinafter Boat 2), also a rubber boat, had 130 people on board, including seven women.[412] Both boats sent distress calls to Alarm Phone who,

[408] Frag den Staat, Antrag nach EU-Verordnungen 1049/2001 sowie 1367/2006 [Application according to EU regulations 1049/2001 and 1367/2006], 21 October 2021, https://fragdenstaat.de/en/request/antrag-nach-eu-verordnungen-10492001-sowie-13672006-1/#message-638494.

[409] Frag den Staat, Antrag nach EU-Verordnungen 1049/2001 sowie 1367/2006 [Application according to EU regulations 1049/2001 and 1367/2006], Attachment "pad-2021-00300-reply_geschwaerzt.pdf", 1 December 2021, https://fragdenstaat.de/en/request/antrag-nach-eu-verordnungen-10492001-sowie-13672006-1/677872/attachment/pad-2021-00300-reply_geschwaerzt.pdf.

[410] Sea-Watch, *Sea-Watch takes Frontex to court*, 28 April 2022, https://sea-watch.org/en/sea-watch-takes-frontex-to-court/.

[411] SOS MEDITERRANEE, Activities and observation of our rescue ship in the Central Mediterranean, OCEAN VIKING - 236 survivors, 14 April-16 May 2021, disembarkation: Augusta, https://onboard.sosmediterranee.org/sections/operations/ocean-viking-236-survivors-14-april-16-may-2021-disembarkation-augusta/.

[412] UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, UN PoE Report, p. 119, Appendix C.C to Annex 24, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf and Alarm Phone, *Coordinating a maritime disaster: Up to 130 people drown off Libya*, 22 April 2021, https://alarmphone.org/en/2021/04/22/coordinating-a-maritime-disaster-up-to-130-people-drown-off-libya/.

in turn, alerted all competent authorities and sent updated positions of Boat 1.[413] Initially, the authorities refused to intervene and were slow to respond.[414]

168. Ultimately, the fate of each boat was markedly different. Boat 1 was intercepted by the scLCG on 21 April 2021 with the likely involvement of Frontex, and its passengers were brought back to and detained in Libya.[415] During this course of events, a woman and her child died in circumstances yet to be clarified.[416] In contrast, on 22 April 2021, the shipwreck of Boat 2, along with the dead bodies of 130 migrants, were found in the Libyan SAR Zone.[417]

169. It is possible to infer that the migrants and refugees aboard Boat 1 were intercepted sometime after 12:24 UTC on 21 April 2021, when *Ocean Viking*, a rescue vessel of the organization SOS MEDITERRANEE, spotted the scLCG vessel two nautical miles from the position of either Boat 1 or Boat 2.[418] The scLCG vessel performing the interception must have been the *Ubari* patrol boat, given that, around that time, a Libyan officer had informed Alarm Phone "that they were aware of three boats and searching for them with their *Ubari* patrol vessel."[419]

170. Based on UNHCR's data, *Ubari* disembarked 103 migrants and refugees at the Tripoli Naval Base, where they were taken to the **Al Mabani** detention center.[420]

Frontex involvement in this incident

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[413] [REDACTED] See also: Frag den Staat, Attachment to "Shipwreck in the Central Mediterranean", Document 3, https://fragdenstaat.de/dokumente/117785-document-3pdf/.

[414] Tweet by Alarm Phone, 21 April 2021, 11:31 AM, https://twitter.com/alarm_phone/status/1384801882175066114?s=20&t=shPo1GBGs-oOALniCgWrNQ.

[415] [REDACTED] Tweet by Alarm Phone, 21 April 2021, 10:51 PM, https://twitter.com/alarm_phone/status/1384973210702200835 and Tweet by Safa Msehli, 21 April 2021, 10:04 PM, https://twitter.com/msehlisafa/status/1384961301429080070.

[416] Alarm Phone, *Coordinating a maritime disaster: Up to 130 people drown off Libya*, 22 April 2021, https://alarmphone.org/en/2021/04/22/coordinating-a-maritime-disaster-up-to-130-people-drown-off-libya/ and Tweet by Safa Msehli, 21 April 2021, 10:04 PM, https://twitter.com/msehlisafa/status/1384961301429080070.

[417] UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, p. 119, Appendix C.C to Annex 24 https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf; Border Forensics, 22 April 2021 Shipwreck – Chain of Events, July 2021, https://mediterranearescue.org/wp-content/uploads/2021/07/La_ricostruzione_di_Border_Forensic_English.pdf; and Alarm Phone, *Coordinating a maritime disaster: Up to 130 people drown off Libya*, 22 April 2021, https://alarmphone.org/en/2021/04/22/coordinating-a-maritime-disaster-up-to-130-people-drown-off-libya/.

[418] SOS MEDITERRANEE, Activities and observation of our rescue ship in the Central Mediterranean, OCEAN VIKING - 236 survivors, 14 April-16 May 2021, disembarkation: Augusta, https://onboard.sosmediterranee.org/sections/operations/ocean-viking-236-survivors-14-april-16-may-2021-disembarkation-augusta/.

[419] Alarm Phone, *Coordinating a maritime disaster: Up to 130 people drown off Libya*, 22 April 2021, https://alarmphone.org/en/2021/04/22/coordinating-a-maritime-disaster-up-to-130-people-drown-off-libya/.

[420] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://data2.unhcr.org/en/dataviz/211?sv=0&geo=0; Tweet by Rob Gowans, 22 April 2021, 6:38 AM, https://twitter.com/rgowans/status/1385090529881468928; and Tweet by Sergio Scandura, 22 April 2021, 7:23 PM, https://twitter.com/scandura/status/1385283045406748681?s=20&t=4DpDsrTZhnqevz9z9qZzXA.

171. The interception of Boat 1 was likely coordinated between Frontex and the scLCG. Firstly, Frontex asset *Osprey* was spotted on 21 April at 18:39 CET and was streaming live video from the area where the distress calls by the boats were sent.[421] Secondly, *Ocean Viking* overheard several communications that further point to the collaboration between Frontex and the scLCG as making the interception of Boat 1 possible. At 11:40 UTC, *Ocean Viking* overheard a VHF communication on Channel 16 between an unidentified aircraft – likely *Osprey 1*, which was present in the area – and a scLCG patrol vessel, in which the first position of a boat in distress was relayed. *Ocean Viking* considered that this possibly corresponded to Boat 1 or Boat 2.[422] At 12:15 UTC, *Ocean Viking* again overheard a similar communication, in which the unidentified aircraft provided an updated position to the scLCG.[423] Afterwards, at 12:24 UTC, *Ocean Viking* spotted the scLCG vessel two nautical miles away from the relayed position.[424] In sharing the updated positions of the boat in distress, the role of the unidentified aircraft – likely *Osprey* – was essential for the interception of the boat.
172. Thirdly, in Frontex's JORA Database, Incident Id. 584461 (Incident N° 437628), matches the description of the boat and roughly the same number of people. Nonetheless, the incident is marked as having no Frontex involvement, an aspect that needs to be further clarified by the agency.
173. The extent of the involvement of Frontex in the interception of Boat 1 is yet to be determined, particularly with respect to the exact time at which *Osprey 1* and/or *Osprey 3* were operating on 21 April 2021 and to whom it streamed the live video. Regarding Boat 2, in an email sent by Frontex to Alarm Phone on 22 April at 16:06 CET, the agency conveyed:

> "that Frontex is aware about the distress case in question, occurring within the Libyan Search and Rescue Region and initially spotted by OSPREY 3 on April 21.
>
> Upon sighting, all the MRCCs in the area have been informed, including the RCC Tripoli as Rescue Coordination Centre responsible for the Libyan SRR.
>
> Additionally, and due to the dangerous condition of the boat in distress, a MAYDAY radio message was broadcasted in order to alert all the ships in the area.
>
> Frontex is still supporting the search and rescue operations."[425]

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[421] There is conflicting information on whether either *Osprey 1*, *Osprey 3*, or both were operating in the area that day. *See* UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, p. 120 and 131, Appendix C.C to Annex 24 and Figure 24.C.16, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf and Tweet by Alarm Phone, 21 April 2021, 9:11 PM, https://twitter.com/alarm_phone/status/1384947811423297536?s=20&t=Ci8EbIScgB4saR-Nx1XD5g.

[422] [REDACTED]

[423] [REDACTED]

[424] [REDACTED]

[425] *See* UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, p. 141, Figure 24.C. 26, Appendix C.C to Annex 24,

174. Frontex also claimed that *Osprey 1* was active that day. In a set of email correspondence obtained by Frag den Staat, a Frontex press officer informed that:

> "At 17:15 Frontex plane OSPREY 1 took off from Lampedusa to comply with a request from the Italian national rescue centre (MRCC) regarding three possible boats in distress in the Libyan Search and Rescue zone […] At 18:36 OSPREY 1 spotted a grey rubber boat adrift with about 80 persons on board, Frontex informed the Libyan, Italian and Maltese Rescue Coordination Centres."[426]

175. Thus, Frontex should be requested to provide all information, including VHF communications, emails, and messages, along with the trajectory and positions of its aerial surveillance assets, in order for the OTP to be able to assess with certainty the degree of Frontex collaboration, through both *Osprey 1* and *Osprey 3*, in this incident. Unfortunately, civil society organizations cannot access evidence of this kind, but the OTP, using its investigative powers, certainly can. Frag den Staat has tried to access information on Frontex assets deployed that day, including its positions, footage, and all communications sent or received by Frontex from all actors involved, including those in Libya. As is standard practice by Frontex, the access to this information was denied due to "the number of elements pertaining to Personal Data, Number and profile of Human Resources, Reporting tools and methods used by law enforcement officials, Sensitive operational information and Number and type of technical equipment."[427] Thus, it is essential that the OTP obtains it directly. Additionally, according to Frontex's response to that FOIA request, there was at least one serious incident report filed for the interceptions occurring on 21 or 22 April. However, Frontex denied access to that document on the same grounds.[428]

Incident 10, starting on 28 March 2021 – Interception at sea by the scLCG involving Frontex

https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf and Tweet by Emmanuelle Chaze, 24 April 2021, 1:19 PM, https://twitter.com/EmmanuelleChaze/status/1385916220654903297.

[426] Frag den Staat, Attachment to "Shipwreck in the Central Mediterranean", Correspondence, p. 9, https://fragdenstaat.de/dokumente/117782-correspondence/. The email incorrectly refers to the date as "Wednesday, 22 April," but we have to assume this was a typo, as the 22 April was a Thursday.

[427] Frag den Staat, Attachment to "Shipwreck in the Central Mediterranean", Microsoft Word - PAD-2021-00138-reply, https://fragdenstaat.de/dokumente/117787-microsoft-word-pad-2021-00138-reply/.

[428] Frag den Staat, Attachment to "Shipwreck in the Central Mediterranean", Microsoft Word - PAD-2021-00138-reply, https://fragdenstaat.de/dokumente/117787-microsoft-word-pad-2021-00138-reply/.

176. On 28 March 2021, the scLCG intercepted 11 migrants and refugees aboard a grey rubber boat in distress in the Maltese SAR zone. The case was documented [publicly][429], by Sea-Watch through its civil monitoring aircraft *Seabird*,[430] and the Open Arms rescue vessel.[431]
177. At 14:18 UTC, *Fezzan* received, from an unknown station, the coordinates of a boat in distress.[432] Similarly, at around the same time, Sea-Watch overheard [REDACTED] a communication between the same unknown sender and *Fezzan*, in which the same coordinates were provided.[433] This unknown station had an essential role in providing the updated position of the boat in distress to *Fezzan* and guiding it to make sure that the migrants and refugees were intercepted by the scLCG vessel.
178. [REDACTED] Sea-Watch spotted the scLCG in the area, which had already conducted several interceptions that day, and thus, several migrants and refugees were already on board.[434] [REDACTED] Sea-Watch [REDACTED] alerted the RCC in Malta and the MRCC in Rome about this distress case.[435] Despite the fact that the Maltese RCC was responsible for this case, it was the scLCG that conducted the interception in the Maltese SAR zone and later returned the migrants and refugees to Libya.[436]
179. Throughout the afternoon of 28 March 2021, the unknown station continued to provide updates to *Fezzan* to further guide it towards the boat in distress. [REDACTED]
180. [REDACTED]
181. Through a communication with merchant vessel *Saint George*, the unknown station identified itself as "European aircraft in the area." [Without disclosing any further information][437]
182. [REDACTED] *Seabird* had to leave the area and return to land.[438] However, the journalistic documentation indicates that *Fezzan* continued to search for the boat until nighttime, which it eventually found at coordinates inside the Maltese SAR zone. [439] At 21:41 UTC, the 11 migrants

[429] In: Sara Creta, *Respinti all'inferno [Rejected to Hell]*, Domani, 29 April 2021, https://www.editorialedomani.it/longform/migranti-libia-torture-respingimenti-frontex-europa-italia-ghbpk0qo
[430] [REDACTED] Sea-Watch, *Airborne Factsheet March 2021*, Distress case E (DC 133), https://sea-watch.org/wp-content/uploads/2021/05/Airborne_Monthly_Factsheet_March2021.pdf
[431] [REDACTED]
[432] Sara Creta, *Respinti all'inferno [Rejected to Hell]*, Domani, 29 April 2021, https://www.editorialedomani.it/longform/migranti-libia-torture-respingimenti-frontex-europa-italia-ghbpk0qo.
[433] [REDACTED]
[434] [REDACTED]
[435] [REDACTED]
[436] Based on Sea-Watch's most recent documentation of cases, it appears that it has become a recurrent practice of the scLCG to conduct interceptions in the Maltese SAR Zone; whether the Maltese authorities are aware of these situations or possibly contributing to them, remains to be determined. E.g. Sea-Watch, *Airborne Factsheet July 2022*, https://sea-watch.org/wp-content/uploads/2022/09/202207_Airborne_Monthly_Factsheet.pdf; Sea-Watch, *Airborne Factsheet June 2022*, https://sea-watch.org/wp-content/uploads/2022/07/Airborne_Monthly_Factsheet_June-2022.pdf
[437] [REDACTED]
[438] [REDACTED]
[439] Sara Creta, *Respinti all'inferno [Rejected to Hell]*, Domani, 29 April 2021, https://www.editorialedomani.it/longform/migranti-libia-torture-respingimenti-frontex-europa-italia-ghbpk0qo.

and refugees in the boat were intercepted and brought aboard *Fezzan*, and the operation was declared as completed, as an scLCG member, identified as "Mahmoud," communicated with the Operation Room back in Tripoli.[440]

183. At 01:21 UTC on 29 March, *Fezzan* arrived back in Tripoli.[441] The migrants and refugees aboard, including the 11 mentioned in this incident, were likely disembarked at the Tripoli Naval Base, based on UNHCR Operational Data and publicly available information on Twitter.[442] Migrants and refugees were handcuffed and forced into buses of the **Al Mabani** detention center. [443]

Frontex or Maltese involvement in this incident

184. In this incident, the European aircraft clearly provided essential information to ensure that the scLCG was able to intercept migrants and refugees and return them to Libya. The aircraft was probably operating either under Frontex or Maltese command, as that day, both *Osprey 1* and a Maltese Air Force Beechcraft King Air were operating in the area.[444] [REDACTED] assessment of the case considered Maltese authorities to be responsible for operating the aircraft in question.[445] According to journalistic sources, however, this European aircraft was, indeed, Frontex asset *Osprey 1*.[446] The journalistic assessment is preliminarily confirmed by the information included on the JORA Database, which indicates that for 28 March 2021, a total of six incidents occurred, in which the point of departure and of disembarkation was Libya, involving a total of 378 migrants and refugees. Incident Id. 568546 (Incident N° 435244) is a likely match for the interception described above, as it registers a rubber boat with around 20 people on board.

185. Further pointing to Frontex's involvement is the interview of a Libyan captain who acknowledged the role of Frontex and EUNAVFOR MED in conducting interceptions at sea, including through "exchange of information, surveillance and reconnaissance operations with

[440] Sara Creta, *Respinti all'inferno [Rejected to Hell]*, Domani, 29 April 2021, https://www.editorialedomani.it/longform/migranti-libia-torture-respingimenti-frontex-europa-italia-ghbpk0qo.
[441] Sara Creta, *Respinti all'inferno [Rejected to Hell]*, Domani, 29 April 2021, https://www.editorialedomani.it/longform/migranti-libia-torture-respingimenti-frontex-europa-italia-ghbpk0qo.
[442] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://data2.unhcr.org/en/dataviz/211?sv=0&geo=0 and Tweet by Rob Gowans, 28 March 2021, 7:49 PM, https://twitter.com/rgowans/status/1376229870854885381?s=20&t=eHWZn7KXQ7ih9SQufev0rg.
[443] Sara Creta, *Respinti all'inferno [Rejected to Hell],* Domani, 29 April 2021, https://www.editorialedomani.it/longform/migranti-libia-torture-respingimenti-frontex-europa-italia-ghbpk0qo.
[444] Sara Creta, *Respinti all'inferno [Rejected to Hell]*, Domani, 29 April 2021, https://www.editorialedomani.it/longform/migranti-libia-torture-respingimenti-frontex-europa-italia-ghbpk0qo
[445] [REDACTED]
[446] Sara Creta, *Respinti all'inferno [Rejected to Hell],* Domani, 29 April 2021, https://www.editorialedomani.it/longform/migranti-libia-torture-respingimenti-frontex-europa-italia-ghbpk0qo.

Frontex and the Irini mission," [447] further adding that he has "received photos of migrant boats directly on his phone." [448] The assessment of the WhatsApp messages obtained by Frag den Staat and included above at the beginning of this Section corroborates this statement, demonstrating that a standard practice of Frontex seems to be the exchange of information in this manner.

186. The Submitting Party calls upon the OTP to obtain from Frontex further evidence, including radio communications, emails, messages, and the trajectory of its air surveillance assets, in order to identify the authority responsible for the unidentified aircraft and to determine with certainty the extent of Frontex's participation in this incident. The OTP should conduct a similar assessment for the conduct of Maltese officials, including those of the RCC Malta, the Airforce, and the personnel of its Beechcraft King Air.

Incident 11, starting on 12 February 2020 – Interception by the scLCG involving Frontex

187. On 12 February 2020 [REDACTED], a white fiberglass boat with approximately 50 persons on board, among which 15 were women, was intercepted by the scLCG patrol boat *Fezzan*. The evidence provided by Sea-Watch shows the direct involvement of Frontex in this incident, as it was on-scene until the interception was completed.

188. Initially, Alarm Phone alerted the authorities about the boat in distress on 12 February 2020 [REDACTED] and provided its last known position.[449] Given that there had been no response by the authorities, Sea-Watch's aircraft *Moonbird* conducted an operation later that morning, and [REDACTED] spotted the scLCG boat *Fezzan*.[450] [REDACTED] Shortly thereafter, [*Moonbird*] observed *Osprey 1* hovering over it.[451] [REDACTED] The scLCG vessel arrived close to the location of the boat in distress, and [REDACTED] members of the scLCG began boarding the migrants from the fiberglass boat onto *Fezzan*.[452] Throughout the transfer of migrants and refugees, *Osprey 1* stayed on-scene, making sure that the interception was

[447] Sara Creta, *Respinti all'inferno [Rejected to Hell],* Domani, 29 April 2021, https://www.editorialedomani.it/longform/migranti-libia-torture-respingimenti-frontex-europa-italia-ghbpk0qo.
[448] Sara Creta, *Respinti all'inferno [Rejected to Hell],* Domani, 29 April 2021, https://www.editorialedomani.it/longform/migranti-libia-torture-respingimenti-frontex-europa-italia-ghbpk0qo.
[449] [REDACTED]
[450] [REDACTED]
[451] [REDACTED] Sea-Watch, *Crimes of the European Border Coast Guard Agency Frontex in the Central Mediterranean Sea*, May 2021, p. 3, https://sea-watch.org/wp-content/uploads/2021/05/Frontex-Factsheet_Airborne_Sea-Watch_May-2021.pdf; Tweet by Sea-Watch International, 12 February 2020, https://twitter.com/seawatch_intl/status/1227683058679271426, at 0:18 03:28.
[452] [REDACTED]

completed.[453] Once all migrants and refugees were aboard *Fezzan*, [REDACTED] Sea-Watch's crew overheard *Osprey 1* communicating with Fezzan, stating "Tripoli *Osprey 1* operation complete in your area routing northbound."[454] [REDACTED]

189. Eventually, *Fezzan* returned the migrants and refugees to Tripoli.[455] Unfortunately, that day, UNHCR did not document any interceptions or disembarkations. Thus, the ultimate detention center for the migrants and refugees remains unknown. Nonetheless, based on the pattern of disembarkations included in UNHCR's database for February 2020, the scLCG is likely to have disembarked the migrants and refugees at the Tripoli Commercial Port, as this was the most common disembarkation point during that month.[456] The majority of the migrants and refugees intercepted that month were put under the custody of the **Hay Al-Andalus Investigation Unit**.[457] Therefore, it is very likely that the migrants intercepted in this incident were transferred to a detention facility under the control of this unit.

Frontex involvement in this incident

190. [The] evidence is exemplary of the essential role of Frontex in ensuring that the scLCG is able to perform its interceptions at sea. Moreover, the JORA Database confirms Frontex's involvement in this event, as Incident Id. 67411/Incident N°. 401339 is the only one registered for 12 February 2020. Furthermore, the details of this incident in JORA match the description of the boat, as it registers a fiberglass boat with 47 people on board and Libya as the point of departure and Tripoli as the point of disembarkation.[458] In addition, information available on Twitter shows that *Osprey 1* was operating that day between 08:15 and 09:15 UTC close to Libyan shores, but no traceroute is available.[459] It is possible that *Osprey 1* continued to operate

[453] [REDACTED]
[454] [REDACTED]
[455] Frontex, JORA Database, as obtained by Frag den Staat on 9 May 2022. The disembarkation point mentioned therein is Tripoli. The interception was further reported on Twitter by Rob Gowans, 13 February 2020, https://twitter.com/rgowans/status/1227869731471994881?s=20&t=eHWZn7KXQ7ih9SQufev0rg.
[456] In February 2020, in the cases when UNHCR was able to document disembarkations, most of them occurred in the Tripoli Commercial Port (644 individuals); in second place is the Tajoura Port (205 individuals), followed by AlKhums (90 individuals), and Sabratha (64 individuals). Overall, in 2020, the Tripoli Naval Base and Tripoli Commercial port were the two most common disembarkation points. *See* UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://app.powerbi.com/view?r=eyJrIjoiMWFiMTk3NDMtNDE0NS00NzIwLWFiMGMtODg0OWJiYjU0MDhjIiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9.
[457] In February 2020, 756 individuals were transferred to the Hay Alandlus Investigation Unit. To a lesser extent, 93 individuals that month were transferred to the Anjila (Janzour) detention center, 90 individuals were released – coinciding with number of individuals disembarked in AlKhums – and 64 were transferred to Zuwara. *See* UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://app.powerbi.com/view?r=eyJrIjoiMWFiMTk3NDMtNDE0NS00NzIwLWFiMGMtODg0OWJiYjU0MDhjIiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9.
[458] Frontex, JORA Database, as obtained by Frag den Staat on 9 May 2022.
[459] Tweet by Sergio Scandura, 12 February 2020, 5:20 PM, at https://twitter.com/scandura/status/1227628524938440706

in the area around the time of the interception. In order to determine this, the Submitting Party calls upon the OTP to request Frontex to provide all evidence related to the activities of *Osprey 1* on 12 February 2020, including its traceroute, flight tracks, and all radio communications, emails, images, or messages exchanged.

5. Incident 12, starting on 28 February 2018 by unknown actors

191. Lastly, some of the witnesses included within the 2021 Communication provided accounts of being intercepted at sea and taken back to detention in Libya, where they continued to experience severe violence inflicted against them.[460] The interception of the boat in which Witness 1 was traveling on 28 February 2018 is particularly relevant (hereinafter **Incident 12**). Witness 1 recalls seeing an aircraft flying over the boat and a person photographing it. Later on, three small military vessels intercepted the boat and took Witness 1 and his fellow passengers back to Libya. Witness 1 was unable to identify which military unit or militia was responsible for the interception. He was later disembarked at the Zuwara Port, where IOM and UNHCR were present, and then transferred by bus to the Zuwara detention center.[461] The UNHCR database corroborates the witness' testimony, showing that on 28 February, there was one documented interception of 100 migrants, disembarked in Zuwara and taken to the detention center in that area.[462] After five days in Zuwara, he was transferred to a detention center in Janzour, where he stayed for several months before being transferred to Salah Aldin detention center.

192. The Submitting Party could not find publicly available information on the involvement of European actors in this interception, given the lack of transparency and the difficulties in accessing information and evidence on the operations of Italian, Maltese, EUNAVFOR MED, and Frontex personnel (see Methodology). We respectfully request the OTP to use its investigative powers to investigate these incidents and determine the extent of the involvement of Libyan actors and officials of EU agencies and Member States in the interception of Witness 1.

B. Disembarkation and Detention

[460] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, Witnesses 1, 2, 3, 6, and 13.
[461] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, Annex I, Interview Protocol Witness 1.
[462] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://app.powerbi.com/view?r=eyJrIjoiMWFiMTk3NDMtNDE0NS00NzIwLWFiMGMtODg0OWJiYjU0MDhjIiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9.

193. Once returned to Libya, the overwhelming majority of disembarked migrants are sent to official and unofficial detention facilities, as shown by UNHCR data[463] and reporting,[464] as well as Amnesty International reports that characterize transfers to arbitrary detention as "routine."[465] Not even vulnerable individuals, such as children, pregnant women, the sick, injured, or disabled, are spared from transfer to arbitrary detention.

1. Disembarkation

194. Following their return to Libya after being intercepted at sea, migrants and refugees are systematically transferred to detention centers. Migrants and refugees are only released under extraordinary circumstances (such as during the increased bouts of armed confrontation in 2019 or the COVID-19 pandemic). In general, MSF has also reported that, after providing limited emergency medical care and referring serious or complicated cases to the hospital, the remainder of the people are taken to detention centers by the authorities.[466]

195. With regard to the incidents documented in previous Section III.A, the following disembarkation points were identified: the Tripoli Naval Base Abu Sitta (Incidents 1, 2, 3, 4, 9, and 10); Zuwara Port (Incident 5 and 12); Port of Misrata (Incident 6); Alkhums Port (Incident 7); Tripoli Commercial Port (Incident 11). For Incident 8, UNHCR registered six interceptions on 30 July 2021 with disembarkations on the Tripoli Naval Base, Zawiya Oil Refinery Port, and the Tripoli Commercial Port.[467] However, the specific disembarkation point for the migrants and refugees involved in this incident remains to be clarified.

196. In general, migrants and refugees are not free to walk away after disembarkation in Libya. Attempts to run are typically met with violence. For example, three Sudanese nationals aged between 15 and 18 were shot dead on 28 July 2020, reportedly by members of a militia linked to the scLCG, as they tried to avoid being detained at Khoms/al-Khums disembarkation point.[468]

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[463] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation – Rescued Individuals by Destination, https://data2.unhcr.org/en/dataviz/211?sv=0&geo=0.
[464] UNHCR, *UNHCR Position on the Designation of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea*, September 2020, para. 9, https://www.refworld.org/pdfid/5f1edee24.pdf.
[465] Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 33-34, https://www.amnesty.org/en/documents/mde19/4439/2021/en//.
[466] MSF, *Migrants in Libya: "We were able to make their time in that horrible place slightly better."*, 2 April 2019, https://www.msf.org/providing-care-people-trapped-libyan-detention-centres-migration-libya.
[467] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://data2.unhcr.org/en/dataviz/211?sv=0&geo=0.
[468] MSF, *Libya: "They were shot and killed as they fled arbitrary detention"*, 31 July 2020, https://www.msf.org/people-shot-and-killed-libya-while-trying-flee-arbitrary-detention and The New Humanitarian, *What happens to migrants forcibly returned to Libya?*, 5 August 2020, https://www.thenewhumanitarian.org/news-feature/2020/08/05/missing-migrants-Libya-forced-returns-Mediterranean.

Similarly, a Sudanese national was killed at a disembarkation site in Tripoli in September 2019.[469]

197. Migrants are even at times directly sold upon disembarkation: one migrant reported overhearing a uniformed member of the scLCG speaking on the phone at the Tripoli Port, saying that he had around 100 migrants and was willing to sell them for 500 dinars each.[470]

198. Even the very few migrants and refugees who are released[471] at disembarkation points are still at risk of being recaptured by armed groups and sold to detention centers or traffickers. Hence, they reportedly "live in constant fear of being targeted for assault, kidnappings and robberies, and are routinely exposed to labour exploitation and forced labour."[472] IOM and UNHCR have further expressed their concern that "others go missing and are unaccounted for, raising fears that some may have been channeled into human trafficking networks."[473]

199. It should be noted that what has been documented regarding the situation of migrants upon disembarkation in Libya is most likely only the tip of the iceberg. Despite the presence of IOM, UNHCR, and various other humanitarian aid organizations at disembarkation points in Libya, they are unable to consistently track where people go next because Libyan authorities do not keep an official database of migrants intercepted at sea or held in detention centers.[474] The organizations are also largely unable to

> "assess specific needs and vulnerabilities, monitor violations or record claims for international protection before DCIM officials funnel them into detention. The relatively quick process and chaotic nature of disembarking hundreds of individuals who are exhausted, traumatized and in some cases ill or injured following their experiences at sea, not to mention distraught about being returned to Libya and fearful about their fate, also

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[469] MSF, *Libya: "They were shot and killed as they fled arbitrary detention"*, 31 July 2020, https://www.msf.org/people-shot-and-killed-libya-while-trying-flee-arbitrary-detention.

[470] The New Humanitarian, *What happens to migrants forcibly returned to Libya?*, 5 August 2020, https://www.thenewhumanitarian.org/news-feature/2020/08/05/missing-migrants-Libya-forced-returns-Mediterranean.

[471] The New Humanitarian, *What happens to migrants forcibly returned to Libya?*, 5 August 2020, https://www.thenewhumanitarian.org/news-feature/2020/08/05/missing-migrants-Libya-forced-returns-Mediterranean.*See also* IOM, *Migrants Flee as Tripoli's Port Shelled*, 10 April 2020, https://www.iom.int/news/migrants-flee-tripolis-port-shelled and IOM, *IOM Deplores Killing of 30 Trafficked Migrants in Libya*, 28 May 2020, https://www.iom.int/news/iom-deplores-killing-30-trafficked-migrants-libya. "According to UNHCR data, only 702 people were released from disembarkation points in the first six months of 2021, out of around 15,000 disembarked." Amnesty International, *No one will look for you: Forcibly Returned from Sea to Abusive Detention in Libya*, July 2021, p. 33, https://www.amnesty.org/en/documents/mde19/4439/2021/en/, citing UNHCR, UNHCR Libya Activities at Disembarkation – 2021, https://data2.unhcr.org/en/dataviz/177?sv=0&geo=666 (content no longer available).

[472] Amnesty International, *Malta: Waves of Impunity*, September 2020, p. 23, https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR3329672020ENGLISH.pdf.

[473] IOM, *IOM and UNHCR Condemn the Return of Migrants and Refugees to Libya*, 17 June 2021, https://www.iom.int/news/iom-and-unhcr-condemn-return-migrants-and-refugees-libya.

[474] Amnesty International, *No one will look for you: Forcibly Returned from Sea to Abusive Detention in Libya*, July 2021, p. 33, https://www.amnesty.org/en/documents/mde19/4439/2021/en/.

severely hampers the ability of disembarked refugees and migrants to confidentially raise concerns, report abuse or seek protection."[475]

200. Indeed, according to interviews conducted by Amnesty International with migrants returned to Libya in 2021 following interception at sea and disembarked at two Tripoli ports,

> "[t]hey recounted facing ill-treatment by the Libyan authorities, having little if any opportunity to speak with humanitarian organizations present, and being provided with misleading or no information by Libyan officials about where they or their loved ones would be taken next. DCIM officials then boarded them on buses or other vehicles and transferred them directly to detention centers in all but four instances, in which refugees and migrants managed to avoid detention by escaping from the ports or en route to detention centers."[476]

2. Detention

201. After disembarkation in Libya, migrants and refugees are systematically transferred to official or unofficial detention sites.[477] Official detention centers are those nominally under DCIM control but, *de facto*, run by armed groups active in different areas.[478] After the agency was created in January 2021, the SSA has also been running several detention sites. Regarding official DCIM sites, it has been observed that refugees are frequently picked up at disembarkation points by white buses with DCIM logos.[479] The 2021 Communication, in its Annex III, provided a list of formal and informal detention sites and places of captivity. Recently, the UN Panel of Experts provided an updated list as of March 2022 of centers under the nominal control of the DCIM and the SSA.[480]

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[475] Amnesty International, *No one will look for you: Forcibly Returned from Sea to Abusive Detention in Libya*, July 2021, p. 31, https://www.amnesty.org/en/documents/mde19/4439/2021/en/.
[476] Amnesty International, *No one will look for you: Forcibly Returned from Sea to Abusive Detention in Libya*, July 2021, p. 30-34, https://www.amnesty.org/en/documents/mde19/4439/2021/en/.
[477] UN Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya (Advanced Unedited Version)*, A/HRC/48/83, 1 October 2021, para. 68, https://reliefweb.int/report/libya/report-independent-fact-finding-mission-libya-ahrc4883-enar.
[478] *See* Arezo Malakooti, Global Initiative Against Transnational Organized Crime and Clingendael, *The Political Economy of Migrant Detention in Libya: Understanding the players and the business models*, April 2019, https://globalinitiative.net/wp-content/uploads/2019/11/Final-Report-Detention-Libya.pdf.
[479] *See* video footage from France 24, *Le reportage de France 24 "Libye : piège infernal" primé aux One World Media Awards*, 19 June 2020: https://www.france24.com/fr/20200619-libye-reportage-france-24-piege-infernal-one-world-media-award (around 30:20); The New Humanitarian, *What happens to migrants forcibly returned to Libya?*, 5 August 2020, https://www.thenewhumanitarian.org/news-feature/2020/08/05/missing-migrants-Libya-forced-returns-Mediterranean; and Libya Herald, *Libya signs contract with China's King Long for 130 buses*, 27 March 2019, https://www.libyaherald.com/2019/03/27/libya-signs-contract-with-chinas-king-long-for-130-buses/.
[480] UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, p. 112, Annex 24, Appendix A,

202. The violence committed against migrants in these and other official and unofficial detention centers has been widely documented, including in the 2021 Communication, which summarized the vast documentation on the matter and provided witness accounts of the different patterns of violence inside these centers. The 2021 Communication further argued that this violence amounts to crimes against humanity, including those of imprisonment, enslavement, murder, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, other forms of sexual violence, persecution, and other inhumane acts.[481]

203. The FFM has similar findings in its reports.[482] In his April 2022 report, the UN Special Rapporteur on the human rights of migrants also observed that "[t]hose who are intercepted and returned to the hands of Libyan authorities face torture, ill-treatment, unlawful killings, enforced disappearances, sexual violence, arbitrary arrest, indefinite detention in inhumane conditions and other human rights violations, including, at times, the detention of children with adults."[483] Moreover, the Special Rapporteur is "concerned that in 2021 over 32,000 migrants were forcibly returned to Libya, where they are at the risk of extensive abuses and human rights violations by both State and non-State actors, potentially amounting to crimes against humanity."[484] In a similar vein, the Report of the UN Panel of Experts of 2022 documented that after interception, migrants and refugees are taken to detention centers, such as **Ain Zara, Al-Mabani, Shara al-Zawiyah, Tariq al-Sikka, and Mitiga**, where they face different forms of violence against them.[485]

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https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf.

[481] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, Section IV.4 p. 102-197.

[482] UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/50/63, 27 June 2022, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya; UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/48/83, 1 October 2021, https://www.ohchr.org/sites/default/files/2021-11/A-HRC-48-83-AEV-EN.docx; and UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Follow-up Report of the Independent Fact-Finding Mission on Libya (Advanced Unedited Version)*, A/HRC/49/4, 23 March 2022, https://www.ohchr.org/sites/default/files/2022-03/A_HRC_49_4_AUV.pdf.

[483] Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, *Human rights violations at international borders: trends, prevention and accountability*, A/HRC/50/31, 26 April 2022, para. 25, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/328/57/PDF/G2232857.pdf?OpenElement.

[484] Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, *Human rights violations at international borders: trends, prevention and accountability*, A/HRC/50/31, 26 April 2022, para. 53, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/328/57/PDF/G2232857.pdf?OpenElement, citing UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/48/83, 1 October 2021, https://www.ohchr.org/sites/default/files/2021-11/A-HRC-48-83-AEV-EN.docx and UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Follow-up Report of the Independent Fact-Finding Mission on Libya (Advanced Unedited Version)*, A/HRC/49/4, 23 March 2022, https://www.ohchr.org/sites/default/files/2022-03/A_HRC_49_4_AUV.pdf.

[485] UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, para. 48, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf.

204. The testimony of a woman from Cote d'Ivore for an OHCHR report illustrates how the cycle of violence in interception and detention works. She

> "reported making three previous unsuccessful attempts, each time being intercepted by the scLCG and returned to Libyan detention centers where she and other migrants experienced torture, ill-treatment and extortion by prison guards. She alleged that some of the guards also sexually exploited and abused young women and girls within the detention centers."[486]

205. UNHCR Operational data further provides approximate information on the centers where migrants and refugees are taken after disembarkation. The predominant detention centers vary from year to year, as the instability in Libya persists and the conflict dynamics are ever-changing. In 2018, **Tariq al-Sikka**, **Tajoura**, and the **Zawiya al-Nasr** detention centers were the main destinations for intercepted migrants and refugees. In 2019, the main destinations were the **Shara al-Zawiya**, **Alkhums**, and **Zawiya al-Nasr** detention centers.[487] In 2020, because of the COVID-19 pandemic, the situation was unusual and 43% of intercepted migrants and refugees were either released (as was the case in Incident 3) or transferred to the authority of the Hay al-Andlus Investigation Unit. When taken to detention centers in 2020, **Tariq al-Sikka**, **Zawiya al-Nasr**, and **Souq Alkhums** were the main destinations. In 2021, it was **Al Mabani**, **Azzawiya Stabilization Support Apparatus** (SSA), and **Ain Zara**. In 2022, based on figures only from January to August, it was **Al Maya**, **Tariq al -Sikka**, and **Zawiya al-Nasr**.[488]

206. Regarding the detention centers to which the migrants and refugees in the interceptions at sea described above were transferred after their disembarkation in Libya, there are reasonable grounds to believe that crimes against humanity are committed in these centers. For the **Tariq al Sikka** detention center (Incident 1 and 4), the 2021 Communication established that there are reasonable grounds to believe crimes against humanity were and are being committed in this detention center, including enslavement, forced labor, and torture.[489] The detention center is nominally under DCIM authority but, *de facto*, run by the Al-Khoja Militia, headed by

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[486] OHCHR, *Lethal Disregard: Search and rescue and the protection of migrants in the central Mediterranean Sea*, May 2021, p. 8-9, https://www.ohchr.org/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf.

[487] For this year, a total of 1,946 migrants and refugees (21% of those intercepted that year) were released after interception. The majority of the releases occurred between July and November 2019 and are probably linked to the increase in armed confrontations in Tripoli after the Libyan National Army started an offensive to capture Tripoli from GNA control. During this period, an airstrike at the Tajoura detention center on 2 July killed at least 53 migrants and refugees.

[488] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://app.powerbi.com/view?r=eyJrIjoiMWFiMTk3NDMtNDE0NS00NzIwLWFiMGMtODg0OWJiYjU0MDhjIiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9 (*see* data up until 2020).

[489] ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, paras. 388-655.

Mohammed al-Khoja. Al-Khoja was simultaneously Deputy Head of the DCIM and, in December 2021, was named Head of DCIM. [490]

207. In the **Zuwara** detention center (Incidents 5 and 12), instances of torture and severe deprivation of liberty – including of Witness 1 – have been documented.[491] The center is nominally under DCIM authority, with Anwar Bodeeb identified as one of the persons in charge of the center. [492]
208. In the **Karareem detention center**, where the majority of migrants and refugees were taken after the interception at sea in Incident 6, instances of beatings and inhumane conditions of detention have been reported.[493] Reporting from 2017 indicated that the head of this center was Captain Wajdi, allegedly a DCIM official and in charge of 70 officers.[494] By 2019, it was reported that this center was closed and the migrants and refugees were transferred to the **Zuwara** and **Alkhums** centers.[495]
209. Regarding the **Zawiya al-Nasr detention center** (Incident 8), there is plenty of documentation of murder, torture, sexual slavery, forced labor, forced nudity, inhumane conditions of detention, as well as its links with human smuggling and trafficking networks.[496] This center is exemplary of the changing dynamics in the detention of migrants as a result of the instability in Libya. The Zawiya al-Nasar detention center was, until recently, affiliated with DCIM and controlled by the al-Nasr Brigade. [497] Recently, however, with the growth in influence of the SSA in the

[490] UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, Table 24.A.1 and 24.A.2, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf; ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, Annex III; Global Detention Project, Triq al Seka Detention Center, https://www.globaldetentionproject.org/countries/africa/libya/detention-centres/2036/triq-al-seka-detention-center; Ian Urbina, Despite Calls for Reform, Libya Appoints Notorious Militia Leader to Handle Migrants, 22 December 2021, https://www.theoutlawocean.com/investigations/the-secretive-prisons-that-keep-migrants-out-of-europe/subsequent-coverage/despite-calls-for-reform-libya-appoints-notorious-militia-leader-to-handle-migrants/; and Tweet by Sara Creta, 24 December 2021, 2:48 PM, https://twitter.com/saracreta/status/1474376488728375297?s=20.

[491] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, para. 447.

[492] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, Annex III and Global Detention Project, Zuwarah Detention Center, https://www.globaldetentionproject.org/countries/africa/libya/detention-centres/995/zuwarah-detention-centre-%D8%B2%D9%88%D8%A7%D8%B1%D8%A9.

[493] HRW, *No Escape From Hell*, p. 35; Björn Blaschke, 'Man behandelt uns wie Tiere', Deutschlandfunk, 05 May 2017, available at: https://www.deutschlandfunk.de/fluechtlingslager-in-libyen-man-behandelt-uns-hier-wie-tiere-100.html

[494] Björn Blaschke, 'Man behandelt uns wie Tiere', Deutschlandfunk, 05 May 2017

[495] MSF, *Libyen: Schließung des Internierungslagers Misrata bedeutet weitere Verschlechterung der Lage von Migrantinnen, Migranten und Flüchtlingen*, 17 October 2019, available at: https://www.aerzte-ohne-grenzen.at/presse/libyen-schliessung-des-internierungslagers-misrata-bedeutet-weitere-verschlechterung-der

[496] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021; Sally Hayden, My Fourth Time, We Drowned: Seeking Refuge on the World's Deadliest Migration Route, 29 March 2022, p. 227-233; UN Security Council, Mohammed Kachlaf, 7 June 2018, https://www.un.org/securitycouncil/sanctions/1970/materials/summaries/individual/mohammed-kachlaf.

[497] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, Annex III and Global Detention Project, (Al Nasr) Az-Zawiyah Detention Center, https://www.globaldetentionproject.org/countries/africa/libya/detention-centres/991/al-nasr-az-zawiyah-detention-centre; UN Security Council, Final Report of the Panel of Experts established pursuant to resolution

Zawiya area and its increased participation in the interception at sea and subsequent detention of migrants, the UN Panel of Experts has found that the center is now under the control of the SSA and has been at least since December 2021.[498]

210. **Alkhums** (**Khoms Souq al Khamis or Souq Alkhums)**, where migrants and refugees were transferred after the interception in Incident 7, was under nominal control of DCIM until the detention center was closed in September 2020. [499] Before that, other migrants and refugees detained in the center reported beatings, rapes, extortion, and forced labor, and that the guards were selling detainees back to smugglers in Bani Walid.[500] It remains unclear whether the center continues to operate, as it is common practice for armed groups to start operating in the centers again after DCIM has shut down the centers.

211. In the **Abu Salim** detention center (Incident 8), torture, sexual violence, murder, and shootings after attempted escapes have been documented.[501] This detention center also exemplifies the fluctuating character of those in charge of the detention of migrants. Initially, the center was nominally under DCIM authority but, in reality, was influenced by groups under the authority of Abdel Ghani al-Kikli, a.k.a. "Gheniwa," who used to command the Abu Salim Central Security Force and was appointed commander of the SSA in January 2021.[502]

212. In the **Al Mabani** detention center (Incidents 2, 8, 9, and 10), there are accounts of murder, torture, extortion, rape, forced labor, and detention under inhumane conditions.[503] The center was taken over by the DCIM between the end of 2020 and the beginning of 2022 and quickly became the largest functional detention center in 2021 for holding migrants and refugees after

1973 (2011) concerning Libya, S/2022/427, 27 May 2022, Annex 24, Table 24.A.1, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf.

[498] UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, Annex 24, Table 24.A.4, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf.

[499] UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2021/229, 8 March 2021, para. 3 and Annex 18, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/037/72/PDF/N2103772.pdf?OpenElement.

[500] Sally Hayden, My Fourth Time, We Drowned: Seeking Refuge on the World's Deadliest Migration Route, 29 March 2022, p. 146-152.

[501] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021; Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 39, https://www.amnesty.org/en/documents/mde19/4439/2021/en//; Sally Hayden, My Fourth Time, We Drowned: Seeking Refuge on the World's Deadliest Migration Route, 29 March 2022, p. 137-143.

[502] Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 7 and 39, https://www.amnesty.org/en/documents/mde19/4439/2021/en// and https://www.amnesty.org/en/latest/news/2022/05/libya-hold-stability-support-authority-militia-leaders-to-account/.

[503] Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 6, https://www.amnesty.org/en/documents/mde19/4439/2021/en//; Outlaw Ocean: https://www.theoutlawocean.com/investigations/the-secretive-libyan-prisons-that-keep-migrants-out-of-europe/; ECCHR, FIDH, LFJL, Article 15 Communication, November 2021.

disembarkation,[504] as shown by the number of incidents in this Communication linked to this center. In reality, the detention center is run by the Public Security Agency, a GNU-affiliated militia led by Emad al-Tarabulsi.[505] Amnesty International has further reported that the management and staff of the center, including its director, Noureddin al-Qureitli (also spelled as Noureddine al-Ghreetly), is similar to those who previously worked at the DCIM center of Tajoura, which was closed after rampant abuse.[506] In both **Abu Salim and Al Mabani**, MSF has reported shootings by guards, ongoing ill-treatment, physical abuse, and violence to such an extent that the organization had to cease its activities in those centers.[507]

213. Beyond official detention centers, many migrants go unaccounted for, likely disappearing into unofficial facilities operated by other militias, smugglers, or traffickers.[508] The FFM has noted in its reports that migrants often disappear after having been intercepted and disembarked in Libya, "raising concerns that significant numbers of migrants may have been returned to smugglers and traffickers who further abuse them."[509] The discrepancy between the reported number of detained individuals and that of those transferred to DCIM centers further suggests that migrants and refugees are also detained at unspecified unofficial locations.[510]

214. Finally, migrants and refugees are rarely able to end their detention. In addition to the lack of judicial processes available to them, the only practical ways to get out of detention are to pay ransoms, to attempt to escape while risking one's life, or to accept repatriation to one's home country, again often risking one's life.[511] The continued deprivation of liberty also ensures that migrants and refugees can be further exploited by performing forced labor and abused by being

[504] Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 18-19, https://www.amnesty.org/en/documents/mde19/4439/2021/en//.
[505] Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 6, https://www.amnesty.org/en/documents/mde19/4439/2021/en//.
[506] Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 20, https://www.amnesty.org/en/documents/mde19/4439/2021/en//.
[507] Libya: Recurring violence against migrants and refugees forces MSF to suspend activities in Tripoli detention centers | Doctors Without Borders - USA
[508] The New Humanitarian, *What happens to migrants forcibly returned to Libya?*, 5 August 2020, https://www.thenewhumanitarian.org/news-feature/2020/08/05/missing-migrants-Libya-forced-returns-Mediterranean.
[509] UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/50/63, 27 June 2022, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya; UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/48/83, 1 October 2021, https://www.ohchr.org/sites/default/files/2021-11/A-HRC-48-83-AEV-EN.docx; and UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Follow-up Report of the Independent Fact-Finding Mission on Libya (Advanced Unedited Version)*, A/HRC/49/4, 23 March 2022, https://www.ohchr.org/sites/default/files/2022-03/A_HRC_49_4_AUV.pdf.
[510] Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 33-34, https://www.amnesty.org/en/documents/mde19/4439/2021/en//.
[511] Amnesty International, *No one will look for you: Forcibly Returned from Sea to Abusive Detention in Libya*, July 2021, p. 30-34, https://www.amnesty.org/en/documents/mde19/4439/2021/en/.

subjected to other crimes against humanity, as detailed in the 2021 Communication.[512] As such, once migrants are intercepted at sea for return to Libya, their physical liberty is deprived and can hardly be regained, as they become "endlessly trapped between the sea and detention."[513]

IV. Legal Analysis – The Crime Against Humanity of Severe Deprivation of Liberty of Migrants and Refugees

215. This section argues that the interceptions at sea of migrants and refugees crossing the Mediterranean and their subsequent return to Libya, where they are systematically transferred to detention, may amount to the crime against humanity of severe deprivation of physical liberty under article 7(1)(e) of the Rome Statute, among others. It first argues that the ICC can exercise its jurisdiction over this crime under the statutory criteria and the scope of the UN Security Council referral of the Libyan situation since 2011. It then establishes the contextual element required under Article 7 of the Rome Statute. Finally, the section proceeds to qualify the facts introduced in Sections II and III under the contextual and material elements of the crime of severe deprivation of physical liberty in violation of fundamental rules of international law.

A. ICC Jurisdiction

216. The crime against humanity of severe deprivation of liberty committed against migrants and refugees by Libyan and European perpetrators falls under the jurisdiction of the ICC. As already extensively argued in the 2021 Communication, crimes committed against migrants and refugees in the Libyan contextfall within the scope of the United Nations Security Council (UNSC) referral of the Situation in Libya in Resolution 1970 of 2011.[514] Included therein is the crime against humanity of severe deprivation of liberty, to which the present Communication introduces additional information on new incidents of interception, return, and detention of migrants and refugees, along with a legal analysis of the criminal responsibility of nationals of State parties to the Rome Statute (see *infra* Section V). Thus, this section stresses the main arguments in favor of ICC jurisdiction over the alleged conduct.

1. Legal Standard for the Exercise of ICC Jurisdiction

[512] ECCHR, FIDH, LFJL Article 15 Communication, November 2021 and Amnesty International, *No one will look for you: Forcibly Returned from Sea to Abusive Detention in Libya*, July 2021, p. 36, https://www.amnesty.org/en/documents/mde19/4439/2021/en/

[513] MSF, *Migrants in Libya: "We were able to make their time in that horrible place slightly better."*, 2 April 2019, https://www.msf.org/providing-care-people-trapped-libyan-detention-centres-migration-libya.

[514] UN Security Council, Resolution 1970 (2011), S/RES/1970 (2011), 26 February 2011, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement.

217. In Resolution 1970 of 2011, the UNSC referred the Situation in Libya to the Prosecutor of the ICC,[515] thus authorizing the Court to exercise its jurisdiction over the crimes listed in the Rome Statute. The ICC subsequently opened an investigation in March 2011.[516]

218. In cases of a referral by the UNSC or a State Party, the assessment of jurisdiction requires the existence of a sufficient link between the referred situation and the crimes allegedly committed.[517] Following the reasoning of Pre-Trial Chamber I (PTC I) in its assessment of the situation in Libya in the *Al-Werfalli* case, a sufficient link can be found when acts amounting to crimes against humanity or war crimes are associated with the country's non-international armed conflict (NIAC) or are a consequence thereof. [518]

219. Thus, the crimes as documented in the present Communication may fall within the Court's jurisdiction, as referred by the UNSC.[519] The following paragraphs show that the crime of severe deprivation of liberty against migrants and refugees through their interception at sea, return to Libya, and subsequent detention there is sufficiently linked with the UNSC referral and is under the Court's territorial, temporal, personal, and subject matter jurisdiction.

a. Jurisdiction Ratione Loci

[515] UN Security Council, Resolution 1970 (2011), S/RES/1970 (2011), 26 February 2011, para. 4, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement.

[516] By definition, the situations referred to the ICC are of a general character, and thus, the Prosecutor has the discretion to open an investigation within the framework of a referred situation, as long as it falls within the temporal, territorial, and personal parameters defining that situation. *See The Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, "Decision on the 'Defence Challenge to the Jurisdiction of the Court'", 26 October 2011, ICC-01/04-01/10, paras. 21, 27, and 41; *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Appeals Chamber, "Judgment on the Appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's 'Decision on the Defence "*Exception d'incompétence*"', 1 November 2021, ICC-02/05-01/20, paras. 25-26; William A. Schabas, The International Criminal Court: A Commentary on the Rome Statute, 22 November 2016, ISBN 019873977X, p. 372; *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, "Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58", 10 February 2006, ICC-01/04-01/06, para. 21; *The Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana", 28 September 2010, ICC-01/04-01/10, para. 6; and *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Pre-Trial Chamber I, "Decision on Prosecution application under Article 58(7) of the Statute (2)", 29 April 2007, ICC-02/05-01/07, para. 14. Specifically, "[t]he territorial and temporal scope of a situation is to be inferred from the analysis of the situation of crisis that triggered the jurisdiction of the Court through the referral. Crimes committed after the referral can fall within the jurisdiction of the Court when sufficiently linked to that particular situation of crisis […] It is the existence, or non-existence, of such link, and not the particular timing of the events underlying an alleged crime, that is critical in determining whether that crime may or may not fall within the scope of the referral." *The Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, "Decision on the 'Defence Challenge to the Jurisdiction of the Court'", 26 October 2011, ICC-01/04-01/10, paras 21 and 41.

[517] ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, para. 350.

[518] *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Pre-Trial Chamber I, "Warrant of Arrest", 15 August 2017, ICC-01/11-01/17, para. 23; *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Pre-Trial Chamber I, "Second Warrant of Arrest", 4 July 2018, ICC-01/11-01/17, para. 20.

[519] ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, Section IV.A, paras. 356 et seq.

220. Territorial jurisdiction is determined by the territory of the State of Libya,[520] including its mainland and territorial waters. Vessels in international waters flying a Libyan flag, such as those operated by the scLCG or private persons, as was the case in the majority of incidents described in Section III, are under the territorial jurisdiction of the Libyan State.[521] Thus, by extension, Libyan-flagged vessels are included as part of the ICC jurisdiction granted by the UNSC referral.

b. Jurisdiction Ratione Temporis

221. Resolution 1970 referred the situation in Libya since 15 February 2011 and did not include a temporal end limit.[522] Section II of the present Communication, as well as the 2021 Communication, assert the ongoing character of the crisis situation in Libya, as evinced in the persistent political instability in the country.[523] Furthermore, since 2011, the UNSC continues to remain actively seized of the matter, for instance, with sanctions against the country imposed since the approval of Resolution 1970 still in force[524] and the ICC Prosecutor's obligation to report periodically to the Council. Hence, the incidents introduced in this Communication fall under the temporal jurisdiction of the court, as they occurred after 15 February 2011 and are connected to the situation underlying the UNSC referral.

c. Jurisdiction Rationae Personae

222. Resolution 1970 includes exceptions to the Court's personal jurisdiction in the following manner:

> "6. […] nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established

[520] UN Security Council, Resolution 1970 (2011), S/RES/1970 (2011), 26 February 2011, para. 4, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement ("Decides to refer the situation **in the Libyan Arab Jamahiriya** since 15 February 2011 to the Prosecutor of the International Criminal Court" [emphasis added]).
[521] The UN Convention on the Law of the Sea (UNCLOS), Art. 92(1): "Status of ships. 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry."
[522] UN Security Council, Resolution 1970 (2011), S/RES/1970 (2011), 26 February 2011, para. 4, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement.
[523] ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, paras. 24 et seq.
[524] The UNSC, particularly its Sanctions Committee on Libya continues to be engaged with the situation in the country and in following up on Resolution 1970 (2011). *See*, most recently, UN Security Council, Resolution 2635 (2022), S/RES/2635, 3 June 2022, https://www.un.org/securitycouncil/content/sres2635-2022.

or authorised by the Council, unless such exclusive jurisdiction has been expressly waived by the State;"

223. Resolution 1970 shall be interpreted in the sense that the Court's personal jurisdiction extends to all subjects, except only for those explicitly mentioned in paragraph 6. Thereby, both Libyan nationals and citizens of States Parties to the Rome Statute may be subjected to the jurisdiction of the Court. Excluding nationals of State Parties from the jurisdiction of the Court in the Libya situation would favor a restrictive interpretation of the Resolution and go against the principle of the Court included in Article 1 that mandates it to "exercise its jurisdiction over persons for the most serious crimes of international concern."

224. As such, nothing precludes the OTP from investigating the participation of nationals of State Parties involved in the commission of crimes against migrants and refugees in Libya, as is the case with the nationals of Italy, Malta, France, Belgium, and Spain included in this Communication.

225. In regard to individuals that are officials of the EU, the EU and ICC have concluded an agreement defining their terms of cooperation and assistance.[525] Under article 12 of this agreement, the EU is obliged to waive immunity according to the relevant rules of international law to allow the Court to exercise its jurisdiction.[526]

d. Jurisdiction Ratione Materiae

226. Following the 2021 Communication, as well as communications and evidence submitted by other civil society organizations, the ICC Prosecutor, in his April 2022 report to the UNSC, asserted that crimes against migrants and refugees are part of his Office's investigative focus on the Situation in Libya[527] and in his recent report from November 2022, he reiterated that "the

[525] International Criminal Court, Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, 10 April 2006, ICC-PRES/01-01-06, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf.

[526] International Criminal Court, Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, 10 April 2006, ICC-PRES/01-01-06, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf ("ARTICLE 12. Privileges and immunities. If the Court seeks to exercise its jurisdiction over a person who is alleged to be criminally responsible for a crime within the jurisdiction of the Court and if such person enjoys, according to the relevant rules of international law, any privileges and immunities, the relevant institution of the EU undertakes to cooperate fully with the Court and, with due regard to its responsibilities and competencies under the EU Treaty and the relevant rules thereunder, to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities in accordance with all relevant rules of international law.")

[527] OTP, Twenty-Third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970, 21 April 2022, para. 5, https://www.icc-cpi.int/sites/default/files/2022-04/2022-04-28-otp-report-unsc-libya-eng.pdf.

Office's preliminary assessment is that these crimes may constitute crimes against humanity and war crimes."[528]

227. Because of its general character, Resolution 1970 does not limit the Court's subject matter jurisdiction to a specific crime. Thus, the ICC has jurisdiction over crimes against humanity and/or war crimes as long as a sufficient link can be found in the situation underlying Resolution 1970.

2. Jurisdictional Links Between UNSC Resolution 1970 and the Crime of Severe Deprivation of Liberty of Migrants and Refugees

228. The 2021 Communication already established sufficient links regarding a wide array of crimes against humanity and war crimes against migrants and refugees in Libya.[529] Regarding the crime of severe deprivation of liberty of migrants and refugees occurring through their interception at sea and subsequent return to and detention in Libya, jurisdictional links are also very present, as will be argued below.

a. The Crisis in Libya, the Armed Conflict and Crimes Against Migrants and Refugees

229. Since 2011, the crisis in Libya has led to continuing political instability and the emergence of a non-international armed conflict (NIAC). This situation has fostered the strengthening of several State and non-State actors, some of which are affiliated with the different governments competing for authority or looking for legitimacy within the unstable power apparatus. These actors include militias, armed groups, smugglers, and traffickers – all of which are involved in the exploitation and systematic violence against migrants and refugees in the country, as has been sufficiently documented in the 2021 Communication.[530] Particularly in the case of the scLCG, the emergence and capacity-strengthening of this body traces back to this context of instability, as well as to the EU's approach to migration management (see *supra* Section II.C).

230. These actors are deeply intertwined in the Libyan armed conflict and in the commission of crimes against migrants and refugees,[531] from which a jurisdictional link can be inferred. Often, they collaborate with each other to exploit migrants and economically benefit from them. For instance, the DCIM, the scLCG, and armed groups collude with one another for the purpose of

[528] OTP, Twenty-Fourth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011), 9 November 2022, para. 68, https://www.icc-cpi.int/sites/default/files/2022-11/2022-11-09-otp-report-unsc-libya-eng.pdf.
[529] ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, Section IV.A.2, paras. 364 et seq.
[530] ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, paras. 34 et seq.
[531] ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, para. 375; and Mark Micallef *et al*., *Conflict, Coping and Covid: Changing human smuggling and trafficking dynamics in North Africa and the Sahel in 2019 and 2020*, GI-TOC, April 2021, p. 29, https://globalinitiative.net/wp-content/uploads/2021/06/GI-TOC-Changing-human-smuggling-and-trafficking-dynamics-in-North-Africa-and-the-Sahel-in-2019-and-2020.pdf.

smuggling and trafficking migrants in and out of Libya.[532] The testimony of Witness 1 in the 2021 Communication – included in Section III as Incident 12 – is exemplary in that regard, when he explained how the same person who transported him and fellow migrants and refugees to the Zuwara coast to embark on a boat was also present at the disembarkation point, once the boat was intercepted and returned to Libya.[533] Similarly, an AP News investigation found that "traffickers work hand in hand with some coast guard members'" in Zawiya, Zuwara, and Tripoli.[534]

231. Moreover, it has been documented that the scLCG collaborates with armed groups involved in the Libyan armed conflict and which control detention centers. For instance, the UNSC Panel of Experts' 2017 report contains an annex on the links between armed and criminal groups and the scLCG in Zawiya.[535] The most notable example is the Zawiya branch of the scLCG – sometimes referred to as the Zawiya Coast Guard – which was known to collude with the al-Nasr Brigade in that area to take intercepted migrants and refugees to the al-Nasr detention center in Zawiya. [536] The al-Nasr Brigade, and particularly its commander Mohammed Kachlaf (sometimes spelled Kushlav), are known for their collaboration with other armed groups and involvement in clashes in 2016 and 2017.[537]

232. While the DCIM has nominal control of several detention centers (included among those identified in Section III), in reality, these are in fact operated by armed groups who, in turn, also participate in the armed conflict.[538] The detention center in Abu Salim in Incident 8 provides a

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[532] ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, para. 41, citing UNSMIL and OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 20 December 2018, p. 6; Nikolaj Nielsen, *Libyan police lieutenant: 'Coast guard are smugglers'*, EUobserver, 5 July 2021, https://euobserver.com/migration/152337; The Maritime Executive, *Libyan Coast Guard Faces Allegations of Corruption*, 21 March 2017, https://maritime-executive.com/article/libyan-coast-guard-faces-allegations-of-corruption.

[533] ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, Annex I, Interview Protocol Witness 1, p. 26-27.

[534] Maggie Michael, Lori Hinnant, and Renata Brito, *Making Misery pay: Libya militias take EU funds for migrants AP*, 31 December 2019, https://apnews.com/article/united-nations-tripoli-ap-top-news-international-news-immigration-9d9e8d668ae4b73a336a636a86bdf27f.

[535] UN Security Council, Panel of Experts on Libya, Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011), 1 June 2017, Annex 17, https://reliefweb.int/sites/reliefweb.int/files/resources/N1711623.pdf.

[536] Arezo Malakooti, Global Initiative Against Transnational Organized Crime and Clingendael, *The Political Economy of Migrant Detention in Libya: Understanding the players and the business models*, April 2019, p. 71, https://globalinitiative.net/wp-content/uploads/2019/11/Final-Report-Detention-Libya.pdf and UN Security Council, Abd Al Rahman Al-Milad, 7 June 2018, https://www.un.org/securitycouncil/sanctions/1970/materials/summaries/individual/abd-al-rahman-al-milad

[537] UNSC, Mohammed Kachlaf, 7 June 2018, https://www.un.org/securitycouncil/sanctions/1970/materials/summaries/individual/mohammed-kachlaf and Arezo Malakooti, Global Initiative Against Transnational Organized Crime and Clingendael, *The Political Economy of Migrant Detention in Libya: Understanding the players and the business models*, April 2019 p. 73 https://globalinitiative.net/wp-content/uploads/2019/11/Final-Report-Detention-Libya.pdf.

[538] *See generally* Arezo Malakooti, Global Initiative Against Transnational Organized Crime and Clingendael, *The Political Economy of Migrant Detention in Libya: Understanding the players and the business models*, April 2019, https://globalinitiative.net/wp-content/uploads/2019/11/Final-Report-Detention-Libya.pdf.

notable example of the long-standing involvement of members of these armed groups in the Libyan armed conflict and in the commission of crimes against migrants. The Abu Salim detention center is allegedly under the control of Abdel Ghani al-Kikli, a.k.a. "Gheniwa," now commander of the SSA, who has been militarily active and involved in international crimes, in 2011 as part of the Abu Salim Military Council and in 2013 under the command of the Central Security Force – Abu Salim.[539]

233. Another jurisdictional link is established through the impact of the armed conflict on the commission of the crime of severe deprivation of liberty. A clear example is the use of migrant and refugee labor directly or indirectly in the Libyan armed conflict.[540] Most recently, the UN Panel of Experts found evidence of a pattern, present since at least April 2019, in which interceptions at sea contribute to providing forced labor for military purposes in Mitiga.[541] After their interception at sea and subsequent transfer to Mitiga, migrants and refugees are forced to perform military-related tasks including: forcibly and directly participating in hostilities; cleaning and loading weapons; unloading arms and other military equipment; retrieving and disposing of dead bodies after hostilities; and reconstructing military facilities affected by the hostilities.[542] Moreover, detained migrants and refugees are subject to increased risk and vulnerability of being injured or killed during armed hostilities; the July 2019 air raid in Tajoura that killed at least 53 migrants and refugees is a blatant example of this.[543] Even when hostilities are not occurring, the location of the detention centers still places migrants and refugees at high risk considering that many detention centers are located inside or next to military compounds

[539] Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 39, https://www.amnesty.org/en/documents/mde19/4439/2021/en// and Amnesty International, *Libya: Hold Stability Support Authority militia leaders to account*, 4 May 2022, https://www.amnesty.org/en/latest/news/2022/05/libya-hold-stability-support-authority-militia-leaders-to-account/; and Arezo Malakooti, Global Initiative Against Transnational Organized Crime and Clingendael, *The Political Economy of Migrant Detention in Libya: Understanding the players and the business models*, April 2019, https://globalinitiative.net/wp-content/uploads/2019/11/Final-Report-Detention-Libya.pdf.

[540] ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, paras. 369 et seq (referring to the testimonies of Witness 1, 5, 7, and 10).

[541] UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, Annex 21 "Slavery of migrants detainees in the Mitiga detention facility" and Appendix A, B, and C, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf.

[542] UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, Annex 21 "Slavery of migrants detainees in the Mitiga detention facility" and Appendix A, B, and C, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf.

[543] Amnesty International, *Libya: Abhorrent attack on migrant detention centre must be investigated as a war crime*, 3 July 2019, https://www.amnesty.org/en/latest/news/2019/07/libya-investigate-abhorrent-attack-on-migrant-detention-centre/ and UN Security Council, United Nations Support Mission in Libya, Report of the UN Secretary-General to the Security Council on Libya, S/2020/360, 5 May 2020, para. 43, https://unsmil.unmissions.org/sites/default/files/s_2020_360_e.pdf.

of the militias in charge of those centers.[544]A recent example involves the Burashada (also known as Bou-Rashada or Abu Rashada) detention center. On 20 June 2021, a few days after an interception at sea by the scLCG, a weapons cache next to the detention center exploded and injured several detained migrants and refugees, killing at least two.[545] In addition, the recent armed confrontations in Tripoli in July and August 2022 have shown that migrants and refugees in detention continue to be at an increased risk of further violence as part of the armed conflict and instability in Libya.[546]

b. The Severe Deprivation of Liberty of Migrants and Refugees as Part of Libya's Conflict Economy

234. The exploitation of migrants is a key part of Libya's conflict economy, and thus, another strong jurisdictional link can be established.[547] The severe deprivation of liberty of migrants and refugees is part of this exploitation and, thus, instrumental for Libya's conflict economy. In particular, the interceptions at sea of migrants and refugees escaping from Libya perpetuate the cycle of exploitation of migrants and refugees, as they are transferred back to detention centers in the country.

235. Militias running those facilities profit from the detention of migrants in myriad ways. Firstly, they profit directly through the commission of crimes against migrants and refugees, by torturing and extorting them in exchange for their liberty, by selling them as commodities, or by forcing them to work in construction or in conflict-related activities.[548] For example, a piece by the media portal EUobserver quoted an "ex-Libyan lieutenant police officer" as saying that "the Libyan coast guard and smugglers are one together." The source alleged that "the smugglers pay money to the [so-called] Libyan coast guard to let them pass," and that the scLCG confiscated migrants' possessions before handing them off to the militias or the DCIM (with the implication that this is done for profit). The EUobserver report describes the source's account as painting a picture of a "circular business where everyone takes a cut from the victim,"

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[544] Sally Hayden, *My Fourth Time, We Drowned: Seeking Refuge on the World's Deadliest Migration Route*, 29 March 2022, p. 274.

[545] Sara Creta, *Libya detention centre blast exposes dangerous conditions for refugees*, Middle East Eye, 9 July 2021, https://www.middleeasteye.net/news/libya-detention-centre-blast-exposes-dangerous-conditions-refugees.

[546] *See e.g.*, Twitter, Se-Watch International, 27 July 2022, 3:19 PM, https://twitter.com/seawatch_intl/status/1552282643097583617?s=20&t=lMIw4t8247mfjXWQzLooqg.

[547] ECCHR, FIDH, and LFJL, Article 15 Communication, November 2021, para. 380.

[548] ECCHR, FIDH, and LFJL, Article 15 Communication, November 2021, Section III.A, para. 104 and Arezo Malakooti, Global Initiative Against Transnational Organized Crime and Clingendael, *The Political Economy of Migrant Detention in Libya: Understanding the players and the business models*, April 2019, p. 39, https://globalinitiative.net/wp-content/uploads/2019/11/Final-Report-Detention-Libya.pdf. For the Khoms Souq al Khamis detention center, *see* Sally Hayden, *My Fourth Time, We Drowned: Seeking Refuge on the World's Deadliest Migration Route*, 29 March 2022, p. 146-152.

including smugglers notifying the scLCG of their trip and buying motors and boats from the scLCG.[549]

236. Secondly, militias profit from the funding of the detention centers nominally under the control of the DCIM. This occurs because they are under state payroll, receive money indirectly from the EU, or misappropriate funds meant for the provision of food or improvement of infrastructure.[550] Lastly, armed groups and militias participate in "anti-human trafficking" initiatives as a way to obtain revenue from the scLCG and, indirectly, the EU or other international actors, while continuing to operate detention centers.[551]

237. In conclusion, the crimes committed against migrants and refugees in Libya, as substantiated in this Communication, as well as those included in the 2021 Communication, fall under territorial, temporal, and personal scope of the Situation in Libya, as referred by the Security Council to the ICC. Given the severity of the crimes and the involvement of multiple actors from different State and non-State Parties, the Prosecutor should give priority to the investigation of these crimes.

B. Analysis of the Acts Introduced in Section III as Crimes Against Humanity Against Migrants and Refugees

1. Contextual Element of Crimes Against Humanity

238. The Rome Statute defines crimes against humanity in Article 7(1) as acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." The attack is further defined in Article 7(2)(a) 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." [552]

239. The 2021 Communication has already established the existence of such an attack against migrants and refugees in Libya at least since 2011. Building on the previous Communication, this section further demonstrates that the interceptions at sea and return of migrants and refugees to Libya constitute part of this attack.

a. The Attack

[549] Nikolaj Nielsen, *Libyan police lieutenant: 'Coast guard are smugglers'*, EUobserver, 5 July 2021, https://euobserver.com/migration/152337.

[550] Maggie Michael, Lori Hinnant, Renata Brito, *European money spawns more misery for migrants in Libya*, 31 December 2019, https://apnews.com/article/6a9414416f1bab1375094be6883b25ba.

[551] ECCHR, FIDH, and LFJL, Article 15 Communication, November 2021, para. 384, interview with expert Tim Eaton.

[552] Rome Statute, Article 7(2)(a). *See also* ICC, Elements of Crimes, Introduction to Article 7 of the Statute, para. 3.

240. An "attack" is "a course of conduct involving the multiple commission of acts."[553] These acts need not have a military nature,[554] and it suffices "to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity."[555] The understanding of violence encompasses physical and psychological violence, as well as the legislation, government policy, and administrative acts or omissions that mistreat the civilian population.[556] As specified by the Pre-Trial Chamber I in *Prosecutor v. Laurent Gbagbo*, a "course of conduct" already indicates a "systemic aspect" inherent in the attack, "as it describes a series or overall flow of events as opposed to a mere aggregate of random acts."[557]

241. The 2021 Communication has thoroughly established a course of conduct involving different crimes consisting in the infliction of violence and inhumane conditions upon migrants and refugees in Libya.[558] This contributes to the system of exploitation and abuse of migrants and refugees[559] and involves acts of violence that amount to crimes against humanity and/or war crimes. The aspect of *flow* is clearly evident, as the acts constituting the attack are linked to each other.

242. This Communication further argues that the course of conduct extends to other violent acts, such as the interceptions at sea and returns to Libya, during which migrants are severely deprived of physical liberty by the scLCG and Libyan armed groups and/or militias in accordance to the common plan with officials of EU agencies and EU Member States (see Section IV.B.). As illustrated in Section II, interceptions are also part of the system of abuse to which migrants are exposed after being returned to Libya. The 2021 Communication has touched upon this, as it stated that "[t]hese interceptions are frequently violent and result in migrants and refugees'

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[553] Rome Statute, Article 7(2)(a). *See also* ICC, Elements of Crimes, Introduction to Article 7 of the Statute, para. 3.

[554] Rome Statute, Article 7(2)(a). *See also* ICC, Elements of Crimes, Introduction to Article 7 of the Statute, para. 3. *See also The Prosecutor v. Germain Katanga*, Trial Chamber II, "Judgment pursuant to Article 74 of the Statute", 7 March 2014, ICC-01/04-01/07, para. 1101; *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, para. 85.

[555] *The Prosecutor v. Dragoljub Kunarac et al*., ICTY Appeals Chamber, "Judgment", 12 June 2002, IT-96-23, para. 419.

[556] Schabas, *The International Criminal Court*, p. 155; D. Luban, *A Theory of Crimes against Humanity*, in Yale Journal of International Law (2004)

[557] *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, para. 209.

[558] ECCHR, FIDH, and LFJL Art. 15 Communication to the ICC, November 2021, para. 393; UN Security Council, Panel of Experts on Libya, Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011), 5 September 2018, para. 48, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/243/84/PDF/N1824384.pdf?OpenElement; and UN Security Council, Panel of Experts on Libya, Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011), 27 May 2022, p. 15-17, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/334/41/PDF/N2233441.pdf?OpenElement.

[559] Statement of ICC Prosecutor to the UNSC on the Situation in Libya, 9 May 2017, https://www.icc-cpi.int/news/statement-icc-prosecutor-unsc-situation-libya.

forced transport to official detention sites, leading to further cycles of violence and exploitation."[560]

243. As such, interceptions at sea and returns are part of the system of exploitation that commodifies and targets migrants and refugees. They are not isolated incidents of abuse but, rather, are part of the "attack."

b. Directed Against a Civilian Population

244. Article 7(1) of the Statute stipulates that the attack must be directed against a civilian population. ICC jurisprudence has further determined that "the potential civilian victims under article 7 of the Statute could be of any nationality, ethnicity or other distinguishing features."[561]

245. In the attack described above, the status as migrants, refugees, or asylum seekers in Libya is the distinguishing feature under which they are attacked and, as such, they are the primary target of the attack.[562] As part of this attack, interceptions are distinctively directed at migrants, refugees, and asylum seekers that are on boats fleeing Libya.

c. Widespread or Systematic Nature of the Attack

246. While "widespread" and "systematic" are disjunctive elements of the attack,[563] the analysis of acts perpetrated against migrants and refugees as part of the attack show that both elements are fulfilled.

Widespread nature of the attack

247. The notion of "widespread" can be considered a quantitative standard, with regard to the number and multiplicity of civilians against whom the attack is directed, or a qualitative standard, with regard to the geographic scope of the attack. In *Ntaganda*, Pre-Trial Chamber II found that the attack against the civilian population was widespread, as it resulted in a large number of civilian

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[560] ECCHR, FIDH, and LFJL Art. 15 Communication to the ICC, para. 396.

[561] *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, para. 76. *See also The Prosecutor v. Germain Katanga*, Pre-Trial Chamber I, "Decision on the Confirmation of Charges", 30 September 2008, ICC-01/04-01/07, para. 399.

[562] ECCHR, FIDH, and LFJL Art. 15 Communication to the ICC, November 2021, para. 400.

[563] For ICC case law affirming that the conditions of "widespread" and "systematic" in Article 7 of the Rome Statute are disjunctive, *see* 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, para. 94; *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, para. 82; and *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, "Judgment pursuant to Article 74 of the Statute", 21 March 2016, ICC-01/05-01/08, para. 162.

victims.[564] In *Bemba*, Trial Chamber III held the term "widespread" to connote the "large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims."[565] More specifically, the Chamber found it to necessitate "an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians."[566] Hence, a key feature of the "widespread" standard is that it refers to a "multiplicity of victims,"[567] intended to exclude isolated acts of violence,[568] such as "murder directed against individual victims by persons acting of their own volition rather than as part of a broader initiative."[569]

248. The 2021 Communication has established the widespread nature of the attack against migrants and refugees in the context of detention in Libya. This Communication further argues that interceptions at sea with the purpose of returning migrants to Libya constitute part of this attack. As laid out in Sections II and III above, the interceptions at sea and returns to Libya conducted through the coordination between the scLCG and officials of EU agencies and EU Member States are directly connected with the abuse and crimes to which migrants and refugees are exposed after being returned to Libya. As will be analyzed in Section IV.B.2, the severe deprivation of physical liberty begins at sea, as soon as the migrants are intercepted, and continues during their return, disembarkation, and subsequent detention in Libya. Moreover, once intercepted at sea, migrants and refugees are rarely able to end their deprivation of liberty, even after they are brought back to land. The continued deprivation of liberty also ensures that

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[564] *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, para. 24.

[565] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, "Judgment pursuant to Article 74 of the Statute", 21 March 2016, ICC-01/05-01/08, para. 163.

[566] *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, para. 83.

[567] *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, para. 83. *See also The Prosecutor v. Kayishema and Ruzindana*, ICTR Trial Chamber II, "Judgment", 21 May 1999, ICTR-95-01, para. 123; *The Prosecutor v. Akayesu*, ICTR Trial Chamber I, "Judgment", 2 September 1998, ICTR-96-4-T, para. 580; *The Prosecutor v. Mrksić et al*., ICTY Trial Chamber I, "Judgment", 27 September 2007, IT-95-13/1-T, para. 437 ("'widespread' refers to the large scale nature of the attack and the number of victims"); and International Law Commission (ILC), Draft Code of Crimes against the Peace and Security of Mankind (1996), Art. 18, https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf (using the phrase "on a large scale" instead of "widespread").

[568] *See The Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, "Decision on the Prosecutor's application under Article 58", 13 July 2012, ICC-01/04-02/06, para. 19, and *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad al abd-al-Rahman*, Pre-Trial Chamber I, "Decision on the prosecution application under Article 58(7) of the Statute", 27 April 2007, ICC-02/05-01/07, para. 62. *See also Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, ICTR Trial Chamber I, "Judgment and Sentence", 6 December 1999, ICTR-96-3-T, paras 67–69, and *The Prosecutor v. Kayishema and Ruzindana*, ICTR Trial Chamber II, "Judgment", 21 May 1999, ICTR-95-01, paras 122–123.

[569] ILC, Draft Articles on Prevention and Punishment of Crimes Against Humanity with Commentaries (2019), para. 12, https://legal.un.org/ilc/texts/7_7.shtml.

migrants and refugees can be further exploited by performing forced labor and abused by being subject to other crimes against humanity as established by the 2021 Communication, including torture, murder, rape, and sexual slavery, among others. Therefore, interceptions at sea are part of the much larger attack against migrants and refugees in Libya.

249. Though it is the attack as a whole, and not the individual underlying acts, that must be widespread,[570] the nature of the interceptions at sea with the purpose of returning migrants and refugees to Libya also contributes to the widespread character of the attack as a whole. Three factors can be considered. The first one is the number of people subject to interceptions at sea and returns to Libya, which ranges from thousands to tens of thousands per year. In terms of migrants intercepted at sea, according to UNHCR, a total of 32,425 migrants and refugees were intercepted and taken back to Libya in 2021; between January and July 2022, the interceptions involved 9,882 migrants and refugees.[571] Notably, as described in Section III, in many of these cases, the interceptions take place under the coordination of European nationals. After disembarkation in Libya, the majority of the migrants and refugees intercepted are systematically transferred to detention centers. The same data by UNHCR reveals that out of the 32,425 migrants and refugees intercepted in 2021, only 722 were released and the rest taken to different detention facilities; the situation continues in 2022, with only 29 migrants and refugees recorded as being released so far.[572]

250. The second factor is the multiplicity of people targeted. Migrants and refugees should not be understood as a monolithic category. On the contrary, through an intersectional perspective, it can be observed that the group of migrants and refugees targeted is composed of a variety of nationalities, races, ethnic groups, genders, religions, and age groups. The attack is widespread across these different subgroups of migrants and refugees, although the extent and modality of violence used against specific groups largely depends on the combination of these elements.[573] For instance, Black, able-bodied men are frequently targeted for forced labor, and non-Muslim migrants and refugees often suffer worse conditions of detention.

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[570] *The Prosecutor v. Dusko Tadić*, ICTY Appeals Chamber, "Judgment", 15 July 1999, IT-94-1-A, fn.311 to para. 248, citing *The Prosecutor v. Mile Mrksić et al*., ICTY Trial Chamber I, "Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", 3 April 1996, IT-95-13-R61, para. 30: "As long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specific context identified above." *See also* ICC OTP, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, p.18, https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (reaffirming this interpretation).

[571] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation – Rescued Individuals, https://data2.unhcr.org/en/dataviz/211?sv=0&geo=0.

[572] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation – Rescued Individuals, https://data2.unhcr.org/en/dataviz/211?sv=0&geo=0.

[573] ECCHR, FIDH, and LFJL Art. 15 Communication to the ICC, November 2021, paras. 409.

251. The third factor is the geographical scope of the attack. Particularly for the interceptions at sea, the violence reaches not only Libyan territorial waters but, in many cases, also international waters, including the Libyan, Maltese, and Italian SAR zones, where boats flying Libyan flags conduct the interceptions in a violent manner. As such, the widespread nature of the interceptions at sea with the purpose of returning migrants and refugees to Libya further contributes to the widespread nature of the attack.

Systematic nature of the attack

252. The "systematic" character of the attack, as a feature of the contextual element of crimes against humanity, has been defined as "the organized nature of the acts of violence and the improbability of their random occurrence."[574] The term "has been understood as either an organized plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as 'patterns of crimes' such that crimes constitute a 'non-accidental repetition of similar criminal conduct on a regular basis.'"[575] In determining whether an attack is systematic and if patterns of crimes are present, it shall be assessed if: "(i) identical acts took place or similarities in criminal practices can be identified; (ii) the same modus operandi was used; or (iii) victims were treated in a similar manner across a wide geographic area."[576]

253. The 2021 Communication has established the systematic nature of the attack against migrants and refugees in the context of detention in Libya. Moreover, as analyzed above, interceptions at sea with the purpose of returning migrants and refugees to Libya constitute an integral part of this attack. In many cases, interception at sea, return to Libya, and transfer to a detention center is a precondition for the commission of other crimes occurring against migrants and refugees in detention facilities.

254. Additionally, although it is the attack as a whole, and not the individual underlying acts, that must be widespread or systematic,[577] the nature of the interceptions also contributes to the

[574] *The Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, "Judgment", 8 July 2019, ICC-01/04-02/06, para. 692; *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, para. 222; and *The Prosecutor v. Germain Katanga*, Trial Chamber II, "Judgment pursuant to Article 74 of the Statute", 7 March 2014, ICC-01/04-01/07, para. 1123.

[575] *The Prosecutor v. Germain Katanga*, Pre-Trial Chamber I, "Decision on the Confirmation of Charges", 14 October 2008, ICC-01/04-01/07, para. 397; *The Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, "Judgment", 8 July 2019, ICC-01/04-02/06, para. 692; *The Prosecutor v. Germain Katanga*, Trial Chamber II, "Judgment pursuant to Article 74 of the Statute", 7 March 2014, ICC-01/04-01/07, para. 1123; and *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, para. 24.

[576] *The Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, "Judgment", 8 July 2019, ICC-01/04-02/06, para. 693, and *The Prosecutor v. Germain Katanga*, Trial Chamber II, "Judgment pursuant to Article 74 of the Statute", 7 March 2014, ICC-01/04-01/07, para. 1113.

[577] *The Prosecutor v. Dusko Tadić*, ICTY Appeals Chamber, "Judgment", 15 July 1999, IT-94-1-A, fn.311 to para. 248, citing *The Prosecutor v. Mile Mrksić et al*., ICTY Trial Chamber I, "Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", 3 April 1996, IT-95-13-R61, para. 30: "As long as there is a

systematic nature of the attack as a whole. As illustrated in Sections II and III and as will be further analyzed in Section V, the coordination of interceptions at sea and returns of migrants and refugees to Libya between the scLCG and the officials of EU agencies and Member States are clearly conducted pursuant to organized policies in the form of various resolutions, strategies, agreements, etc. The interceptions and returns also follow the same modus operandi: namely, the apprehension of migrants and refugees at sea under the guise of SAR operations, when in fact they are done with the purpose of returning the migrants and refugees to Libya, usually with European nationals coordinating these maritime operations and providing the location of the migrants in distress. Therefore, the interceptions at sea and returns of migrants and refugees to Libya contribute to the systematic character of the attack.

d. Pursuant to a State or Organizational Policy

255. Article 7(2)(a) of the Rome Statute requires the attack on a civilian population to be "pursuant to or in furtherance of a State or organizational policy to commit such attack." While Pre-Trial Chamber I has held that a separate policy element "has no independent relevance as an element of crime," it nonetheless "may serve as evidence of the systematic character of the attack."[578]

256. Although "it is relatively rare ... that a State or organization seeking to encourage an attack against a civilian population might adopt and disseminate a pre-established design or plan to that effect,"[579] a policy can be "inferred by discernment of, inter alia, repeated actions occurring according to a same sequence, or the existence of preparations or collective mobilization orchestrated and coordinated by that State or organization."[580]

257. Moreover, a policy "need not be formalized" and can be "inferred from a variety of factors which taken together, establish that a policy existed."[581] Such factors may include: "(i) that the attack was planned, directed or organized; (ii) a recurrent pattern of violence; (iii) the use of public or private resources to further the policy; (iv) the involvement of the State or organisational forces in the commission of crimes; (v) statements, instructions or documentation

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link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specific context identified above." *See also* ICC OTP, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, p.18, https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (reaffirming this interpretation).

[578] *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Pre-Trial Chamber I, "Decision on the prosecution application under Article 58(7) of the Statute", 29 April 2007, ICC-02/05-01/07, para 62.

[579] *The Prosecutor v. Germain Katanga*, Trial Chamber II, "Judgment pursuant to Article 74 of the Statute", 7 March 2014, ICC-01/04-01/07, para. 1109

[580] *The Prosecutor v. Germain Katanga*, Trial Chamber II, "Judgment pursuant to Article 74 of the Statute", 7 March 2014, ICC-01/04-01/07, para. 1109.

[581] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, "Judgment pursuant to Article 74 of the Statute", 21 March 2016, ICC-01/05-01/08, para. 160.

attributable to the State or the organisation condoning or encouraging the commission of crimes; and/or (vi) an underlying motivation."[582]

258. The 2021 Communication established the existence of a State policy in Libya to attack migrants and refugees, for which Law No. 19 of 2010 has provided a legal basis, allowing for the indiscriminate, arbitrary, and indefinite detention of migrants and refugees, as well as forced labor.[583] Moreover, the 2021 Communication found that the State policy is implemented by the different actors involved in the attack, given that State actors, armed groups, militias, smugglers, and traffickers all participate in the arbitrary detention of and violence against migrants and refugees. Each of these actors has adapted the policy in the manner most convenient to them.[584] The FFM also found "a State policy encouraging the deterrence of sea crossings, the extortion of migrants and refugees in detention, and the subjection to violence and discrimination. Militias (some of which manage official detention settings), criminal networks, traffickers and smugglers contribute to the implementation of this policy."[585]

259. This Communication further argues that the implementation of such a State policy extends to interceptions at sea with the purpose of returning migrants and refugees back to Libya. The interceptions and returns of migrants and refugees are closely tied to the implementation of the State policy within Libya, as the DCIM, or militias affiliated with it, transfer migrants and refugees to official and unofficial detention centers upon disembarkation. This not only entails collaboration between these different Libyan actors but also involves direct collaboration between Libyan and European authorities (such as the European funding of detention centers mentioned in Sections II and III).

260. Thus, the interceptions at sea and returns of migrants and refugees to Libya are part of the policy to attack the migrant and refugee population, and the implementation of this policy ensures that the exploitation and violence against them continues upon their return to Libya.

e. With Knowledge of the Attack

261. Article 7 (1) of the Rome Statute and Article 7 of the Elements of Crimes require that the perpetrator commits the act with knowledge that the act is part of a widespread or systematic attack against a civilian population, without "requiring proof that the perpetrator had knowledge

[582] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, "Judgment pursuant to Article 74 of the Statute", 21 March 2016, ICC-01/05-01/08, para. 160.
[583] ECCHR, FIDH, and LFJL Art. 15 Communication to the ICC, November 2021, para. 419.
[584] ECCHR, FIDH, and LFJL Art. 15 Communication to the ICC, November 2021, para. 420 ff.
[585] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya (Advanced Unedited Version)*, A/HRC/48/83, 1 October 2021, https://reliefweb.int/report/libya/report-independent-fact-finding-mission-libya-ahrc4883-enar, para. 69.

of all characteristics of the attack or the precise details of the plan or policy of the State or organization."

262. Section V will analyze in detail the *mens rea* of each co-perpetrator for the crime of severe deprivation of physical liberty.

263. In conclusion, the crimes committed against migrants and refugees, as described in this Communication, need to be seen in the context of the widespread and systematic attack against the migrant and refugee population, pursuant to a clear policy at the State level throughout Libya, as further detailed in the 2021 Communication. Thus, the contextual element for crimes against humanity is fulfilled.

2. Art. 7 (1) (e) – Crime Against Humanity of Imprisonment or Severe Deprivation of Physical Liberty

264. The 2021 Communication introduced ample documentation regarding the crime of imprisonment or severe deprivation of physical liberty, in violation of fundamental rules of international law, of migrants and refugees in Libya.[586] This crime is obviously mostly happening in official and unofficial detention centers and other places of captivity throughout Libya.[587] However, as this section illustrates, deprivation of migrants and refugees' liberty already starts when migrants and refugees are intercepted at sea with the purpose of returning them to Libya. These interceptions can be seen as the beginning of a continuous act of deprivation of liberty that goes on to include the migrants and refugees' return and disembarkation in Libya, where they are systematically transferred to detention facilities under inhumane conditions. This form of deprivation of liberty is, in many cases, a precondition for the further commission of other crimes against migrants and refugees in Libya.

a. Material Elements for Severe Deprivation of Physical Liberty Under Art. 7 (1) (e)

265. The Elements of Crimes require two material elements for the crime of imprisonment or other severe deprivation of physical liberty: (i) "the perpetrator imprisoned one or more persons or

[586] *See e.g.*, UN Human Rights Council, Independent Fact-Finding Mission on Libya, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/48/83, 1 October 2021; Amnesty International, *Libya's Dark Web of Collusion: Abuses against Europe-bound Refugees and Migrants*, 11 December 2017, https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF; ECCHR, FIDH, LFJL Art. 15 Communication, November 2021; and Human Rights Council, Report of the Independent Fact-Finding Mission on Libya, A/HRC/50/63, 27 June 2022, para. 39, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya.

[587] *See e.g.*, ECCHR, FIDH, LFJL Art. 15 Communication, November 2021.

otherwise severely deprived one or more persons of physical liberty"; and (ii) "the gravity of the conduct was such that it was in violation of fundamental rules of international law."[588]

The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty

266. The ICC Pre-Trial Chamber III understands "imprisonment" to "encompass unlawful captivity of a person in an enclosed environment, such as a prison or psychiatric institution," and "other severe deprivation of physical liberty" to denote "the unlawful restriction of the person's movements to a specific area, such as a ghetto, camp, or a house."[589] The UN General Assembly has defined detention as the severe deprivation of liberty occurring "except as a result of conviction for an offence."[590] The UN Human Rights Committee (UNHRC) further considers involuntary transportation to be a deprivation of liberty.[591]

267. Under these standards, this Communication argues that Libyan actors, in coordination with European authorities, are severely depriving migrants and refugees of their physical liberty. This deprivation of liberty is a continuous act starting from **interceptions at sea and extending to the forceful return to and subsequent detention in Libya**.

268. Far from being search and rescue operations that save lives, the interceptions at sea and subsequent return of migrants and refugees to Libya are violent operations that actually often put the lives of the intercepted in danger. Interceptions are apprehensions of migrants and refugees at sea for the main purpose of returning them to Libya and keeping them out of Europe and can constitute a deprivation of the migrants and refugees' physical liberty. Furthermore, the subsequent return to and disembarkation in Libya can also constitute a form of deprivation of liberty under the standards of the UNHRC.

269. The deprivation of liberty of migrants and refugees is committed against their will and without providing them any legal option to refuse or challenge their interception at sea, return, and ensuing detention in Libya. It is also not the result of the commission of any offence: none of the 12 incidents documented in this Communication has evidence of the existence of warrants, convictions, or any legal proceedings at any point throughout the process of detaining migrants and refugees intercepted on the boats and then returning them to Libya.

270. The incidents described in Section III thoroughly documented this reality. In **Incident 1**, the deprivation of liberty started on 14 April 2020 at 05:00 CEST when the Libyan-flagged fishing

[588] Elements of Crimes, Article 7 (1) (e).
[589] ICC, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi," Pre-Trial Chamber, ICC-01/17-9-Red (9 November 2017), para. 68.
[590] UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Use of Terms (b) and (d), Adopted by General Assembly resolution 43/173 of 9 December 1988.
[591] UNHRC, General comment No. 35: Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, para. 5.

boat *Dar Al Salam 1*, under the orders of Maltese authorities, intercepted 51 migrants and refugees. It continued with their return to Libya, where they were disembarked at the Tripoli Naval Base Abu Sitta, and their placement in the Tariq al-Sika detention center. A day before *Dar Al Salam 1* intercepted the migrants and refugees, seven migrants died after jumping into the sea to avoid being returned to Libya, which shows the direness of the situation and that they are in fact intercepted against their will.

271. In **Incident 5**, the deprivation of liberty started on 10 April 2019, when the 20 migrants and refugees were intercepted by Libyan actors (possibly the scLCG or GACS). Following the interception at sea, the deprivation of liberty continued as migrants and refugees were returned to Libya, disembarked at the Zuwara port and transferred to the eponymous detention center.

272. Regarding **Incident 6**, the deprivation of liberty started with the interception at sea on 7 November 2018 conducted by the crew of the *Nivin* vessel – following the instructions of the Italian MRCC acting on behalf of the scLCG. The 91 migrants and refugees were then returned back to Libya, arriving at the Misrata port on 10 November. In comparison to other incidents in which the interception, return, and detention each follow successively in a short time span, in this incident, the deprivation of liberty was protracted when the migrants and refugees tried for several days to refuse their disembarkation from the *Nivin* in Libya. The deprivation of liberty continued throughout these days, as the migrants and refugees were still apprehended by the *Nivin* crew, and they were not able to leave the boat without facing their transfer to a detention center in Libya. In this incident, not only the complete absence of warrants, convictions, or legal recourse was evident, but also the use of violence for forced disembarkation – through threats and actual use of violence, including tear gas, rubber bullets, and live ammunition, the Libyan Security Forces finished removing all migrants and refugees from the *Nivin* by 20 November. Following their removal, the majority were transferred to the Karareem or Zlitan detention centers or the Karareem Anti-Crime Department. Several migrants and refugees were transferred to a hospital in Misrata before being taken for questioning to unknown locations in Tripoli or Misrata.

273. In **Incident 7**, the deprivation of liberty of around 161 migrants and refugees began on 2 May 2019, when the scLCG crew aboard the *Sabratha 654* vessel intercepted the migrants and refugees at sea. Prior to the interception, the civil monitoring aircraft *Colibri* observed *Sabratha 654* chasing one of the two boats in distress that was trying unsuccessfully to move away from the scLCG vessel, likely in an attempt to avoid being returned to Libya. The deprivation of liberty continued as the migrants and refugees were disembarked in the Alkhums Port on 3 May 2019 and subsequently taken to the Khoms Souq al Khamis detention center.

274. Regarding **Incident 8**, the crew of the scLCG vessel *Ras Jadir* deprived 20 migrants and refugees of their liberty beginning with their interception at sea [REDACTED] on 30 July 2021. The deprivation of liberty continued through the return of the 20 migrants and refugees back to

Libya. Despite the lack of specific information regarding the exact disembarkation point and detention center, the evidence available in this Communication allows the Submitting Party to conclude that the deprivation of liberty continued with the disembarkation and ensuing detention of migrants and refugees in Libya. The likely disembarkation points were the Tripoli Naval Base, the Azzawiya Oil Refinery Port, or the Tripoli Commercial Port; the migrants and refugees were likely transferred to the detention centers of Al Mabani, Azzawiya Stabilization Support Apparatus (SSA), and Abu Salim.

275. In **Incident 9**, the deprivation of liberty of the 100 migrants and refugees aboard Boat 1 started in the afternoon of 21 April 2021 when the crew of the scLCG vessel *Ubari* intercepted them at sea. The deprivation of liberty continued as the migrants and refugees were returned to Libya, disembarked at the Tripoli Naval Base and subsequently transferred to the Al Mabani detention center. Such involuntary transportation is also part of the severe deprivation of liberty under the standards of the UNHRC.

276. In **Incident 10**, the deprivation of liberty of 11 migrants and refugees began when the crew of the scLCG patrol boat *Fezzan* intercepted the migrants at sea at 21:00 UTC on 28 March 2021. The migrants and refugees continued to be deprived of their liberty as they were returned to Libya and disembarked on 29 March 2021 at the Tripoli Naval Base and subsequently transferred in DCIM buses to the Al Mabani detention center.

277. In **Incident 11**, the deprivation of liberty of 50 migrants and refugees began on 12 February 2020 at 12:10 UTC when the crew of the scLCG patrol boat *Fezzan* intercepted them at sea. The information available to the Submitting Party is insufficient to determine the exact point of disembarkation and detention facility to which the migrants and refugees were taken; however, following the patterns of deprivation of liberty identified in this Communication and the general data available in UNHCR's database, it is highly likely that the 50 migrants and refugees were disembarked in the Tripoli Commercial Port and transferred to the Hay Al-Andalus Investigation Unit – thereby indicating that their deprivation of liberty continued after their return to Libya.

278. Lastly, in **Incident 12**, Witness 1 (already included in the 2021 Communication) was deprived of his liberty when, on 28 February 2018, the boat he was traveling on was intercepted by unidentified Libyan actors. Following the interception, he was returned to Libya and disembarked at the Zuwara port and subsequently transferred by bus to the Zuwara detention center. After five days in that detention center, Witness 1 was transferred to another detention center, this time in Janzour, where he would stay for five months before being once again transferred to the Salah Aldin detention center.

279. In many other publicly documented cases of interceptions, it is very obvious that they amount to a form of deprivation of liberty conducted by means of violence and against the migrants and refugees' will. Those who were allegedly "rescued" jumped into the sea or protested going

aboard vessels to avoid being returned to Libya. For instance, during an incident on 2 May 2021, several of the people in distress jumped into the water to prevent interception and return by the scLCG to Libya; they also declared on the phone during a distress call that "[w]e prefer to die, than to be taken back to the Libyan hell."[592] During the infamous *El Hiblu 1* incident on 26 March 2019, people in distress that were brought aboard a merchant vessel protested vehemently upon learning they were approaching Libya, rather than Malta as promised – they were eventually disembarked in Malta, but arrested and charged with criminal offenses.[593] A similar incident took place in 2018 with regard to an Italian merchant vessel that attempted to return rescued people to Libya.[594]

280. Moreover, as discussed in Section II.A.2, the scLCG is widely reported to use reckless and dangerous forms of threats and violence against migrants and refugees during interceptions. From ramming, circling, and roping in migrant boats to shooting directly at migrants, the scLCG's dangerous operations further demonstrate that migrants and refugees are already being severely deprived of their physical liberty during interceptions at sea and on their way back to Libya. This also underscores the fact that the interceptions at sea are not search and rescue operations that save lives; the interceptions themselves put lives in further danger.

281. As such, this Communication argues and emphasizes that the interceptions at sea constitute the beginning of the continuous deprivation of the migrants and refugees' physical liberty, which extends to the subsequent return to, disembarkation in, and detention in Libya.

The gravity of the conduct was such that it was in violation of fundamental rules of international law

282. For the deprivation of liberty to be severe, the conduct must be in violation of fundamental rules of international law, meaning that the person must have been deprived of liberty without due process of law.[595] Such rules include international treaties, such as the International Covenant on Civil and Political Rights (ICCPR), which protects the right to be free from arbitrary

[592] *See e.g.*, Joint Statement by Alarm Phone and Mediterranea Saving Humans, 3 May 2021, https://mediterranearescue.org/en/news-en/95-people-captured-at-sea-and-pushed-back-to-libya-the-case-from-may-2/.

[593] Zach Campbell, *The Rescue*, The Atavist Magazine, No. 95, 2019, https://magazine.atavist.com/the-rescue-mediterranean-migrants-malta-europe-crisis/.

[594] Asylum Information Database, Country Report: Italy (2020), p. 32, https://asylumineurope.org/wp-content/uploads/2021/06/AIDA-IT_2020update.pdf.

[595] ICC, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi," Pre-Trial Chamber, ICC-01/17-9-Red (9 November 2017), para. 68, citing ICTY, *Prosecutor v. Kordić and* Čerkez, Trial Chamber Judgment, IT-95-14/2-T (26 February 2001), para. 302; ICTY, *Prosecutor v. Krnojelac*, Trial Chamber Judgment, IT-97-25-T, (15 March 2002), para. 113; ICTR, *Prosecutor v. Ntagerura et al*, Trial Chamber Judgment and Sentence, ICTR-99-46-T (25 February 2004), para. 702; Extraordinary Chambers in the Courts of Cambodia, *Prosecutor v. KAING Guek Eav alias Duch*, Trial Chamber Judgment, 001/18-07-2007/ECCC/TC, (26 July 2010), para. 347.

detention and the right to a fair trial.[596] Moreover, "[t]he brevity of detention alone cannot be brought forward as an argument to deny the severity of the deprivation of physical liberty"; it is not required that the imprisonment or the deprivation of liberty occurs for a prolonged period of time.[597]

283. As such, procedural safeguards supporting the right to be free from arbitrary detention should have been provided, including "the right to review by a court of the legality of the detention."[598] In particular for detention in the context of immigration control, the Human Rights Committee has established that "the detention must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time."[599]

284. In the 12 incidents described in Section III, the deprivation of liberty of migrants and refugees from the interceptions at sea to their detention in centers in Libya amounts to arbitrary detention under international law. Migrants and refugees are apprehended and detained solely due to their assumed status and under a Libyan law that is contrary to international law. Moreover, no procedural protections are granted to migrants and refugees throughout the process of their interception at sea, return to, and detention in Libya. Migrants and refugees are not able to have their interception, return, and detention challenged by a court or any administrative process in Libya. Moreover, the deprivation of liberty of migrants and refugees in Libya is never justified as reasonable, necessary, and proportionate. The fact that the detention is indefinite and without a legal option to end or challenge it, renders it unlawful. As detailed in Section II, Libya lacks all guarantees and procedures for the international protection of refugees and asylum seekers, with no possibility of having any asylum claim considered before national authorities. [600]

285. Therefore, fundamental rules of international law regarding the prohibition of arbitrary detention are violated during the migrants and refugees' deprivation of physical liberty that begins with their interception at sea and continues during their return to and subsequent disembarkation and detention in Libya. The inhumane conditions of the deprivation of liberty in Libya detention centers and the commission of other crimes against humanity in these

[596] International Covenant on Civil and Political Rights (ICCPR), Articles 9, 14, and 15.
[597] ICC, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi," Pre-Trial Chamber, ICC-01/17-9-Red (9 November 2017), para. 68.
[598] UN Human Rights Committee, General Comment No. 35, Article 9: Liberty and security of person, CCPR/C/GC/35, 16 December 2014, para. 4.
[599] UN Human Rights Committee, General Comment No. 35, Article 9: Liberty and security of person, CCPR/C/GC/35, 16 December 2014, para. 18.
[600] Even if intercepted migrants and refugees have the option to register with UNHCR as asylum seekers, the registration is not a mechanism that allows for the end of the detention. Currently, only nationals of Iraq, Syria, Palestine, Eritrea, Ethiopia, Somalia, Sudan, South Sudan, and Yemen are able to be registered with UNHCR in Libya. See e.g. Sally Hayden, *My Fourth Time, We Drowned: Seeking Refuge on the World's Deadliest Migration Route*, 29 March 2022.

settings, as thoroughly detailed in the 2021 Communication, also make the deprivation of liberty not only unlawful, but also criminal.

286. Moreover, in this specific context, a substantive legal principle has also been violated – the principle of non-refoulement. As laid out in Section II.C., the principle of non-refoulement is recognized in international law, including under international SAR law and international refugee law. Moreover, it is a part of customary international law.[601] As such, non-refoulement is a fundamental principle of international law that has been repeatedly violated by both Libyan actors and officials of EU agencies and Member States.

287. In all incidents in Section III, the principle of non-refoulement was violated as migrants and refugees were returned directly to Libya, a country in which – as already thoroughly described in the 2021 Communication – their rights and freedoms are constantly under attack. These violations start with interceptions at sea, as those operations are conducted for the purpose of returning migrants and refugees to Libya, and clearly persist during the subsequent return to, disembarkation in, and systematic detention in Libya. As such, the operation of interceptions and returns of migrants and refugees, as exemplified by the incidents included in this Communication, is an outright violation of the non-refoulement principle.

288. Therefore, in actively participating in interceptions at sea, as well as supporting the Libyan actors' capacity to carry out interceptions and returns of migrants and refugees to Libya, officials of EU agencies and Member States have contributed to violations of the non-refoulment principle and to a system of arbitrary detention, such that the gravity of this conduct violates fundamental rules of international law. Thus, this element of severe deprivation of physical liberty of migrants and refugees in the 12 incidents included in this Communication is fulfilled.

The conduct was committed as part of a widespread or systematic attack directed against a civilian population

289. The Elements of Crimes determine that the course of conduct should be committed as part of a widespread or systematic attack against a civilian population.

290. As already noted, the severe deprivation of liberty and detention of migrants and refugees in Libya is a part of the widespread and systematic attack against migrants and refugees (see Section IV.B.1). This is so because the severe deprivation of liberty is an integral part of the

[601] *See* UN High Commissioner for Refugees (UNHCR), *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, https://www.refworld.org/docid/437b6db64.html ("UNHCR considers that the principle of non-refoulement has acquired a normative character and constitutes a rule of international customary law"), and European Commission, Migration and Home Affairs, *Non-Refoulement*, https://home-affairs.ec.europa.eu/pages/glossary/non-refoulement_en ("[t]he principle of non-refoulement is a part of customary international law and is therefore binding on all States, whether or not they are parties to the Geneva Refugee Convention and Protocol").

system of exploitation and abuse of migrants and refugees that constitute the attack against this population.

291. Once deprived of their liberty at sea, it is virtually certain that migrants and refugees will be returned to Libya and put into detention facilities through "a systematic transfer" and will remain there for indefinite periods of time, while being subjected to intolerable conditions.[602] It is in the context of this deprivation of liberty that other crimes against humanity against migrants and refugees are committed, including murder, torture, rape, enslavement, sexual slavery, other forms of sexual violence, and other inhumane acts.[603] Indeed, it is recognized that the interceptions at sea are directly connected with the system of abuse to which migrants and refugees are exposed after being returned to Libya.[604]

292. As described in Section III, the deprivation of liberty of migrants and refugees in the Libyan detention centers is part of the widespread and systematic attack against this population. Among the detention centers related to the incidents included in this Communication, there has been ample documentation of a wide range of criminal conduct, encompassing murder, torture, inhumane conditions of detention, enslavement, forced labor, and various forms of sexual violence. These centers include the **Tariq al-Sika** detention center,[605] the **Zuwara** detention center,[606] the **Zawiya al-Nasr** detention center,[607] the **Alkhums** detention center (also known as the **Khoms Souq al Khamis or Souq Alkhums** detention center),[608] the **Abu Salim** detention center,[609] and the **Al Mabani** detention center.[610]

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[602] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya (Advanced Unedited Version)*, A/HRC/48/83, 1 October 2021, para. 68, https://reliefweb.int/report/libya/report-independent-fact-finding-mission-libya-ahrc4883-enar.

[603] ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, paras. 388-655

[604] German Federal Foreign Office, Statement by Human Rights Commissioner Luise Amtsberg on maritime rescue efforts in the Mediterranean, 29 July 2022, https://www.auswaertiges-amt.de/en/newsroom/news/amtsberg-maritime-rescue-efforts/2545076.

[605] Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 26, https://www.amnesty.org/en/documents/mde19/4439/2021/en//; ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, paras. 388-655 (inhumane conditions of detention, enslavement, forced labor and torture).

[606] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, para. 447 (torture).

[607] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021; Sally Hayden, *My Fourth Time, We Drowned: Seeking Refuge on the World's Deadliest Migration Route*, 29 March 2022, p. 227-233; UN Security Council, Mohammed Kachlaf, 7 June 2018, https://www.un.org/securitycouncil/sanctions/1970/materials/summaries/individual/mohammed-kachlaf (murder, torture, sexual slavery, forced labor, forced nudity, and inhumane conditions of detention, as well as its links with human smuggling and trafficking networks).

[608] Sally Hayden, *My Fourth Time, We Drowned: Seeking Refuge on the World's Deadliest Migration Route*, 29 March 2022, p. 146-152 (enslavement, torture, rape, and forced labor).

[609] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021; Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 39, https://www.amnesty.org/en/documents/mde19/4439/2021/en//; Sally Hayden, *My Fourth Time, We Drowned: Seeking Refuge on the World's Deadliest Migration Route*, 29 March 2022, p. 137-143 (torture, sexual violence, murder, and shootings after attempts to escape).

[610] Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 6, https://www.amnesty.org/en/documents/mde19/4439/2021/en//; Outlaw Ocean:

293. Hence, the severe deprivation of liberty is an integral component of the system of exploitation and abuse against migrants and refugees and thereby part of the widespread and systematic attack against migrants and refugees.

e. Mental Element Required for the Crime of Severe Deprivation of Physical Liberty Under Art. 7 (1) (e)

294. Regarding the mental element for severe deprivation of physical liberty, Article 7 (1) (e) of the Rome Statute does not set out specific requirements for *mens rea*. Therefore, Article 30 applies, which means a person would be criminally responsible and liable for punishment if the material elements are committed with intent and knowledge.[611] A person has intent where the person "means to engage in the conduct" (in relation to a conduct) or the person "means to cause that consequence or is aware that it will occur in the ordinary course of events" (in relation to a consequence).[612] A person has knowledge if they are aware that a circumstance exists or a consequence will occur in the ordinary course of events.[613]

295. The Elements of Crimes further specify that the perpetrator (1) must have been aware of the factual circumstances that established the gravity of the conduct; and (2) must have known that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[614]

296. As will be analyzed in Section V, the severe deprivation of physical liberty has been committed with each perpetrator's knowledge, and each perpetrator was aware of the gravity of the conduct and knew it was part of a widespread or systematic attack directed against a civilian population.

V. Individual Criminal Responsibility of Alleged Perpetrators

297. Having established that there are reasonable grounds to believe that the crime of severe deprivation of physical liberty as a crime against humanity has been committed against migrants and refugees intercepted at sea and returned to Libya, this Communication argues that, alongside Libyan actors, namely members of the scLCG and militias operating in the country, officials of EU agencies and EU Member States are also directly responsible for the commission of this crime against migrants and refugees in the context of their interception, return to, and detention in Libya.

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https://www.theoutlawocean.com/investigations/the-secretive-libyan-prisons-that-keep-migrants-out-of-europe/; ECCHR, FIDH, LFJL, Article 15 Communication, November 2021 (murder, torture, extortion, rape, forced labor, and detention under inhumane conditions).

[611] Rome Statute, Article 30 (1).

[612] Rome Statute, Article 30 (2).

[613] Rome Statute, Article 30 (3).

[614] Elements of Crimes, Article 7 (1) (e).

298. Notwithstanding the many actors involved at different levels, in accordance with the OTP's strategic approach, this Communication focuses on several high-ranking EU agencies' and EU Member States' officials that are the "most responsible"[615] as co-perpetrators of these crimes and for which the Submitting Party has found reliable evidence of their involvement. This section thus analyzes the individual criminal responsibility for such acts in terms of "co-perpetration" under Article 25(3)(a) of the Rome Statute. Moreover, the alleged perpetrators that have been identified here (and listed in Annex III) are intended to provide a preliminary outline of the involved individuals and does not exclude the fact that other individuals, involved in such crimes at different levels, may be identified by the OTP during the course of its investigation.

A. Legal Standard for Co-Perpetration Under the Statute

299. According to Article 25(3)(a) of the Rome Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the ICC if that person commits such a crime "jointly with another." ICC jurisprudence has further specified the following material and mental elements for co-perpetration:

- Agreement or common plan between two or more persons
- Coordinated essential contribution which results in the fulfillment of material elements of the crime
- The *mens rea* required for the crime committed
- Mutual awareness that implementing the common plan would result in the fulfillment of the material elements of the crime
- Awareness of factual circumstances enabling joint control

300. As for the first material element, the agreement or common plan between two or more persons, the common plan need not be explicit; it can be inferred from subsequent concerted action of the co-perpetrators.[616] Moreover, the common plan can be initially non-criminal, but there must be a virtual certainty that the commission of the crimes would be an outcome of the common plan.[617]

[615] OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, para. 42, https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.
[616] *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber, "Decision on the confirmation of charges", 29 January 2007, ICC-01/04-01/06, para. 345. See also *The Prosecutor v. Jean-Pierre Bemba Gombo et al*, Trial Chamber VII, "Judgment pursuant to Article 74 of the Statute", 19 October 2016, ICC-01/05-01/13, para. 66.
[617] *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber, "Decision on the confirmation of charges", 29 January 2007, ICC-01/04-01/06, para. 344. See also *The Prosecutor v. Jean-Pierre Bemba Gombo et al*, Trial Chamber VII, "Judgment pursuant to Article 74 of the Statute", 19 October 2016, ICC-01/05-01/13, para. 67.

301. According to the second material element, each co-perpetrator must provide a coordinated essential contribution resulting in the fulfillment of the material elements of the crimes.[618] There is no need to show each individual's contribution alone caused the crime – control over the crime is collective.[619] Whether the contribution is essential depends on whether the co-perpetrator performs an essential role in accordance with the common plan, and whether the contribution, as it relates to the exercise of the role and functions assigned, is essential.[620] In other words, the co-perpetrator must have the power to frustrate the commission of the crime by not performing his or her task.[621] Still, there is no need for the co-perpetrator to be physically present at the scene or physically commit any elements of the crime.[622]

302. As for the *mens rea* required, according to the general provision under Art. 30 of the Rome Statute, the crime of severe deprivation of physical liberty must be committed with intent or knowledge. The corresponding Elements of Crimes further specify that the perpetrator (1) must have been aware of the factual circumstances that established the gravity of the conduct; and (2) must have known that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

303. According to ICC jurisprudence, additional mental elements are specifically required for co-perpetration. In the first one, co-perpetrators must be mutually aware – and accept – that the common plan will result in the realization of the material elements of the crime.[623] In other words, they must have intent or knowledge of the virtual certainty of the commission of the crime.[624] Under this standard, each co-perpetrator must be aware that, in an ordinary course of events, the commission of the crime will follow his or her actions or omissions.[625]

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[618] *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, para. 350.

[619] *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, para. 994.

[620] *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, para. 1000.

[621] *The Prosecutor v. Jean-Pierre Bemba Gombo et al*, Trial Chamber VII, "Judgment pursuant to Article 74 of the Statute", 19 October 2016, ICC-01/05-01/13, para. 69.

[622] *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, para. 1003. See also *The Prosecutor v. Jean-Pierre Bemba Gombo et al*, Trial Chamber VII, "Judgment pursuant to Article 74 of the Statute", 19 October 2016, ICC-01/05-01/13, para. 69.

[623] *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber, "Decision on the confirmation of charges", 29 January 2007, ICC-01/04-01/06, paras. 361-365. See also *The Prosecutor v. Jean-Pierre Bemba Gombo et al*, Trial Chamber VII, "Judgment pursuant to Article 74 of the Statute", 19 October 2016, ICC-01/05-01/13, para. 70.

[624] *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber, "Decision on the confirmation of charges", 29 January 2007, ICC-01/04-01/06, paras. 361-365. See also *The Prosecutor v. Jean-Pierre Bemba Gombo et al*, Trial Chamber VII, "Judgment pursuant to Article 74 of the Statute", 19 October 2016, ICC-01/05-01/13, para. 70.

[625] *The Prosecutor v. Jean-Pierre Bemba Gombo et al*, Trial Chamber VII, "Judgment pursuant to Article 74 of the Statute", 19 October 2016, ICC-01/05-01/13, para. 29.

304. As a second mental element for co-perpetration, the individuals must be mutually aware of the factual circumstances enabling joint control,[626] meaning that the co-perpetrators must be aware of their essential roles and their ability to frustrate the common plan by refusing to perform their respective tasks.[627]

B. Analysis of the Individual Criminal Responsibility of Alleged Co-Perpetrators of the Crime of Severe Deprivation of Physical Liberty

305. Based on available evidence, the following section analyzes the abovementioned material and mental elements to determine the individual criminal responsibility of officials of EU agencies and EU Member States, as well as officials of the internationally recognized Libyan government, and other Libyan actors as co-perpetrators of the crime of severe deprivation of physical liberty.

1. The Existence of an Agreement or Common Plan Between Two or More Persons

306. The background provided in Section II, along with the facts described in Section III, are indicative of the existence of an agreement or a common plan between officials of EU agencies and Member States and Libyan actors to intercept migrants and refugees traveling via the Central Mediterranean route, with the aim of returning them back to Libya.

307. At least since 2016, there is ample evidence of the collaboration between officials of EU agencies and Member States with Libyan actors. According to this plan, EU agencies and Member States would provide different forms of support to Libyan actors, mainly the scLCG,[628] to ensure that migrants and refugees fleeing Libya are intercepted at sea and returned to Libya. Notably, in its assessment on the situation in Libya, the German Parliament's Scientific Service has determined that, as part of an agreement with the EU, the scLCG prevents migrants and refugees from continuing their journey towards Europe.[629]

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[626] *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, "Decision on the confirmation of charges", 14 March 2012, ICC-01/04-01/06, paras. 366-367.

[627] *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, para. 370.

[628] As described in Section II, public documentation available has also identified the SSA, GACS, and other groups as conducting interceptions at sea. However, the incidents described in this Communication and the resulting analysis of the existence of a common plan refer to the scLCG. The OTP could further investigate the involvement of these other groups in a common plan to intercept migrants and refugees at sea and return them to Libya.

[629] Deutscher Bundestag – Wissenschaftliche Dienste, *Libyen: aktuelle politische Situation und Hafteinrichtungen für Migranten*, WD 2 - 3000 - 005/22, 3 February 2022, p. 15 https://www.bundestag.de/resource/blob/887842/6b256b49a87d6b4b589f79631720e46b/WD-2-005-22-pdf-data.pdf

308. Such a common plan, as it is publicly framed, may not appear as criminal at first glance. Initially, it was enacted with goals such as border management, combatting human trafficking and smuggling, and even saving lives. Nonetheless, evidence shows that the cooperation with Libyan actors, in terms of the provision of training, funding, technical equipment, and operational contributions, in particular to the scLCG, results, with virtual certainty, in the commission of grave crimes against migrants and refugees at sea and in Libya.

309. Evidence is provided in this sense by the widely available reports and information that show that migrants and refugees who have been intercepted and returned to Libya are systematically sent to detention centers, where the commission of grave crimes are well-documented – as thoroughly analyzed in the 2021 Communication. In 11 out of the 12 incidents outlined in Section III, the migrants and refugees intercepted at sea were returned to Libya and indefinitely detained there.

310. The common plan has two levels. The first level consists in setting up frameworks for cooperation with Libyan actors to build up their capacity to intercept migrants and refugees at sea, return them to, and detain them in Libya. These frameworks for cooperation, as explained below in detail, allow for EU agencies and Member States to provide to the scLCG funding, training, technical equipment, and patrol vessels.

311. On a second level, within these frameworks of cooperation, officials of EU agencies and Member States contribute to the interception operations of the scLCG which invariably lead to the return and detention of the migrants and refugees in Libya. These operational contributions often take the form of relaying to the scLCG the information on the position of boats, guiding them to such positions, or communicating on behalf of the scLCG.

312. While there had been previous cooperation with Libyan authorities in terms of border and migration management, the common plan under which the crime against humanity of severe deprivation of liberty has been and continues to be committed, has its origins in 2016, at the highest political levels of the EU. In June 2016, the Council of the EU amended the mandate and mission of EUNAVFOR MED to, among other things, include the provision of training and capacity-building to the so-called Libyan Coast Guard and Navy,[630] arguing for the need to reduce trafficking through the Central Mediterranean and increase the ability of the scLCG to perform "search and rescue activities."[631] Given the virtual certainty of the commission of the crime of severe deprivation of liberty, these activities cannot be considered as search and rescue

[630] Council of the EU, *Council Decision (CFSP) 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)*, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D0993&from=EN.

[631] Council of the EU, *European External Action Service (EEAS) to the Political and Security Committee and Delegations, Strategic Review on EUNAVFOR MED Operation Sophia, EUBAM Libya & EU Liaison and Planning Cell*, 27 July 2018, para. 73, https://www.statewatch.org/media/documents/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf.

activities, and are, in fact, interceptions at sea. Following the June 2016 decision of the Council of the EU, the Political and Security Committee (PSC)[632] formally authorized the commencement of the training of Libyan personnel in August 2016, the official decision of which was signed by then-PSC Chairperson Walter Stevens.[633] That same month, the EU Commission and EEAS instructed the Italian Coast Guard to support Libyan actors in establishing a Libyan MRCC and declaring a Libyan SAR zone.[634]

313. In January 2017, in advance of the informal meeting of heads of State or Government at the Valletta Summit on 3 February 2017, the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, Federica Mogherini, sent a Joint Communication to the European Parliament, the European Council, and the Council of the EU, which summarized the key features of the common plan. The Joint Communication on migration in the Central Mediterranean stresses the need for further cooperation between EU agencies, Member States, and Libyan actors with the intended aims of managing migration flows, reducing the number of crossings over the Central Mediterranean, saving lives, combatting trafficking and smuggling, and protecting migrants. For this, the Libyan GNA is identified as a "crucial partner in this endeavour."[635]

314. The Joint Communication states that "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."[636] In this context, building up the capacity of the scLCG is established as a priority, through: (1) trainings provided by EUNAVFOR MED Operation Sophia, the Seahorse Mediterranean Network,[637] and Frontex; (2) an increase in patrolling assets; (3) the

[632] The PSC is a Committee of the Council of the EU deals with the EU's Common Foreign and Security Policy (CFSP). The PSC contributes to the definition of EU policies and monitors the international situation related to the CFSP. It is chaired by representatives from the EEAS. See: Publications Office of the European Union, *Political and Security Committee (PSC)*, 24 March 2017, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM%3Apolitical_security_committee

[633] Council of the EU, *Political and Security Committee Decision (CFSP) 2016/1635 of 30 August 2016 on the commencement of the capacity building and training of the Libyan Coast Guard and Navy by the European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) (EUNAVFOR MED/3/2016)*, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D1635&from=EN.

[634] Forensic Oceanography, *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, May 2018, p. 51, https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf.

[635] European Commission, 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, 25 January 2017, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017JC0004&from=EN.

[636] European Commission, 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, 25 January 2017, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017JC0004&from=EN.

[637] The Seahorse Mediterranean Network is a surveillance network to monitor the EU's external southern border. It is composed of southern Mediterranean states of the EU, including Italy, Malta, Greece, Cyprus, France, Spain, and Portugal. See: Matthias Monroy, *EU to process "confidential security information" with Libyan Coast Guard*, 7 December 2018, https://digit.site36.net/2018/12/07/eu-to-process-confidential-security-information-with-libyan-coast-guard/#more-972

establishment of a Maritime Rescue Coordination Center; (4) the provision of intelligence and surveillance equipment so that the scLCG can connect with Member States and coordinate patrolling activities.

315. Additionally, the document lays out other measures, including: engagement with Libyan authorities to address the unacceptable and inhumane conditions in migrant and refugee detention facilities; the improving of Libyan authorities' capacity for migration management inside Libyan territory and along its southern border; and lastly, provision of additional funding for the implementation of the actions proposed in the Joint Communication through the EU Trust Fund for Africa or contributions by Member States.

316. While mentioning that the EU has the goal of ensuring that migrants and refugees' rights are respected, the Joint Communication, at the same time, affirms the goals of increasing the capacity of, first, the scLCG to ensure "safe disembarkation on the Libyan coast" and, second, of other Libyan actors involved in migration management inland. The goal of ensuring migrants and refugees' rights is incongruous with these latter goals, particularly after the *Hirsi* decision of 2012, which made clear that Libya was not a safe port of disembarkation.

317. Despite this, the Joint Communication was welcomed by the Members of the European Council in the Malta Declaration, which followed the aforementioned Valletta Summit. In this declaration, first priority was given to the provision of training, equipment, and support to the scLCG and other relevant agencies to stop migration flows.[638] In practice, this has resulted in the support for interceptions at sea as the main goal of the common plan between officials of EU agencies and Member States and Libyan actors, as the analysis in Sections II and III have demonstrated.

318. Based on the evidence at hand, it is possible to identify key participants involved in the common plan in different EU agencies and Member States, as described below.

319. **In Malta**, the common plan initially took the form of a secret agreement between the AFM and the scLCG to operate a system for intercepting migrants and refugees at sea and disembarking them in Libya, involving the use of private merchant vessels, as described in Section III.A.1.[639] Given the secret nature of this agreement, it is not possible to determine exactly when it was

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[638] European Council, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route*, 3 February 2017, § 6 (a), https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/

[639] Newsbook, *The government uses Gafa' to co-ordinate pushback*, 29 April 2020, https://newsbook.com.mt/en/the-government-uses-gafa-to-co-ordinate-pushback/#:~:text=Former%20OPM%20operative%20Neville%20Gafa,who%20gave%20him%20these%20instructions; Times of Malta, *Exposed: Malta's secret migrant deal with Libya*, 10 November 2019, www.timesofmalta.com/articles/view/exposed-maltas-secret-migrantdeal-with-libya.748800; Malta Today, *Neville Gafà reveals controversial secret migration pact with Libya*, 23 February 2020, www.maltatoday.com.mt/news/national/100529/neville_gaf_reveals_controversial_secret_migration_pact_with_libya#.XxCqgihKjIV; and Manuel Delia, *Now we know*, 30 April 2020, www.manueldelia.com/2020/04/now-we-know/

enacted; however, Neville Gafà, former official of the Office of the Prime Minister, declared in April 2020 that he had been coordinating interceptions with the scLCG between July 2018 and January 2020.[640] Maltese media also reported that the negotiation of the agreement began around 2018.[641] A government source, cited by the Times of Malta, described the common plan with Libyan actors to intercept and return migrants and refugees back to Libya in the following terms: "[…]When there is a vessel heading towards our waters, the AFM coordinates with the Libyans who pick them up and take them back to Libya before they come into our waters and become our responsibility."[642]

320. Moreover, the facts of Incident 1 indicate that these agreements were in place at least until the beginning of 2020. Carmelo Grech, the owner of the merchant vessel that intercepted the migrants and refugees in Incident 1**,** testified in Maltese domestic court proceedings that the Maltese government (specifically the AFM) had paid him on three or four occasions (for fuel) to return refugees and migrants in distress to Libya.[643]

321. Besides these secret agreements, the Maltese government headed by Robert Abela and the Libyan GNA under Fayez Mustafa al-Sarraj signed an MoU in May 2020. According to the official statement from the Maltese Office of the Prime Minister, the MoU is focused on strengthening the cooperation between the two countries to combat human trafficking.[644] Under the MoU, the Maltese government agreed to finance two coordination centers consisting of both Maltese and Libyan individuals, in Valletta and Tripoli respectively, to coordinate activities

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[640] Times of Malta, *Anger as Neville Gafà says he coordinated Libya pushback on OPM orders*, 30 April 2020, https://timesofmalta.com/articles/view/neville-gafa-says-he-coordinated-libya-pushback-on-opm-orders.788951

[641] Times of Malta, *Exposed: Malta's secret migrant deal with Libya*, 10 November 2019, www.timesofmalta.com/articles/view/exposed-maltas-secret-migrantdeal-with-libya.748800;

[642] Times of Malta, *Exposed: Malta's secret migrant deal with Libya*, 10 November 2019, www.timesofmalta.com/articles/view/exposed-maltas-secret-migrantdeal-with-libya.748800

[643] Malta Today, *Malta government paid for Libya pushbacks 'three to four' times, shipper reveals*, 19 May 2021, https://www.maltatoday.com.mt/news/national/109738/malta_government_paid_for_libya_pushbacks_three_to_four_times_shipper_reveals#.Yf0qzfXMJok; OHCHR also expressed concern over Maltese MRCC using commercial ships for interceptions: OHCHR, Press briefing note on Migrant rescues in the Mediterranean, 8 May 2020, https://www.ohchr.org/en/press-briefing-notes/2020/05/press-briefing-note-migrant-rescues-mediterranean?LangID=E&NewsID=25875; Times of Malta, *Anger as Neville Gafà says he coordinated Libya pushback on OPM orders*, 30 April 2020, https://timesofmalta.com/articles/view/neville-gafa-says-he-coordinated-libya-pushback-on-opm-orders.788951; New York Times, *Latest Tactic to Push Migrants From Europe? A Private, Clandestine Fleet*, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html; Associated Press, *Malta defends its use of private vessels to rescue migrants*, 1 May 2020, https://apnews.com/article/371696d67ceb8f38b61a50283ceb825a; The Guardian, *Exclusive: 12 die as Malta uses private ships to push migrants back to Libya*, 19 May 2020, https://www.theguardian.com/global-development/2020/may/19/exclusive-12-die-as-malta-uses-private-ships-to-push-migrants-back-to-libya.

[644] Statement by the Office of the Prime Minister, 28 May 2020, https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/May/28/pr201016.aspx.

aimed at suppressing immigration across the Mediterranean.[645] Moreover, Malta agreed to propose to the European Commission and other Member States to, among other things, increase the funding for "additional maritime assets necessary for the interception and follow-up of human trafficking activities," and to provide technologies for border surveillance.[646]

322. In the context of these agreements, Maltese officials provide operational contributions to the interceptions of migrants and refugees at sea and, thus, their severe deprivation of liberty. In Incidents 1 to 4 included in Section III, Maltese RCC or AFM officials communicated with the scLCG or private vessels (as in Incident 1) to provide instructions or coordinates that enabled the interceptions of migrants and refugees in these incidents.

323. Further indications of the virtual certainty of the commission of crimes through the implementation of the common plan were provided in a February 2022 report by the Commissioner for Human Rights of the Council of Europe, Dunja Mijatović. In her report, she found that the continued cooperation between Malta and the Libyan authorities is "a matter of grave concern, in so far as it leads to refugees and migrants being returned to face extreme suffering in Libya and contributes to other human rights violations."[647]

324. **In Italy**, the characteristics of the common plan are laid out in an MoU between Libya and Italy, signed on February 2017 by the then-Prime Minister Pablo Gentiloni and former GNA Primer Minister, Fayez Mustafa al-Sarraj. The MoU's main purpose was to establish cooperation between the two countries for stemming migration flows.[648] In the MoU, Italy committed to providing "technical and technologic support" to the scLCG and Libya's Ministry of Home Affairs.[649] Both countries also agreed, among other things, to adapt migrant and refugee detention centers, with Italy facilitating funding for the improvement of detention conditions and the training of detention center personnel. [650]

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[645] Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combatting Illegal Immigration, 28 May 2020, arts. 1-3, https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf,

[646] Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combatting Illegal Immigration, 28 May 2020, arts. 5, https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf,

[647] Dunja Mijatović, Commissioner for Human Rights of the Council of Europe, Country Report: Report Following Her Visit to Malta from 11 to 16 October 2021, 15 February 2022, p. 5, https://rm.coe.int/report-of-the-council-of-europe-commissioner-for-human-rights-dunja-mi/1680a5498d.

[648] 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 [English translation], 2 February 2017, Article 1(A), https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

[649] 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 [English translation], 2 February 2017, art. 1(C), https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

[650] 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 [English translation], 2 February 2017, art. 2, https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

325. As a consequence of the February 2017 MoU between Italy and Libya, Operation Mare Sicuro's mandate was also amended in December 2017 to include the provision of direct capacity-building assistance to the scLCG, including "intelligence, surveillance, and reconnaissance capabilities."[651]

326. After these frameworks of cooperation and capacity-building were established, Italy began providing patrol vessels to the scLCG and supporting the declaration of a so-called Libyan SAR zone and the set-up of an MRCC for the scLCG, as thoroughly described in Section II.C.3. In 2018, the Italian Navy docked a ship in the Port of Tripoli, through which it essentially coordinated Libyan maritime operations. [652] And in 2021, Italy delivered a mobile MRCC to Tripoli to further increase the capacity of the scLCG to communicate with Member States' RCCs and European agencies operating at sea (such as EUNAVFOR MED and Frontex), which facilitates the interception of migrants and refugees and their return to Libya. [653]

327. At the operational level, several incidents as documented in Section III provide an indication of the characteristics of the common plan in Italy. The incidents evince the close collaboration between Italian officials and the scLCG, which involves the former sharing information on locations of boats in distress to the latter, or sending messages to other maritime actors "on behalf of the scLCG." In a March 2019 letter from the Director-General of the EU Commission's Migration and Home Affairs department to Frontex's Executive Director, the Director-General stated that Italy is "supporting the [so-called Libyan Coast Guard] a lot in particular in acting during the SAR event as a 'communication relay.'"[654] Similarly, a recent report by IRPI Media cited a Libyan source involved with the coordination of maritime operations in Tripoli, who stated that the scLCG is informed via email by Italy (and, to a lesser degree, Spain and Malta) of distress events.[655] In addition, the existence of the common plan in Italy has been pointed out by scholar Dora Tarantino who argued that the Italian Coast Guard

[651] Ministero Della Difese, Marina Militare, Operazione Mare Sicuro (OMS), https://www.marina.difesa.it/cosa-facciamo/per-la-difesa-sicurezza/operazioni-in-corso/Pagine/MareSicuro.aspx and Uffici del Senato della Repubblica e della Camera dei deputati, *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, 28 July 2017, p5, https://stefanoceccanti.files.wordpress.com/2017/08/dossier-parlamento-libia.pdf.

[652] Tribunale di Ragusa, R.G. GIP 1182/18, Decreto di rigetto di richiesta di sequestro preventivo, 16 April 2018.

[653] Matthias Monroy, *EU development aid: Italy is gifting more surveillance technology to the Libyan coastguard*, 7 December 2021, https://digit.site36.net/2021/12/07/eu-development-aid-italy-is-gifting-more-surveillance-technology-to-the-libyan-coastguard/.

[654] European Commission, Directorate-General for Migration and Home Affairs, Letter to Frontex Executive Director, 2019, p.2, https://www.statewatch.org/media/documents/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf.

[655] Lorenzo Bagnoli and Fabio Papetti, *Come l'Italia ha costruito le forze marittime della Libia*, IRPI Media, 27 October 2022, https://irpimedia.irpi.eu/thebigwall-grande-muro-mediterraneo-italia-libia/

and the scLCG have been acting in a coordinated manner on the orders of their respective superiors.[656]

328. For instance, in Incident 5, despite the fact that the scLCG was the coordinating actor of the interception, the Italian MRCC was actively communicating in the name of the scLCG.[657] In Incident 6, the Italian MRCC instructed the merchant vessel *Nivin* to intercept a migrant and refugee boat "on behalf of" the scLCG, given its lacking capabilities.[658] In turn, the scLCG then directed the *Nivin* to a port in Misrata, Libya, using the communications equipment inside the aforementioned Italian Navy vessel docked in Tripoli.[659] According to the Libyan source in the IRPI Media report, this military vessel has also been involved in these kinds of information activities in other instances.[660]

329. **Regarding EUNAVFOR MED**, the training provided to the scLCG as part of the extended mandate of Operation Sophia has already been described above. Following the extension of the mandate, on 3 August 2016, EUNAVFOR MED Operation Commander, Enrico Credendino and Commander of the scLCG, Abdalh Toumia, signed a Memorandum of Understanding that included provisions for a EUNAVFOR MED program to provide training to the scLCG.[661] In March 2020, Operation Sophia was replaced by Operation Irini,[662] with a current mandate extending until March 2023.[663] While Operation Irini's primary focus is on the enforcement of the UN-mandated arms embargo on Libya, the Operation's secondary tasks include training and capacity-building of the scLCG and GACS, as well as combatting trafficking and smuggling through air surveillance and information gathering.[664]

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[656] Dora Tarantino, "Politiche anti-migratorie e responsabilità dei vertici politico-istituzionali per crimini contro l'umanità", *Diritto Penale Contemporaneo*, 1/2021, pp. 241-265

[657] [REDACTED]

[658] Email date 07.11.2018 at 19:39 UTC from the Italian MRCC to Merchant Vessel Nivin, cited in: Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 61-63, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[659] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 63-64, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[660] Lorenzo Bagnoli and Fabio Papetti, *Come l'Italia ha costruito le forze marittime della Libia*, IRPI Media, 27 October 2022, https://irpimedia.irpi.eu/thebigwall-grande-muro-mediterraneo-italia-libia/

[661] European External Action Service (EEAS), *Operation SOPHIA: signed the agreement on Libyan Coast Guard and Navy Training*, 23 August 2016, http://eeas.europa.eu/archives/csdp/missions-and-operations/eunavfor-med/news/20160823_en.htm

[662] Council of the EU, *Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI)*, Art. 1, https://www.operationirini.eu/wp-content/uploads/2020/04/200401-CD-IRINI-in-OJ.pdf.

[663] Council of the EU, *Council extends the mandate of Operation IRINI until 2023*, Press release, 26 March 2021, https://www.consilium.europa.eu/en/press/press-releases/2021/03/26/council-extends-the-mandate-of-operation-irini-until-2023/

[664] Council of the EU, *Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI)*, Arts. 4-5, https://www.operationirini.eu/wp-content/uploads/2020/04/200401-CD-IRINI-in-OJ.pdf

330. In setting up Operation Irini in this manner, EUNAVFOR MED is allowed to use its air assets to provide operational contributions that are instrumental in the deprivation of liberty of migrants and refugees in Libya. EUNAVFOR MED uses its air assets for the detection of boats in distress and relays this information to scLCG, which then performs the interception with the purpose of returning migrants and refugees to Libya, where they are transferred to detention facilities. This is evident in Incident 7, where EUNAVFOR MED aircraft *Seagull 19* was overheard via radio to be in direct contact with the scLCG regarding a boat in distress.[665] Similarly, Incident 5 and Incident 6 also point to the involvement of EUNAVFOR MED air assets in providing crucial information for the interception of migrants and refugees in each incident.

331. These are not isolated incidents. In a letter from the Director-General of the EU Commission's Migration and Home Affairs department to Frontex's Executive Director, it has also been explicitly confirmed that many of the sightings of migrants and refugees in the Libyan SAR zone have been provided by the aerial assets of EUNAVFOR MED and "were notified directly to the Libyan RCC responsible for its own region."[666] UNHCR has further noted that, despite the fact that EUNAVFOR MED should contact all the capable Maritime Rescue Coordination Committees in distress cases, in reality, many of the boats in distress detected by EUNAVFOR MED are disembarked in Libya,[667] possibly because of the exclusive relaying of information from EUNAVFOR MED to the scLCG.

332. **Frontex** officials' collaboration with Libyan actors, as part of the common plan to intercept migrants and refugees at sea to return them to Libya, has not been set out explicitly in the form of MoUs or any other formal agreements – in contrast to Malta, Italy, and EUNAVFOR MED. Still, at least since the Joint Communication in 2017, the role of Frontex in accordance with the common plan is evident. Frontex communicates and provides information on the location of boats in distress to the scLCG as part of the border surveillance system (i.e., FASS) that the agency maintains together with other European actors. As laid out in Section II, under t FASS, Frontex has engaged in both Joint Operations and Multipurpose Aerial Surveillance (MAS) with EU Member States. [668]

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[665] Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 18, https://eu-libya.info/img/RemoteControl_Report_0620.pdf

[666] European Commission, Directorate-General for Migration and Home Affairs, Letter to Frontex Executive Director, 2019, p.2, https://www.statewatch.org/media/documents/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf

[667] UN Secretary-General, Implementation of resolution 2437 (2018) – Report of the Secretary-General to the UN Security Council, S/2019/711, 5 September 2019, para. 16, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/263/95/PDF/N1926395.pdf?OpenElement.

[668] European Parliament, Answer to Parliamentary Question E-003553/2019, p. 2.

333. On the Joint Operations side, Frontex currently collaborates with Italy through Operation Themis. This Operation began in February 2018 to "[support] Italy with border control, surveillance and search and rescue in the Central Mediterranean."[669] Frontex officers serve as a contact point between Frontex and Italy and foster cooperation and coordination among Italy and other participating Member States;[670] Frontex is also informed of every action related to border surveillance.[671] Specifically regarding maritime operations, Frontex provides aerial surveillance support to the MRCC(s) involved in these operations. Despite the fact that the scLCG does not have a functioning and independent MRCC, Frontex still relays crucial information to the scLCG for the interception of migrants and refugees at sea, as indicated by several incidents described in Section III and corroborated by the documentation obtained by Frag den Staat (Section III.A.4).

334. Through MAS, Frontex collects surveillance information and relays it to Member States, International Coordination Centers, as well as MRCCs. The collaboration between Frontex and Malta is provided under MAS and involves providing drones and planes, as well as allowing the use of Malta's international airport for MAS activities.[672] Moreover, Frontex closely collaborates with EUNAVFOR MED operations on information exchange and coordination of assets.[673]

335. This complex web of collaboration and agreements allows Frontex to communicate with the scLCG – either directly or through Member States or other EU agencies – regarding the position of boats in distress that it detects as part of its surveillance activities. As such, this indicates a concerted effort reflecting the common plan to intercept migrants and refugees at sea and return them to Libya.

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[669] Frontex, Main Operations – Operation Themis (Italy), https://frontex.europa.eu/we-support/main-operations/operation-themis-italy-/.

[670] European Union, Regulation (EU) No 1168/2011, Art. 3b(5), 3c(2), and 3c(3), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R1168&from=EN.

[671] Frontex, Operation Plan, 4.3.1.

[672] European Parliament, Answer to Parliamentary Question E-003553/2019, 14 January 2020, p. 2, https://www.europarl.europa.eu/RegData/questions/reponses_qe/2019/003553/P9_RE(2019)003553(ANN)_XL.pdf; European Parliament, European Parliament, Answer to Parliamentary Question E-004149/2021, 20 October 2021, p.1, https://www.europarl.europa.eu/RegData/questions/reponses_qe/2021/004149/P9_RE(2021)004149(ANN01)_XL.pdf; Times of Malta, EU Border Agency Frontex to Deploy Drone from Malta in €100m Mission, 3 May 2021, https://timesofmalta.com/articles/view/eu-border-agency-frontex-to-deploy-drone-from-malta-in-100-million.869113; Matthias Monroy, *First Test in Malta: Frontex Drones Approaching*, 3 May 2021, https://digit.site36.net/2021/05/03/first-test-in-malta-frontex-drones-approaching/; Scramble, FRONTEX Heron in Maltese Markings, 6 May 2021, https://scramble.nl/military-news/frontex-heron-in-maltese-markings. The procurement statement listed Malta as a possible operation zone: TED, Contract Award Notice 2018/S 007 – 010629, 11 January 2018, https://ted.europa.eu/udl?uri=TED:NOTICE:10629-2018:TEXT:EN:HTML.

[673] Frontex, Working Agreement between the European Border and Coast Guard Agency (Frontex) and EUNAVFOR MED IRINI, 15 January 2021, Section 3, Article 1, https://www.statewatch.org/media/1770/eu-frontex-op-irini-working-agreement-15-1-21.pdf.

2. Coordinated Essential Contribution Which Results in Fulfillment of Material Elements of the Crime (Severe Deprivation of Physical Liberty)

336. Having established the existence of a common plan between officials of EU agencies and Member States and Libyan actors, this section describes the different contributions that several individuals – including high-ranking officials – have made to the common plan to intercept migrants and refugees at sea with the purpose of returning them to Libya. All of these contributions are coordinated and essential, resulting in the fulfillment of the material elements of the crime of severe deprivation of physical liberty. The essential character of their contributions entails that each individual actor has the power to frustrate the commission of the crime.

337. The following analysis of the individual contributions to the alleged crimes is divided according to the EU agency or Member State for which the individual perpetrators perform their functions, mainly Malta, Italy, EUNAVFOR MED, Frontex, the European Commission, and the EEAS. The analysis at times refers to official positions to illustrate the structural and continuous nature of the implementation of the common plan within EU agencies and Member States.

a. Maltese Officials

338. As further detailed in this section, high-ranking Maltese officials are alleged to have made essential contributions to the common plan of intercepting and returning migrants and refugees to Libya, which resulted in the commission of crimes against humanity under the jurisdiction of the Court, in particular, the crime of severe deprivation of physical liberty, as exemplified in Incidents 1 to 4 in Section III. Officials of particular relevance are Joseph Muscat and Robert Abela, in their positions as former and current Maltese Prime Ministers, respectively. Joseph Muscat served as Maltese Prime Minister between March 2013 and January 2020, when Robert Abela was elected and became, and currently remains, the Prime Minister. Other officials include the Armed Forces of Malta (AFM) Head of Plans and Intelligence, Colonel Clinton O'Neil, former government employee, Neville Gafá, and unidentified members of the RCC Malta or the AFM.

339. The **former Maltese Prime Minister Joseph Muscat** allegedly contributed to the common plan which resulted in the fulfillment of the crime of severe deprivation of physical liberty. The instructions to set up the secret agreement with the scLCG to coordinate the interception of migrants and refugees at sea and their return to Libya originated from the Office of the Prime Minister around July 2018, with Muscat appointing Neville Gafà as a "special envoy of the Prime Minister" for meetings and negotiations with Libyan counterparts.[674]

[674] Times of Malta, *Exposed: Malta's secret migrant deal with Libya*, 10 November 2019, www.timesofmalta.com/articles/view/exposed-maltas-secret-migrantdeal-with-libya.748800;

340. Public reporting on the matter indicates that former Prime Minister Muscat's orders were essential for the enactment of this secret agreement resulting in the commission of grave crimes as documented in this Communication. Incident 4 occurred while Muscat was in office, indicating that the deprivation of liberty in this incident likely was a result of Muscat's orders. Even after former Prime Minister Muscat left office, the agreement continued to be in place, and Muscat's orders continued to be followed, which resulted in the severe deprivation of liberty in Incident 1. Further evidence should be collected to confirm Muscat's contributions to the commission of the crimes in these and additional incidents.

341. **Current Maltese Prime Minister Robert Abela** continued the arrangements with Libyan actors that his predecessor set up. Moreover, he strengthened and formalized the collaboration with Libyan actors, as the MoU between Malta and Libya was signed in May 2020, while he was in office. The agreement was signed during Prime Minister Abela's visit to Tripoli to meet with Libyan officials, including Prime Minister of the GNA Fayez Al-Sarraj, Foreign Minister Mohamed Sayala, and Interior Minister Fathi Bashaga.[675]

342. The essential contribution of Prime Minister Abela is exemplified in Incident 1 through the testimony of the Special Envoy of the Prime Minister, Neville Gafà, who testified under oath that he had coordinated the interception of 51 migrants and refugees in this incident following the instructions of Prime Minister Abela's office.[676] The Prime Minister personally confirmed at a press conference that Neville Gafà was asked to reach out to his Libyan contacts regarding the people in the boat in distress, which also reflects Abela's involvement.[677] Incident 2 and Incident 3 occurred as a direct result of the implementation of the Malta-Libya MoU.

343. Thus, the contribution of Abela as Prime Minister, through the establishment of the framework of cooperation with the scLCG, is essential to the fulfillment of the material elements of the crime, as the Malta-Libya MoU was instrumental for the commission of the crime of severe deprivation of liberty. Furthermore, as exemplified in the facts of Incident 1, he ordered Maltese government officials to collaborate with the scLCG for the interception of migrants and refugees that amounts to the crime of severe deprivation of liberty. Similarly, a technical consultancy ordered by an Italian Prosecutor in Genoa to determine the responsibilities of Italian and Maltese

[675] Libyan Express, *Libya, Malta ink MoU to combat illegal migration*, 28 May 2020, https://www.libyanexpress.com/libya-malta-ink-mou-to-combat-illegal-migration/.
[676] Times of Malta, *Anger as Neville Gafà says he coordinated Libya pushback on OPM orders*, 30 April 2020, https://timesofmalta.com/articles/view/neville-gafa-says-he-coordinated-libya-pushback-on-opm-orders.788951;
[677] Newsbook, *Watch: PM denies Gafa coordinating rescue; says he was asked to use contacts*, 1 May 2020, www.newsbook.com.mt/en/watch-pm-denies-gafa-coordinating-rescue-says-he-was-asked-to-use-contacts ; and TVM, *Immigrants' rescue: Maltese Government asked private boats to help out and also sent food and drink to Libya*, 22 April 2020, www.tvm.com.mt/en/news/immigrants-rescue-maltese-government-asked-private-boats-to-help-out-and-also-sent-food-and-drink-to-libya/

officials, found that the "MRCC Malta's behavior seems to have been arranged at the highest governmental levels."[678]

344. Other Maltese officials similarly made essential contributions that resulted in the commission of crimes against migrants, as documented in this Communication. Notably, **Special Envoy of the Office of the Prime Minister Neville Gafà**, between 2018 and 2020, coordinated with the scLCG on the interceptions of migrants and refugees at sea for the purpose of returning them back to Libya. Gafà's contribution is essential, given that without his coordination in certain incidents, the alleged crimes in those incidents would not have occurred. During Incident 1, for example, if he had not coordinated between the merchant vessel *Dar Al Salam 1*, the AFM, and the scLCG, the severe deprivation of liberty of the 51 migrants and refugees involved in the incident would not have taken place. Gafà has admitted that on 10 April, when the boat in this incident was already in distress, his role involved coordinating with the scLCG on the return of migrants and refugees to Libya.[679]

345. **AFM Head of Plans and Intelligence, Colonel Clinton O'Neil**, has also provided essential contributions in these incidents. On 18 June 2019, O'Neil attended a meeting with Gafà, the Libyan Deputy Prime Minister Ahmed Maiteeq, and the Maltese Ambassador to Libya Charles Saliba. The purpose of this meeting was to discuss the cooperation as part of the secret agreement between the two countries that makes up the common plan to intercept migrants and refugees and return them back to Libya.[680] As the AFM Head of Plans and Intelligence, his individual contribution is essential because his involvement in the secret agreement with Libya allowed for AFM aircraft to provide critical surveillance information and distress locations to RCC Malta and the scLCG. In many incidents, including Incidents 1–4, and possibly in Incidents 7 and 10, assets of the AFM were likely involved in the interceptions of migrants and refugees at sea. In these incidents, the air surveillance provided by these aerial assets played an essential role in the detection of the boats in distress that, with additional essential contributions by AFM and Maltese RCC officers in the form of providing Libyan actors with location information, were later intercepted and returned to Libya by the scLCG or merchant vessels.

346. As further documented in an email sent by O'Neil [REDACTED] to all recipients (and not just to internal AFM and RCC Malta personnel), he ordered "DO NOT REPLY" as a command to refrain from communicating with civil sea rescue organizations and insisted that the recipients

[678] Technical consultancy demanded by the *Procura della Repubblica di Genova*, Proceeding 7165/20/44 RGPM, deposited on 17 September 2021.
[679] Malta Today, *Malta government paid for Libya pushbacks "three to four" times, shipper reveals*, 19 May 2021, https://www.maltatoday.com.mt/news/national/109738/malta_government_paid_for_libya_pushbacks_three_to_four_times_shipper_reveals#.Yf0qzfXMJok
[680] Times of Malta, *Exposed: Malta's secret migrant deal with Libya*, 10 November 2019, https://timesofmalta.com/articles/view/exposed-maltas-secret-migrant-deal-with-libya.748800.

coordinate directly with the scLCG and merchant vessels for the interception at sea and return to Libya of the migrants and refugees.[681]

347. **Additional individuals of the AFM and the RCC Malta**, though not specifically identified at this point, likely made essential contributions to the common plan, as they are directly involved in the deprivation of liberty of migrants and refugees in the same incidents. Their contribution is essential because they provided critical information regarding the distress locations to the scLCG. Without these contributions, the commission of the crimes alleged in this Communication would not have happened, as the scLCG would not have been able to locate and apprehend the migrants and refugees.

348. The testimony of Carmelo Grech, the owner of the merchant vessel *Dar Al Salam 1* that conducted the interception and return of migrants and refugees in Incident 1, is further indicative of the essential contribution of AFM officials. Grech testified in a Maltese trial that the AFM had paid him on three or four occasions for fuel to return refugees and migrants in distress to Libya.[682]

349. Lastly, that the unidentified individuals of the AFM and RCC Malta had the power to frustrate the commission of the crime is further indicated by the fact that in a number of incidents, including Incidents 1–4, there were other vessels in the vicinity who could have been instructed to conduct the operation and bring the migrants and refugees to a safe port of disembarkation. However, Maltese officials invariably gave the instruction to take the migrants and refugees back to Libya, which resulted in the severe deprivation of liberty of the concerned migrants and refugees. Without such contributions and coordination by the individuals of RCC Malta and the AFM, the common plan to intercept and return migrants and refugees to Libya would have been

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[681] [REDACTED]

[682] Malta Today, *Malta government paid for Libya pushbacks "three to four" times, shipper reveals*, 19 May 2021, https://www.maltatoday.com.mt/news/national/109738/malta_government_paid_for_libya_pushbacks_three_to_four_times_shipper_reveals#.Yf0qzfXMJok. OHCHR also expressed concern over Maltese MRCC using commercial ships for pushbacks: OHCHR, Press briefing note on Migrant rescues in the Mediterranean, 8 May 2020, https://www.ohchr.org/en/press-briefing-notes/2020/05/press-briefing-note-migrant-rescues-mediterranean?LangID=E&NewsID=25875. *See also* Mandates of the Special Rapporteur on the human rights of migrants; the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, AL MLT 2/2020, 9 December 2020, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25753; Times of Malta, *Anger as Neville Gafà says he coordinated Libya pushback on OPM orders*, 30 April 2020, https://timesofmalta.com/articles/view/neville-gafa-says-he-coordinated-libya-pushback-on-opm-orders.788951; New York Times, *Latest Tactic to Push Migrants From Europe? A Private, Clandestine Fleet*, 30 April 2020, https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html; Associated Press, *Malta defends its use of private vessels to rescue migrants*, 1 May 2020, https://apnews.com/article/371696d67ceb8f38b61a50283ceb825a; The Guardian, *Exclusive: 12 die as Malta uses private ships to push migrants back to Libya*, 19 May 2020, https://www.theguardian.com/global-development/2020/may/19/exclusive-12-die-as-malta-uses-private-ships-to-push-migrants-back-to-libya.

frustrated, and the material elements of severe deprivation of liberty would not have been fulfilled.

b. Italian Officials

350. High-ranking Italian officials have made essential contributions to the common plan of intercepting and returning migrants and refugees to Libya. They have done so through their positions as the Italian Minister of the Interior, Chief of Staff of the Minister of the Interior, the Commander General of the Italian Coast Guard, and the Commander of MRCC Rome. Other individuals who have made essential contributions to the common plan also include members of the Italian MRCC who are yet to be identified.

351. Former **Italian Ministers of the Interior** have made essential contributions to the common plan resulting in the fulfillment of the crime of severe deprivation of physical liberty of migrants and refugees at sea and in Libya. The Italian Minister of the Interior oversees the Department of Civil Liberties and Immigration and the Department of Public Security[683] and is also responsible for the command of Italian joint operations with Frontex. Marco Minniti held the position as Italian Minister of the Interior from December 2016 to June 2018. Afterwards, Matteo Salvini assumed this role from June 2018 to September 2019.

352. As described in the preceding subsection, then-**Italian Minister of the Interior Marco Minniti** was responsible for negotiations with Libyan authorities regarding the Italy-Libya MoU. In January 2017, then-Minister of the Interior Minniti traveled to Libya to begin such negotiations with then-Prime Minister of the GNA Fayez al-Sarraj.[684] During this visit, Minniti also reopened the Italian embassy in Tripoli, designating it as the coordination center for all migration projects between Italy and Libya.[685] Minniti traveled again to Libya in May 2017 to continue discussing the cooperation with Libya, where he also participated in a ceremony in which Italian patrol boats were given to Libya.[686]

353. His successor, **Matteo Salvini**, also provided essential contributions to the common plan in his capacity as Minister of the Interior. During his time in office, Salvini continued to support the cooperation with Libyan actors through the capacity-building of and cooperation with the scLCG.[687] Through the enactment of a directive in March 2019 to prevent the entry of migrants

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[683] Italy Ministry of the Interior, Departments, https://www.interno.gov.it/it/ministero/dipartimenti.
[684] Gerado Pelosi, *Minniti in missione a Tripoli, tra lotta agli scafisti e sostegno a Sarraj*, 6 January 2017, https://www.ilsole24ore.com/art/minniti-missione-tripoli--lotta-scafisti-e-sostegno-sarraj-ADnxQARC
[685] Rai News, *Immigrants, Minniti in Libya: first step for a new cooperation*, 9 January 2017, https://www.rainews.it/archivio-rainews/articoli/Immigrati-Minniti-in-Libia-primo-passo-per-nuova-cooperazione-ceb31db3-caaa-4edd-8f06-e1a33a63e59f.html?refresh_ce
[686] Italian Ministry of the Interior, *Minniti in Libia: fronte comune contro il traffico di migranti*, 16 May 2017, https://www.interno.gov.it/it/notizie/minniti-libia-fronte-comune-contro-traffico-migranti
[687] EuropaToday, *"Per l'Ue la Libia è porto sicuro", ma Bruxelles smentisce Salvini*, 29 March 2019, https://europa.today.it/attualita/libia-bufala-porto-sicuro.html; Stefano Vespa, *In Libia porti sicuri? Una lettera*

and refugees into Italian territory through supporting interceptions at sea occurring in the so-called Libyan SAR Zone, Salvini *de facto* established that intercepted migrants and refugees should be disembarked in Libya.[688] Among others, this directive was addressed to the Commander General of the Italian Coast Guard, Chief Inspector Admiral Giovanni Pettorino. Moreover, during Salvini's time in office, Italy delivered more patrol boats to Libya, including the vessel *Ubari*.[689] In addition, the Italian Ministry of the Interior has been indispensable to the establishment of the so-called Libyan MRCC and the declaration of the so-called Libyan SAR zone, as described in Section II.B. As already established, such actions have the virtual certainty of resulting in the commission of the crime against humanity of severe deprivation of liberty.

354. Thus, the contributions of former Italian Ministers of the Interior Minniti and Salvini are essential because the deprivation of liberty of migrants and refugees in several incidents would not have taken place without the Italy-Libya MoU (spearheaded by the Ministers of the Interior), the enactment of migration management policies, or the coordination of projects between Italy and Libya.

355. Moreover, both Minniti and Salvini were instrumental in the delivery of Italian patrol boats to the scLCG, which, in turn, have been essential for the interception of migrants and refugees in eight of the incidents documented in Section III, in which the scLCG patrol boats were identified. The patrol boat *Ubari* intercepted migrants and refugees in Incidents 2 and 9; patrol boat *Ras Jadir* conducted the interceptions in Incidents 3 and 8; patrol boat *Fezzan* conducted the interceptions in Incidents 4, 10, and 11; and patrol boat *Sabratha* conducted the interception in Incident 7. The provision of boats and accompanying communications equipment delivered by Italian officials to the scLCG have proved to be essential to the scLCG's ability to conduct interceptions. In February 2018, a EUNAVFOR MED monitoring report noted that the Italian naval assets are essential to the scLCG, as "[t]he most capable ships belong to the IT-built Bigliani class (4 assets, 75% operational) and to the IT-built Corrubias class (2 assets, 100%

di Bruxelles a sostegno di Salvini, poi la smentita, 29 March 2019, https://formiche.net/2019/03/migranti-bruxelles-salvini-europa-libia/

[688] Italian Ministry of the Interior, *Direttiva per il coordinamento unificato dell'attività di sorveglianza delle frontiere marittime e per il contrasto all'immigrazione illegal ex articolo 11 del d.lgs. n. 286/1998 recante il Testo Unico in materia di Immigrazione*, N. 14100/141(8), 18 March 2019, https://www.interno.gov.it/sites/default/files/direttiva_ministro_su_controllo_frontiere_marittime_18.03.2019.pdf

[689] Financial Times, *Italy donates 12 more vessels to Libya to stem migration*, 7 August 2018. www.ft.com/content/391ed012-9a28-11e8-9702-5946bae86e6d and Safa Alharathy, *Libyan Coast Guard receives new vessel from Italy*, The Libya Observer, 26 November 2018, https://www.libyaobserver.ly/inbrief/libyan-coast-guard-receives-new-vessel-italy

operational) similar to the Bigliani class."[690] The scLCG's own Facebook page also contains numerous posts on interceptions conducted by the scLCG using Italy-donated vessels.[691]

356. F**ormer Chief of Staff to the Minister of the Interior, Matteo Piantedosi**, is also alleged to have provided an essential contribution to the common plan. Piantedosi held the position of Chief of Staff of the Minister of the Interior during former Minister Salvini's term in office and remained in this position until August 2020, at which time, Luciana Lamorgese had replaced Salvini in the role of Interior Minister. The former Chief of Staff of the Minister of the Interior had a major technical and operational role in the drafting of the so-called *Decreti Sicurezza*,[692] two decrees enacted by the Italian Minister of the Interior that tightened the regulations and allocated funding for the protection of asylum-seekers and severely restricted the activities of civil rescue missions in the Central Mediterranean.[693]

357. Moreover, Piantedosi's responsibilities as Salvini's right-hand man emerged when he was initially investigated, alongside Salvini, in an incident in 2019 when civil rescue vessel *Open Arms* was prevented from entering Italian waters.[694] As part of this investigation, the Tribunal of Palermo emphasized that Chief of Staff Piantedosi's previous statements were an indication of his own direct involvement not only in the conduct of former Interior Minister Salvini in enacting the *Decreti Sicurezza*, but also in the refusal to assign a safe port of disembarkation in Italy to the *Open Arms* vessel.[695]

358. In January 2019, the Chief of Staff of the Minister of the Interior was given the competence to assign a safe port of disembarkation, effectively granting Piantedosi an essential role in the implementation of the common plan.[696] By creating barriers for civil rescue vessels to perform SAR operations and disembarkations in Italy, the conduct of Piantedosi left the scLCG in a primary position to intercept and return migrants and refugees back to Libya. Thus, it is alleged

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[690] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 20, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf, citing EUNAVFOR MED Operation Sophia - Six Monthly Report 1 June - 30 November 2018, Part A, 18 January 2019, p. 13.

[691] *See e.g.*, interceptions on 10 May 2019 using boat *Sabratha*; interceptions on 12 May 2019, 18 May 2019, 4 June 2019, 6 June 2019, 8 June 2019, 16 June 2019, 21 June 2019, 25 July 2019, 3 to 5 August 2019, 7 August 2019, 13 August 2019, 13 September 2019, and 16-18 September 2019 using boat *Fezzan*; interceptions on 3 June 2019, 11 June 2019, 21 June 2019, 27 June 2019, 25 July 2019, 26 July 2019, 13 August 2019, 18 August 2019, 27 August 2019, 15-16 September 2019, and 28 September 2019 using boat *Ubari*.(There is no posting after 2019.)

[692] Alessandro Ziniti, *Piantedosi, al Viminale ritorna l'altro Matteo, l'ombra di Salvini*, La Repubblica, 22 October 2022, https://www.repubblica.it/politica/2022/10/22/news/ministro_interno_piantedosi-371090041/

[693] Decree Law 113/2018 and Decree Law 53/2019.

[694] Gaetano De Monte and Giovanni Tizian, *I venti giorni di Open Arms*, Domani, 9 January 2021, https://www.editorialedomani.it/fatti/i-venti-giorni-di-open-arms-gyy0v8sr

[695] Tribunale di Palermo, Collegio per i reati ministeriali, Relazione, 30 Gennaio 2020, pp. 86-95, https://www.senato.it/service/PDF/PDFServer/DF/349843.pdf

[696] Tribunale di Catania, Sezione reati ministeriali, 29 Gennaio 2019, p. 37, https://www.senato.it/Web/AutorizzazioniAProcedere.nsf/dfbec5c17bce92adc1257be500450dad/4c5c5e58bdf39bbac125838c00431f69/$FILE/Doc.%20IV-bis,%20n.%201.pdf

that, in his role, Piantedosi also contributed to establishing the cooperation between Italy and Libya and supported the activities to increase the capacity of the scLCG to perform interceptions at sea. In this manner, Chief of Staff Piantedosi allegedly provided essential contributions to the common plan which resulted in the deprivation of liberty of migrants and refugees in Libya. The involvement of Piantedosi thus warrants further investigation by the OTP.

359. On the operational level, the **Commander General of the Italian Coast Guard, Chief Inspector Admiral Giovanni Pettorino**, the **Commander of MRCC Rome, Lorenzo Savarese**, as well as other **officials of the Italian MRCC**, have made essential contributions to the common plan by coordinating with the scLCG to intercept migrants and refugees at sea and to return them to Libya. Chief Inspector Admiral Pettorino was Commander General of the Italian Coast Guard between February 2018 and July 2021; the length of Lorenzo Savarese's posting as Commander of MRCC Rome remains to be determined. The positions of these two officials warrant further investigation by the OTP, as they are allegedly instrumental to the interceptions and returns to Libya of migrants and refugees as part of the common plan which amounts to the crime of severe deprivation of liberty. For instance, the aforementioned directive by Salvini of March 2019, which effectively allowed for the return of intercepted boats back to Libya, was addressed to Commander Pettorino, among others. The Commander General and the Commander of MRCC Rome allegedly provided an essential contribution to the common plan by implementing this directive.

360. It is alleged that Incident 5 occurred under the implementation of the directive by Pettorino and Savarese. As described in Section III, during this incident, the Italian MRCC repeatedly stated to Sea-Watch and Initiative Watch the Med - Alarm Phone that the scLCG was the coordinating authority, despite the scLCG's unresponsiveness to Alarm Phone and Sea-Watch's calls throughout the incident. The Italian MRCC officers also did not order any of the four nearby commercial vessels to intervene, thereby giving preference to the scLCG to conduct the interception. Moreover, the Italian MRCC broadcasted distress information "on behalf of" the scLCG, which further shows the Italian MRCC's close collaboration with the scLCG, which was instrumental in the deprivation of liberty of the migrants and refugees in this incident.

361. Relaying information directly to the scLCG or communicating to third parties "on behalf of" the scLCG is a pattern that manifested in other incidents described in Section III. As exemplified during Incident 6, the Commander and the officials of Italian MRCC provided essential contributions in this incident by communicating to the *Nivin* ship "on behalf of" the scLCG and instructing the *Nivin* to contact the scLCG through the Italian MRCC. Without the intervention of the officials of the Italian MRCC, the crime of severe deprivation of liberty of the migrants and refugees would not have occurred. Such coordination has been further corroborated by a report signed by Bassm Sbat, the captain of the *Nivin*, as well as by testimonies from survivor

witnesses and MSF personnel.[697] Moreover, scLCG member Commodore Masoud Abdalsamd confirmed that a scLCG officer initially went aboard the Italian warship docked in Tripoli to contact the *Nivin* using Italian communication equipment.[698]

c. EUNVAFOR MED Officials

362. Officials of EUNAVFOR MED are alleged to have provided essential contributions to the severe deprivation of liberty of migrants and refugees at sea and in Libya. These include, the **Operation Commander of EUNAVFOR MED Operation Sophia, Vice Admiral Enrico Credendino**, from June 2017 to February 2020; [699] the current **Operation Commander of EUNAVFOR MED Operation Irini, Rear Admiral Stefano Turchetto**, also formerly Force Commander of Operation Sophia (from September 2018 to June 2019), and Tactical Commander of Italy's Operation Mare Sicuro (from June 2019 to September 2021).[700] The positions and alleged contributions of these two officials warrant further investigation by the OTP, as they are allegedly instrumental to the interceptions and returns to Libya of migrants and refugees as part of the common plan which amounts to the crime of severe deprivation of liberty. Incident 7 took place during the time that Vice Admiral Credendino was the Operation Commander of EUNAVFOR MED Operation Sophia. The Operation Commander oversaw the entire operation and, most importantly, signed the abovementioned MoU with the Commander of the scLCG, Abdalh Toumia, on August 2016. This contribution was essential because it was aimed at improving the capacity of the scLCG to conduct interceptions of migrants at sea, without which the crime of deprivation of liberty of migrants and refugees would not have occurred. At the time of Incident 7, for instance, the Force Commander of Operation Sophia, Rear Admiral Stefano Turchetto, was also closely involved in the operation, as he commanded the aerial and naval forces.

363. Other EUNAVFOR MED officials yet to be identified have likely provided essential contributions to the fulfillment of the material elements of the crime of severe deprivation of liberty. It has been observed that EUNAVFOR MED has increasingly relied on air assets to

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[697] Forensic Oceanography, *The* Nivin *Case: Migrant's resistance to Italy's strategy of privatized push-back*, December 2019, p. 54, 60, and 67, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf.

[698] European Commission, Directorate-General for Migration and Home Affairs, Letter to Frontex Executive Director, 2019, p.2, https://www.statewatch.org/media/documents/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf.

[699] Wikipedia, *Enrico Credendino*, https://de.wikipedia.org/wiki/Enrico_Credendino.

[700] EUNAVFOR MED Operation Irini, *Operation CommanderRead Admiral Stefano Turchetto*, https://www.operationirini.eu/about-us/roles/operation-commander/; Council of the EU, *EUNAVFOR MED IRINI: new Operation Commander appointed*, 23 September 2021, https://www.consilium.europa.eu/en/press/press-releases/2021/09/23/eunavfor-med-irini-new-operation-commander-appointed/

enhance "early detection" of boats in distress that is then followed by scLCG interceptions.[701] Such surveillance and coordination are demonstrated by the events in Incident 7, where the pilot of EUNAVFOR MED aircraft *Seagull 19* was overheard while in direct contact with the scLCG via radio, confirming that they were in charge of coordinating the interception, as on-scene coordinator of the distress case. The pilot was directly implementing the plan to intercept and return migrants and refugees to Libya through the provision of critical information regarding the distress locations to the scLCG. Without this information, the scLCG members aboard patrol vessel *Sabratha 654* would not have been able to arrive at the location of the boat in distress and, thus, deprive the migrants and refugees of their liberty by intercepting and returning them to Libya.

364. In other incidents, such as Incidents 5 and 6, air assets of EUNAVFOR MED have also been described as providing crucial information either to the scLCG or to the Italian MRCC (who then relays the information to the scLCG). Therefore, the essential contributions of the pilots of these air assets, along with other officials with similar functions, also warrant further investigation by the OTP.

d. Frontex Officials

365. The opaque nature of Frontex operations and the obstacles preventing civil society organizations from obtaining full information through publicly available sources and FOIA requests speak to the importance of further investigation by the ICC (see also Section VI on admissibility). Therefore, the allegations regarding Frontex officials is intended to provide a preliminary outline of the identified and unidentified officials that the OTP is urged to further investigate.

366. The **Frontex Executive Director** is alleged to have made an essential contribution to the common plan. Fabrice Leggeri was Frontex Executive Director from 2015 to April 2022. Not only is the surveillance information provided by Frontex, as explained above, essential to the interception and return of migrants and refugees to Libya, but the Frontex Executive Director also holds the decision-making power for joint operations with EU Member States. According to EU regulations, the Frontex Executive Director is responsible for evaluating, approving, and coordinating the proposals of Member States concerning joint operations – including whether

[701] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 26, https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf, citing EUNAVFOR MED Operation Sophia - Six Monthly Report 1 December 2018 –31 May 2019, 9 July 2019, p. 4 and Daniel Howden, Apostolis Fotiadis, and Antony Loewenstein, *Once migrants on Mediterranean were saved by naval patrols. Now they have to watch as drones fly over*, The Guardian, 4 August 2019, https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu.

or not to launch an operation at all and how to finance an operation.[702] The Executive Director also draws up the operation plan in agreement with the host State and in consultation with participating Member States.[703] The operational plan to implement Operation Themis was agreed upon by Frontex and Italian officers after consultation with the participating States and approved and signed by Frontex's then-Executive Director Leggeri.[704] Without the latter's involvement, Operation Themis would not have been launched or implemented in a manner conducive to the common plan to intercept and return migrants and refugees to Libya. Fabrice Leggeri's contributions as Frontex Executive Director resulted in the commission of the crime of severe deprivation of liberty, as exemplified in Incidents 8–11 described in Section III, all involving Frontex.

367. The **Head of Frontex Situation Center (FSC) and Head of Situational Awareness and Monitoring Division, Dirk Vande Ryse**, is also alleged to have contributed to the common plan. The FSC was created to provide "a constantly updated picture, as near to real time as possible, of Europe's external borders and migration situation";[705] it also "acts as a central point of contact and information access for all Frontex stakeholders" and is "a vital part of Frontex's rapid-response mechanism in the event of an emergency situation occurring anywhere at the external border."[706] One of the FSC's core functions is situation monitoring, which provides "situation and crisis monitoring, delivering early alerts and situation reports to internal and external customers."[707] During the time of the Frontex incidents included in Section III, Dirk Vande Ryse served as the head of the FSC and of the Situational Awareness and Monitoring Division under the FSC. In this position, he likely contributed to the common plan through the gathering and relaying of information to various actors, including the MRCCs and the scLCG.[708] His role in Incidents 8–11 warrants further investigation by the OTP.

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[702] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No. 1052/2013 and (EU) 2016/1624, Articles 36(2) and 100(4), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1896 and UK Parliament, Select Committee on Euripean Union – Minutes of Evidence, Examination of Witnesses (Questions 220-239), Answer to Question 228, https://publications.parliament.uk/pa/ld200708/ldselect/ldeucom/60/7102303.htm.

[703] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No. 1052/2013 and (EU) 2016/1624, Article 38 (1) and (2), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1896.

[704] Frontex, Operational Plan JO Themis 2020, p. 1 and 4, https://fragdenstaat.de/dokumente/149853-oplan-themis-2020-main-partpdf/.

[705] Frontex, Situational awareness and monitoring, https://frontex.europa.eu/we-know/situational-awareness-and-monitoring/information-management/.

[706] Frontex, Situational awareness and monitoring, https://frontex.europa.eu/we-know/situational-awareness-and-monitoring/information-management/.

[707] Frontex, Situational awareness and monitoring, https://frontex.europa.eu/we-know/situational-awareness-and-monitoring/information-management/.

[708] According to a Brochure on MAS, the information detected by air assets is first sent to Frontex's European Monitoring Team, which is composed by officials of other EU agencies and Member States. From there, the information is passed to Member States and other partners. It is likely that the scLCG is included among the

368. Additionally, the **Frontex Head of Surveillance Sector** is alleged to have contributed to the common plan, as this person oversees the entire surveillance sector of Frontex, including MAS, under which Malta and Frontex officially cooperate. As part of this cooperation, essential information is sent to the scLCG, without which interceptions at sea would not be able to occur. The essential character of the contribution provided by the Frontex Head of Surveillance warrants further investigation by the OTP – particularly, in regard to establishing the link between Malta and Frontex in Incident 10 and determining whether the air asset that provided an essential contribution in that case was operating under Frontex or Maltese authorities.

369. Other officials of Frontex, either acting under Joint Operation Themis, MAS, or the FSC, though not specifically identified at this point, also contributed to the common plan, as they are directly involved in various incidents described in Section III. Their contributions are essential because, similar to the "early detection" provided by EUNAVFOR MED, the aerial surveillance information Frontex provides to the scLCG is critical to the interception of migrants and refugees. Without these contributions, the commission of the crime would have been frustrated, as the scLCG would not have been able to locate and intercept the migrants and refugees. For instance, Frontex's air assets have far more capabilities than the civilian monitoring aircrafts used by sea rescue organizations in terms of flight time, scope of surveillance area, camera quality, etc., which enables them to obtain much more precise and constant information on distress locations. Unlike civil monitoring aircrafts, Frontex aerial assets are often able to continuously receive real-time information on the location of boats in distress. Moreover, Incidents 10 and 11 (described above) indicate that Frontex provides updated information on the location of boats in distress to the scLCG, without which the scLCG would not be able to reach the boats in distress, perform the interception, and thus, fulfil the material element for the severe deprivation of liberty of the migrants and refugees in these incidents.

370. In general, the UN Special Rapporteur on the human rights of migrants has also noted reports of Frontex facilitating interceptions "through drone surveillance and secretive communication practices that prevent merchant and NGO ships from accessing information regarding boats in distress and undermine their timely and effective involvement in search and rescue."[709] The information Frontex provides, either as part of Joint Operation Themis with Italy or MAS with Malta, is crucial to the interceptions at sea by the scLCG because neither the Member States nor the Libyan actors would be able to carry out interceptions without Frontex's support.

e. Other EU Officials

latter category. Frontex, *Multipurpose aerial surveillance: Frontex situation centre*, Publications Office, 2018, p. 3, https://data.europa.eu/doi/10.2819/393657.

[709] Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, *Human rights violations at international borders: trends, prevention and accountability*, A/HRC/50/31, 26 April 2022, para. 53, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/328/57/PDF/G2232857.pdf?OpenElement.

371. Several other officials of the European Union, particularly of the European Commission, have also provided essential contributions that resulted in the fulfillment of the elements of the crime against humanity of severe deprivation of liberty of migrants and refugees at sea and in Libya. The involvement of these officials and the essential character of their contributions to the common plan warrant further investigation by the OTP.

372. The **High Representative of the Union for Foreign Affairs and Security Federica Mogherini** oversaw the drafting of and sent out the 2017 Joint Communication on migration in the Central Mediterranean which, as argued above in this section, described the main elements of the common plan for the interception at sea of migrants and refugees with the purpose of returning them to Libya. The main role of the High Representative is to shape and conduct the EU's Common Foreign and Security Policy (CFSP). The Political and Security Committee (PSC) of the Council of the EU, chaired by an EEAS representative, works together with the High Representative for the implementation of the CFSP.[710]

373. Federica Mogherini held the position of High Representative from November 2014 to November 2019, during which the EU and its Member States significantly increased their engagement with Libyan actors and ultimately established the common plan described above. In this position, former High Representative Mogherini is alleged to have provided an essential contribution to the common plan. Her responsibility and involvement in the commission of the crime of severe deprivation of liberty warrant further investigation by the OTP. In July 2018, High Representative Mogherini traveled to Libya, where she met with then-Libyan Prime Minister Sarraj. Among other matters, the two high-level officials discussed the training of the scLCG through EUNAVFOR MED Operation Sophia and other measures of migration management,[711] thus indicating further coordination to implement the common plan. Incidents 4, 6, 7, and 12 occurred during former High Representative Mogherini's time in office. It is alleged that the commission of the crime of severe deprivation of liberty of migrants and refugees, as exemplified in these incidents, is a direct result of the implementation of this common plan, indicating Former High Representative Mogherini's essential contribution.

374. The role of the High Representative of the Union for Foreign Affairs and Security Policy for the implementation of the CFSP is further supported by the EEAS. The EEAS Deputy Secretary General for the CSDF is in charge of managing the issues related to the implementation of the

[710] Publications Office of the European Union, *High Representative of the Union for Foreign Affairs and Security Policy*, 14 January 2021, https://eur-lex.europa.eu/EN/legal-content/glossary/high-representative-of-the-union-for-foreign-affairs-and-security-policy.html

[711] EEAS, *High Representative/Vice-President Federica Mogherini visits Libya*, 14 July 2018, https://www.eeas.europa.eu/node/48409_en

CSDP.[712] Pedro Serrano held this function between November 2015 and January 2020.[713] Indications of the alleged contributions of the EEAS Deputy Secretary General for the CSDF were provided by Serrano during an interview in 2016, where he explicitly stated that:

> "we are cooperating actively with the Libyan authorities, we are assisting the Libyan authorities as much as we can in terms of training and building their capacities. […] By training the Libyan coast guard, which is one of the tasks that Sophia has undertaken, we intend to help the Libyan authorities and the Government of National Accord, President Sarraj to gain control over some elements that can provide security and that will be directly under the control of the GNA."[714]

375. In November 2018, Serrano met then-Libyan Prime Minister Sarraj in Tripoli to discuss cooperation between Libya and the EU, including agreements on irregular migration[715] – providing another indication of his contribution to the implementation of the common plan. Thus, in this position, he is alleged to have contributed to the common plan which resulted in the commission of the crime of severe deprivation of liberty, as documented in this Communication, in particular with regard to Incidents 4, 6, 7, and 12.[716] The OTP should further investigate the possible criminal responsibility of the **EEAS Deputy Secretary General for CSDP, Pedro Serrano**.

376. Lastly, another alleged EEAS official involved in the implementation of the common plan is the **Chairperson of the PSC, Walter Stevens,** who held this position between July 2013 and August 2018. In 2016, the PSC authorized the capacity-building and training of the scLCG as part of the amended mandate of EUNAVFOR MED Operation Sophia. This decision was approved and signed by PSC Chairperson, Walter Stevens.[717] Given the role of the PSC in the definition and implementation of policies under the Common Foreign and Security Policy (CFSP) of the EU, the essential contribution of the PSC Chairperson, Walter Stevens, for the

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[712] Publications Office of the European Union, *Service of Deputy Secretary General CSDP and crisis response (CSDPCR)*, https://op.europa.eu/en/web/who-is-who/organization/-/organization/EEAS_CSDP/EEAS_CSDP

[713] EEAS, *Pedro Serrano appointed Deputy Secretary General at the EEAS*, 19 October 2015, https://www.eeas.europa.eu/node/5841_en; Voz Populi, *Borrell elige a un español como su principal asesor diplomático*, 27 January 2020, https://www.vozpopuli.com/espana/politica/borrell-espanol-asesor-diplomatico_0_1321669017.html

[714] Euronews, *In conversation with EU defence and security official Pedro Serrano*, 12 September 2016, https://www.euronews.com/my-europe/2016/12/09/in-conversation-with-eu-defence-and-security-official-pedro-serrano

[715] Safa Alharathy, *PC Head holds talks with Deputy Secretary-General for CSDP*, The Libya Observer, 29 November 2018, https://www.libyaobserver.ly/inbrief/pc-head-holds-talks-deputy-secretary-general-csdp

[716] *See* International Peace Institute, *EU Envoy Serrano: No Peace in Sahel Without Development*, 25 April 2019, https://www.ipinst.org/2019/04/conversation-with-pedro-serrano-deputy-secretary-general-csdp-eeas#4.

[717] Council of Europe, *Political and Security Committee Decision (CFSP) 2016/1635 of 30 August 2016 on the commencement of the capacity building and training of the Libyan Coast Guard and Navy by the European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA) (EUNAVFOR MED/3/2016)*, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D1635&from=EN.

commission of the crime of severe deprivation of liberty warrants further investigation by the OTP.

f. Libyan Actors

377. The Libyan actors involved in the co-perpetration of the crime of severe deprivation of liberty of migrants and refugees in Libya include officials of the internationally recognized government, as well as members of the scLCG and various militias and armed groups who have coopted Libyan institutions, such as the Directorate for Combating Illegal Migration (DCIM), or taken over the control of detention facilities.

378. High-ranking Libyan officials have made essential contributions to the common plan of intercepting migrants and refugees at sea with the purpose of returning them to Libya. The **Prime Minister of the then-GNA, Fayez Mustafa al-Sarraj,** has made essential contributions to the common plan which resulted in the commission of the crime of severe deprivation of physical liberty against migrants and refugees. As described above, both Malta and Italy have concluded MoUs with Libya to set up frameworks through which the collaboration between these countries can be carried out, with the aim intercepting migrants and refugees at sea and returning them to Libya. Fayez al-Sarraj was in charge of these activities on the Libyan side, as he held several meetings in Tripoli with high-level EU and Member State officials. For instance, this includes meetings with the Italian Minister of the Interior to negotiate and sign the Italy-Libya MoU in 2017; with EU High Representative Mogherini in July 2018; with EEAS Deputy Secretary General Serrano in November 2018; and with the Maltese Prime Minister in May 2020 for signing the Malta-Libya MoU.

379. Other Libyan officials are alleged to have made essential contributions to the common plan that resulted in the commission of the crime of severe deprivation of physical liberty against migrants and refugees, as documented in the incidents in Section III. During the meeting between Maltese and Libyan officials where they signed the Malta-Libya MoU, **Libyan Foreign Minister** Mohamed Sayala and **Interior Minister** Fathi Bashaga were both present. They are crucial connections between the Maltese and Libyan officials and Libya's foreign and internal affairs for the signing of the MoU of 2020, as well as the prior secret agreement that set up the system for intercepting and returning migrants and refugees to Libya. The then-**Libyan Deputy Prime Minister**, Ahmed Maiteeq, was also present during a meeting with Maltese officials regarding these secret agreements. Ahmed Maiteeq was the only Libyan official in the meeting, which indicates his important role in the negotiation and implementation of these secret agreements.

380. Moreover, as the scLCG is formally under the Libyan Ministry of Defense, the **Libyan Minister of Defense** has a critical role as well in coordinating the capacity-building, training,

funding, and provision of equipment from EU agencies and Member States to the scLCG. From September 2018 to August 2020, the Libyan Prime Minister at the time, Fayez Mustafa al-Sarraj, was also simultaneously the Minister of Defense. Similarly, from March 2021 to the present, the current Libyan GNU Prime Minister, Abdul Hamid Dbeibeh, has been simultaneously the Minister of Defense. The person who took office in between these two periods was Salah Eddine al-Namrush, who was previously the Deputy Defense Minister and whose role is also likely important and warrants further investigation by the OTP.

381. The individuals behind the conclusions of these agreements, aimed at increasing the operational and technical capabilities of the scLCG to perform the interceptions and returns to Libya of migrants and refugees, are allegedly responsible as co-perpetrators for the incidents described in Section III. Their contributions to the common plan are essential because the migrants and refugees in those incidents would not have been intercepted and returned to Libya without the agreements involving the Prime Minister of the GNA and other high-ranking Libyan officials, as described above.

382. On the operational level, although **members of the scLCG or Libyan-flagged merchant vessels** have not yet been specifically identified at this point, they clearly made essential contributions to the common plan, as they have been directly involved in the severe deprivation of liberty of migrants and refugees, beginning from their interception at sea and their later disembarkation in Libya. Their contribution is essential because they physically carried out the interceptions and returns, usually with violence, which Section IV has sufficiently demonstrated to be the starting points of the crime of severe deprivation of liberty. These individuals include the scLCG crew members of vessels: *Ubari* for Incidents 2 and 9; *Ras Jadir* in Incidents 3 and 8; *Fezzan* in Incidents 4, 10, and 11; and *Sabratha* 654 in Incident 7. For Incidents 5 and 12, it remains to be determined which specific Libyan actors performed the interceptions and returns. In Incident 1, the *Dar Al Salam 1* conducted the interception through the coordination of the scLCG and Maltese officials yet to be identified. Regarding Incident 6, Panama-flagged merchant vessel *Nivin* intercepted and returned migrants and refugees to Libya only under the direction of the Italian MRCC and the scLCG.

383. Other unidentified scLCG members also have provided essential contributions to the deprivation of liberty of migrants and refugees; they include those who are involved in the Libyan MRCC that, thanks to the support of Italian officials' functions, enables the communication between the scLCG and officials of other MRCCs, Frontex, and/or EUNAVFOR MED. Moreover, as the scLCG has become intertwined with militias and armed groups and has worked in close coordination with the smuggling and trafficking networks in Libya, certain members of the scLCG are also physically involved in the severe deprivation of liberty in the migrants and refugees' subsequent disembarkation and detention in Libya.

384. Once the scLCG has disembarked migrants and refugees in Libya, the DCIM – or the militias collaborating with it – systematically transfers the migrants and refugees to detention centers. The DCIM, which formally answers to the Libyan Ministry of the Interior, was headed by **Mabrouk Abdelhafid** (sometimes spelled as Abd al-Hafiz) until the end of 2021, when he was replaced by **Mohammed al-Khoja, former Deputy Head of the DCIM and Head of the Al-Khoja militia**.[718] It is likely that Abdelhafid and al-Khoja provided essential contributions to the deprivation of liberty of migrants and refugees. The DCIM has been a crucial partner of EU agencies and Member States for receiving funding to manage migration and improve the conditions of the detention centers. The severe deprivation of liberty of migrants and refugees is an outcome of these actions and thus, the DCIM heads provided an essential contribution to the crime.

385. Moreover, several militias' and armed groups' members have been identified as running the detention facilities in the incidents described in Section III. Notably, the Tariq al-Sikka detention center (Incidents 1 and 4) is nominally under DCIM authority but, *de facto*, is run by the Al-Khoja Militia, headed by Mohammed al-Khoja.[719] The Zuwara detention center (Incidents 5 and 12) is also nominally under DCIM authority, with Anwar Bodeeb identified as one of the persons in charge of the center.[720] In the Karareem detention center (Incident 6), reporting from 2017 indicated that the head of this center was Captain Wajdi, allegedly a DCIM official.[721] By 2019, it was reported that this center was closed.[722] The Zawiya al-Nasr detention center (Incident 8) was, until recently, affiliated with DCIM and controlled by the al-Nasr Brigade,[723] with recent reports indicating that the center is now under the control of

[718] Ian Urbina, *Despite Calls for Reform, Libya Appoints Notorious Militia Leader to Handle Migrants*, Gunjur Online, 19 January 2022, https://www.gunjuronline.com/post/despite-calls-for-reform-libya-appoints-notorious-militia-leader-to-handle-migrants

[719] UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, Table 24.A.1 and 24.A.2, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf; ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, Annex III; Global Detention Project, Triq al Seka Detention Center, https://www.globaldetentionproject.org/countries/africa/libya/detention-centres/2036/triq-al-seka-detention-center; Ian Urbina, *Despite Calls for Reform, Libya Appoints Notorious Militia Leader to Handle Migrants*, 22 December 2021, https://www.theoutlawocean.com/investigations/the-secretive-prisons-that-keep-migrants-out-of-europe/subsequent-coverage/despite-calls-for-reform-libya-appoints-notorious-militia-leader-to-handle-migrants/; and Twitter, Sara Creta, 24 December 2021, 2:48 PM, https://twitter.com/saracreta/status/1474376488728375297?s=20.

[720] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, Annex III and Global Detention Project, Zuwarah Detention Center, https://www.globaldetentionproject.org/countries/africa/libya/detention-centres/995/zuwarah-detention-centre-%D8%B2%D9%88%D8%A7%D8%B1%D8%A9

[721] Björn Blaschke, 'Man behandelt uns wie Tiere', Deutschlandfunk, 05 May 2017, https://www.deutschlandfunk.de/fluechtlingslager-in-libyen-man-behandelt-uns-hier-wie-tiere-100.html

[722] MSF, *Libyen: Schließung des Internierungslagers Misrata bedeutet weitere Verschlechterung der Lage von Migrantinnen, Migranten und Flüchtlingen*, 17 October 2019, available at: https://www.aerzte-ohne-grenzen.at/presse/libyen-schliessung-des-internierungslagers-misrata-bedeutet-weitere-verschlechterung-der

[723] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, Annex III and Global Detention Project, (Al Nasr) Az-Zawiyah Detention Center,

the SSA and has been at least since December 2021.[724] Alkhums (Khoms Souq al Khamis or Souq Alkhums – Incident 7), was under nominal control of DCIM until the detention center was closed in September 2020.[725] The Abu Salim detention center (Incident 8), initially under nominal DCIM authority, is influenced by groups under Abdel Ghani al-Kikli, a.k.a. "Gheniwa," who used to command the Abu Salim Central Security Force and was appointed commander of the SSA in January 2021.[726] Lastly, the Al Mabani detention center (Incidents 2, 8, 9, and 10), was under nominal DCIM control between the end of 2020 and the beginning of 2020 but, in reality, was run by the Public Security Agency, a GNU-affiliated militia led by Emad al-Tarabulsi.[727] According to Amnesty International, the center's director is Noureddin al-Qureitli (also spelled as Noureddine al-Ghreetly).[728] The involvement of the past and current Heads of the DCIM, along with the members of militias or armed groups running detention centers, warrants further investigation by the OTP.

3. Mental Element for the Crime of Severe Deprivation of Physical Liberty

386. This subsection will show that, in addition to the material elements, the subjective elements of co-perpetration in relation to the commission of the crimes against migrants and refugees, as documented in this Communication, are also fulfilled. In fact, the abovementioned officials of EU agencies and Member States, as well as the Libyan actors involved, were well aware of the consequences of their actions and of the context in which they were operating. They intentionally contributed to, and can therefore be responsible as co-perpetrators for, the crime against humanity of severe deprivation of physical liberty under Art. 7(1)(e) of the Rome Statute. This section will establish that the alleged perpetrators were both aware of the factual

https://www.globaldetentionproject.org/countries/africa/libya/detention-centres/991/al-nasr-az-zawiyah-detention-centre; UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, Annex 24, Table 24.A.1, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf.

[724] UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2022/427, 27 May 2022, Annex 24, Table 24.A.4, https://unsmil.unmissions.org/sites/default/files/final_report_of_the_panel_of_experts_established_pursuant_to_resolution_1973_2011_concerning_libya.pdf.

[725] UN Security Council, Final Report of the Panel of Experts established pursuant to resolution 1973 (2011) concerning Libya, S/2021/229, 8 March 2021, para. 3 and Annex 18, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/037/72/PDF/N2103772.pdf?OpenElement.

[726] Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 7 and 39, https://www.amnesty.org/en/documents/mde19/4439/2021/en// and https://www.amnesty.org/en/latest/news/2022/05/libya-hold-stability-support-authority-militia-leaders-to-account/.

[727] Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 6, https://www.amnesty.org/en/documents/mde19/4439/2021/en//.

[728] Amnesty International, "*No one will look for you": Forcibly returned from sea to abusive detention in Libya*, July 2021, p. 20, https://www.amnesty.org/en/documents/mde19/4439/2021/en//.

circumstances that establish the gravity of the conduct, and that they knew that the conduct was part of a widespread and systematic attack directed against migrants and refugees.

387. As already detailed in Sections II and III, officials of EU agencies and Member States and Libyan actors have all intentionally crafted migration policies with each other to intercept migrants and refugees traveling to Europe via the Central Mediterranean route and return them to Libya, in order to prevent them from reaching Europe. This includes intentionally providing capacity-building support, training, funding, equipment, and patrol vessels to the Libyan actors, mainly the scLCG. These actions, in the ordinary course of events, have resulted in the deprivation of liberty of migrants and refugees. As argued in Section IV, this deprivation of liberty started at the moment of their interception at sea, and continued throughout their return to, disembarkation in, as well as transfer to detention centers, in Libya.

388. In general, the officials of EU agencies and Member States, along with the Libyan actors, were all aware of the gravity of the deprivation of liberty during interceptions at sea and returns to Libya. Particularly, officials of EU agencies and Member States know that the deprivation of liberty is severe, given that Libya cannot be considered a safe port for disembarkation (and thus, returns to Libya entail a violation of the non-refoulement principle), that there are not procedural guarantees regarding the deprivation of liberty in Libya, and that the scLCG's use of violence against migrants and refugees during interceptions has been well-documented. In as early as November 2012, the European Parliament passed a resolution that observed that "human rights abuses and violations are committed regularly in Libya against migrants, asylum seekers and refugees, and…undocumented foreigners continue to be at risk of exploitation, racism, arbitrary detention, beatings and torture, including while in detention."[729] In the same resolution, the European Parliament "expresses deep concern about the particularly vulnerable security and human rights situation of foreigners currently in Libya, especially those coming from sub-Saharan and Eastern Africa in search of work or political asylum and those still in prison; is concerned, in particular, at the living conditions and treatment of migrant detainees in detention centers, particularly in Kufra, Tripoli, Benghazi and the Nafusa Mountain region," and "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."[730]

389. Finally, they have known that the deprivation of liberty is part of the ongoing widespread and systematic attack directed against migrants and refugees in Libya. They are aware of the

[729] European Parliament, Resolution on the situation of migrants in Libya (2012/2879(RSP), 22 November 2012, p. 2, para. G.
[730] European Parliament, Resolution on the situation of migrants in Libya (2012/2879(RSP), 22 November 2012, p. 3, paras. 3-4, https://www.europarl.europa.eu/doceo/document/TA-7-2012-0465_EN.pdf.

existence of a system of exploitation and abuse targeting migrants and refugees in Libya, and they are aware that the deprivation of liberty initiated in the course of interceptions at sea constitute an integral part of the system of exploitation and abuse, as detailed by a multitude of reliable public reports.[731]

a. Maltese Officials

390. **The abovementioned Maltese officials** have intentionally created and contributed to the deprivation of liberty of migrants and refugees. The intent and knowledge of the Maltese officials is clear, and it is evidenced by official statements, such as the one by Neville Gafà to the Times of Malta:

> "If we knew of any boats headed to Malta's SAR, we would draw the attention of the Libyan coastguards, who would re-divert any boats in Libyan waters, back to Libya."[732]

391. Notably, Gafà worked under the orders of two Maltese Prime Ministers, Robert Abela and Joseph Muscat. In Incident 1, the intent to deprive migrants and refugees of their physical liberty, in order to return them to Libya rather than to Europe, is clearly demonstrated by RCC Malta members' efforts to prevent cargo ship *Ivan* from rescuing the distressed migrants. Although the migrants were squarely within Malta's own SAR zone and even with *Ivan* stopped only one mile away from the distress boat, RCC Malta and an AFM aircraft ordered *Ivan* to merely stay at the scene and "monitor" the situation until rescue arrived. [733] Instead, Maltese authorities, allegedly acting pursuant to the orders of Prime Minister Abela and Neville Gafà, instructed the Libyan-flagged fishing boat *Dar Al Salam 1* to proceed to the scene and intercept the migrants and refugees.[734] Such orders are a clear indication of the intent to deprive migrants

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[731] *See generally*, Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/50/63, 27 June 2022, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya; Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya* (Advanced Unedited Version), A/HRC/48/83, 1 October 2021, https://reliefweb.int/report/libya/report-independent-fact-finding-mission-libya-ahrc4883-enar; Médecins sans Frontières (MSF), *Trading in Suffering: Detention, Exploitation and Abuse in Libya*, 23 December 2019, https://www.msf.org/libya%E2%80%99s-cycle-detention-exploitation-and-abuse-against-migrants-and-refugees; Tim Eaton, *Libya's War Economy: Predation, Profiteering and State Weakness*, Chatham House, April 2018, https://www.chathamhouse.org/sites/default/files/publications/research/2018-04-12-libyas-war-economy-eaton-final.pdf; Amnesty International, *Libya's Dark Web of Collusion: Abuses Against Europe-bound Refugees and Migrants*, 11 December 2017, https://www.amnesty.org/en/documents/mde19/7561/2017/en/; and ECCHR, FIDH, LFJL Art. 15 Communication, November 2021.

[732] Times of Malta, *Anger as Neville Gafà says he coordinated Libya pushback on OPM orders*, 30 April 2020, https://timesofmalta.com/articles/view/neville-gafa-says-he-coordinated-libya-pushback-on-opm-orders.788951

[733] Alarm Phone, *Twelve Deaths and a Secret Push-Back to Libya*, 16 April 2020, https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/.

[734] Times of Malta, *Neville Gafà says he coordinated migrant pushback 'under Libyan jurisdiction'*, 19 May 2021, https://timesofmalta.com/articles/view/neville-gafa-says-he-coordinated-migrant-pushback-under-libyan.873103.

and refugees of their liberty. A similar indication of intent is evidenced in Incident 10, when RCC Malta ordered Liberian-flagged merchant vessel *Saint George* to "monitor" the migrants in distress until the scLCG patrol vessel *Fezzan* was able to reach the area.

392. In incidents where the scLCG vessels were the only ones immediately involved, the Maltese officials provided distress locations directly to them: during Incident 2, an aircraft (likely Maltese) continuously provided the distress locations of two migrant boats to scLCG patrol boat *Ubari*, which eventually intercepted both boats and returned the migrants to Libya; similarly, during Incident 3, an aircraft (likely Maltese) called the scLCG several times, giving the scLCG directions on which way to go to proceed to the distress scene. The direct provision of information and coordination with the scLCG within these operations demonstrate the intent to deprive migrants and refugees of their physical liberty.

b. Italian Officials

393. Similarly, **the abovementioned Italian officials** have intentionally contributed to the deprivation of liberty of migrants and refugees in Libya. They intentionally signed MoUs to cooperate with Libyan actors; provided equipment, funding, and training to the scLCG; and promoted the establishment of the so-called Libyan MRCC and the declaration of the so-called Libyan SAR zone. Italian MRCC officials have further actively engaged in direct coordination with Libyan actors in specific incidents.

394. As described in Section III, in Incident 5, the Italian MRCC broadcasted distress information "on behalf of" the scLCG and refused to order any of the four nearby commercial vessels to intervene. During Incident 6, the Italian MRCC again sent communications to the *Nivin* ship "on behalf of" the scLCG and instructed the *Nivin* to contact the scLCG through the Italian MRCC. These actions demonstrate an intent to deprive migrants and refugees of their physical liberty so that they may be intercepted at sea and returned to Libya.

395. The intent for the conduct of deprivation of liberty by **former Italian Minister of the Interior** Minniti is illustrated by a statement he gave in an Italian Parliamentary session, in which he argued in favor of the cooperation with the scLCG that would result in the interception and return of migrants and refugees to Libya by stating that "having a maritime rescue center in Tripoli, which therefore allows the Coast Guard to be able to operate in territorial waters and, at the same time, to bring back to Libya people who are rescued in territorial waters, is a crucial point."[735]

[735] Senate of the Republic. Assemblea, *Resoconto stenografico.* XVII legislatura, seduta n.852, 5 July 2017, pp. 38-40. https://www.senato.it/service/PDF/PDFServer/BGT/1029577.pdf

396. Similarly, an indication of **former Italian Minister of the Interior** Matteo Salvini's intent is provided by a statement he made via Twitter on 24 June 2018 shortly after he assumed office earlier that month. Salvini thanked the scLCG for the interception and return of 820 migrants and refugees back to Libya,[736] which likely signifies his intent and knowledge that his actions as Minister of the Interior could, in the ordinary course of events, result in the deprivation of liberty of migrants and refugees in Libya.

397. There is an abundance of public documentation, as well as individual statements, that illustrate the full awareness on the part of the abovementioned Italian officials of the gravity of the migrants and refugees' severe deprivation of liberty and of the fact that this conduct is part of the cycle of widespread and systematic commission of crimes against migrants and refugees in Libya. For example, Italian tribunals have explicitly ruled that Libya cannot be considered as a "safe place."[737]

398. **Former Italian Minister of the Interior Marco Minniti** was certainly well aware of the gravity of the situation of migrants and refugees in Libya in as early as 2017, as he admitted on 15 August 2017 that "there is an issue of primary importance, and that is the issue of the living conditions of those who are saved by the [so-called Libyan Coast Guard] and taken back to Libya."[738] Moreover, in a hearing by a Parliamentary Commission on 22 February 2017, after MP Erasmo Palazzotto detailed the scLCG entrenchment with militias and the situation in detention centers, such as the al-Nasr detention facilities, Minniti recognized that "I am a person informed of the facts" even though he denies that the actions of Italian officials are violating human rights obligations.[739]

399. Recent statements by **Matteo Piantedosi, former Chief of Staff of the Italian Minister of the Interior** under Salvini, and now himself Italian Minister of the Interior, appear to indicate awareness of the gravity of the deprivation of liberty of migrants and refugees, particularly with regard to the violation of the non-refoulement principle. Piantedosi criticized the *Hirsi* decision

[736] Original in Italian: "Ringrazio di cuore, da ministro e da papà, le Autorità e la Guardia Costiera Libica che oggi hanno salvato e riportato in Libia 820 immigrati, rendendo vano il "lavoro" degli scafisti ed evitando interventi scorretti delle navi delle Ong." Tweet by Matteo Salvini, 24 June 2018, https://twitter.com/matteosalvinimi/status/1010976674622660608

[737] Tribunale di Napoli, Sentenza N. 1643/21, depositata il 30/12/2021, p. 28 and Tribunale di Catania, Sezione del Giudice per le Indagini Preliminari, Decreto di convalida e di sequestro preventivo, 16 April 2018, http://questionegiustizia.it/doc/decreto_rigetto_sequestro_preventivo_tribunale_Ragusa_gip.pdf.

[738] La Repubblica, *Migranti, Minniti: "Condizioni di chi è riportato in Libia sono mio assillo"*, 15 August 2017, https://video.repubblica.it/cronaca/migranti-minniti-condizioni-di-chi-e-riportato-in-libia-sono-mio-assillo/282714/283328. (Original quote in Italian: "Nel momento in cui dovesse stabilizzarsi il dato dell'azione di controllo delle acque territoriali libiche da parte della guardia costiera, si pone una questione di grandissimo rilievo, e cioe' il tema delle condizioni di vita di coloro che vengono salvati dalla guardia costiera e riportati in Libia. Come voi sapete questo e' l'assillo personale mio, ed e' l'assillo dell'Italia.")

[739] Chamber of Deputies. Commissione parlamentare di inchiesta, *Resoconto stenografico.* XVII legislatura, seduta n.76, 22 February 2017, http://documenti.camera.it/leg17/resoconti/commissioni/stenografici/html/69/audiz2/audizione/2017/02/22/indice_stenografico.0076.html

on Italy's violation of this principle, which came at a time when Piantedosi was an official at the Italian Ministry of the Interior.[740] It is likely that at least since 2012 (when the decision was reached), Piantedosi has been aware of the unsafe situation of migrants and refugees in Libya and, nonetheless, has provided contributions to the common plan, which resulted in the deprivation of liberty of migrants and refugees in Libya.

400. These statements evince that the awareness on the part of Italian officials of the gravity of the migrants and refugees' deprivation of liberty, and that this conduct is part of the attack against migrants and refugees in Libya, is widespread across Italian institutions, including the Parliament and the judiciary, as well as among politicians and in public discourse.

401. For instance, in an interview published by the Italian newspaper *La Stampa* on 6 August 2017, the Deputy Minister for Foreign Affairs, signaling partial disagreement with decisions of the government, stated, "Our ships will keep collecting migrants. Preferably, also those present in boats blocked by the [so-called Libyan Coast Guard], when our ships are in a condition to do so. Because taking them back to Libya, at this moment, means taking them back to hell."[741] In response to a letter from Amnesty International, Ambassador Mariangela Zappia, Diplomatic Councilor to the Prime Minister, wrote on 3 November 2017 that the problematic living conditions in the reception centers for migrants in Libya "have been well known to us for a long time."[742]

402. Such awareness is also reflected in Italian parliament sessions discussing the scLCG, including in two separate sessions in August 2018 (before the occurrence of the incidents involving Italian authorities in Section III.A.2), in which, relying on public documentation, it was repeatedly stated that Libya is not a place of safety for disembarkation, and that returning migrants and refugees to Libya is a violation of non-refoulement.[743] This indicates that those present in the

[740] Franceso Grignetti, *Matteo Piantedosi: "Se i migranti sono su navi straniere si può vietare lo sbarco in Italia",* La Stampa, 26 October 2022, https://www.lastampa.it/politica/2022/10/26/news/matteo_piantedosi_se_i_migranti_sono_su_navi_stranieresi_puo_vietare_lo_sbarco_in_italia-12199988/

[741] La Stampa, *Giro: "Fare rientrare quelle persone vuol dire condannarle all'inferno"*, 14 August 2017, https://www.lastampa.it/cronaca/2017/08/14/news/giro-fare-rientrare-quelle-persone-vuol-dire-condannarle-all-inferno-1.34431931/. (Original in Italian: "Le nostre navi continueranno a raccogliere i migranti. Sarebbe auspicabile, anche quelli ospitati da imbarcazioni bloccate dalla Guardia costiera libica, quando le nostre imbarcazioni siano in condizione di poterlo fare. Perché riportarli in Libia, in questo momento, vuol dire riportarli all'inferno.")

[742] Amnesty International, *Libya's dark web of collusion: Abuses against Europe-bound refugees and migrants*, December 2017, p. 58, https://www.amnesty.org/en/documents/mde19/7561/2017/en/. (Original in Italian: "Siamo inoltre in prima linea per il miglioramento delle condizioni di vita dei centri di accoglienza dei migranti in Libia – la cui criticita' ci e' da tempo ben nota – in cooperazione con i principali attori ed agenzie internazionali.")

[743] Italian Parliament Session 38, Discussion of the bill: S. 624 - Conversion into law, with amendments, of Decree-Law No. 84 of July 10, 2018, on urgent provisions for the transfer of Italian naval units to support the Coast Guard of the Ministry of Defense and the coastal security organs of the Libyan Ministry of the Interior (Approved by the Senate), 3 August 2018 and Session 39, Bill: S. 624 - Conversion into law, with amendments, of Decree-Law No. 84 of July 10, 2018, on urgent provisions for the transfer of Italian naval units to support the

sessions – which included the undersecretaries of the Ministry of the Interior who reported this to Minister Salvini – had knowledge of these factual circumstances prior to the occurrence of the incidents included in this Communication.

403. Other parliamentary sessions were held in November 2018 after the occurrence of Incident 6[744] and, in April 2019, immediately following Incident 5.[745] The discussions held on those occasions again demonstrate awareness on the part of all MPs and members of the Italian government present of the gravity of the situation of the migrants and refugees as part of a widespread and systematic attack against them. Despite having full awareness of the criminal features of the actions of the scLCG and the horrible detention conditions to which migrants and refugees are subjected in Libya, Italian officials continued their cooperation with Libyan actors.

c. EUNAVFOR MED Officials

404. **The abovementioned EUNAVFOR MED officials** have also intentionally contributed to migrants and refugees' severe deprivation of liberty in Libya. They have intentionally signed agreements; provided information on migrants and refugees in distress in specific incidents to the scLCG; provided training to the scLCG; and also actively engaged in direct coordination with Libyan actors in several incidents, as described in Section III.

405. Officials of EUNAVFOR MED were aware of the problems and potential abuse against migrants caused by the scLCG's lack of competence, despite the training programs. In February 2018, a EUNAVFOR MED monitoring report acknowledged 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/SOLAS events."[746] Another EUNAVFOR MED report – signed by Operation Commander Rear Admiral Stefano Truchetto – also observed "excessive use of physical force" by the scLCG

Coast Guard of the Ministry of Defense and the coastal security organs of the Libyan Ministry of the Interior (Approved by the Senate) (A.C. 1004), 6 August 2018.

[744] On 21 November 2018 after the occurrence of Incident 6, Parliament Member (MP) Erasmo Palazzotto observed the "persistent attempt to conceal the responsibilities" that Italy has with regard to the violations of international conventions on maritime rescue and human rights, as well as the setting up of detention centers (which are "real concentration camps"). See: Italian Parliament Session 88, Question by i Erasmo, Palazzotto, Diplomatic initiatives to protect the human rights of the migrants currently aboard the ship *Nivin*, docked in the Libyan port of Misratah, particularly through destination to a European safe haven, 21 November 2018.

[745] In the two sessions in April 2019, immediately following Incident 5, more recent public documentation of the violence and abuse against migrants and refugees in Libya, the violence by the scLCG during interceptions, and Italy's support to the scLCG were again brought up. See: Italian Parliament Session on 11 April 2019, Urgent information from the Prime Minister on recent developments in the situation in Libya and Interpellation regarding incident on 2.04.2019 by Fausto Raciti, 12 April 2019.

[746] Forensic Oceanography, *Mare Clausum*, May 2018, p. 32, citing EUNAVFOR MED Operation Sophia - Monitoring of Libyan Coast Guard and Navy Report October 2017 - January 2018, 9 March 2018, p. 26.

against migrants.[747] That EUNAVFOR MED Operations Sophia and Irini have continued training with the scLCG as part of their missions, despite the awareness of the scLCG's conduct, is an indication of the intent of its officials, including Rear Admiral Stefano Truchetto, to contribute to the deprivation of liberty of migrants and refugees.

406. At the operational level, the intent of other EUNVAFOR MED's officials is exemplified in Incident 7, when the pilot of EUNAVFOR MED's asset *Seagull 19* confirmed that it was the on-scene coordinator for the interception.[748] The direct communication of the pilot exclusively with the scLCG patrol vessel *Sabratha 654* that disregarded a civil rescue vessel available to conduct the operation is a further indication of the intent of the contribution to the migrants and refugees' deprivation of liberty through the interception at sea conducted by the scLCG.

d. Frontex Officials

407. Frontex officials have intentionally contributed to the deprivation of liberty of migrants and refugees in Libya. Particularly, the recently leaked report by the European Anti-Fraud Office (OLAF), which conducted a confidential investigation into Frontex staff, includes information pointing to Frontex officials' knowledge of the gravity of the severe deprivation of liberty of migrants and refugees in Libya.[749] Incident 1 is among the incidents investigated by OLAF where a situational report by the Frontex Situation Center "highlighted strong indications of violations of fundamental rights."[750] In spite of this, Frontex officials have continued to provide information to the scLCG for the interception of migrants and refugees at sea and their return to and detention in Libya. Nevertheless, further incidents, including Incidents 8–11, all likely involving Frontex officials, occurred afterwards, when Frontex officials' awareness of the gravity of the deprivation of liberty of migrants and refugees cannot be doubted.

408. Moreover, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) has found that Frontex generally disregarded the reports of "several reliable actors, such as national and international human rights bodies and organisations" that "consistently reported about fundamental rights violations at the border in a number of Member States," and even "failed to adequately respond to internal observations about certain cases of probable

[747] European External Action Service (EEAS), Libyan Coast Guard and Navy monitoring / Four months report August – November 2021, p. 9, 4 January 2022, https://www.documentcloud.org/documents/21185907-libyan-coast-guard-and-navy-monitoring-four-months-report-august-november-2021.
[748] [REDACTED]; Alarm Phone, Borderline Europe, Mediterranea – Saving Humans, and Sea-Watch, *Remote Control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, 17 June 2020, p. 19, https://eu-libya.info/img/RemoteControl_Report_0620.pdf.
[749] European Anti-Fraud Office (OLAF), Final Report Case No. OC/2021/0451/A1. The report is confidential, but on October 2022, Frag den Staat, Lighthouse Report and Der Spiegel decided to leak a redacted public version of it, which is available at: https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/
[750] European Anti-Fraud Office (OLAF), Final Report Case No. OC/2021/0451/A1, p. 18

fundamental rights violations in Member States."[751] Regarding joint operations with EU Member States, the LIBE Committee has concluded that Frontex "found evidence in support of allegations of fundamental rights violations in Member States with which it had a joint operation, but failed to address and follow-up on these violations promptly, vigilantly and effectively. As a result, Frontex did not prevent these violations, nor reduce the risk of future fundamental rights violations."[752]

409. Overall, the LIBE Committee report and the OLAF Report have pointed out the refusal of Frontex officials, including former Executive Director Leggeri, to take human rights violations seriously and described the attempts to undermine the actions of other Frontex officials, including the Fundamental Rights Officer, to in some way improve or change the agency's operations. These attempts to deny or cover up incidents of human rights violations serve as an indication of Frontex officials' knowledge of the gravity of the deprivation of liberty of migrants and refugees in cases where they have collaborated with the scLCG.

410. On the operational level, the intent of Frontex officials to contribute to, as well as their knowledge of, the deprivation of liberty of migrants and refugees can be exemplified through the incidents included in Section III. In Incident 10, an air asset likely operated by Frontex or the AFM continuously sent updated distress locations of the migrant and refugee boat to the scLCG boat *Fezzan* and guided it to the migrants and refugees in distress. Similarly, in Incident 11, Sea-Watch observed Frontex asset *Osprey 1* hovering above the location of a boat in distress until scLCG boat *Fezzan* completed the interception. Afterwards, *Osprey 1* was overheard communicating that the operation had been completed.[753] This clearly indicates the intent to deprive migrants and refugees of their physical liberty and to return them to Libya.

e. Other EU Officials

411. There is an abundance of public documentation, also including EU reports, on the situation in Libya that establishes that other EU officials, particularly of the European Commission and the EEAS, are aware that the crime of severe deprivation of physical liberty of migrants and refugees will occur in the ordinary course of events; of the circumstances that establish the gravity of said deprivation of liberty; and of the fact that such a crime is part of the widespread and systematic attack directed against migrants and refugees in Libya. Such awareness is evident

[751] European Parliament (2019-2024), LIBE Committee on Civil Liberties, Justice and Home Affairs, Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations, 14 July 2021, p. 5.
[752] European Parliament (2019-2024), LIBE Committee on Civil Liberties, Justice and Home Affairs, Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations, 14 July 2021, p. 5.
[753] [REDACTED] Sea-Watch, *Crimes of the European Border Coast Guard Agency Frontex in the Central Mediterranean Sea*, May 2021, p. 3, https://sea-watch.org/wp-content/uploads/2021/05/Frontex-Factsheet_Airborne_Sea-Watch_May-2021.pdf; Tweet by Sea-Watch International, 12 February 2020, https://twitter.com/seawatch_intl/status/1227683058679271426,

in the direct statements, parliament discussions, court decisions, and EU documents mentioned above.

412. A leaked report by the EU Border Assistance Mission to Libya (EUBAM),[754] dated 25 January 2017, also confirms, among other things, that "[t]here are reports about [detention centers] which describe gross human rights violations and extreme abuse and mishandling of detainees, including sexual abuse, slavery, forced prostitution, torture and maltreatment."[755]

413. Moreover, EEAS's strategic review of Operation Sophia repeatedly noted the need for "new disembarkation procedures for persons rescued in SOLAS operations,"[756] reflecting that the EEAS officials knew the existing disembarkation framework in Libya was problematic and would lead to crimes against humanity being committed against migrants pulled back to Libya. These materials also indicate the awareness of EU agencies' and Member States' officials of the gravity of the deprivation of liberty and the fact that it is part of the widespread and systematic attack against migrants and refugees in Libya.

414. In particular, several statements of **former High Representative of the Union for Foreign Affairs and Security Policy, Federica Mogherini**, indicate that, at the very least, she had intent to collaborate with Libyan actors and knowledge of the system of exploitation that is constitutive of the widespread and systematic attack against migrants and refugees in Libya. In an interview with Euronews on December 2017, the former High Representative stated that it was a priority to collaborate with Libyan actors to "save lives" and manage Libyan borders and detention centers. Additionally, she indicated her knowledge of the system of exploitation against migrants and refugees, involving enslavement and detention in Libya at least since 2014.[757] In a separate statement, the former High Representative demanded the closure of migrant and refugee detention centers, due to their unacceptable conditions.[758] Despite the awareness (and rejection) of these circumstances, the collaboration with Libyan actors – mainly the scLCG – spearheaded by Mogherini has intentionally continued to ensure that migrants and refugees were intercepted and with the knowledge that in the ordinary course of events they would invariably be returned to and detained in Libya.

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[754] EUBAM is a civil mission under the Common Security and Defense Policy (CSDF) and the EEAS, created to support Libyan internationally recognized authorities to manage their borders. EEAS, *About the EU Border Assistance Mission in Libya (EUBAM)*, 15 September 2021, https://www.eeas.europa.eu/eubam-libya/about-eu-border-assistance-mission-libya-eubam_en?s=327

[755] EEAS, EUBAM Libya Initial Mapping Report Executive Summary, 25 January 2017, https://www.statewatch.org/media/documents/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf.

[756] Council of the European Union, European External Action Service (EEAS) to the Political and Security Committee and Delegations, Strategic Review on EUNAVFOR MED Operation Sophia, EUBAM Libya & EU Liaison and Planning Cell, 27 July 2018, p. 7, 36-37, 43, 45-47, 73, and 75, https://www.statewatch.org/media/documents/news/2018/aug/eu-sophia-libya-overview-11471-18.pdf

[757] Euronews, *Federica Mogherini: 'Europe is already fighting slavery in Libya'*, 4 December 2017, https://www.euronews.com/2017/12/04/federica-mogherini-europe-is-already-fighting-slavery-in-libya

[758] Libyan Observer, *EU's foreign policy chief demands closure of migrant shelters in Libya*, 28 March 2019, https://www.libyaobserver.ly/inbrief/eus-foreign-policy-chief-demands-closure-migrant-shelters-libya

f. Libyan Actors

415. The Libyan actors mentioned above have intent to commit the crime of severe deprivation of physical liberty. They purposefully have intercepted migrants and refugees at sea, returned them to, and detained them in Libya.

416. For the members of the scLCG or Libyan merchant vessels, their intent is manifested through their direct and physical engagement in the interceptions and returns, often through violent means. The incidents in Section III in which the scLCG conducted the interceptions and returns of migrants and refugees to Libya could not have happened without clear intent and awareness of the scLCG in this regard. A blatant example is given by Incident 6, where the scLCG gave instructions to the crew of the merchant vessel *Nivin*, with the intent to return migrants and refugees to Libya. The violent actions of Libyan armed groups also reveal the intent to deprive the migrants and refugees of their liberty and transfer them to detention centers, which effectively occurred.

417. These Libyan actors have also been aware of the gravity of the deprivation of liberty during interceptions at sea. The Libyan officials of the internationally recognized government, including the Heads of the DCIM, along with members of the scLCG, militias, and armed groups operating detention centers, know about the lack of any procedural guarantees regarding the deprivation of liberty, as they intentionally keep migrants and refugees detained for indeterminate periods. These Libyan actors are similarly aware of the violation of the non-refoulement principle during those interceptions and returns because they are aware of the dire situation in Libya and the fact that Libya is not a place of safety. Finally, they have known that the deprivation of liberty initiated in the course of interceptions at sea is part of the widespread and systematic attack directed against migrants and refugees in Libya, as they are directly involved in the system of exploitation and abuse against migrants and refugees that comprises this attack, and in which the deprivation of liberty constitutes an integral component.

4. Mental Elements for Co-Perpetration

418. The two mental elements required for co-perpetration require: firstly, the mutual awareness that the implementation of the common plan results in the fulfillment of the material elements of the crimes; and secondly, the awareness of factual circumstances enabling joint control. This assessment is largely supported by the analysis above on the *mens rea* required for the crime of severe deprivation of liberty.

419. The **abovementioned officials of EU agencies and Member States, as well as Libyan actors**, are mutually aware that their contributions to the common plan would result in the fulfillment of the material elements of the crime of severe deprivation of liberty of migrants and refugees.

As has been thoroughly described in Section IV, the deprivation of liberty of migrants and refugees already begins with their interception at sea by the scLCG or by merchant vessels who return them to Libya.

420. By engaging in a common plan to intercept migrants and refugees at sea with the purpose of returning them to Libya, both the officials of EU agencies and Member States, along with Libyan actors, are aware and accept that these interceptions, in the ordinary course of events, result in the severe deprivation of physical liberty of migrants and refugees. As argued above, this awareness and acceptance can be inferred from the fact that the alleged co-perpetrators have knowledge of the situation of migrants and refugees in Libya and, in particular, the existence of a widespread and systematic attack against them, in which they are exploited and detained under inhumane conditions. This is clear from the public documentation, direct statements by certain European officials, and EU reports elaborated above in this Communication.

421. The **abovementioned Libyan actors** also have knowledge of the "virtual certainty" of the commission of the crime of severe deprivation of liberty in Libya as a result of carrying out the common plan of intercepting and returning migrants and refugees to Libya. The high-ranking Libyan officials mentioned above have such knowledge because they formed the collaboration with European officials, who rely on this virtual certainty to achieve the goal of keeping migrants within Libya and therefore out of Europe. Moreover, members of the scLCG or Libyan merchant vessels also "ensure" that this is a virtual certainty by physically carrying out the commission of the crime.

422. Lastly, the element of awareness of the circumstances enabling joint control is also fulfilled by the **abovementioned European officials and Libyan actors.** For the **Maltese, Italian, and EUNAVFOR MED officials** who concluded agreements (whether secret ones or official MoUs) with Libya, it is clear that they know they are collaborating with the Libyan actors and that they have joint control over such collaboration.

423. For instance, when the Malta-Libya MoU was signed, the Office of the **Maltese Prime Minister Robert Abela** highlighted that "both leaders spoke about the need to strengthen cooperation to ensure that lives are not lost at sea and to combat human traffickers on the ground and at sea."[759] While the statement is framed under the goals of saving lives and fighting human trafficking, as has been elaborated above, there is virtual certainty that these actions will result in the severe deprivation of liberty of migrants and refugees. This evinces the likely awareness of the joint control of both Maltese officials and Libyan actors for the implementation of the common plan.

424. For **officials of the RCC Malta or AFM, the Italian MRCC, EUNAVFOR MED operations, and Frontex**, it is also clear that they have awareness of joint control as they directly

[759] Government of Malta, Statement by the Office of the Prime Minister, 28 May 2020, https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/May/28/pr201016.aspx

communicate and interact with Libyan actors to coordinate interceptions and returns of migrants and refugees, as illustrated in the 12 incidents in Section III.A. The officials of EU agencies and Member States know the control is joint because they are aware the Libyan actors would not have been able to intercept and return migrants and refugees alone.

425. Incident 5 provides an example of how MRCC officials and the scLCG are aware that they have joint control over the deprivation of liberty of intercepted migrants and refugees. The response of the MRCC official that "everyone" was aware of the situation indicates the awareness of the joint control. In contrast, for Sea-Watch's crew, it was impossible to reach the Libyan MRCC and the scLCG, which points to the conclusion that not only was the collaboration between the Italian authorities and the scLCG intended with the goal of ensuring that the migrants and refugees were intercepted and returned to Libya, but also that the Italian officials were aware of the joint control they had over the deprivation of liberty of migrants.

426. In a statement to an Italian newspaper, a Frontex official explicitly stated, "We know the coordination center in Tripoli is not working, we inform the Italians and all the MRCCs of neighboring countries."[760] Although this is not directed solely at the scLCG, it is clear that Frontex is aware of its joint control, as it knows that scLCG members would not be able to coordinate an interception independently and require the information relayed by officials of Frontex, EUNAVFOR MED, the Italian MRCC, or the Maltese RCC.

427. Lastly, officials of EU agencies and Member States are well aware that the Libyan MRCC is inoperative and that, therefore, the scLCG relies on their support – particularly by the Italian provision of a Navy Ship and equipment – to send and receive information that allows them to detect and intercept boats in distress. Most recently, in an answer by current High Representative of the EU for Foreign Affairs and Security Policy to an EU Parliamentary question, Josep Borrell recognized that the Libyan MRCC is not yet operational, but that EUBAM is planning to support the scLCG in this regard.[761] Thus, officials of EU agencies and Member States are aware that their essential support to the Libyan MRCC is a circumstance that enables the joint control over the deprivation of liberty of migrants and refugees.

428. The **abovementioned Libyan actors** are also aware of the joint control they have with the European officials. For the high-ranking Libyan officials who concluded agreements (whether secret or official MoUs) with European Member States or EUNAVFOR MED, it is clear that they know they are collaborating with the European officials and that they have joint control over such collaboration. For members of the scLCG or Libyan merchant vessels, it is also clear

[760] Sara Creta, *Respinti all'inferno*, Domani, 29 April 2021, https://www.editorialedomani.it/longform/migranti-libia-torture-respingimenti-frontex-europa-italia-ghbpk0qo.

[761] European Parliament, *Answer given by High Representative/Vice-President Borrell i Fontelles on behalf of the European Commission*, Parliamentary question - E-003014/2022(ASW), 8 November 2022, https://www.europarl.europa.eu/doceo/document/E-9-2022-003014-ASW_EN.html

that they have awareness of joint control as they directly communicate and interact with members of RCC Malta, the AFM, the Italian MRCC, EUNAVFOR MED operations, and Frontex to coordinate interceptions and returns of migrants and refugees. They know the control is joint because, although they rely heavily on European coordination and support to conduct interceptions and returns, they are the ones physically implementing the returns, as illustrated in the incidents in Section III. Thus, Libyan actors are fully aware of the factual circumstances of enabling joint control.

429. Based on the assessment of the material and mental elements above, there are reasonable grounds to believe that officials of EU agencies and of Member States, along with Libyan officials and members of the scLCG, militias, and armed groups, are likely responsible as co-perpetrators for the crime against humanity of severe deprivation of liberty of migrants and refugees as part of the incidents described in Section III of this Communication. The Submitting Party respectfully request the OTP to further investigate the alleged involvement of the abovenamed officials and to determine the identity of unnamed individuals.

C. Final Considerations on Individual Criminal Responsibility

430. Should the OTP consider that the elements of co-perpetration under Article 25 (3)(a) of the Rome Statute are not fulfilled, the analysis above of the individual criminal responsibility of officials of EU agencies and Members States and of Libyan actors under co-perpetration does not preclude the investigation of other alternative modes of liability.

431. It is also possible to analyze the responsibility of EU agencies' and Member States' officials under aiding, abetting, or otherwise assisting in the commission of the crime under Article 25 (3)(d). [762] For instance, the actions of high-ranking Italian officials in providing capacity-building support, training, and equipment (including patrol boats) to the scLCG can be understood as the provision of material assistance that had the effect of facilitating the commission of the crime of severe deprivation of liberty of migrants and refugees in Libya.

432. The provision of this assistance, based on the statements of the Italian officers named above, was done with the purpose of facilitating the interceptions and returns of migrants and refugees back to Libya which, as argued in Section IV of this Communication, fulfills the material element of the crime of severe deprivation of liberty.

[762] Alternatively, the "common purpose" as a mode of responsibility under Article 25(3)(d) has been elaborated in an Article 15 Communication to the ICC submitted by Uprights, Adala for All, and StraLi in January 2022. Public version of the submission is available at: https://static1.squarespace.com/static/5eccc1ca80c0dd25fddf363f/t/62700396ce98e81f5eaf7824/1651508122395/Public+Circulation+Article+15+Communication+on+War+Crimes+and+Crimes+Against+Humanity+Committed+Against+Migrants+and+Asylum+Seekers+in+Libya.pdf.

433. Lastly, as elaborated in the previous section on co-perpetration, the officials of EU Member States and EU agencies clearly have the *mens rea* required for the commission of severe deprivation of physical liberty. Therefore, this element would also be fulfilled.

434. An Italian People's Tribunal reached a similar conclusion regarding the responsibility of Italian representatives, following the signature of the Italy-Libya MoU, for their complicity in crimes against humanity against migrants and refugees at sea and on the territory of Libya.[763] The People's Tribunal further argued that there are not "any insurmountable technical obstacles […] to delineate a concurring criminal liability of the top institutional leaders who implemented policies that resulted in serious violations of the right to life and to the safety of migrants."[764] Significantly, the decision admits that these complex issues should be addressed "by the competent national or international prosecutors."[765] Furthermore, the fragmentation of responsibility for Italian representatives is far from coincidental and, on the contrary, is functional in order to intentionally hinder the identification of the actors who should be accountable for the crimes committed. A similar analysis could be undertaken by the OTP not only for Italian officials, but also Maltese officials and officials and EU agencies.

VI. Admissibility and Interests of Justice

435. As prescribed by Article 17(1) of the Rome Statute, the Court shall determine the inadmissibility of a case in the event it does not meet two criteria: a) complementarity and b) gravity. Accordingly, the following sections will elaborate on these issues specifically.

436. While the wording of the provision seems to suggest that the admissibility assessment is to be conducted with regard to specific cases with identified perpetrators, the Court has already clarified that a correct and comprehensive interpretation of the Rome Statute indicates, on the contrary, that questions related to admissibility are solved at different stages of the proceedings

[763] "The activities carried out on Libyan territory and in Libyan and international waters by the Libyan police and Libyan military, as well as by the multiple tribal militias and the so-called 'Libyan coastguard', following the Italy-Libya Memorandum of 2 February 2017, configure - in their objective consequences of death, deportation, disappearance of persons, arbitrary imprisonment torture, rape, enslavement, and in general persecution against the people of the migrants - a crime against humanity." Tribunale permanente dei popoli, Sessione Sulla Violazione Dei Diritti Delle Persone Migranti E Rifugiate (2017-2018), Palermo, 18-20 dicembre 2017, Sentenza: https://www.questionegiustizia.it/data/doc/1607/tpp_palermo_migranti_sentenza_def_ita.pdf.

[764] Tribunale permanente dei popoli, Sessione Sulla Violazione Dei Diritti Delle Persone Migranti E Rifugiate (2017-2018), Palermo, 18-20 dicembre 2017, Sentenza: https://www.questionegiustizia.it/data/doc/1607/tpp_palermo_migranti_sentenza_def_ita.pdf.

[765] Tribunale permanente dei popoli, Sessione Sulla Violazione Dei Diritti Delle Persone Migranti E Rifugiate (2017-2018), Palermo, 18-20 dicembre 2017, Sentenza: https://www.questionegiustizia.it/data/doc/1607/tpp_palermo_migranti_sentenza_def_ita.pdf

up until trial[766] and, thus, can be related to a "case" or a "situation."[767] Notwithstanding the phase of the proceedings where the assessment occurs, the same criteria, derived from the Regulations of the Office of the Prosecutor and the Court's case law, shall apply.

A. Complementarity

437. According to the principle of complementarity as adopted in the Rome Statute, the primary responsibility to investigate lies with national States, which have the duty to investigate the crimes committed on their territory or by their nationals. In the incidents described above, based on the location where the crimes were committed and on the nationality of the alleged perpetrators, this would lead in most cases to the Maltese, the Italian, and the Libyan jurisdictions.[768]

438. With regard to the conducts perpetrated by EUNAVFOR MED and Frontex personnel, there is no explicit provision defining a differentiated jurisdictional regime. In the context defined so far, this could allow the application of criminal jurisdiction on behalf of further States, other than Italy, Libya, and Malta, depending on the nationality and sending State of the EU officials involved. In particular, while in the case of Frontex staff, the host State (namely, Italy for Joint Operation Themis) will be the one most likely exercising jurisdiction, in the case of EUNAVFOR MED, prosecution would most likely take place in the sending State, namely in Italy for Vice Admiral Enrico Credendino and Rear Admiral Stefano Turchetto.

439. Based on Article 73(3) of the Frontex Regulation,[769] Frontex staff members enjoy immunity from prosecution before the courts of the State of deployment when deployed in third countries. In these circumstances, the model status agreement provides for immunity from criminal jurisdiction of the third country, unless waived by the Frontex Executive Director or the home Member State.[770]

440. Complementarity will thus be assessed with reference to Malta, Italy, and Libya as the main *fora* for the incidents considered, first in a general evaluation of the suitability of each judicial system involved to prosecute the international crimes described and, then, vis-à-vis the specific cases analyzed in the present Communication. The Submitting Party remains at the disposal of

[766] ICC Pre-Trial Chamber I, "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, para. 41.

[767] ICC Pre-Trial Chamber I, "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, para. 45.

[768] *See supra* Sections III and IV.

[769] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No. 1052/2013 and (EU) 2016/1624, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1896.

[770] The waiver of immunity depends on whether the staff member is a statutory staff member, or a Member State staff member, the former being a person employed by Frontex and the latter a person seconded to Frontex or ready to be deployed as reserve staff.

the OTP to provide further assessments related to other European countries of interest for the investigation.

1. Libya

441. With regard to the crimes committed within the territory of Libya, or by Libyan nationals, based on open sources and the information provided by Sea-Watch and other sea rescue organizations, none of the incidents described in the present Communication seems to have been prosecuted or investigated by Libyan authorities.

442. Moreover, as thoroughly explained in the 2021 Communication,[771] the Libyan legal framework is inadequate to prosecute the crimes targeted, as it lacks provisions criminalizing international crimes under domestic law, the criminalization of serious offenses are limited and inappropriate, and the statute of limitations and granting of amnesties hamper the prosecution of the serious offences perpetrated.[772] Further, the fact that the criminal justice system in Libya has been severely weakened by over a decade of conflict, together with the absence of reliable and recognized institutions, translates into a lack of independent and impartial courts, inadequate fair trial standards, ineffectiveness of the criminal justice system, and lack of enforcement of criminal decisions.[773] As underlined in different reports by the FFM, "[c]ourts in Libya are effectively non-functional in numerous places, with justice actors facing continuing intimidation, death threats and other forms of violence."[774]

443. More specifically, the FFM found that the Libyan justice system still does not have the capacity to provide citizens with access to civil remedies for human rights violations[775] and that:

> "the Libyan justice system does not currently appear to have the means or capacity to conduct prompt, independent and impartial investigations, as evidenced by the many cases

[771] ECCHR, FIDH, LFJL, Article 15 Communication, November 2021, paras. 716-771.

[772] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/50/63, 27 June 2022, para. 102, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya.

[773] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/50/63, 27 June 2022, paras. 103-104, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya.

[774] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/50/63, 27 June 2022, para. 106, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya.

[775] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/50/63, 27 June 2022, para. 76, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya.

documented by the Mission characterized by an inability to prosecute those responsible in accordance with international human rights standards." [776]

Further, the FFM found that the absence of accountability for abuses against migrants and refugees is in the first place an instrument to deter sea crossings.[777]

444. In a recent report, the World Organization against Torture (OMCT) found that:

> "The uniting element in these diverse contexts is an environment of near-total disregard for the rule of law in which perpetrators can count positively on their full impunity, an environment in which justice is not only not done but actively prevented, and in which victims and their families have no place to turn to and enjoy neither protection nor access to support or rehabilitation. On the contrary, victims, their families or potential witnesses, lawyers, and those documenting violations face a ubiquitous and heavy risk of reprisals in an environment described to us as 'militia rules'."[778]

2. Italy

a. Relevant Proceedings

445. To date, Italian judicial authorities have received two criminal complaints regarding Incident 1, which, so far, have resulted in no indictment. For other interceptions at sea that did trigger legal proceedings against Italian officials in Italy, none led to accountability, as the prosecutors in charge either decided not to proceed with indictments or requested dismissals, despite abundant evidence indicating criminal responsibility.

Case brought by the Initiative Watch the Med – Alarm Phone, Mediterranea, and Sea-Watch

446. The first criminal complaint was filed on 17 April 2020 by the Initiative Watch the Med – Alarm Phone, Mediterranea, and Sea-Watch, who provided the Prosecutor in Genoa with the facts and asked for a criminal investigation to identify those responsible for the unlawful management of the maritime operations. The complaint described thoroughly the dynamics of the operations, which led to the death of five people and the disappearance of seven others, and argued that European authorities bear responsibility on two grounds. First, on the ground that, had the authorities intervened promptly when the distress call was received, the 12 people wouldn't

[776] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/50/63, 27 June 2022, para. 105, https://www.ohchr.org/en/documents/country-reports/ahrc5063-report-independent-fact-finding-mission-libya.

[777] Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya*, A/HRC/48/83, 29 November 2021, para. 69, https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Libya/A-HRC-48-83-AUV-EN.docx.

[778] OMCT, *That Was the Last Time I Saw My Brother: Extrajudicial and Unlawful Killings in Libya*, September 2022, p. 9.

have lost their lives or disappeared. Secondly, because, upon arrival in Libya, the migrants and refugees were exposed to renewed risk to their lives and were subject to torture, arbitrary detention, kidnapping for the purpose of ransom, physical injury, sexual violence, and other inhumane and degrading treatment. Hence, the complainant demanded the authorities to promptly investigate and prosecute those responsible, starting with interviewing the commander of the *Ivan* vessel and the acquisition of audiovisual material and the logbook of the boat, still docked in Genoa at the moment of the filing.

447. The Prosecutor's Office in Genoa consequently opened a criminal investigation.[779] The Prosecutor interviewed people informed of the facts and acquired the logbook of the *Ivan* vessel. Most importantly, on 27 April 2020, the Prosecutor demanded a technical consultancy, in order to reconstruct the facts and to establish whether the delay in the intervention and the modality in which the operation was conducted were causally linked to the death and disappearance of the 12 people at sea. The consultancy, commissioned to an admiral inspector of the Italian military engineer corps, was completed on 7 December 2021; on 30 July 2022, the Prosecutor asked the admiral for further analysis, which was provided on 17 September 2022.

448. The over-600-page document [REDACTED] concluded that the conduct of the Libyan and Maltese officials was indeed among the factors determining the death of the migrants. In particular, the consultant found that the Maltese authorities, who were in charge of the rescue operation:

> "delayed the rescue operations and organized the forced return of the migrants to Libya by using a fishing boat formally flying the Libyan flag, but actually acting on the instructions of the Maltese authorities."[780]

449. While the Maltese authorities claimed that this operation was a success and that it allowed the authorities to save the lives of dozens of migrants and refugees and that no alternatives were available, the consultant stated that:

> "This attempt, despite the involvement of judges with political backgrounds very close to the current government, does not appear convincing to the consultant, however, leaving open various questions, such as the real impossibility of rescuing the migrants before 14 April, the need to resort to a Libyan-flagged vessel such as the Dar al Salam 1, the choice to disembark the survivors in Tripoli, the lack of medical assistance to the survivors and the refusal to share the information gathered with others such as Frontex and MRCC Rome."[781]

[779] The file was registered as No. 7165/2020, RGNR Genova.

[780] Technical consultancy demanded by the Procura della Repubblica di Genova, Proceeding 7165/20/44 RGPM, deposited on 17 September 2021.

[781] Technical consultancy demanded by the Procura della Repubblica di Genova, Proceeding 7165/20/44 RGPM, deposited on 17 September 2021.

450. The consultant noted that, based on the documents analyzed, the Libyan authorities also avoided intervention when the vessel was in their SAR zone. Based on this, he concluded that: "It appears very likely that there was a link between the behavior of the Libyan and Maltese authorities and the death or disappearance of 12 migrants,"[782] significantly specifying that: "MRCC Malta's behavior seems to have been arranged at the highest governmental levels."[783] Conversely, the consultant found that no criticalities were found in the conduct of MRCC Rome and Frontex.

451. Moreover, the choice to bring the migrants and refugees intercepted to Tripoli even though there were closer ports (namely that of Lampedusa and of Malta), together with the lack of medical assistance, may have contributed to the death of the migrants. As it was further noted:

> "the behavior towards the remaining migrants (false information about the disembarkation destination, lack of contact and information during the journey, provision of limited quantities of water and food) appears to be contrary to the most basic principles of respect for human rights."[784]

452. This conduct involved primarily the Libyan-flagged merchant vessel *Dar Al Salam 1*, but also the vessels *Salve Regina* and *Tremar* (both Maltese), who participated in the interception and transfer of migrants and refugees to Tripoli without objecting. The two vessels, based on the documentation gathered in the investigation, participated in another similar operation on a later date.

453. Notwithstanding the abovementioned findings, the Prosecutor found that her Office in Genoa was not the competent one to prosecute the officials for those facts and, thus, ordered the transmission of the file to the Prosecutor's Office in Rome, who asked the Judge for Preliminary Examination to discontinue the investigation.

Case brought by Comitato Verità e Giustizia, Open Arms et al.

454. The second criminal complaint, for the same incident, was filed by Comitato Verità e Giustizia per i Nuovi Desaparecidos, Fundacion Open Arms, Associazione Open Arms Italia, Senator Gregorio De Falco, Flore Murard Yovanotovich, and the Italian lawyers Alessandra Ballerini, Emiliano Benzi, and Stefano Greco.[785] The complaint was submitted to the Prosecutor's Office

[782] Technical consultancy demanded by the Procura della Repubblica di Genova, Proceeding 7165/20/44 RGPM, deposited on 17 September 2021.
[783] Technical consultancy demanded by the Procura della Repubblica di Genova, Proceeding 7165/20/44 RGPM, deposited on 17 September 2021.
[784] Technical consultancy demanded by the Procura della Repubblica di Genova, Proceeding 7165/20/44 RGPM, deposited on 17 September 2021.
[785] Melting Pot Europa, *Strage di Pasquetta. Responsabilità italiane: esposto alla Procura di Roma* [Easter Monday massacre. Italian responsibilities: exposed to the Public Prosecutor of Rome], 3 July 2020, https://www.meltingpot.org/2020/07/strage-di-pasquetta-responsabilita-italiane-esposto-alla-procura-di-roma/.

in Rome and demanded to establish the criminal responsibility of the Italian authorities involved.

455. In particular, the complaint argued that the facts as described could entail violations of provisions on international human rights and the breach of several criminally relevant provisions, namely, failure to assist boats or people in distress (Nautical Code Art. 1158), failure to rescue (Nautical Code Art. 1113 and Penal Code Art. 593), dereliction of duty (Penal Code Art. 328), and torture (Penal Code Art. 613*bis*). The current status of this case is unknown.

Unwillingness and inability of Italian judicial authorities

456. These precedents seem to be in line with a more general unwillingness of the Italian judiciary to criminally sanction its own authorities. One important example is the *Gregoretti* case, where former Minister of the Interior Matteo Salvini was investigated for the abduction of 164 migrants and refugees rescued by the Italian Coast Guard and held on the vessel *Gregoretti* for five days, due to his denial to disembark. After an extensive evidentiary recollection, the judge for preliminary examination decided to discontinue the investigation as "the accused acted not *contra ius*, but rather in accordance with the primary and secondary norms regulating the present case."[786] Significantly, the Prosecutor himself asked for the dismissal of the case.[787]

457. Another trial has recently opened before the Court of Palermo for a similar case against Matteo Salvini, regarding an incident in 2019 when civil rescue vessel *Open Arms* was prevented from entering Italian waters (see Section V.A.2.b). [788]After the Parliament provided the necessary authorization to proceed against Salvini,[789] the indictment was formalized and confirmed by the Judge for Preliminary Examination in April 2021.[790] The proceedings are currently being held before the Corte d'Assise in Palermo,[791] where the latest hearing, scheduled for 16 September

[786] ANSA, *Gregoretti: motivazioni gup, Salvini ha agito secondo norme* [Gregoretti: gup motivations, Salvini acted according to rules], 12 August, 2021, https://www.ansa.it/sicilia/notizie/2021/08/12/gregoretti-motivazioni-gup-salvini-ha-agito-secondo-norme_85b6d44f-c576-4001-8783-4b2806a1e5fd.html.
[787] Reuters, *Italian prosecutor says Salvini should not be tried in Gregoretti migrant case*, 10 April 2021, https://www.reuters.com/world/europe/italian-prosecutor-says-salvini-should-not-be-tried-gregoretti-migrant-case-2021-04-10/.
[788] DW, *Italy: Former minister Matteo Salvini on trial for preventing migrant ship from docking*, 23 October 2021, https://www.dw.com/en/italy-former-minister-matteo-salvini-on-trial-for-preventing-migrant-ship-from-docking/a-59602987.
[789] Senate of the Republic. Assemblea, *Resoconto stenografico*. XVIII legislatura, seduta n.247, 30 July 2020, https://www.senato.it/service/PDF/PDFServer/DF/353255.pdf
[790] Manuele Modica, Open Arms, *Matteo Salvini rinviato a giudizio per rifiuto d'atti d'ufficio e sequestro di persona: rischia una pena fino a 15 anni* [Open Arms, Matteo Salvini indicted for refusal of official documents and kidnapping: he risks a sentence of up to 15 years], Il Fatto Quotidiano, 17 Aprile 2021, https://www.ilfattoquotidiano.it/2021/04/17/open-arms-matteo-salvini-rinviato-a-giudizio-per-rifiuto-datti-dufficio-e-sequestro-di-persona-rischia-una-pena-fino-a-15-anni/6169136/
[791] Alessia Candito, *Salvini, udienza ad alta tensione al processo Open Arms. L'agonia di Open Arms* [Salvini, intense hearing at the Open Arms trial. The agony of Open Arms], La Repubblica, 13 May 2022,

2022, was postponed.[792] The hearing will be dedicated to interviewing witnesses Elisabetta Trenta (former Minister of Defense) and Danilo Toninelli (former Minister of Infrastructure and Transportation), who refused to sign Salvini's request to halt the disembarkation.[793] Nonetheless, as noted by prominent Italian scholar Luca Masera, Italian governments have since kept pursuing similar policies "blatantly disregarding the declarations of judicial authorities, with respect to issues that affect the fundamental rights of hundreds of people."[794] It is therefore unlikely that the trial will end with a condemnation, also in light of the newly acquired governmental role of the accused.

b. Legislation on International Crimes in Italy

458. The Italian legislation is overall inadequate to prosecute the crimes falling under the jurisdiction of the ICC, such as the ones submitted in Sections III and IV committed against migrants and refugees in the context of their interception at sea, return to, and detention in Libya.

459. A first limitation of the Italian legal system, which compromises an effective and appropriate prosecution of the crimes included in this Communication, is the absence of appropriate legislation criminalizing international crimes as such. While some conduct can, to a certain extent, be subsumed under provisions on common crimes, as they substantially correspond to the crimes listed in the Rome Statute, even though they lack the contextual element thereof, others are entirely absent from the Penal Code and, therefore, cannot be prosecuted in national proceedings.

460. With specific regard to the crime of severe deprivation of physical liberty, as framed under Art. 7(1)(e) of the Rome Statute, there are no provisions substantially corresponding to this crime in the Italian Penal Code (P.C.). The closest provision can be identified in Art. 605 P.C., which punishes "anyone who deprives someone of personal liberty" with imprisonment from 6 months to 8 years. The range of penalty is increased if the crime is committed by a public official as an abuse of their powers (Art. 605, comma 2, n. 2) or against a minor (comma 3), further aggravated

https://palermo.repubblica.it/cronaca/2022/05/13/news/salvini_udienza_ad_alta_tensione_al_processo_open_arms_tra_guasti_elettrici_e_scintille_fra_accusa_e_difesa-349379876/

[792] Giornale di Sicilia, *Open Arms, motivi di salute per l'avvocato di Salvini: rinviata l'udienza di venerdì* [Open Arms, health reasons for Salvini's lawyer: Friday's hearing postponed], 14 September 2022, https://palermo.gds.it/articoli/politica/2022/09/14/open-arms-motivi-di-salute-per-salvini-rinviata-ludienza-di-venerdi-32ecad00-aa31-4a9c-9b64-39753c5a0c98/.

[793] Lorenzo Tondo, *Perché l'imputato Matteo Salvini rischia grosso nel processo Open Arms* [The defendant Matteo Salvini has a lot at stake in the Open Arms proceedings], L'Espresso, 12 September 2022, https://espresso.repubblica.it/politica/2022/09/12/news/perche_limputato_matteo_salvini_rischia_grosso_nel_processo_open_arms-365309372/.

[794] Luca Masera, *Gli sbarchi selettivi e l'assenza della giurisdizione* [Selective landings and the absence of jurisdiction], Questione Giustizia, 14 November, 2021, https://www.questionegiustizia.it/articolo/sbarchi-selettivi.

if committed against a child under 14 years old or if the minor is transferred or held abroad. If the perpetrator causes the death of the minor, the penalty is life imprisonment (comma 4).[795]

461. If committed by a public official, the crime could also be subsumed under Art. 606 P.C., which punishes "the public official who proceeds with an arrest, abusing the powers attached to his/her functions." Notably, the penalty for this crime is significantly lower, being limited to a maximum of three years of imprisonment.

462. None of the previous provisions, however, is applicable to the acts described in the present Communication. In fact, Art. 605 P.C. can be applied only where the deprivation of liberty is not ordered or authorized by the law and is not perpetrated under a justification, such as the execution of orders.[796] Most significantly, the Italian Corte di Cassazione has further specified that:

> "The offence of kidnapping requires, from a subjective point of view, awareness of inflicting on the victim an unlawful deprivation of liberty. It follows that this offence cannot be committed if the deprivation of liberty is the result of conduct which, *although objectively unlawful*, is subjectively characterised by the purpose of exercising a power legitimately vested in the agent and is not characterised as conduct completely unrelated to any institutional activity."[797]

463. The preferred interpretation would then lead to the application of Art. 606 P.C., titled as "unlawful arrest," in the cases described in the previous sections. This provision, however, would not be applicable herein for two reasons. First, the Italian officials involved generally halt the migrants and refugees at sea without formally arresting them,[798] thus making the provision not applicable for lack of an objective element. Second, this offense differs from the one under 605 P.C. in terms of the subjective element, since the limitation of personal liberty has to be realized by handing the victim over to the competent authority,[799] and not with the intent of holding the person under the domain of the perpetrator.[800]

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[795] The range of penalty is increased to 1 – 10 years if the crime is committed by a public official and to 3 – 12 years if committed against a minor; if committed by a public official against a child under 14 years old or if the minor is transferred or held abroad, the range is increased to 3 – 15 years.

[796] Even though it can be argued that orders, contrary to Constitutional principles and international obligations, are inherently against the law and can never be considered as a legitimate justification in criminal proceedings, this argument is conspicuously weakened by the set of directives and agreements that specifically designed this practice.

[797] Corte di Cassazione, Chamber VI, Judgment 1808/2003 (emphasis added; unofficial translation).

[798] *See* Corte di Cassazione, Chamber V, Judgment 30971/2015, where the Court specified that "the agent must have wanted to realise a typical coercive act, qualified as such following the procedural provisions that regulate it and that simultaneously define the abusive character of the exercise of that power."

[799] Corte di Cassazione, Chamber VI, Judgment 17955/2020.

[800] *See also* Corte di Cassazione, Chamber VI, Judgment 23423/2010.

464. Moreover, the offense as framed by Art. 606 P.C. does not adequately correspond to the offence under Art. 7(1)(e) of the Rome Statute. On the one hand, the penalty envisaged by this provision of the Italian Penal Code does not reflect the gravity of the crime as conceived in the Statute of the Court. On the other hand, and most importantly, the conduct of unlawful arrest under Art. 606 P.C. is qualified mainly for its nature of abuse of power, and not for the deprivation of liberty imposed on the victim.

465. The case law confirms that these provisions of the Penal Code are not applied in similar cases. In the case of *Asso 28*, for instance, the conduct of intercepting migrants and refugees at sea and returning them to Libya against their will was not qualified by the Prosecutor or by the Tribunal of Napoli as deprivation of liberty (either under Art. 605 or 606 P.C.). On the contrary, the captain returning the migrants and refugees to Tripoli was charged and convicted for abandonment of a child or incapacitated person (Art. 591, P.C., which only applies where a minor or other extraordinarily vulnerable category of person is affected), and disembarkation and arbitrary abandonment of persons (Art. 1155, Nautical Code). It should be noted that, in this case, where the perpetrator was directly and materially performing the interception, the conduct was still not qualified in terms of deprivation of liberty.

466. Therefore, the current Penal Code does not provide a suitable criminal offense to prosecute the conduct of Italian officials, amounting to a violation of Art. 7(1)(e) of the Rome Statute, and the Italian legal system currently lacks the notion of crimes against humanity as such, characterized by their contextual element of being perpetrated as part of a widespread or systematic attack directed against any civilian population.

467. Another aspect that is likely to hinder accountability for the crimes described is the application of a special legal framework to members of military bodies,[801] such as the Marina Militare.[802] More precisely, according to the Military Penal Code for Peacetime, members of military organs in service are subject to military jurisdiction, are judged by a military court, and are subject to a different set of substantial and procedural criminal provisions. The Italian military jurisdiction can, under certain conditions, be applied also when crimes are perpetrated by Italian military personnel in foreign territory or waters.[803] The criminal offenses included differ largely from the ones in the Rome Statute and in the Italian Penal Code for civilians, as in the Military Penal Code, many acts (including murder and severe deprivation of physical liberty) are not criminalized as such. Furthermore, the Military Penal Code includes provisions to excuse the use of force whenever justified by necessity and in pursuance of military orders.[804]

[801] Military Penal Code for Peacetime, Art. 1.

[802] Military Penal Code for Peacetime, Art. 2.

[803] Military Penal Code for Peacetime, Art. 17 and 18.

[804] *See* in particular Arts. 41 and 42 of the Military Penal Code for Peacetime.

B. Malta

a. Relevant proceedings

468. Within the Maltese judicial system, two criminal complaints were filed to assess the responsibility of Maltese officials and high-echelon politicians for Incident 1.[805] The complaints were filed on 16 April 2020 by the NGO Repubblika on behalf of the families of the 12 people who died or went missing in the interception. The following day, Prime Minister Abela – who was identified by Repubblika as one of the perpetrators – ordered to open a magisterial inquiry into the incident;[806] after a month, the inquiry concluded that no crimes had been committed.[807]

469. As anticipated in Section III, the inquiry resulted in a clarification of the facts of the incident and the role of the Maltese politicians involved in the systematic interception and return of migrants and refugees to Libya.[808] However, it did not initiate any step forward in terms of criminal accountability. In fact, a magisterial inquiry is not a judicial trial but, rather, an investigative procedure led by a magistrate acting in their investigative capacity, with the aim of collecting and securing evidence in case an alleged crime or a death with unclear cause occurred, in order to determine whether any person should be charged in connection with any offense.[809] The response of the Maltese judicial system in this case raises many concerns in terms of its effectiveness and genuineness. First, the magisterial inquiry was ordered by Prime Minister Abela, who was also identified as one of the main responsible actors for the incident, therefore making the genuineness and impartiality of the proceeding largely questionable. Second, the inquiry was concluded in only one month, generating ample criticism and concerns

[805] In addition, two constitutional cases were filed. The first one, filed by 13 migrants who survived the incident, claimed the violation of Article 3 of the European Convention on Human Rights, with regard to inhuman and degrading treatment, and a violation of Article 18 and 19 of the Charter of Human Rights of the EU, for the breach of their right to seek asylum and the prohibition of collective expulsion. The second case was filed by 52 asylum seekers pushed back in the same incident, asking to apply for asylum and seeking damages. Monique Agius, *Repubblika files criminal complaints against PM, AFM and Brigadier*, 16 April 2020, News Book, https://newsbook.com.mt/en/repubblika-files-2-police-reports-over-migrants-death/

[806] Sephora Francalanza, *Watch: PM urges police to investigate him over migrants' deaths*, News Book, 17 April 2020, https://newsbook.com.mt/en/live-prime-minister-to-deliver-press-statement/

[807] *Updated: Inquiry clears PM, Brigadier and AFM members over migrant deaths*, The Malta Independent, 30 May 2020, https://www.independent.com.mt/articles/2020-05-30/local-news/Magisterial-inquiry-annihilates-allegations-of-PM-AFM-Brigadier-involvement-in-murder-of-migrants-6736223696

[808] *See e.g.*, the declarations of Neville Gafa and PM Abela admitting they co-coordinated pushbacks: Sarah Carabott, *Anger as Neville Gafà says he coordinated Libya pushback on OPM orders*, Times of Malta, 30 April 2020, https://timesofmalta.com/articles/view/neville-gafa-says-he-coordinated-libya-pushback-on-opm-orders.788951#:~:text=Notorious%20government%20official%20Neville%20Gaf%C3%A0,Office%20of%20the%20Prime%20Minister and Matthew Xuereb, *Abela admits coordinating private boats that returned migrants to Libya*, Times of Malta, 1 May 2020, https://timesofmalta.com/articles/view/abela-admits-coordinating-private-boats-that-returned-migrants-to.789362 .

[809] Maltese Judiciary, Court of Magistrates, https://judiciary.mt/en/Pages/The%20Courts/Court-of-Magistrates.aspx.

regarding its accuracy.[810] Finally, the immediate comment of the authorities was re-stating that the incident was not an interception at sea but, rather, a "rescue operation," and that investigations should focus on human traffickers, rather than accusing the government.[811] These declarations clearly indicate the unwillingness to prosecute international crimes committed by State officials and to properly qualify the acts under international criminal law to reflect their systematic and egregious character. At the same time, the declarations minimize the role of officials of EU Member States and EU agencies in the crimes.

470. Repubblika further contested the quality of the inquiry in a written letter to the Attorney General:[812] it demanded that testimonies given by the 66 survivors that were brought to Malta were included in the report; it also lamented that the testimonies given by the Office of Prime Minister's Chief of Staff Clyde Caruana and former employee Neville Gafà were not included in the inquiry, and that survivors were not summoned to testify. The scarce relevance given to the witnesses' and survivors' testimonies stands in stark contrast to the nature and aim of the ICC's activities, which attribute a central role to victims within the proceedings.

471. The way the inquiry was conducted clearly indicates the inability and deep unwillingness of the judicial actors in Malta to hold perpetrators of grave crimes accountable, and should not undermine the admissibility of the case.

b. Legislation on International Crimes in Malta

472. Malta has incorporated the Rome Statute through the International Criminal Court Act in 2002.[813] Crimes against humanity are therefore included in the Maltese Penal Code, under Book First, Part II, Title I. The Act incorporates the international crimes, as defined by the Rome Statute, referring to it and to the Elements of Crimes as interpretative tools for national courts.

473. While the legislation thus adequately reflects the qualification of the crimes under the jurisdiction of the Court, the implementation of these provisions for unlawful acts committed against migrants and refugees intercepted at sea is substantially lacking. As of 2020, no

[810] Sephora Francalanza, *Inquiry into 12 migrant deaths, PM, AFM concluded within a month*, News Book, 27 May 2020, https://newsbook.com.mt/en/inquiry-into-12-migrant-deaths-pm-afm-concluded-within-a-month/.

[811] InfoMigrants, *Maltese prime minister cleared of migrant death-related homicide charges*, 1 June 2020, https://www.infomigrants.net/en/post/25109/maltese-prime-minister-cleared-of-migrant-deathrelated-homicide-charges

[812] InfoMigrants, *Maltese prime minister cleared of migrant death-related homicide charges*, 1 June 2020, https://cdn.newsbook.com.mt/wp-content/uploads/2020/06/06134141/letter-to-AG-following-proces-verbal-060520.pdf.

[813] Maltese House of Representatives at Sitting No. 809 of the 4th November 2002, International Criminal Court Act, Act No. XXIV of 2002, 13 December 2003, Chapter 453, https://cjad.nottingham.ac.uk/documents/implementations/pdf/Malta_ICC_Act_2003.pdf.

investigations have been initiated in instances of human rights violations perpetrated in the context of SAR operations,[814] except for the inquiry in Incident 1.

474. As it has been denounced by Amnesty International, Maltese authorities have "traditionally chosen a narrow interpretation of their search and rescue responsibilities,"[815] thus making prosecution over the crime against humanity of severe deprivation of physical liberty extremely arduous. Moreover, several human rights organizations have stressed their concern about the fact that "Maltese police and judiciary may have failed to investigate reports of human rights violations deriving from the actions of the government and the AFM [Armed Forces of Malta] to prevent the arrival of refugees and migrants in the past."[816]

475. Corroborating the claims of human rights defenders, in February 2022, the Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, stressed that: "The authorities should strengthen the independent monitoring of places of detention and guarantee human rights defenders, including NGOs, wide access to such places to provide support and assistance with respect to the asylum procedure or other matters."[817] She then recalled that "Libya is not a safe place for disembarkation" and "urges the Maltese authorities to suspend such co-operation activities with the Libyan Coast Guard and other Libyan authorities until clear guarantees of their human rights compliance are in place."[818] Moreover, she strongly urges "Malta's government to refrain from any action, including instructions to private vessels, that would result in returns to, and disembarkations in, Libya and to ensure accountability for any such incidents occurring as a result of action by the Maltese authorities."[819]

C. Gravity

476. According to Art. 17(1)(d) of the Rome Statute, the Court shall determine that a case is inadmissible where "[t]he case is not of sufficient gravity to justify further action by the Court."

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[814] Amnesty International, *Malta: Waves of impunity – Malta's human rights violations and Europe's responsibilities in the central Mediterranean*, September 2020, p. 16, https://www.amnesty.org/en/documents/eur33/2967/2020/en/.

[815] Amnesty International, *Malta: Waves of impunity – Malta's human rights violations and Europe's responsibilities in the central Mediterranean*, September 2020, p. 15, https://www.amnesty.org/en/documents/eur33/2967/2020/en/.

[816] Amnesty International, *Malta: Waves of impunity – Malta's human rights violations and Europe's responsibilities in the central Mediterranean*, September 2020, p. 16, https://www.amnesty.org/en/documents/eur33/2967/2020/en/.

[817] Dunja Mijatović, Commissioner for Human Rights of the Council of Europe, Country Report: Report Following Her Visit to Malta from 11 to 16 October 2021, 15 February 2022, p. 5, https://rm.coe.int/report-of-the-council-of-europe-commissioner-for-human-rights-dunja-mi/1680a5498d.

[818] Dunja Mijatović, Commissioner for Human Rights of the Council of Europe, Country Report: Report Following Her Visit to Malta from 11 to 16 October 2021, 15 February 2022, p. 5, https://rm.coe.int/report-of-the-council-of-europe-commissioner-for-human-rights-dunja-mi/1680a5498d.

[819] Dunja Mijatović, Commissioner for Human Rights of the Council of Europe, Country Report: Report Following Her Visit to Malta from 11 to 16 October 2021, 15 February 2022, p. 5, https://rm.coe.int/report-of-the-council-of-europe-commissioner-for-human-rights-dunja-mi/1680a5498d.

The Court has then clarified that "in assessing the gravity of a case, 'the issues of the nature, manner and impact of the [alleged] attack are critical'"[820] and that "[i]n making its assessment, the Chamber considers that gravity may be examined following a quantitative as well as qualitative approach."[821]

477. The Regulations of the Office of the Prosecutor (Regulation 29), and the Office's Policy Paper on Preliminary Examinations and on Case Selection and Prioritisation, enumerate the factors for assessing gravity, namely: (a) the scale, (b) nature, (c) manner of commission, and (d) impact of the relevant crimes.

1. The Scale

478. Both the Policy Paper on Preliminary Examinations and the Policy Paper on Case Selection and Prioritisation issued by the OTP establish that:

> "The scale of the crimes may be assessed in light of, inter alia, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period)." [822]

479. In light of these parameters, the facts described in the present Communication clearly indicate that the crimes under consideration are committed on a large scale. Since the enforcement of the policies for interceptions of migrants and refugees at sea with the purpose of returning them to Libya, the number of migrants and refugees effectively returned to Libya has been consistently increasing: while in 2015, the scLCG had intercepted and returned 800 people to Libya,[823] in 2018, this number increased to 15,000 migrants and refugees, with peaks in July, September, and December 2018.[824] In 2021, the number of migrants and refugees intercepted at sea and

[820] *The Prosecutor v. Bahr Idriss Abu Garda*, Pre-Trial Chamber I, "Decision on the Confirmation of Charges", 8 February 2010, ICC-02/05-02/09, para 31.

[821] 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, para. 62.

[822] ICC OTP, *Policy Paper on Preliminary Examinations*, November 2013, para. 62, https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf; *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, para. 38, https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

[823] Forensic Oceanography, *Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean*, May 2018, p. 63, https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf.

[824] Forensic Oceanography, *The* Nivin *Case: Migrants' resistance to Italy's strategy of privatized push-back*, December 2019, p. 22, https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf.

returned to Libya reached 32,425,[825] coming to a total of over 82,000 between 2016 and 2021.[826] It should further be noted that these figures are necessarily partial, as they represent only the interceptions documented by UNHCR, while an undefined number of interceptions are ordinarily performed without being publicly known, to enforce the same externalization policies.

480. The extent of damage caused to the victims shall also be highlighted, as it represents one of the criteria to evaluate the scale of crimes being committed. It should be noted that, while the conducts described in the present Communication have been analyzed only as violations of Art. 7(1)(e) of the Rome Statute, they can result in further and graver crimes. In particular, the interceptions and returns to Libya occasionally entail the death of migrants,[827] and often cause a severe deterioration in their already precarious health conditions, since the durations of the interception and travel back to Libya significantly delay essential nourishment and medical assistance, when provided. Finally, in most cases, a further consequence of the crime committed by the intercepting authorities is their return of migrants and refugees to detention centers, where they are subjected to other grave crimes, including murder, enslavement, torture, rape, sexual slavery, forced pregnancy, and other inhumane acts.[828]

2. The Nature

481. As for the nature of the crime, the OTP Policy Paper specified that:

> "The nature of the crimes refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children,

[825] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://app.powerbi.com/view?r=eyJrIjoiMWFiMTk3NDMtNDE0NS00NzIwLWFiMGMtODg0OWJiYjU0MDhjIiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9 and Amnesty International, *Libya/EU: Conditions remain 'hellish' as EU marks 5 years of cooperation agreements*, 31 January 2022. https://www.amnesty.org/en/latest/news/2022/01/libya-eu-conditions-remain-hellish-as-eu-marks-5-years-of-cooperation-agreements/.

[826] UNHCR Operational Data Portal – Refugee Situations, UNHCR Libya Activities at Disembarkation, https://app.powerbi.com/view?r=eyJrIjoiMWFiMTk3NDMtNDE0NS00NzIwLWFiMGMtODg0OWJiYjU0MDhjIiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9 and Amnesty International, *Libya/EU: Conditions remain 'hellish' as EU marks 5 years of cooperation agreements*, 31 January 2022, https://www.amnesty.org/en/latest/news/2022/01/libya-eu-conditions-remain-hellish-as-eu-marks-5-years-of-cooperation-agreements/.

[827] *See e.g.*, Incident 1 in Section III, where the technical consultancy demanded by the Prosecutor's Office in Genoa (Italy) concluded that the way rescue operations were managed caused the death of at least two migrants.

[828] *See e.g.*, ECCHR, FIDH, LFJL Art. 15 Communication, November 2021.

persecution, or the imposition of conditions of life on a group calculated to bring about its destruction."[829]

482. The crimes considered are of exceptional gravity. In fact, as detailed above, the severe deprivation of liberty is a necessary step before the cycle of systematic exploitation of migrants and refugees is perpetuated in Libyan territory. These crimes are very often underestimated, as the focus of national criminal jurisdictions is mostly directed towards offenses against public order and national interests, causing prosecutions to frame the conducts only within the paradigm of trafficking and smuggling. It should be noted that a substantial number of the victims, against whom the crime of severe deprivation of liberty is committed, are children. According to UNHCR, in 2021 alone, 1,507 children were intercepted and taken back to Libya, making up five percent of the population intercepted that year.[830] Out of the total of migrants and refugees disembarked in Libya, only 722 of them were released.[831] Even in the event that all released migrants and refugees were children, the data allows the inference that children are indeed deprived of their liberty. As described in the methodology, that same UNHCR database provides information on the destinations of migrants and refugees after disembarkation in Libya, referring mostly to detention centers in which crimes against humanity are occurring, as Section III has described.[832]

3. The Manner

483. The manner of commission, or *modus operandi*, may be assessed in light of:

"inter alia, the means employed to execute the crime, the degree of participation and intent of the perpetrator (if discernible at this stage), the extent to which the crimes were systematic or result from a plan or organized policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups."[833]

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[829] ICC OTP, *Policy Paper on Preliminary Examinations*, November 2013, para. 63, https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf; *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, para. 39, https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

[830] IOM, IOM Libya Migrant Report, July-September 2021, p. 29, https://migration.iom.int/sites/default/files/public/reports/DTM_Libya_R38_Migrant_Report.pdf.

[831] https://migration.iom.int/sites/default/files/public/reports/DTM_Libya_R38_Migrant_Report.pdf , p. 29.

[832] For instance, Al-Mabani, Ain Zara, Abusliem, and Surman as detailed in ECCHR, FIDH, LFJL Art. 15 Communication, November 2021.

[833] ICC OTP, *Policy Paper on Preliminary Examinations*, November 2013, para. 64, https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf; *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, para. 40, https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

484. The crimes committed against migrants and refugees as they are intercepted in the Mediterranean, returned to, and systematically detained in Libya stand out with regard to the degree of organization in place to coordinate the activity of the European and Libyan actors present at sea. This organization stems not only from the consistent practice adopted to locate, stop, and bring migrants and refugees at sea under the control of Libyan actors before they reach European shores, but also and most strikingly by the common plan set up between the officials of EU agencies and Member States and Libyan actors. As described in Section V, this common plan, as a central element for the alleged co-perpetration, includes a number of agreements between EU agencies and Member States explicitly arranging such operations,[834] and presenting them under a veil of legality when, on the contrary, they are in open violation of international law, as described in Section II.D.

485. The interceptions, as conducted, show a clear and calculated intent to defer the maritime intervention to the scLCG or other Libyan actors, in order to intercept and return the migrants and refugees to Libya, representing a violation of law and, thus, an undue exercise of powers on behalf of EU Member States' and EU agencies' officials. This fact is further proved by the total lack of transparency of EU agencies, notably Frontex, with regard to these operations, which contribute to the difficulties in establishing accountability for the crimes committed.

486. The way the crimes are perpetrated also entails elements of particular cruelty. First, they are perpetrated against a group of people characterized by ultimate vulnerability, as they are shipwrecked or at least in distress at sea, yet they are labeled as operations of "rescue." Further, as thoroughly elaborated in the 2021 Communication,[835] migrants and refugees generally represent a vulnerable population group in Libya. Moreover, most of the migrants and refugees intercepted have already been subject throughout their journey to forms of the utmost physical and psychological violence, as part of the cycle of endless detention and abuse. A substantial number of them are further marked by extraordinary vulnerability, as in the case of children or pregnant women. Finally, the crimes committed are motivated by an underlying discriminatory intent, as they are targeted and mistreated due to their race, nationality, religion, gender, and socio-economic status.[836]

4. The Impact

487. The impact of the crime refers to:

[834] *See supra* Section V.

[835] *See* ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, paras. 582-584, 614, and 785-789.

[836] On the different grounds for discrimination of migrants and refugees in Libya, *see* ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, Section III.E, paras 295 et seq.

"inter alia, the sufferings endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities."[837]

488. Regarding this aspect, it is sufficient to recall the nature of the damage suffered by migrants and refugees intercepted and returned to Libya, where they are subject to an array of further grave crimes against humanity in the detention centers to which they are systematically transferred. As already detailed in the 2021 Communication, these crimes include torture, enslavement, murder, sexual violence in different forms, persecution, and other inhumane acts. Moreover, the living conditions in these detention facilities are inhumane, even amounting to torture or, alternatively, to other inhumane acts. Furthermore, the detention is arbitrary, with no access to legal recourse or due process, and its duration can be indefinite, unless people pay either through extortion or forced labor, exemplifying not only its severity, but also the protracted impact it has on migrants and refugees. Besides causing them enormous suffering, the interceptions at sea and returns to Libya also dramatically increase their vulnerability and expose them to the horrific terror, as they are once again imprisoned in the same unlawful detention centers.

489. The economic consequences of this practice are equally grave, as for each time migrants and refugees are captured, they are extorted for money for their release from detention and/or travel to Europe.[838] These ransoms are imposed on individuals and families, who are likely to have already endured extreme economic difficulties, with the risk of being tortured or killed if the money is not paid.[839] On another note, sexual and gender-based violence places migrant and refugee women and girls in a situation of particular vulnerability and affects some men and boys as well. It has been found that sexual violence is used for "extortion, subjugation, punishment, and entertainment, and frequently involves elements of profound cruelty and psychological torture."[840] Survivors of sexual violence often have to face the social stigma or rejection by members of their communities, thus inducing a second victimization.[841]

490. Finally, the migrants and refugees returned to Libya are exposed to a heightened risk of violence, as social distress has long translated into racist and violent acts against migrants and refugees transiting through Libya. As already explained in detail in the 2021 Communication, since the

[837] ICC OTP, *Policy Paper on Preliminary Examinations*, November 2013, para. 65, https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf; *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, para. 41, https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

[838] ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, paras. 34-42 and paras. 104-331.

[839] *See e.g.*, ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, para. 122.

[840] WRC, *"More Than One Million Pains": Sexual Violence Against Men and Boys on the Central Mediterranean Route to Italy*, March 2019, p. 2, https://s33660.pcdn.co/wp-content/uploads/2020/04/Libya-Italy-Report-03-2019.pdf.

[841] *See e.g.*, ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, para. 13.

1990s, due to policies enforced by Gaddafi, the rejection of and hostile reactions to sub-Saharan migrants and refugees in Libya is ongoing.[842]

5. Interests of Justice

491. Art. 53(1)(c) of the Rome Statute demands the Prosecutor to consider whether an investigation would serve the interests of justice, taking into account the gravity of the crime and the interests of victims, before opening an investigation. The interests of justice can be reassessed at different stages and, in particular, after investigations have been conducted, according to Art. 53(2)(c).

492. Beside the aim, as expressed in the Preamble of the Statute, "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes" and "to guarantee lasting respect for and the enforcement of international justice," further factors to assess the interests of justice can be identified in the gravity of the crime, the interests of victims, the particular circumstances of the accused, and the existence of other available justice mechanisms and peace processes.

493. As acknowledged by the OTP itself, "there is a strong presumption that investigations and prosecutions will be in the interests of justice."[843] Additionally, contrary to the positive requirements of jurisdiction and admissibility, the interests of justice test is a potential countervailing consideration, meaning that:

> "the Prosecutor is not required to establish that an investigation or prosecution is in the interests of justice. Rather, he shall proceed with investigation unless there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time."[844]

494. This interpretation was further confirmed in the case of Afghanistan.[845] Reversing the interpretation of the Pre-Trial Chamber, the Appeals Chamber found that Art. 53(1) of the Statute is formulated in the negative, so the Prosecutor needs only to consider whether there are reasons to believe an investigation would not serve the interests of justice.[846]

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[842] ECCHR, FIDH, LFJL Art. 15 Communication, November 2021, paras. 44-45.

[843] ICC OTP, *Policy Paper on Preliminary Examinations*, November 2013, para. 71, https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf.

[844] ICC OTP, *Policy Paper on Preliminary Examinations*, November 2013, para. 71, https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf.

[845] Situation in the Islamic Republic of Afghanistan, Pre-Trial Chamber II, "Decision Pursuant to Art. 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.

[846] Situation in the Islamic Republic of Afghanistan, Appeals Chamber, "Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan", 5 March 2020, ICC-02/17, para. 49.

495. Thus, the assessment of the interests of justice is based on the gravity of the crime and the interests of the victims.[847] As argued in the previous paragraphs, the crimes included in this Communication are of concerning gravity, as spelled out by the parameters of scale, nature, manner, and impact relevant for the assessment of admissibility. There is no reason to assume that the gravity established for the purpose of admissibility is not equally satisfied for the purpose of the interests of justice.

496. Moreover, there is nothing to suggest that opening an investigation and prosecuting the crime of severe deprivation of liberty committed against migrants and refugees would not serve the interests of the victims. On the contrary, the involvement of the officials of EU agencies and Member States in the cycle of exploitation and dramatic violations perpetrated against migrants and refugees in Libya speaks for the paramount relevance of their conducts, within a wider criminal system. The assessment of these responsibilities is thus a fundamental element to providing justice to the victims of these crimes and the crimes against humanity that are fostered or, at least, made possible by the interception and transfer to Libya, as widely described.

497. Finally, not addressing the responsibilities of these actors for the crimes perpetrated would represent an application of double standards and a neo-colonial understanding of international criminal law, which constantly leaves officials of more powerful States immune to criminal liability. This outcome, stemming from a lack of investigation and prosecution, and not the contrary, would clearly be against the interests of justice.

VII. Conclusion

498. European migration management policies and practices in the Central Mediterranean currently involve the commission of crimes against humanity, an appalling reality that must come to an end. Prevailing narratives portray the policies and practices of EU agencies and Member States in the Central Mediterranean – specifically the interception of migrants and refugees in distress at sea and their return to Libya – as genuine search and rescue operations, valid efforts to combat human trafficking, and legitimate transnational migration management. This Communication challenges these narratives, presenting evidence and analysis of 12 exemplary incidents to argue that interceptions and returns to Libya constitute crimes against humanity of severe deprivation of liberty co-perpetrated by high-ranking officials of EU agencies and Member States, along with internationally recognized Libyan authorities.

[847] Rome Statute, Article 53(1)(c).

499. The deprivation of liberty begins with the interceptions at sea of migrants and refugees in the Central Mediterranean and continues through their systematic return, disembarkation, and transfer to detention centers in Libyan territory. It is a crime against humanity in and of itself and enables other forms of international crimes against migrants and refugees occurring in detention facilities in Libya, as has been described in previous Article 15 Communications submitted to the OTP. Moreover, this Communication has established that the ICC has jurisdiction over these crimes.

500. These crimes are part of a complex system of exploitation and abuse of migrants and refugees in Libya, which fulfils the contextual element of crimes against humanity. Section II has provided a thorough background on how this situation came to be, by tracing the development of EU agencies' and EU Member States' border and migration management cooperation policies with Libya over the years. EU agencies and Member States have increasingly withdrawn from direct engagement in sea rescue activities and, instead, have established a common plan with Libyan actors to contain migrants and refugees in Libya, inter alia, through their interception at sea and return to Libyan territory. To accomplish this common plan, since 2016, the EU has implemented an approach focused on increasing capacity-building support to Libyan actors, especially maritime actors such as the scLCG, by providing, among other things, training, funding, patrol vessels, other technical equipment and operational support in the form of distress location information. Without these essential contributions, Libyan actors would not be able to locate migrants and refugees in distress at sea or carry out interceptions and returns. Such actions are in violation of both international maritime laws and international refugee laws. Thus, the interceptions at sea with the purpose of returning migrants and refugees to Libya cannot be considered as rescue operations and are, in fact, constitutive of the crime against humanity of severe deprivation of liberty.

501. The ICC is the only possible avenue for breaking the cycle of impunity and assessing the individual criminal responsibility of high-level perpetrators. At the domestic level, the lack of appropriate legal frameworks, as well as the lack of independence and impartiality of the judiciary regarding governmental officials, render proper national prosecution a remote possibility. At the supranational level of the EU, the accountability mechanisms are insufficient to investigate and prosecute these conducts as international crimes and thus rely on national European jurisdictions which are unwilling and/or unable to bring justice. Moreover, due to the opaque nature of various European agencies, particularly Frontex, it is crucial that the ICC uses its investigative powers to obtain information and evidence that cannot be gained by civil society actors or even national prosecutors. Annex III contains a detailed list of suggested additional evidence to be gathered by the OTP.

502. At the international level, there is also no effort to hold European actors responsible. This lack of accountability efforts is problematic for several reasons. It enables the continuation and

legitimizing of a grave situation, whose dire consequences for the lives of migrants and refugees have been known for years without any effective policy change at the EU or national levels. Furthermore, it not only encourages impunity, but also raises suspicion as to the double standards applied to Western leaders vis-à-vis those from Global South countries. This Communication thus concludes that only an investigation by the OTP can properly address the complexity of the crimes and truly hold European officials accountable for their contribution to these crimes.

503. In light of the information collected and presented in this Communication, ECCHR urges the Prosecutor to proceed with the investigation and prosecution of those responsible for the grave crimes under the ICC jurisdiction against migrants and refugees in the context of the Situation in Libya, which has been under ICC investigation since 2011. The violence perpetrated against migrants and refugees in distress at sea and in Libya – characterized by ultimate vulnerability – must cease, as must the impunity that encourages its continuation.

VIII. Annexes

Annex I – Confidential information provided by civil society organizations

[REDACTED]

Annex II – Confidential list of alleged perpetrators

[REDACTED]

Annex III – Suggested Further Investigative Steps for the OTP

[REDACTED]