

Communication to the United Nations Human Rights Committee

In the case of

SDG

against

Italy

(Anonymized version)

*Submitted for consideration under the Optional Protocol to the International Covenant on Civil
and Political Rights*

to

The United Nations Human Rights Committee

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I. THE VICTIM

Full name: SDG

Nationality: South Sudanese

Date and place of birth: XXXXX

Address: XXXXX

II. LEGAL REPRESENTATIVES OF THE VICTIM

1. This claim is submitted by the Global Legal Action Network (GLAN) and Dr Violeta Moreno-Lax, Dr Itamar Mann, and Noemi Magugliani, who are appointed as legal representatives of the victim. A letter of authority is attached to this communication.
2. Address for exchange of confidential correspondence:

Global Legal Action Network (GLAN)
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Ireland

3. The authors respectfully request the Committee to keep the name of the victim confidential in the disposing of communications related to the decision of the present case.

III. STATE PARTY

4. This communication is submitted against Italy. Italy ratified the International Covenant on Civil and Political Rights (ICCPR) and its Protocol on 15 September 1978.

IV. SUMMARY OF THE CLAIM

5. This case concerns a privatised *refoulement* operation carried out during the night between the 7th and the 8th of November 2018. In the course of the operation, the Maritime Rescue Coordination Centre (MRCC) Rome directed a Panamanian merchant vessel, the *Nivin*, to rescue a migrant boat adrift on the high seas in the Central Mediterranean. MRCC Rome also directed the *Nivin* to liaise thereafter with the so-called Libyan Coast Guard (LYCG). As the Italian MRCC, which was *de facto* acting as coordinator of the search and rescue (SAR) operation, knew or should have known, this was bound to lead to the disembarkation of the survivors in Libya, in breach of the survivors' rights under the International Convention on Civil and Political Rights (ICCPR).¹
6. As a result of this operation, many of the 93 survivors, including the claimant, SDG, were prevented from escaping Libya, where they had suffered torture and abuse. Due to Italy's coordination, they were forcibly returned there to face similar ill-treatment. On the 20th of November 2018, after having resisted disembarkation for 10 days for fear of having to face arbitrary detention and other

¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

dangers they had already experienced first-hand during their stay in the country, Libyan authorities forcefully disembarked Mr SDG and 80 other individuals from the *Nivin*, at gunpoint. During this operation, they fired rubber and live bullets at the *Nivin* rescuees, resulting in serious injuries. One bullet penetrated Mr. SDG's leg. Between 8 and 11 people were transferred to Misrata hospital, 27 people were transferred to the Karareem Anti-Crime Department, and the rest were scattered between the Zliten and the Karareem Detention Centres (DCs).

7. Upon disembarkation, Mr SDG was taken into custody and transferred to Misrata, where he was denied adequate treatment—the bullet was not extracted from his leg. He was subsequently taken to an unidentified detention centre in Misrata, where Libyan authorities tortured and interrogated him abusively. Mr SDG was further singled out as one of the organisers of the resistance to the disembarkation. After five days, they transferred him to Zliten DC, where they beat him and subjected him to cruel, inhuman and degrading treatment over the course of seven months, between November 2018 and June 2019. In June 2019, Libyan authorities brought him to Misrata Hospital in order to have the rubber bullet removed from his leg, and at that time he managed to escape. Between June and August 2019, Mr SDG tried to cross the Mediterranean twice: On the first occasion, he was intercepted by the LYCG and brought back to Khoms, where he was detained and subjected to forced labour before managing to escape once again; on the second occasion, he was able to successfully reach Malta, where he currently finds himself together with 12 other passengers of the *Nivin* who reached the island at different times between June and September 2019. As we write this complaint, Mr SDG remains in Malta.
8. As a result of the return operation, first *de jure* and then *de facto*, coordinated by MRCC Rome, and executed in collaboration with, and through the intermediation of, the LYCG by the merchant vessel *Nivin*, Mr SDG suffered severe harm, including serious violations to his security and to his life. He was denied his right to leave any country, he was arbitrarily detained, and exposed to torture and cruel, inhumane and degrading treatment that subsequently materialised, as well as to slavery and forced or compulsory labour.

A. *Summary of the facts*

9. In early November 2018, a group of 93 migrants fleeing Libya, among whom Mr SDG, was forcefully returned to the war-torn country after they were “rescued” by a merchant ship heading towards Libya, the *Nivin*. A Spanish surveillance aircraft operating within the Italian-coordinated EUNAVFOR MED first sighted the migrants’ boat. The aircraft then passed the information on to the Italian MRCC, which in turn relayed the information to the LYCG, to conclude their interception and push-back by proxy. However, as the LYCG were unable to perform this task, the Italian Coast Guard communicating “on behalf of the Libyan Coast Guard” directed the *Nivin*, which was transiting in the area, to intervene. The LYCG then assumed coordination, taking over from the Italian MRCC, but communicating with the merchant ship from the Libyan Naval Coordination Centre (LNCC) held on board the Italian Navy ship docked in Tripoli harbour, deployed in Libya as part of the Italian Navy Operation *Nauras*. While the passengers resisted *refoulement*, locking themselves in the hold of the ship for 10 days once it had docked in the port of Misrata, they were violently removed from the vessel by Libyan security forces, detained, and subjected to multiple forms of ill-treatment including torture. This case exemplifies the recurrent practice of “privatized push-back” that is being implemented by Italy in collaboration with the LYCG since the summer of 2018 as a new modality of delegated containment of boat migrants.

10. In the night between the 6th and the 7th of November 2018, Mr SDG left Zliten, Libya, among a group of 93 passengers, on a rubber boat directed towards Italy. After some 18 hours of navigation, they contacted WatchTheMed-Alarm Phone (AP),² who received the boat's exact location and communicated the same to MRCC Rome at 19h50 Universal Coordinated Time (UTC). MRCC Rome was, however, already in possession of information with respect to the specific SAR event, as a Spanish surveillance aircraft operating within EUNAVFOR MED (Operation Sophia) had spotted the boat at 15h25 UTC and passed the data on to them—as the relevant MRCC—which in turn relayed the details to the LYCG. MRCC Rome did not share this information with AP and having determined that the migrant boat was in the unilaterally declared Libyan Search and Rescue (SAR) zone,³ and thus outside their area of responsibility, directed AP to contact the Libyan authorities. Aware of the risk of *refoulement* and violence the survivors would face at the hands of the LYCG but seeking to avert the immediate threat to their lives if left unattended at sea, the AP attempted several times to contact the LYCG. Their calls remained unanswered. At 21h23 UTC, 07/11/2018, MRCC Rome informed AP that they themselves had contacted the Libyan authorities and that such authorities had accepted to take over the coordination of the SAR operation.
11. In the meantime, at 19h39 UTC, 07/11/2018, the Italian authorities had already contacted the *Nivin* “on behalf of the Libyan Coast Guard,”⁴ directing the merchant vessel to divert its course and to proceed to the boat's location. The message also directed the *Nivin*'s captain to communicate with the Libyan authorities *through* MRCC Rome, which, despite formally relinquishing responsibility to coordinate, continued to act as facilitator—or *de facto* coordinator—throughout the rescue operation. After the *Nivin* received the communication from MRCC Rome at 19h39 UTC, 07/11/2018, it altered its course—as corroborated by the vessel's Automatic Identification System (AIS) track.⁵ At 21h34 UTC, 07/11/2018, the *Nivin* captain received an email from the LYCG stating that it had assumed coordination of the SAR event, and, according to his report, was “order[ed] to proceed to the same position which we receive[d] from MRCC,”⁶ with no further indications as to disembarkation.
12. At 03h30 UTC, 08/11/2018, the *Nivin* reached the migrant boat. In his testimony,⁷ Mr SDG recalls that around 04h00 UTC, 08/11/2018, a big ship approached them, which is consistent with the time recorded in the *Nivin*'s logbook. Crew members of the *Nivin* told the survivors that they would take them to Italy, and on the basis of that promise, they accepted to come aboard. However, the *Nivin*

² WatchTheMed-Alarm Phone is a self-organized hotline for refugees in distress in the Mediterranean Sea, whose main objective is to offer boat people at risk of being lost a means to make their SOS noticeable. It is an initiative by activist networks and civil society actors in Europe and Northern Africa established 2014. The Alarm Phone documents the situation, informs the coastguards and, when necessary, mobilises additional rescue support in real-time. See <https://alarmphone.org/en/about/>.

³ Libya notified the designation of its SAR region to the International Maritime Organization (IMO), first in July 2017, in a statement that was subsequently withdrawn, and then in December 2017. The IMO confirmed the declaration of the Libyan SAR region in June 2018, see <https://gis.imo.org/Public/COMSAR/NationalAuthority.aspx> and https://sarcontacts.info/srrs/ly_srr/.

⁴ Forensic Oceanography, *The Nivin case: Migrants' resistance to Italy's strategy of privatized push-back* (2019) p. 10.

⁵ *Ibid.*, p. 62. The automatic identification system (AIS) is an automatic tracking system that uses transponders on ships and is used by vessel traffic services (VTS). Information provided by AIS equipment, such as unique identification, position, course, and speed, can be displayed on a screen or an electronic chart display and information system (ECDIS). AIS is also intended to allow maritime authorities to track and monitor vessel movements.

⁶ *Ibid.*, p. 10.

⁷ Testimony of Mr SDG as collected by MSF (Annexed).

had received orders from the LYCG to proceed towards Misrata for their disembarkation. In order to avoid the protests and tensions that would have arisen, had the survivors known they were being brought back to Libya, at one point the crew members told them that they had reached Malta, but that since Malta had refused to let them disembark, they had to resume navigation towards Italy. Such lying illustrates how utterly foreseeable was the response to disembarkation in Libya, considering well-known circumstances there.

13. At 01h00 UTC, 09/11/2018, the *Nivin* arrived at the meeting position with the LYCG. The survivors were again deceived and told that they had arrived in Italy. Once they realised that the men on the other boat were speaking English with a Libyan accent, they refused to board the other boat. Armed guards got on board, but the survivors still refused to leave the *Nivin*. They were told that the *Nivin* would navigate towards Misrata to unload the cargo of cars it was carrying, and that then it would bring them away from Libya. The survivors acquiesced at that point to go to Misrata under the impression that, once the *Nivin* would have unloaded the cars, they would be taken away from Libya.
14. At 06h00 UTC, 10/11/2018, the *Nivin* arrived in Misrata, where survivors were told by “Libyans in soldiers’ uniform” that at that time, “willing or not, you need to disembark.”⁸ Mr SDG recalls that the guards loaded their guns as they were preparing to shoot. The survivors refused to disembark and barricaded themselves in the hold, closing the entrance to the boat. For 10 days, they exercised resistance. Mr SDG recalls that personnel from the United Nations High Commissioner for Refugees (UNHCR), the International Organisation for Migration (IOM), Médecins Sans Frontières (MSF), CESVI,⁹ and the Libyan Red Crescent were present at the scene, but that access to the boat was restricted. Mr SDG and the other passengers were able at that stage to access a phone, through which they communicated their situation and demands to the international press.¹⁰
15. On 14/11/2018, following their intervention, the Libyan security forces forcefully disembarked fourteen people under the threat of violence and transferred to the Karareem Detention Centre. On 20/11/2018, security forces intervened and forcefully disembarked the 81 remaining persons. During the forceful disembarkation, witnesses recall that rubber and live bullets were fired.¹¹ According to MSF personnel,¹² between 8 and 11 people were transferred to Misrata Hospital, 27 people were transferred to the Karareem Anti-Crime Department, and the rest scattered between Zliten and the Karareem Detention Centre. Mr SDG, as well as several other passengers, was shot during the forceful disembarkation. He did not, however, receive treatment upon disembarkation,

⁸ Ibid., para 25.

⁹ Cesvi is an independent lay Italian humanitarian organisation. Cesvi has been in Libya since 2011 and was the first Italian NGO to act following the Arab Spring. See <https://www.cesvi.eu/approfondimenti/cesvi-in-libya/>.

¹⁰ See *Middle East Eye*, ‘Libya is ‘hell’: Migrants barricaded in cargo ship refuse demands to leave’ (16 November 2018) available at <https://www.middleeasteye.net/news/libya-hell-migrants-barricaded-cargo-ship-refuse-demands-leave>; *The Guardian*, ‘Migrants fleeing Libya refuse to leave ship and be sent back to camps’ (17 November 2019) available at <https://www.theguardian.com/world/2018/nov/17/migrants-fleeing-libya-refuse-to-leave-ship-and-be-sent-back-to-country>; *BBC News*, ‘Rescued migrants refuse to leave ship taking them to Libya’ (18 November 2018) available at <https://www.bbc.com/news/world-africa-46255984>; *Al Jazeera*, ‘Barricaded refugees ‘ready to die’ than return to Libya detention’ (19 November 2018) available at <https://www.aljazeera.com/news/2018/11/barricaded-refugees-ready-die-return-libya-detention-181118162855287.html>.

¹¹ Testimony of Mr SDG (n 7) paras 30-36.

¹² Forensic Oceanography, *The Nivin case* (n 4) p. 73.

as the bullet he had in his leg was extracted only months later, in June 2019.¹³ He was subsequently transferred to an unidentified location in Misrata by the Libyan police, where he was kept for five days, during which Libyan armed guards interrogated and beat him. He was finally transferred to the Zliten Detention Centre, where he was again subjected to beatings and inhuman and degrading treatment.

16. In early June 2019, Mr SDG was brought to Misrata Hospital to have the bullet removed from his leg. While undergoing treatment, he seized the opportunity of less intense surveillance and escaped. Following his escape, he attempted to leave Libya once again. On the 24th of July 2019, he departed from Khoms but, as in past attempts, he and his fellow passengers were intercepted by the LYCG and brought back to Khoms, where he was amongst a group of four other people selected for forced labour, which he could hardly perform due to his medical conditions.¹⁴ After a few weeks, Mr SDG managed to escape and attempted the crossing a second time on the 24th of August 2019. This time, he and his fellow passengers refrained from calling upon any actor for rescue, fearing to be brought back to Libya again, and arrived autonomously close to Malta on the 26th of August 2019, when they were intercepted by an AFM patrol vessel.¹⁵

B. Violations of the International Covenant on Civil and Political Rights

17. Although the victim was located outside of any territory effectively controlled by Italy, his rights were decisively impacted by the activities of Italian authorities in a direct and foreseeable manner. Italy exercised power and effective control over the enjoyment of his rights in his situation of distress at sea, triggering the chain of events that led to the violations of his rights under Articles 2(3), 6(1), 7, 8(1), 8(3), 9(1), and 12(2) of the ICCPR:¹⁶
- i Article 2(3), since Mr SDG, considered that the push-back happened as a result of the interception on the high seas, did not have access to any remedy in Italy, the State responsible for the operations, and much less a remedy capable of meeting the requirements of Article 2(3), as his claim was not determined by any competent judicial, administrative or legislative authority;
 - ii Article 6(1), considering Italy's role in the return of the passengers of the rubber boat to Libya, exposing them to a real risk to their right to life, arising from both the threat and effective use of violence by the Libyan authorities, infringing fundamental rules of international law, such as the norm of *non-refoulement* and the obligation to deliver survivors to a place of safety following rescue at sea;¹⁷
 - iii Article 7, since upon return to Libya, Libyan authorities detained, interrogated, and subjected the returnees to torture and cruel, inhuman or degrading treatment, which the

¹³ Extracts from interview with Mr SDG as collected by Forensic Oceanography (Annexed) para 1.

¹⁴ *Ibid.*, para 11.

¹⁵ See *Malta Today*, '162 migrants rescued by AFM to be brought to Malta' (26 August 2019) available at https://www.maltatoday.com.mt/news/national/97099/73_migrants_rescued_by_afm_to_be_brought_to_malta#.XdFBUzL7R0s.

¹⁶ ICCPR (n 1).

¹⁷ See International Convention on Maritime Search and Rescue (SAR) (adopted 27 April 1979, entered into force 22 June 1985) ch 1.3.2; International Convention for the Safety of Life at Sea (SOLAS) (adopted 1 November 1974, entered into force 25 May 1980) ch V reg 33(1-1); IMO, Resolution MSC.159(78) Interim Guidance on Control and Compliance Measures to Enhance Maritime Security (21 May 2004) IMO Doc MSC 78/26/Add.1 Annex 13, para 8; and IMO, Resolution MSC.167(78) Guidelines on the Treatment of Persons Rescued at Sea (20 May 2004) IMO Doc MSC 78/26/Add.2 Annex 34, paras 6.12-6.18.

Italian authorities knew or should have known, taken alone and in conjunction with Article 13, having the *refoulement* of Mr SDG taken the form of a collective expulsion;

- iv Article 8(1) and 8(3), since the return exposed the returnees to the risk of being subjected to slavery, servitude, or forced or compulsory labour, as the Italian authorities knew or should have known;
- v Article 9(1), because returnees were arbitrarily detained upon disembarkation by the Libyan authorities, which the Italian authorities should have foreseen;
- vi Article 12(2), considering that Italy's intervention in the interception of the rubber boat at sea deprived the applicant of his right to leave any country—including Libya.

C. Summary of domestic remedies exhausted

18. An applicant is required to exhaust those domestic remedies that are available and effective.¹⁸ The Human Rights Committee has clarified that this refers “primarily to judicial remedies,”¹⁹ which must offer “a reasonable prospect of redress.”²⁰ As the Committee has explained, “if the alleged offense is particularly serious, as in the case of violations of basic human rights, in particular the right to life, purely administrative and disciplinary remedies cannot be considered adequate and effective.”²¹ The victim is, thus, not required to pursue other remedies, such as civil or disciplinary proceedings. In the instant case, accessible remedies capable of providing redress and offering reasonable prospects of success are not available to the applicant, if only because Italy considers, wrongfully, that the facts in question fall outside of its jurisdiction and do not engage its responsibility under the Covenant.

V. FACTS OF THE CLAIM

19. Facts build on Forensic Oceanography's (FO) study and on personal statements of survivors, as well as other public sources listed in Section X. Forensic Oceanography has provided a reconstruction of the events based on several sources, among which are the testimonies of several passengers, as collected by MSF in Libya and in Niger; reports and logbooks of the Alarm Phone, which was contacted by the passengers in distress; reports of the *Nivin* Captain and records of his communication with the Italian and Libyan coast guard; interviews with Libyan authorities on duty at the relevant time; official responses to inquiries from military actors; vessel tracking data (AIS); and news reports.

¹⁸ UN HRC, *Annual Report 1984*, para 584 (quoted in Moller and de Zayas, *United Nations Human Rights Committee Case Law 1977–2008* (Kehl am Rhein: N.P. Engel Verlag, 2009) 112: “exhaustion of domestic remedies can be required only to the extent that these remedies are effective and available”).

¹⁹ See UN HRC, *R.T. v. France* (30 March 1989) CCPR/C/35/D/262/1987, para 7.4; UN HRC, *Vicente et al. v. Colombia* (19 August 1997) CCPR/C/60/D/612/1995, para 5.2; UN HRC, *Mariam Sankara et al. v. Burkina Faso* (28 March 2006) CCPR/C/60/D/1159/2003, para 6.4.

²⁰ See UN HRC, *Patiño v. Panama* (21 October 1994) CCPR/C/52/D/437/1990, para 5.2; UN HRC, *Potter v. N.Z.* (28 July 1997) CCPR/C/60/D/632/95, para 6.3; UN HRC, *Torres Ramirez v. Uruguay* (8 April 1980) CCPR/C/10/D/4/1977, para 5 (requiring that the State demonstrate “a reasonable prospect that such remedies would be effective”); UN HRC, *Yuzepchuk v. Belarus* (17 November 2014) CCPR/C/112/D/1906/2009, para 7.4.

²¹ See UN HRC, *Vicente et al. v. Colombia* (n 19) para 5.2; UN HRC, *Coronel et al. v. Colombia* (n 21) para 6.2.

A. Background of the victim

20. The claimant, SDG, is a 20-year-old man from Bentiu state, South Sudan. He is one of four siblings born between 1997 and 2007. Like their parents, the four were all born in Bentiu and belong to the Nuer people.
21. Mr SDG left South Sudan due to the ongoing conflict between the Nuer and the Dinka. He recounts that the fight between the two peoples began on December 18, 2013. The fighting started because Salva Kii, the president of South Sudan (who is Dinka), tried to kill Dr. Riak Machar, the Vice-president (who is Nuer), because he was his opponent in the coming elections. Mr SDG states that the Dinka wanted to kill his people. When Dr. Riak Machar escaped after the assassination attempt, Salva Kii announced that he would kill all Nuer people. As of today, Mr SDG still fears for his life.²² He recalls that people were recruited from Darfur, Uganda and Kenya to kill the Nuer people. In 2013, when the conflict started, the claimant was in Juba, as he was enrolled in XXXX Primary School. He came back to Bentiu in January 2014, because he feared for his life in Juba. The claimant recalls that it was dangerous, and that he lived, for this reason, in the United Nations Mission in South Sudan (UNMISS) building in Juba at that time.
22. Mr SDG's father was killed on the XXXX 2014, when the Dinka people arrived in Bentiu. The claimant recalls that they tried to run to the UNMISS camp, but his father was shot. After that, he went to Leer, but the Dinka soldiers followed him and his people there. The claimant and his family ran away from them but were separated in the process. The claimant stayed with his older brother, but he has no information with respect to the whereabouts of the rest of the family and has had no possibility of contacting them since.
23. The claimant and his older brother stayed in South Sudan for two years before they left together to Sudan in 2016. The claimant informs that he wanted to leave Sudan, and that he could not return to South Sudan, as he feared for his life. He declares that he entered Libya from Sudan together with his older brother in January 2017. From Al Kufrah, they were brought to Bani Walid, where they stayed in a small house up in the mountains for around five months with 70 other people. The claimant recalls that there were six men working in the house, and more working outside. Each person was asked to pay \$4,000 to be released and continue his journey, but the claimant did not have the money. Armed guards used to beat Mr SDG every day, he was fed once a day with little food and water. He recalls that some people died of starvation, while others were shot inside the house by armed guards. His brother was burnt with melted plastic on his leg, arm, stomach and shoulder. Mr SDG states that he was used as a translator, and that for this reason only he was never burnt, but rather beaten—he still bears the marks of the beatings.
24. Mr SDG informs that his brother died because of the constant beatings. When his brother died, the claimant decided to escape and, together with two other individuals, they managed to break out in June of 2017. From Bani Walid, they tried to reach Tripoli, but militias found them, kidnapped them, and brought them back to Bani Walid. They were now held in a different house, where Mr SDG was forced into unpaid labour. He then managed to escape again and to reach Tripoli. When he reached Tripoli, he stayed for about one month there, before attempting to cross the Mediterranean Sea. The claimant attempted several times to cross, but every time the LYCG intercepted him and placed him in arbitrary detention. He was held in several detention places,

²² For background concerning the Dinka-Nuer conflict, and the violence that erupted between the groups in 2013, see <https://library.ecc-platform.org/conflicts/natural-ressource-conflict-south-sudan-dinka-vs-nuer>.

including Tajoura Detention Centre in February 2018, then Zuwarah Detention Centre, and Ain Zara Detention Centre in March 2018. The claimant states that he stayed in Ain Zara Detention Centre for five months. During this time, he registered with the UNHCR. Despite his registration with them, however, he declares that he never received any documentation nor was he ever interviewed. The claimant further notes that UNHCR used to evacuate only Eritreans from that Detention Centre. In August 2018, the claimant attempted another crossing, but was again intercepted and sent to a detention facility near El Soul Althalat, where he stayed for ten days. After another failed attempt, he was brought back to Khoms Detention Centre in October 2018, from which he did manage to escape.

25. At the beginning of November 2018, Mr SDG attempted to cross yet again, but was intercepted by a commercial ship, the *Nivin*, that returned him and more than 90 other people to Libya. This particular interception is at the heart of the present complaint.
26. The claimant is currently in Malta.

B. Interception at sea and return to Libya

The departure from Libya and communication leading to the rescue

27. In the night between the 6th and the 7th of November 2018, a group of 93 passengers left Zliten, Libya, directed towards Italy in an unseaworthy boat. The boat left Zliten at around midnight. At 15h25 UTC, 07/11/2019, a Spanish aircraft of the Italian-coordinated EUNAVFOR MED operation sighted the passengers in the recently declared Libyan Search and Rescue (SAR) zone. According to EUNAVFOR MED, with “no ENFM naval assets (...) in the vicinity,” “the information was passed to the relevant MRCC which relayed the information to the Libyan Coast Guard.”²³ At 17h18 UTC, 07/11/2018, migrants on the boat contacted the WatchTheMed-Alarm Phone (AP). At 18h48 UTC, 07/11/2018, AP successfully managed to receive the boat’s exact location. The communication was difficult due to the phone line breaking down. After several unsuccessful attempts of contacting the migrant boat, at 19h50 UTC, 07/11/2018, AP informed MRCC Rome about the last known location of the boat. Between 19h50 UTC and 21h16 UTC, 07/11/2018, AP and MRCC Rome exchanged several communications.²⁴ At 20h05 UTC, 07/11/2018, AP sent an email to both MRCC Rome and AFM Malta. The email read as follows:

“Urgent distress: 100pl including 5 women and 3 children in the Central Mediterranean

...

We received a call from a boat which is in distress. It embarked in Kumut, Libya at around 11pm 6th November CEST.

There are around 100 persons on board, including 5 women and 3 children.

Their current position is 33 22’ 12.3’’ N, 14 23’ 22.3’’ E and telephone number on board is +88 216 2101 0449.

Additional information: it is a rubber boat which the people on the boat said was in bad condition.

If you add also SAR NGOs: We informed the NGO Mario Junio in the vicinity as well. They are urgently asking for help.”²⁵

²³ Forensic Oceanography, *The Nivin case* (n 4) pp. 8-9.

²⁴ *Ibid.*, pp. 57-60.

²⁵ *Ibid.*, p. 57.

After AP informed MRCC Rome about the location of the boat in distress, MRCC Rome suggested that the boat was clearly on the high seas and within the Libyan SAR zone, and thus outside the scope of their responsibility. AP was asked to contact the competent Libyan authority directly. Following the unresponsive interaction with the Italian and Maltese MRCCs, AP attempted several times to contact the LYCG, despite fully aware of the risk of *refoulement* and violence the survivors would undergo at the hands of the LYCG, yet seeking to aver the immediate threat to their lives if left to drown. Their calls remained unanswered. The AP shift team registered calling the LYCG multiple times at 20h20 UTC, 21h07 UTC and 23h49 UTC.²⁶ At 21h23 UTC, 07/11/2018, AP received the following e-mail from MRCC Rome (here in English, the language originally used):

*“Good evening,
first of all thank you very much indeed for the information about thuraya number 008821621010449,²⁷ that we have immediately sent to Libyan Authorities that have assumed the coordination of the SAR [search and rescue] case [emphasis added].
Nevertheless, as you know, Libya, as United Nations recognized government, has clearly declared her “Search and Rescue Region” and she has posted her contacts in the “Web INTERNATIONAL MARITIME ORGANISATION GISIS” where you can find them.
For these reasons kindly we suggest you, for the future, to contact directly Libyan Authorities to spare precious time. Otherwise your behaviour could add a lot of time for an information in reaching the right competent “RCC”. Furthermore we take the opportunity to remember that ITMRCC is neither the competent or the closest RCC to Libyan SRR.
We know “Watch the Med” is a good and well aware organisation so it is strange that you call and write us for competence instead of info.
We are gratefully for your work and for your infos and we appreciate a lot your efforts to save the human life and beings and we hope you continue in the right way.
We are in touch with UNHCR, IOM and UNICEF, ITMRCC will always be ready to help, save and assist anyone at sea because this is our mission.
Have a great night.
Best regards.
IMRCC.”²⁸*

28. Upon receiving the above email, AP responded as follows at 21h56 UTC, 07/11/2018:

*“Hello,
Thank you very much for the response.
We would like to make clear that we tried to phone the Libya MRCC multiple times on different numbers, however, they were unresponsive.
We therefore had no other option other than to call ITMRCC and Malta MRCC to act as the responsible coordinating authority to find information of the boat.
What actions are you currently undertaking to prevent deaths at sea?
What assets are you sending?
Thank you for your communication.
Watch the Med - Alarmphone”²⁹*

²⁶ Ibid.

²⁷ Thuraya is one of the world’s largest satellite-phone companies, with a service that extends to much of the world and that has particularly good coverage of the Mediterranean. Many of the phones given to migrants are Thurayas, as evidenced by the virtual country code (+882 16) on incoming calls to Coast Guards in the Mediterranean. This appears to be the number used by Mr SDG and the other passengers to contact AP.

²⁸ Forensic Oceanography, *The Nivin case* (n 4) p. 58.

²⁹ Ibid.

To which ITMRCC responded:

“Dear Madam,
we don’t understand your questions, we have told you that **JRCC Tripoli has assumed the coordination of the case** [emphasis added]. So they are responsible and coordinating authority.

We are not in charge of any sar cases now. We don’t know why you say that Libyans were unresponsive. We have talked with them, passed the information and received the assumption of the sar cases. So, according to SAR CONVENTION HAMBURG 79, they are now in charge of the ops. For example yesterday they have saved about 320 persons in three sar cases. So, in our opinion, they are able to performing sar activities.

Thanks a lot again.

Best regards.

Italian Maritime Rescue Coordination Centre
Italian Coast Guard Headquarters”³⁰

29. However, before AP contacted MRCC Rome, MRCC Rome was already in possession of relevant information with respect to the SAR event. Not only had MRCC Rome contacted the LYCG, and then delivered information that was disclosed by AP, but at 19h39 UTC, 07/11/2018, in fact, it had already contacted the *Nivin* with the following message:

“**ON BEHALF OF LIBYAN COAST GUARD [emphasis added] FOR SAFETY OF LIFE AT SEA PLEASE DIVERT YOUR COURSE AND PROCEED TO THE MAXIMUM SPEED TO LAT. 33 39N LONG, 014 39E AT 1810UTC TO RENDER ASSISTANCE TO A BOAT IN DISTRESS WITH ABOUT 70 PEOPLE ON BOARD. PLEASE CONTACT URGENTLY JRCC LIBYA THROUGH THIS MRCC [emphasis added] AT FOLLOWING NUMBERS ...**”³¹

The *Nivin*, an 88-meter long car carrier flying the Panamanian flag,³² was directed towards Misrata in order to unload its cargo. It is significant that Forensic Oceanography’s reconstruction and AIS data analysis show that at approximately the same distance to the migrants’ boat position at the time was the *Omega Star*, a 103-meter livestock carrier, which was headed towards Malta instead.³³ The choice of contacting the *Nivin* rather than the *Omega Star* has not been explained by MRCC Rome, despite repeated requests for disclosure of relevant information regarding their decision-making in the case. Requesting the assistance of the *Omega Star* would have allowed this ship to continue towards its next port of call with minimum deviation and to disembark the passengers in a safe port, where their lives would not have been put at immediate risk and where they might have requested international protection.³⁴ MRCC Rome, however, contacted the *Nivin* instead.

30. The message in paragraph [...] was sent by MRCC Rome to the *Nivin* before AP had informed MRCC Rome of the boat’s position, and also refers to the boat’s position at 18h10 UTC, that is before 18h48 UTC, when AP first received the position itself. These elements thus confirm that the vessel’s position was provided to MRCC Rome by another actor. In his testimony, Mr SDG recalls

³⁰ Ibid., pp. 58-59.

³¹ Ibid., p. 62.

³² Detailed information on the *Nivin*, including voyage information, are available at <https://www.marinetraffic.com/en/ais/details/ships/shipid:753755/mmsi:374729000/imo:8206533/vessel:NIVIN>.

³³ Forensic Oceanography, *The Nivin case* (n 4) p. 61.

³⁴ Ibid.

that at around 15h25 UTC and, then again, at around 17h00 UTC, 07/11/2018, the boat was flown over by an aircraft.³⁵ Based on the description provided, it is reasonable to believe that it was the above-cited Spanish aircraft under the Italian-commanded EUNAVFOR MED operation. This was corroborated by EUNAVFOR MED itself, which registered a SAR event (No. 937), on 07/11/2018.³⁶ There is, however, no disclosed evidence of any communication between the aircraft, or any other EUNAVFOR MED asset or coordination centre, and MRCC Rome or the LYCG.³⁷ The second element to be noted is that the order was given *on behalf of the Libyan Coast Guard* by MRCC Rome, followed by the request to contact JRCC Libya *through* MRCC Rome. This indicates that the responsibility for the coordination of the SAR operation, flowing from the power to make decisions and from the decisions indeed made, was first *de jure*—under the relevant SAR and SOLAS Convention provisions³⁸—and then *de facto*—once the Italian authorities declared they had relinquished responsibility in favour of their Libyan counterparts—undertaken by MRCC Rome. The fact that the coordination was intended, and declared, to be performed “on behalf of” the Libyan authorities does not relieve Italy of its obligations under the Covenant for its own conduct and producing detrimental effects that it could and should have foreseen.

31. The *Nivin*'s report indicates that the vessel immediately altered its course, which is corroborated by the vessel's AIS track.³⁹ Since 20h42 UTC, 07/11/2018, however, the *Nivin*'s AIS track was interrupted, and it only resumed at 13h35 UTC, 08/11/2018. Forensic Oceanography confirms that this is not due to poor coverage by coastal AIS data receivers in the area, as the positions of other vessels transiting in the same area are available for that time. Rather, the lack of an AIS position for the *Nivin* is either the outcome of a technical problem of the *Nivin*, or a deliberate act of turning off the AIS transponder, as can be the case when a captain intends to commit an illegal action and seeks to leave no trace.⁴⁰ At 21h34 UTC, 07/11/2018, the Libyan authorities contacted the *Nivin* via email through the Libyan Naval Communication Centre (LNCC)—located at the time in an Italian Navy vessel deployed as part of Operation *Nauras* and docked at Tripoli harbour with the mission to support the coordination of the maritime activities of the LYCG and the Libyan Navy.⁴¹ It delivered an order to proceed to the position of the boat and to rescue the survivors. The email provided by the *Nivin*'s captain reads as follows:

“Good evening Sir,

I am the Libyan Coast Guard, the authority responsible for SAR operations in area.

I take the responsibility of the coordination of this SAR event:

- *Rubber boat in PSN: 33 40N 014 38E,*
- *70 people on board*
- *Not good but buoyancy conditions.*

MRCC Rome informed me that you have received my request of cooperation and you are sailing towards this contact.

³⁵ Testimony of Mr SDG (n 7) para 8.

³⁶ Forensic Oceanography, *The Nivin case* (n 4) p. 55.

³⁷ *Ibid.*

³⁸ See (n 17).

³⁹ Forensic Oceanography, *The Nivin case* (n 4) p. 62.

⁴⁰ *Ibid.*, p. 63, citing: Sarah Gibbens, ‘How Illegal Fishing Is Being Tracked From Space, National Geographic’ (12 March 2018) available at <https://www.nationalgeographic.com/news/2018/03/illegal-fishing-ais-data-going-dark-protected-ocean-reserve-spd/>.

⁴¹ Forensic Oceanography, *The Nivin case* (n 4) pp. 28-29. See also C. Heller and L. Pezzani, *Mare Clausum. Italy and the EU's undeclared operation to stem migration across the Mediterranean* (Forensic Oceanography: 2018) available at <https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf>.

*As Libyan Authority I order you to rescue the people of rubber boat in distress.
I will provide you instruction for disembarkation.
Please acknowledge this message.
Regards.
Libyan Navy Coast Guard
Libyan Naval Communication Centre”⁴²*

32. At 22h13 UTC, 07/11/2018, MRCC Rome informed Alarm Phone that they had been in contact with the Libyan authorities who launched a SAR operation. At 23h00, 07/11/2018, it appears from the *Nivin* report that a NATO helicopter provided an updated position with respect to the boat in distress.⁴³ This was not corroborated by NATO, who denied presence in the Mediterranean that night.⁴⁴ At 02h00 UTC, 08/11/2018, the *Nivin* arrived at the position allegedly received from NATO, but did not locate the boat. Captain Bassm Sbat informed the LYCG, which contacted “MRCC-Malta asking assistance for updating the rubber boat position.”⁴⁵ MRCC Malta immediately sent a helicopter and, at 02h30 UTC, 08/11/2018, updated coordinates were sent to the *Nivin*.⁴⁶ At 03h30 UTC, 08/11/2018, the *Nivin* reached the boat in distress and was in contact with the Libyan Authorities, who directed it towards Misrata.

The rescue

33. The claimant informs that around 03h00 UTC, 08/11/2018, passengers saw an aircraft, or maybe two. The first one came and left, and after about one hour another one, or the same aircraft, came again. According to Mr SDG’s testimony, the aircraft “made circles above us and then would just move to a direction. I had the impression that it was showing us the way as the compass was showing/indicating the same direction taken by the plane. None of them, threw anything at us.”⁴⁷ He also informs that around that time, migrants on board the rubber boat spotted a big ship:

“...one of those merchant ships. During our navigation, we did not try to catch the attention of these big boats because I knew they would bring us back to Libya. It already happened to me when, in October 2018, I was brought back to Libya along with other 84 people and then we were transferred to Khoms [Detention Centre].”⁴⁸

Mr SDG also stated that at around 03h00 UTC, 08/11/2018, “we opened the phone again and got some messages. They were in English. The messages were from some human rights organizations. The messages were saying: ‘Where are you we are looking for you’,”⁴⁹ which is consistent with the Alarm Phone’s report. Mr SDG further recalls that around 04h00 UTC, 08/11/2018, a big ship approached them. The passengers on the boat did not want to stop, but the boat approached them and, by doing that, “moved the water around us creating waves. Our rubber boat started taking water. We had to stop although the rubber boat was in condition to continue.”⁵⁰

34. Mr SDG states that, once the ship came closer, the crew members told them they would take them to Italy. Eventually the migrants acquiesced to get inside the boat. As the passengers were taken on

⁴² Forensic Oceanography, *The Nivin case* (n 4) p. 63.

⁴³ *Ibid.*, p. 65.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Testimony of Mr SDG (n 7), para 14.

⁴⁸ *Ibid.*, para 15.

⁴⁹ *Ibid.*, para 13.

⁵⁰ *Ibid.*, para 16.

board the *Nivin*, the crew members of the Panamanian-flagged vessel deceived the migrants by telling them that they would be brought to Italy. At 06h00 UTC, 08/11/2018, the *Nivin* “receive[d] instruction from Libyan coast guard to alter course and proceeding 20 N.Miles north of Khums port for the discharge of immigrant.”⁵¹ At one point, the *Nivin*’s crew members told the migrants that the boat was approaching Malta, but that Malta refused to let them disembark. At that time, the migrants were again deceived and told that the *Nivin* would thereafter navigate towards Italy. Although the *Nivin*’s AIS track is unavailable for the period between 20h42 UTC, 07/11/2018, and 13h35 UTC, 08/11/2018, it is evident that the *Nivin* never approached Malta nor navigated towards Italy.⁵² Indeed, when the AIS track resumed, the *Nivin* was located just outside of Libyan territorial waters, North of Misrata. It is therefore clear that the communication between the *Nivin*’s crew members and the migrants was untruthful.

35. At 01h00 UTC, 09/11/2018, the *Nivin* arrived at the meeting position with the LYCG and was approached by a boat of the LYCG. The rescuees were told that they had arrived in Italy, while the boat was really in Libyan territorial waters. Once the migrants realised that the men on the other boat were speaking English with a Libyan accent, they refused to board the other boat. According to Mr SDG’s testimony, when one of the Libyans told the others to go and bring the guns, many of the migrants ran away and tried to hide among the cars transported by the *Nivin*. Only two people agreed to board the LYCG’s boat out of fear, while the rest refused to return to any Libyan port. Mr SDG recalls that, at that time, the Libyans “ordered [the *Nivin* crew] not to feed us anymore,”⁵³ and two armed Libyan guards stayed on board of the *Nivin* while the LYCG boat left the scene. At around 17h00 UTC, 09/11/2018, the Libyan boat came back, and armed guards got on board. The migrants still refused to leave the *Nivin*. They were told that the *Nivin* would navigate towards Misrata to unload the cars, and that then it would bring the migrants away from Libya. Mr SDG recalls that, on the basis of the promise that upon unloading the cargo they would be taken to Italy, the migrants on board accepted to go to Misrata, and at 19h55 UTC, 08/11/2018, the *Nivin* left the meeting point.

The disembarkation

36. At 06h00 UTC, 10/11/2018, the *Nivin* arrived in Misrata, where Libyans in military uniform told the 91 passengers that, willing or not, they had to disembark. Mr SDG recalls that the soldiers loaded the guns as they were preparing to shoot. The survivors refused to disembark and ran where the cars were parked, closing the entrance to the boat and barricading themselves inside the *Nivin*. There followed a 10-day long resistance against disembarkation.
37. Mr SDG recalls that personnel from UNHCR, IOM, MSF, CESVI, and the Libyan Red Crescent were present at the scene. On 11/11/2018, the LYCG granted MSF access to the passengers, as many of them were injured, sick or burnt. According to MSF personnel,⁵⁴ 33 of the 91 people on board the *Nivin* were minors, and at least 12 reported being registered with UNHCR. Many stated that they had been trafficked in Beni Walid and had spent several months, if not years, in the hands of traffickers. On the same day, Mr SDG recalls that migrants “accepted for all the cars to be taken

⁵¹ Forensic Oceanography, *The Nivin case* (n 4) p. 67.

⁵² *Ibid.*, p. 7.

⁵³ Testimony of Mr SDG (n 7), para 21.

⁵⁴ Forensic Oceanography, *The Nivin case* (n 4) p. 69.

outside. We did not do anything to them. It took two days to take the cars out. There were many soldiers.”⁵⁵ During the disembarkation of cars, Libyan Deterrence Forces were present at the dock.

38. On 14/11/2018, the Libyan Attorney General issued an order to end the ‘occupation’ of the *Nivin* and Special Forces were dispatched.⁵⁶ Mr SDG recalls that “they came with many soldiers ... wearing balaclava.⁵⁷ ... The Libyans said they would drop a bomb inside. ... They said they would burn the ship.”⁵⁸ 14 people, among which were a Sudanese woman with her 4-month-old baby and six injured Bangladeshi nationals, were forcefully disembarked under the threat of violence and transferred to the Karareem Detention Centre in Misrata.⁵⁹

39. Thanks to a mobile phone on board, the passengers were able to contact the international press and share the news about their resistance. Mr SDG, thanks to his knowledge of the English language and his leadership, was one of those who communicated with the media.⁶⁰ The coverage of the standoff, however, did not prevent a violent ending, and Mr SDG suffered the consequences of his role in sharing the plight of the *Nivin* migrants.

40. On 20/11/2018, Members of the Joint Force of Misrata and the Central Sector of the Coast Guard intervened and forcefully disembarked the 81 remaining persons. The claimant recalls that on that day:

“Around 9am we heard a bomb sound coming from the top from the area where the captain used to be. Then they cut the electricity. And everything inside the boat became immediately dark. Then we started hearing gun shooting in all directions coming from laser guns sights. ... The Libyans forces opened the door and shot everywhere. The security forces grabbed me from my hair, and I was beaten with the guns. At one point they blocked me in front of a door and ordered me to open it. I said I don’t know how to open. At that moment I had several guns pointed at me. I saw the lights of the guns on me. All over my body and on my eyes. They were close, something like 2 meters away. Then I saw the smoke of the gun when they shot at

⁵⁵ Testimony of Mr SDG (n 7), para 29.

⁵⁶ Forensic Oceanography, *The Nivin case* (n 4) p. 71. See also *Reuters*, ‘Libyan coast guards force stranded migrants off container ship’ (20 November 2018) available at <https://www.reuters.com/article/us-europe-migrants-libya/libyan-coast-guards-force-stranded-migrants-off-container-ship-idUSKCN1NP21A>.

⁵⁷ A balaclava, also known as a balaclava helmet or ski mask, is a form of cloth headgear designed to expose only part of the face, usually the eyes and mouth. Depending on style and how it is worn, only the eyes, mouth and nose, or just the front of the face are unprotected.

⁵⁸ Testimony of Mr SDG (n 7) para 31.

⁵⁹ Forensic Oceanography, *The Nivin case* (n 4) p. 71.

⁶⁰ See *Reuters*, ‘Shipbound migrants in Libya port say would rather die than disembark’ (14 November 2019) available at <https://www.reuters.com/article/us-europe-migrants-libya/shipbound-migrants-in-libya-port-say-would-rather-die-than-disembark-idUSKCN1NJ2QY>; *La Repubblica* ‘Libia, “Le 79 persone su una nave nel porto di Misurata non fatele sbarcare: rischiano arresti e torture”’ (16 November 2018) available at https://www.repubblica.it/solidarieta/profughi/2018/11/16/news/libia_le_79_person_e_le_79_person_e_a_bordo_di_una_nave_nel_porto_di_misurata_non_siano_costrette_a_sbarcare_li_rischiano_a-211859362/; *La Repubblica*, ‘Blitz dei soldati libici i migranti della Nivin accusati di pirateria’ (21 November 2018) available at <https://ricerca.repubblica.it/repubblica/archivio/repubblica/2018/11/21/blitz-dei-soldati-libici-i-migranti-della-nivin-accusati-di-pirateria06.html>; *La Repubblica* ‘Così l'Italia rispedisce i migranti nell'inferno dei centri libici’ (16 November 2018) available at <https://ricerca.repubblica.it/repubblica/archivio/repubblica/2018/11/16/cosi-litalia-rispedisce-i-migranti-nellinferno-dei-centri-libici14.html>; *Al Jazeera*, ‘Barricaded refugees 'ready to die' than return to Libya detention’ (n 10); and *Middle East Eye*, ‘Libya is 'hell': Migrants barricaded in cargo ship refuse demands to leave’ (n 10).

me. But I had not realized that I had been shot. When I tried to move my leg wouldn't move and then I lost consciousness."⁶¹

Testimonies inform that the Libyan forces fired rubber as well as live bullets.⁶² Human Rights Watch (HRW) also said that Libyan security forces reportedly used tear gas,⁶³ which Tawfiq Esskair, commander of the Central Region Coastguards, confirmed.⁶⁴ According to MSF,⁶⁵ between 8 and 11 people were transferred to Misrata hospital, 27 people were transferred to the Karareem Anti-Crime Department, and the rest scattered between Zliten and the Karareem Detention Centre. Although MSF had carried out, between the 11th and the 18th of November, over 90 medical consultations on board the *Nivin*, after disembarkation they were "not authorised to see patients [they] had previously been able to treat."⁶⁶

After disembarkation

41. Mr SDG recalls that, when he woke up in Misrata, he found some people there, including two Eritreans and one Sudanese, that were on board of the *Nivin* and that were later taken to Tripoli. He was transferred to "the security place" in Misrata by the police,⁶⁷ together with three South Sudanese and two Sudanese nationals. He informs that he was kept, together with the other four, for five days. During the five days, Mr SDG was interrogated and tortured. In the morning, he "would be brought to a room where two men with a computer would ask many questions," while at night "men in plain clothes would come and bring water and shampoo and put it in [his] eyes."⁶⁸ Mr SDG affirms that beatings were systematic, that armed guards "would take one person per time and bring in a room for beating."⁶⁹ He recalls that they used to ask if his name was SDG, if he was of Christian faith, and the name of his mother. Mr SDG stated that he was accused of being "the one talking in English and sending messages to the media,"⁷⁰ and therefore he lied and changed his name, saying that his name was Yousef in an attempt to avoid further ill-treatment. He recalls that:

"They took a picture of me. They also showed a picture of me and say to me: you are the one who did this (talk to journalist and refuse to disembark). They wouldn't believe that we were just migrants refusing to disembark. ... I denied having that phone. And they beat me. They also brought me a photo of myself published by the media. I did take pictures while I was onboard and sent to TV."⁷¹

42. Mr SDG recounts that many passengers were put to forced labour, but that he was spared due to his wounded leg. Mr SDG remained for six months with the bullet in his leg, a direct consequence of the forceful disembarkation. The rubber bullet was indeed only removed in June of 2019, when

⁶¹ Testimony of Mr SDG (n 7) para 33.

⁶² Forensic Oceanography, *The Nivin case* (n 4) p. 11.

⁶³ Human Rights Watch, 'Libya: Migrants Forced off Ship at Libya Port' (21 November 2018) available at <https://www.hrw.org/news/2018/11/21/libya-migrants-forced-ship-libya-port>.

⁶⁴ See *Reuters*, 'Libyan coast guards force stranded migrants off container ship' (n 56).

⁶⁵ Forensic Oceanography, *The Nivin case* (n 4) p. 73.

⁶⁶ MSF, 'Over 80 refugees and migrants forcibly disembarked in Misrata after 10-day standoff' (23 November 2018) available at <https://www.msf.org/forced-disembarkation-81-refugees-and-migrants-misrata-libya>.

⁶⁷ Testimony of Mr SDG (n 7), para 34.

⁶⁸ *Ibid.*, para 35.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, para 36.

he was brought to Misrata hospital and finally treated. While undergoing treatment, Mr SDG seized the opportunity of less intense surveillance and escaped. Following his escape, he attempted to leave Libya once again: On the 24th of July 2019, he departed from Khoms but, as in past attempts, he and his fellow passengers were intercepted by the LYCG and brought back to Khoms, where he was amongst a group of four other people selected for forced labour, which he could hardly perform due to his medical conditions.⁷² Two days later, *Al Jazeera* reported that “Ayoub Qasim, a spokesman for Libya's coastguard, told The Associated Press news agency that two boats carrying around 300 people sank approximately 120km east of the capital, Tripoli, before adding that 134 had been rescued.”⁷³ After a few weeks, Mr SDG managed to escape and attempted the crossing a second time on the 24th of August 2019. This time, he and his fellow passengers refrained from calling upon any actor for rescue, fearing to be brought back to Libya again, and arrived autonomously close to Malta on the 26th of August 2019, when they were intercepted by an AFM patrol vessel.⁷⁴ There are a total of twelve former *Nivin* passengers present in Malta, who arrived on different boats in early June, August and September.

C. Violence and threats to life arising from the actions of the Libyan authorities

43. On 09/11/2018, at the time of the first encounter of the LYCG with the migrants, armed individuals threatened the passengers of the rubber boat with guns in order to have them leave the *Nivin* and transfer onto the LYCG vessel.⁷⁵ The same armed individuals ordered the *Nivin* crew not to feed migrants anymore, unless they agreed to the transfer.⁷⁶ On 10/11/2018, when the *Nivin* arrived in Misrata, Libyan soldiers loaded their guns and, pointing them at the migrants, ordered them to disembark.⁷⁷ On 14/11/2018, following the order of the Libyan Attorney General, Special Forces intervened and forcefully disembarked 14 people through threats of and actual recourse to violence.⁷⁸ On 20/11/2018, in order to force the remaining migrants to disembark, Special Forces cut the electricity on the boat and started shooting in the dark with laser guns.⁷⁹ Testimonies indicate that both rubber and live bullets were fired.⁸⁰ As a result, between 8 and 11 people had to be transferred to the hospital in Misrata. Mr SDG, who was shot in the leg and wounded,⁸¹ was not treated at that time. The bullet was removed only in June 2019, when he was again transferred from Zliten DC to Misrata Hospital.⁸²

D. Detention, torture and interrogation of the claimant

44. After disembarkation, the police transferred Mr SDG to an unknown location in Misrata, together with five other individuals. He was kept there isolated for five days, during which he was interrogated and beaten. The police would bring him to a room where they would ask him questions with respect to his interactions with the media while on board of the *Nivin*. They accused him of

⁷² Extracts from interview with Mr SDG (n 13) para 11.

⁷³ See *Al Jazeera*, ‘Up to 150 feared dead in 'year's worst Mediterranean tragedy’ (26 July 2019) available at <https://www.aljazeera.com/news/2019/07/100-migrants-refugees-feared-drowned-mediterranean-sea-190725150839996.html>.

⁷⁴ See *Malta Today*, ‘162 migrants rescued by AFM to be brought to Malta’ (n 15).

⁷⁵ Testimony of Mr SDG (n 7), para 21.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, para 25.

⁷⁸ *Ibid.*, para 31.

⁷⁹ *Ibid.*, para 33.

⁸⁰ Forensic Oceanography, *The Nivin case* (n 4) p. 11.

⁸¹ Testimony of Mr SDG (n 7), para 33.

⁸² Extracts from interview with Mr SDG (n 13) para 1.

being the leader of the occupation of the *Nivin* and questioned him at length in that respect. Every night, while in detention, Mr SDG was assaulted by men in plain clothes who would enter his cell and rub his eyes with shampoo, until he would collapse from the pain. Beatings were systematic, as armed guards “would take one person per time and bring in a room for beating.”⁸³ The guards that interrogated him for five days would ask if his name was SDG, if he was of Christian faith, as well as the name of his mother. Mr SDG stated that he was accused of being “the one talking in English and sending messages to the media,”⁸⁴ and that therefore he lied and changed his name. After five days, he was sent to Zliten Detention Centre, where he was again beaten by “the security.”⁸⁵

E. Exposure to risk of being subjected to slavery and forced labour

45. Instances of forced labour involving migrants are widespread and systematic in Libya, where slavery-like conditions and slave auctions have been reported by, *inter alia*, *Al Jazeera*,⁸⁶ the *CNN*,⁸⁷ and numerous UN reports.⁸⁸ When Mr SDG arrived in Libya in January 2017 with his brother, smugglers brought them to Beni Walid, where they were locked in a small house in the mountains with 70 other people. Mr SDG recalls that there were many men working in slavery-like conditions inside and outside of the house and that each person was asked to pay 4.000\$ in order to be released. When Mr SDG managed to escape from the house, he was kidnapped by militias and brought back to Beni Walid, where he was forced into labour in different places and requested to pay money. Mr SDG was further subjected to forced labour in July 2019, following his interception at sea by the LYCG and detention in Khoms.⁸⁹

VI. ADMISSIBILITY

A. Jurisdiction

46. The ICCPR and the first Optional Protocol to the ICCPR entered into force for the Italian Republic on the 15th of September 1978.⁹⁰ The violations concerned in this communication commenced on the 7th of November 2018 and are yet to be repaired. This communication therefore falls within the jurisdiction of the Committee.

⁸³ Testimony of Mr SDG (n 7) para 35.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, para 36.

⁸⁶ *Al Jazeera*, ‘Migrants for Sale: Slave trade in Libya | Counting the Cost’ (26 November 2017) available at <https://www.youtube.com/watch?v=9JX6DC4Ajj0>.

⁸⁷ *CNN*, ‘People for sale. Exposing migrant slave auctions in Libya’, available at <https://edition.cnn.com/specials/africa/libya-slave-auctions>.

⁸⁸ See UNSMIL and OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya* (20 December 2018) available at <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>; UN Security Council, Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011) (5 September 2018) S/2018/812, para 60; UN Security Council, Final report of the Panel of Experts on Libya established pursuant to Security Council resolution 1973 (2011) (9 December 2019) S/2019/914, paras 49 and 54.

⁸⁹ Extracts from interview with Mr SDG (n 13) para 11.

⁹⁰ See OHCHR, Status of Ratifications, available at <https://indicators.ohchr.org/>; OHCHR, UN Treaty Body Database, available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx.

B. No other international complaint

47. No complaint has been submitted to any other procedure of international investigation or settlement regarding this case. This communication therefore satisfies the admissibility requirement in Article 5(2)(a) of the first Optional Protocol to the ICCPR and in Rule 99(e) of the Rules of procedure of the Human Rights Committee.

C. Exhaustion of domestic remedies

48. A claimant is required to exhaust those domestic remedies that are available and effective.⁹¹ The Human Rights Committee has clarified that this refers “primarily to judicial remedies,”⁹² which must offer “a reasonable prospect of redress.”⁹³ As the Committee has explained, “if the alleged offense is particularly serious, as in the case of violations of basic human rights, in particular the right to life, purely administrative and disciplinary remedies cannot be considered adequate and effective.”⁹⁴ The victim is thus not required to pursue other remedies, such as civil or disciplinary proceedings. In the instant case, accessible remedies capable of providing redress and offering reasonable prospects of success are not available to the applicant, if only because Italy considers, wrongfully, that the facts in question fall outside of its jurisdiction and do not engage its responsibility under the Covenant.

VII. CONTEXT OF THE VIOLATIONS

49. The cooperation and collaboration between Italy and Libya on migration and border control was already formalised during the 2000s, when several agreements focused on curbing migratory flows and enhancing readmission were concluded.⁹⁵ Since 2008, when Italy and Libya signed a *Treaty of Friendship, Partnership and Cooperation aimed at preventing irregular migration from Libya to Italy*,⁹⁶ Italy carried out several naval operations intercepting irregular migrants and returning them to Libya. In 2012, this partnership was suspended, as the European Court of Human Rights concluded, in the case of *Hirsi Jamaa and Others v Italy*,⁹⁷ that Italy had violated the principle of *non-refoulement* and the prohibition of collective expulsion through its policy of “push-back” to Libya of migrant vessels intercepted in the Central Mediterranean, under the aegis of the *Treaty of Friendship* and its *Additional Technical Protocols*⁹⁸ providing precisely for this course of action. In that instance, the applicants were part of a group of about two hundred individuals who left Libya

⁹¹ UN HRC, *Annual Report 1984* (n 18).

⁹² See UN HRC, *R.T. v. France* (n 19); UN HRC, *Vicente et al. v. Colombia* (n 19); UN HRC, *Mariam Sankara et al. v. Burkina Faso* (n 19).

⁹³ See UN HRC, *Patiño v. Panama* (n 20); UN HRC, *Potter v. N.Z* (n 20); UN HRC, *Torres Ramirez v. Uruguay* (n 20); UN HRC, *Yuzepchuk v. Belarus* (n 20).

⁹⁴ UN HRC, *Vicente et al. v. Colombia* (n 19) para 5.2; UN HRC, *Coronel et al. v. Colombia* (n 21).

⁹⁵ See E. Paoletti, *The Migration of Power and North-South Inequalities* (2010, Palgrave Macmillan); N. Ronzitti, ‘The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?’ (2009) 1 *Bulletin of Italian Politics* 1, 125.

⁹⁶ Legge 6 febbraio 2009, n. 7 Ratifica ed esecuzione del Trattato di amicizia, partenariato e cooperazione tra la Repubblica italiana e la Grande Giamahiria araba libica popolare socialista, fatto a Bengasi il 30 agosto 2008 (GU n. 40 del 18-2-2009) available (in Italian) at <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2009;7>.

⁹⁷ *Hirsi Jamaa and Others v Italy* [GC] No. 27765/09 (European Court of Human Rights 23 February 2012).

⁹⁸ Protocollo aggiuntivo tecnico-operativo al Protocollo di Cooperazione tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell’immigrazione clandestina (signed on 29 December 2007) available (in Italian) at https://www.meltingpot.org/IMG/pdf/Protocollo_operativo_Italia_Libia_2007.pdf.

aboard three vessels with the aim of reaching the Italian coast. They were intercepted around 35 nautical miles south of Lampedusa, i.e. within the Maltese SAR Region of responsibility, by ships from the Italian Revenue Police (*Guardia di Finanza*) and the Italian Coast Guard. The survivors were transferred onto Italian military ships and returned to Tripoli, where they were handed over to the Libyan authorities and forced to disembark.

50. Cooperation with the Libyan authorities resumed at the time of the sharp increase in the number of migrants reaching Europe in 2015 and 2016. On the one hand, EUNAVFOR MED - Operation Sophia, the European Union (EU) operation launched in June 2015 under Italian overall command,⁹⁹ provided training to LYCG personnel. Between October 2016 and May 2019, 355 LYCG personnel have been instructed by EUNAVFOR MED.¹⁰⁰ In parallel, the Italian Coast Guard assumed the leadership of a project¹⁰¹ to establish a Libyan MRCC and support the Libyan authorities in identifying and declaring their SAR Region, an objective reiterated in January 2017 by the European Commission.¹⁰² In addition, Italian Council of Ministers' Resolution of 14 January 2017, implementing both the Treaty of Benghazi's Additional Protocol of the 29 December 2007 and the Cooperation Protocol of the 29 December 2009, provided for the prolongation of the bilateral mission of assistance to the LYCG through Italian personnel of the (*Guardia di Finanza*), with the purpose of tackling the phenomena of irregular migration and human trafficking through, *inter alia*, training and joint patrolling on board the units gifted to the LYCG between the end of 2009 and the beginning of 2010.¹⁰³ Without the material, technical and political support of the European Union and of the Italian Government, it would have been virtually impossible for the LYCG to operate.
51. The decisive influence of the Italian Government was strengthened in February 2017, when Italy and the UN-backed Libyan Government of National Accord signed a *Memorandum of Understanding on Cooperation on Development, Combating Illegal Immigration, Human Trafficking and Smuggling, and on Strengthening Border Security* (MoU).¹⁰⁴ In the MoU, the Parties highlight "the importance of Libyan land and sea borders' control and security, in order to ensure the reduction of illegal migratory flows, the fight against human trafficking and fuel smuggling, besides highlighting the importance of benefiting from the experience of the institutions involved in the fight against clandestine immigration and border control."¹⁰⁵ In light of this acknowledgment, "the Italian party commits to provide technical and technological support to the

⁹⁹ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), L 122/31.

¹⁰⁰ See EUNAVFOR MED, 'Operation SOPHIA: training activity in progress' (10 May 2018) available at <https://www.operationsophia.eu/operation-sophia-training-activity-in-progress/>; EUNAVFOR MED, 'New LNCG Training module in Croatia' (14 November 2018) available at <https://www.operationsophia.eu/new-lncg-training-module-in-croatia/>; Forensic Oceanography, *The Nivin case* (n 4) p. 18.

¹⁰¹ Forensic Oceanography, *The Nivin case* (n 4) p. 18.

¹⁰² See European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Join Communication to the European Parliament, the European Council and the Council. Migration on the Central Mediterranean route: Managing flows, saving lives' (25 January 2017).

¹⁰³ See Camera dei Deputati, Partecipazione dell'Italia a missioni nel Mediterraneo, Dossier n° 316 (27 settembre 2017) p. 5, available (in Italian) at <http://documenti.camera.it/leg17/dossier/pdf/DI0621.pdf>.

¹⁰⁴ Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana (signed on 2 February 2017) available (in Italian) at <http://www.governo.it/sites/governo.it/files/Libia.pdf> and (in English) at https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

¹⁰⁵ *Ibid.*, Preamble.

Libyan institutions in charge of the fight against illegal immigration, 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.”¹⁰⁶ In May 2017, Italy gifted the Libyan Navy and Coast Guard with four fast patrol boats.¹⁰⁷ A few months later, further six boats were delivered to the LYCG.¹⁰⁸ This significantly increased the operational capacity of the LYCG.¹⁰⁹

52. In June 2017, the Italian Coast Guard was awarded a €44 million grant for the ‘Assessment of the Libyan Coast Guard legal framework and capability in terms of SAR Services’ by the European Commission.¹¹⁰ This helped expand the Italian Navy *Mare Sicuro* operation within “Libyan internal and territorial waters controlled by the Government of National Accord, in order to support Libyan naval assets.”¹¹¹ In fact, in August of 2017, an extension was launched, called operation *Nauras*,¹¹² with several objectives: to refurbish and maintain LYCG assets thanks to the presence of an Italian Navy ship in the port of Tripoli, which crucially also served as a Liaison Navy and Communication Centre (LNCC), allowing the LYCG to coordinate their operations at sea. Since the 8th of August 2017, the *Tremiti*, the *Capri*, and the *Caprera* have been alternating in Tripoli harbour, docked

¹⁰⁶ Ibid., Article 1(C).

¹⁰⁷ Italian Ministry of Interior, ‘Contro il traffico dei migranti: consegnate le prime motovedette alla Marina libica’ (21 April 2017) available (in Italian) at <https://www.interno.gov.it/it/notizie/contro-traffico-dei-migranti-consegnate-prime-motovedette-alla-marina-libica>; Italian Ministry of Interior, ‘Minniti in Libia: fronte comune contro il traffico di migranti’ (16 May 2017) available (in Italian) at <https://www.interno.gov.it/it/notizie/minniti-libia-fronte-comune-contro-traffico-migranti>; and *Il Sole 24 Ore*, ‘Libia e Niger: il bilancio dell’Italia e l’eredità per il prossimo governo’ (25 February 2018) available (in Italian) at https://www.ilssole24ore.com/art/libia-e-niger-bilancio-dell-italia-e-l-eredita-il-prossimo-governo--AEwxvQ6D?refresh_ce=1.

¹⁰⁸ Ibid.

¹⁰⁹ See IOM, DTM Libya data for 2017, available at <http://www.globaldtm.info/libya/>; IOM, Maritime Update Libyan Coast, 25 October-28 November 2017, available at www.iom.int/sites/default/files/situation_reports/file/IOM-Libya-Maritime-UpdateLibyan-25Oct-28Nov.pdf; Forensic Oceanography, *Mare Clausum* (n 39) p. 13; V. Moreno-Lax and M. Lemberg-Pedersen, ‘Border-induced displacement: The ethical and legal implications of distance-creation through externalization’ (2019) *QIL* 56, p. 12.

¹¹⁰ See Parliamentary questions, Question reference: E-004603/2018, Answer given by Mr Avramopoulos on behalf of the European Commission, 21 December 2018, available at http://www.europarl.europa.eu/doceo/document/E-8-2018-004603-ASW_EN.html; EU Commission, *Grant agreement for an action with one beneficiary. Agreement Number - HOME/2017 /ISFB/ AG/EMAS/0051*, available at <https://www.guardiacostiera.gov.it/stampa/Documents/progetti-finanziati/Grant%20Agreement%2000051%20signed.pdf>.

¹¹¹ *Deliberazione del Consiglio dei Ministri in merito alla partecipazione dell’Italia alla missione internazionale in supporto alla Guardia Costiera Libica* (DOC CCL, n. 2) (28 July 2017) p. 6, available at <https://www.camera.it/dati/leg17/lavori/documentiparlamentari/IndiceETesti/250/002/INTERO.pdf>.

¹¹² Camera dei Deputati, XVII LEGISLATURA Commissioni Riunite (III-IV Camera e 3a-4a Senato) *Resoconto stenografico, Seduta n. 28 di Martedì 1 agosto 2017*, available (in Italian) at https://www.camera.it/leg17/1058?idLegislatura=17&tipologia=audiz2&sottotipologia=audizione&anno=2017&mese=08&giorno=01&idCommissione=0304c0304&numero=0028&file=indice_stenografico; Camera dei Deputati, Risoluzione n. 6-00338 (2 August 2017); Senato della Repubblica, Doc. XXIV n. 78 e n. 80 (2 August 2017).

there “with onboard materials, equipment and a technical team,”¹¹³ and serving as a Liaison Navy and Communication Centre (LNCC), allowing the LYCG to coordinate their operations at sea.¹¹⁴

53. Despite the fact that without the communication equipment on board the Italian ship the LYCG would not have been able to independently coordinate operations at sea and assume responsibility for SAR missions, in July and December 2017 the Libyan authorities, following Italian recommendations,¹¹⁵ unilaterally declared the Libyan SAR zone.¹¹⁶ Although the Italian Coast Guard project indicated that the Libyan MRCC would not have been fully operational until at least 2020,¹¹⁷ Italian and European actors have acted as if it already were and have progressively withdrawn their naval assets from the areas of the Central Mediterranean known to be frequented by migrant vessels in distress,¹¹⁸ so as “to force the LCG&N to become the primary actor and progressively take full ownership of their area of responsibility.”¹¹⁹
54. This has led to naval assets being relegated to a ‘second line’ while air assets took the ‘front line’ to “provide the ‘early detection’ capability of SOLAS events (essential for the LCG&N to successfully operating saving lives at sea).”¹²⁰ Air assets operating near the Libyan territorial waters “complement the naval presence, contributing to the early detection of migrants boats and passing the information to the relevant MRCC authorities (including Libyan MRCC when this is appropriate) *through the Force Headquarters on board the flagship* [emphasis added].”¹²¹ From the beginning of the EUNAVFOR MED mission, this flagship has systematically been Italian, since it is Italy that has assumed overall command of the operation.¹²² On the 1st of August 2018, the *San Marco* took over from the *San Giusto*, and acted as flagship until the 30th December 2018,

¹¹³ Italian Senate, *Analytic report on the ongoing international military missions and on the state of the development cooperation to sustain peace and stabilisation processes* (28 December 2017) p. 101, available at <http://www.senato.it/service/PDF/PDFServer/BGT/1063681.pdf>.

¹¹⁴ Forensic Oceanography, *The Nivin case* (n 4) pp. 20, 28-32. See also Italian Senate, *Analytic report on the ongoing international military missions and on the state of the development cooperation to sustain peace and stabilisation processes* (n 113).

¹¹⁵ See S. Lösing (GUE/NGL), Parliamentary question to the European Commission, Subject: Search and Rescue Area Off Libya (3 July 2018) available at http://www.europarl.europa.eu/doceo/document/P-8-2018-003665_EN.html.

¹¹⁶ *News Deeply*, ‘Libya Drops Claim to Search-and-Rescue Zone, IMO Confirms’ (14 December 2017) available at <https://www.newsdeeply.com/refugees/executive-summaries/2017/12/14>.

¹¹⁷ Ministero delle Infrastrutture e dei Trasporti, Comando Generale del Corpo delle Capitaneria di Porto, Guardia Costiera, ‘Le capacità di ricognizione nella difesa dei confini nel dominio marittimo’ (28 February 2018) p. 19, available at <https://docplayer.it/72840151-Ministero-delle-infrastrutture-e-dei-trasporti-comando-generale-del-corpo-delle-capitanerie-di-porto-guardia-costiera.html>.

¹¹⁸ See e.g. Frontex, ‘Frontex launching new operation in Central Med’ (01 February 2018) available at <https://frontex.europa.eu/media-centre/news-release/frontex-launching-new-operation-in-central-med-yKqSc7>; EUNAVFOR MED, Six Monthly Report 1 JUN 2018 - 30 NOV 2018, EEAS(2019) (18 May 2019) p. 4.

¹¹⁹ EUNAVFOR MED (n 118) p. 4.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*. The Force Head Quarter (FHQ) is embarked on a unit in order to manage the whole operation at a tactical level. It is divided into cells covering personnel, intelligence, operations, logistics and finance, planning and training, Communication and Information System (CIS), Civilian and Military Cooperation (CIMIC), medical and legal. See EUNAVFOR MED, ‘Welcoming the new Sophia Task Force flagship’ (1 August 2018) available at <https://www.operationsophia.eu/welcoming-the-new-sophia-task-force-flagship/>.

¹²² Council Decision (CFSP) 2015/778 (n 99). See also EUNAVFOR MED, ‘A new Force Commander for EU Sophia Task Force’ (14 September 2018) available at <https://www.operationsophia.eu/a-new-force-commander-for-eu-sophia-task-force/>.

when it was replaced by the *Luigi Rizzo*. At the time of the incident involving the *Nivin*, therefore, it was the Italian *San Marco* that was acting as flagship for EUNAVFOR MED.¹²³

55. The crucial function of the Italian ships in the framework of Operation *Nauras* has been stressed by the Tribunals of Catania and Ragusa in judgments involving SAR events in the Central Mediterranean. Reconstructing a pull-back incident which had occurred on the 15th of March 2018 involving the NGO rescue ship *Open Arms*, the Judge illustrated the high level of coordination existing between different EU agencies and the way they directed the LYCG, as well as the key role of the LNCC, going as far as to affirm that the coordination of rescue operations by Libya is “essentially entrusted to the Italian Navy, with its own naval assets and with those provided to the Libyans.”¹²⁴ The Judge further held that the intervention of the Libyan patrol vessels happened “under the *aegis* of the Italian navy ship present in Tripoli,”¹²⁵ which functioned as a communication and coordination centre providing a decisive contribution to the LYCG’s command and control capabilities.¹²⁶ Further cases have confirmed the findings of the Tribunals of Catania and Ragusa, including the incident of the 18th of March 2019 documented by *Mediterranea*,¹²⁷ and subsequently investigated by the Prosecutor of Agrigento.¹²⁸ In this case, it emerged not only that LYCG officials use Italian communication equipment on board the Italian ship, but that actually Italian officials in the LNCC communicate *on behalf of* absent LYCG officials.¹²⁹
56. Through these policy agreements and forms of support and coordination, the EU and Italy have *de facto* re-established the LYCG which, until then, had been unable or unwilling to intercept migrants leaving the Libyan shores. While in 2016 NGOs had been the main search and rescue actor in the Mediterranean, by the end of 2017 the Libyan Coast Guard intercepted more migrants than any

¹²³ See EUNAVFOR MED, ‘Welcoming the new Sophia Task Force flagship’ (1 August 2018) available at <https://www.operationsophia.eu/welcoming-the-new-sophia-task-force-flagship/>.

¹²⁴ Tribunale di Catania, *Sezione del Giudice per le Indagini Preliminari, Decreto di convalida e di sequestro preventivo* (27 March 2018) available at <https://www.statewatch.org/news/2018/apr/it-open-arms-sequestration-judicial-order-tribunale-catania.pdf>; Tribunale di Ragusa, Ufficio del Giudice per le indagini preliminari, *Decreto di rigetto di richiesta di sequestro preventivo* (16 April 2018) available at http://questionegiustizia.it/doc/decreto_rigetto_sequestro_preventivo_tribunale_Ragusa_gip.pdf. See also M. Petrillo and L. Bagnoli, ‘The Open Arms case continued: New documents and Malta’ (12 April 2018) available at <https://openmigration.org/en/analyses/the-open-arms-case-continued-new-documents-and-malta/>.

¹²⁵ Tribunale di Catania (n 124) p. 22.

¹²⁶ Ibid.

¹²⁷ *Mediterranea*, ‘Mare Jonio ha salvato 49 persone da un naufragio: adesso l’Italia ci indichi un porto sicuro’ (18 March 2019) available at <https://mediterraneaescue.org/news/mare-jonio-ha-salvato-49-persone-da-un-naufragio-adesso-litalia-ci-indichi-un-porto-sicuro/>.

¹²⁸ See *La Repubblica*, ‘Tripoli e il bluff della guardia costiera: “È gestita da Roma”’ (2 November 2019) available (in Italian) at https://rep.repubblica.it/pwa/generale/2019/11/02/news/tripoli_e_il_bluff_della_guardia_costiera_e_gestita_da_roma_-240106393/.

¹²⁹ See *Open*, ‘«La Libia abbandonò un barcone in mezzo al mare»: ecco gli audio dell’ultimo salvataggio della Mare Jonio’ (18 April 2019) available at <https://www.open.online/2019/04/18/la-libia-abbandonò-un-barcone-in-mezzo-al-mare-ecco-gli-audio-dell-ultimo-salvataggio-della-mare-jonio/>; and *Repubblica*, ‘Migranti, le carte false sui soccorsi. i fax dei libici scritti dagli italiani’ (18 April 2019) available at https://rep.repubblica.it/pwa/generale/2019/04/17/news/migranti_le_carte_false_sui_soccorsi_i_fax_dei_libici_scritti_dagli_italiani_-224317594/.

other actor.¹³⁰ This change in the nature of SAR, which was enhanced after the MoU became effective, led to numerous incidents at sea.¹³¹

57. On the basis of one of these incidents, the Global Legal Action Network (GLAN) filed an application with the European Court of Human Rights on behalf of 17 survivors in May 2018: *S.S. and Others v. Italy* (pending).¹³² In the night of the 5th of November 2017, passengers of a migrant boat made a distress call to the Italian MRCC, which instructed both the NGO vessel *Sea Watch 3* and the LYCG's patrol vessel *Ras Jadir*—donated by Italy under the terms of the MoU—to direct themselves towards the boat in distress, which was located between 20 and 24 nautical miles off the Libyan coast—and therefore outside Libyan territorial waters. Several European vessels and aircraft were nearby, including an Italian navy helicopter. Though compared to the case of *Hirsi*, in this case the migrants were intercepted by a Libyan rather than an Italian vessel, the command and control authority was ultimately retained by the Italian Navy, acting within Operation *Nauras*—the communication infrastructure in Libya was in reality the CINCNAV¹³³ of the Italian Navy. Following the interception, many migrants were returned to Libya. The survivors who were brought back endured detention in inhumane conditions, beatings, extortion, starvation, rape, slavery and torture.
58. As the above case shows, the pattern followed by the Italian government substantially changed since *Hirsi*. Recent Italian activities have increasingly involved 'contactless' measures,¹³⁴ which may nonetheless constitute *de facto* forms of control. Indeed, in view of the extent and pervasiveness of Italy's role in Libya's migration and SAR systems, Libya has acted under its decisive influence, and with its essential support, since at least 2017, to the extent that Italy must be considered to exercise its jurisdiction in migration-related operations conducted by Libyan forces, and for which it must be deemed to retain its own independent responsibility under the Covenant.
59. As a result of the above-detailed policy agreements and multiform support and coordination, Italy and the EU must be deemed to have exercised *strategic overall control* over the LYCG, which has operated as their proxy to intercept migrants and bring them back to a country in which they are subjected to extreme forms of violence and exploitation. The 'closed port policy', adopted by the

¹³⁰ See IOM data at <http://www.globaldtm.info/libya/>.

¹³¹ See SAROBMED Search and Rescue Observatory for the Mediterranean, *Incidents*, available at <https://sarobmed.org/incidents/>.

¹³² *S.S. and Others v. Italy* No. 21660/18. Case communicated on 26 June 2019. Available (in French) at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-194748%22%5D%7D>.

¹³³ The Operations Centre of the Italian Navy. See *Paese Italia*, 'Marina Militare, cambio al vertice del comando Squadra Navale. A Taranto il 12 ottobre' (10 October 2019) available (in Italian) at http://www.paeseitaliapress.it/news_10666_Marina-Militare-cambio-al-vertice-del-comando-Squadra-Navale-A-Taranto-il-12-ottobre.html; Marina Militare Italiana, 'Italian Navy Maritime Situational Awareness', available at http://www.marina.difesa.it/EN/operations/shade_med/Documents/shade_med_1_2016/IT_CINC_FLEET.pdf.

¹³⁴ V. Moreno-Lax, 'The Interdiction of Asylum Seekers at Sea: Law and (Mal)Practice in Europe and Australia', Kaldor Centre for International Refugee Law, Policy Brief No 4 (UNSW, May 2017); V. Moreno-Lax and M. Giuffrè, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' (SSRN Scholarly Paper, 31 March 2017) available at <https://www.unhcr.org/5a056ca07.pdf>; and V. Moreno-Lax and M. Lemberg-Pedersen, 'Border-induced Displacement: The Ethical and Legal Implications of Distance-creation through Externalization' (n 109).

Italian Government in June of 2018 has radicalised this approach,¹³⁵ targeting not only rescue NGOs, but also EU Member States and Italian flagships seeking to disembark boat migrants in Italy. As Amnesty International's report highlights:

“In the weeks that followed, Italy escalated its stance and refused or delayed the disembarkation not only of NGO rescue vessels, such as the *Lifeline* of the German NGO Mission Lifeline and the *Open Arms* of the Spanish NGO Proactiva, but also of two foreign navy ships, the US *Trenton* and the Irish *Samuel Beckett* (the latter operating as part of operation EUNAVFOR Med Sophia, which is under Italian command), the Danish commercial ship *Maersk*, the Italian commercial ship *Vos Thalassa*, and even the Italian Coast Guard ship *Diciotti*.”¹³⁶

Rescue NGOs have subsequently been increasingly criminalised and prevented from operating in Italy, with those who disembark rescued migrants at Italian ports investigated for aiding irregular migration.¹³⁷ The progressive marginalisation of rescue NGOs, coupled with the retreat of EU's SAR missions at sea,¹³⁸ left a gap in the Mediterranean, which only two actors can fill: the LYCG, and merchant ships. But this gap is not the result of unforeseen developments. It is rather part of a carefully planned and executed strategy by Italy and the EU to stem the migration flow of unwanted arrivals of refugees and migrants across the Mediterranean.

60. The *Nivin* case is representative of this trend towards the externalisation of border control and maritime interdiction through a new modality of delegated containment of migrants, by which private merchant vessels are directed by the MRCC Rome to intercept migrant boats and to disembark survivors in Libya, giving rise to a process of 'privatisation' of *refoulement*.¹³⁹ This practice is not an isolated event,¹⁴⁰ but rather part of a pattern that has been consolidating since the summer of 2018. Although the role of merchant ships had already become important in 2014, where they were increasingly called upon to support the response to the large scale migrant crossings registered in that period,¹⁴¹ the new rise in their mobilisation differs substantially from the previous one in purpose and effect. Merchant ships, rather than being called upon to perform rescue, are strategically mobilised for interdiction and *refoulement*. Privatised push-backs emerged as a pattern

¹³⁵ See Amnesty International, 'Between the Devil and the Deep Blue Sea' (August 2018) available at <http://www.amnesty.org/en/documents/eur30/8906/2018/en>.

¹³⁶ Ibid, p. 7.

¹³⁷ Ibid, pp. 14-17.

¹³⁸ EUNAVFOR MED, for example, from its launch in June 2015 to the end of May 2019, contributed to rescue 45.000 migrants in 312 SOLAS events, which represents just below 10% of the total number of migrants rescued since 2015. However, after June 2018, the rescues operated by EUNAVFOR MED practically stopped. Indeed, according to the EUNAVFOR MED six-monthly report of the 30th of November 2018, "during the reporting period Operation Sophia was directly involved in 1 SOLAS event ..., compared to 19 events attended in the previous reporting period, rescuing a total of 106 migrants (minus 95% in comparison with the 2.155 in the previous reporting period)." See EUNAVFOR MED (n 118) 18.

¹³⁹ On the privatisation of extraterritorial border controls through carrier sanctions imposed on airlines and ferry services via a mechanism of 'hidden coercion' and 'imperfect delegation' of State power and the risk of *refoulement* it entails, see V. Moreno-Lax, *Accessing Asylum in Europe* (Oxford: OUP, 2017) Ch 5.

¹⁴⁰ On Italian-Libyan cooperation to control migration flows see: F. Mussi and N. F. Tan, 'Comparing Cooperation on Migration Control: Italy-Libya and Australia-Indonesia', in: F. de Londras and S. Mullally (Eds), *Irish Yearbook of International Law 2015*, Vol. 10 (Oxford: Hart Publishing, 2017); Forensic Oceanography, *Mare Clausum* (n 39); M. Giuffrè, 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?' (2012) 24(4) *International Journal of Refugee Law*.

¹⁴¹ Forensic Oceanography, *Death by Rescue. The lethal effects of the EU's policies of non-assistance*, available at <https://deathbyrescue.org/>.

since June 2018. Forensic Oceanography has collected data documenting 13 instances of this practice between June 2018 and June 2019,¹⁴² involving several vessels among which the VOS *Thalassa* and the *Asso Ventotto*, both flying Italian flag, as well as the *Sarost 5* and the VOS *Triton*, which were involved in two or more incidents. Three of these happened before November 2018, when Mr SDG was intercepted and brought back to Libya by the *Nivin*. The privatised push-back operated by the Italian Coast Guard through the *Nivin* resulted in denying Mr SDG and fellow survivors fleeing Libya the right to seek protection elsewhere. Returning the intercepted migrants to Libya also resulted in violations of the prohibition of torture and inhuman or degrading treatment, the prohibition of arbitrary detention, and the prohibition of slavery, and constituted a very real and tangible threat to the migrants' life. For the claimant, it also resulted in political persecution due to his leadership role in protesting their *refoulement*, which gave rise to a claim of refugee status vis-a-vis Libya. This policy of return also violates and undermines fundamental rules of public international law, including the *jus cogens* norm of *non-refoulement* and the principle of disembarkation in a place of safety, recognised under customary norms of the law of the sea.¹⁴³

VIII. VIOLATIONS OF THE ICCPR

61. The Italian government, allegedly intervening in substitution of, but *de facto* acting jointly and in coordination with the LYCG, has directed, aided and assisted a private actor, the *Nivin*, in performing an act that violated not only the principle of *non-refoulement*, which encompasses important absolute obligations of protecting human life and personal security, but that also impacted upon the following rights contained in the ICCPR:

- Art. 2(3), the right to an effective remedy;
- Art. 6(1), the right to life;
- Art. 7, the prohibition of torture or cruel, inhuman or degrading treatment or punishment;
- Art. 8(1) and 8(3), the prohibition of slavery and to be subject to forced or compulsory labour and servitude;
- Art. 9(1), the right to liberty and security including the prohibition on arbitrary arrest or detention;
- Art. 12(1), the right to leave any country, including one's own;
- Art. 2(3)(a), the right to an effective remedy.

A. State jurisdiction

62. General Comment No. 31, *The nature of the general legal obligation imposed on States Parties to the Covenant*, states that:

“10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the

¹⁴² Forensic Oceanography, *The Nivin case* (n 4) pp. 38-49.

¹⁴³ See *The Corfu Channel Case* (Judgment), ICJ Reports 1949, p. 22: “The obligations incumbent upon the ... authorities ... are based ... on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war ...”; *The M/V Saiga* ITLOS Case No 2, ICGJ 336 (ITLOS 1999) para 155: “Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.”

Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party [emphasis added].”¹⁴⁴

63. Jurisdiction is primarily, but not necessarily, territorial.¹⁴⁵ International human rights may indeed also have extraterritorial application. So long as affected individuals come within a State’s jurisdiction, that State will have an obligation to ensure that the relevant rights are guaranteed. The Human Rights Committee has previously held that a State party may be responsible for extraterritorial violations of the Covenant, if there is a link in the causal chain that would make possible violations on the territory of another State.¹⁴⁶ The risk of an extraterritorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time.¹⁴⁷ Other international authorities have also established that “a person is under the jurisdiction of the State ... if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory.”¹⁴⁸ The mere fact that the victim and the other impacted individuals were located outside a territory effectively controlled by the State does not preclude the engagement of the State’s responsibilities. *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*¹⁴⁹ strengthens this position, as it provides that “all persons over whose enjoyment of the right to life [the State] exercises power or effective control,” including “persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner,” are subject to the State’s jurisdiction for the purposes of the ICCPR.¹⁵⁰

B. Article 6(1): The right to life

64. Building on General Comment No. 31, General Comment No. 36 provides that:

“63. In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. *This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.* States also have obligations under international law not to aid or assist activities undertaken by other States [including Libya, acting through the LYCG] and non-State actors [including commercial vessels, such as the *Nivin*] that violate the right to life. ... States parties are also required to respect and protect the lives of all individuals located on marine vessels or aircrafts registered by them or flying

¹⁴⁴ UN HRC, *General comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant* (2004) CCPR/C/21/Rev.1/Add.13, para 10.

¹⁴⁵ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 200, p. 136 § 109.

¹⁴⁶ UN HRC, *Mohammad Munaf v. Romania* (30 July 2009) CCPR/C/96/D1539/2006, para 14.2.

¹⁴⁷ See e.g. UN HRC, *Mohammad Munaf v Romania* (n 146); *A.R.J. v Australia*, CCPR/C/60/D/692/1996; *Roger Judge v Canada*, CCPR/C/78/D/829/1998; *Samuel Lichtensztejn v Uruguay*, CCPR/C/OP/2 (1990) para 102; *Alzery v Sweden* (10 November 2006) CCPR/C/88/D/1416/2005.

¹⁴⁸ Inter-American Court of Human Rights, *Environment and human rights, Advisory Opinion*, OC-23/17, 15 November 2017, para 74.

¹⁴⁹ UN HRC, *General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life* (2018) CCPR/C/GC/36.

¹⁵⁰ *Ibid.*, para 63.

their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea [emphasis added].”¹⁵¹

65. The application of human rights treaties outside a State’s own territory has thus far been based on two models, that of effective control, or the spatial model, and that of the power over an individual, or the personal model. *General Comment No. 36* seemingly introduces a third model, the impact model, in which sufficiently proximate and foreseeable impact is constitutive of jurisdiction for the purpose of the extraterritorial application of the Covenant.¹⁵² The right to life of Mr SDG, among the people on board the rubber boat, was clearly impacted, in a direct, major as well as very predictable manner, by the activities of the Italian State. On account of the wealth of reliable information available on the human rights situation of migrants in Libya, the foreseeability of the impact is near-absolute from the minute MRCC Rome communicates with the LYCG and instructs the *Nivin* to follow their lead. The amount of knowledge in the public domain of what happens to migrant returnees in Libya makes claims to ignorance and unforeseeability on the part of Italy untenable.
66. In addition, in light of General Comment No. 36, which provides that a State exercises jurisdiction over all persons “over whose enjoyment of the right to life [the State] exercises power or effective control,”¹⁵³ it is argued that, because of the activities carried out by Italy, though contactless, brought the migrants under its authority, its intervention also meets the threshold of the control test. Indeed, it was MRCC Rome which first received the distress call and independently decided to call upon the LYCG, ordering the *Nivin* “on behalf of the LYCG” to intercept the migrant vessel and bring it back to Libya. So, even though via remote means, i.e. not entailing direct physical contact, it must be considered that Italy’s responsibility under Article 6(1) ICCPR is engaged, whether under the impact model or the personal control model.
67. The maritime conventions point in the same direction. Under the law of the sea, coastal States are under an obligation to maintain SAR services, as well as to cooperate with other States to perform rescue,¹⁵⁴ an obligation which involves coordination and cooperation and only terminates with the disembarkation of survivors in a place of safety.¹⁵⁵ Such ‘place of safety’ must be one where the lives and freedoms of the rescued persons are not in danger. According to the IMO, ‘place of safety’ means precisely “a location where rescue operations are considered to terminate [and] a place where the survivors’ safety of life is no longer threatened.”¹⁵⁶ States “cannot circumvent refugee law and

¹⁵¹ Ibid.

¹⁵² D. Møgster, ‘Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR’ (*EJIL: Talk!*, 27 November 2018) available at <https://www.ejiltalk.org/towards-universality-activities-impacting-the-enjoyment-of-the-right-to-life-and-the-extraterritorial-application-of-the-iccpr>.

¹⁵³ UN HRC, *General comment No. 36* (n 149) para 63.

¹⁵⁴ United Nations Convention on the Law of the Sea (UNCLOS) (adopted 10 December 1982, entered into force 16 November 1994) Article 98(2); SOLAS (n 17) ch V reg 7.

¹⁵⁵ (n 17).

¹⁵⁶ IMO, Guidelines on the Treatment of Persons Rescued at Sea (n 17) para 6.7; IMO and UNHCR, Practical Guide, ‘Rescue at Sea: A Guide to Principles and Practices as Applied to Migrants and Refugees’ (2006) available at http://www.imo.org/includes/blastDataOnly.asp/data_id=15282/UNHCRIMOLEafletpersonsrescuedatsea.pdf.

human rights requirements by declaring border control measures ... to be rescue measures.”¹⁵⁷ As confirmed in the *Hirsi Jamaa* case, a State “cannot circumvent its ‘jurisdiction’ under the Convention by describing the events in issue as rescue operations on the high seas.”¹⁵⁸ Indeed, maritime operations that aim at intercepting boats at sea, and/or at preventing migrants from leaving a third country, constitute a misconception of SAR duties.¹⁵⁹ Equating interdiction to SAR and disconnecting it from attendant human rights obligations does not have support in international law, and cannot be considered an implementation in good faith of the law of the sea either.¹⁶⁰

68. In sum, the consequences for migrants who are intercepted, pushed back, pulled back, or otherwise returned to Libya have been widely documented by numerous and reliable sources, including UN agencies and bodies, among which UNSMIL, OHCHR, and the Secretary General.¹⁶¹ In light of this information, which was known or ought to have been known by Italy at the time of events, the level of foreseeability was that of near certainty. The conduct of Italian authorities, at MRCC Rome, within Operation *Nauras* in Tripoli, and as commander in chief of the EUNAVFOR MED, including their coordination with and “on behalf of” the LYCG of the *Nivin*, instructing it to intercept and disembark Mr SDG and his fellow survivors in Libya, had major effects on the right to life of the individuals concerned, in a direct and very predictable way, such as to engage the responsibility of Italy under the Covenant.

C. Article 7: The prohibition of torture or cruel, inhuman or degrading treatment or punishment, alone and in conjunction with Article 13: The prohibition of collective expulsions

69. The Human Rights Committee has consistently held that States “must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.”¹⁶² This obligation directs States “to undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”¹⁶³ In evaluating a potential violation, the Committee considers whether a high risk of torture or ill-treatment is a “necessary and foreseeable consequence” of *refoulement*:¹⁶⁴ as the Committee held in *Kindler v. Canada*, “if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.”¹⁶⁵

¹⁵⁷ A. Fischer-Lescano, T. Löhr and T. Tohidipur, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’ (2009) 21 *International Journal of Refugee Law* 256, 291, reflecting: *Hirsi Jamaa and Others v Italy* (n 97).

¹⁵⁸ *Hirsi Jamaa and Others v Italy* (n 97) para 79.

¹⁵⁹ See further D. Ghezelbash, V. Moreno-Lax, and N. Klein, ‘Securitization of Search and Rescue at Sea: The Response to “Boat Migration” in the Mediterranean and Offshore Australia’ (2018) 67(2) *International and Comparative Law Quarterly* 315-351.

¹⁶⁰ See further V. Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (2011) 23(2) *International Journal of Refugee Law* 174-220.

¹⁶¹ See UNSMIL and OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya* (n 88); United Nations Security Council, ‘United Nations Support Mission in Libya, Report of the Secretary-General’ (26 August 2019) UN Doc S/2019/682.

¹⁶² UN HRC, *General Comment No. 20, Article 7, Concerning Prohibition of Torture and Cruel Treatment or Punishment* (1992) para 9.

¹⁶³ ICCPR (n 1) Art. 2.

¹⁶⁴ UN HRC, *G.T. v. Australia* (4 November 1997) CCPR/C/61/D/706/1996, paras 8.1 and 8.6.

¹⁶⁵ UN HRC, *Kindler v. Canada* (11 November 1993) CCPR/C/48/D/470/1991, para 6.2.

70. Regarding the principle of *non-refoulement*, including indirect or chain *refoulement*, the only adequate manner in which to determine whether an individual can be safely sent elsewhere is by establishing first and foremost through an adequate procedure with sufficient guarantees, including the right to an effective remedy to challenge any ensuing unfavourable decision, as recognised in Article 2(3)(a) of the Covenant, that their life or freedom will not be threatened in the country of destination. Threats might arise either due to lack of adequate protection or because of insufficient procedural safeguards, in either or both the expelling and the receiving States, against removal and/or onwards expulsion somewhere else.
71. The prohibition of *non-refoulement* is widely considered to be a duty under customary international law, and arguably also a norm of *jus cogens*.¹⁶⁶ Indeed:
- “It is generally considered that the prohibition upon *non-refoulement* is not subject to territorial restrictions and applies wherever a State exercises jurisdiction. The consistent jurisprudence of the relevant human rights bodies construe “jurisdiction” as a connection between a State and either territory over which it exercises effective control or an individual affected by that State’s agents. This therefore extends to situations where a State exercises de facto or de jure control over persons aboard a vessel at sea.”¹⁶⁷
72. International human rights and refugee law may indeed also have extraterritorial application. So long as affected individuals come within a State’s jurisdiction, that State will have an obligation to ensure that the relevant rights are guaranteed. As such, there is a general consensus that the ordinary meaning of *refouler* is to drive back, repel, or re-conduct, which does not presuppose a presence in-country. *Non-refoulement* thus also applies to rejection at the border, in transit zones, as well as anywhere at sea.¹⁶⁸ Whether interdiction takes the form of ‘contact’ actions¹⁶⁹ or ‘contactless’ measures,¹⁷⁰ is immaterial.¹⁷¹ In so far as the *effect* of the measure concerned is to prevent migrants from reaching the borders of a State exposing them to serious harm, the prohibition will be engaged. In other words, as the European Court of Human Rights held in *Hirsi*, “interceptions ... the effect of which is to prevent migrants from reaching the borders of the State ... constitute an exercise of jurisdiction ... which engages the responsibility of the State in question under Article 4 Protocol 4.”¹⁷²
73. This is also true with respect to the *non-refoulement* obligation under Article 7 of the ICCPR, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and Article 4 of the Charter of Fundamental Rights of the

¹⁶⁶ C. Costello and M. Foster, ‘Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test’ in *Netherlands Yearbook of International Law 2015* (TMC Asser Press, The Hague 2016).

¹⁶⁷ D. Guilfoyle and E. Papastavridis, ‘Mapping Disembarkation Options: Towards Strengthening Cooperation in Managing Irregular Movements by Sea’ (2014) p. 8, available at <https://www.refworld.org/pdfid/5346438f4.pdf>.

¹⁶⁸ See e.g. *Hirsi Jamaa and Others v Italy* (n 97).

¹⁶⁹ Such as e.g. seizing, towing, boarding and returning a vessel, or handing people over to third countries.

¹⁷⁰ Including warning, blockading, re-routing or ordering a change of course.

¹⁷¹ V. Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea’ (n 160). See further, for a full elaboration, V. Moreno-Lax, *Accessing Asylum in Europe* (n 139) ch 8.

¹⁷² *Hirsi Jamaa and Others v Italy* (n 97) para 180.

European Union (CFR), all of which prohibit exposure to a real risk of ill-treatment in whatever circumstances.

74. In the 2001 Concluding Observations on the Dominican Republic, the Committee stated that it was “gravely concerned at the continuing reports of mass expulsions of ethnic Haitians,” and that it held “mass expulsions of non-nationals to be in breach of the Covenant since no account is taken of the situation of individuals for whom the Dominican Republic is their own country in the light of article 12, paragraph 4, nor of cases where expulsion may be contrary to article 7 given the risk of subsequent cruel, inhuman or degrading treatment, nor yet of cases where the legality of an individual’s presence in the country is in dispute and must be settled in proceedings that satisfy the requirements of article 13.”¹⁷³
75. Similarly, in its 2017 Concluding Observations on Italy, the Human Rights Committee noted with concern the continued practice of collective expulsion of migrants, and called upon Italy to:
- “Refrain from carrying out the collective expulsion of migrants, ensure that all expulsion orders are based on an individual assessment of each migrant’s situation, taking into account the person’s special protection needs, ensure that bilateral and multilateral agreements are applied in such a way as to guarantee full respect of Covenant rights and strict compliance with the principle of *non-refoulement*, and suspend any agreement that does not include effective human rights protections.”¹⁷⁴
76. Not only were agreements that did not include effective human rights protection upheld, but also the designation of certain countries as safe, among which is Libya, remained unchanged.¹⁷⁵ However, the presumption that a particular country is safe must be subject to rebuttal, and will not be justified when reliable information indicates that the country concerned fails to meet suitable standards of protection. In such circumstances, the presumption reverses and it will be presumed that those facts were known or ought to have been known by the State undertaking actions leading to *refoulement* at the time of removal.¹⁷⁶
77. In this particular instance, MRCC Rome maintained a decisive role in coordinating the rescue operation, acting territorially from Rome, relaying crucial information and delivering instructions to the relevant actors on the high seas. It was MRCC Rome who directed, “on behalf of the LYCG” the *Nivin* to “divert [her] course and proceed to the maximum speed to ... render assistance to a boat in distress,” requesting the *Nivin* to “contact urgently JRCC Libya through this [i.e. the Italian] MRCC.”¹⁷⁷ The role maintained by MRCC Rome in the course events amounts to an exercise of *de facto* control over the individuals at sea insofar as its decisions determined their final destination and, thus, impacted directly and decisively the enjoyment of their rights under the ICCPR in an

¹⁷³ UN HRC, *Concluding Observations on the Dominican Republic* (26 April 2001) CCPR/CO/71/DOM, para 16.

¹⁷⁴ UN HRC, *Concluding observations on the sixth periodic report of Italy* (2017) CCPR/C/ITA/CO/6, paras 24-25.

¹⁷⁵ See e.g. Italian Ministry of the Interior, *Direttiva per il coordinamento unificato dell’attività di sorveglianza delle frontiere marittime e per il contrasto all’immigrazione illegale ex articolo 11 del d.lgs. n. 286/1998 recante il Testo Unico in materia di Immigrazione* (18 March 2019) p. 6, available at https://www.interno.gov.it/sites/default/files/direttiva_ministro_su_controllo_frontiere_marittime_18.03.2019.pdf

¹⁷⁶ *MSS v Belgium and Greece* No. 30696/09 (European Court of Human Rights 21 January 2011); *Hirsi Jamaa and Others v Italy* (n 97).

¹⁷⁷ Forensic Oceanography, *The Nivin case* (n 4) p. 62.

immediate and foreseeable manner, therefore bringing those persons under the jurisdiction of Italy for the purposes of the Covenant.

78. The Human Rights Committee had already highlighted its concern over similar practices. In its 2014 Concluding Observation on Malta, the Committee expressed its concern “about alleged instances of collective expulsions of migrants who have been intercepted and rescued at sea, in case of a real risk of ill-treatment, infringing the principle of *non-refoulement* and regret[ted] that the State party contests its jurisdiction over persons rescued at sea.”¹⁷⁸
79. In the present case, after disembarkation in Misrata, according to MSF, between 8 and 111 persons were transferred to Misrata hospital for medical care; 27 persons were transferred to the Karareem Anti-Crime Department, and the rest were scattered between Zliten and Karareem Detention Centre. Mr SDG reports that:

“When I woke up [in Misrata], I found some people there, including two Eritreans and one Sudanese that were later taken to Tripoli.

I was supposed to be brought to Tripoli but was not allowed. I believe the security forces already knew me. I think because of the media. After a few hours I was transferred to the security place with [a] soldier’s car. They just dumped me like this in the car. We were three south Sudanese and two Sudanese together. They kept the five of us for five days. The place is in Misrata. Is building with and office and cells. ...

During the five days I was interrogated and beaten: in the morning I would be brought to a room where two men with a computer would ask many questions. At night men in plain clothes would come and bring water and shampoo and put it in my eyes. They would do this until I fall. No one knew what else they could do. I was also beaten. They would take one person per time and bring in a room for beating. ... They took a picture of me. They also showed a picture of me and say to me: you are the one who did this (talk to journalist and refuse to disembark). They wouldn’t believe that we were just migrants refusing to disembark.

After five days I was sent to Zliten. ... When I first arrived in Zliten DC I was beaten for the first three days. Not by Zliten DC guards. They never beat us. It was the security. They came to Zliten DC and beat me. ... They also brought me a photo of myself published by the media. I did take pictures while I was onboard and sent to TV.”¹⁷⁹

80. As a result of the interception and *refoulement* operation coordinated by MRCC Rome, Mr SDG and his fellow survivors were collectively returned to Libya, where they were subject to cruel, inhuman or degrading treatment by the LYCG and the Libyan authorities, as per their testimonies and the witness accounts provided by MSF. This tallies with the numerous reports of similar experiences available in the public domain and which Italy knew or should have known at the time of events. Its wilful disregard of the near-certain consequences the interception and disembarkation in Libya would have for the persons concerned, including Mr SDG, cannot be justified under any meaningful reading of Article 7 of the ICCPR, both when taken alone, as prohibiting *refoulement*,

¹⁷⁸ UN HRC, *Concluding observations on the second periodic report of Malta*, 2014, CCPR/C/MLT/CO/2, para 17.

¹⁷⁹ Testimony of Mr SDG (n 7) paras 33-36.

and when taken in combination with Article 13, which the Committee has interpreted as forbidding the collective expulsion of aliens.¹⁸⁰ Italy should be condemned on both counts.

D. Article 8: The prohibition of slavery and forced or compulsory labour

81. The prohibition of slavery is arguably a norm of *jus cogens*, which admits no derogations. Although the prohibition of forced labour, on the other hand, “shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court,”¹⁸¹ where detention is arbitrary and the performance of hard labour is not in pursuance of a sentence by a competent court, as is the case in Libya, this exception is not applicable.
82. In *Fulmati Nyaya v. Nepal*, the Committee “has considered that for labour not to be forced or compulsory, it must, at a minimum ... be provided for by law in order to serve a legitimate purpose under the Covenant.”¹⁸² In *Faure v. Australia*, the Committee observed that, while the Covenant does not spell out in further detail the meaning of the terms ‘forced or compulsory labour,’ “in the Committee’s view, the term ‘forced or compulsory labour’ covers a range of conduct extending from, on the one hand, labour imposed on an individual by way of criminal sanction, notably in particularly *coercive, exploitative or otherwise egregious conditions*, through, on the other hand, to lesser forms of labour in circumstances where punishment as a comparable sanction is threatened if the labour directed is not performed [emphasis added].”¹⁸³
83. The pattern of abuses of migrants detained in Libya and their subjection to forced labour, as well as the existence of a widespread phenomenon of human trafficking, have been widely documented as early as 2016. As early as October 2017, *CNN* journalists witnessed and reported slave auctions in various locations in Libya, including Zuwara, Sabratah, Garyan, Alzintan, and Sabha.¹⁸⁴ A confidential interim report from the UN Panel of Experts on Libya, leaked to the press, concluded that most smuggling and trafficking groups have links to official security institutions and detention centres.¹⁸⁵ Many migrants indeed reported that traffickers have access to detention centres and colluded with guards operating there.¹⁸⁶ According to a 2016 report from UNSMIL and OHCHR:

“The overwhelming majority of migrants interviewed ... described experiences in Libya of being forced to work in farms, as domestic workers, construction and road paving workers, and rubbish collectors. Those who were forced to work said that they did not receive payment. Others in detention centres were forced to work in order to save enough funds to buy their way out of detention. After working during the day, some are taken back to the detention centres in the evenings; others are held at the workplace for weeks or months at a time. In some cases,

¹⁸⁰ UN HRC, *General Comment No. 15: The Position of Aliens Under the Covenant* (11 April 1986) para 10.

¹⁸¹ ICCPR (n 1) Art. 8(3)(a).

¹⁸² UN HRC, *Fulmati Nyaya v. Nepal* (11 June 2019) CCPR/C/125/D/2556/2015, para 7.4.

¹⁸³ UN HRC, *Faure v. Australia* (23 November 2005) CCPR/C/85/D/1036/2001, para 7.5.

¹⁸⁴ *CNN*, ‘Libya opens investigation into slave auctions following CNN report’ (17 November 2017) available at <https://edition.cnn.com/2017/11/17/africa/libya-slave-auction-investigation/index.html>.

¹⁸⁵ Human Rights Watch, *No Escape from Hell* (January 2019) available at https://www.hrw.org/sites/default/files/report_pdf/eu0119_web2.pdf, p. 13 citing: United Nations, Interim Report of the Panel of Experts Established Pursuant to Resolution 1973 (2011) concerning Libya.

¹⁸⁶ Amnesty International, *Libya's Dark Web of Collusion: Abuses Against Europe-Bound Refugees and Migrants* (11 December 2017) p. 60, available at <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>.

employers gave money to smugglers, traffickers, or DCIM guards as payment for the work. ... Migrants also recounted that in order to force them to work, employers, smugglers, traffickers and DCIM staff often threatened to kill them, beat them with sticks, metal bars and gun butts, or shot at them. Survivors also witnessed the killing of friends who were unable to work or had attempted to escape.”¹⁸⁷

84. In May 2017, the Prosecutor of the International Criminal Court (ICC) stated that her office was “carefully examining the feasibility of opening an investigation into migrant related crimes in Libya,” as there were “credible accounts that Libya has become a marketplace for the trafficking of human beings.”¹⁸⁸ Shortly afterwards, a number of UN Special Rapporteurs called on the Libyan government to “take urgent action to end the country’s trade in enslaved people,” in a joint statement in November 2017.¹⁸⁹ In May 2018, in the Fifteenth report and update on the activities of the Office of the Prosecutor regarding the situation in Libya, the ICC Prosecutor expressed concerns “about reports that migrants are subjected to arbitrary detention, torture, rape and other forms of sexual violence, abduction for ransom, extortion, forced labour and unlawful killings,” as well as of “slave auctions.”¹⁹⁰ At the same time, the Office also noted “that the climate of impunity prevails in Libya. Alleged crimes continue to be widely reported, including the summary execution of detained persons; abductions; arbitrary detentions; torture; and various crimes committed against migrants transiting through Libya.”¹⁹¹ In November 2018, at the time of the *Nivin* incident, the Prosecutor reported to the UN Security Council that she “remain[s] focused on the alleged Rome Statute crimes committed against migrants transiting through Libya. The journeys these people embark upon can quickly turn into true nightmare scenarios where they become victims of the darkest sides of human nature; where they are preyed upon mercilessly, and their vulnerabilities exploited with no regard for decency or the rule of law,” and that her “office continues to receive evidence of serious crimes committed against migrants in Libya [including] killings, sexual violence, torture and enslavement.”¹⁹² In her 2019 statement, the Prosecutor further affirmed that “the body of evidence collected by [the] Office indicates that crimes including torture, unlawful imprisonment, rape and enslavement are committed against migrants throughout their journeys and in both official and unofficial detention centres. The evidence implicates individuals, militias and State actors in the migrant smuggling and trafficking business in many parts of Libya, including Misrata.”¹⁹³

¹⁸⁷ UNSMIL and OHCHR, ‘Detained and Dehumanised. Report on human rights abuses against migrants in Libya’ (13 December 2016) p. 18.

¹⁸⁸ Statement of the Prosecutor to the United Nations Security Council on the Situation in Libya (8 May 2017) p. 4, available at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7934.pdf.

¹⁸⁹ OHCHR, ‘Libya must end “outrageous” auctions of enslaved people, UN experts insist’ (30 November 2017) available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22475&LangID=E>.

¹⁹⁰ Fifteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970(2011) (9 May 2018) para 28, available at <https://www.icc-cpi.int/itemsDocuments/180509-otp-rep-UNSC-lib-ENG.pdf>.

¹⁹¹ Ibid.

¹⁹² ICC OTP, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011) (2 November 2018) paras 16-17, available at <https://www.icc-cpi.int/Pages/item.aspx?name=20181102-otp-stat>.

¹⁹³ Statement of the Prosecutor to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011) (8 May 2019) para 22, available at <https://www.icc-cpi.int/Pages/item.aspx?name=180508-otp-statement-libya-UNSC>.

85. During his time in Libya, Mr SDG was subjected to forced labour in at least three occasions, both before and after the *Nivin* returned him to Libya. First, when Mr SDG arrived in Libya in January 2017, he was locked in a small house in the mountains with 70 other people and made to work in slavery-like conditions inside and outside of the house, while asked to pay 4,000\$ to be released; second, when he managed to escape from the house, he was kidnapped by militias and brought back to Beni Walid, where he was forced into labour in different places and requested again to pay money; and third, in July 2019, following his interception at sea by the LYCG and detention in Khoms.¹⁹⁴ Mr SDG would have further been subjected to forced labour shortly after he was forcefully disembarked in Misrata, had it not been for the condition of his wounded leg.¹⁹⁵
86. The chain of actions initiated by the Italian MRCC, which directed the *Nivin* to perform the rescue operation and to liaise with the LYCG with respect to disembarkation, relinquishing at the same time its responsibility to offer a place of safety, had a decisive and predictable impact on the right of Mr SDG not to be subjected to slavery and forced labour, in contravention of Article 8 of the Covenant, for which reason Italy should be held responsible.

E. Article 9(1): The right to liberty and security, including the prohibition on arbitrary arrest or detention

87. *General Comment No. 35 on Article 9 (Liberty and security of person)* provides that “liberty of person concerns freedom from confinement of the body [and that] security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity.”¹⁹⁶ Significantly, “Article 9 guarantees those rights to everyone [including], among others, girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, *aliens, refugees and asylum seekers*, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity [emphasis added].”¹⁹⁷
88. Although the right to liberty of person is not absolute, Article 9(1) requires that “deprivation of liberty must not be arbitrary, and must be carried out with respect for the rule of law.”¹⁹⁸ While an arrest or detention may be authorised by domestic law, it might nonetheless be arbitrary as the notion of arbitrariness is not to be equated with ‘against the law’, but must be interpreted more broadly to include “elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”¹⁹⁹
89. Libya’s legal framework concerning irregular entry and exit, irregular migration, and detention pre-dates the 2011 civil war. Relevant provisions are contained in Law No. 6 (1987) Regulating Entry, Residence and Exit of Foreign Nationals to/from Libya as amended by Law No. 2 (2004), and Law No. 19 (2010) on Combating Irregular Migration. While these laws do not explicitly provide for administrative detention, under both laws violations of migration provisions are criminalised and sanctioned with fines and *de facto* indefinite imprisonment. Under Article 11 of Law No. 19 (2010) on Combating Irregular Migration, all foreigners residing in Libya must legalise their stay in Libya

¹⁹⁴ Extracts from interview with Mr SDG (n 13) para 11.

¹⁹⁵ Testimony of Mr SDG (n 7) para 15.

¹⁹⁶ UN HRC, *General Comment No. 35 on Article 9 (Liberty and security of person)* (2004) CCPR/C/GC/35, para 3.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*, para 10.

¹⁹⁹ *Ibid.*, para 12. See also UN HRC, *Gorji-Dinka v. Cameroon* (17 March 2005) CCPR/C/83/D/1134/2002, para 5.1; UN HRC, *Van Alphen v. Netherlands* (23 July 1990) CCPR/C/39/D/305/1988, para 5.8.

within a period of two months after entry - otherwise they will be considered to be illegal migrants and will be subject to penalties (Article 6). Article 6 of Law No 19 (2010) on Combating Irregular Migration provides, in turn, that “illegal migrants” will be put in jail and condemned to forced labour in jail or a fine of 1,000 LYD (approximately 723 USD). Following this, they will be expelled from Libyan territory. Under Article 19 of Law No. 6 (1987), persons who violate immigration provisions will either be imprisoned, fined, or both. Article 19, as amended by Law No. 2 (2004), increased the monetary fine to at least 2,000 LYD (approximately 1,447 USD) and introduced harsher penalties of up to 20 years' imprisonment for crossing a border without travel documents, a crime aggravated if committed by an organised criminal network.

90. It is unclear whether irregular migrants in Libya are detained by virtue of the aforementioned provisions, whereby a criminal trial should take place with adequate procedural guarantees and under judicial oversight, or pursuant to some sort of administrative, if not completely unregulated, regime. It is, nonetheless, well documented that migrants and refugees do not have access to any legal process, let alone effective remedies to contest the legality of their deprivation of liberty, neither before nor while in detention, since it oftentimes is performed by militia, traffickers, and other non-State actors.²⁰⁰ Also, there is no constitutional guarantee against arbitrary detention.²⁰¹ The 2010 Law on Combating Irregular Migration (Law No. 19) appears to provide for indefinite detention, followed by deportation, of those considered to be irregular migrants. Libyan law criminalises irregular entry, exit, or stay and as such does not distinguish between migrants, refugees, victims of trafficking, or others in need of international protection. The systematic use of arbitrary detention, often in inhumane conditions that amount to ill treatment, has been widely documented.²⁰² According to Amnesty International, detainees are “placed outside judicial procedures by being held in [Libyan Directorate for Combating Illegal Migration (DCIM)] detention centres indefinitely and without the ability to legally challenge their detention or seek other legal remedies.”²⁰³
91. The principal authority operating detention centres is the Libyan Directorate for Combating Illegal Migration (DCIM), even if numerous other actors, including militias, have taken on this role in various parts of the country. Although International NGOs and EU institutions have in the past urged the Libyan government to regain control of all detention facilities, efforts to do so have been compounded by the lack of a political settlement as well as the broader *militiafication* of Libyan institutions. Libya does not appear to have an official catalogue of places of immigration detention (often referred to as ‘holding centres’).²⁰⁴ When the LYCG intercepts boats at sea, migrants are

²⁰⁰ EU Commission, EU Emergency Trust Fund for Africa, *Action Fiche of the EU Trust Fund to be used for the decision of the Operational Committee* (12 April 2017) p. 5.

²⁰¹ Global Detention Project, ‘Global Detention Project Submission to the UN Committee on Migrant Workers’ (September 2017) p. 3.

²⁰² See inter alia Amnesty International, *Libya’s dark web of collusion* (n 186); Human Rights Watch, *No Escape from Hell* (n 185); UNSMIL and OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya* (n 88).

²⁰³ Amnesty International, *Libya’s Dark Web of Collusion* (n 186); UNSMIL and OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya* (n 88); *The Guardian*, ‘I saw hell’: under fire inside Libya’s refugee detention centres (10 July 2019) available at <https://www.theguardian.com/global-development/2019/jul/10/under-fire-libya-refugee-detention-centres>.

²⁰⁴ Global Detention Project, *Immigration Detention in Libya: “A Human Rights Crisis”* (2018) p. 39, available at <https://www.globaldetentionproject.org/immigration-detention-in-libya-a-human-rights-crisis>.

returned to Libya and routinely transferred to DCIM detention centres.²⁰⁵ Both the UN and NGOs have consistently reported that their documents are confiscated, that they are not registered upon arrest, and that they do not have access to the judicial system.²⁰⁶ A 2016 report by UNSMIL and OHCHR states that:

“According to information received by UNSMIL, armed groups, smugglers and traffickers, private employers, police, the Libyan Coast Guard, and DCIM staff have brought migrants into DCIM detention centres, with no formal registration, no legal process, and no access to lawyers or judicial authorities. Usually their documents and belongings are confiscated. ... Migrants are held indefinitely for periods varying from days to months. The detention of migrants under these circumstances is arbitrary, contravening both Libyan national law and international human rights standards.”²⁰⁷

92. According to an UNSMIL report of January 2019, migrants and refugees continued to be vulnerable to, *inter alia*, “deprivation of liberty and arbitrary detention in official and unofficial places of detention.”²⁰⁸ The same report highlights that “the number of detainees increased during the reporting period owing to more interceptions at sea and the closure of sea routes to migrants, preventing their departure.”²⁰⁹
93. In light of the above, which was known or ought to have been known by Italy, the arbitrary detention of returned migrants in inhumane conditions was a necessary and foreseeable consequence of their interdiction and disembarkation in Libya. The Committee has clarified in its jurisprudence that States may not expel, return or *refoule* individuals, if this means that they will face a real risk of, *inter alia*, arbitrary detention or other form of severe violation of liberty or security.²¹⁰ The chain of actions initiated by the Italian MRCC, which directed the *Nivin* to rescue the migrant boat and to liaise with the LYCG, relinquishing at the same time its responsibility to offer a place of safety for disembarkation, had a decisive and predictable impact on the right to liberty of the individuals concerned, in direct contravention to Article 9(1) of the Covenant, for which reason Italy should be held accountable.

F. Article 12(2): The right to leave any country, including one’s own

94. The right to leave any country, including one’s own, is enshrined in Article 12(2) of the ICCPR, as well as in, *inter alia*, Article 13(2) of the 1948 Universal Declaration of Human Rights, in Article 5 of the 1966 United Nations Convention on the Elimination of All Forms of Racial Discrimination, and in Article 2(2) of Protocol No. 4 to the European Convention on Human Rights. The right to leave any country, including one’s own, is inevitably and inextricably linked with the right to seek and enjoy asylum, which is enshrined not only in the Universal Declaration of Human Rights, but

²⁰⁵ This was confirmed, *inter alia*, in EU Commission, EU Emergency Trust Fund for Africa, *Action Fiche of the EU Trust Fund to be used for the decisions of the Operational Committee* (n 200) p. 5. See also UNSMIL and OHCHR, *Detained and Dehumanised* (187) p. 19.

²⁰⁶ See *inter alia* UNSMIL and OHCHR, *Detained and Dehumanised* (n 187); UNSMIL and OHCHR, *Abuse Behind Bars: Arbitrary and unlawful detention in Libya* (April 2018); MSF, *Human suffering: Inside Libya’s detention centres* (1 September 2017); and UNHCR, *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: Detailed findings* (2016) UN Doc A/HRC/31/CRP.3, p. 259.

²⁰⁷ UNSMIL and OHCHR, *Detained and Dehumanised* (n 187) p. 15.

²⁰⁸ UNSC, *United Nations Support Mission in Libya. Report of the Secretary-General* (7 January 2019) UN Doc S/2019/19, para 36.

²⁰⁹ *Ibid.*

²¹⁰ UNHRC, *General Comment No. 35* (n 196), para 57.

also (if implicitly) in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (for the very existence of refugees depends on it), and is arguably a norm of customary international law.²¹¹

95. In its *General Comment No. 27 on the Freedom of movement (article 12)*, the Human Rights Committee has concluded that “freedom to leave the territory of a State may not be made dependent on any specific purpose,” and that, notably, “the scope of article 12, paragraph 2, is not restricted to persons lawfully within the territory of a State.”²¹² *General Comment No. 27* further states that:

“18. The application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant [including, with particular relevance to this case, the prohibition of torture in Article 7, which also includes an absolute protection against *refoulement*] and with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²¹³

96. Border control measures, including at sea, are subject to strict limits under refugee law, human rights law and the law of the sea. Significantly, States cannot exonerate themselves from their international obligations by engaging countries of origin and transit in migration containment strategies to impede access to their territories by refugees and migrants. Therefore, preventing departure by sea, particularly under a written agreement providing for this, such as the Italy-Libya MoU of February 2017, shall be taken to constitute an undue interference with the right to leave that fails to comply with the minimum criteria of legality and legitimacy, and bearing the potential to violate, if not completely annul, its core content, particularly in light of its current implementation. Although it is true that the right to leave is not considered an absolute right, *General Comment No. 27* provides that “restrictions must not impair the essence of the right,” and that “[t]he laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.”²¹⁴

97. Where preventing departure is intended as a means to ensure compliance with the receiving State’s immigration laws or as a means to prevent human trafficking and smuggling, it must be borne in mind not only that Article 11(1) of the UN Smuggling Protocol²¹⁵ clarifies that measures against human smuggling or trafficking must not turn into unjustified prevention of departure, but also that Article 31(1) of the Refugee Convention provides for the principle of non-penalisation of irregular entry, according to which:

“Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they

²¹¹ Nora Markard, ‘The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries’ (2016) 27 *Eur J Int Law* 591.

²¹² UN HRC, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, para 8.

²¹³ *Ibid.*, para 18.

²¹⁴ *Ibid.*, para 13.

²¹⁵ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the Convention against Transnational Organised Crime (adopted 12 December 2000, in force 28 January 2004) 2241 UNTS 507, Article 11(1).

present themselves without delay to the authorities and show good cause for their illegal entry or presence.”²¹⁶

Indeed, in the Commentary on Draft Article 31 it was considered that “a refugee, whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry into the country of refuge,”²¹⁷ as well as that “[i]t would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum and is recognized as a *bona fide* refugee.”²¹⁸

98. Although it is true that the ICCPR does not recognise a right of aliens to enter and reside in another country, the Committee has recognised that in certain circumstances aliens may nonetheless enjoy the protection of the Covenant “even in relation to entry or residence,” especially “when considerations of non-discrimination, *prohibition of inhuman treatment* and respect for family life arise [emphasis added].”²¹⁹ The link between the right to leave, the right to seek asylum, and the right to protection against *refoulement* is of particular significance, and it shall be duly operationalized when devising mechanisms of immigration control. The intersection of these three elements renders the right to leave of vital importance to those fleeing irreversible harm. In this context, Article 12(2), when taken together with, and interpreted in the light of, Article 7 ICCPR, shall be construed and interpreted as meaningfully benefiting protection seekers.²²⁰
99. In 2000, the Sub-Commission on Human Rights acknowledged that “restrictive policies and practices of many States may lead to difficulties for people to gain effective access to protection in the territory of asylum States while escaping persecution and serious human rights violations in their own countries,” as in the case of Mr SDG, and that “such policies and practices ... may be incompatible with the principles of applicable refugee and human rights law.”²²¹ Similarly, UNHCR EXCOM Conclusion No. 97 of 2003 affirms that “interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law.”²²²
100. A third country- or private actor-operated push-back still falls within the responsibility of the State providing the implementing actor with such an instruction. When individuals attempting to leave a country risk persecution or severe human rights violations in the country they are leaving, preventing them from doing so can constitute an abuse of power and be in violation not only of the principle of *non-refoulement* and the prohibition of collective expulsion, but also be incompatible with the *bona fide* interpretation (and implementation) of the right to leave. By directing the *Nivin*

²¹⁶ Convention relating to the Status of Refugees (adopted 28 July 1951, into force 22 April 1954) 189 UNTS 137, Article 31(1).

²¹⁷ Commentary on Draft Article 31 by the Secretariat, in Weis, *The Refugee Convention 1951* (CUP, 1995) p. 279.

²¹⁸ *Ibid.*

²¹⁹ UN HRC, *General Comment No. 15* (n 180) para 5.

²²⁰ Violeta Moreno-Lax, ‘Intersectionality, Forced Migration and the Jus-generation of the Right to Flee’, in Motoc and Calic (eds), *The European Convention on Human Rights and Migration* (Oxford University Press, 2020) ch 1 (forthcoming).

²²¹ Sub-Commission on Human Rights, *Resolution 2000/20 on ‘The Right to Seek and Enjoy Asylum’* (18 August 2000) recital 7.

²²² UNHCR, EXCOM Conclusion No. 97 (2003), para a), principles iii and iv.

to intercept the migrant boat on the high seas and by orchestrating, jointly with the LYCG, the interdiction process, MRCC Rome decisively contributed and led to the violation of Mr SDG's right to leave Libya in a direct and unjustifiable manner, thus engaging Italy's responsibility under Article 12(2), interpreted in consonance with Article 7.

G. Article 2(3): The right to an effective remedy

101. The individual right to an effective remedy provides a crucial and essential guarantee for the rights protected by the ICCPR. The Human Rights Committee has stated that because Article 2(3) provides the necessary framework for securing the rights protected under the Covenant, it is "essential to its object and purpose."²²³ Article 2(3)(a) requires that each State Party ensure an effective remedy to any person whose Covenant rights are violated, and that any person seeking a remedy "shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State,"²²⁴ and the remedy granted must be enforced by competent authorities.
102. In determining what constitutes an effective remedy under Article 2(3), the Committee has stated that the domestic remedy provided must be both accessible and effective. While judicial remedies are not explicitly required, the drafting committee expressed a "strong sentiment ... in favour of judicial remedies as the most effective means of protection within a national system."²²⁵ Where non-judicial remedies are contemplated, their effectiveness must be on par with judicial remedies. In terms of the type of relief that should be made available, Article 2(3) "requires [the State] to make full reparation to individuals whose Covenant rights have been violated."²²⁶ Indeed, "without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged."²²⁷ As the Committee affirmed in General Comment 31, "reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."²²⁸
103. In *Prashanta Kumar Pandey v. Nepal*, the Committee further stated that "the effectiveness of a remedy depends on the nature and the particular seriousness of the alleged violation."²²⁹ In *Vicente et. al. v. Colombia*, the Committee further explained that, "[i]f the alleged offence is particularly serious, as in the case of violations of basic human rights ... purely administrative and disciplinary remedies cannot be considered adequate and effective."²³⁰ Indeed, in *Bakar Japalali and Carmen Baloyo-Japalali v. The Philippines*, the Committee held that "[a] civil claim seeking compensation cannot itself be considered either as an effective remedy to address serious human rights violations

²²³ UN HRC, *General Comment No. 24, General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant* (2004) CCPR/C/21/Rev.1/Add.6, para 11.

²²⁴ ICCPR (n 1) Art. 2(3)(b).

²²⁵ T. Makkonen, *Equal in Law, Unequal in Fact: Racial and Ethnic Discrimination and the Legal Response Thereto in Europe* (Martinus Nijhoff Publishers, 2012) 161.

²²⁶ UN HRC, *Bakar Japalali and Carmen Baloyo-Japalali v. The Philippines* (30 May 2019) CCPR/C/125/D/2536/2015, para 9.

²²⁷ UN HRC, *General comment No. 31* (n 144) para 16.

²²⁸ *Ibid.*

²²⁹ UN HRC, *Prashanta Kumar Pandey v. Nepal* (29 November 2018) CCPR/C/124/D/2413/2014, para 7.6.

²³⁰ UN HRC, *Vicente et. al. v. Colombia* (n 19), para 5.2.

or as a remedy that needs to be exhausted for the purposes of bringing a complaint before the Committee.”²³¹

104. Although the Italian Civil Code provides, pursuant to its Article 2043, a right to seek compensation for unlawful acts, these proceedings are only open to individuals physically present on the territory of the State. Mr SDG, having been intercepted on the high seas and returned to Libya under instructions flowing directly from the Italian Coast Guard, was prevented from having access to such remedies. He was prevented from challenging before any authorities the ill-treatment inflicted by the Libyan officials, the illegal *refoulement* to Libya performed by the *Nivin* acting as a proxy, and the mistreatment suffered there as a result. Even if Mr SDG could have pursued compensation pursuant to Article 2043 of the Civil Code, such remedy could not have been considered “either as an effective remedy to address serious human rights violations [that would have been capable of preventing them from occurring] or as a remedy that needs to be exhausted for the purpose of bringing a complaint before the Committee.”²³²

IX. REMEDIES

105. The authors hereby respectfully request that the Committee:

- i Declares a violation of Mr SDG’s rights under Articles 2(3), 6(1), 7, 8(1), 8(3), 9(1), and 12(2) of the ICCPR;
- ii Recommends that Italy adopts measures to ensure that Mr SDG, as well as any individual who has suffered harm as the direct result of a privatised, or otherwise delegated, push-back receives full and adequate reparation for the harm he has suffered, including compensation and rehabilitation;
- iii Recommends that Italy adopts measures to ensure that Mr SDG and any other individual who has suffered harm as the direct result of a privatised, or otherwise delegated, push-back, and who is in need of international protection, has access to entry in the Italian territory through a humanitarian visa pursuant to Article 25 of Regulation CE 810/2009, and in light of Article 10(3) of the Italian Constitution, as per judgment No. 22917/2019, published on 28 November 2019 by Tribunale di Roma and referring to the similar case of *Nave Orione* (annexed). The latter provides that Article 10(3) can be interpreted as to “protect the position of the individual who, as a result of an unlawful act committed by the Italian authorities, finds himself or herself in a position in which he or she cannot file an application for international protection due to their absence from the territory of the State, having the authorities of that State prevented the individual’s entry, as a result of a collective *refoulement*, in violation of the Constitutional principles”²³³;
- iv Urges Italy to acknowledge the violations of Mr SDG’s rights and its role in such violations, to publish the decision of the Committee, and to issue a public apology to Mr SDG for the violations of his rights;
- v Urges Italy to introduce safeguards to prevent similar violations from happening in the future and to adopt measures as to guarantee the non-repetition of the type of violation in

²³¹ UN HRC, *Bakar Japalali and Carmen Baloyo-Japalali v. The Philippines* (n 226), para 6.5.

²³² *Ibid.*, para 6.5.

²³³ Tribunale di Roma, Judgment No. 22917/2019 (published on 28 November 2019) p. 16.

question, both by cancelling the Memorandum of Understanding with Libya and by discontinuing its practices of privatised, or otherwise delegated, push-back;

- vi Urges Italy to introduce due diligence requirements ensuring that Italy's human right obligations are met in a cooperation it initiates with other countries for the purpose of border control, including where applicable a termination of such cooperation;
- vii Urges Italy to ensure transparency regarding its border enforcement activities, including by publicly reporting on the results of the aforementioned measures.

Urges Italy to ensure transparency regarding its border enforcement activities, including BY publicly reporting on the results of the aforementioned MEASURES

X. LIST OF SUPPORTING DOCUMENTS

1. Power of attorney signed by Mr SDG;
2. Victim's materials: Testimony of Mr SDG as collected by Médecins Sans Frontières (MSF) in Misrata, Libya on May 5th, 2019
3. Victim's materials: Extracts from interview with Mr SDG as collected by Charles Heller of Forensic Oceanography via phone on November 7th, 2019
4. Report: Forensic Oceanography, *The Nivin case. Migrants' resistance to Italy's strategy of privatized push-backs*, 2019
5. Legislation: Memorandum of Understanding on Cooperation on Development, Combating Illegal Immigration, Human Trafficking and Smuggling, and on Strengthening Border Security (signed on 2 February 2017)
6. EUNAVFOR MED Reports: EUNAVFOR MED, Six Monthly Report 1 JUN 2018 – 30 NOV 2018, EEAS(2019) (18 May 2019)
7. IMO Documents: Resolution MSC.167(78) Guidelines on the Treatment of Persons Rescued at Sea (20 May 2004) IMO Doc MSC 78/26/Add.2
8. IMO Documents: Resolution MSC.159(78) Interim Guidance on Control and Compliance Measures to Enhance Maritime Security (21 May 2004) IMO Doc MSC 78/26/Add.1
9. IMO Documents: Practical Guide, 'Rescue at Sea: A Guide to Principles and Practices as Applied to Migrants and Refugees' (2006)
10. UN Documents: UNSMIL and OHCHR, *Detained and Dehumanised: Report on human rights abuses against migrants in Libya* (13 December 2016)
11. UN Documents: UNSMIL and OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful detention in Libya* (April 2018)
12. UN Documents: UNSMIL and OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya* (20 December 2018)
13. ICC Documents: Office of the Prosecutor, *Fifteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970(2011)* (9 May 2018)
14. NGO Reports: Amnesty International, *Libya's Dark Web of Collusion: Abuses Against Europe-Bound Refugees and Migrants*, 2017
15. NGO Reports: Human Rights Watch, *No Escape from Hell. EU Policies Contribute to Abuse of Migrants in Libya*, 2019
16. Court judgments: Tribunale di Roma, Judgment No. 22917/2019 (adopted 14 November 2019, published 28 November 2019)