



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

“Lethal Disregard”

Search and rescue and the protection of migrants in the central Mediterranean Sea



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protection of migrants in the central
Mediterranean Sea



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In the Mediterranean, I urge more determined and effective action by the European Union, and by its Member States, to deploy search and rescue operations and to support the rescue work of NGOs.

I also strongly recommend the EU adopt a common and human-rights based arrangement for the timely disembarkation of all people rescued at sea – a mechanism which is automatic, functions rapidly, is sustainable over the long-term, and reflects the international commitments and solidarity of all EU Member States.

In recent months, actions by several countries in Europe to criminalise, impede or halt the work of humanitarian rescue vessels and search planes – and the sharp decrease in the number of search and rescue vessels operated by European States – have had deadly consequences for adults and children seeking safety.

Numerous boats have floated at sea for weeks, seeking a port of refuge for the exhausted and traumatized migrants they have rescued.

Countless other migrants have been intercepted by the Libyan Coast Guard and forcibly returned to Libya – where their rights and, potentially, even their lives are under serious threat.

I am concerned by this lethal disregard for desperate people. I salute the organizations and human rights activists who continue to work to defend the rights of migrants in these difficult circumstances.

I also remind all policy-makers that the DNA of almost every human being includes contributions from people of other origins – and the same is true of our cultural heritages and our economic prosperity.

States have a right to determine whether nationals may enter and remain on their territory. But all migration governance measures should be implemented with full respect for the human rights of the people concerned. They are no different – and in no way less valuable or less deserving of dignity – than you or I.

Opening statement by UN High
Commissioner for Human Rights
Michelle Bachelet to the 42nd session
of the Human Rights Council

9 September 2019

Executive Summary

This thematic report aims to highlight how certain laws, policies and practices related to search and rescue (SAR) and the protection of migrants at sea have negatively impacted the human rights protection of migrants transiting through Libya. The report is part of a wider project by the UN Human Rights Office (OHCHR) seeking to identify, document and analyze human rights violations and protection gaps impacting migrants in Libya and the neighbouring region and to formulate recommendations to relevant governments and other stakeholders, aimed at ensuring compliance with international human rights law and standards.

This report covers the period from January 2019 to December 2020 and is based on interviews with migrants, visits to reception and detention centres, meetings with Government officials, relevant experts, United Nations (UN) partners and stakeholders and additional research. It builds upon and complements the findings of previous reports by OHCHR and the United Nations Support Mission in Libya (UNSMIL) on the protection of the human rights of migrants in Libya.

The report is structured into five key human rights challenges and in each section the human rights legal framework is discussed, followed by an analysis of the challenge and a set of recommendations. The key challenges highlighted in this report include: a) failures to provide prompt and effective assistance to migrants in distress, such as unanswered distress calls, insufficient maritime SAR capacity, and a lack of transparency and coordination between different actors with SAR responsibility; b) dangerous rescue and interception practices, including firing at or in the vicinity of boats in distress, colliding with them, conducting unsafe manoeuvres causing the capsizing of boats, acts of physical violence, and the use of threatening, discriminatory or racist language; c) pushbacks at sea, including through enhanced cooperation and coordination to effectively intercept and return migrants from international waters to Libya; d) actions to criminalise, impede or halt the work of humanitarian SAR organisations and other human rights defenders, such as the impounding or seizing of humanitarian SAR aircraft and vessels and arresting or bringing criminal charges against humanitarian SAR crew members, including in the context of COVID-19; and e) failures to ensure safe disembarkation and adequate reception of migrants, with rescued migrants being stranded aboard vessels that are unsuited for their accommodation, held in inadequate reception conditions upon disembarkation, including being at risk of arbitrary immigration detention, and facing obstacles to access immediate assistance such as medical care.

Information gathered by OHCHR and presented in this report confirms a lack of human rights protection for migrants during their journeys and their stays in Libya, as well as while attempting to depart Libya via the central Mediterranean route. The evidence further suggests that this is not a tragic anomaly, but rather a consequence of concrete policy decisions and practices by the Libyan authorities, European Union (EU) Member States and institutions, and other actors that have combined to create an environment where the dignity and human rights of migrants are at risk. The High Commissioner has previously expressed her concern about “lethal disregard for desperate people” in this context and urged more determined and effective action to deploy SAR operations, support the work of humanitarian NGOs, and to adopt a common and human rights-based arrangement for the timely disembarkation of all people rescued at sea.¹

¹ UN High Commissioner for Human Rights Michelle Bachelet, *Global update at the 42nd session of the Human Rights Council*, 9 September 2019, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24956&LangID=E>.



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The report reveals that the real tragedy of the damage and death along the central Mediterranean route is that so much of it is preventable. As the High Commissioner has noted, what is happening to migrants along the central Mediterranean route is the result of a failed system of migration governance, one that fails to place the human rights of migrants at the centre and for too long has been marked by a lack of solidarity.² The recommendations in this report are therefore directed at Libyan authorities, the EU, its Member States, and institutions, and all other concerned stakeholders who have a role to play in preventing future harm by upholding respect for international human rights law and a commitment to the protection of migrants at sea.

In particular, the recommendations seek to provide practical guidance to ensure SAR policies and practices are consistent with the effective respect, protection and fulfilment of the human rights of migrants in the central Mediterranean Sea, including by ending policies or practices that facilitate or enable human rights violations and abuses against migrants or create threats to human life or human dignity. Above all, they seek to reinforce approaches to the challenge at hand that are guided by a will to cooperate to end tragedies at sea, and compliance with international law.

² OHCHR, *Shocking Cycle of Violence for migrants departing Libya to seek safety in Europe*, 2 October 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26337>.



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Introduction and Methodology



Migrants³ continue to suffer unimaginable horrors during their journeys to, during their stay in, and when attempting to depart Libya. Before reaching Libya, during their journeys through the remote Sahara Desert across the east, west and south of Libya, migrants routinely face dehydration, starvation, lack of access to medical care, arbitrary detention, kidnapping, trafficking, sexual abuse, and other forms of physical violence at the hands of traffickers and smugglers, as well as criminal gangs, armed groups, State security forces, police, immigration officials and border guards.⁴ Once in Libya, they become vulnerable to unlawful killings, slavery and forced labour, torture and ill-treatment, gender-based violence, arbitrary detention, extortion, and other human rights violations and abuses by both State and non-State actors, which have been confirmed by an overwhelming amount of evidence and reports, including previous public statements and reporting by OHCHR.⁵

³ There is no universal legal definition of “migrant”. OHCHR uses the term “international migrant” to refer to “any person who is outside a State of which they are a citizen or national, or, in the case of stateless person, their State of birth or habitual residence”. See, OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (2014), available at: https://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf.

⁴ See, Mixed Migration Centre (MMC), *Protection incidents in Africa and the Middle East*, available at: <http://www.mixedmigration.org/4mi/4mi-infographics/protection-incident/>. See also, UNHCR and MMC, *‘On this journey, no one cares if you live or die,’ Abuse, protection, and justice along routes between East and West Africa and Africa’s Mediterranean coast*, 29 July 2020, available at: <https://www.unhcr.org/5f2129fb4>.

⁵ See, OHCHR, *Shocking Cycle of Violence for migrants departing Libya to seek safety in Europe*, 2 October 2020; OHCHR, *Press briefing note on Migrant rescues in the Mediterranean*, 8 May 2020; OHCHR, *Press briefing note on Libya*, 28 April 2020; OHCHR, *Press briefing note on Libya*, 20 December 2019; OHCHR, *Statement by UN High Commissioner for Human Rights Michelle Bachelet, Attack on Libyan migrant detention centre*, 3 July 2019; OHCHR, *Press briefing note on Libya*, 7 June 2019; all available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24681&LangID=E>. See also, UNSMIL/OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 18 December 2018, available at: <https://unsmil.unmissions.org/sites/default/files/libya-migration-report-18dec2018.pdf>; and UNSMIL/OHCHR, *“Detained and Dehumanized”: Report on Human Rights Abuses Against Migrants in Libya*, 13 December 2016, available at: https://unsmil.unmissions.org/sites/default/files/migrants_report-en.pdf.

The continued violence and insecurity in Libya, combined with a lack of pathways for safe and regular migration leaves migrants with only irregular and increasingly perilous journeys at sea. These journeys are marked by overcrowded and unseaworthy vessels, being left to drift for days without adequate food, water or medical attention, the increasing risk of capsizing or drowning, and the ever-present threat of being pushed-back, intercepted or forcibly returned to Libya, where the shocking cycle of violence, exploitation, and abuse begins all over again.⁶ These threats to migrants' human rights have only intensified during the COVID-19 pandemic.

The central Mediterranean route, in particular, continues to be among the deadliest migration routes in the world. From January 2019 to December 2020, at least 2,239 migrants have died attempting to cross the central Mediterranean Sea, crossing primarily from Libya to either Italy or Malta.⁷ Deaths along the central Mediterranean route comprise 69% of all migrant deaths in the entire Mediterranean Sea. These stark figures reflect a human tragedy on a massive scale.

Over the past two years, the EU and its Member States have significantly decreased their maritime SAR capacity and many humanitarian NGOs have been compelled to suspend or reduce their SAR operations, while the Libyan Coast Guard (LCG) has increased its role in intercepting migrants in the central Mediterranean Sea and returning them to Libya. In 2020, at least 10,352 migrants were intercepted by the LCG at sea and returned to Libya, compared to at least 8,403 in 2019.⁸

OHCHR has consistently highlighted that Libya cannot be considered a safe place for the return or disembarkation of migrants intercepted or rescued at sea and that such returns to Libya may violate the principle of *non-refoulement*.⁹ Migrants returned to Libya systematically and routinely face the risk of death, disappearance, arbitrary detention, torture, ill-treatment, gender-based violence, exploitation, and other human rights violations and abuses by both State and non-State actors.¹⁰

Additionally, in 2020, SAR operations in the central Mediterranean were significantly affected by policy responses to the COVID-19 pandemic. In some instances, States denied a safe harbour to humanitarian NGO vessels involved in SAR and imposed restrictions on their operations as COVID-19 response measures, despite calls from OHCHR to lift restrictions on the work of these rescuers, for States to maintain SAR operations and to ensure the swift disembarkation of rescued migrants in a port of safety, while guaranteeing compatibility with public health measures.¹¹

This thematic report aims to shed light on the human rights challenges faced by migrants in the context of SAR and the protection of migrants in the central Mediterranean Sea. The report covers the period from January 2019 to December 2020, and is based on first-hand accounts and information gathered by OHCHR through remote monitoring, including a mission conducted to Malta in September 2020.

Recognizing that Malta is one of the primary disembarkation points for migrants successfully crossing the central Mediterranean route, in September 2020, an OHCHR monitoring team visited Malta in

⁶ See, e.g. Council of Europe, Commissioner for Human Rights, *Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean*, June 2019, available at: <https://rm.coe.int/lives-saved-rights-protected-bridging-the-protection-gap-for-refugees-/168094eb87>.

⁷ IOM, Missing Migrants Project, available at: <https://missingmigrants.iom.int/region/mediterranean>.

⁸ Data provided by the Italian General Command of the Harbour Master Corps (Comando Generale del Corpo della Capitaneria di Porto); See also, UNHCR, *Libya Update 24 December 2020*, available at: <https://data2.unhcr.org/en/documents/details/83931> and UNHCR, *Libya Update 27 December 2020*, available at: <https://data2.unhcr.org/en/documents/details/73177>.

⁹ UNSMIL/OHCHR, *Desperate and Dangerous*, pages 10-21; The Secretary-General has similarly noted "Libya cannot be considered a place of safety for the disembarkation of refugees and migrants under international law, including international human rights law, international refugee law and the law of the sea." Report of the Secretary-General, Implementation of resolution 2491 (2019), S/2020/275, 2 September 2020, para. 10, available at: <https://undocs.org/S/2020/876>.

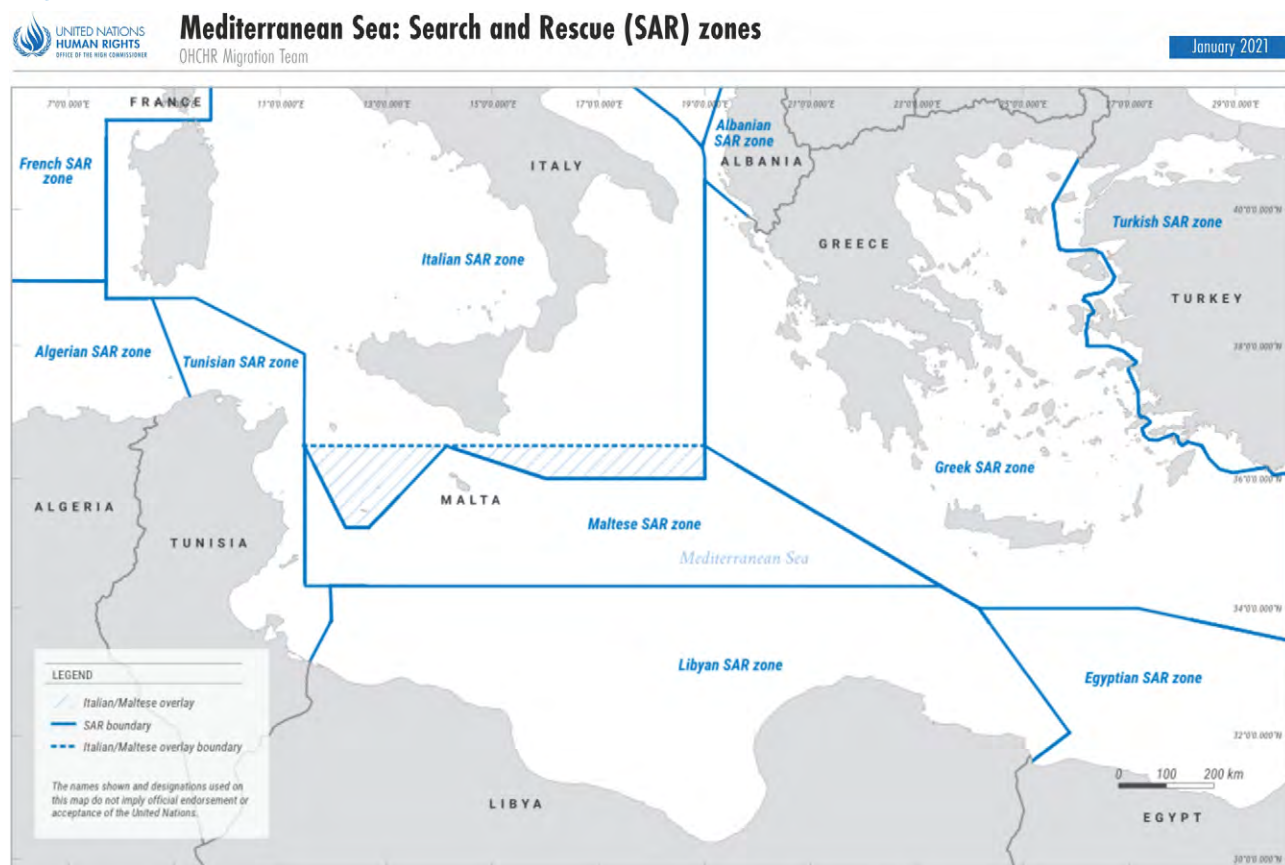
¹⁰ UNSMIL/OHCHR, *Desperate and Dangerous*, pages 10-21.

¹¹ See, OHCHR, *Guidance on COVID-19 and the human rights of migrants*, 7 April 2020, available at: https://www.ohchr.org/Documents/Issues/Migration/OHCHRGuidance_COVID19_Migrants.pdf; See also, OHCHR, *Press briefing note on Migrant rescues in the Mediterranean*, 8 May 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25875&LangID=E>.

order to assess the human rights situation of migrants transiting through Libya, with a particular focus on laws, policies and practices related to SAR and the human rights protection of migrants at sea. During the visit, OHCHR held meetings with Maltese authorities,¹² UN entities, migrant community leaders, academics and civil society organisations. The Office also visited open migrant reception centres (Hal Far Open Centre, Dar Il-Liedna shelter for unaccompanied and separated children, Hal Far Hangar Open Centre, Hal Far Tent Village) and one closed immigration detention centre (Safi Barracks), where it conducted interviews with 80 migrants, including 46 men, 21 women, and 13 children from 23 different nationalities.¹³ OHCHR was unable to visit Malta’s initial reception centres (Marsa IRC) due to COVID-19 concerns. The High Commissioner appreciates the willingness of the Maltese authorities to receive OHCHR staff, and extends her gratitude for their full support in the preparation and conduct of the mission.

The findings of this report are also based on information gathered through desk research and other remote monitoring activities throughout the reporting period, including meetings with relevant government institutions and other stakeholders, official statistics, reports by national and international organizations, views and observations by international and regional human rights mechanisms, and public media reports. In line with its methodology on human rights monitoring, OHCHR exercised due diligence to assess the credibility and reliability of sources and has cross-checked the information gathered to ensure its validity.

Figure 1: Mediterranean SAR zones¹⁴



¹² Including the Ministry for Foreign and European Affairs; the Ministry for Health; and the Ministry for Home Affairs, National Security and Law Enforcement (including the Agency for the Welfare of Asylum Seekers, Armed Forces of Malta, Detention Service, and International Protection Agency).

¹³ Nationalities included Bangladesh, Burkina Faso, Cameroon, Chad, Cote d’Ivoire, Eritrea, Ethiopia, Gambia, Ghana, Guinea-Conakry, Libya, Madagascar, Mali, Morocco, Nigeria, Palestine, Senegal, Sierra Leona, Somalia, South Sudan, Sudan, Syria and Togo.

¹⁴ This figure is for illustration purposes only.



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Key Human Rights Challenges Faced by Migrants in the Context of Protection at Sea



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Focusing on the laws, policies and practices impacting the human rights and protection of migrants in the central Mediterranean Sea, OHCHR documented the following set of selected concerns, which have given rise to serious human rights challenges. These concerns have been identified on the basis of applicable norms and standards of international human rights law, international refugee law, international maritime law, and transnational criminal law, and reinforce similar concerns raised by the UN Secretary-General, other UN agencies, independent human rights experts of the UN and Council of Europe, and human rights defenders.

A. FAILURES TO ASSIST MIGRANTS IN DISTRESS AND DEATHS AT SEA

LEGAL FRAMEWORK

International human rights law guarantees all people the rights to life and to security of person. The right to life is a fundamental and non-derogable human right contained in the International Covenant for Civil and Political Rights (ICCPR) and other international human rights treaties.¹⁵ As the Human Rights Committee has elaborated, “The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.”¹⁶ The Committee further noted that States’ obligation to respect the right to life includes an obligation to take action in the case of foreseeable threats to the right to life and in life-threatening situations, even where those threats and situations are not caused directly by the State.¹⁷ Moreover, under article 6 (1) read in conjunction with article 2 (3) ICCPR, States have “the duty to provide an effective remedy to victims of human rights violations and their relatives”, which includes a “duty to conduct a prompt investigation of the allegations relating to a violation of the rights to life”, including death and disappearance.¹⁸

Under international maritime law and law of the sea, a range of actors have obligations to render assistance to persons in distress at sea, including flag States, the captains of ships, coastal States and States responsible for the coordination of relevant SAR zones. The United Nations Convention on the Law of the Sea (UNCLOS), requires flag States to require the master of a ship flying its flag to render assistance to any person found at sea in danger of being lost and to proceed with all possible speed to the rescue of persons in distress (Article 98). The International Convention for the Safety of Life at Sea (SOLAS Convention), similarly provides that any ship master at sea who is in a position to be able to provide assistance, upon receiving information that persons are in distress at sea must proceed with all speed to their assistance, and that “[t]his obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found”.¹⁹

The International Convention on Maritime Search and Rescue (SAR Convention), directs coastal states to establish national SAR zones in cooperation with neighboring states and to take primary responsibility for responding to SAR incidents that occur within their region, either through deploying national vessels, coordinating responses with other states, or tasking private, commercial or other non-state actors to respond and render assistance.²⁰ The SAR Convention also requires States providing the overall coordination of such SAR zones, on receiving information that a person is in distress within their SAR zone, to “take urgent steps to provide the most appropriate assistance available”²¹ and, where such assistance is rendered, to take primary responsibility for ensuring effective co-ordination and co-operation “so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety.”²²

¹⁵ ICCPR, Art. 6.1; CRC, Art. 6.1; ICMW, Art. 9.

¹⁶ CCPR/C/GC/36 para. 3.

¹⁷ CCPR/C/GC/36 para. 7.

¹⁸ Ibid, para 27; CCPR/C/130/D/3042/2017, paras. 8.6, 8.7, 10.

¹⁹ SOLAS Convention, chapter V, regulation 33(1).

²⁰ SAR Convention, Annex 2.1.3.

²¹ SAR Convention, chapter 2, para. 2.1.9.

²² SAR Convention, as amended, IMO Doc. Resolution MSC.155(78), Annex 5, chapter 3, para. 3.1.9.

Prompt assistance provided by vessels at sea is an essential element of the integrity and effectiveness of SAR activities and the human rights protection of all persons in distress at sea; therefore it must remain a top priority for shipmasters, shipping companies and flag States.²³ When States delay or fail to render assistance to migrants in distress at sea; discriminate in the decisions of whether and how to render such assistance; or fail to effectively coordinate and cooperate with organisations or individuals in the provision of assistance to migrants in distress at sea, they fail to uphold their obligation under the ICCPR to take action in the case of foreseeable threats to the right to life and in life-threatening situations. When de facto authorities and non-State actors with effective control over territory engage in the same conduct, they violate the right to life under customary international law.²⁴

Migrant deaths at sea along precarious migration routes represent a serious human rights protection gap that impacts migrants, their families and communities. The Mediterranean Sea, and in particular the central Mediterranean route, remains among the deadliest migration routes in the world. While figures are imprecise due to a lack of systematic monitoring and public reporting on migrant deaths at sea, according to available data, from January 2019 to December 2020, at least 2,239 migrants have died or gone missing while attempting the central Mediterranean crossing.²⁵

Despite a significant decline in the overall number of migrants arriving to Europe along the central Mediterranean route in recent years,²⁶ the mortality rate has more than doubled.²⁷ In 2017, when 119,310 migrants reached Europe via Libya using the central Mediterranean route, the mortality rate was one in every 51 migrants (1.98%). However, by 2018, 1 in every 35 migrants (2.86%) attempting the crossing would perish, and by the end of 2019, even as the overall number of migrant arrivals to Europe decreased significantly to 14,560, at least one in every 21 migrants (4.78%) would die attempting the crossing.²⁸ As the Secretary-General has noted, these figures also do not account for the unknown number of migrants who have died or gone missing after being returned to Libya.²⁹

Due to the increasing role of the LCG in intercepting migrants at sea and returning them to Libya, many migrants are now attempting the dangerous central Mediterranean route multiple times before successfully arriving to Europe. Many of the migrants interviewed by OHCHR reported attempting the crossing between two and three times and, in some cases, even five or six times before successfully disembarking in Europe—each time putting their lives and physical safety at risk. In the overwhelming majority of these cases, migrants reported being intercepted by the LCG and returned to Libya. In other cases, migrants reported failed crossings as a result of mechanical failures, shipwrecks, or interception by armed groups. For example, a woman from Cote d'Ivoire reported making three previous unsuccessful attempts, each time being intercepted by the LCG and returned to Libyan detention centres where she and other migrants experienced torture, ill-treatment and extortion by prison guards. She alleged that

²³ International Maritime Organisation (IMO), Guidelines on the Treatment of Persons Rescued at Sea, IMO Doc. Resolution MSC. 167(78), Annex 34, adopted by the Maritime Safety Committee on 20 May 2004, para. 3.1.

²⁴ OHCHR policy on engagement in relation to non-State armed groups and de facto authorities, paras. 5.3.3-5.3.8; 5.3.11.

²⁵ IOM, Missing Migrants Project, available at: <https://missingmigrants.iom.int/region/mediterranean>.

²⁶ According to the European Border and Coast Guard Agency (Frontex), in 2018 the central Mediterranean route experienced the biggest drop in the number of migrants arriving irregularly to Europe since 2012, with successful departures via Libya falling by 87%. See, <https://frontex.europa.eu/along-eu-borders/migratory-routes/central-mediterranean-route/>.

²⁷ See, e.g. Migration Policy Institute, *Criminalization of Search-and-Rescue Operations in the Mediterranean Has Been Accompanied by Rising Migrant Death Rate*, 9 October 2020, available at: <https://www.migrationpolicy.org/article/criminalization-rescue-operations-mediterranean-rising-deaths>.

²⁸ IOM, *Calculating "Death Rates" in the Context of Migration Journeys: Focus on the Central Mediterranean*, available at: <https://publications.iom.int/system/files/pdf/mortality-rates.pdf>. Mortality rate data for 2020 was not available at the time of publication.

²⁹ Report of the Secretary-General, Implementation of resolution 2491 (2019), S/2020/275, April 2020, para. 4, available at: <https://undocs.org/S/2020/275>.

some of the guards also sexually exploited and abused young women and girls within the detention centres.³⁰

Many of the migrants interviewed by OHCHR reported witnessing or hearing of migrant deaths at sea, including several who lost family members or others they were travelling with. Others noted that they came very close to death themselves, experiencing a lack of food, water and medical attention, bad weather, mechanical failures, and boats deflating or sinking, causing water to enter, often with no sign of help for days even after making distress calls to relevant SAR authorities, with serious consequences to their physical and mental health. A woman from Burkina Faso, who was several months pregnant during the journey, reported that she lost her partner when he fell overboard in rough seas. She recounted how three others died in her boat when, after several days all of their food and water was exhausted, and many people on board became so thirsty that they were forced to drink water from the sea. Among these were two children, who died after becoming sick from drinking the salt water.³¹ Another man from Somalia described how he was among three boats that departed Libya on the same night, during which they had to withstand bad weather. The first and the third boats managed to arrive safely, but at least 90 people travelling in the second boat went missing and are presumed to have drowned.³² Several others recounted shipwrecks at sea, including a Sudanese man who was one of only 60 survivors from a boat of approximately 125 people, including several women and children, that capsized off the coast of Libya,³³ and a Nigerian man who was one of only seven survivors from a boat of approximately 115 people that similarly capsized.³⁴

OHCHR also received information that smugglers sometimes board migrants onto these unseaworthy boats without lifejackets, a compass, or satellite communication. One man from Mali, who migrated with his wife and children, explained that smugglers put them into a boat without a compass or GPS device, instructing them instead to guide themselves by the stars, pointing to a particular star on the horizon and telling them to “follow the star.”³⁵

Maltese authorities reported systematically documenting the number of bodies of deceased persons arriving to Maltese shores and taking action to establish the cause of death and assist in the possible identification of the deceased person.³⁶ However, OHCHR learned that there are no similar cross-border efforts among coastal States to identify migrants who have died or gone missing during the central Mediterranean journey, to trace the relatives or family members of the deceased, to recover and repatriate the bodies or belongings of the dead and missing, or to report these figures publicly. Additional information received by OHCHR indicated that when migrants are identified as having died or gone missing during their journeys, family members often rely on ad-hoc responses and the intervention of the Red Cross, consular officials of migrants’ country of origin, or religious leaders to help locate and inform them of their missing loved ones.

OHCHR has also continued to receive reports regarding the failure to provide prompt and effective assistance to boats with migrants in distress in the central Mediterranean Sea, including by State authorities responsible for coordinating SAR activities, as well as by ship masters and their flag States. As noted in previous OHCHR reports, at least since August 2017, when Libya declared the extension of its SAR zone to 94 nautical miles off its coast, the EU and its Member States have gradually reduced their maritime assets in the central Mediterranean, shifting responsibility for SAR operations

³⁰ OHCHR interview.

³¹ OHCHR interview.

³² OHCHR interview.

³³ OHCHR interview.

³⁴ OHCHR interview.

³⁵ OHCHR interview.

³⁶ Malta indicated it is in the process of acceding to the Agreement on the Status and Functions of the International Commission on Missing Persons (ICMP), seeking to join Afghanistan, Chile, Cyprus, Germany, Luxembourg, the Netherlands, Serbia, Sweden and the United Kingdom as States Parties to the Treaty, which has also been signed by Belgium and El Salvador. See, <https://www.icmp.int/>.

in international waters to the LCG.³⁷ In March 2019, the EU's Naval Force for the Mediterranean (EUNAVFOR MED) operation SOPHIA officially ended its sea patrols, which had saved thousands of lives since 2015, and significantly shifted its focus from undertaking its own maritime SAR operations to strengthening surveillance by air as well as reinforcing support to the LCG through enhanced training and capacity-building.³⁸ On 31 March 2020, operation SOPHIA was replaced by operation IRINI which has a specific mandate to implement the arms embargo on Libya imposed by the UN Security Council; however, IRINI vessels have no specific search and rescue mandate.³⁹ As human rights organisations have observed, IRINI's more eastward operational area also effectively avoids placing EU maritime assets in the area of the central Mediterranean Sea where most migrants seek to cross from Libya to Europe.⁴⁰

In September 2020, a more coordinated EU approach to SAR was presented in the new Pact on Migration and Asylum proposed by the European Commission, which, however, remains to be adopted by EU member States.⁴¹ The European Commission has also adopted a Recommendation⁴² aimed at supporting reinforced information sharing, coordination and cooperation between Member States, private actors and other relevant stakeholders, with a focus on operations carried out by private vessels owned or operated for the specific purpose of search and rescue activities. As announced in the Recommendation, the EU has also recently established the first European Contact Group on search and rescue, as a means to reinforce cooperation and coordination between Member States and with other relevant stakeholders in this field.⁴³

Italy and Malta have pointed to efforts to ensure the effective coordination of search and rescue operations within their SAR regions.⁴⁴ Yet, OHCHR received information that there continue to be significant delays and failures to render assistance to migrant boats in distress in the central Mediterranean Sea either due to uncertainty over the responsible coordinating MRCC authority or the safe port where migrants will be disembarked, particularly where the SAR zones of Libya and Malta meet, or where the SAR zones of Italy and Malta overlap.⁴⁵ Some of these delays and failures to assist

³⁷ UNSMIL/OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 18 December 2018, p. 17. OHCHR, Press briefing note on Migrant rescues in the Mediterranean, 8 May 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25875&LangID=E>.

³⁸ Press Release, *EUNAVFOR MED Operation Sophia: mandate extended until 30 September 2019*, 29 March 2019, available at: <https://www.consilium.europa.eu/en/press/press-releases/2019/03/29/eunavfor-med-operation-sophia-mandate-extended-until-30-september-2019/>; The Guardian, EU to stop Mediterranean migrant rescue boat patrols, 27 March 2019, available at: <https://www.theguardian.com/world/2019/mar/27/eu-to-stop-mediterranean-migrant-rescue-boat-patrols>.

³⁹ Operation IRINI's core task is the implementation of the UN arms embargo on Libya through the use of aerial, satellite and maritime assets. As secondary tasks, operation IRINI also contributes to the capacity building and training of the LCG, and contributes to the disruption of the business model of human smuggling and trafficking networks through information gathering and patrolling by planes. See, <https://www.operationirini.eu/about-us/>.

⁴⁰ European Council on Refugees and Exiles (ECRE), *Med: IRINI Ships will Not Search but Rescue – Civilian Search and Rescue Vessel Back at Sea*, 2 April 2020, <https://www.ecre.org/med-irini-ships-will-not-search-but-rescue-civilian-search-and-rescue-vessel-back-at-sea/>.

⁴¹ See European Commission, *New Pact on Migration and Asylum*, available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en. Among other things, the document proposes 1) an EU-wide solidarity mechanism following disembarkations after SAR operations; 2) the reinforcement of cooperation and information exchange among EU Member States and other relevant stakeholders; 3) guidance clarifying that EU law should not be interpreted in a way allowing humanitarian SAR activities to be criminalised; 4) strengthening cooperation with countries of origin and transit to prevent dangerous journeys and irregular crossings; 5) and continuing operational and technical support to Member States, in order to improve their capabilities and thus contribute to saving lives at sea.

⁴² (EU) 2020/1365, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32020H1365&from=en>.

⁴³ The first meeting of the group was held in March 2021. See, <https://www.pubaffairsbruxelles.eu/new-pact-on-migration-and-asylum-first-meeting-of-the-new-european-contact-group-on-search-and-rescue-eu-commission-press/> or https://ec.europa.eu/commission/commissioners/2019-2024/johansson/blog/today-we-start-work-european-approach-search-and-rescue_en.

⁴⁴ Both Italy and Malta indicated that all distress calls received from within their respective SAR regions are duly answered and responded to in a non-discriminatory manner and in accordance with relevant SAR procedures. In the case that the position of a vessel in distress falls within the SAR region of another State, they indicated they immediately inform the RCC of that State, with a request to assume coordination of the rescue.

⁴⁵ Malta has not accepted the 2004 Amendments to the SAR and SOLAS Conventions, which inter alia place the primary responsibility for identifying a safe place of disembarkation with the State responsible for responding to situations of distress within their respective SAR region. Malta thus adheres to the practice that all rescued persons within the Malta SAR region should be disembarked in the nearest place of safety as provided for in the pre-Amendment legislation.

appear based upon an interpretation by some States of when boats are in a “situation of distress” and related SAR responsibilities. In this regard, the Maltese authorities conveyed to the OHCHR team that they do not consider migrants to be in “distress at sea” for the purposes of their legal obligation to render assistance under international maritime law, absent verification that persons are in imminent danger of losing their lives and that these persons require immediate assistance.⁴⁶

OHCHR spoke with several migrants and NGOs who reported that calls about migrants in distress either went ignored or unanswered for extended periods, despite numerous attempts over several hours. In other cases, OHCHR received information that the State first contacted about a vessel in distress would refuse to intervene or ask migrants to call another State—effectively passing the responsibility to another State and in doing so delaying rescue.⁴⁷ For example, a Bangladeshi man recounted that in January 2020 his boat of 47 people spent three days at sea and more than 35 hours calling EU Member State SAR authorities for assistance before the Armed Forces of Malta (AFM) arrived to undertake a rescue.⁴⁸ In another account, a migrant recalled that after several days at sea they phoned the Italian SAR authorities only to be given another number and told to call the Maltese authorities.⁴⁹ In at least one instance, a migrant claimed to have called EU Member State SAR authorities but no one answered the phone.⁵⁰ Several migrants and humanitarian SAR organisations have also repeatedly alleged that calls to the Libyan SAR authorities frequently go unanswered or experience significant delays.⁵¹

Some migrants interviewed by OHCHR also reported examples of ship masters of merchant vessels failing to render assistance, despite being the nearest vessel to them. In several instances, migrants reported merchant vessels came close enough to see that they were in distress, but failed to initiate a rescue or render assistance. A child from Eritrea described how, after three days at sea aboard a rubber boat, a commercial ship approached them, took photos of their boat, but said: “We can’t give you food. We cannot accept you [on board]. You have coronavirus”. The boy described how they tried in vain to get closer to the commercial ship in the hopes the ship would rescue them, but the ship kept moving farther and farther away to keep its distance from them. “Finally, the waves pushed us away”, he explained.⁵² Another woman from Cote d’Ivoire reported that several private and commercial vessels passed around them on the high seas but no one stopped to assist or rescue them.⁵³

OHCHR also received reports of a lack of cooperation, including information sharing in rescue coordination, particularly from coordinating States to humanitarian NGOs operating in the central Mediterranean Sea. Some humanitarian NGOs and SAR observers reported that their calls and inquiries were ignored or dismissed when operating in the immediate area of a boat in distress and

⁴⁶ The SAR Convention defines distress as “A situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance” (Annex, Chapter 1 para.1.3.13.), leaving the responsibility for determining whether a vessel is in distress to the individual Member State or shipmaster responding to the situation. EU Regulation No 656/2014 of 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by FRONTEX, states that EU Member State SAR assets participating in FRONTEX joint operations “shall, for the purpose of considering whether the vessel is in a phase of uncertainty, alert or distress, take into account”, inter alia, (ii) the seaworthiness of the vessel and the likelihood that the vessel will not reach its final destination; (iii) the number of persons on board in relation to the type and condition of the vessel; (iv) the availability of necessary supplies such as fuel, water and food to reach a shore; (v) the presence of qualified crew and command of the vessel; (vi) the availability and capability of safety, navigation and communication equipment; (vii) the presence of persons on board in urgent need of medical assistance; (viii) the presence of deceased persons on board; (ix) the presence of pregnant women or of children on board; and (x) the weather and sea conditions, including weather and marine forecasts. A request for assistance is explicitly described as not being the sole factor for determining the existence of a distress situation (Article 9(2)(f)), available at: <https://eur-lex.europa.eu/eli/reg/2014/656/oj>.

⁴⁷ According to art. 6.7 of the IMO Guidelines on the Treatment of Persons Rescued at Sea, “The first RCC [receiving a distress call] is responsible for co-ordinating the case until the responsible RCC or another competent authority assumes responsibility.”

⁴⁸ OHCHR interview.

⁴⁹ OHCHR interview.

⁵⁰ OHCHR interview.

⁵¹ Note on file with OHCHR, Meeting with SAR NGOS, 16 November 2020.

⁵² OHCHR interview.

⁵³ OHCHR interview.

standing ready to assist. In other cases, they reported being told to “hold” their position or to “stand down”, even when they were the nearest vessel able to undertake a rescue and sometimes even when they were within sight of the boat in distress. In such cases, it was reportedly common that the LCG would subsequently arrive and intercept the boat, often after a significant period of delay.⁵⁴

SURVIVOR VOICES: “IN THE WATER, YOUR CHANCES ARE 50-50”

A group of Bangladeshi men relayed the fear and desperation that drive migrants to face the perilous central Mediterranean journey: “You have to understand that Libya is horrible – no words can explain our suffering there (. . .) The situation there is so unsafe, you must risk your life in the water.” (OHCHR interview)

A Nigerian woman who crossed the sea while pregnant noted the uncertainty of knowing whether the boats, and those on board, will survive the journey: “In the water, your chances are 50-50. The sea is not easy, either you’re safe or you die.” (OHCHR interview)

A woman from Burkina Faso, who delivered a baby on the boat during her journey, shared how her partner perished when a wave threw him overboard during a storm. He was lost in the water as she and the others on board were helpless to save him: “When you fall into the water, it’s over for you.” (OHCHR interview)

A woman from Somalia who travelled with her children shared: “My two girls were vomiting and crying all the time (. . .) by the end of the journey they were almost unconscious. I thought I lost them.” (OHCHR interview)

RECOMMENDATIONS

General recommendations:

- Assume a collective responsibility to save lives and prevent migrant deaths at sea. Avoid acts and inaction that are likely or foreseeably expected to arbitrarily deprive migrants of their lives, and ensure that laws, policies and practices do not create or exacerbate the risk of migrant death or disappearance.
- Ensure that prompt and effective assistance is provided to all migrants in distress at sea, including through adequate State-led maritime patrols and by supporting SAR operations carried out by private commercial or humanitarian vessels, while ensuring swift disembarkation in a port of safety. In the context of COVID-19, maintain SAR operations, while ensuring compatibility with public health measures.
- Carry out independent, impartial and thorough investigations into all allegations of failures to assist migrants in distress at sea, including by ensuring victims and their relatives access to justice, accountability and, when appropriate – such as in the context of deaths caused by use of force violations – to effective redress.

⁵⁴ Note on file with OHCHR, Meeting with SAR NGOS, 16 November 2020.

- Cooperate internationally to ensure the recovery, identification, safe transfer and burial of deceased migrants, and to safely and appropriately notify their families.
- Regularly collect and make data on migrant deaths and missing persons available in accordance with the right to privacy and data protection.
- Fully cooperate and ensure that information on the situation of migrants in distress within the corresponding SAR zone is shared with all relevant actors, including private commercial and humanitarian NGO vessels.

To the Libyan authorities:

- Ensure that Libya's Joint Rescue Coordination Centre is adequately and professionally staffed, including the ability to answer and respond to distress calls in a timely manner.
- Refrain from denying assistance or leaving migrants to die at sea if/when they refuse to be disembarked in Libya, instead taking responsibility to coordinate their rescue and disembarkation in a port of safety.

To the European Union and its Member States:

- Refrain from encouraging a shifting responsibility for SAR operations in international waters to the LCG. Instead, ensure that sufficient EU and Member State maritime resources are mobilized for SAR responses along the central Mediterranean Sea route, including proactive maritime patrolling by the EU and its Member States, in addition to aerial reconnaissance missions.
- Ensure that SAR services and coordinating authorities operate under a broad understanding of distress, so that timely and necessary assistance is provided to migrants at sea, including those in unseaworthy vessels even if they are not in immediate danger of sinking.
- Ensure cooperation of the EU Contact Group on search and rescue with the United Nations, international and regional organisations, and civil society with a view to developing common practices by EU member States on search and rescue and the protection of migrants at sea, in compliance with the international and European legal framework.

B. DANGEROUS RESCUE AND INTERCEPTION PRACTICES

LEGAL FRAMEWORK

Under International Human Rights Law, the right to life and right to security of person place obligations on States which govern how SAR and interceptions are conducted, notably by prohibiting the unnecessary or disproportionate use of force, violence or other practices that put migrants' lives at risk. The duty to protect the right to life requires States to take special measures of protection towards persons in situations of vulnerability or whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence.⁵⁵

An important element of the protection afforded to the right to life by the ICCPR is the obligation of States, where they know or should have known of potentially unlawful deprivations of life, to investigate and, where appropriate, prosecute such incidents including allegations of use of force violations, even if the risk of death did not ultimately materialize.⁵⁶

The International Convention on Maritime Search and Rescue (SAR Convention) obliges all State Parties to "ensure that assistance [is] provided to any person in distress at sea (...) regardless of the nationality or status of such a person or the circumstances in which that person is found",⁵⁷ and includes a duty to "provide for their initial medical or other needs, and deliver them to a place of safety."⁵⁸

During the reporting period, more than 20,300 migrants have been registered as rescued/intercepted at sea by the LCG and disembarked in Libya, including more than 11,200 in 2020.⁵⁹ OHCHR has previously noted "a pattern of reckless and violent behavior" by the LCG in the course of interceptions at sea, including firing at or in the vicinity of migrant vessels, colliding with or ramming migrant vessels, conducting high speed and unsafe maneuvers causing large waves and the capsizing of migrant vessels, acts of physical violence such as beating and slapping of migrants, and the use of threatening, discriminatory or racist language.⁶⁰

The EU has noted that the purpose of its support to the Libyan General Administration for Coastal Security and Libyan Coast Guard and Port Security is to improve their capacities for carrying out SAR operations, thereby saving lives at sea, and for fighting smuggling of migrants and trafficking in human beings. This includes EU-funded support to the LCG in the form of life-saving and protective equipment, including protective suits and gloves for members of the LCG, as well as life jackets and floating rings needed for emergency interventions. It also includes capacity-building programmes that focus on the human rights of migrants to enhance the LCG's understanding of international standards

⁵⁵ CCPR/C/GC/36, para. 23.

⁵⁶ CCPR/C/GC/36, para. 27.

⁵⁷ SAR Convention, Chapter 2.1.10.

⁵⁸ SAR Convention Chapter 1.3.2.

⁵⁹ UNHCR, *Update Libya*, 24 December 2020, available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20Libya%20Update%2024%20December%202020.pdf>; See also, UNHCR, *Libya: Activities at Disembarkation – Monthly update*, December 2019, available at: <https://data2.unhcr.org/en/documents/details/73284>.

⁶⁰ UNSMIL/OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, December 2018, pp 34-38. In a particularly concerning and widely reported event, on 20 November 2018, Libyan security forces in Misrata used tear gas and rubber bullets to forcibly remove around 80 migrants from the Panama-flagged cargo ship Nivin, after they were forcibly returned to Libya. Among those forcibly disembarked were women, children and several victims of arbitrary detention, torture and trafficking in Libya. See, <https://forensic-architecture.org/investigation/nivin>; and Doctors Without Borders, *Mediterranean: Refugees and migrants forced to disembark ship, return to unsafe conditions in Libya*, 18 November 2018, available at: <https://www.doctorswithoutborders.org/what-we-do/news-stories/news/mediterranean-refugees-and-migrants-forced-disembark-ship-return>.

and to improve their ability to identify and prevent potential breaches of international human rights law.

Despite these interventions, OHCHR continues to receive reports of behaviour by the LCG in the course of interceptions at sea which endangers the lives of migrants in distress. Migrants interviewed by OHCHR reported having their boats rammed or shot at by the LCG, causing panic and distress among migrants, causing their boats to capsize or people to jump into the water out of desperation. Others reported incidents of kicking, punching and other physical violence. Some related how their boats or motors were damaged while migrants were still inside them, apparently in an effort to force migrants to board the LCG vessels. A Sudanese migrant alleged that during the course of an interception in January 2019, the LCG rammed his boat, which was carrying 42 migrants, causing it to capsize.⁶¹ Another Sudanese migrant, intercepted by the LCG in September 2019, claimed that the LCG fired their weapons in the vicinity of their boat and beat migrants with the butts of their guns during an interception.⁶² A Bangladeshi child claimed that in November 2019 the LCG intercepted a large rubber boat that he was traveling in with over 100 migrants by rapidly circling them at high speeds, causing large waves and almost causing the entire boat to capsize.⁶³

Humanitarian NGOs have also reported incidents of LCG personnel coming on board SAR vessels and threatening the crew and rescued migrants, shooting in the area or in the direction of NGO vessels, instructing SAR NGOs to stay away from boats in distress during interceptions and not to provide assistance, threatening SAR NGOs that they will be “targeted” if they do not disembark migrants in Libya or if they do not leave the Libyan SAR zone.⁶⁴

OHCHR has also previously noted the alleged complicity of some State actors, including members of Directorate for Combatting Illegal Migration (DCIM) and the LCG, in the trafficking or aggravated smuggling of migrants, raising concerns that migrants intercepted and returned to Libya by the LCG may be placed at a heightened risk of trafficking and abuses by criminal networks. An Ethiopian migrant interviewed by OHCHR confirmed that he was unsure whether the people who intercepted him during his attempted crossing in October 2019 were members of the LCG or an armed militia with ties to smuggling networks. The man reported that the Libyans who intercepted the boat he was travelling in were wearing official LCG uniforms and carrying firearms. However, when he and the other migrants were disembarked they were not taken to a Libyan detention centre, but instead to a farm run by smugglers, where he remained detained for eight months.⁶⁵

OHCHR has called for a moratorium on all interceptions and returns to Libya.⁶⁶ In light of persistent allegations of abuse and mistreatment of migrants in the course of interceptions and upon return to Libya, an increasing number of UN entities and civil society organisations have called for Libya’s SAR zone to be reconsidered, and the LCG’s SAR responsibilities to be redefined.⁶⁷ Humanitarian NGOs have also noted a lack of preparedness and technical and logistical capacity of the LCG to fulfil its SAR obligations within its own SAR zone, including an inability to assume the coordination of rescues due to the lack of available naval assets, the failure to ensure English-speaking personnel as required

⁶¹ OHCHR interview.

⁶² OHCHR interview.

⁶³ OHCHR interview.

⁶⁴ Note on file with OHCHR, Meeting with SAR NGOS, 16 November 2020.

⁶⁵ OHCHR interview.

⁶⁶ OHCHR, *Press briefing note on Migrant rescues in the Mediterranean*, 8 May 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25875&LangID=E>; See also, UN News, UN rights office concerned over migrant boat pushbacks in the Mediterranean, May 2020, available at: <https://news.un.org/en/story/2020/05/1063592>.

⁶⁷ IOM and UNHCR, *Call for Urgent Action after 45 Die in Largest Recorded Shipwreck off Libya Coast in 2020*, 19 August 2020, available at: <https://www.iom.int/news/iom-unhcr-call-urgent-action-after-45-die-largest-recorded-shipwreck-libya-coast-2020>; See also, Hundreds of NGOs and individuals call for revocation of Libya’s SAR Zone, available at: <http://www.migreurop.org/article2997.html?lang=fr>.

by the IAMSAR Manual, and multiple failures and significant delays in answering distress alerts or in mobilizing maritime assets to effect rescues within its SAR zone.⁶⁸

While several of the migrants OHCHR spoke with noted the professionalism and safety of AFM rescue operations, human rights experts have expressed concern regarding allegations of dangerous rescue and interception practices by Maltese SAR authorities, which have been corroborated by interviews conducted by OHCHR. For example, on 9 April 2020, the NGO Alarm Phone reported that approximately 70 migrants were in distress near Malta and relayed to them over the phone “We have an emergency here. Malta military came and cut cable of motor. Water is in the boat. Malta military said ‘I leave you to die in the water. Nobody will come to Malta’”.⁶⁹ Two of the migrants OHCHR spoke with indicated that they were on the above-referenced boat, which, they noted, had lost its way and, after three days at sea, was running out of food, water and fuel within the Maltese SAR zone.⁷⁰ The migrants alleged that they were approached by an AFM vessel that distributed life jackets to those on board, but did not distribute food or water, and told them that Malta’s ports were closed due to COVID-19 and that they should continue to Lampedusa. The migrants further alleged that the AFM officials confiscated their GPS and provided them with a new GPS device programmed for Lampedusa. Due to the fatigue of those on board, the migrants reported that they refused to continue to Italy and, after an approximately 12-hour standoff during which the migrant boat began taking on water, they were approached by a second AFM vessel. The migrants alleged this second vessel deployed a smaller launch craft that attempted to deter the migrants from proceeding towards Malta by maneuvering rapidly, creating strong waves that threatened to capsize them, blocking the direction of their travel, and eventually damaging the engine of their boat by cutting the cable and rendering the boat without power. According to the migrants interviewed, those on board feared for their lives and pleaded “either take us to Malta or leave us here to die.” Upon their disembarkation in Malta, migrants claimed that their cell phones with video and photo evidence of the encounter were confiscated and have not been returned. A magistrate inquiry of this event was carried out by Maltese authorities in response to a criminal complaint filed by the NGO Repubblica, however the magistrate dismissed the complaint in May 2020, finding no grounds for criminal action, concluding that the engine was stopped for safety reasons and clearing AFM personnel from any wrongdoing.⁷¹ Two days later, on 11 April 2020, it was reported that the AFM approached another boat that had arrived within sight of Maltese shores. In this instance, according to information received by OHCHR, over a dozen migrants jumped into the water and video documentation appears to show an AFM vessel dangerously maneuvering near them.⁷²

⁶⁸ Note on file with OHCHR, Meeting with SAR NGOS, 16 November 2020; See also, International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual, Volume III.

⁶⁹ Times Malta, *OPM refuses to deny claims that AFM sabotaged migrant boat*, April 11 2020, available at: <https://timesofmalta.com/articles/view/opm-refuses-to-deny-claims-that-afm-sabotaged-migrant-boat.784772>.

⁷⁰ OHCHR interview.

⁷¹ See, <https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/May/30/pr201030.aspx>.

⁷² See, https://twitter.com/seawatch_intl/status/1263017618413441024.

SURVIVOR VOICES: "THEY DON'T CARE IF YOU LIVE OR DIE"

A Sudanese man, who made four separate attempts to flee Libya by boat before successfully arriving to Europe, reported that in January 2019 the boat he was travelling in called the Italian SAR authorities for assistance.. He alleged that after several hours of awaiting a rescue, the LCG arrived to intercept their boat and that the LCG rammed their boat, causing it to capsize and putting the lives of everyone on board at risk, stating "These people [the LCG] don't have any humanity. They don't care if you live or die." Following the incident, all 42 survivors were forcibly returned to Libya and placed in a Libyan detention centre in Zuwara. The man alleged that while in detention he was beaten by Libyan guards and only given food once per day. After 25 days of suffering, he and other migrants managed to escape. Several migrants were shot by detention guards and died, and he suffered a broken leg in the escape. On his fourth attempt at the central Mediterranean crossing in January 2020, he indicated having spent 29 hours at sea without assistance before his boat was eventually rescued by the humanitarian NGO Sea Watch and successfully disembarked in Malta. (OHCHR interview)

A man from Sudan explained that in September 2019 after departing Libya and sailing for few hours, they were intercepted at sea by LCG and returned to detention in Tripoli. He recounted that migrants were beaten by the LCG with the butts of guns and that LCG fired shots in their vicinity to scare them. He alleged that they were all searched and all their belongings were confiscated by the LCG and never returned, including money, passports and personal identification. (OHCHR interview)

A woman from Somalia described a dangerous interception in January 2019 in which three migrants died: "A [LCG] boat approached us, they were speeding and maneuvering around our rubber boat. Then they dropped a rope and ordered us to climb to their boat (. . .) because of the maneuvers and the speed of the Libyan boat, at least three migrant men fell in the water, but the Libyan boat left and did not pay any attention to our cries. The men lost their lives (. . .) they drowned (. . .) their friends were crying and asking for help, but [the LCG] didn't care. They continued sailing and took us to al-Khoms to detain us." (OHCHR interview)

RECOMMENDATIONS

General recommendations:

- Make sure that those responsible for SAR or for providing assistance at sea are properly trained to conduct their work in a human rights-compliant manner, and understand their primary obligation to save life, to uphold the principle of *non-refoulement*, to refrain from use of force violations, to ensure the human rights, safety and dignity of persons rescued, and to address their specific needs.
- Ensure that rules of engagement for those responsible for conducting SAR activities prohibit use of force violations and any dangerous rescue and interception practices that may cause human rights violations or abuses or make them more likely.
- Carry out independent, impartial and thorough investigations into all allegations of violations or abuses of human rights against migrants during rescue and interception and ensure that migrants have access to accountability, including through effective complaint mechanisms and redress without discrimination.

To the Libyan authorities:

- Cease dangerous rescue or interception practices that put migrants' lives, safety and human rights at risk.
- Provide effective complaints mechanisms for migrants, ship masters, human rights defenders and other relevant stakeholders to seek accountability and redress for dangerous rescue and interception practices, including deaths caused by use of force violations.
- Independently investigate and prosecute, as appropriate, allegations of use of force violations or violations of the right to life or security of person by the LCG.

To the European Union and its Member States:

- Ensure any cooperation with the LCG is premised on due diligence and suspend the provision of funding, training and logistical support to the LCG, making the continuation of such support dependent upon a consistent and sustained demonstration of respect for international human rights law by the LCG.
- Establish independent national mechanisms to monitor the human rights of migrants, as proposed in the EU Pact on Migration and Asylum, with a broad mandate to include the context of SAR and protection of migrants at sea.

To United Nations agencies and other international actors:

- The International Maritime Organisation (IMO) and other relevant actors should reconsider the classification of the Libyan SAR zone until such time as the LCG demonstrates it is capable of conducting SAR operations without putting migrants' lives and safety at risk.
- United Nations agencies providing support to the LCG or other Libyan State security forces engaged in migration control, should fully implement and comply with the Human Rights Due Diligence Policy (HRDDP) by suspending their support unless and until mitigating measures are in place that can effectively avoid risk of grave violations of international human rights, refugee or humanitarian law.
- Promote a human rights-based approach to migration and border governance at all times in discussions with the Libyan authorities, including through the Libyan Political Dialogue Forum and the Coordination Framework for International Technical Cooperation with the State of Libya.

C. PUSHBACKS AT SEA

LEGAL FRAMEWORK

Pushbacks⁷³ at sea, including the interception and return of migrants from international waters to ports of origin effectively constitute violations of the prohibition of collective and arbitrary expulsions and may constitute violations of the principle of non-refoulement. The obligation to respect the principle of non-refoulement requires that States put in place sufficient legal and administrative measures to ensure that they do not return any person to a place where they will be at risk of persecution, death, torture or other cruel, inhuman or degrading treatment or punishment, enforced disappearance or other irreparable harm.⁷⁴

The prohibition of collective expulsion requires that returns are only carried out following an individual assessment of the circumstances of each individual. Some of the relevant circumstances to be considered include, but are not limited to, the best interests of the child, the right to family life or risks of irreparable harm related to the fundamental prohibition of refoulement. This prohibition also requires that individuals be given a meaningful opportunity to contest the return decision if they believe it to be unlawful or arbitrary.⁷⁵

The prohibitions of refoulement and collective expulsion apply in all circumstances where a State exercises jurisdiction or effective control, including when acting outside its territorial waters.⁷⁶ The prohibition of refoulement under international human rights law is also broader than the scope of the principle under international refugee law since it may also require the protection of migrants not entitled to refugee status.⁷⁷

These prohibitions establish both negative and positive obligations for States. Positive obligations require States to proactively take effective legislative, administrative, judicial or other measures to prevent acts inconsistent with the prohibitions of refoulement and collective expulsion.⁷⁸ This duty requires not only the prevention of violations on the part of State officials, but also includes a well-established due diligence obligation of States to prevent mistreatment by third parties, including private actors or other States operating within their jurisdiction or effective control.⁷⁹ Where a State provides material support or assistance to another State to carry out SAR operations, the assisting State has, at minimum, a responsibility to take action to mitigate the risk that the State performing the operations does not commit human rights violations, including violations of the right to life, and the prohibitions of refoulement and collective expulsion.⁸⁰

⁷³ Pushback operations are proactive operations that aim to physically prevent migrants from reaching, entering or remaining within the territorial jurisdiction of the destination State (direct arrival prevention measures). They can take place at sea, where they involve the interception of vessels carrying migrants inside or outside territorial waters and may be followed by immediate return to their port of origin or may leave migrants adrift. They can also happen on land at or close to an international border. Pushbacks usually involve the threat or use of force by border officials to prevent migrants from approaching or crossing the border, or to intimidate those who have successfully crossed the border, before returning them to the country of departure. Pushbacks render screening for protection needs summary or non-existent. Pushbacks effectively constitute collective expulsions. See, e.g. UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50, 26 February 2018, paras. 49-57.

⁷⁴ The prohibition of *refoulement* is explicitly included in the 1951 Convention Relating to the Status of Refugees (1951 Convention) (Article 33, 1) as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3, 1), and the International Convention for the Protection of All Persons from Enforced Disappearance (Article 16, 1). The principle of *non-refoulement* has also been interpreted to be an implicit obligation of States parties to the ICCPR, the CRC, and the ICMW. See also OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (2014), p. 37, available at: <https://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>.

⁷⁵ ICCPR, art. 13; ICRMW, art. 22(1); CERD, General Recommendation No. 30, CERD/C/64/Misc.11/rev.3 (2002), para. 26.

⁷⁶ HRC, General Comment No. 31, CPR/C/21/Rev.1/Add.13 (2004), para 10.

⁷⁷ CCPR/C/GC/36, para. 31.

⁷⁸ See A/HRC/37/50, para. 12.

⁷⁹ See, CAT/C/GC/2 (24.01.2008), paras. 17-19; CCPR GC No. 31, para. 8; CPR GC No. 36, para. 22.

⁸⁰ CPR GC No. 36, para. 63; OHCHR/GMG, *Recommended Principles and Guidelines on the Protection of the Human Rights of Migrants in Vulnerable Situations* (2018), Principle 4.1, available at: <https://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>; UNHCR, *Submission in the case of S.S. and Others. v. Italy (Appl. No. 21660/18) before the European Court of Human Rights*, 14 November 2019, para. 5.9.

Negative obligations require States to refrain from engaging in, or knowingly contributing to, any acts inconsistent with the prohibitions of *refoulement* and collective expulsion, whether through acts or omissions, whenever they exercise de jure or de facto effective control.⁸¹ This includes where States exercise control or influence over a place, person, or process outside their borders and where the State is aware, or ought to be aware, of circumstances which indicate there are substantial grounds for believing that persons would be in danger of persecution, death, torture or other cruel, inhuman or degrading treatment or punishment, enforced disappearance or other irreparable harm if returned.

Any State that plays a role in determining the course of events, including States that deploy their own assets to assist a rescue of migrants in distress, designate the nearest port of safety, or coordinate SAR operations involving private vessels or the SAR assets of other States, has a duty to abide by its international legal obligations, including the principles of *non-refoulement* and the prohibition of collective expulsion.⁸²

OHCHR has previously expressed concern about reports of pushbacks of boats in the central Mediterranean, including reports of “coordinated pushbacks” whereby Maltese authorities allegedly requested a private fleet of commercial ships to force boats with migrants in distress back to Libya.⁸³

On 15 April 2020, OHCHR received information about a boat with 56 migrants, including eight women and three children, which became stranded when its engine stopped working and that the migrants were boarded onto on a private vessel and returned to Libya.⁸⁴ Based on information received by OHCHR and special procedure mandate-holders, the migrants were transferred to Tariq al-Sikka detention facility by the Libyan authorities. During their six days at sea, five people died and seven others went missing and are presumed drowned. This was part of a series of events taking place over the Easter weekend of 2020 whereby the Maltese government is accused of reportedly having enlisted privately owned fishing trawlers to intercept migrants in the central Mediterranean and push them back to Libya.⁸⁵

In another incident, previously noted (see “Dangerous rescue and interception practices”), it was reported that the AFM approached a rubber boat on 11 April 2020 that had arrived within sight of Maltese shores and handed out life vests to migrants in distress, but refused to allow them to arrive to Malta. OHCHR later received information that the AFM allegedly equipped the rubber boat with a new outboard motor, fuel, drinking water and navigational instruments calibrated towards Italy and

⁸¹ See, A/HRC/37/50, para. 13.

⁸² See, UNCLOS, Art. 98; CAT GC No. 4, para 27; OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (2014), I. A.1, II.A.2, II.A.5; UNHCR, *Oral intervention at the European Court of Human Rights Hearing of the case Hirsi and Others v. Italy*, p. 4, available at: <https://www.refworld.org/pdfid/4e0356d42.pdf>; UNHCR, *Submission in the case of S.S. and Others. v. Italy (Appl. No. 21660/18) before the European Court of Human Rights*, 14 November 2019, para. 4.5.

⁸³ OHCHR, *Press briefing note on Migrant rescues in the Mediterranean*, 8 May 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25875&LangID=E>.

⁸⁴ *Ibid.* See also, AL MLT 1/2020, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25394>; AL MLT 2/2020 <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25753>; and IOM, *IOM Alarmed by Return of Migrants to Libya from Maltese Waters*, 16 March 2020, available at: <https://www.iom.int/news/iom-alarmed-return-migrants-libya-maltese-waters>.

⁸⁵ See, AL MLT 2/2020 <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25753>; Times of Malta, *Anger as Neville Gafà says he coordinated Libya pushback on OPM orders*, 30 April 2020, available at: <https://timesofmalta.com/articles/view/neville-gafa-says-he-coordinated-libya-pushback-on-opm-orders.788951>; New York Times, *Latest Tactic to Push Migrants From Europe? A Private, Clandestine Fleet*, 30 April 2020, available at: <https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html>; Associated Press, *Malta defends its use of private vessels to rescue migrants*, 1 May 2020, available at: <https://apnews.com/article/371696d67ceb8f38b61a50283ceb825a>; The Guardian, *Exclusive: 12 die as Malta uses private ships to push migrants back to Libya*, 19 May 2020, available at: <https://www.theguardian.com/global-development/2020/may/19/exclusive-12-die-as-malta-uses-private-ships-to-push-migrants-back-to-libya>.

that a private Maltese vessel escorted the boat in the direction of Sicily.⁸⁶ On 12 April, 101 migrants on board the rubber boat in question arrived and were disembarked in Pozzallo, Sicily.⁸⁷

Information received by OHCHR also appears to confirm that coordination, cooperation and the sharing of intelligence between EU and Libyan SAR authorities work to effectively “pull back”⁸⁸ migrants to Libya from international waters, including from the Maltese SAR zone.⁸⁹ For example, the European Border and Coast Guard Agency (FRONTEX) maintains surveillance capability in the central Mediterranean under the Multipurpose Aerial Surveillance (MAS) framework, which uses surveillance airplanes and drones to directly stream video and other data to national authorities, allowing for real-time monitoring at and beyond the borders of the EU, including for the early detection of migrant boats departing from the Libyan coast, and to identify and track vessels and other craft being used for, or suspected of being used for, smuggling or facilitating irregular migration or cross-border crime.⁹⁰ The MAS system includes four privately chartered maritime patrol aircraft who either fly pre-determined search patterns or respond to real-time intelligence on boats from a range of sources at sea, including both civilian and military assets.⁹¹ FRONTEX’s role in SAR operations includes providing technical and operational assistance in the support of search and rescue operations for persons in distress at sea.⁹² However, in sharing information and operational assistance with non-EU countries such as Libya, civil society and humanitarian SAR organisations have expressed concern at the lack of safeguards to ensure that such information is only shared upon the condition that migrants will be disembarked in a port of safety, and upon an individual assessment which safeguards the principle of *non-refoulement*.

Multiple migrants interviewed by OHCHR provided information indicating that their interception and return to Libya was facilitated by the deployment of European aerial assets over international waters within the Libyan and Maltese SAR zones. For example, a man from Cote d’Ivoire reported that his boat, which carried around 80 migrants, was first spotted by a European aerial asset, and that soon after the LCG arrived, taunting them “There is no Europe for you today.”⁹³ A Sudanese man similarly claimed that their boat was first spotted by a helicopter with a Spanish flag, leading to their interception by the LCG and return to Libya, where he and the others were taken to a Libyan detention centre.⁹⁴

OHCHR also received information regarding alleged pull backs to Libya involving private or commercial vessels. For example, in one incident recounted by a Somali woman, a boat of migrants was rescued by a Philippine tanker approximately 44 nautical miles from Malta. She reported that the ship captain radioed the Italian Maritime Rescue Coordination Centre (MRCC) to seek directions on disembarkation and reassured the migrants that they would be disembarked in a place of safety. Several hours later she realized they were being returned to al-Khoms, Libya. The migrants on board the tanker began crying and begging the crew not to return them to Libya. When they finally disembarked in Libya, the woman recounted that the LCG officials were laughing and mocked them, saying: “Welcome to Malta!” After being disembarked, the woman recounted that many women and girls disappeared, and she later heard that they were sold to traffickers.⁹⁵

⁸⁶ Note on file with OHCHR, Marc Tilley Report Case 4.

⁸⁷ The Guardian, ‘We give you 30 minutes’: Malta turns migrant boat away with directions to Italy, 20 May 2020, available at: <https://www.theguardian.com/global-development/2020/may/20/we-give-you-30-minutes-malta-turns-migrant-boat-away-with-directions-to-italy>.

⁸⁸ “Pullback” operations are designed to physically prevent migrants from leaving the territory of their State of origin or a transit State (retaining State), or to forcibly return them to that territory, before they can reach the jurisdiction of their destination State. See, UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50, 26 February 2018, para. 56.

⁸⁹ See also, Report of the Secretary-General, S/2020/275, *Implementation of resolution 2491 (2019)*, 6 April 2020, par. 41, available at: <https://undocs.org/S/2020/275>.

⁹⁰ FRONTEX, *Multipurpose aerial surveillance*, 2018, available at: <https://op.europa.eu/en/publication-detail/-/publication/b96286e0-1aa8-11e8-ac73-01aa75ed71a1>.

⁹¹ See, e.g., Monroy, Mathias, *Frontex aircraft: Below the radar against international law*, 11 June, 2020, available at: <https://digit.site36.net/2020/06/11/frontex-aircraft-blind-flight-against-international-law/>.

⁹² Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, para. 11, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R1624&from=EN>.

⁹³ OHCHR interview.

⁹⁴ OHCHR interview.

⁹⁵ OHCHR interview.

THE ROLE OF PRIVATE AND COMMERCIAL VESSELS

There has been a significant decline in rescues by private merchant and commercial vessels in the central Mediterranean since 2018⁹⁶ and concerns expressed by the shipping industry that if shipmasters engage in the rescue and disembarkation of migrants in a place of safety, they could be subject to legal action by coastal States.⁹⁷ Meanwhile, human rights experts and civil society organisations have expressed concern that States are using private and commercial vessels to conduct “privatised pushbacks” to Libya in an effort to avoid international law obligations.⁹⁸

Several migrants interviewed by OHCHR reported being sighted by private merchant or commercial vessels within international waters who failed to render assistance. On several occasions, migrants reported that the vessels came close enough to verify their coordinates, direction of travel, and the general situation on board the boat, but did not initiate actions to rescue them or render immediate assistance. Following the failure of these commercial vessels to render assistance, some of the migrants interviewed by OHCHR reported later being intercepted by the LCG and returned to Libya, where they claimed to have suffered arbitrary detention, torture and other human rights violations.

On at least one occasion, in March 2019, a commercial oil tanker (El Hiblu 1) on its way from Istanbul to Tripoli, and reportedly acting upon the instructions of an operation SOPHIA surveillance aircraft, was called upon to render assistance to a boat of 108 migrants in distress in international waters and directed to return the migrants to Tripoli.⁹⁹ This resulted in a protest by migrants on board the tanker, with some threatening to jump overboard rather than be returned. The migrants were eventually disembarked in Malta, where three teenage migrants, including two children, were arrested by Maltese authorities and charged with terrorism-related criminal offenses.¹⁰⁰

Other instances of interceptions by the LCG within the Maltese SAR zone have previously been noted by EU parliamentarians and NGOs.¹⁰¹ For example, in August 2020, a humanitarian NGO claimed to have witnessed two LCG boats intercepting approximately 100 migrants from the Maltese SAR zone¹⁰² and several others have raised concern that current EU-Libya collaboration in the field of migration is leading to mass interceptions and pullbacks to Libya.¹⁰³ While Malta’s SAR zone is part of the high seas and, as such, Malta does not exercise territorial jurisdiction or sovereignty over it, Malta is responsible for coordinating all SAR interventions within its SAR zone.

⁹⁶ Cusumano and Villa, *Over troubled waters: maritime rescue operations in the Central Mediterranean Route*, p. 203, available at: <https://publications.iom.int/system/files/pdf/ch16-over-troubled-waters.pdf>.

⁹⁷ Press Release, *The shipping industry and EUNAVFOR MED operation Sophia met to improve mutual understanding and cooperation in the Central Mediterranean Sea*, 28 June 2019, available at: <https://www.operationsophia.eu/the-shipping-industry-and-eunavfor-med-operation-sophia-met-to-improve-mutual-understanding-and-cooperation-in-the-central-mediterranean-sea/>.

⁹⁸ See, e.g., UN Special Rapporteur on the human rights of migrants, *Call for inputs for the Special Rapporteur’s report on pushback practices and their impact on the human rights of migrants*, available at: <https://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/Pushback-practices.aspx>; Amnesty International, *Malta: Waves of Impunity. Malta’s Human Rights violations and Europe’s Responsibilities in the Central Mediterranean*, 7 September 2020, available at: <https://www.amnesty.org/en/documents/eur33/2967/2020/en/>; New York Times, *Privatized Pushbacks: How Merchant Ships Guard Europe*, 20 March 2020, available at: <https://www.nytimes.com/2020/03/20/world/europe/mediterranean-libya-migrants-europe.html>.

⁹⁹ For a detailed account of this incident, see The Atavist Magazine, no. 95, *The Rescue*, September 2019, available at: <https://magazine.atavist.com/the-rescue-mediterranean-migrants-malta-europe-crisis>.

¹⁰⁰ OHCHR, *Press briefing note on Malta*, 7 May 2019, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24569&LangID=E>; See also, Amnesty International, *Malta: the El Hiblu 1 case – three teenagers in the dock for daring to oppose their return to suffering in Libya*, 23 October 2019, available at: <https://www.amnesty.org/download/Documents/EUR3312702019ENGLISH.PDF>.

¹⁰¹ See, e.g. European Parliament, Press release, *The situation in Libya and on the migration route to Europe*, 24 April 2020, available at: <https://www.europarl.europa.eu/news/en/press-room/20200425IPR77901/the-situation-in-libya-and-on-the-migration-route-to-europe>.

¹⁰² Times of Malta, *NGOs claim Libyan coast guard is returning migrants from Maltese SAR waters*, 15 August 2020, available at: <https://timesofmalta.com/articles/view/ngos-claim-libyan-coast-guard-is-returning-migrants-from-maltese-sar.812133>.

¹⁰³ See, Alarm Phone, Borderline Europe, Mediterranean – Saving Humans, and Sea-Watch, *Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean*, available at: <https://eu-libya.info/>.

These coordinated actions are further substantiated and facilitated by Memoranda of Understanding (MoUs) between Libya's Government of National Accord and European Member States that currently fail to include sufficient human rights safeguards and assurances that migrants rescued at sea will not be returned to Libya. In February 2020, despite the opposition of several UN Human Rights experts¹⁰⁴ and the Commissioner for Human Rights of the Council of Europe,¹⁰⁵ and the fact that the agreement had previously been judged not conform to the Italian Constitution and to international law,¹⁰⁶ a 2017 MoU between Italy and Libya was renewed.¹⁰⁷ Since then, the two sides have been negotiating an amended version, whereby Italy—while continuing to financially support the LCG, together with capacity-building, training courses and equipment for SAR activities, “for the prevention and fight against irregular immigration”—has indicated an intention to improve compliance with international human rights law and standards, and to facilitate a larger role of relevant international organizations.¹⁰⁸ In May 2020, the Maltese Prime Minister travelled to Libya to establish a similar three-year agreement, which involves the setting up of coordination centres in Tripoli and Valletta to support continued “operations against illegal migration” in the central Mediterranean.¹⁰⁹

When migrants are pushed back to Libya, upon disembarkation they are exposed to a range of serious human rights violations and abuses. Migrants interviewed by OHCHR reported ongoing and repeated instances of arbitrary detention, torture and ill-treatment, trafficking, sexual violence, forced labour, lack of health care and other human rights violations and abuses, which confirm the High Commissioner's position that Libya cannot be considered a safe place for migrants to be returned or disembarked under international human rights and international maritime law.

SURVIVOR VOICES: “THERE IS NO EUROPE FOR YOU TODAY”

A man from Cote d'Ivoire reported that his boat, which carried some 80 migrants was first spotted by European helicopters, and that soon after the LCG arrived, taunting them “There is no Europe for you today.” (OHCHR interview)

Two men that travelled in the same boat reported that after four days at sea, and after they had run out of food and water, an AFM vessel (PR51) arrived and gave them a GPS while stating that Malta is in strict lockdown because of COVID-19, and that they should continue to Lampedusa instead. They recounted spending an additional 12 hours in distress at sea before a second AFM boat approached them and blocked their passage by maneuvering rapidly and creating waves to deter them from reaching Malta. They explained how the Maltese authorities told them that they have three options: return to Libya, continue to Lampedusa or continue to Malta and be arrested upon arrival. (OHCHR interview)

A child migrant recalled being met at sea by the AFM, who told them “Malta does not want migrants (...) You should continue until Lampedusa.” The child recounted how people in the rubber boat, including women and young children, were exhausted and refused to continue onward, insisting to be rescued. (OHCHR interview)

¹⁰⁴ See, AL ITA 4/2017; CAT, Concluding observations on the combined fifth and sixth periodic reports of Italy CAT/C/ITA/CO/5-6, 18 December 2017.

¹⁰⁵ Council of Europe, Commissioner for Human Rights, *Commissioner urges Italy to suspend co-operation activities with Libyan Coast Guard and introduce human rights safeguards in future migration co-operation*, 21 February 2020, available at: <https://www.coe.int/en/web/commissioner/-/commissioner-urges-italy-to-suspend-co-operation-activities-with-libyan-coast-guard-and-introduce-human-rights-safeguards-in-future-migration-co-opera>.

¹⁰⁶ See, <https://archiviodpc.dirittopenaleuomo.org/upload/4095-sentenza-gip-trapani-con-omissis.pdf>.

¹⁰⁷ The 2017 MoU is available at: https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

¹⁰⁸ Information received from the Italian Ministry of Foreign Affairs and International Cooperation; See also, Alessandra Generale, *When migrants do not arrive in Europe: The Memorandum of Understanding*, 4 March 2020, available at: <https://www.eu-logos.org/2020/03/04/when-migrants-do-not-arrive-in-europe-the-memorandum-of-understanding/>.

¹⁰⁹ Available at: <https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf>.

RECOMMENDATIONS

General recommendations:

- Enact a moratorium on all interceptions and returns to Libya. In the context of inter-State cooperation and coordination on SAR, ensure that no material support or assistance to carry out SAR operations, including the provision or deployment of assets, the provision of intelligence, or cooperation in SAR operations involving private vessels or the SAR assets of other States, contributes to the designation of Libya as the nearest port of safety or forcibly returning migrants to Libya.
- Ensure that relevant judicial and administrative authorities are made aware of and implement legal obligations to ensure that no person, regardless of their status, is returned to a place where there are substantial grounds to believe that they would be at risk of being subject to torture, ill-treatment or other irreparable harm.
- Ensure that no arbitrary or collective expulsions occur, including push-backs at sea, in any area over which the State exercises jurisdiction or effective control, including areas outside the territory of the expelling State, border areas, and on the high seas.
- Refrain from facilitating or participating in “pullback” operations conducted by other States or non-State actors in violation of the right of migrants to seek protection.
- Strengthen or establish official mechanisms and procedures to receive, investigate and monitor allegations of *refoulement* and collective expulsions.

To the Libyan authorities:

- Refrain from intercepting and returning migrants to Libya from international waters.
- Uphold the human right to leave any country, including one’s own.

To the European Union and its Member States:

- Ensure that all agreements or measures of cooperation on migration governance with Libya are consistent with Member States’ obligations under international law, including international human rights law.
- Ensure that all SAR coordination and cooperation with the Libyan authorities is conditioned upon assurances that migrants rescued or intercepted at sea will not be disembarked in Libya and will be designated a port of safety.
- Refrain from pushing back migrants at international borders, including by directing migrants intercepted at sea to return to Libya or to continue travelling to other EU Member States.

To United Nations agencies and other international actors:

- Shipmasters of private commercial and humanitarian SAR organisations should refrain from returning any rescued migrants to Libya and their flag States should ensure that rescued migrants are promptly designated a port of safety.

D. TARGETING OF HUMANITARIAN ORGANISATIONS AND HUMAN RIGHTS DEFENDERS

LEGAL FRAMEWORK

The UN Declaration on Human Rights Defenders acknowledges the responsibility of States to ensure the protection of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of their legitimate exercise of the rights referred to the Declaration.¹¹⁰

The UN Principles and Guidelines on the human rights protection of migrants in vulnerable situations state that States should ensure that appropriate laws and procedures are in place to enable human rights and humanitarian actors to protect and assist migrants, and provide a safe, accessible and enabling environment for individuals and organizations that work to promote or protect the human rights of migrants.¹¹¹ Organizations and individuals who rescue or provide assistance to migrants should not be criminalized or otherwise punished for doing so.¹¹²

Acts prohibiting or otherwise impeding humanitarian SAR activities may violate States' obligation to respect the right to life, and deaths linked to such acts may constitute an arbitrary deprivation of life.¹¹³

The High Commissioner for Human Rights has previously expressed her concern about the “lethal disregard for desperate people” borne out by the actions of several European countries to criminalise, impede or halt the work of humanitarian SAR organisations, and has noted the deadly consequences such actions have for migrants crossing the central Mediterranean Sea.¹¹⁴ The High Commissioner has also saluted the organisations and human rights activists who continue to work to defend the rights of migrants in these difficult circumstances and has called for restrictions on the work of these individuals and organisations to be lifted immediately.¹¹⁵ UN Human Rights experts have repeatedly deplored the prevention or obstruction of humanitarian SAR efforts, including through impounding of vessels and criminalisation of SAR providers and other defenders of the rights of migrants.¹¹⁶

Yet, during the reporting period humanitarian SAR vessels and aircraft operating in the central Mediterranean continue to be prevented from monitoring, searching for, assisting and rescuing migrants in distress. At various times during the reporting period, this led to periods in which no humanitarian SAR NGOs were present at sea in the central Mediterranean, leading to tragic and preventable loss of life. According to the EU Fundamental Rights Agency (FRA), since 2018, national authorities in EU Member States have initiated some 50 administrative and criminal proceedings¹¹⁷

¹¹⁰ Art 12.2.

¹¹¹ Principles 1.2, and 18.1.

¹¹² Principles 4.7, 18.1, 18.2 and 18.6.

¹¹³ Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, A/73/314, Saving lives is not a crime, 7 August 2018, available at: <https://undocs.org/A/73/314>.

¹¹⁴ UN High Commissioner for Human Rights Michelle Bachelet, *Global update at the 42nd session of the Human Rights Council*, 9 September 2019, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24956&LangID=E>.

¹¹⁵ Ibid. See also, OHCHR, *Press briefing note on Migrant rescues in the Mediterranean*, 8 May 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25875>.

¹¹⁶ See, e.g., AL MLT 1/2020; AL ITA 5/2020; JAL ITA 6/2019; JAL ITA 2/2018; JAL ITA 4/2019.

¹¹⁷ Compared to the previous updates, FRA noted an increasingly common use of measures of an administrative rather than criminal nature based on the laws of navigation and safety at sea, and a decrease of measures against individuals (crew members or NGO staff). Out of a total of nine cases, only two consisted in the opening of judicial investigations against the captain and the ship-owner of 'Mare Jonio' following disembarkation of rescued migrants for refusing to obey to orders of the competent authorities. FRA, *December 2020 update - NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them*, 18 December 2020, available at: <https://fra.europa.eu/en/publication/2020/december-2020-update-ngo-ships-involved-search-and-rescue-mediterranean-and-legal>.

against crew members or vessels, including the impounding or seizure of humanitarian SAR vessels. As of 15 December 2020, out of a total of 15 humanitarian SAR assets that routinely patrol the central Mediterranean in an effort to save lives at sea, it is reported that only five were operating and only two of these were actively performing SAR operations, as the remaining assets were either impounded or otherwise being prevented from undertaking their activities.¹¹⁸

Authorities often justify these measures against SAR activities by questioning the legality of their work and funding¹¹⁹ and claiming that SAR activities may supposedly act as a “pull factor” for irregular migration, a claim that is not supported by the statistical evidence.¹²⁰ Organizations have also been accused of allegedly facilitating and abetting “illegal migration” and of colluding with smugglers and traffickers. UN Human Rights experts have expressed concern about continuing “campaigns against civil society organisations engaged in search and rescue operations in the Mediterranean Sea, as well as the criminalisation of the work of migrant rights defenders”¹²¹ and have alleged that authorities use these measures in part to prevent the documentation and reporting of human rights violations committed by European States in the central Mediterranean.¹²²

Whereas previously, measures targeting humanitarian SAR organisations and activities were largely based on alleged violations of criminal law, including the seizure of vessels on charges of facilitating migrant smuggling or trafficking in persons, in recent years States have increasingly used administrative regulations or the adoption of public health or other emergency legislation to impede or delay SAR operations.¹²³ UN Human Rights experts have noted that in some instances the detainment of SAR vessels has relied on a “skewed” interpretation of maritime law and safety regulations, resulting in the further reduction of the already limited SAR capacity in the central Mediterranean and directly endangering the lives of migrants.¹²⁴ The European Commission seeks to address this by proposing guidance in the Pact on Migration and Asylum clarifying that EU law should not be interpreted in a way allowing the humanitarian activities mandated by law, including SAR activities carried out by non-State actors while complying with the relevant legal framework, to be criminalised.¹²⁵ Humanitarian SAR organizations have also expressed concerns to OHCHR about the lack of transparency and information when these measures are adopted, in some cases only being informed of the actions being taken against their organizations by the media.¹²⁶

Restrictive measures imposed in response to the COVID-19 outbreak have negatively impacted humanitarian SAR operations, at times leaving no active humanitarian NGO vessels involved in SAR

¹¹⁸ Ibid.

¹¹⁹ Amnesty International, *Between the devil and the deep blue sea – Europe fails refugees and migrants in the central Mediterranean*, 2018, available at: <https://www.amnesty.org/download/Documents/EUR3089062018ENGLISH.pdf>.

¹²⁰ See, e.g. <https://blamingtherescuers.org/>; See also, E. Cusumano and M. Villa, *Sea Rescue NGOs: a Pull Factor of Irregular Migration?* European University Institute, Policy Brief Issue 2019/22, November 2019.

¹²¹ See, *UN Experts, Legal changes and climate of hatred threaten migrants’ rights in Italy*, 18 November 2018, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23908>.

¹²² AL ITA 7/2020.

¹²³ For instance, on 14 June 2019, Italy passed an emergency Decree Law 53/2019, adopted into Law 77/2019, imposing fines on NGO vessels for every person rescued at sea and transferred to Italian territory, which range from €10 to €50,000, as well as threatening them with having their licenses revoked or suspended. On 18 December 2020, a new Decree Law 130/2020, was adopted into law. However, the new Decree Law does not fundamentally change the previous financial penalty system, which is still possible but now requires a court judgement. Additionally, the new Decree Law only allows NGO vessels to enter Italian territorial waters if they have complied with the obligation to communicate and comply with any competent SAR authorities even when outside the Italian SAR zone. This implies that NGO vessels could be refused entry to Italy if, for example, they fail to obey the designation of Libya as a safe port for disembarkation while operating in the Libyan or Maltese SAR zones.

¹²⁴ AL ITA 7/2020.

¹²⁵ Available at [https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52020XC1001\(01\)](https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52020XC1001(01)).

¹²⁶ Note on file with OHCHR, Meeting with SAR NGOS, 16 November 2020.

in the central Mediterranean Sea.¹²⁷ Fear of COVID-19 has also exacerbated existing hostile rhetoric and xenophobia, racism and stigmatization against migrants and the humanitarian NGOs who seek to rescue them, due to harmful stereotypes and narratives associating migrants with the spread of the virus.¹²⁸

The measures adopted to undermine SAR organisations and migrant human rights defenders are situated within a broader trend of erosion and shrinking of civic space. According to the Commissioner for Human Rights of the Council of Europe, the rise of xenophobic and anti-migrant discourse in some countries has negatively impacted the work of human rights defenders, who face increasing challenges to conduct their work and who are being specifically targeted for assisting migrants and for protecting and promoting their rights.¹²⁹ OHCHR and UN Human Rights experts have received reports of attacks on NGO premises and vehicles, hate speech and threats to human rights defenders, including death threats and threats of sexual violence, as well as threats against authorities who have spoken out in defense of the human rights of migrants.¹³⁰

In addition, UN entities, SAR NGOs and other migrant human rights defenders have reported to OHCHR that they are frequently denied access to immigration detention centres or other locations where disembarked migrants are received by coastal States, and that this access has been further restricted in light of measures adopted to tackle the COVID-19 pandemic, limiting their ability to monitor and report on the human rights of migrants.¹³¹

Measures to prevent or obstruct the work of humanitarian SAR organisations and other migrant human rights defenders, together with political and media rhetoric linking SAR organisations with criminality, have contributed to undermining the humanitarian nature of SAR and to creating a hostile environment of xenophobia, discrimination and exclusion against migrants and those who advocate on their behalf.¹³² Such efforts not only endanger the lives of migrants at sea and undermine human rights generally, but they can also have “chilling effect” on civil society as a whole and undermine the right to freedom of association.¹³³

¹²⁷ See, OHCHR, *Press briefing note on Migrant rescues in the Mediterranean*, 8 May 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25875&LangID=E>; See also FRA, *June 2020 update - NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them*, 19 June 2020, available at: <https://fra.europa.eu/en/publication/2020/2020-update-ngos-sar-activities>.

¹²⁸ Secretary-General, *Policy brief on COVID-19 and People on the Move*, page 3, June 2020, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/sg_policy_brief_on_people_on_the_move.pdf.

¹²⁹ See, Expert Council on NGO Law, *Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States*, December 2019, CONF/EXP(2019)1.

¹³⁰ See e.g., OHCHR, *Report of mission to Italy on racial discrimination, with a focus on incitement to racial hatred and discrimination*, 28 January – 1 February 2019, available at: <https://www.ohchr.org/Documents/Countries/IT/ItalyMissionReport.pdf>; UN experts, *Italy: UN experts condemn criminalisation of migrant rescues and threats to the independence of judiciary*, 18 July 2019, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24833&LangID=E%20I>; AL ITA 6/2019; and AL ITA 5/2020.

¹³¹ Both Italy and Malta indicated that international organisations such as UNHCR and IOM, as well as non-governmental organisations, have access to detention centres for migrants or other places where disembarked migrants are received, provided that these organisations comply with relevant procedures. In Italy, for example, this includes the National Preventive Mechanism (NPM) in accordance with the Optional Protocol to the Convention Against Torture (OPCAT) and organisations that have entered into specific agreements with the Department for Civil Liberties and Immigration\Ministry of Interior or individual Prefectures for the performance of activities and assistance to migrants.

¹³² AL ITA 5/2020.

¹³³ UN experts, *Italy: UN experts condemn criminalisation of migrant rescues and threats to the independence of judiciary*, 18 July 2019, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24833&LangID=E%20I>.

RECOMMENDATIONS

General recommendations:

- Provide, in law and in practice, a safe, accessible and enabling environment for individuals and organizations that work to promote and protect the human rights of migrants.
- Publicly recognize the important role of human rights defenders and the legitimacy of the work carried out by organizations and individuals who rescue or provide assistance to migrants. Condemn publicly all instances of violence, discrimination, intimidation or reprisals against them and underline that such practices can never be justified.
- Take all necessary measures to ensure that humanitarian organizations and other migrant human rights defenders are protected from violence, retaliation, threats, discrimination, and other kinds of pressure or arbitrary action by State or non-State actors as a consequence of their work. Ensure that they are able to communicate to non-governmental or intergovernmental organisations, and international and regional human rights bodies, without fear of intimidation or reprisal.
- Investigate and prosecute any attacks by State or non-State actors against humanitarian organizations and other migrant human rights defenders or against their families, associates or legal representatives.
- Ensure that national human rights institutions, ombuds offices, national preventive mechanisms and other relevant independent investigative and monitoring bodies are empowered to visit all locations, including SAR vessels, disembarkation points and places of detention, to interview migrants as well as officials privately, and obtain promptly all the information they need. Permit civil society actors to participate in monitoring.
- In the context of the COVID-19 pandemic, adopt protocols and procedures to ensure that access to migrants and locations for the purpose of monitoring is not restricted, ensuring compatibility with public health priorities and protecting migrants and monitors' right to health.
- Review and suspend any administrative measure, legislation and other practice aimed at or *de facto* resulting in preventing or obstructing humanitarian SAR vessels from supporting migrants in distress.
- Ensure that the organizations and individuals who rescue or provide assistance to migrants are not criminalized or otherwise punished for doing so.

To the European Union and its Member States:

- Revise and modify EU legislation to bring it in line with UN standards under the Protocol against the Smuggling of Migrants, in particular by introducing a 'financial or other material benefit' requirement for classifying 'migrant smuggling' as a crime and an obligatory provision that expressly exempts humanitarian assistance by civil society organisations or individuals from criminalisation.
- Adopt the guidance proposed as part of the EU Pact on Migration and Asylum clarifying that EU law should not be interpreted in any way to allow criminalization of humanitarian operations carried out by non-state actors to save lives at sea.

E. DELAYS IN SAFE DISEMBARKATION AND INADEQUATE RECEPTION CONDITIONS

LEGAL FRAMEWORK

Delays in disembarkation or the failure to disembark migrants rescued at sea in a place of safety, can affect a range of human rights, including the rights to life, right to liberty and security of person, to an adequate standard of health or the right to an adequate standard of living, which comprises the rights to food, safe drinking water and sanitation and housing, amongst others.¹³⁴

The International Convention on Maritime Search and Rescue (SAR Convention) obliges the State Party responsible for the SAR region in which a rescue is undertaken “to exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety (...) as soon as reasonably practicable.”¹³⁵

According to the Maritime Safety Committee, a “place of safety” is a location where rescue operations are considered to terminate and “where the survivors’ safety of life is no longer threatened (...) where their basic human needs (such as food, shelter and medical needs) can be met (...) and from which transportation arrangements can be made for the survivors’ next or final destination.”¹³⁶

Disputes relating to place of disembarkation or so-called “non-SAR considerations”, such as those related to the right to seek asylum or other protection under international human rights law, for instance, should be resolved after disembarkation, so as not to prejudice the provision of immediate assistance.¹³⁷

OHCHR continues to receive reports that rescued migrants are being stranded for days, or even weeks, aboard vessels that are unsuited for their long-term accommodation. Delays between the rescue of migrants and their disembarkation in a place of safety are most often the result of protracted political debates over the lack of solidarity and responsibility for receiving migrants in Europe or diplomatic negotiations seeking to make the screening and relocation of migrants to other EU Member States a prerequisite for their disembarkation. Migrants stranded on board the vessels that rescue them often suffer from overcrowding, inadequate food, shelter and medical care and increasing uncertainty and anxiety about their fate. These conditions can exacerbate pre-existing traumas and ultimately harm migrants’ mental and physical health. Deteriorating conditions on board rescue vessels have at times led to the situation becoming unsustainable, with migrants jumping into the water in desperate attempts to try to get to shore.¹³⁸ As OHCHR has noted, these delays in disembarkation put migrants at further risk, in particular children, pregnant women and other migrants in vulnerable situations.¹³⁹

There have been several examples of delayed disembarkation involving rescues undertaken by humanitarian NGOs and merchant vessels. In one instance, on 25 June 2020, the humanitarian SAR vessel *Ocean Viking* rescued 118 migrants within the Italian and Maltese SAR regions, and later conducted additional rescues totalling 180 persons. Following repeated place of safety requests to both

¹³⁴ ICCPR, Art. 6.1, 9.1; ICESCR, Art. 11, 12; CRC, Art. 6.1, 24, 27; ICMW, Art. 9, 16, 28.

¹³⁵ SAR Convention, chapter 3 § 3.1.9, emphasis added.

¹³⁶ Resolution MSC.167 (78). See also, International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual, Volume III.

¹³⁷ See International Maritime Organization (IMO), Resolution MSC.167 (78), Guidelines on the Treatment of Persons Rescued at Sea, 2004.

¹³⁸ OHCHR interview.

¹³⁹ OHCHR, *Press briefing note on Migrant rescues in the Mediterranean*, 8 May 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25875>.

the Italian and Maltese authorities, these migrants remained stranded on board the *Ocean Viking* for over one week before they were finally transferred by the Italian authorities to a private quarantine ship on 7 July and after multiple reports of mental distress and suicidal ideation, including attempts to jump overboard.¹⁴⁰ In another instance in September 2020, the chemical tanker *Maersk Etienne*, after being requested by the Malta MRCC to assist a boat in distress in international waters, was refused permission to disembark some 27 migrants for a period of 37 days.¹⁴¹ Reports indicated that the vessel was not equipped to accommodate passengers in need of medical assistance and that three migrants jumped overboard, risking serious injuries, before being rescued by crew members.¹⁴²

Challenges with delayed disembarkation have become more acute during the COVID-19 pandemic. In April 2020, in response to COVID-19, both Italy and Malta temporarily closed ports to all vessels and declared their ports ‘unsafe’ for disembarkation, which led UN Human Rights experts to address allegations letters to both countries calling on States to effectively co-operate to identify a place of safety where survivors can be disembarked, while taking all necessary measures to protect the health of all involved.¹⁴³ During the pandemic, both Italy and Malta further resorted to quarantining migrants offshore on ships before allowing them to disembark. While relevant authorities have clarified that these measures have been taken in response to the public health emergency and that measures were taken to protect the health of all persons, concerns have been raised over the living conditions on board these vessels.¹⁴⁴ Concerns were also raised over the length of mandatory quarantine at sea, as well as the lack of remedies against this measure and its indefinite duration not being compliant with the right to liberty of those on board.¹⁴⁵

Migrants interviewed by OHCHR in Malta detailed the difficult conditions on board these vessels. A man from Sierra Leone explained how he spent one month aboard one of the boats designated as quarantine facilities for migrants rescued at sea, and described the conditions: “Water was coming inside the boat. We had no toothbrush, no shampoo. We were sleeping on the floor.”¹⁴⁶ Others alleged that the only medicine made available to them on board was paracetamol.

In Italy, the EU Fundamental Rights Agency (FRA) noted that that some 1,195 migrants were kept on five quarantine vessels as of 27 November 2020, drawing concern from NGOs, legal experts, academics and the media over instances of self-harm by people held onboard, including attempted suicide by swallowing razor blades and one migrant who drowned after jumping overboard in a desperate attempt

¹⁴⁰ See, InfoMigrants, *Ocean Viking: Italy to transfer migrants to quarantine ship after suicide attempts*, 6 July 2020, available at: <https://www.infomigrants.net/en/post/25803/ocean-viking-italy-to-transfer-migrants-to-quarantine-ship-after-suicide-attempts>.

¹⁴¹ Maersk Tankers, *Safe disembarkation of the 27 rescued persons from Maersk Etienne*, 13 September 2020, available at: <https://maersktankers.com/newsroom/caught-at-sea-after-rescuing-27-people>. The facts are currently under investigation by the Italian judicial authorities.

¹⁴² See, Centre Suisse pour la Défense des droits des Migrants (CSDM) et al., *Urgent appeal to the Special Rapporteur on Torture and the Special Rapporteur on the Human Rights of Migrants*, 4 September 2020, available at: <https://centre-csdm.org/csdm-alarm-phone-sea-watch-and-mediterranea-to-request-urgent-intervention-from-un-special-rapporteurs-for-27-migrants-on-board-maersk-etienne/> and <https://centre-csdm.org/urgent-update-maersk-confirms-that-3-migrants-jumped-over-board-on-the-etienne-malta-still-refuses-safe-port/>.

¹⁴³ See, AL/ITA 3/2020 and AL MLT 1/2020; See also, COE Commissioner for Human Rights, Statement, *States should ensure rescue at sea and allow safe disembarkation during the COVID-19 crisis*, 16 April 2020, available at: <https://go.coe.int/6Bzqo>

¹⁴⁴ For instance, in June 2020, the Commissioner for Human Rights of the Council of Europe called for immediate action on the situation outside Malta’s territorial water, where, more than 400 persons were kept on private ships in an unsustainable manner, available at: <https://www.coe.int/en/web/commissioner/-/immediate-action-needed-to-disembark-migrants-held-on-ships-off-malta-s-coast>; See also, Esposito, F., Caja, E. and Mattiello, G. (2020), ‘No one is looking at us anymore’: *Migrant Detention and Covid-19 in Italy*, available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/11/no-one-looking-u>; and Italian Coalition for Civil Liberties and Rights, *Migrant detention in Covid-19 time*, 4 August 2020, available at: <https://cild.eu/en/2020/08/04/migrant-detention-in-covid-19-times/>.

¹⁴⁵ Council of Europe Commissioner for Human Rights, *Immediate action needed to disembark migrants held on ships off Malta’s coast*, 4 June 2020, available at: <https://www.coe.int/en/web/commissioner/-/immediate-action-needed-to-disembark-migrants-held-on-ships-off-malta-s-coast>.

¹⁴⁶ OHCHR interview.

to get to shore.¹⁴⁷ In September 2020, after a visit by Italy's National Preventive Mechanism to the ship "Rhapsody" where migrants were quarantined, the *Garante* assessed that the "overall respectful appearance of the visited accommodations and the professionalism of the front line staff have nothing in common with the previous provisional accommodation in overcrowded hotspots (...) and confirms the positive evaluation of the quarantine ship as an absolutely acceptable solution."¹⁴⁸

As stressed by the UN Secretary-General, solidarity and responsibility should guide the EU's efforts towards the establishment of a predictable agreement for disembarkation encompassing all European Union Member States.¹⁴⁹ The new Pact on Migration and Asylum, introduced by the European Commission in September 2020, stipulates that a more predictable solidarity mechanism for disembarkation is needed and presents a proposal for a solidarity mechanism following disembarkations after SAR operations.¹⁵⁰ Yet, many Maltese authorities, as well as civil society organizations and UN entities that spoke with OHCHR, indicated that a main challenge regarding the willingness of EU actors to strengthen their own maritime SAR operations is the continued lack of EU Member State solidarity in the disembarkation and further relocation of migrants arriving by sea, noting that coastal States are bearing a disproportionate amount of the pressure for providing protection and reception for disembarked migrants, and that further support from other EU member States was needed. Others noted that delays in disembarkation disproportionately involve rescues undertaken by humanitarian NGOs or other private and commercial vessels, rather than rescues involving States' own SAR maritime assets, raising particular concerns of the protection of civic space and the humanitarian character of SAR activities.

Upon disembarkation, migrants face human rights challenges related to inadequate conditions of reception, including the risk of mandatory, prolonged or otherwise arbitrary detention, failures to adequately identify, screen and assess migrants' human rights protection needs, including for children, victims of trafficking, survivors of torture, sexual violence and other trauma, LGBTI migrants, and other migrants in vulnerable situations, as well as obstacles to non-discriminatory access of migrants to immediate assistance such as physical and mental health care, adequate housing, food, water and sanitation.

Migrants interviewed by OHCHR, including unaccompanied children, reported being automatically placed in closed reception centres. Due to COVID-19 quarantine measures, some migrants reported being kept in Malta's initial reception centres for several months, often being held in close quarters with other migrants and experiencing a heightened risk of contracting COVID-19 due to their group confinement. A Nigerian man claimed he tested negative for COVID-19 upon disembarkation in Malta in April 2020, but later tested positive for COVID-19 after he was in close proximity to other migrants in an initial reception centre.¹⁵¹ After 16 days of quarantine he alleged he was returned to the initial reception centre over the objections of the doctors treating him. He noted that, other than the short period of time he spent in the hospital being treated for COVID-19, he had been deprived of liberty for the entire six months since he arrived to Malta, where he claimed he has had no access to a lawyer or the opportunity for a formal asylum hearing, but was told that his asylum claim was rejected.

¹⁴⁷ EU Fundamental Rights Agency, Migration: Key Fundamental Rights Concerns, 1 October - 31 December 2020, p. 16, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-migration-bulletin_en.pdf; see also, The New Humanitarian, Italy's use of ferries to quarantine migrants comes under fire, 9 November 2020, available at: <https://www.thenewhumanitarian.org/news-feature/2020/11/9/italy-migration-ferries-coronavirus-quarantine-health-asylum>.

¹⁴⁸ Press Release, The National Guarantor climbs aboard the quarantine ship "Rhapsody" at anchor in Palermo, 17 September 2020, available at: <https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/97a9719829fd2bbec8ccd943492a4cbe.pdf>.

¹⁴⁹ Report of the Secretary-General, S/2020/275, *Implementation of resolution 2491 (2019)*, 6 April 2020, par. 41, available at: <https://undocs.org/S/2020/275>.

¹⁵⁰ See European Commission, New Pact on Migration and Asylum, available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en.

¹⁵¹ OHCHR interview.

Following initial reception, many migrants also shared information regarding their continued and prolonged deprivation of liberty, as well as the poor conditions within Malta's immigration detention facilities, such as overcrowding and lack of proper sanitation and medical care, including for COVID-19 prevention.¹⁵² At the moment of the OHCHR visit to Malta, migrants in immigration detention reported having extremely limited access to information about their legal or asylum status, as well as access to the outside world, including lawyers, detention monitors or civil society organisations.¹⁵³ An Ethiopian man detailed shocking detention conditions in Malta, including migrants being forced to drink water out of the toilet due to a lack of clean drinking water; insufficient beds for all of the detained to sleep in, forcing migrants to take "shifts"; severe overcrowding to the point that migrants lacked sufficient space to walk or lay down; and extremely hot temperatures without access to air conditioning or fans.¹⁵⁴ "You can't survive like this" he said. "There are many children here—even very small boys—that have fainted from the heat." He claimed to have been detained in Malta for seven months without receiving any information about his rights or legal situation, and no visits from NGOs or the United Nations, until OHCHR's visit.

Others recounted allegations of use of force by some detention guards and security forces, including the use of pepper spray and physical violence to quash protests over detention conditions. One man recounted the response of security forces to a protest at the Safi Detention Centre that took place in September 2020: "The police came and shot robber bullets at people and beat us. People tried to escape, but they were chased by the police and beaten on the heads with batons. I still have a scar from where the police came into my room and beat me."¹⁵⁵

OHCHR also received information regarding multiple instances of depression, self-harm and attempted suicide within immigration detention centres. A Bangladeshi man, claiming to have spent eight consecutive months in detention upon his disembarkation in Malta, noted that there have been countless cases of attempted suicide and self-harm since he has been detained in Malta. He alleged that some detention centre guards have taunted migrant detainees saying "go ahead, kill yourselves."¹⁵⁶

SURVIVOR VOICES: "FROM HELL TO UNCERTAINTY..."

A Nigerian woman noted that her asylum application was rejected and recalled the desperation and depression many migrants feel: "I feel as if I have gone from hell [in Libya] to uncertainty (. . .) I thought my journey would come to an end and I would find a safe place in Europe." (OHCHR interview)

"It's all the same: suffering after suffering", explained a Sudanese man describing his journey from Sudan via Libya to Europe. (OHCHR interview)

A Somalian man told OHCHR: "You're in jail in Libya and when you come to Europe—prison again. Every night you're having rough dreams. I prayed and said: God allow me to die when I'm free, not in prison". (OHCHR interview)

¹⁵² See also, Council of Europe, Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 22 September 2020, 10 March 2021, available at: <https://rm.coe.int/1680a1b877>; OHCHR, *Guidance on COVID-19 and the human rights of migrants*, 7 April 2020, available at: https://www.ohchr.org/Documents/Issues/Migration/OHCHRGuidance_COVID19_Migrants.pdf.

¹⁵³ OHCHR, *Shocking Cycle of Violence for migrants departing Libya to seek safety in Europe*, 2 October 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26337>.

¹⁵⁴ OHCHR interview.

¹⁵⁵ OHCHR interview.

¹⁵⁶ OHCHR interview.

An unaccompanied child from Cote d'Ivoire explained: "It's not necessary to put people into prison. Somebody who just left the water is traumatized, then you imprison him for eight, nine months. This is not good." (OHCHR interview)

A woman from Togo shared her challenges surviving in Europe: "Many of us became sex workers, nobody will tell you this (...) I became a sex worker to have extra money to feed myself and my daughter. If I knew that, I never would have risked my life to come to Europe." (OHCHR interview)

A group of Bangladeshi men described their reception in Malta: "When they rescued us they gave us hope (...) but then they dumped us here" "Here we are still treated like criminals, only here everything is invisible." (OHCHR interview)

A man from Sierra Leone shared: "There's a lot of stress in this place. I suffer too much here. I cry every day. They're always telling you to wait...wait...but never any solutions. I don't want to lose my future, my family, my dreams, my ambition in Malta. You don't know what it's like. This place can even drive you mad." (OHCHR interview)

"In [Malta], we were all together; children, women and men. We had no privacy, it was extremely crowded . . . no proper hygiene. I had an infection because of rape and sexual abuses in Libya. I was in pain all the time and they kept me in detention with no proper health care. I was so depressed, it reminded me of Libyan prisons," said a woman from Cote d'Ivoire (OHCHR interview)

RECOMMENDATIONS

General recommendations:

- Prepare safe places for arrival and disembarkation that meet international human rights standards for reception and assistance. Arrival and disembarkation points should be staffed by trained personnel who are able to screen arrivals for situations of vulnerability and protection needs, and should provide inter alia adequate shelter, food, water and sanitation, and legal assistance in an age, gender and disability responsive manner. In line with OHCHR Guidance on COVID-19 and the human rights of migrants, take specific actions to protect the health of migrants in reception facilities, including adequate prevention, testing, treatment and vaccination.
- Establish operational guidelines and agreements with national protection bodies and other relevant actors that ensure timely and effective referral of migrants who need protection and assistance, especially those who need psychological support after rescue. Ensure provision of information about migrants' rights, including asylum procedures and other pathways of admission and stay and effective referral. Make sure that specialized support is provided as a priority to those in the most vulnerable situations. Respond specifically to the special needs of children who have been rescued.
- Measures implemented at international borders in the context of the COVID-19 pandemic, including health screening and quarantine at points of entry, must be limited and imposed only if no alternative protective measure can be taken by authorities to prevent or respond to the spread of infection; ensure non-discrimination and continued access to individual assessments, determination of the best interests of the child, and international protection; and should not imply mandatory or indefinite detention.

To the European Union and its Member States:

- Adopt a common and human-rights based arrangement for the timely disembarkation in a place of safety of all people rescued at sea, including migrants rescued within the Libyan SAR zone. This mechanism should be predictable, function rapidly, sustainable over the long-term, and reflect the international commitments and solidarity of all EU Member States.¹⁵⁷
- Refrain from the use of immigration detention for migrants disembarked after rescue at sea. Instead, expand the availability of human rights-based alternatives to detention.

¹⁵⁷ See, UN High Commissioner for Human Rights Michelle Bachelet, *Global update at the 42nd session of the Human Rights Council*, 9 September 2019, available at: <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24956&LangID=E>.



3

Conclusion

While some of the statistics, events, and allegations detailed in this report are shocking, this report is only the latest in an ever-growing body of research, reports, and statements highlighting serious human rights concerns arising from policies and practices that fail to prioritize the lives, safety and human rights of migrants in the central Mediterranean Sea.

The overarching messages of this body of research and reporting make clear that: Libya is not a safe place for the return or disembarkation of migrants rescued at sea; current SAR policies and practices in the central Mediterranean enable a range of violations and abuses against migrants rather than ending them; and all States in the region, as well as the EU Border and Coast Guard Agency, the EU Naval Force for the Mediterranean, the European Commission and other stakeholders, must urgently reform their SAR policies, practices, funding and cooperation in order to promote more principled and effective migration governance that prioritizes the protection of migrants at sea and is consistent with obligations under international law. As expressed in the voices of migrants throughout this report, OHCHR has heard harrowing testimonies of harm, which make it clear that too often SAR responses in the central Mediterranean Sea rob migrants of their lives, dignity and human rights. At the same time, OHCHR has heard heartening stories of hope and resilience, making clear that migrants are not victims, stripped of agency, but rather are rights holders that can and should be included in crafting more humane and effective policy solutions.

A more coordinated EU approach to SAR and the protection of migrants at sea was presented in the Pact on Migration and Asylum proposed by the European Commission in September 2020. This provides a positive starting point for more determined and effective SAR operations in line with the High Commissioner's call. However, greater efforts are urgently needed, including to strengthen SAR capacity in the central Mediterranean, to support the work of humanitarian NGOs, and to adopt a common and human rights-based arrangement for the timely disembarkation of all people rescued at sea, ensuring that every person rescued in the central Mediterranean is disembarked in a place of safety.

OHCHR acknowledges the commitment of Member States to strengthening the promotion and protection of the human rights of all migrants, regardless of their nationality or migration status, and in particular to ensuring the safety and protection of lives at sea. OHCHR stands ready to assist States and other stakeholders in implementing the recommendations of this report and other practical efforts to ensure the effective respect, protection and fulfilment of the human rights of all migrants.



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