



MALTA: WAVES OF IMPUNITY

MALTA'S HUMAN RIGHTS VIOLATIONS AND EUROPE'S RESPONSIBILITIES IN THE CENTRAL MEDITERRANEAN

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Cover photo: Migrants onboard the Sea-Watch 4 civil sea rescue ship cheer on sea off the coast of Sicily, Italy, on September 01, 2020, as they learn that they have permission to run into the port of Palermo, Sicily, the next day

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1. EXECUTIVE SUMMARY

In the first half of 2020, Maltese authorities were implicated in multiple failures to respect and protect the rights of refugees and migrants at sea. Under their coordination, people were pushed back to Libya, a country at war where refugees and migrants are systematically abused. Delays in attending to distress calls exposed people to the risk of drowning. People rescued at sea were denied disembarkation and were unlawfully detained for weeks on board private vessels meant for brief pleasure cruises. The Maltese government also signed an agreement with Libyan authorities, likely to make it even harder for refugees and migrants to flee from Libya and reach the Maltese search and rescue (SAR) region.

Although the number of people attempting the crossing of the central Mediterranean from Libya to Europe has plummeted in recent years, based on historical data and recent trends it can be expected that people will continue to flee the country on unseaworthy boats. If the Maltese authorities' unlawful conduct is left unchallenged, the already dire predicament of refugees and migrants fleeing across the central Mediterranean could become even worse.

Malta's unlawful practices are the by-product of European Union (EU)'s migration policies which have prioritized reducing arrivals at all costs, and of the EU member states' continuing failure to agree on a fair system to share responsibilities for arrivals. By progressively delegating to Libya control over migration flows in the central Mediterranean, the EU has shown that containing refugees and migrants in war-torn Libya mattered more than protecting their safety, and it has fuelled and facilitated violations and abuses on a vast scale. By failing to agree on a fair system to share responsibilities for people arriving in Europe or being rescued at sea, EU member states have left countries on the external border of the Union such as Malta and Italy feeling legitimately aggrieved at having to face new arrivals by themselves. States that accept the disembarkation of rescued refugees and migrants have the responsibility of meeting their protection needs, of addressing their irregular status and of ensuring they have access to their rights for as long as they remain within their jurisdiction. The EU Dublin Regulation's flawed design and implementation, allocating responsibility for asylum-seekers primarily to the EU state whose border they have first crossed, and the absence of a permanent or automatic mechanism of responsibility-sharing have resulted in states at the external borders of the Union having to bear most of the impact of people arriving on their shores. The lack of a robust mechanism to monitor human rights compliance of border practices, capable of triggering processes leading to accountability, has also contributed to rendering violations more likely and easier to hide, while making the collection of evidence very difficult.

Engaging in a race to the bottom with Italy to prevent arrivals, and given the lack of a cohesive approach among EU member states, in the first half of 2020 Malta has doubled-down on the same strategy of containment in Libya which the EU has been pursuing for over three years, through measures and policies which have contributed to grave human rights violations.

To prevent unnecessary loss of life and much suffering, the Maltese authorities must change course and those responsible for violations of human rights must be held accountable. However, EU policies must also change. European states close to the central Mediterranean must be ready to prioritize search and rescue activities and to offer a safe place to disembark people rescued at sea – even during the Covid-19 pandemic. Those more removed from it must be prepared to offer solidarity and support. European institutions must encourage such cooperation and responsibility sharing and firmly ensure respect for European and international laws and standards including by strengthening the mechanisms to prevent human rights violations in the context of external borders' surveillance.

This report describes violations by Maltese authorities for which they must be held accountable and how these violations are part and parcel of a wider regional strategy of containment of refugees and migrants in

Libya. It also describes the consequences of this strategy, and it recommends steps which must urgently be put in place by Malta, Italy and EU member states and institutions, to protect the lives of refugees and migrants in the central Mediterranean.

1.1 METHODOLOGY

This report covers events that took place in the first seven months of 2020, with some reference being made to older ones. Chapter 2, regarding Malta's violations of the human rights of refugees and migrants at sea, is based on desk-research carried out during the Covid-19 lockdown restrictions. Media reports, official statements, judicial and parliamentary documents and other information available from online sources were supplemented and verified through interviews with and documents provided by lawyers, local non-governmental organizations and international organizations. As part of researching the events described in this report, Amnesty International wrote twice to the Prime Minister of Malta, who replied with a letter dated 25 August 2020.

Chapter 3, regarding human rights violations against refugees and migrants in the context of Europe's continuing cooperation with Libya, is also based on desk-research carried out in the period under review, corroborated by information obtained from international and non-governmental organizations in Libya, as well as from Libyan authorities' and non-state actors' statements. This Chapter relies also on information emerging from testimonies gathered by Amnesty International researchers from refugees and migrants trapped in Libya, and which will be published as part of a forthcoming report specifically focusing on Libya. In addition, Amnesty International wrote to the Prime Minister of Italy with regard to Italian authorities' responsibilities for violations in the central Mediterranean. The Italian Ministry of Foreign Affairs replied with a letter dated 2 September 2020.

Chapter 4, regarding human rights violations arising during EU external borders' surveillance, is based on information gathered as part of the organization's documentation of violations in the central Mediterranean as well as from EU open sources such as parliamentary committee hearings, and from correspondence with the European Border and Coast Guard Agency (Frontex) and the European Commission.

The analysis provided in this report builds upon extensive research conducted by Amnesty International over the last five years, including interviews with hundreds of refugees and migrants who had survived the dangerous crossing of Libya and the central Mediterranean, and numerous meetings with Italian, Maltese, and other authorities with responsibility over search and rescue or migration and border management.

Chapter 5 lists Amnesty International's new recommendations to address the conclusions reached in this report and reiterates relevant recommendations reflecting analysis and conclusions from previous reports on violations of human rights in the central Mediterranean.

2. MALTA'S VIOLATIONS OF THE RIGHTS OF REFUGEES AND MIGRANTS AT SEA

Although overall crossings of the central Mediterranean have plummeted in recent years, arrivals by sea to Malta have risen over the same time – with 1,445 recorded in 2018, 3,406 in 2019 and 2,161 as of 31 August 2020.¹ While these figures may appear modest from the outside, they are perceived as overwhelming in a country of limited territory and population. Italy's operation Mare Nostrum, the EU's operation Eunavformed Sophia and Frontex Joint Operation Triton sheltered Malta from most arrivals between 2013 and 2017, leaving the country to take in only a small number of people requiring medical evacuations.² As a result of Italy and the EU having reduced their presence in the central Mediterranean since 2017 to decrease the likelihood of having to rescue people and take them to Europe, Malta is now more often called upon to coordinate rescues or respond to rescue vessels' requests to provide a safe place of disembarkation.

Responding to the upward migration trend in Malta and the perceived insufficient European solidarity – compared to the Maltese government's demands – in the first half of 2020, the Maltese government has resorted to unlawful measures to avoid responsibilities to rescue and accept the disembarkation of refugees and migrants, such as pushbacks from the Maltese SAR region, delayed or denied rescues, re-direction of boats to Italy's SAR region, denial of a place of safety to disembark, and arbitrary detention at sea of refugees and migrants. These unlawful measures increased risks to life for hundreds of refugees and migrants.

In a letter to Amnesty International dated 25 August 2020, Malta's Prime Minister firmly rejected allegations that Maltese authorities may have ignored distress calls in Malta's SAR region. In his words, "Malta has acted on all the distress calls inside its area of responsibility and coordinated rescue to ensure that the persons in distress disembark in the closest place of safety", adding that Maltese authorities have rescued "a record number of 1,966 persons in the first seven months of this year". Amnesty international acknowledges Malta's efforts to save lives at sea. However, the cases described in this report highlight how Maltese authorities have repeatedly breached Malta's international obligations, including by coordinating rescues that have delivered people to Libya, which is not a place of safety.

¹ Data from <https://data2.unhcr.org/en/situations/mediterranean> and <https://www.unhcr.org/mt/figures-at-a-glance>

² According to UNHCR, Malta recorded the arrival of only 104 people in 2015, 25 people in 2016, and 23 people in 2017. See: https://www.unhcr.org/mt/wp-content/uploads/sites/54/2020/05/Malta-Sea-Arrivals-and-Asylum-Statistics_UNHCR_April2020_v3.pdf

2.1 THE “EASTER MONDAY” PUSHBACK, APRIL 2020

A recent case of pushback by Malta towards Libya unfolded between 10 and 15 April 2020 and was widely reported in the media as the “Easter Monday pushback”. The case illustrates the determination of the Maltese authorities to prevent the arrival of people to the island even at the cost of exposing them to further risks to their life. It also raises questions about the responsibilities of Italian and EU authorities who knew of the boat in distress and left the people on board stranded and unassisted for days.

On 15 April 2020 a group of 51 people, including seven women and three children, were unlawfully returned to Tripoli after having been rescued in Malta’s SAR region by the fishing boat *Dar Al Salam 1*, a Libyan-flagged vessel routinely docked in Malta. They were part of a group of reportedly 63 who left Libya from Garabulli on 9 April. Five people were dead when the vessel reached Libya, and the survivors reported that a further seven people were missing at sea. Maltese authorities confirmed having coordinated the operation in an official statement.³

The non-governmental organization (NGO) Alarm Phone was in contact with the people on this boat since 10 April, when they became in distress at sea.⁴ Alarm Phone repeatedly alerted maritime authorities in Italy, Libya and Malta, to the situation of this boat. A Frontex aircraft patrolling the area spotted boats in difficulty on 10 April and it too alerted maritime authorities in Italy, Libya, Malta and Tunisia.⁵ Yet, according to information so far available to Amnesty International, no rescue operation was initiated until the night between 13 and 14 April, when Italy and Malta sent out air reconnaissance flights. Eventually, Maltese authorities coordinated an operation which resulted in the return of 51 people to Libya and which, according to survivors’ reports, arrived too late to save the lives of 12 people.

Survivors’ testimonies received by Alarm Phone in the aftermath of the pushback indicate that seven people drowned before the rescue by the *Dar Al Salam 1*, some attempting to swim towards a Portuguese-flagged ship, the *Ivan*, which Malta requested to stand by near the boat in distress, some in desperation.⁶ Survivors also reported that five people were hoisted unconscious to the *Dar Al Salam 1* and that some of these may have died while on board the *Dar Al Salam 1*, where no medical assistance was provided to them, nor requested for them by the *Dar Al Salam 1* crew from Maltese authorities.⁷

On arrival, the 51 survivors were placed in detention in the centre of Trik-al-Sikka, in Tripoli. Refugees and migrants interviewed by Amnesty International in 2019 described Trik-al-Sikka as a place of awful conditions and where deaths have taken place due to lack of medical care.⁸ International organizations have also documented abuses against refugees and migrants inside Trik-al-Sikka.⁹

2.1.1 CRITICISM BY INTERNATIONAL HUMAN RIGHTS BODIES

The International Organization for Migration (IOM), whose representatives in Tripoli were present at the disembarkation, stated that “The migrants were rescued by a commercial ship from the Maltese search and rescue zone and handed over to the Libyan Coast Guard. We reiterate that people rescued at sea should not

³ Statement by the Government of Malta, 15 April 2020, <https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/April/15/pr200673en.aspx>

⁴ Alarm Phone, Twelve deaths and a secret push-back to Libya, press release, 16 April 2020, <https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/>

⁵ See Frontex Executive Director statements at a hearing of the LIBE parliamentary committee: https://multimedia.europarl.europa.eu/en/libe-committee-meeting_20200427-1600-COMMITTEE-LIBE_vd
The Maltese government also said in its statement that EU aircrafts flew over the area while the boat was in distress in the Libya’s SAR region.

⁶ AlarmPhone, Twelve deaths and a secret push-back to Libya, press release, 16 April 2020, <https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/>

⁷ Amnesty International’s interview with Alarm Phone on 1 May 2020 and with other sources in May and June 2020 who contacted survivors in Libya

⁸ Amnesty International, Europe’s shameful failure to end the torture and abuse of refugees and migrants in Libya, 7 March 2019, <https://www.amnesty.org/en/latest/news/2019/03/europes-shameful-failure-to-end-the-torture-and-abuse-of-refugees-and-migrants-in-libya/>

⁹ See for example: United Nations Human Rights Council, Situation of human rights in Libya, and the effectiveness of technical assistance and capacity-building measures received by the Government Report of the United Nations High Commissioner for Human Rights, A/HRC/43/75, 23 January 2020, https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_hrc_43_75_e.pdf and UNSMIL/OHCHR, Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya, 20 December 2018 <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>

be returned to unsafe ports.”¹⁰ The Libyan office of the UN Refugee Agency (UNHCR) also expressed criticism about their transfer to Libya, describing the survivors as “traumatized and weakened by days adrift at sea” and reiterating that “Libya is a country at war and not a safe port for refugees and asylum-seekers to be returned to.”¹¹ Many of the people in the group were of Eritrean origin, and therefore likely to have a well-founded fear of persecution.¹²

In a letter to Malta’s Prime Minister on 5 May, the Council of Europe Commissioner for Human Rights urged Maltese authorities to “respond effectively and urgently to any situation of distress at sea of which they become aware”, in accordance with their obligations under international maritime and human rights law, and to investigate and address all credible allegations of delay or non-response and to refrain from requesting private vessels to disembark rescued people in Libya.¹³ Concern about the pushback and reports that Maltese authorities may have delayed rescues or left unanswered distress calls was voiced also by the UN High Commissioner for Human Rights on 8 May.¹⁴

2.1.2 EFFORTS TO ESTABLISH RESPONSIBILITIES FOR THE PUSHBACK AND THE 12 REPORTED DEATHS

In the days following the pushback, a Maltese blogger and journalists from Italian newspaper *Avvenire* and the *New York Times* investigated the circumstances surrounding the delayed rescue and pushback operation. It emerged that the Maltese government had contracted private vessels, at the time docked in Malta, to conduct the operation under the coordination of Maltese authorities, one being the *Dar Al Salam 1*.¹⁵ The *Dar Al Salam 1* left to search for the refugees and migrants, took them onboard and proceeded towards Tripoli. A second vessel, the *Salve Regina*, accompanied the *Dar Al Salam 1* with a cargo of goods to be delivered to the Libyan authorities.¹⁶ A former Maltese government official has maintained he was asked by the government to arrange for the return of the people to Libya.¹⁷ The former official has also claimed that for some three years he was involved in operations aimed at preventing migrant boats from reaching the Maltese SAR region using a group of private vessels – a system based on agreements with the Libyan authorities, under the previous Maltese government.¹⁸ Malta’s Prime Minister confirmed to journalists at a press conference that the former official was indeed asked by government representatives to intercede with Libyan contacts with regard to the people in the boat in distress on 15 April.¹⁹

¹⁰ https://twitter.com/IOM_Libya/status/1250383167351128065?s=20

¹¹

<https://twitter.com/UNHCRLibya/status/1250433528979795973?s=20><https://twitter.com/UNHCRLibya/status/1250412347815948289?s=20>

¹² *Avvenire*, Libia. Lasciati morire, ora hanno un nome. Ecco le vittime della strage in mare, 29 April 2020,

<https://www.avvenire.it/economia/pagine/lasciati-morire-ora-hanno-un-nome-ecco-le-vittime-della-strage-in-mare>

¹³ Council of Europe Commissioner for Human Rights, Commissioner urges Malta to meet its obligations to save lives at sea, ensure prompt and safe disembarkation, and investigate allegations of delay or non-response to situations of distress, 11 May 2020, <https://www.coe.int/en/web/commissioner/-/commissioner-urges-malta-to-meet-its-obligations-to-save-lives-at-sea-ensure-prompt-and-safe-disembarkation-and-investigate-allegations-of-delay-or-no>

¹⁴ UN News, UN rights office concerned over migrant boat pushbacks in the Mediterranean, 8 May 2020, <https://news.un.org/en/story/2020/05/1063592>

¹⁵ *Avvenire*, Migranti. Strage di Pasquetta, la nostra ricerca della verità per 12 morti, 22 April 2020,

<https://www.avvenire.it/attualita/pagine/controlinchiesta-strage-di-pasquetta-libia-malta-scavo>; Manuel Delia, A boat

with no name, 23 April 2020, <https://manueldelia.com/2020/04/a-boat-with-no-name/>; The New York Times, Latest

Tactic to Push Migrants From Europe? A Private, Clandestine Fleet, 30 April 2020,

<https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html>

¹⁶ The New York Times, Latest Tactic to Push Migrants From Europe? A Private, Clandestine Fleet, 30 April 2020,

<https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html>

¹⁷ The New York Times, Latest Tactic to Push Migrants From Europe? A Private, Clandestine Fleet, 30 April 2020,

<https://www.nytimes.com/2020/04/30/world/europe/migrants-malta.html>

¹⁸ Newsbook, The government uses Gafa’ to co-ordinate pushback/#.XqnIbOvhpfA.whatsapp; Times of Malta, Exposed: Malta’s secret

migrant deal with Libya, 10 November 2019, <https://timesofmalta.com/articles/view/exposed-maltas-secret-migrant-deal-with-libya.748800>; Malta Today, Neville Gafà reveals controversial secret migration pact with Libya, 23 February

2020,

https://www.maltatoday.com.mt/news/national/100529/neville_gaf_reveals_controversial_secret_migration_pact_with_l

[ibya#.XxCqgihKjIV](https://www.maltatoday.com.mt/news/national/100529/neville_gaf_reveals_controversial_secret_migration_pact_with_l); and Manuel Delia, Now we know, 30 April 2020, <https://manueldelia.com/2020/04/now-we-know/>

¹⁹ Among many reports covering the press conference during which the statement was made, see Newsbook, Watch:

PM denies Gafa coordinating rescue; says he was asked to use contacts, 1 May 2020,

<https://newsbook.com.mt/en/watch-pm-denies-gafa-coordinating-rescue-says-he-was-asked-to-use-contacts/>; and TVM,

Soon after news of the pushback emerged, on 16 April the Maltese NGO Repubblika filed a report requesting that the Police Commissioner investigate the Prime Minister and the Commander of the Armed Forces of Malta (AFM) for endangering the lives of the people on the boat by delaying their rescue and for failing to prevent the deaths of the 12 who reportedly died without assistance.²⁰

Following Repubblika's report to the police, a magisterial inquiry was opened. After about six weeks of investigations, at the end of May, the magistrate dismissed the accusations against the Prime Minister and AFM Commander. The 400-page report, however, left many unanswered questions regarding the circumstances of the transfer of 51 people to Libya and the reported death of 12 people, some at sea and some after being taken on board by the *Dar Al Salam 1*. A key gap in the investigation is that the magistrate did not wait to hear the testimonies of the 51 people transferred to Libya before closing the inquiry. Repubblika's representatives told Amnesty International that the magistrate also did not probe the chain of responsibility to contract the *Dar El Salam 1* and instruct it to transfer people out of the Maltese SAR region and onto Libya, nor why AFM vessels were not involved in the operation.²¹ Furthermore, the inquiry report makes no reference to the information provided by the former government official who was asked to use his contacts in Libya to facilitate the operation; nor does it detail whether information exchanged between Italian and Maltese authorities was sought.²² The inquiry also did not look into the responsibilities for the failure of the authorities over at least two days to initiate a rescue operation notwithstanding having been informed by Frontex on 10 April of the coordinates of boats in distress, including the one eventually pushed back on 15 April. In his letter to Amnesty International, the Prime Minister noted that the all the testimonies and documents considered relevant by the magistrate were collected. Repubblika has urged Malta's Attorney General to reject the findings of the magistrate's report and reopen the investigation. An answer to their request was pending at the time of writing.

2.1.3 THE ROLE OF FRONTEx AND ITALY

This case, as well as others more briefly described in this report, calls into question the role of Frontex and of other member states' maritime authorities, such as Italy's, which were aware of the situation and which are all bound to uphold international and European law.

In this incident, Frontex was aware that the boat was in need of assistance for days, a circumstance noted by the government of Malta. In its 15 April 2020 statement, the government of Malta reported that EU aircrafts had been patrolling the Libyan SAR region and were aware of some boats needing assistance.²³ A journalist managed to record the route of Frontex aircraft *Eagle 1* before it was taken down from air traffic tracking sites²⁴ and to show that already on 12 April the aircraft had been involved in a protracted search over the area where several refugees and migrants' boats, including the one which would then be pushed back on 15 April, were travelling at the time.²⁵ Frontex's Executive Director confirmed in a letter to the Chairman of the European parliamentary committee on civil liberties, justice and home affairs (LIBE), dated 10 July 2020,

Immigrants' rescue: Maltese Government asked private boats to help out and also sent food and drink to Libya, 22 April 2020, <https://www.tvn.com.mt/en/news/immigrants-rescue-maltese-government-asked-private-boats-to-help-out-and-also-sent-food-and-drink-to-libya/>

²⁰ See among the many media reports on the issue: Malta Today, Malta PM denounces criminal report over migrant deaths, 17 April 2020,

https://www.maltatoday.com.mt/news/national/101763/malta_pm_denounces_criminal_report_over_migrant_deaths#.XwUCyShKjIU; Repubblika filed also a second complaint regarding a separate incident – not examined in this briefing – in which it alleged the crew of an AFM vessel may have deliberately endangered the lives of people in a separate boat in need of rescue

²¹ Interviewed on 30 June 2020

²² Avvenire, Migranti. Malta si auto-assolve dalla strage. E l'Italia pone il segreto sui barconi, 4 June 2020, <https://www.avvenire.it/attualita/pagine/malta-si-autoassolve-dalla-strage-e-litalia-pone-il-segreto-sui-barconi>

²³ Statement by the Government of Malta, 15 April 2020,

<https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/April/15/pr200673en.aspx>

²⁴ Journalists investigating the case reported that – unusually - soon after the pushback, the routes of the Frontex aircrafts flying over the area where the boat in distress was waiting for rescue had to be removed from air traffic tracking websites. The removal was motivated on the basis of “European government data rules”. Frontex Executive Director, in a letter to the LIBE parliamentary committee Chairman, stated that not disclosing positions of law enforcement assets is “general practice” to avoid undermining operational objectives. See Avvenire, Migranti. Strage di Pasquetta, la nostra ricerca della verità per 12 morti, 22 April 2020,

<https://www.avvenire.it/attualita/pagine/controinchiesta-strage-di-pasquetta-libia-malta-scavo>

²⁵ Mediterraneo Cronaca, Il buco nero del Mediterraneo è un Segreto di Stato, intervista a Sergio Scandura (Radio Radicale), 17 April 2020, <https://www.mediterraneocronaca.it/2020/04/17/il-buco-nero-del-mediterraneo-e-un-segreto-di-stato-intervista-a-sergio-scandura-radio-radiale/tracciamento-di-eagle-1-del-12-aprile-2020-sergio-scandura/>

that four rubber boats with approximately 250 people on board were spotted by a Frontex surveillance aircraft while departing from Libya, but still within the Libyan SAR region, over the Easter period, and that Frontex informed the Maritime Rescue Coordination Centres (MRCCs) of Italy, Malta, Libya and Tunisia of the exact location of the boats, in real time.²⁶ He also stated that Frontex did not receive any feedback after informing the competent SAR authorities of the sightings of the vessels in distress. Frontex, he added, conducted further flights during this period to provide updates on the on-going cases to the competent authorities. It is not clear from the letter whether any of the competent authorities responded to the further communications by Frontex regarding the updates. He also clarified that Frontex is not mandated to further follow up the measures taken by the MRCCs and has no powers to investigate or to audit decisions made to address a distress situation at sea.

Apart from Malta, Italy is the other EU member state whose authorities were aware of the situation throughout the incident and at least since being alerted by Frontex on 10 April. It is not known whether they ever responded to Frontex; nor whether they offered assistance to Malta or were requested such assistance by Malta, which reportedly had no available AFM vessels at the time.

2.2 ALLEGED PUSHBACKS IN MARCH 2020 AND OCTOBER 2019

According to Alarm Phone, the Maltese authorities pushed people in distress at sea back to Libya on other occasions. On 14 March 2020, 49 people aboard a fiberglass boat, who had called Alarm Phone from the Maltese SAR region, were taken back to Libya by the Libyan Coast Guard's vessel *Ras Al Jadar* (or *Ras Jadir*), a speedboat donated by Italy. That same day, Alarm Phone was contacted by someone on another rubber boat carrying some 110 people, who had reportedly been at sea already for 30 hours. They also had reached the Maltese SAR region. Alarm Phone brought this further case to the attention of the Maltese authorities, who carried out a rescue operation the day after.²⁷ A group of 112 people were disembarked in Malta by AFM personnel in protective gear against Covid-19 on 15 March.²⁸ With regard to the operations on 14 March, Alarm Phone stated that Frontex aircrafts were likely involved in the pushback of the boat carrying 49 people by providing information about its precise location and helping Libyan authorities to reach the boat in distress in the Maltese SAR region.²⁹ That same weekend of 14-15 March saw over 400 people being returned to Libya by Libyan authorities in multiple operations³⁰ – an outcome criticized by IOM as “unacceptable”, exposing vulnerable people to detention and abuse.³¹

Between 18 and 19 October 2019, Alarm Phone had documented another pushback by Maltese authorities towards Libya regarding a wooden boat carrying about 50 people, who also ended up in the detention centre of Trik-al-Sikka.³² Immediately after receiving the distress call from the people on the boat who were in the Maltese SAR region, Alarm Phone contacted the Maltese authorities, which acknowledged the call and started coordinating the situation. However, they did not respond to any further communication from Alarm Phone for hours. About seven hours later they told Alarm Phone that a Libyan Coast Guard vessel had reached the boat – which was still in the Maltese SAR region – and was transporting the people back to

²⁶ On file with Amnesty International. See also Frontex Executive Director statements at a hearing of the LIBE parliamentary committee, 27 April 2020, https://multimedia.europarl.europa.eu/en/libe-committee-meeting_20200427-1600-COMMITTEE-LIBE_vd

²⁷ Alarm Phone, Returned to War and Torture: Malta and Frontex coordinate push-back to Libya, Press release, 15 March 2020, https://alarmphone.org/en/2020/03/15/returned-to-war-and-torture/?post_type=release_type=post

²⁸ Reuters, Malta rescues 112 migrants from sinking boat, 15 March 2020, <https://uk.reuters.com/article/uk-malta-migrants/malta-rescues-112-migrants-from-sinking-boat-idUKKBN2120KI>

²⁹ Alarm Phone, Returned to War and Torture: Malta and Frontex coordinate push-back to Libya, Press release, 15 March 2020, https://alarmphone.org/en/2020/03/15/returned-to-war-and-torture/?post_type=release_type=post

³⁰ IOM Libya, Monthly update, March 2020, <https://reliefweb.int/sites/reliefweb.int/files/resources/IOM%20Libya%20Monthly%20Update%20-%20March%202020.pdf>

³¹

https://twitter.com/UNmigration/status/1239137984974372864?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1239137984974372864%7Ctwgr%5E&ref_url=https%3A%2F%2Fwww.infomigrants.net%2Fen%2Fpost%2F23448%2Fover-400-migrants-returned-to-libya-over-weekend

³² Alarm Phone, Back to the Libyan Warzone - How Malta Instructed Libyan Authorities to Intercept 50 Migrants within the Maltese SAR Zone, 23 October 2019, https://alarmphone.org/en/2019/10/23/back-to-the-libyan-warzone/?post_type=release_type=post

Libya. The Maltese authorities also told Alarm Phone that an AFM aircraft was involved in the operation monitoring from the air.

2.3 RESCUE DENIED AND RE-DIRECTION TO ITALY, APRIL 2020

Recently, Maltese authorities appear to have resorted again to the practice of re-directing refugees and migrants' boats found in the Maltese SAR region towards Italy, instead of proceeding to their rescue and taking them to Malta.

Italian Coastguard officials told Amnesty International in the past that they were used to migrants' boats being given some provisions and being escorted in the direction of Italy by Maltese officials.³³ That this is a long-standing practice of Maltese authorities, and one about which Italian authorities have complained in the past, was confirmed in May 2020 by the Italian Deputy Minister for Foreign Affairs responding to questions in the Italian parliament.³⁴

A recent case of re-direction, involving one of the boats which departed from Libya on 9-10 April, was fully documented by journalists and their reconstruction was confirmed by the Italian Foreign Ministry.³⁵ Footage shared with Alarm Phone by some of the 101 survivors who eventually reached Pozzallo, in Sicily, clearly shows how an AFM vessel approached the refugees and migrants who appeared to have already entered Maltese territorial waters, as the coastline was clearly visible. The Maltese officials addressed them at gunpoint, threatening to return them to Libya and failing to rescue and take them to Malta notwithstanding some people jumping in the water in a panic. The Maltese AFM crew is seen directing the people towards Italy and even providing them with fuel and installing a new engine on the migrants' boat.

Prosecutors in Ragusa, Sicily, have opened an investigation into facilitation of irregular migration with regard to Malta's redirection of refugees and migrants' boats towards Italy. The two cases that according to media reports are being investigated regard the boat that reached Pozzallo, near Ragusa, on 12 April and one that reached Capo Passero, Siracusa, on 13 April – both likely to be part of the group of boats spotted at departure by Frontex on 9-10 April.³⁶

2.4 REFUSAL OF A PLACE OF SAFETY FOR DISEMBARKATION AND ARBITRARY DETENTION AT SEA

Between 30 April and 6 June 2020, Maltese authorities confined about 425 people rescued at sea by the AFM or under the coordination of Malta MRCC on four ferry boats placed outside territorial waters, at 13 nautical miles from Malta's coasts.

In April, Italy closed its ports to disembarkations and declared the country could not meet the requirements to be a place of safety due to the Covid-19 pandemic for rescues carried out by foreign-flagged ships outside

³³ Amnesty International, *Lives adrift: Refugees and migrants in peril in the central Mediterranean*, 30 September 2014, <https://www.amnesty.org/download/Documents/8000/eur050062014en.pdf>

³⁴ Camera dei Deputati, Commissione Affari Esteri e Comunitari, 28 May 2020, <http://documenti.camera.it/leg18/resoconti/commissioni/bollettini/pdf/2020/05/28/leg.18.bol0377.data20200528.com03.pdf>

³⁵ See Camera dei Deputati, Commissione Affari Esteri e Comunitari, 28 May 2020, <http://documenti.camera.it/leg18/resoconti/commissioni/bollettini/pdf/2020/05/28/leg.18.bol0377.data20200528.com03.pdf> and also: *Avvenire*, *Migranti. Malta respinge i barconi e li dirotta verso Libia e Italia. Ecco le prove*, 20 May 2020, <https://www.avvenire.it/attualita/pagine/cosi-malta-respinge-i-migranti-e-li-dirotta-verso-libia-e-italia>; *The Guardian*, *'We give you 30 minutes': Malta turns migrant boat away with directions to Italy*, 20 May 2020, <https://www.theguardian.com/global-development/2020/may/20/we-give-you-30-minutes-malta-turns-migrant-boat-away-with-directions-to-italy>; and *The Guardian*, *Italy considers charges over Malta's 'shocking' refusal to rescue migrants*, 29 May 2020, <https://www.theguardian.com/global-development/2020/may/29/italy-considers-charges-over-maltas-shocking-refusal-to-rescue-migrants>

³⁶ *Ragusa Oggi*, *Indagine di Ragusa su Malta: quest'ultima, avrebbe respinto i profughi della "strage di Pasquetta"*, 12 June 2020, <https://www.ragusaoggi.it/indagine-di-ragusa-su-malta-questultima-avrebbe-respinto-i-profughi-della-strage-di-pasquetta/>

Italy's SAR region.³⁷ Malta followed suit and declared its ports to be closed to disembarkations (including, as soon it would become clear, to rescues coordinated by Maltese authorities within the Maltese SAR region) but also that it was not in a position to ensure search and rescue within its SAR region because all the AFM's resources had to be devoted to fighting the health emergency.³⁸ The decision was communicated to the European Commission.³⁹ Both Italy's and Malta's decisions, which remain in place, are disproportionate and not in line with their international obligations. In May 2020, UNHCR and IOM reminded European states in a joint statement that they "must continue to disembark people rescued at sea, in line with international maritime law obligations and ensure access to asylum and humanitarian assistance."⁴⁰

During April and May 2020, Malta refused all disembarkation of people rescued at sea, including for rescues coordinated and carried out by Maltese authorities. Determined to prevent further arrivals in the country, the government moved to the use of private vessels – ferry boats, normally used for daily tourist cruises along Malta's coast, and visibly inadequate to the task – to host people for an indefinite period of time. By the end of May, approximately 425 people were kept aboard four such private vessels, which Maltese authorities placed on the high seas just outside Malta's territorial waters.

In his letter to Amnesty International, the Prime Minister of Malta maintained that "Ferry boats were used as a quarantine area, during the period that the Closed and Open Centres [for reception of asylum-seekers and migrants] were subject to considerable pressure due to the influx in arrivals". He also maintained that "Once the period of quarantine elapsed, on the 6th June 2020, the migrants disembarked in Malta and the asylum process initiated immediately". Although the decision to close the ports was originally motivated by the need to divert resources towards fighting the pandemic, the holding of refugees and migrants on the ferry boats was never devised as a form of quarantine, regardless of the government's posthumous claims. To Amnesty International's knowledge, no end date was ever set for the detention of the rescued people and no legal grounds ever articulated, making the measure an unlawful deprivation of liberty. The authorities hoisted a large banner stating "European solidarity" on the first ferry chartered as a maritime detaining facility, seemingly making the detention at sea a sort of provocation to coerce the EU into arranging the relocation of the refugees and migrants Maltese authorities had rescued.⁴¹ In May, Malta's Ministers of Foreign Affairs and Home Affairs and National Security reportedly wrote to the European Commission complaining about past unfulfilled relocation pledges and stating that the rescued people would be kept on the ferry boats pending their relocation elsewhere.⁴² The Prime Minister also stated that the use of the ferries was justified by the need "to protect those migrants who were at the time in the Open Centres, from the risk of contracting the infectious disease". This is not consistent with the duration of the detention of people on the ferries; and with the choice of placing the ferries outside territorial waters.

By the end of May, the first group of 57 men, rescued on 29 April by a fishing boat, had been on the *Europa II*, owned by company Captain Morgan Cruises, for over a month. Two further groups, of 45 and 78 people respectively, were rescued on 7 May by a speedboat of the AFM and a fishing boat. While families from these groups, including 18 women and children, were allowed to disembark in Malta, the remaining 105 people were transferred first to the *Bahari* and then, on 15 May, to the *Atlantis* – both operated by Captain Morgan Cruises. On 22 May, the AFM rescued 140 people in two separate operations. The Maltese government chartered the *Bahari* again, and transferred the rescued people to the ferry boat, with the exception of 19 of them, including children and pregnant women, who were brought ashore for

³⁷ Inter-ministerial decree 7 April 2020, n. 150, signed by the Ministers for Infrastructure and Transport, Foreign Affairs and International Cooperation, Interior, and Health, [https://www.avvenire.it/c/attualita/Documents/M_INFR.GABINETTO.REG_DECRETI\(R\).0000150.07-04-2020%20\(3\).pdf](https://www.avvenire.it/c/attualita/Documents/M_INFR.GABINETTO.REG_DECRETI(R).0000150.07-04-2020%20(3).pdf)

³⁸ Press release by the Ministry for foreign and European affairs and the Ministry for home affairs, national security and law enforcement: Malta should not carry the burden of migrant trafficking, 10 April 2020, <https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/April/10/pr200650en.aspx>

³⁹ The European Commission (DG Home) received a note verbal on this from Malta, as confirmed by a representative of the European Commission at a hearing before the LIBE committee of the European Parliament on 27 April 2020, https://multimedia.europarl.europa.eu/en/libe-committee-meeting_20200427-1600-COMMITTEE-LIBE_vd; see also, for the content of the communication: Times of Malta, Malta shuts its ports to asylum seekers, citing COVID-19 pandemic, 9 April 2020, <https://timesofmalta.com/articles/view/malta-says-it-cannot-guarantee-migrant-rescues.784571>

⁴⁰ UNHCR, IOM, urge European states to disembark rescued migrants and refugees on board the Captain Morgan vessels, 21 May 2020, <https://www.unhcr.org/news/press/2020/5/5ec664284/unhcr-iom-urge-european-states-disembark-rescued-migrants-refugees-board.html>

⁴¹ Times of Malta, Malta charters Captain Morgan boat to house rescued migrants off shore, 30 April 2020, <https://timesofmalta.com/articles/view/malta-charters-captain-morgan-boat-to-house-rescued-migrants-off-shore.789095>

⁴² Times of Malta, '128 migrant relocation pledges yet to materialise', Malta tells EU in letter, 1 May 2020, <https://timesofmalta.com/articles/view/128-migrant-relocation-pledges-yet-to-materialise-malta-tells-eu-in.789302>

humanitarian reasons. On 25 May, another group of 90 people were rescued by a patrol boat of the AFM and transferred to the ferry boats the following day. On 26 May, eight children and 18 women were allowed to disembark in Malta. Following the rescue of a further group of 75 people by the AFM on 27 May, the Maltese government chartered a fourth vessel, the *Jade*, owned by the company Supreme Cruises.

For nearly six weeks, Maltese authorities prevented lawyers, NGOs and UNHCR from accessing the people on the ferry boats. According to media reports, the national Agency for the Welfare of Asylum Seekers (AWAS) was also not allowed on the ferry boats.⁴³ Lawyers and local NGOs told Amnesty International that their requests to get access to the people on board were denied or left unanswered.

Conditions on board were inadequate and potentially dangerous from the start, on vessels unsuited to host people for long stays. Local NGOs, raising concern about the situation with the European Commission, noted that the ferries were sailing “under a Commercial Vessel Certificate, which allows them to sail within three nautical miles from land and not more than three nautical miles from a place of refuge, in favourable weather conditions”.⁴⁴ No information was available as to the authorities’ attempt at identifying vulnerable people and unaccompanied minors. Lawyers interviewed by Amnesty International expressed concern about the use of private security guards to manage the situation on the ferry boats, rather than trained police officials or border guards. According to media reports, 12 private security personnel on average were constantly present on the ferries, having been selected from the company which had been providing security services at the Marsa Initial Reception Centre.⁴⁵ Media reported that Covid-19 tests were carried out on the rescued people confined to the ferries, that the medical authorities would have been prepared to treat any Covid-19 case⁴⁶, and that the Maltese Red Cross was providing some medical care, although details were not available. In his letter to Amnesty International, the Prime Minister confirmed that doctors, nurses and emergency care assistants of the Malta Red Cross were given daily access to the people on the ferry boats.

International organizations expressed concern at the situation. On 21 May, IOM and UNHCR urged Malta to disembark the people on the ferry boats, stating that it was “unacceptable to leave people at sea longer than necessary, especially under difficult and unsuitable conditions”.⁴⁷ On 4 June, the Council of Europe Commissioner for Human Rights urged Malta to grant access to monitoring agencies and called for the urgent disembarkation of those held on board, noting that “the confinement of those rescued on the ships, as well as the lack of remedies against this measure and its indefinite duration may not be compliant with the right to liberty of those on board, as guaranteed by Article 5 of the European Convention on Human Rights”.⁴⁸

In the night between 6 and 7 June, after nearly six weeks for some of the rescued people, Maltese authorities finally allowed the disembarkation of the approximately 425 refugees and migrants by then held on four ferry boats off Malta’s territorial waters.⁴⁹ Bad weather at sea and unrest in one of the ferries due to the growing exasperation at the confinement reportedly played a part in the decision,⁵⁰ although in his letter to Amnesty International the Prime Minister claimed that the disembarkation occurred because the quarantine had “elapsed”. As articulated above, Amnesty International does not consider that a quarantine was ever in place.

⁴³ Malta Today, Asylum seekers welfare agency asks for access to Captain Morgan vessels hosting migrants, 26 May 2020,

https://www.maltatoday.com.mt/news/national/102588/asylum_seekers_welfare_agency_asks_for_access_to_captain_morgan_vessels_hosting_migrants#.XvjnyvhKjIU

⁴⁴ JRS, Integra, Aditus: our open letter to EU Commissioner Johansson regarding the detention of rescued migrants on private vessels just outside our territorial waters, 16 May 2020,

<http://www.jrsmalta.org/content.aspx?id=432637#.XwebaShKjIV>

⁴⁵ Malta Today, Migrants offshore detention cost €1.7m, European countries to take 284 people, 6 July 2020,

https://www.maltatoday.com.mt/news/national/103408/migrants_offshore_detention_cost_17m_european_countries_to_take_284_people#.XwOoCihKjIV

⁴⁶ TVM, Covid-19 tests on migrants aboard Captain Morgan vessel, 10 May 2020,

<https://www.tvm.com.mt/en/news/covid-19-tests-on-migrants-aboard-captain-morgan-vessel/>

⁴⁷ UNHCR, IOM, urge European states to disembark rescued migrants and refugees on board the Captain Morgan vessels, 21 May 2020, <https://www.unhcr.org/news/press/2020/5/5ec664284/unhcr-iom-urge-european-states-disembark-rescued-migrants-refugees-board.html>

⁴⁸ Council of Europe Commissioner for Human Rights, Immediate action needed to disembark migrants held on ships off Malta’s coast, 4 June 2020, <https://www.coe.int/en/web/commissioner/-/immediate-action-needed-to-disembark-migrants-held-on-ships-off-malta-s-coast>

⁴⁹ Amnesty International, Urgent Action/Further information and outcome: Asylum-seekers allowed to disembark, UA 87/20, <https://www.amnesty.org/download/Documents/EUR3324972020ENGLISH.pdf>

⁵⁰ Malta Today, Update 4: All four boats carrying 425 asylum seekers to dock in Malta, 6 June 2020,

https://www.maltatoday.com.mt/news/national/102799/captain_morgan_migrant_protest_four_boats_dock#.XwglWChKjIV

As of 6 July, media reported that the relocation of 204 of those that were confined on board the ferries was agreed with other EU member states, while there were commitments to relocate a further 80 people.⁵¹ France, Germany, Luxembourg and Portugal were mentioned as countries having offered to take some of the refugees and migrants.⁵² Malta was also seeking EU funds to cover the cost of chartering the vessels, for a total of 1.7 million Euros, including one million to cover the 33,000 hours of private security services.⁵³ The Prime Minister's claim that the confinement was a form of quarantine and the fact that the government attempted to have the EU pay for the chartering of the ferries to unlawfully detain people indicate that there is no acknowledgment of the unlawfulness of that measure.⁵⁴

Measures limiting human rights, for example for the protection of public health, may at time be justifiable; however, they should be set out in law and be proportionate and necessary to the pursuit of a legitimate aim. Rescue at sea, which includes disembarkation in a safe place, is an obligation aimed at protecting the right to life, which is non-derogable, as clarified by UNHCR: "Rescue at sea is a humanitarian imperative and an obligation under international law. Legitimate public health concerns can be addressed through quarantine, health checks, and other measures. However, delayed rescue or failure to disembark boats in distress put the lives in danger. A safe port for disembarkation should be provided without delay, together with a prompt agreement on how to share responsibility amongst States for hosting people once they reach safety on dry land."⁵⁵ Moreover, in the context of the Covid-19 crisis, UNHCR has clarified that "[W]hile States may put in place measures which may include a health screening or testing of persons seeking international protection upon entry and/or putting them in quarantine, such measures may not result in denying them an effective opportunity to seek asylum or result in refoulement."⁵⁶ The European Commission has also provided guidance in the context of Covid-19 indicating that EU member states should take into account the principle of non-refoulement – prohibiting the transfer of any person to a country where they are at risk of serious human rights violations – and other obligations under international law, including to fulfil the right to seek asylum, when adopting relevant decisions.⁵⁷

Malta has received 2,161 refugees and migrants as of 31 August 2020⁵⁸ and the resources and efforts necessary to ensure reception, access to protection, and protection from Covid-19 are undoubtedly considerable for a small country. Amnesty International considers that, in order to ensure the adequate reception of people disembarked in Malta – many of whom are likely to be in need of international protection or have faced serious abuse or other traumatic experiences while in Libya or at sea – Malta should be able to rely on the support of other EU member states. EU member states need to adequately share responsibility for assisting people rescued in the central Mediterranean, including in order to facilitate the identification of places of safety where people rescued in the Libyan SAR region should be disembarked. This could be achieved through a predictable disembarkation and relocation mechanism, which needs to be urgently adopted. The absence of such a mechanism, however, does not relieve Malta of the responsibility to indicate a place of safety for the disembarkation of people rescued under its coordination; to cooperate with other states towards the prompt identification of a place of safety where to disembark people rescued in the Libyan SAR region; and to provide adequate assistance to people disembarked in Malta, including access to international protection in line with international standards – without resorting to unlawful detention.

⁵¹ XinhuaNet, Malta to relocate 284 migrants to EU states, 6 July 2020, http://www.xinhuanet.com/english/2020-07/06/c_139192463.htm

⁵² The Malta Independent, Another EU member state offers to take migrants from Malta, 14 June 2020, <https://www.independent.com.mt/articles/2020-06-14/local-news/Another-EU-member-state-offers-to-take-migrants-from-Malta-6736224154>

⁵³ Malta Today, Migrants offshore detention cost €1.7m, European countries to take 284 people, 6 July 2020, https://www.maltatoday.com.mt/news/national/103408/migrants_offshore_detention_cost_17m_european_countries_to_take_284_people#.XwrERihKjIW

⁵⁴ Times of Malta, EU will not pay for boats that held migrants offshore, 9 June 2020, <https://timesofmalta.com/articles/view/eu-refuses-to-pay-for-boats-that-held-migrants-offshore.797337>

⁵⁵ UNHCR, News comment on search and rescue in the Central Mediterranean by Gillian Triggs, Assistant High Commissioner for Protection at UNHCR, the UN Refugee Agency, 1 May 2020 <https://www.unhcr.org/uk/news/press/2020/5/5eac53214/news-comment-search-rescue-central-mediterranean-gillian-triggs-assistant.html>

⁵⁶ UN High Commissioner for Refugees, Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response, 16 March 2020, available at: <https://www.refworld.org/docid/5e7132834.html>

⁵⁷ Communication from the Commission, COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement 2020/C 126/02, [https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1587138114770&uri=CELEX:52020XC0417\(07\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1587138114770&uri=CELEX:52020XC0417(07))

⁵⁸ Data from <https://data2.unhcr.org/en/situations/mediterranean> and <https://www.unhcr.org/mt/figures-at-a-glance>

2.5 RESTRICTIVE INTERPRETATION OF SEARCH AND RESCUE RESPONSIBILITIES AND IMPACT ON REFUGEES AND MIGRANTS

Malta's vast search and rescue region, situated north of the Libyan one and stretching across a large part of the Libyan coastline, covers the area of the central Mediterranean cut through by refugees and migrants' routes. Its crossing is unavoidable for refugees and migrants fleeing from Libya and directed to Europe. Maltese authorities have always worried about the strain on resources that the disembarkation of refugees and migrants involves. Malta's Minister for Foreign and European Affairs pointed out that 1% of Malta's population is currently constituted by "irregular migrants waiting in centres to be processed"⁵⁹. Maltese authorities have therefore traditionally chosen a narrow interpretation of their search and rescue responsibilities, as documented by Amnesty International.⁶⁰ For example, Malta has traditionally interpreted the key concept of "distress at sea"⁶¹, which is the trigger for the legal obligation to render assistance at sea, in a narrow way, making it dependent on a request of assistance and on a clear and immediate danger of loss of life. By contrast, the 2014 EU Regulation on surveillance of external borders in the context of Frontex joint operations⁶² requires that, in determining whether a boat is in distress at sea, EU member states' SAR units assigned to Frontex Joint Operations take all relevant elements into account including the seaworthiness of the vessel, the presence on board of a qualified crew, of safety, navigation and communication equipment, of necessary supplies including fuel and water, and the likelihood that the boat reaches its final destination, among others. 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)). The acceptance by all EU member states, including Malta, of these broader parameters to assess the distress situation of a boat is needed to adequately protect the right to life at sea and to avoid leaving safety of navigation to chance, with the same boat regarded as in distress by one SAR authority and able to continue its journey by another.

Furthermore, in keeping with its determination to limit its responsibilities, Malta has not yet ratified the 2004 Amendments to the International Convention for the Safety of Life at Sea (SOLAS) and International Convention on Maritime Search and Rescue (SAR) Conventions⁶³ which, together with the accompanying IMO Guidelines on the Treatment of Persons Rescued at Sea, strengthen the search and rescue regime, by placing the primary responsibility to provide a place of safety for disembarkation on the state coordinating a rescue operation either by offering one on its own territory or by ensuring that one is granted in another country.⁶⁴

In his letter to Amnesty International, the Prime Minister, after substantially confirming Malta's above described narrow interpretation of its obligations under the law of the sea, added that it is of concern to Malta that "various international and regional organizations appear to be interpreting legislation and promulgating guidelines in a different manner from the existing international legislative framework as promulgated through the IMO". Amnesty International notes that Malta is a member of various international and regional organizations, including the United Nations, the EU and the Council of Europe, and has ratified a number of international conventions regarding the protection of human rights. As such, it must uphold all

⁵⁹ Press release by the Ministry for Foreign and European Affairs, A message from the Minister for Foreign and European Affairs Evarist Bartolo on the irregular migration crisis in the Mediterranean, 22 May 2020 <https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2020/May/22/pr200973en.aspx>

⁶⁰ Amnesty International, Lives adrift: refugees and migrants in peril in the central Mediterranean 30 September 2014, <https://www.amnesty.org/en/documents/EUR05/006/2014/en/>

⁶¹ This is described in the 1979 SAR Convention 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). Such definition leaves it to the state or shipmaster dealing with the situation to determine when immediate assistance is required

⁶² Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014, establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0656&from=EN>

⁶³ MSC res., 153 (78) (2004), Adoption of amendments to the International Convention for the Safety of Life at Sea, 1974, as amended, available at [http://www.imo.org/blast/blastDataHelper.asp?data_id=15526&filename=153\(78\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=15526&filename=153(78).pdf); and Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, as amended, Annex 5, Resolution MSC.155(78), MSC 78/26/Add.1, <http://www.imo.org/OurWork/Facilitation/IllegalMigrants/Documents/Resolution%20MSC.155-%2078.pdf>

⁶⁴ Amnesty International, Lives adrift: refugees and migrants in peril in the central Mediterranean 30 September 2014, <https://www.amnesty.org/en/documents/EUR05/006/2014/en/>

relevant international laws and standards, including those pertaining to the protection of the right to life, and must ensure that its interpretation of the law of the sea is consistent with its other obligations under international human rights and refugee law.

Allowing preoccupations regarding migration control to taint its interpretation and implementation of the law of the sea and of its search and rescue responsibilities has led Malta to expose refugees and migrants to unnecessary risks, in some cases contributing to deaths at sea.⁶⁵

2.6 RISK OF IMPUNITY FOR HUMAN RIGHTS VIOLATIONS AGAINST REFUGEES AND MIGRANTS AT SEA

Notwithstanding the international outcry, Malta's government is in denial about the catalogue of human rights violations involved in its actions at sea and about the impact these have had on refugees and migrants, ranging from arbitrarily depriving them of liberty for weeks to exposing them to death at sea. Unless there is accountability for what has happened and any breach of international law, there is a concrete risk that the tactics employed by the Maltese government and the AFM in the past months will be used again and cause suffering and potentially loss of life.

Accountability is necessary at the national level for the actions of Maltese authorities but also at EU level to clarify whether other member states and EU institutions contributed to human rights violations occurred in the context of external border surveillance.

At the domestic level, Amnesty International is concerned that the Maltese police and judiciary may have failed to investigate reports of human rights violations deriving from the actions of the government and the AFM to prevent the arrival of refugees and migrants in the past. It is a welcome step that, as described above, a magisterial inquiry was opened into the reported deaths of 12 people and the return of 51 to a place where they were at high risk of human rights violations, albeit only following a report by an NGO. However, Amnesty International is concerned that it was not thoroughly conducted.

Amnesty International is not aware that investigations have been opened in Malta into other instances of human rights violations in the context of search and rescue operations, such as the failure to rescue people who appeared to be inside Maltese territorial waters during the re-direction of refugees and migrants to Italy in April; or the government-ordered detention of over 400 people for weeks without legal grounds. With regard to the unlawful detention at sea, Maltese lawyers and NGOs told Amnesty International that they had in practice no domestic legal remedy available to ensure the protection of the rights of the rescued people confined on the ferries while the detention was ongoing, without first obtaining a power of attorney from them – which they could not obtain because the government was denying them – and UNHCR and AWAS – access to the refugees and migrants.⁶⁶

Police and judicial authorities in Malta must do their utmost to thoroughly, independently and impartially investigate and, where there is admissible evidence, prosecute criminally relevant conduct related to human rights violations of refugees and migrants at sea. In particular, investigations into the 15 April pushback and the 12 reported deaths should continue, to gather all the available evidence, including the testimonies of the people returned to Libya. Reparations should also be provided to all the people who may have been unfairly pushed back and to the families of victims where it is proven they could have been saved. The unlawful detention at sea of over 425 people between 30 April and 6 June should also be investigated, and all those suspected of criminal responsibility brought to justice in fair trials and reparation ensured.

In addition, the government should address broader systemic failures to protect the rights of refugees and migrants at sea and establish an independent, public inquiry to investigate reports of human rights violations

⁶⁵ Amnesty International, Lives adrift: refugees and migrants in peril in the central Mediterranean 30 September 2014, <https://www.amnesty.org/en/documents/EUR05/006/2014/en/>; Parliamentary Assembly of the Council of Europe, Lives lost in the Mediterranean Sea: who is responsible?, 29 March 2012, https://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf; EU Agency for Fundamental Rights, Fundamental Rights at Europe's southern sea borders, 2013, p34 <https://fra.europa.eu/en/publication/2013/fundamental-rights-europes-southern-sea-borders>

⁶⁶ Malta Today, Asylum seekers welfare agency asks for access to Captain Morgan vessels hosting migrants, 26 May 2020, https://www.maltatoday.com.mt/news/national/102588/asylum_seekers_welfare_agency_asks_for_access_to_captain_morgan_vessels_hosting_migrants#.XxHFKp5KjIU

by Maltese authorities in the central Mediterranean and how Malta is meeting international human rights, refugee and law of the sea obligations in the central Mediterranean.

It is equally essential that there is full accountability at European level for human rights violations in the central Mediterranean by Malta and other member states and that such accountability extends to the role Frontex and other EU bodies may have played, as will be described in Chapter 4.

3. CONCERNS ABOUT EUROPE'S CONTINUING COOPERATION WITH LIBYA

The new, abusive practices implemented by Malta in the first half of 2020 – described in the previous chapter – must be seen as part and parcel of wider efforts by EU member states and institutions to outsource the control of the central Mediterranean to Libya. Such efforts aim at reducing the number of refugees and migrants embarking in the sea crossing from Libya to Europe, by ensuring that as many of them as possible are intercepted at sea by EU-supported Libyan authorities and disembarked in Libya.

This strategy has been pursued in recent years despite the fact that, as repeatedly stated by international organizations and acknowledged by EU member states and institutions, Libya is not a place of safety where refugees and migrants can be disembarked. Whether a boat is rescued in the Libyan, Maltese or Italian SAR region, the rescued people need to be disembarked in a place of safety.⁶⁷ Indeed, returning anyone to a country where they are exposed to the risk of arbitrary detention and torture and other ill-treatment – as it is the case for refugees and migrants disembarked in Libya – violates the principle of *non-refoulement*, which is enshrined in both international and EU law and is now part of customary international law.⁶⁸ European states would be acting unlawfully, were they to instruct a shipmaster to return to Libya people rescued in international waters. In 2012, in the case of *Hirsi Jamaa and Others v. Italy*, the European Court of Human Rights ruled against Italy for having intercepted at sea and returned to Libya a group of Eritrean and Somali nationals, thus exposing them to ill-treatment and potential onwards *refoulement* towards their countries of origin.⁶⁹ It is precisely in an attempt to circumvent these legal obligations that, in recent years, EU member states and institutions have cooperated with Libyan authorities to enable them to contain people in Libya.

⁶⁷ 1979 SAR Convention, Annex, para.1.3.2, para.3.1.6.4, and para.3.1.9 (as amended); 1974 SOLAS Convention Chapter V, Reg.33, para.1.1 (as amended). See also: IMO, RESOLUTION MSC.167(78), GUIDELINES ON THE TREATMENT OF PERSONS RESCUED AT SEA, 20 May 2004.

⁶⁸ See, inter alia, UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law, 1994, <https://www.refworld.org/docid/437b6db64.html>

⁶⁹ *Hirsi Jamaa and Others v Italy* (27765/09), European Court of Human Rights, Grand Chamber, Judgment, Strasbourg, 23 February 2012, <http://hudoc.echr.coe.int/eng?i=001-109231>

3.1 COOPERATION WITH LIBYA AND ITS CONSEQUENCES

The reduction in crossings from Libya has been pursued, over the past few years, through closer cooperation with Libyan actors. In particular, EU member states and institutions have supported the Libyan Coast Guard (LCG) and the General Administration for Coastal Security (GACS) through the provision of speedboats and training, as well as assisting in the declaration of a Libyan SAR region and in the setting up of a coordination centre to direct maritime operations.⁷⁰

Italy plays a central role in assisting Libyan authorities on this front, including through the continuing deployment of Italian military and civilian personnel and assets in Libya – recently extended until the end of 2020.⁷¹ Many cooperation activities are funded by the EU, through the EU Trust Fund for Africa (EUTF).⁷² Italy primarily cooperates with the internationally recognized Government of National Accord (GNA), which controls most of the western part of the country through a number of armed groups and militias affiliated with it, and is entangled in an armed conflict with the self-proclaimed Libyan National Army, which controls much of eastern and southern Libya. The Italian government has also actively sought the support of local actors, previously involved in the smuggling of human beings, to stop such activities.⁷³ Moreover, Italy, Malta and other EU Member States have actively hampered the activities of NGOs that, in an attempt to fill a vacuum in rescue capacity purposely left by European governments in the central Mediterranean, have stepped in and put private rescue vessels at sea.⁷⁴

Containment policies have achieved their objective of reducing the number of people arriving in Italy and Malta – bringing them from 181,461 in 2016 to 14,877 in 2019 – and in the first eight months of 2020 19,532 crossings have been recorded.⁷⁵ Over this time, the proportion of people being brought back to Libya after attempting the crossing has increased substantially, as since 2016 over 50 thousand women, men and children have been intercepted at sea by the Libyan Coast Guard and returned to Libya, contributing to a plummeting of attempted departures. With fewer departures, there have also been fewer shipwrecks and drownings, from 4,581 in 2016 to 1,262 in 2019, with a further 359 recorded in the first eight months of 2020.⁷⁶ However, the withdrawal of rescue assets has led to an increase of the death rate in 2018 and 2019.⁷⁷ Moreover, due to the reduced presence of rescue ships able to intervene promptly and witness events, chances that “invisible shipwrecks” may have taken place unrecorded have increased over time,⁷⁸ together with the risk that the Libyan Coast Guard may have committed abuses against people intercepted at sea without this being documented.

But reducing the number of people reaching Europe has not diminished the suffering of people seeking safety. It is on dry land that the European policies have produced their most negative impact, as cooperation with Libya has never been conditioned upon the adoption of radical measures needed to ensure the humane

⁷⁰ Amnesty International, Libya’s dark web of collusion: Abuses against Europe-bound refugees and migrants, 12 December 2017, <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>

⁷¹ On 16 July 2020 the Italian Parliament gave final approval to a deliberation adopted by the Italian government on 21 May 2020 and providing for the extension of a number of military missions until the end of 2020. <https://www.camera.it/leg18/410?idSeduta=0373&tipo=stenografico#sed0373.stenografico.tit00060.int00020>

⁷² See in particular the projects Support to Integrated border and migration management in Libya (first phase), approved on 27 July 2017, and Support to Integrated border and migration management in Libya (second phase), approved on 13 December 2018) at <https://ec.europa.eu/trustfundforafrica/region/north-africa/libya>

⁷³ Amnesty International, Libya’s dark web of collusion: Abuses against Europe-bound refugees and migrants, 12 December 2017, <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF> See also: Nello Scavo, La trattativa nascosta. Dalla Libia a Mineo, il negoziato tra l'Italia e il boss, *Avvenire*, 4 October 2019, <https://www.avvenire.it/attualita/pagine/dalla-libia-al-mineo-negoziato-boss-libico>

⁷⁴ Amnesty International, Punishing compassion: Solidarity on trial in fortress Europe, 3 March 2020, <https://www.amnesty.org/en/documents/eur01/1828/2020/en/>

⁷⁵ Amnesty International’s elaboration of data from <https://data2.unhcr.org/en/situations/mediterranean#> and https://www.unhcr.org/mt/wp-content/uploads/sites/54/2020/05/Malta-Sea-Arrivals-and-Asylum-Statistics_2019_UNHCRFactsheet_allyear.pdf Data for 2020 was accessed on 30 August. Note that, while the majority of arrivals are from Libya, this total also includes a significant number of arrivals from other countries, including Tunisia and Algeria.

⁷⁶ IOM data from https://missingmigrants.iom.int/region/mediterranean?migrant_route%5B%5D=1376 accessed on 30 August 2020.

⁷⁷ ISPI data from

<https://docs.google.com/spreadsheets/d/1nHxOHlx4ptt4YFXgGi9Tlbwd53HaR3oFbrfBm67ak4/edit#gid=0>

⁷⁸ IOM, COVID-19 Control Measures, Gap in SaR Capacity Increases Concern About ‘Invisible Shipwrecks’, press release, 20 May 2020, <https://www.iom.int/news/covid-19-control-measures-gap-sar-capacity-increases-concern-about-invisible-shipwrecks>

and lawful treatment of people stranded in Libya. As a result, the containment of refugees and migrants in Libya has exposed them, and continues to expose them, to serious harm.

Amnesty International and other organizations have extensively documented the impact of these policies on the refugees and migrants trapped in Libya, as over the past four years tens of thousands of people have been intercepted at sea by Libyan authorities, brought back to Libya and then arbitrarily held in inhumane conditions in detention centres nominally ran by Libya's GNA and other facilities controlled by militias or armed groups, where they are exposed to torture and other ill-treatment, including in the form of sexual violence, forced labour, exploitation and other serious human rights violations.

The situation has been compounded by the intensification of the armed conflict between factions fighting for the control over territory, which has invested Tripoli and the West and South of the country between April 2019 and June 2020, after which the conflict moved to Central Libya around Sirte, where it turned into a stalemate. Both sides announced a ceasefire on 21 August 2020.

Despite such situation, European governments have continued to implement their strategy of containment in Libya, including in recent months.

On 2 February 2020, the Memorandum of Understanding between Italy and Libya, underpinning the provision of support by Italy to Libyan maritime authorities stopping boats at sea and returning people to detention centres, was extended for another three years.⁷⁹ Although in previous months many critics had pointed out the negative consequences of this agreement, calling on the Italian government to either withdraw from it or subject its extension to the inclusion of solid human rights guarantees, the Italian government refrained from taking any such action and hence the agreement was extended without amendment. To respond to criticism of this decision, in February 2020 the Italian government proposed to amend the text of the Memorandum, in order to add some guarantees to protect the rights of people disembarked in Libya and held in detention centres. While proposed amendments would ameliorate the original text, they still fall far short of what is necessary, particularly as they still assume that people intercepted at sea would continue to be disembarked in Libya and only aim at the *gradual* closure of detention centres in Libya, in an undetermined future. The proposed amendments fall short of conditioning any further cooperation upon the *immediate* closure of all detention centres and the release of all refugees and migrants held therein. As a matter of fact, Italy did not even condition continuing cooperation upon Libya's acceptance of the proposed amendments: indeed, while in the following months Libyan authorities did not accept them, on 16 April 2020 the Italian Ministry of Interior ordered an Italian shipyard to build six small patrol vessels, for the price of 1.6 million Euro, to be donated to Libya.⁸⁰

In a letter to Amnesty International, the Italian Ministry of Foreign Affairs emphasized that "following Foreign Minister Di Maio's visit to Tripoli on the 24th June, Italy and Libya have undertaken a comprehensive review of their framework of collaboration. On July 2nd a meeting of the Italian-Libyan joint commission met in order to start the negotiation and to achieve a convergence between the two Countries' positions."⁸¹ However, as of 4 September 2020 the two governments had not released any information of the outcome of such consultations. Until any amendment is approved by both parties, the original text of the Memorandum of Understanding continues to be in force. In any event, the impact of any amendment – or even a withdrawal – risks being very limited by now, as at this point Italy has already provided Libya with many resources – including at least 16 speedboats,⁸² assistance with the establishment of the Libyan SAR region, and a coordination centre – that enable Libyan maritime authorities to trap people in Libya. Meanwhile, cooperation continues to focus on the priority objective of enabling Libyan authorities to control borders and reducing

⁷⁹ Camera dei Deputati, Resoconto stenografico dell'Assemblea, Seduta n. 249, 30 October 2019, <https://www.camera.it/leg18/410?idSeduta=0249&tipo=stenografico#sed0249.stenografico.tit00010.sub00020.int00040> See also: Amnesty International, Libya: Renewal of migration deal confirms Italy's complicity in torture of migrants and refugees, 30 January 2020, <https://www.amnesty.org/en/latest/news/2020/01/libya-renewal-of-migration-deal-confirms-italys-complicity-in-torture-of-migrants-and-refugees/>

⁸⁰ Ministero dell'Interno, Direzione Centrale Immigrazione e Polizia delle Frontiere, Decreto del Direttore Centrale, 16 April 2020, <https://www.poliziadistato.it/statics/02/dm-aggiudicazione-prot..pdf>

⁸¹ Italian Ministry of Foreign Affairs, Letter to Amnesty International by the Director General for Political and Security Affairs, 2 September 2020. See also: Italian Ministry of Foreign Affairs, Riunione del Comitato misto italo-libico, 2 July 2020, <https://www.esteri.it/mae/it/sala stampa/archivionotizie/comunicati/2020/07/riunione-del-comitato-misto-italo-libico.html>

⁸² On top of the four speedboats delivered to Libya in May 2017, the Italian government authorized the provision of 12 more boats in July 2018. See: Decreto Legge 10 luglio 2018, n. 84, Disposizioni urgenti per la cessione di unità navali italiane a supporto della Guardia costiera del Ministero della difesa e degli organi per la sicurezza costiera del Ministero dell'interno libici, <https://www.gazzettaufficiale.it/eli/id/2018/07/10/18G00111/sg>

crossings – as also highlighted by the Italian Minister of Interior, Luciana Lamorgese, during a visit to Tripoli on 16 July 2020, when she emphasized the need to “accelerate” cooperation on this issue.⁸³

In December 2019, Malta pledged to take action towards an “Improved protection environment for refugees and migrants in Libya”.⁸⁴ However, most of its actions since then, like Italy’s, have focused on the containment of refugees and migrants in Libya instead. Perhaps inspired by the “success” of the Italy-Libya agreement at reducing crossings by trapping people in Libya, on 28 May 2020 the Maltese Prime Minister, Robert Abela, flew to Tripoli to meet his Libyan counterpart, Fayez al-Serraj, and sign a new Memorandum of Understanding between the two countries “in the field of combatting illegal immigration”.⁸⁵ The scope of the document is fairly limited, as it only promises the setting up of two coordination centres in Valletta and Tripoli, which were inaugurated on 6 July when the head of the Tripoli government returned the visit. The centres are expected to “offer the necessary support relating to combatting illegal immigration in Libya and the Mediterranean region”.⁸⁶ Beyond this, the new Memorandum’s text does not include details regarding the actual cooperation being promoted. However, it seems clear that the Maltese government – after being harshly criticized in April 2020 for the abusive practices described in the previous chapter – has looked at the Libyan authorities to find allies able to enhance even further measures aimed at blocking refugees and migrants in Libya, while avoiding accountability before European courts. Indeed, through the Memorandum, Malta also commits to coordinating with the EU to “propose funding towards additional maritime assets necessary for the interception and follow up of human trafficking activities in the search and rescue region in the Mediterranean basin”.⁸⁷ The document does not clarify what such “follow up” would consist of, nor to which “search and rescue region” it refers, and lacks virtually any reference to concrete guarantees to avoid human rights abuse. Notably, just a few weeks before signing the Memorandum of Understanding with Libya, the Maltese government had written to the European Commission to propose the urgent launch of a new mission in Libya purportedly meant to ensure – through the delivery of aid and the boosting of the Libyan Coast Guard – the further containment of people in Libya.⁸⁸

On 2 July 2020, the European Commission adopted a new package “to protect migrants, stabilise local communities and respond to COVID-19 in North Africa.”⁸⁹ The package involves new programmes to assist refugees and migrants in Libya, including through the reallocation of part of the funding previously earmarked for border control programmes. While this decision may potentially represent a positive development, Amnesty International is concerned that EU institutions have nonetheless recommitted to continue implementing border management programmes – supporting the Libyan Coast Guard, providing boats and training, working to enhance Libya’s capability to maintain the speedboats, and assisting with the establishment of a “mobile” Libyan Maritime Rescue Coordination Centre – once again without conditioning such support upon enforceable human rights guarantees.⁹⁰

On the basis of the continuing support and encouragement of EU governments, during 2020 the Libyan Coast Guard has continued to engage in maritime interceptions. A total of about 7,256 people were in fact pulled back to Libya in the period to 27 August 2020.⁹¹

In April and May 2020, intensifying conflict in and around Tripoli at times hampered maritime operations, with disembarkation of people intercepted at sea being postponed as Tripoli’s main port was under

⁸³ Italian Ministry of Interior, Missione in Libia del ministro dell’Interno Luciana Lamorgese, 16 July 2020, <https://www.interno.gov.it/it/notizie/missione-libia-ministro-dellinterno-luciana-lamorgese>

⁸⁴ UNHCR, Global Compact on Refugees digital platform – Pledges and contributions dashboard, accessed on 19 July 2020, <https://globalcompactrefugees.org/channel/pledges-contributions>

⁸⁵ Memorandum of Understanding between the Government of National Accord of the State of Libya and the Government of the Republic of Malta in the field of combatting illegal immigration, signed in Tripoli on 28 May 2020, <https://www.independent.com.mt/file.aspx?f=206640>

⁸⁶ Memorandum of Understanding Libya-Malta, art.1

⁸⁷ Memorandum of Understanding Libya-Malta, art.5

⁸⁸ Letter to the High Representative of the EU for Foreign Affairs, Josep Borrell, by Malta’s Minister for Foreign and European Affairs, Evarist Bartolo, and Minister for Home Affairs, National Security and Law Enforcement, Byron Camilleri, 13 April 2020, https://www.politico.eu/wp-content/uploads/2020/04/Malta.pdf?utm_source=POLITICO.EU&utm_campaign=456d38e663-EMAIL_CAMPAIGN_2020_04_14_05_05&utm_medium=email&utm_term=0_10959edeb5-456d38e663-190046705

⁸⁹ EU Emergency Trust Fund for Africa: New assistance package to support vulnerable groups and address COVID-19 in North Africa, press release, 2 July 2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1244

⁹⁰ EU Emergency Trust Fund for Africa, Action Document: Support to Integrated border and migration management in Libya - Second phase (T05-EUTF-NOA-LY-07), <https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-07.pdf>

⁹¹ UNHCR, Libya update, 28 August 2020, <https://reliefweb.int/report/libya/unhcr-update-libya-28-august-2020>

shelling.⁹² Also, the arrival of Covid-19 in Libya has had an impact on disembarkation operations, as in some cases managers of detention centres refused to receive new arrivals who were thus left in the community. This contributed to a welcome decrease in the number of people held in detention centres nominally under the responsibility of the GNA, with about 2,267 people currently spread between up to nine detention centres in western Libya.⁹³ However, Libyan authorities remained active at sea, and people intercepted at sea continued to be disembarked in Libya and handed over to DCIM officials, to be transferred to detention centres. Notably, in the case of the “Easter Monday” push-back carried out by fishing vessels coordinated by the Maltese government, described in the previous chapter, survivors were disembarked in Tripoli and taken to the Trik-al-Sikka detention centre.⁹⁴ Amnesty International has also found that, in some instances, migrants and refugees returned to Libya following interception at sea have been handed to militias or armed groups affiliated with the GNA and held in unofficial places of detention, such as the “Tobacco factory” in Tripoli.

The transfer of people to detention centres or other places of captivity continues to be hugely problematic, as it results in the arbitrary detention or other unlawful deprivation of liberty in inhumane conditions of women, men and children. It also exposes people to a range of other serious human rights violations and abuses that have been consistently documented in Libya’s detention centres for years, in particular torture and other ill-treatment, including sexual violence, often to extract a ransom from relatives. Other human rights violations frequently reported include exploitation through bonded labour⁹⁵ as well as unlawful killings – as shown by the killing of three people on 27 July 2020, when security forces shot at a group of around 70 refugees and migrants who were being disembarked in the town of Khoms and tried to escape detention.⁹⁶

Human rights violations are perpetrated in Libya with total impunity, given the near collapse of the judiciary and the power held by militias and armed groups. However, in a recent case Italy’s judiciary has recognized the extent of abuses perpetrated in Libya’s detention centres and places of captivity. In May 2020, a court in Messina, Italy, sentenced three men to 20 years of imprisonment for torture and other serious crimes inflicted in Libya on refugees and migrants who subsequently managed to reach Italy and identified the three men during the journey.⁹⁷ The three men, a Guinean and two Egyptians, had been operating in the Shohada al-Nasr detention centre in the Libyan city of Zawiyah, a former military base known as “Ossama detention centre” after the name of its director. The centre is still functional and among the most crowded ones at present. Already in 2017, Amnesty International had documented serious human rights violations in this detention centre, routinely used to detain people intercepted at sea.⁹⁸ Indeed, one of the asylum-seekers who denounced the three men immediately after arriving in Italy had also been subjected to horrific abuse in the detention centre after previously being intercepted at sea and returned to Libya. Victims’ statements documented by Italian authorities in this case detail horrendous violations and abuses – torture, including with electric shocks, batons and cables, as well as systematic rapes and unlawful killings – suffered by the victims in various places of captivity.⁹⁹

⁹² IOM, Libya Considers Its Ports Unsafe for the Disembarkation of Migrants, press release, 9 April 2020, <https://www.iom.int/news/libya-considers-its-ports-unsafe-disembarkation-migrants> and https://twitter.com/IOM_Libya/status/1258508007085727744?s=20

⁹³ UNHCR, Libya update, 21 August 2020, <https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20Libya%20Update%2021%20August%202020.pdf>

⁹⁴ Alarm Phone, Twelve Deaths and a Secret Push-Back to Libya, Press release, 16 April 2020, <https://alarmphone.org/en/2020/04/16/twelve-deaths-and-a-secret-push-back-to-libya/>

⁹⁵ See, inter alia: UN Security Council, Report of the Secretary-General, S/2020/275, 6 April 2020, https://reliefweb.int/sites/reliefweb.int/files/resources/S_2020_275_E_O.pdf; UN Security Council, Final report of the Panel of Experts on Libya, S/2019/914, 9 December 2019, <https://undocs.org/S/2019/914>; UN Office of the High Commissioner for Human Rights / UN Support Mission in Libya, Desperate and dangerous: report on the human rights situation of migrants and refugees in Libya, 20 December 2018, <https://reliefweb.int/report/libya/desperate-and-dangerous-report-human-rights-situation-migrants-and-refugees-libya> and Amnesty International, Libya’s dark web of collusion: Abuses against Europe-bound refugees and migrants, 12 December 2017, <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>

⁹⁶ IOM, IOM Deplores Killing of Two Migrants Returned from Sea to Libya, 28 July 2020, www.iom.int/news/iom-deplores-killing-two-migrants-returned-sea-libya; Al Jazeera, Libyan authorities shot dead three Sudanese migrants: UN, 28 July 2020, <https://www.aljazeera.com/news/2020/07/libyan-authorities-shot-dead-sudanese-migrants-200728132723944.html>

⁹⁷ Avenire, Migranti: Condannati a Messina tre torturatori arruolati in Libia dagli uomini di Bija, 28 May 2020, <https://www.avenire.it/attualita/pagine/condannati-a-messina-tre-torturatori-arruolati-in-libia-dagli-uomini-di-bija>

⁹⁸ Amnesty International, Libya’s dark web of collusion: Abuses against Europe-bound refugees and migrants, 12 December 2017, <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>

⁹⁹ Procura della Repubblica di Palermo, Direzione Distrettuale Antimafia, Decreto di Fermo, N. 12809/2019, on file with Amnesty International.

Indeed, beyond official detention centres, horrific abuses continue to be perpetrated in other places of captivity managed by militias, armed groups and criminal groups, also extracting ransoms from refugees and migrants. Sometimes, people intercepted at sea also end up disappeared – and likely re-trafficked – after being disembarked in Libya.¹⁰⁰ On 27 May 2020, at least 30 migrants were killed and 11 injured, by traffickers in the warehouse where some 200 people were being kept.¹⁰¹ Many remain missing to date, amid fears that they may have been killed or kidnapped. The Libyan authorities have failed to open comprehensive investigations into the killings and bring those responsible to justice.

Even when free, refugees and migrants live in constant fear of being targeted for assault, kidnappings and robberies, and are routinely exposed to labour exploitation and forced labour. Women and girls are at particular risk of sexual violence and exploitation. Refugees and migrants are also unable to seek police protection, as they fear detention. In the east, the Libyan National Army continues to deport people to neighbouring countries – according to statements on the official Facebook page of DCIM's Benghazi office –¹⁰² including from the Kufra detention center, except for Egyptians whom have been deported from the Musaid crossing. This raises serious concerns about further violations of the principle of *non-refoulement*, which prohibits the transfer of people to a place where they are at risk of serious human rights violations.

The conflict has exacted its toll amongst civilians, including migrants and refugees, who have been killed or harmed as a result of indiscriminate attacks. In the most dramatic case, in July 2019, dozens of refugees and migrants held in the detention centre of Tajoura, on the eastern outskirts of Tripoli, were killed when the centre – placed near an ammunition deposit – was hit by a bomb.¹⁰³

The arrival of Covid-19 in Libya has also affected refugees and migrants, who are widely unable to receive adequate medical assistance. Many medical facilities in the country have been targeted and destroyed during the conflict, and those existing often refuse treatment to Sub-Saharan African migrants and refugees – who rarely seek treatment for fear of being detained or kidnapped.¹⁰⁴ Curfews and other restrictions linked to the pandemic have also had a heavy impact on the livelihood of refugees and migrants, who overwhelmingly work in the informal labour market.¹⁰⁵ Migrants and asylum seekers also constantly find themselves being paid less than what was previously agreed upon and are unable to seek legal remedies.

On top of this, Covid-related international travel restrictions have resulted in UNHCR having to halt all humanitarian evacuations and resettlement since 17 March, meaning that even the most vulnerable refugees, including those held in detention centres, have had no way out of the country.¹⁰⁶ On 18 June 2020, UNHCR and IOM announced a global resumption of resettlement,¹⁰⁷ however this has not yet resulted in new evacuations from Libya of people in need of international protection to be resettled in other countries. The number of those being able to benefit from such programmes in Libya was already minimal in previous years, due to inadequate pledges from EU and other states: only 5,709 refugees and asylum-seekers have been evacuated from Libya in total since November 2017, and just 297 of them have departed in 2020.¹⁰⁸

¹⁰⁰ IOM, Migrants Flee as Tripoli's Port Shelled, Press release, 10 April 2020, <https://www.iom.int/news/migrants-flee-tripolis-port-shelled>

¹⁰¹ IOM, IOM Deplores Killing of 30 Trafficked Migrants in Libya, press release, 28 May 2020, <https://www.iom.int/news/iom-deplores-killing-30-trafficked-migrants-libya>

¹⁰² <https://www.facebook.com/2259394174314795/photos/a.2259633977624148/2610216592565883/?type=3&theater>

¹⁰³ Amnesty International, Libya's relentless militia war: Civilians harmed in the battle for Tripoli, April-August 2019, 22 October 2019, <https://www.amnesty.org/en/documents/mde19/1201/2019/en/>

¹⁰⁴ On the situation in medical facilities, see: <https://reliefweb.int/report/libya/ocha-libya-l-humanitarian-bulletin-july-2020>; on migrants access to health:

https://displacement.iom.int/system/tdf/reports/DTM_R31_Migrant_Report.pdf?file=1&type=node&id=9426

¹⁰⁵ IOM, Covid-19 movement restrictions: Libya mobility restriction dashboard #4 (7-31 May 2020), https://migration.iom.int/system/tdf/reports/DTM%20Libya%20Mobility%20Restrictions%20Dashboard%20_4.pdf?file=1&type=node&id=8805%20Some%20files%20can%20contain%20viruses%20or%20otherwise%20be%20harmful%20to%20your%20computer.%20It%20is%20important%20to%20be%20certain%20that%20this%20file%20is%20from%20a%20trustworthy%20source.%20Would%20you%20like%20to%20open%20this%20file?%20-----%20OK%20Cancel%20-----

¹⁰⁶ UNHCR/IOM, IOM, UNHCR announce temporary suspension of resettlement travel for refugees, press release, 17 March 2020, <https://www.unhcr.org/news/press/2020/3/5e7103034/iom-unhcr-announce-temporary-suspension-resettlement-travel-refugees.html>

¹⁰⁷ UNHCR/IOM, Joint Statement: UN refugee chief Grandi and IOM's Vitorino announce resumption of resettlement travel for refugees, press release, 18 June 2020 <https://www.unhcr.org/news/press/2020/6/5eeb85be4/joint-statement-un-refugee-chief-grandi-ioms-vitorino-announce-resumption.html>

¹⁰⁸ UNHCR, Libya update, 28 August 2020, <https://reliefweb.int/report/libya/unhcr-update-libya-28-august-2020>

3.2 THE LIBYAN SAR REGION: PEOPLE RETURNED TO LIBYA, PEOPLE LEFT STRANDED AT SEA

The situation in Libya continues to require that no refugee or migrant rescued at sea in the central Mediterranean is disembarked there. Indeed – as also reiterated by the Secretary-General of the United Nations, António Guterres –¹⁰⁹ Libya cannot be considered as a “place of safety” for disembarkation purposes, as this must be a place where people are treated humanely and offered a genuine opportunity to seek asylum. The choice of the port of disembarkation must comply with the principle of *non-refoulement*, prohibiting the transfer of any person to a country where they are at risk of serious human rights violations, which is enshrined in both international and EU law and is now part of international customary law. Based on relevant obligations, UNHCR continues to maintain that no one should be forcibly returned to Libya under any circumstances, and that Libya does not qualify as a place of safety for disembarkation following rescue or interception at sea.¹¹⁰ It should also be noted that Italy’s push-back operations towards Libya in 2009/10 were ruled unlawful by the European Court of Human Rights in 2012,¹¹¹ as well as by the Tribunal of Rome in November 2019,¹¹² and that since then the treatment of refugees and migrants in Libya has deteriorated even further.

While fully aware of the suffering of people returned to Libya, Italian, Maltese and EU authorities have adopted policies to secure the disembarkation in Libya of people rescued at sea. In a clear attempt to circumvent the prohibition of pushbacks, they have done so by supporting the Libyan maritime authorities to gain control of the central Mediterranean and stop the crossings.

Beyond providing speedboats and training, such support has materialized in carrying out the arrangements necessary to establish a Libyan SAR region.¹¹³ This resulted in December 2017 in the notification to the International Maritime Organization (IMO) of the establishment of a Libyan SAR region, which was acknowledged by the IMO in June 2018. The declaration of a SAR region has since enabled the Libyan authorities to coordinate rescue operations within a huge area of the central Mediterranean, including operations carried out by private actors, and has allowed other maritime authorities notified of a boat in distress to transfer to Libya the responsibility to coordinate the rescue. This is of crucial importance, as the country coordinating a rescue is also responsible for instructing the rescue vessel on where to disembark the people rescued at sea, which generally means directing it to disembark them on its own territory, unless another state voluntarily offers to use one of its ports.

The declaration of a Libyan SAR region allows Libyan authorities to instruct private vessels to rescue refugees and migrants at sea and to return them to Libya, even if Libya is not a “place of safety”. This means shipmasters face a conundrum, as they are instructed to disembark people in Libya, even if they are under an obligation to disembark them in a place of safety instead. Italian and EU authorities that have supported the declaration of a Libyan SAR region have never clarified where they expect shipmasters to carry people rescued in the Libyan SAR region – even if they acknowledge that Libya is not a place of safety – nor have they proactively offered their ports for the disembarkation of people rescued in Libya’s SAR region.

On the contrary, coinciding with the declaration of the Libyan SAR region, in June 2018 the Italian government launched a policy, labelled the “closed ports” policy, involving the refusal to authorize the disembarkation in Italy of people rescued in the central Mediterranean. This decision immediately resulted in a first “disembarkation crisis”, as vessels carrying refugees and migrants – including ships of the Italian Coast Guard and the US and Irish navies, together with merchant vessels and rescue vessels operated by NGOs – were left at sea for days or even weeks without instructions on where to disembark. This had obvious consequences on frail and traumatized people, including children and other vulnerable individuals, who had escaped horrific abuse in Libya and survived shipwrecks in the central Mediterranean, only to find themselves stranded at sea for protracted periods without adequate care or any possibility to seek asylum.

¹⁰⁹ UN Security Council, Report of the Secretary-General, S/2020/275, 6 April 2020, para. 8, https://reliefweb.int/sites/reliefweb.int/files/resources/S_2020_275_E_0.pdf

¹¹⁰ UNHCR Position on Returns to Libya - Update II, September 2018, paras.37-42, <https://www.refworld.org/docid/5b8d02314.html>

¹¹¹ Hirsi Jamaa and Others v Italy (27765/09), European Court of Human Rights, Grand Chamber, Judgment, Strasbourg, 23 February 2012, <http://hudoc.echr.coe.int/eng?i=001-109231>

¹¹² Tribunale di Roma, Sentenza n. 22917, 28 novembre 2019, <https://www.meltingpot.org/Riconosciuto-il-diritto-ad-entrare-in-Italia-a-chi-e-stato.html#.XxSHGihKiUk>

¹¹³ European Commission, EU Trust Fund for Africa adopts €46 million programme to support integrated migration and border management in Libya, 28 July 2017, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2187

The new policy appears to have influenced the way ships would subsequently conduct their operations in the central Mediterranean. European governments have largely removed state-owned vessels from the sea, in particular from areas where they could be involved in rescues, and have refrained from instructing them to intervene when they happened to be near a refugees and migrants' boat in distress.¹¹⁴ Merchant vessels have in several cases avoided being left at sea for days – which can have a very significant economic impact – by disembarking people they had rescued at sea in Libya, even if this represents a breach of the shipmaster's duties.¹¹⁵ In contrast, NGO rescue ships have consistently – and correctly – refused to return anyone to Libya, and as a result have often been left at sea for long periods, awaiting for instructions on a port where to direct. In all cases, disembarkation has been then authorized in a European port following *ad hoc* negotiations facilitated by the European Commission with EU governments, usually involving the pledge to relocate rescued people and thus share responsibility for assisting them and processing their asylum claims. To avoid having to resort to *ad hoc* negotiations each time, in September 2019 the Ministers of Interior of France, Germany, Italy and Malta, meeting in Valletta, declared their intention to set up a temporary mechanism to govern this process.¹¹⁶ Although such mechanism never materialized formally, in the subsequent months EU governments appeared able to resolve cases more quickly, although without overcoming the “disproportionate level of informality, secrecy and lack of accountability” that marked the relocation arrangements.¹¹⁷

As no systematic solution was agreed, it was only a matter of time before a second disembarkation crisis started. This was triggered in April 2020, when – coinciding with the spreading of the Covid-19 pandemic in the two countries – Italy and Malta further restricted their stance. As described in Chapter 2, on 7 April, the Italian government adopted a decree stating that for the duration of the pandemic emergency Italian ports should not be considered as places of safety for the disembarkation of people rescued by foreign-flagged ships outside the Italian SAR region.¹¹⁸ The Maltese government reacted just a few days later, declaring its ports “closed” in view of the purported need to channel all resources to address the Covid-19 pandemic.¹¹⁹

The new predicament in early 2020 brought again to surface the need for a mechanism for the prompt and predictable disembarkation of people rescued in the central Mediterranean. Attempts by Malta to use the suffering of people left stranded at sea to strongarm other states to intervene were unlawful and unjustifiable. However, this does not mean that the plea of Mediterranean coastal states for more solidarity is not legitimate, and that there is no real need for a mechanism guaranteeing a fair sharing of the responsibility to assist refugees and migrants reaching Europe's borders.

Instead, EU member states at the external borders of the Union are implicitly encouraged to adopt measures restricting asylum-seekers' access to their territory, even if this means breaching international law obligations towards them. On the one hand, the impunity for such violations, as is the case in Malta, further encourages and emboldens the perpetrators. On the other, the disembarkation of people rescued at sea is disincentivized by the so-called Dublin system, which triggers the coastal state's responsibility for assisting the person in the longer term and processing his or her asylum application.

EU Member States and institutions must respect their international obligations and refrain from adopting policies or practices that jeopardize people's human rights. At the same time, to reverse this vicious cycle,

¹¹⁴ Alarm Phone / Borderline Europe / Mediterranean – Saving Humans / Sea-Watch, Remote control: the EU-Libya collaboration in mass interceptions of migrants in the Central Mediterranean, 17 June 2020, https://www.borderline-europe.de/sites/default/files/readingtips/RemoteControl_Report_0620.pdf

¹¹⁵ Forensic Oceanography, The Nivin Case: Migrants' resistance to Italy's strategy of privatized push-back, December 2019, <https://content.forensic-architecture.org/wp-content/uploads/2019/12/2019-12-18-FO-Nivin-Report.pdf>

¹¹⁶ Joint Declaration of Intent on a controlled emergency procedure – Voluntary commitments by member states for a predictable temporary solidarity mechanism, 23 September 2019, <https://www.statewatch.org/media/documents/news/2019/sep/eu-temporary-voluntary-relocation-mechanism-declaration.pdf>

¹¹⁷ Sergio Carrera and Roberto Cortinovis, The Malta declaration on SAR and relocation: A predictable EU solidarity mechanism?, CEPS, October 2019, https://www.ceps.eu/wp-content/uploads/2019/10/PI2019_14_SCRC_Malta-Declaration-1.pdf

¹¹⁸ Inter-ministerial decree 7 April 2020, n. 150, signed by the Ministers for Infrastructure and Transport, Foreign Affairs and International Cooperation, Interior, and Health, [https://www.avvenire.it/c/attualita/Documents/M_INFR.GABINETTO.REG_DECRETI\(R\).0000150.07-04-2020%20\(3\).pdf](https://www.avvenire.it/c/attualita/Documents/M_INFR.GABINETTO.REG_DECRETI(R).0000150.07-04-2020%20(3).pdf)

¹¹⁹ Letter to the High Representative of the EU for Foreign Affairs, Josep Borrell, by Malta's Minister for Foreign and European Affairs, Evarist Bartolo, and Minister for Home Affairs, National Security and Law Enforcement, Byron Camilleri, 13 April 2020, https://www.politico.eu/wp-content/uploads/2020/04/Malta.pdf?utm_source=POLITICO.EU&utm_campaign=456d38e663-EMAIL_CAMPAIGN_2020_04_14_05_05&utm_medium=email&utm_term=0_10959edeb5-456d38e663-190046705

they should adopt far-reaching reforms – particularly in the context of the New Pact on Asylum and Migration to be presented by the European Commission in September 2020 – to ensure a wider sharing of responsibility for managing people arriving irregularly through maritime and land borders across the region – and in particular in countries which, like Greece and Spain, have received a higher number of people in recent years. However, given the specific challenge of identifying an appropriate place of disembarkation when rescues are carried out within Libya’s SAR region, Amnesty International considers that an *ad hoc* mechanism should be set up with utmost urgency, that respects international law, and also encourages compliance through the sharing of responsibility for assisting people disembarked.

This should be coupled with the adoption of measures able to reduce long-standing divergencies between Italy and Malta that undermine the effectiveness of the SAR framework, already mentioned in Chapter 2.

3.3 THE AMBIGUOUS ROLE OF FRONTEX AND OPERATION EUNAVFORMED IRINI

As highlighted in the previous paragraph, in recent years EU member states have largely withdrawn naval assets from the central Mediterranean, in order to avoid them encountering and having to rescue refugees and migrants, as they would have an obligation to disembark them in a place of safety, usually in Europe. Of the 146 rescue operations conducted in the central Mediterranean between 1 September 2019 and 29 February 2020, only 25 were carried out by Italian or Maltese assets, while 69 were realized by the Libyan Coast Guard, 51 by NGOs and one by a merchant vessel.¹²⁰

Vessels previously patrolling the sea as part of EU operations have also been gradually pushed away from areas where distress calls usually come from: the fate of EunavforMed Operation Sophia, a EU joint naval operation that remained without ships for its last year of existence between 2019 and early 2020, is emblematic. In March 2020, Sophia was replaced with another naval operation, called EunavforMed Irini, with the primary task of monitoring the enforcement of the arms embargo on Libya and the additional tasks of preventing the illicit export of petroleum from Libya, training Libyan Coast Guard personnel and tackling smuggling and trafficking in human beings.¹²¹ Irini can deploy naval assets, however only one or two are usually at sea,¹²² and with the explicit provision that any maritime asset will be withdrawn if their deployment “produces a pull effect on migration”.¹²³ Since February 2018, Frontex’s joint operation Themis has also continued to be active to “support Italy with border control, surveillance and search and rescue in the Central Mediterranean”;¹²⁴ however, its ships were rarely called to rescue people from the sea, likely because they were positioned close to Italian waters rather than in areas from where distress calls are most commonly launched.

This has not meant, however, that EU maritime operations have been inactive. Instead, they have largely refocused their activities on providing support to the Libyan Coast Guard, and not only through training. Increasingly, their aerial assets have gained centre stage by ensuring the continuous monitoring of the situation at sea – including well into the Libyan SAR region, while the few remaining European navies’ ships have been kept well away from it. EU aerial assets have routinely been employed to identify the presence of refugee and migrant vessels at sea and to immediately inform the Libyan authorities of their position. Such monitoring activity has the evident aim of ensuring that the Libyan Coast Guard can intercept people at sea and return them to Libya, notwithstanding the fact that Libya cannot be considered as a place of safety. In fact, it is clear that European aerial surveillance “has played a growing role in the early detection of boats departing from the Libyan coast”, in the words of the Secretary-General of the United Nations, António

¹²⁰ UN Security Council, Report of the Secretary-General, S/2020/275, 6 April 2020, para.5 and f.n.2, https://reliefweb.int/sites/reliefweb.int/files/resources/S_2020_275_E_0.pdf

¹²¹ Council of the European Union, COUNCIL DECISION (CFSP) 2020/472 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI), 31 March 2020, <https://www.operationirini.eu/wp-content/uploads/2020/04/200401-CD-IRINI-in-OJ.pdf>

¹²² Operation EunavforMed Irini, Deployed units, https://www.operationirini.eu/media_category/assets/ Accessed on 30 August 2020.

¹²³ Council of the European Union, COUNCIL DECISION (CFSP) 2020/472 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI), 31 March 2020, Art.8(3) <https://www.operationirini.eu/wp-content/uploads/2020/04/200401-CD-IRINI-in-OJ.pdf>

¹²⁴ Frontex, Main operations, Operation Themis, accessed on 20 July 2020, <https://frontex.europa.eu/along-eu-borders/main-operations/operation-themis-italy/>

Guterres, and that such detection “too often contributed to people being disembarked in Libya under unsafe conditions.”¹²⁵

¹²⁵ UN Security Council, Report of the Secretary-General, S/2020/275, 6 April 2020, para.42, https://reliefweb.int/sites/reliefweb.int/files/resources/S_2020_275_E_0.pdf

4. ACCOUNTABILITY NEEDED FOR HUMAN RIGHTS VIOLATIONS DURING EU EXTERNAL BORDER SURVEILLANCE

Amnesty International considers that there is both a monitoring and an accountability gap in the set-up of the EU external border surveillance, including because of the European Commission's narrow view of the EU Border Agency's role when measures at the borders result in human rights violations; and of its interpretation of search and rescue as a function for which member states are responsible and which they exercise distinctly and separately from EU external border control.

With regard to the 15 April pushback, and other reported pushbacks in the past, the European Commission's position has been that search and rescue is a competence of member states and that the Frontex mandate only requires that Frontex promptly communicates information relevant to search and rescue to the competent maritime authorities of the coastal states concerned.¹²⁶

Amnesty International considers that search and rescue is a function that is inextricably linked with EU external border control, to which international human rights obligations of member states and the Union as well as the EU acquis¹²⁷ are applicable. In fact, search and rescue operations only terminate when rescued people are disembarked in a place of safety, which inevitably involves the crossing of borders at sea.¹²⁸ According to Article 4 of the Schengen Borders Code, on Fundamental Rights, "When applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union ('the Charter), relevant international law, including the Convention Relating to the Status of Refugees [...], obligations related to access to international protection, in particular the principle of non-refoulement, and fundamental rights. In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an individual basis."¹²⁹

¹²⁶ European Commissioner for Home Affairs, letter to the Chairman of the LIBE parliamentary committee, 7 July 2020, on file with Amnesty International

¹²⁷ The EU's 'acquis' is the body of common rights and obligations that are binding on all EU countries, as EU Members. See: <https://eur-lex.europa.eu/summary/glossary/acquis.html>

¹²⁸ IMO, RESOLUTION MSC.167(78), GUIDELINES ON THE TREATMENT OF PERSONS RESCUED AT SEA, 20 May 2004, para 6.12.

¹²⁹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399>

The applicability of international human rights obligations to EU external border control can be derived also from Regulation 656/2014 on the surveillance of external sea borders, which contains ample reference to the need for member states to uphold their human rights obligations during border surveillance operations, and which, in its preamble, describes border surveillance as extending to “arrangements intended to address situations such as search and rescue that may arise during a border surveillance operation at sea and arrangements intended to bring such an operation to a successful conclusion.”¹³⁰

The accountability gap for human rights violations in the context of EU external border surveillance is most notable with respect to European aerial assets participating in Frontex Joint Operations or engaged in what is known as Multipurpose Aerial Surveillance (MAS).¹³¹

In the “Easter Monday” incident, the sighting of the boat in distress by a Frontex aircraft was followed by inaction by various EU member states for several days while the boat remained stranded at sea with a hundred people in peril – until eventually triggering the Maltese intervention leading to their return to Libya. Since by its own admission Frontex was aware of the boats in distress over the Easter weekend, including the one with the people eventually pushed back to Tripoli, practically from their departure, Amnesty International asked the European Commission whether the Agency had initiated a ‘serious incident report’¹³² for failure by any of the MRCCs notified to take prompt action and ensure an immediate rescue, or whether it had otherwise reported this incident.¹³³ In fact, given the obligation to guarantee the protection of fundamental rights in all its activities,¹³⁴ failure by any of the MRCCs notified to take prompt action and ensure an immediate rescue and disembarkation in a place of safety should have been duly reported to relevant stakeholders, whether through the ‘serious incident’ reporting mechanism or otherwise. However, as described in Chapter 2, both Frontex and the European Commission have reiterated to Amnesty International, as well as to the LIBE Committee, that Frontex is not mandated to further follow up the measures taken by the member states’ authorities or question their inaction.

Amnesty International is concerned that while both Frontex and the European Commission have pointed out that the practice of notifying sightings to the competent MRCCs is in line with obligations under maritime law, they have refrained from ensuring that other non-derogable principles of international law, such as that of non-refoulement, are equally upheld during Frontex MAS and joint sea operations.

Amnesty International is concerned that it has become routine practice for EU aerial assets, whether in the context of MAS, Frontex or other EU operations, notably EunavforMed Sophia and Irini, to notify Libyan authorities of any sightings of refugee and migrant boats, without adopting measures to ensure such

¹³⁰ Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0656>

¹³¹ The objective of MAS is to enrich the situational picture through real-time surveillance of the external borders of the EU. It involves the collection of data and a full-motion video by means of sensors installed on an aircraft which are then streamed in real-time to the European Monitoring Team at Frontex. MAS supports Frontex, member states, and other EU partners with the surveillance and monitoring activities of specific operational areas. Following a sighting performed by MAS, in case of need for an immediate operational reaction, the information is passed to the member states’ authorities for the proper follow up activity.

¹³² A Serious Incident is an event or occurrence, natural or caused by human action, which may affect, or be relevant to a particular Frontex activity, to the safety and security of participants in Frontex activities, to the Agency’s mission and reputation, or to any combination thereof. Among other events and occurrences as defined by Standard Operating Procedures on SIR, serious incidents also include situations of possible violations of Fundamental Rights and of European Union acquis or international law, particularly related to international protection obligations, and of possible violations of the Frontex Code of Conduct applicable to all persons participating in Frontex operational activities as well as of the Code of Conduct for Return Operations and Return Interventions coordinated or organized by Frontex. The aim of SIR is to inform Frontex Senior Management, the Frontex Management Board, Member States, and other relevant stakeholders, as soon as possible, about the occurrence of a serious incident as defined in the “Frontex Serious Incident Catalogue. <https://www.statewatch.org/media/documents/news/2016/aug/frontex-serious-incident-reporting.pdf>

¹³³ Letter to Ylva Johansson, European Commissioner for Home Affairs dated 20 May 2020

¹³⁴ Article 80(1) European Border and Coast Guard Regulation (EU) 2019/1896. See also Article 80(2): 2. In the performance of its tasks, the European Border and Coast Guard shall ensure that no person, in contravention of the principle of non-refoulement, be forced to disembark in, forced to enter, or conducted to a country, or be otherwise handed over or returned to the authorities of a country where there is, inter alia, a serious risk that he or she would be subjected to the death penalty, torture, persecution, or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a risk of expulsion, removal, extradition or return to another country in contravention of the principle of non-refoulement.

notification does not lead to disembarkation in Libya, in view of the fact that Libya cannot be considered a place of safety.

The European Commission has pointed out that, since the declaration of a Libyan SAR region, the notification of a relevant sighting to the Libyan MRCC is an obligation under the law of the sea, and in particular the SAR Convention.¹³⁵ Amnesty International notes that the same convention provides for a duty to “co-ordinate and co-operate” which is applicable to all relevant parties,¹³⁶ and that all parties have a responsibility to authorize their own rescue coordination centres “to make the necessary arrangements in co-operation with other RCCs to identify the most appropriate place(s) for disembarking persons found in distress at sea.”¹³⁷ Amnesty International also emphasizes that these obligations must be read in conjunction with other legal obligations – under human rights and refugee law – which should also guide the actions of any authorities participating in rescue operations, and which protect any individuals from being returned to a country where they would be exposed to a risk of serious harm.

If Libyan authorities systematically fail to act in compliance with their duty to instruct vessels to disembark in ports qualifying as places of safety, such failure is largely related to the fact that Libya does not have the power to authorize disembarkation in a country different from Libya, unless other states adequately cooperate, by offering their own ports. Other states triggering rescue operations, or in any way fostering Libya’s capacity to intercept people at sea, should be bound to cooperate in good faith with Libya towards the identification of a place of safety where rescued people can be safely disembarked. To achieve this, states notifying Libyan authorities of the position of a boat in distress could accompany such notification with a commitment to cooperate to the identification of an adequate place of safety, to avoid disembarkation in Libya. But since rescue operations must be carried out as promptly as possible, without any political negotiation slowing it down, relevant negotiations should be carried out in advance, by setting up a predictable disembarkation mechanism addressing the specific situation in the Libyan SAR region, ensuring that a protocol to handle sightings in that region is in place beforehand.

The declaration of the Libyan SAR region has created a situation where legal conundrums are apparent. Rather than using and aggravating them to achieve the containment of refugees and migrants in Libya, EU member states and institutions should act to reconcile the different principles at stake: not only the obligation to cooperate towards the prompt rescue of people in distress at sea, but also the prohibition of assisting other states in the commission of wrongful acts.¹³⁸

While acknowledging that primary responsibility for handling rescue operations rests with states, international organizations and EU agencies should not consider themselves relieved of all responsibility arising as a consequence of rescue operations. In particular, regarding EU operations, agencies should refrain from setting up maritime operations or undertaking any other activities without ensuring that any activity carried out by the agency in support of rescue operations leads to disembarkation in a place of safety, in line with the law of the sea as well as with other areas of international law, such as human rights and refugee law.

In this sense, Amnesty International notes that the new Regulation on the European Border and Coast Guard, approved in November 2019 and regulating all Frontex activities, provides that “The executive director shall, after consulting the fundamental rights officer, decide not to launch any activity by the Agency where he or she considers that there would already be serious reasons at the beginning of the activity to

¹³⁵ In a letter by the then Director-General for migration and home affairs of the European Commission, Paraskevi Michou, leaked by media in early 2020, the notification of sightings to the Libyan authorities was presented as a duty under art.4.3 of the SAR Convention: “Any search and rescue unit receiving information of a distress incident shall initially take immediate action if in the position to assist and shall, in any case without delay, notify the rescue co-ordination centre or rescue subcentre in whose area the incident has occurred.” The Guardian, Revealed: The great European refugee scandal, 12 March 2020, <https://www.theguardian.com/world/2020/mar/12/revealed-the-great-european-refugee-scandal>

¹³⁶ “3.1.9 Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships’ intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall 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, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.” Resolution MSC.155(78) (adopted on 20 May 2004), Amendments to the International Convention on Maritime Search and Rescue, 1979, as amended, [http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-\(MSC\)/Documents/MS.155\(78\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Maritime-Safety-Committee-(MSC)/Documents/MS.155(78).pdf)

¹³⁷ Article 3.1.6(4), added as a result of amendments approved in 2004.

¹³⁸ Amnesty International and Human Rights Watch, Italy: Submission to the European Court of Human Rights, 13 November 2019, <https://www.amnesty.org/en/documents/eur30/1398/2019/en/>

suspend or terminate it because it could lead to violations of fundamental rights or international protection obligations of a serious nature.”¹³⁹ While this provision should not provide an easy justification for avoiding interventions, it does require Frontex, in particular, to establish a solid due-diligence framework, ensuring that no border control operation results directly or indirectly in facilitating human rights violations.

Amnesty International considers that EU member states and institutions should take prompt action to address the monitoring and accountability gaps regarding measures adopted at EU’s borders. The ‘serious incident report’ process is one of the main formal channels for reporting on possible human rights violations linked to Frontex activities. Yet, the process has considerable limitations: it depends on Frontex itself, whose officials may have contributed to the situation; it lacks transparency, it relies on the cooperation of the member states concerned for effective follow-up and it is not reported for the purpose of public scrutiny. Additional measures are needed to ensure adequate monitoring and accountability for human rights violations at EU external borders.

This could be done, for example, through the establishment of a mechanism for border control monitoring – which could rely on existing independent human rights bodies – able to operate according to principles of independence and transparency, with broad mandate and powers, including the possibility to conduct unannounced visits to all places where refugees and migrants are detained or placed, and to seek accountability for any human rights violation, including the possibility of triggering investigations, disciplinary and criminal proceedings before the competent authorities, with the ultimate goal of putting an end to impunity.

Monitoring, investigating and ensuring accountability of member states and EU agencies’ officials for human rights violations occurring during border control and surveillance operations at EU external borders, including during search and rescue activities, are indispensable to ensure the EU Charter of Fundamental Rights is effectively upheld. They must be proactively pursued by the European Commission.

¹³⁹ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, Art.46(5)

5. RECOMMENDATIONS

TO MALTA

Ensure that people in distress in Malta's SAR region are promptly assisted and disembarked in Malta without delay, including by withdrawing the April 2020 statement regarding the closure of Maltese ports to disembarkations of refugees and migrants.

Ensure that adequate SAR resources are available where they might be needed on the high seas along the routes of refugees and migrants.

Ensure that people rescued at sea and disembarked in Malta are housed in open centres, in adequate conditions, and that they have access to asylum, in line with international standards.

Establish an independent, public inquiry into violations of the rights of refugees and migrants at sea in the Maltese SAR region, with terms of reference and members able to command the trust of civil society.

With regard to the Easter Monday pushback and reported death of 12 people in April 2020; to the reported pushbacks in March 2020 and October 2019; to the failure to rescue and re-direction of a refugees and migrants' boat to Italy in April 2020; and to the arbitrary detention at sea of approximately 425 people between April and June 2020:

- Ensure that thorough, independent and impartial criminal investigations are conducted and that, where there is admissible evidence available, suspects are brought to justice in a fair trial for charges that reflect the gravity of the human rights violations involved;
- Provide adequate reparations to survivors and the families of the victims in line with international standards; and
- Publicly acknowledge the unlawfulness of the policies and practices which led to the human rights violations described in this report.

Withdraw from the Malta-Libya Memorandum of Understanding and ensure that any form of cooperation with Libya focuses on protecting the human rights of refugees and migrants rather than on their containment in Libya; and make any cooperation with Libya on migration and border control conditional on the adoption of concrete and verifiable measures by Libya to protect the rights of refugees and migrants in the country, including through the closure of detention centres and the enactment of asylum laws by Libyan authorities. Until such steps have not achieved their objective, Malta should demand that Libyan authorities ensure that any refugees and migrants rescued under Libyan coordination are disembarked in a place of safety, i.e. not in Libya, and should fully cooperate with Libyan authorities towards the prompt identification of a suitable place of safety.

Ratify the 2004 Amendments to the SOLAS and SAR Conventions and commit to interpreting distress at sea in the manner that ensures the best protection of the right to life and in line with Malta's international human rights law obligations and European laws and standards.

TO ITALY

Withdraw from the Italy-Libya Memorandum of Understanding and ensure that any form of cooperation with Libya focuses on protecting the human rights of refugees and migrants, rather than on their containment in

the country; and make any cooperation with Libya on migration and border control conditional on the adoption of concrete and verifiable measures by Libya to protect the rights of refugees and migrants in the country, including the closure of detention centres and the enactment of asylum laws by Libyan authorities. Until then, Italy should demand that Libyan authorities ensure that refugees and migrants rescued under their coordination are disembarked in a place of safety, i.e. not in Libya, and should cooperate with Libyan authorities towards the prompt identification of a suitable place of safety.

Ensure that adequate SAR resources are available where they might be needed on the high seas along the routes of refugees and migrants.

Ensure that distress at sea situations are attended to without delay and that prompt cooperation is offered to other states to carry out rescue operations without delay.

Ensure that people rescued at sea can disembark in Italy without delay, including by not extending the implementation of Decree no.150 of 7 April 2020 of the Ministers for Infrastructure and Transport, Foreign Affairs and International Cooperation, Interior, and Health, which declared Italian ports unsuited to be used as a place of safety for the disembarkation of people rescued at sea by foreign ships outside Italy's SAR region.

Refrain from hampering the life-saving activities of rescue NGOs, and in particular:

- Repeal the 'closed ports' provisions in Law 77/2019, and amend as necessary the Immigration Act (Law 286/1998) and the Code of Criminal Procedure.
- Withdraw the code of conduct imposed on rescue NGOs, which unduly restricts their ability to save lives at sea and is used to criminalize them; and halt demands that they meet unnecessary and disproportionate standards and requirements.

TO THE EU AND ITS MEMBER STATES

Building upon the Malta Declaration of September 2019, set up a predictable disembarkation mechanism addressing the specific situation in the Libyan SAR region, to ensure that any refugees and migrants rescued in the area are promptly disembarked in a place of safety, which cannot be in Libya.

Deploy an adequate number of vessels and aircrafts dedicated to rescue activities where they are most likely to be needed in the central Mediterranean to ensure detection, rescue and disembarkation in a place of safety.

Refrain from obstructing and hampering the activities of rescue NGOs in the central Mediterranean.

Set up a Parliamentary Committee of Inquiry into human rights violations at the external borders of the Union and deriving from the Union's cooperation with third countries.

Take prompt action to address the monitoring and accountability gaps regarding measures adopted at EU's borders, through the establishment of a mechanism for border control monitoring – which could rely on existing independent human rights bodies – able to operate according to principles of independence and transparency, with broad mandate and powers, including the possibility to conduct unannounced visits to all places where refugees and migrants are detained or placed, and to seek accountability for any human rights violation, including the possibility of triggering investigations, as well as disciplinary and criminal proceedings before the competent authorities, with the ultimate goal of putting an end to impunity.

Establish a robust due diligence policy and procedures which integrate considerations regarding the potential impact on human rights of all projects and activities being funded and implemented in a third country to adequately manage and mitigate the risks of human rights violations that can arise from such cooperation.

Review and reform policies of cooperation with Libya on migration and border control, with a view to stopping any actions contributing to the containment of people in a country where they are in constant, grave danger. Through the upcoming New Pact on Asylum and Migration, reset all cooperation with Libya on migration – in the form of financial, institutional, material, policy and/or capacity support – focusing it on the priority of protecting the human rights of refugees and migrants in the country. In particular, work with Libyan authorities to achieve, and consistently and publicly call on them to take immediate steps to ensure:

- the prompt release of all refugees, asylum-seekers and migrants being arbitrarily detained, and the end of the system of automatic detention;

- the full and formal recognition of UNHCR, in the form of a memorandum of understanding that guarantees the organization's full access to people of concern across the country and the possibility to carry out its full mandate, irrespectively of the nationality of beneficiaries;
- the adoption and enactment of new legislation and policies on migration and asylum, providing for the decriminalization of irregular entry, stay and exit; an end to automatic detention; and the creation of an asylum system.

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MALTA: WAVES OF IMPUNITY

MALTA'S HUMAN RIGHTS VIOLATIONS AND EUROPE'S RESPONSIBILITIES IN THE CENTRAL MEDITERRANEAN

In the first half of 2020, Maltese authorities were implicated in multiple failures to respect and protect the rights of refugees and migrants at sea. Under their coordination, people were pushed back to Libya, a country at war where refugees and migrants are systematically abused. Delays in attending to distress calls exposed people to the risk of drowning. People rescued at sea were denied disembarkation and were unlawfully detained for weeks on board private vessels meant for brief pleasure cruises.

These human rights violations are part and parcel of a wider EU regional strategy which traps refugees and migrants in Libya. This report describes how this strategy works and the impact it is having on their lives. It also recommends measures which must urgently be put in place by Malta, Italy and European member states and institutions to ensure accountability at domestic and EU level for human rights violations arising from EU external border surveillance.