FORENSIC OCEANOGRAPHY THE NIVIN CASE

Migrants' resistance to Italy's strategy of privatized push-back

A reconstruction of events by Forensic Oceanography, affiliated to the Forensic Architecture agency, Goldsmiths, University of London, December 2019

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ACRONYMS AND ABBREVIATIONS

AP WatchTheMed Alarm Phone

ECtHR European Court of Human Rights

ENFM EUNAVFOR MED - Operation Sophia

GNA Libyan Government of National Accord

IOM International Organization for Migration

IMRCC Italian Maritime Rescue Coordination Centre

ITCG Italian Coast Guard

LYCG Libyan Coast Guard

MRCC Maritime Rescue Coordination Centre

MSF Médecins Sans Frontières / Doctors Without Borders

OHCHR Office of the United Nations High Commissioner for Human Rights

SAR zone Search and Rescue zone

SOLAS International Convention for the Safety of Life at Sea

UNCLOS United Nations Convention on the Law of the Sea

UNHCR Office of the United Nations High Commissioner for Refugees

SYNTHETIC MAP



Synthetic map of the 7 November 2018 Nivin incident on the basis of georeferenced positions and AIS data. Figure by Forensic Oceanography. GIS analysis by Rossana Padeletti.

The map shows the 93 migrants' boat trajectory as determined by two georeferenced positions, and the AIS tracks of vessels in vicinity.

The Nivin's AIS track is interrupted between 20:42 on the 7 November and 13:35 on 8 November. During this time, the Nivin's AIS transponder was either not functioning or intentionally turned off. The AIS data also shows that that at approximately the same distance from the migrants' position while it was in distress, was the Omega Star, which was heading towards Malta.

The two georeferenced points we have accessed concerning the migrants' boat are:

- A) 18:10 UTC, 7.11.2018: 33 39 N 014 39. Position sent by the Italian coast guard to the Nivin at 19.39 UTC
- B) 03:06 UTC, 08.11.2018: 33°58'N 014°40'E. Position sent by the migrants in distress to the Alarm Phone and corresponding to the location of rescue.

SUMMARY

In early November 2018, five months after Matteo Salvini had been instituted as Interior Minister of Italy and implemented a drastic policy of closure of Italian ports to migrants rescued at sea, a group of 93 migrants fleeing Libya was forcefully returned to the war-torn country after they were "rescued" by a merchant ship flying the Panama flag heading towards Libya, the *Nivin*. This case exemplifies the recurrent practice of what we refer to as "privatized push-backs"—the return of migrants to a country in which their lives are at risk using merchant ships as proxy—which has been consolidated since Summer 2018. Privatized push-backs are a new modality of delegated "rescue" to enforce border control. By engaging in this practice, Italy employs extraterritorial violence to contain the movements of migrants from the Global South seeking to reach Europe. This report is an investigation into this case and the emergence of this new pattern of practice.

In the night of 6-7 November 2018, a group of 93 migrants sought to escape Libya and find refuge in Europe. They left the coast of Zlitan, and began travelling in an unseaworthy boat towards Italy



The Spanish aircraft Vigma photographed as it returned from its EUNAVFOR MED mission on 17 November 2018.¹

At 15:25 UTC on 7 November, the vessel was sighted in the recently declared Libyan Search and Rescue (SAR) zone² by a Spanish aircraft taking part in EUNAVFOR MED-Sophia (ENFM) the EU's anti-smuggling operation. During 2018, the operation has increasingly sought to withdraw its naval assets from rescue activities and instead enable interceptions by the Libyan coast guard (LYCG) based upon the early-warning provided by its aircrafts. According to ENFM's response to our request for information, there was "no ENFM naval assets (...) in the vicinity". As such, via the ENFM Force Headquarters on board the mission's flagship,³ which was the Italian ship San Marco at the time of events,⁴ "the information was passed to the relevant MRCC

¹ Available at: https://twitter.com/EMADmde/status/1063789497429762049

See our discussion in the policy section. Libya notified the creation of its SAR region to the International Maritime Organization (IMO), in July 2017, and in December 2017. The IMO confirmed the establishment of the Libyan SAR region in June 2018, see https://gisis.imo.org/Public/COMSAR/NationalAuthority.aspx and https://sarcontacts.info/srrs/ly_srr/.

³ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June - 30 November 2018, Part A, 18 January 2019, p. 4.

^{4 01} Aug 2018, Welcoming the new Sophia Task Force flagship. https://www.operationsophia.gu/welcoming-the-new-sophia-task-force-flagship/; https://www.operationsophia.gu/welcoming-the-new-sophia-task-force-flagship/; https://www.operationsophia.gu/welcoming-the-new-sophia-task-force-flagship/; https://www.facebook.com/EunavforMed/

[Maritime Rescue Coordination Centre] which relayed the information to the Libyan Coast Guard".⁵ In a phone interview, Commodore Masoud Abdalsamd of the LYCG, indicated that the LYCG first received the information from MRCC Rome, and then from ENFM, with which the LYCG has a relationship of "coordination".⁶ However, since LYCG assets were already engaged in another interception, they were unable to intercept the boat, and the passengers continued to navigate.

At 17:18 UTC, the passengers contacted the civilian emergency hotline Watch-TheMed-Alarm Phone (AP) to request assistance, giving their first GPS position at 18:48 UTC. The AP continued for some time to contact the passengers, monitor the boat's condition, and assess the presence of vessels in the area that might operate rescue. The *Mare Ionio* of Mediterranea, the only rescue NGO left in the area at the time of events as a result of the criminalisation of civilian rescue activities, was in the port of Lampedusa, and no merchant ship appeared in the immediate vicinity. Unable to reach the passengers anymore, the AP informed MRCC Rome of the vessel by phone at 19:50 UTC.



The Nivin, June 2018. Photograph: Emmanuel.L⁸

During this time, as Commodore Masoud Abdalsamd has explained, the LYCG identified one of the vessels transiting in the area: the *Nivin*, an 88m long vehicle carrier flying the Panama flag heading towards Misrata. However, despite a temporary Libyan MRCC having been established through an EU-funded project implemented by Italy, the LYCG lacked the communication equipment to contact and direct the Nivin. As such, the LYCG requested that MRCC Rome do so on its behalf. At 19:39 UTC, thus shortly before the AP informed MRCC Rome, the Italian coast guard sent a distress

posts/2026976040711633

- 5 EUNAVFOR MED Op SOPHIA, email communication to the author, 24 January 2018.
- 6 Commodore Masoud Abdalsamd, interview with the author conducted by phone on 29 November 2019.
- For a review, see the report by Sergio Carrera et al. "Fit for purpose?: the Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update", European Parliament, Policy Department of Citizens' Rights and Constitutional Affairs, Study for the PETI committee, PE 608.838, December 2018. http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)608838; FRA, Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations. https://fra.europa.eu/en/theme/asylum- migration-borders/ngos-sar-activities; FRA, 2019 update NGO ships involved in search and rescue in the Mediterranean and criminal investigations, June 2019, Vienna. https://fra.europa.eu/en/publication/2019/2019-update-ngos-sar-activities
- 8 http://www.shipspotting.com/gallery/photo.php?lid=2863065
- 9 European Commission, Support to Integrated border and migration management in Lib-ya First phase (T05-EUTF-NOA-LY-04), 27 July 2017, p. 2. https://ec.europa.eu/europeaid/support-integrated-border-and-migration-management-libya-first-phase-t05-eutf-noa-ly-04_en

signal "on behalf of Libyan Coast Guard" to the captain of the Nivin and directed it to rescue the passengers in distress.

Distress signal send at 19:39 UTC by the Italian Coast Guard "on behalf of Libyan Coast Guard" to the captain of the Nivin and directing it to rescue the passengers in distress. Document shared by the captain of the Nivin with Mediterranea.

At 21:34 UTC, the Nivin captain received an e-mail from the LYCG, which claimed to have assumed coordination of the SAR event, and, according to the captain's report, "order[ed] us to proceed to the same position which we receive[d] from MRCC [Rome]". The LYCG sent that email from the "Libyan Naval Communication Centre" (LNCC), which, since August 2017 has been "located on board the Italian warship moored in Tripoli".¹⁰





Libyan Navy officer on board the Italian Navy ship Caprera docked in the port of Tripoli, March 2018. Photographs: Italian Navy. 11

At **03:30 UTC** on 8 November 2018, the Nivin captain's report, which he shared with the NGO Mediterranea, indicates that after directing itself towards updated positions provided by unidentified **military helicopters**, the Nivin reached the vessel. The passengers describe how, upon rescuing them, **the crew of the Nivin told the passengers they would be brought to Italy**. However, the Nivin's planned course was Misrata and, according to the captain's report, **the Libyan coast guard (LYCG) directed it to proceed towards Misrata** to disembark the migrants.

¹⁰ EUNAVFOR MED Op Sophia - Monitoring of Libyan Coast Guard and Navy Report October 2017 - January 2018, 9 March 2018, p.26.

^{11 &}lt;a href="https://www.difesa.it/OperazioniMilitari/op_intern_corso/Libia_Missione_bilaterale_di_supporto_e_assistenza/notizie_teatro/Pagine/Nave_Caprera_sostituisce_la_Capri_nella_missione_bilaterale_di_assistenza_e_supporto_in_Libia.aspx

The passengers' testimonies describe how, when the LYCG approached the Nivin, they realised they had been lied to and were being brought back to Libya. Fearing for their lives if returned, they refused to be transferred to the vessel of the LYCG. In an act of resistance, they locked themselves up in the hold of the ship to protect themselves from Libyan officials threatening them. The migrants later refused to disembark in the port of Misrata, where the boat arrived in the morning of 10 November, and remained confined inside the vessel. Thanks to a mobile phone, the passengers were able to communicate their plight and refusal to disembark to the international press.¹²



The captured migrants hiding in the hold of the Nivin. Photograph taken by the passengers using a mobile phone and sent to Informigrants.net. ¹³

The stand-off ended only 10 days later, when, on 20 November, Libyan security forces violently removed the passengers from the ship. The migrants describe suffering serious wounds during the attack, which included shootings with both rubber and real bullets. After the forced disembarkation, they faced detention and ill treatment, including torture and forced labour, on Libyan soil.

This reconstruction of events by Forensic Oceanography is based on the cross-referencing of a number of sources, including the testimonies of several passengers; the reports of the WatchTheMed Alarm Phone, a civilian hotline supporting migrants crossing the sea; a report by the owner of the Nivin he shared with the civilian rescue organisation Mediterranea; the testimonies of MSF-France teams in Libya, an interview with a

- 12 Frédéric Bobin, 'Libye: la résistance désespérée de migrants interceptés en mer dans le port de Misrata', Le Monde, 13 November 2018, https://www.reuters.com/article/us-europe-migrants-libya/shipbound-migrants-in-libya-port-say-would-rather-die-than-disembark-idUSKCN1NJ2QY; Francesca Mannocchi, 'L'incubo dei migranti della Nivin, sequestrati in Libia con l'aiuto dell'Italia', La Repubblica, 15.11.2018, https://rep.repubblica.it/pwa/generale/2018/11/15/news/nave_nivin_bloccata_a_misurata-211763109/ Lorenzo Tondo, 'Migrants fleeing Libya refuse to leave ship and be sent back to camps', The Guardian, 17 November 18, https://www.theguardian.com/world/2018/nov/17/migrants-fleeing-libya-refuse-to-leave-ship-and-be-sent-back-to-country; Sally Hayden, 'Barricaded refugees 'ready to die' than return to Libya detention', Al Jazeera, 18 November 2018. https://www.aljazeera.com/news/2018/11/barricaded-refugees-ready-die-return-lib-ya-detention-181118162855287.html.
- 13 Leslie Carretero, 'Migrants refusant de débarquer en Libye : "Je préfère mourir sur ce bateau que de retourner en Libye"', Informigrants.net, 14 November 2018, https://scd.infomigrants.net/media/resize/my_image_big/be80770e787a559de16dda4be57472f63b9deb4e.jpeg

high-ranking Libyan coast guard official; limited official responses and leaked reports from EUNAVFOR MED (the EU's anti-smuggling operation); and the mapping of vessel tracking data (AIS).

Due to the lack of response from some actors-in particular the Italian coast guard-there are still a number of gaps and unanswered questions in the chain of events. And yet the different elements of evidence we have accessed corroborate each other in forming an overall picture that is clear: a web of Italian and European actors operating a system of strategic delegation of rescue for the purpose of border enforcement. When the first-and preferred-modality of delegation operating through LYCG interception and pull-back of the migrants did not succeed, MRCC Rome opted for a second modality, that of privatized push-back, operated through the LYCG and the merchant ship. Although the actors involved may give the impression of coordination between European state actors and the LYCG, control and coordination remained constantly within the firm hands of European - and in particular Italian - actors. The outcome of this strategy in the Nivin case, as in others we document in this report, was denying migrants fleeing Libya the right to leave and request protection in Italy and returning them to a country in which they have faced grave violations. Through this action, Italy has breached its obligation of non-refoulement, one of the cornerstones of international refugee law.14

This report offers a detailed reconstruction of the Nivin incident, and locates it within broader trends in policies and patterns of practice. It demonstrates that the Nivin incident is not an isolated event, but is consistent with a recurring pattern that has been consolidated since June 2018, when Matteo Salvini was instituted as Interior Minister of Italy. As such, before turning to a detailed presentation of the evidence upon which we base our reconstruction of the events in the "Case" section, we first analyse the emergence of this new modality of delegated containment.

In the "Policies" section, the report summarises the multi-level policies and practices that have allowed Italy and the EU to use the LYCG as the cornerstone of their policy and practice of refoulement by proxy. Because a NATO-led military intervention had decimated the LYCG naval capacity and communication equipment during the 2011 civil war, re-establishing the LYCG has necessitated the deployment of a number of policy instruments and means. We summarise the key operational components of this EU policy in which Italy is the leading operational partner (as detailed in our previous Mare Clausum report¹⁶), namely: an agreement between Italy and the Libyan Government of National Accord (GNA) to "combat illegal immigration", Training of LYCG personnel,

¹⁴ According to Article 33(1) of the 1951 Refugee Convention (CSR51): "No contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

¹⁵ Charles Heller and Lorenzo Pezzani, 'Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean', May 2018, https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf

¹⁶ Charles Heller and Lorenzo Pezzani, 'Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean', May 2018, https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf

¹⁷ Memorandum of understanding on co-operation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, 2 February 2017, www.governo.it/sites/

the provision of patrol boats, the installation of a temporary Libyan MRCC and support to Libyan authorities in declaring "their" SAR zone, as well as the deployment of an Italian military operation in support of LYCG activities. We demonstrate that through these combined measures, Italy and the EU have exercised strategic control over the LYCG, which they have equipped and coordinated so that they operate as their proxy, to intercept migrants and bring them back to a country in which they would be subjected to extreme forms of violence and exploitation. We show that during Matteo Salvini's term as Interior Minister that began in June 2018, Italy has continued this policy of outsourced border control, and exacerbated its policy of criminalisation of rescue NGOs. Furthermore, Salvini's "closed ports" policy—through which he systematically denied disembarkation to rescued migrants in Italian ports until other EU States agreed on their relocation to rescued migrants in Italian ports until other EU States agreed on their relocation and merchant ships alike to refrain from rescuing migrants in distress so as not to be embroiled in lengthy standoffs.

The "Patterns" section, locates each of the core operational components of the Nivin incident—the ENFM sighting, the use of Italian communication infrastructure, and the recourse to a merchant ship to push-back the migrants to Libya—within changing patterns of practices, which, we demonstrate, are to a large extent the outcome of the Salvini "shockwave". We first show that the early warning performed by the ENFM aircraft in the Nivin case is exemplary of ENFM's strategy of withdrawing its naval assets to a "second line" and pushing its air assets to the front line so as to provide the "early detection" capability" for LYCG interceptions. Hill this shift corresponds to ENFM's long-term strategy, but was heightened as a result of Salvini's closed ports policy. While between January and June 2018, ENFM rescued 10% of the migrants crossing the Mediterranean, following June 2018 and the closure of Italian ports, the rescue activities operated by EUNAVFOR MED practically stopped. Instead, focusing on early detection, "since September 2016, a total of 94 rescues have been conducted by the Libyan Cost Guard and Navy (...) following a sighting by ENFM assets". In the Nivin case is exemplary to a large extent the outcome of the migrants crossing the Mediterranean, following June 2018, ENFM rescued 10% of the migrants crossing the Mediterranean, following June 2018, and the closure of Italian ports, the rescue activities operated by EUNAVFOR MED practically stopped. Instead, focusing on early detection, "since September 2016, a total of 94 rescues have been conducted by the Libyan Cost Guard and Navy (...) following a sighting by ENFM assets".

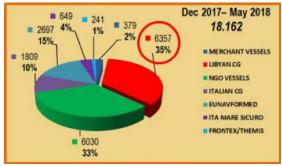
governoNEW.it/files/Libia.pdf An English translation of the "Memorandum" is available here: https://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf

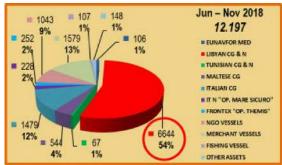
¹⁸ Sergio Carrera and Roberto Cortinovis, "Sailing Away from Responsibility?" CEPS Paper in Liberty and Security in Europe No. 2019-10, June 2019, https://www.ceps.eu/ceps-publications/search-and-rescue-disembarkation-and-relocation-arrangements-in-the-mediterranean/

¹⁹ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 December 2018-31 May 2019, 9 July 2019, p. 4.

²⁰ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June – 30 November 2018, Part A, 18 January 2019 p. 13.

²¹ EUNAVFOR MED Op SOPHIA, email correspondence with the author, 29 November 2019.





Statistical graph indicating the share of rescues/interceptions per actor in the central Mediterranean. EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June - 30 November 2018, Part B, 18 January 2019, p. 2.

We then discuss the centrality of Italian communication and coordination infrastructures in the coordination of the Nivin incident. We show that while Italy, mainly relying on EU funding, has sought to erect a temporary MRCC through the "setting up of basic operational rooms in a joint building in Tripoli", 22 this has remained highly dysfunctional, as the LYCG lack equipment. According to ENFM's monitoring, "capacities ashore in the LCG&N [Libyan Cost Guard and Navy] Operation Rooms does not allow properly carrying out the institutional tasks as MRCC". 23 Thus to coordinate the interception of migrants following information it mainly receives from MRCC Rome, the LYCG relies on the infrastructure of a number of different actors, manly Italian. Thus the LYCG routinely call upon other MRCCs to contact ships at sea "on behalf of the Libyan coast guard", and rely upon the communication equipment "located on board the Italian warship moored in Tripoli" to do so. 24 By discussing several other cases, we demonstrate that the coordination capacity of the LYCG is a fiction sustained by Italian and EU equipment and coordination.

Finally, we demonstrate why it was a merchant ship that was called upon to operate rescue in the Nivin incident, rather than the LYCG. After June 2018, European state assets drastically withdrew from rescue, and, as a result of further criminalisation, NGO vessels were reduced to "an average of one vessel operating at any given time". This left a rescue gap that the still fragile LYCG was unable to fill. Since June 2018, privatized push-backs via merchant ships have been used as a second best option when the LYCG was not able to intercept migrants itself. From an exceptional practice, it became a recurrent pattern. The regularity of this pattern was also noted in ENFM's November 2018 Six-monthly report, observing that while "LCG&N rescued between 40% and 60% of all migrant launches", an "additional 15% to 20%

²² European Commission, Support to Integrated border and migration management in Lib-ya - First phase (T05-EUTF-NOA-LY-04), 27 July 2017, p. 2. https://ec.europa.eu/europeaid/support-integrated-border-and-migration-management-libya-first-phase-t05-eutf-noa-ly-04_en

²³ EUNAVFOR MED Op Sophia, Monitoring of Libyan Coast Guard and Navy Report October 2017, January 2018, 9 March 2018, annex C.

²⁴ EUNAVFOR MED Op Sophia - Monitoring of Libyan Coast Guard and Navy Report October 2017 -January 2018, 9 March 2018, p.26.

²⁵ As ENFM's 1 June - 30 November 2018 report details: "during the reporting period Operation Sophia was directly involved in 1 SOLAS event (...), compared to 19 events attended in the previous reporting period, rescuing a total of 106 migrants (minus 95% un comparison with the 2,155 in the previous reporting period)". EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June - 30 November 2018, Part A, 18 January 2019, p. 13.

of all launches are rescued by civilian vessels under direction from Libyan authorities (SAR Centre, LCG&N Command).²⁶ We analyse 13 privatized push-back attempts that were recorded between July 2018 and May 2019 to better understand the mechanisms shaping this practice. Except for two that failed as a result of migrants' resistance, at least 11 of these 13 privatized push-backs were successful—with three of these diverted to Tunisia.

We fully recognise that as a result of Matteo Salvini's "closed ports" policy, merchant ships have been caught in a difficult situation. They have been forced to choose between obeying the instructions of states aiming to violently contain migrants, or obeying their duties with regard to migrants' rights as framed by international maritime and refugee law. However, by accepting to comply with the orders of European and Libyan state agencies, the merchant vessels involved in the Nivin incident and other cases of privatized push-backs have become complicit in the EU and Italy's system of refoulement by proxy. They have thus ended up contributing to the extreme forms of violence the passengers they rescued have been subjected to in Libya.

We call upon Italy and the EU to immediately end their policy of refoulement by proxy, and cease implementing it either via the LYCG or merchant ships. The delegation of illegal actions along an ever-expanding chain of actors does not put an end to responsibility for these actions. Rescue activities must be used to save lives, not as a cover-up for border control. As long as Libya is unsafe for the Libyan population and migrants alike, no one should be prevented from leaving or forced to return to Libya. Italy should further end the criminalisation of rescue NGOs, whose humanitarian activities are partly filling the lethal rescue gap left by states. Instead of seeking to contain migrants at all cost, Italy and the EU must embark on a fundamental re-orientation of the EU's migration policies to grant legal and safe passage to migrants. Only in this way, will the smuggling business, the daily suffering of thousands of migrants in distress, and the need to rescue them, finally come to an end.

²⁶ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June – 30 November 2018, Part B, 18 January 2019, p. 2.

POLICY CONTEXT

WITHDRAWING EUROPEAN NAVAL ASSETS, CRIMINALISING CIVILIAN RESCUE, AND OUTSOURCING BORDER CONTROL TO THE LIBYAN COAST GUARD

The Nivin incident is the culmination of several years of EU and Italian policies deployed in an attempt to seal off the central Mediterranean. In our Mare Clausum report, published in May 2018, we demonstrated that, with a view to stemming migration across the central Mediterranean, Italy and the EU have been implementing a two-pronged strategy since 2016. This strategy has first aimed at delegitimising, criminalising and ultimately ousting rescue NGOs from the central Mediterranean.²⁷ Second, it has aimed at outsourcing border control to the LYCG by providing material, technical and political support, and coordination, so as to enable the LYCG to intercept and pull back migrants to Libya more effectively. It is this undeclared operation to seal off the central Mediterranean that we have referred to as Mare Clausum. In our previous report, we have reconstructed this policy in detail, as well as Italy's practice of refoulement by proxy using the LYCG. In this new report, we seek to account for a new pattern of practice-privatized push-backs-that has emerged since June 2018, when Matteo Salvini was instituted as Interior Minister and pushed Italy's policy of closure even further. Privatized push-backs, we demonstrate, are a new modality of strategic use of rescue towards border control and migrant containment, one which has been mobilized when the LYCG were unable to intercept migrants themselves. To understand this new twist in Italy's practice, we must briefly summarise the emergence of Italy and the EU's policy of delegated refoulement, before addressing the new trends that have emerged since June 2018 and which the Nivin incident exemplifies.

The emergence of Italy and the EU's policy of delegated refoulement

Following the EU-Turkey deal in March 2016 which successfully stemmed migrant crossings of the eastern Mediterranean, the central Mediterranean route became once again the main are of maritime crossings for illegalised migrants from the Global South seeking to reach Europe.²⁸ Determined to stem these arrivals, from 2016 onwards, Italy and the EU have attempted to re-establish previous high seas practices aimed at interception and return. However, in 2012 the European Court of Human Rights found that it is illegal for Italian patrol vessels to *directly* return migrants intercepted at sea

²⁷ Charles Heller and Lorenzo Pezzani, 'Blaming the Rescuers', June 2017, https://blamingtherescuers.org/

²⁸ European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Joint Communication to the European Parliament, The European Council and the Council, 'Migration on the Central Mediterranean route: Managing flows, saving lives', Brussels, 25.1.2017 JOIN(2017) 4 final

 $[\]frac{https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-mi-gration/proposal-implementation-package/docs/20170125_migration_on_the_central_mediterrane-an_route_-_managing_flows_saving_lives_en.pdf$

to Libya²⁹ in its landmark "Hirsi" judgement.³⁰ Following the decision, **Italy and the EU have opted for a new strategy of refoulement by proxy**.³¹ Through this strategy, Violeta Moreno-Lax and Mariagiulia Giuffré have shown, the aim has been "to eliminate any physical contact" between migrants and the authorities of would-be destination States, so as to "sever any jurisdictional link with EU countries, in an attempt to elude any concomitant responsibility".³²

To operate this policy however, Italy and the EU needed a functioning LYCG agency. This however is precisely what was lacking after the destruction of the LYCG's equipment during the 2011 NATO-led military intervention in Libya, and the descent of the country into civil war following the fall of the Khaddafi regime.³³ As such, re-establishing the Libyan coast guard–ill-equipped, as fragmented as the Libyan political landscape and partly operated by militias–has been a central component of Italy and the EU's policy of refoulement by proxy. This policy rationale, and some of its main operational components, were clearly summarized in a joint EU Commission and High Representative document on "Migration on the Central Mediterranean route" published on **25 January 2017**:

"To effectively cope with this current situation, part of the answer must lie in the Libyan authorities preventing smugglers from operating, and for the Libyan Coast Guard to have the capacity to better manage maritime border and ensure safe disembarkation on the Libyan coast. Of course, the Libyan authorities' effort must be supported by the EU and Member States notably through training, providing advice, capacity building and other means of support. Working together in their respective zones and within their respective mandates, Sophia and Triton could focus on anti-smuggling activities and support to search and rescue operations further out at sea and specialise in monitoring, alerting the Libyan authorities and combating traffickers. Recognising the central role that the Libyan Coast Guard should play in managing the situation, building its capacity is a priority, both in terms of capabilities and equipment needs."³⁴

- 29 According to Article 33(1) of the 1951 Refugee Convention (CSR51): "No contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."
- 30 Hirsi Jamaa and Others v. Italy, App. No. 27765/09 Eur. Ct. H.R. (2012), p. 37: "Relying on these conclusions and the obligations on States under Article 3, the Court considers that by transferring the applicants to Libya, the Italian authorities, in full knowledge of the facts, exposed them to treatment proscribed by the Convention." See also Mariagiulia Giuffré, 'Watered-down Rights on the High Seas: Hirsi Jamaa and Others v Italy', 2012, International and Comparative Law Quarterly, 61(3).
- 31 Itamar Mann has identified this dynamic early on. Itamar Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013' Harvard International Law Journal no 54, 2013.
- 32 Violeta Moreno-Lax and Mariagiulia Giuffré, The Rise of Consensual Containment: From 'Contact-less Control' to 'Contactless Responsibility' for Forced Migration Flows, 31 July 2017, p.3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009331
- 33 See our discussion in Charles Heller and Lorenzo Pezzani, "Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean", May 2018, p. 32-33, https://content.forensic-architecture.org/wp-content/uploads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf
- European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Joint Communication to the European Parliament, The European Council and the Council, 'Migration on the Central Mediterranean route: Managing flows, saving lives', Brussels, 25.1.2017 JOIN(2017) 4 final

The joint document proposed a multilevel strategy to re-establish the LYCG consisting of training, the provision of patrolling assets, assisting Libya in declaring a search and rescue area and establishing a MRCC. These are the main activities that would be implemented by the EU and Italy as of 2016, with their pace accelerating over 2017. Having reconstructed this overall policy in detail in our Mare Clausum report, we only summarize here these core components, and update our analysis in relation to developments that have occurred over 2018-2019.

EUNAVFOR MED-Operation Sophia (ENFM), the EU anti-smuggling military operation launched on 22 June 2015,³⁵ has been planned from the start as a progression through four operational phases. In the final phase, migration control of irregular movement originating from Libya is handed over to the Libyan authorities.³⁶ While limited EU training of the LYCG had begun in 2014 through the EU Border Assistance Mission (EUBAM) Libya mission,³⁷ it was stepped up as of 20 June 2016, when the European Council decided to launch a new training program to be implemented by ENFM.³⁸ Since Autumn 2016 and through until the end of May 2019,³⁹ 355 LYCG personnel have been trained by ENFM. As we will detail further on, the EU operation has also played a fundamental role through its surveillance of the Libyan shores, contributing to the early warning of the LYCG of distress incidents at sea, and thus enabling their interceptions of migrant boats.

While as the Commission document quoted above shows, the policy of refoulement by proxy via the LYCG was clearly an EU project, as of early 2017, Italy took the lead in

- https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-mi-gration/proposal-implementation-package/docs/20170125_migration_on_the_central_mediterrane-an_route_-_managing_flows_saving_lives_en.pdf
- Depending on operational phases, EUNAVFOR MED has deployed close to the Libyan coast five to nine ships belonging to twenty-two different countries on a rotational basis. Press Release 01/05 "EUNAVFOR MED Force Fully Operational", European Union External Action, http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/press-releases/20150728_en.htm and "European Union Naval Force—Mediterranean Operation Sophia", European Union External Action, http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med_en.pdf. European External Action Service (EEAS), EUNAVFOR MED Op SOPHIA Six Monthly Report 22 June 31 December 2015, 28 January 2016, p.11. Released by WikiLeaks https://wikileaks.ch/eu-military-refugees/EEAS/EEAS-2016-126.pdf
- 36 See here: http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med_en.pdf
- 37 Council of the European Union, European External Action Service, EUBAM Libya Initial Mapping Report Executive Summary, Brussels, 18 January 2017, p. 42. http://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf
- 38 European External Action Service (EEAS), EUNAVFOR MED Op SOPHIA Six Monthly Report 22 June 31 December 2015, 28 January 2016, p.3. Released by Wikileaks https://wikileaks.ch/eu-military-refugees/EEAS/EEAS-2016-126.pdf
- 39 EUNAVFOR MED Op SOPHIA Six Monthly Report 1 December 2018–31 May 2019, 9 July 2019., p. 3. As of 21 August 2017, EUNAVFOR MED has further been assigned the task of monitoring the activities of the LYCG and Navy-a task which we should note implies a hierarchical power relation. Monitoring is considered as "an essential component of the Libyan maritime capacity building programme", by helping to "define future training requirements, and helps the LCG&N to define its equipment (including assets) shortfalls and requirements" (EUNAVFOR MED Op Sophia Monitoring of Libyan Coast Guard and Navy Report October 2017 January 2018, 9 March 2018, p.3). The monitoring task was assigned to EUNAVFOR MED by the Council Decision of July 2017 and agreed with the Libyan authorities within an additional Annex to the 2016 Memorandum of Understanding. See EUNAVFOR MED Op SOPHIA Six Monthly Report 1 June 30 November 2017, 22 December 2017.

implementing it with full EU support and financial contributions. On **2 February 2017**, Italy signed a "Memorandum of Understanding" with the Government of National Accord (GNA) of Libya "on cooperation in the development sector, to combat illegal immigration, human trafficking and contraband and on reinforcing the border security".⁴⁰ This Memorandum, with, at its core, the aim of "stemming illegal migrants' flows", received full EU Council support the very next day after it was signed, in the Malta Declaration adopted by all EU Member States on 3 February 2017.⁴¹ The Memorandum between Italy and the GNA has been renewed on **2 November 2019**.⁴²



Official Twitter account of the Italian embassy in Libya, showing the patrol vessels arriving in Tripoli, 5 May 2017;⁴³ Italian Interior Minister Marco Minniti in front of the Ras Jadir (648), 15 May 2017. Reuters, Ismail Zitouny.⁴⁴

In May 2017 Italy began providing the Libyan navy and LYCG with new and repaired patrol boats—with four repaired Bilgiani patrol boats inaugurated in the presence of Italian Interior Minister Marco Minniti. 45 These high performance assets substantially increased the operational capacity of the LYCG to intercept migrants, and further patrol boats have been provided in August 2018 while Matteo Salvini was Interior Minister, 46

- 40 Memorandum of understanding on co-operation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, 2 February 2017, www.governo.it/sites/governoNEW.it/files/Libia.pdf An English translation of the "Memorandum" is available here: https://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf
- 41 Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 February 2017, www.consilium.europa.eu/en/press/ press-releases/2017/02/03/malta-declaration/#
- 42 ANSA, 'Italy renews Libya cooperation deal, pledges to 'improve it'. 1 November 2019 https://www.infomigrants.net/en/post/20536/italy-renews-libya-cooperation-deal-pledges-to-improve-it
- 43 https://twitter.com/ltalyinLibya/status/860452910517415937
- 44 Aidan Lewis and Steve Scherer, 'Italy tries to bolster Libyan coast guard, despite humanitarian concern', Reuters, 15 May 2017, https://uk.reuters.com/article/uk-europe-migrants-libya/italy-tries-to-bolster-libyan-coast-guard-despite-humanitarian-concern-idUKKCN18B2EN
- 45 Italian Ministry of Interior, Contro il traffico dei migranti: consegnate le prime motovedette alla Marina libica, 21 April 2017, www.interno.gov.it/it/notizie/contro-traffico-dei-migranti-conseg-nate-prime-motovedette-alla-marina-libica; Minniti in Libia: fronte comune contro il traffico di migranti, 16 May 2017, www.interno.gov.it/it/notizie/minniti-libia-fronte-comune-contro-traffico-mi-granti. Three more patrol boats were handed over in February 2018, see http://www.ilsole24ore.com/art/mondo/2018-02-24/libia-e-niger-bilancio-dell-italia-e-l-eredita-il-prossimo-governo--212523. shtml?uuid=AEwxvQ6D&refresh_ce=1
- 46 Financial Times, 'Italy donates 12 more vessels to Libya to stem migration', 7 August 2018. https://www.ft.com/content/391ed012-9a28-11e8-9702-5946bae86e6d

as well as in **November 2019** by the new Italian government formed in September 2019.⁴⁷ In its November 2018 Six-monthly report, ENFM assessed the LYCG and Navy naval assets as follows: "Currently, LCG&N inventory consists of 29 naval assets. Six of these vessels are operated by LN with the remaining under LCG control. Total availability levels are 45% (10 out of 23 vessels for LCG and 85% (5 out of 6) for LN".⁴⁸ In this same report, ENFM recognises the centrality of the Italian assets to the LYCG fleet: "The most capable ships belong to the IT-built Bigliani class (4 assets, 75% operational) and to the IT-built Corrubias class (2 assets, 100% operational) similar to the Bigliani class".⁴⁹



PowerPoint slides by the Italian Navy on Operation Mare Sicuro, Shade Med briefing, Rome, 23 November 2017.

On 2 August 2017, a decisive step was achieved when the Italian Parliament approved the extension into Libyan territorial waters of the operation Mare Sicuro (OMS), which had been launched on 12 March 2015.⁵⁰ The state aim was to provide "support to the Libyan security forces in their activities against irregular migration and human smuggling by deploying aerial and naval means and supporting Intelligence, Surveillance and Reconnaissance capabilities."⁵¹ The Mare Sicuro ships and aircrafts operating off the coast of Libya have played a decisive role in facilitating LYCG interceptions. In addition, Italy launched a new operation, *Nauras*, aiming to refurbish and maintain LYCG assets through the presence of an Italian navy ship in the port of Tripoli, which, as we see in the slide of the Italian Navy above, has also served as a Liaison Navy and Communication Centre (LNCC), allowing the LYCG to coordinate their operations at sea.⁵²

⁴⁷ Alessandra Zinti, 'Libia, festa della Marina: l'Italia consegna dieci nuove motovedette', Republica, 4 November 2019. <a href="https://www.repubblica.it/cronaca/2019/11/04/news/libia_festa_della_marina_l_italia_consegna_dieci_nuove_motovedette-240197745/?fbclid=lwAR2elAWRXPPtKGZuD44PQqjZGi-oGzyZGxNrnCRmnLxG_Vi-Uc59-C-4aQOw

⁴⁸ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June - 30 November 2018, Part A, 18 January 2019, p. 13.

⁴⁹ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June - 30 November 2018, Part A, 18 January 2019, p. 13.

⁵⁰ Ministero Della Difesa, 'Operazione Mare Sicuro (OMS)', http://www.marina.difesa.it/cosa-facciamo/per-la-difesa-sicurezza/operazioni-in-corso/Pagine/MareSicuro.aspx

Deliberazione del consiglio dei ministri in merito alla partecipazione dell'Italia alla missione internazionale in supporto alla guardia costiera Libica (DOC CCL, n.2), 28 July 2017, www.camera.it/_dati/leg17/lavori/documentiparlamentari/IndiceETesti/250/002/INTERO.pdf

^{52 &#}x27;Analytic report on the ongoing international military missions and on the state of the development cooperation to sustain peace and stabilization processes', 28 December 2017, http://www.senato.it/service/PDF/PDFServer/BGT/1063681.pdf. This is confirmed by EUNAVFOR MED's March 2018



Power point slides of the Italian Coast guard presentation "Libyan Maritime Rescue Coordination Centre Project", Shade Med briefing, Rome, 23 November 2017.

On 10 August 2017, the Libyan authorities in Tripoli announced that they had (unilaterally) declared the Libyan Search and Rescue (SAR) zone and threatened any rescue NGOs that dared to enter it.53 This SAR zone was recognized by the International Maritime Organisation (IMO) in June 2018.54 Formally, it was Libyan authorities that declared "their" SAR area, which, they came to consider and aggressively defend as if it was Libyan sovereign territory. However, the declaration of the Libyan SAR zone was one of the planned outcomes of the EU-funded project in support of the LYCG implemented by the Italian Coast Guard that began 4 July 2017 (see Shade Med briefing slides in the figure above).55 As part of this same project, to which the EU has allocated 44 million Euros, Italy has also been tasked with drawing up a detailed project aimed at "establishing a fully operational Maritime Rescue Coordination Centre"56 by 2020, and planning and implementing a provisional National Coordination Centre (NCC) and a provisional MRCC (see Shade Med briefing slides in the figure above). As of December 2018 this project has entered a second phase (EUR 45 million) of actual construction of the new Libyan MRCC, as well as the "development of the MRCC Communication network along the coast through a step by step approach".57

- report, which describes an Italian "Naval Liaison Communication Centre located on board the Italian warship moored in Tripoli". EUNAVFOR MED Op Sophia Monitoring of Libyan Coast Guard and Navy Report October 2017 January 2018, 9 March 2018, p.26.
- eNews Channel Africa (ENCA), 'Libya navy blocks foreign ships from migrant 'rescue' zone', 10 August 2017, https://www.enca.com/africa/libya-navy-blocks-foreign-ships-from-migrant-rescue-zone
- The IMO Secretariat received on 10 December 2017 an official communication from the Government representative of Libya to withdraw their 10 July 2017 notification on the Government's designation of the Libyan SAR zone. A new declaration was submitted by Libya on the 14 December 2017. It is only on June 2018 that the Libyan SAR zone was recognised by the IMO, although, there is much debate as to its validity. See Parliamentary questions. Answer given by Mr Avramopoulos on behalf of the European Commission. Question reference: P-003665/2018, 4 September 2018, https://www.europarl.europa.eu/doceo/document/P-8-2018-003665-ASW_EN.html; Euronews, 'Prompted by EU, Libya quietly claims right to order rescuers to return fleeing migrants', 7 August 2018, https://www.euronews.com/2018/07/06/prompted-by-eu-libya-quietly-claims-right-to-order-rescuers-to-return-fleeing-migrants
- European Commission, Support to Integrated border and migration management in Libya - First phase (T05-EUTF-NOA-LY-04), 27 July 2017, https://ec.europa.eu/europeaid/support-integrated-border-and-migration-management-libya-first-phase-t05-eutf-noa-ly-04_en
- International Maritime Organisation, Sub-Committee on Navigation, Communications and Search and Rescue (NCSR): Further Development of the Provision of Global Maritime SAR Services, Libyan Maritime Rescue Coordination Centre Project, Submitted by Italy, 15 December 2017.
- 57 European Commission, Support to Integrated border and migration management in Libya Second phase (T05-EUTF-NOA-LY-07), December 2018, p. 9-12. https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-07.pdf. See Parliamentary questions. Answer given by Answer given by

As a result of these policy agreements and multiform support and coordination, Italy and the EU re-established the LYCG, which, until then, had neither been able or willing to intercept migrants leaving Libyan shores. Through these combined measures, Italy and the EU have exercised strategic control over the LYCG, which they have equipped and coordinated so that they operate as their proxy, to intercept migrants and bring them back to a country in which they would be subjected to extreme forms of violence and exploitation. Since August 2017, the LYCG intercepted more migrants than any other actor,⁵⁸ and the rate of interceptions by the LYCG has grown even higher since. According to IOM data, more than 20,000 migrants were intercepted and brought back to Libya in 2017,59 representing 15% of all rescued/intercepted migrants in the central Mediterranean that year (with peaks of 39% in August and September). In 2018, 15,000 migrants were intercepted and brought back to Libya, representing an even higher rate of 43% (with peaks of over 60% in July, September and December). The EU and Italy have implemented this policy of refoulement by proxy in full knowledge of the conditions for migrants brought back to Libya. In the words of Italy's Deputy Minister for Foreign Affairs, Mario Giro, echoed in several of the migrant testimonies contained in this report, it has meant "taking them back to hell".60

The Salvini shockwave

As the sequence of policies and activities described here shows, Matteo Salvini did not design the Mare Clausum policy, but simply continued to implement its core components. However, through his "closed ports" policy, he exacerbated its effects. One of Salvini's very first decisions after he was instituted as Italian Interior Minister came on 10 June 2018 when he announced on Twitter the closure of Italian ports to the disembarkation of rescued migrants.⁶¹ While the first target of this measure were "foreign" rescue NGOs, it also concerned rescued migrants by all other actors, including EU states and Italian agencies. As Amnesty International summarised, "in the weeks that followed, Italy escalated its stance and refused or delayed the disembarkation not only of NGO rescue vessels, such as the Lifeline of the German NGO Mission Lifeline and the Open Arms of the Spanish NGO Proactiva, but also of two foreign navy ships, the US Trenton and the Irish Samuel Beckett (the latter operating as part of operation EUNAVFOR Med Sophia, which is under Italian command), the Danish commercial ship Maersk, the Italian commercial ship Vos Thalassa, and even the Italian Coast Guard ship Diciotti". 62 From then on, not a single boat carrying rescued migrants was allowed to enter Italian ports and disembark survivors without prior agreement on a plan to

Mr Hahn on behalf of the European Commission. Question reference: E-000190/2019, 4 May 2019, http://www.europarl.europa.eu/doceo/document/E-8-2019-000190-ASW_EN.html

⁵⁸ Qualculation by Gian-Andrea Monsch, Researcher at Fors, University of Lausanne, for Forensic Oceanography based on Italian Coast Guard and IOM data.

⁵⁹ The IOM has been collecting data on "rescues" operated by the LYCG since 2016, http://www.globaldtm.info/libya/

⁶⁰ Marco Menduni, 'Giro: "Fare rientrare quelle persone vuol dire condannarle all'inferno"', La Stampa, 6 August 2017, http://www.lastampa.it/2017/08/06/italia/cronache/giro-fare-rientrare-quelle-persone-vuol-dire-condannarle-allinferno-SXnGzVlzftFI7fNGFCMADN/pagina.html

For a discussion of this policy shift, see Amnesty International, 'Between the Devil and the Deep Blue Sea'. August 2018. Available at: https://www.amnesty.org/en/documents/eur30/8906/2018/en/

Amnesty International, 'Between the Devil and the Deep Blue Sea'. August 2018, p.7. Available at: https://www.amnesty.org/en/documents/eur30/8906/2018/en/

relocate them between EU Member States, a process that often lasted weeks.⁶³ This sent a shock wave throughout the Mediterranean and led actors at sea to refrain from rescuing migrants in distress, abandoning them instead to their fate, so as not to be embroiled in standoffs, route deviations, and costly delays.⁶⁴ As we will see in the "pattern" section bellow, European state actors, such as ENFM, withdrew even further from rescuing migrants with their naval assets, and privileged early detection via air assets to enable LYCG interception instead.

Under Salvini, rescue NGOs were further criminalised and prevented from operating in Italy, but also in Malta. One after the other, NGO ships' flags were removed following pressure over their flag state by Italy, or they were denied the right to sail over dubious administrative reasons. Finally, those who disembarked migrants in Italy were repeatedly investigated for aiding "illegal migration". As a result, ENFM notes in its June-November 2018 report, NGO vessels operated in limited numbers, with an average of one vessel operating at any given time" during the reporting period. The Nivin case illustrates the consequences of this process clearly: at the time of events, there was a single civilian rescue vessel in operation—the Mare Ionio of Mediterranea—but it was not located close enough to avert the privatized push-back.

With rescue NGOs marginalised, and other actors at sea increasingly withdrawing from rescue, this allowed for an unprecedented rate of interceptions by the LYCG. However, as we will now see, the gap left by other actors—the NGOs being forced out and the European states withdrawing their assets rescue—was too large for the LYCG's capabilities to fill. Merchant ships were called upon to contribute to filling this gap in rescue capabilities, leading to the emergence of the new pattern of privatized push-backs. EU member states may have been discontent with Matteo Salvini's "closed ports" policy, which has generated diplomatic tensions on a number of occasions.⁶⁹ However,

- 63 See the review provided by Sergio Carrera and Roberto Cortinovis, "Sailing Away from Responsibility?" CEPS Paper in Liberty and Security in Europe No. 2019-10, June 2019.

 https://www.ceps.eu/ceps-publications/search-and-rescue-disembarkation-and-relocation-arrangements-in-the-mediterranean/
- The effect was almost immediate. See Fabio Butera, 'Migrants rescued by Trenton reveal: 'If that boat saw and rescue us before, 76 people would not have died'', Republica, 25 ottobre 2018, https://video.repubblica.it/cronaca/migrants-rescued-by-trenton-reveal-if-that-boat-saw-and-rescue-us-before-76-people-would-not-have-died/317893/318524
- 65 For a review, see the report by Sergio Carrera et al. "Fit for purpose? : the Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants : 2018 update", European Parliament, Policy Department of Citizens' Rights and Constitutional Affairs, Study for the PETI committee, PE 608.838, December 2018. http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)608838
- 66 FRA, Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations. https://fra.europa.eu/en/theme/asylum- migration-borders/ngos-sar-activities; FRA, 2019 update NGO ships involved in search and rescue in the Mediterranean and criminal investigations, June 2019, Vienna. https://fra.europa.eu/en/publication/2019/2019-update-ngos-sar-activities
- Amnesty International, 'Between the Devil and the Deep Blue Sea'. August 2018, p.14-17. Available at: https://www.amnesty.org/en/documents/eur30/8906/2018/en/
- 68 EUNAVFOR MED Op SOPHIA Six Monthly Report 1 June 30 November 2018, Part A, 18 January 2019, p. 13.
- 69 See for example Deutsche Welle, 'Germany urges Italy to open up ports to migrant rescue ships', 06 July 2019, https://www.dw.com/en/germany-urges-italy-to-open-up-ports-to-migrant-rescue-ships/a-49499822

the EU has been perfectly satisfied with the outcomes of the continued outsourcing of border control to the LYCG. In the December 2018 EU Trust Fund proposal by the Commission that was accepted and has allocated further funding to support the LYCG, the EU notes:

"The EU and Italian efforts in supporting the Libyan Coast Guard to improve its operational capacities have achieved significant and tangible results in 2018. The Libya SAR region declaration and the publication of its coordinates under the International Maritime Organisation (IMO) have been instrumental in this development. So has the training of more than 238 personnel of the Libyan coast guard and navy through Operation Sophia. There has been a huge increase in rescue capacity of the Libyan Coast Guard and Port Security (LCGPS) who rescued 14,795 migrants between 1 Jan and 30 Nov 2018. [...] There was an 80% decrease of total arrivals in Italy - in total 22,031 arrivals were recorded by sea to Italy through the Central Mediterranean Route so far in 2018, compared with 111,244 in the same period of 2017."

While the EU Commission notes, relying on UNHCR data, that the number of deaths across the central Mediterranean has diminished as a result of the drop in crossings (from 3,139 persons in 2017 to 1,719 persons in 2018),⁷¹ it fails to note that, according to the IOM, the danger of crossing (measured through the mortality rate) has rise from 1.96 2017 to 3.11 in 2018, and has risen further since.⁷²

This section has demonstrated that the EU and Italy's policy of refoulement by proxy is long-standing. As a result of the policy agreements and multiform support and coordination implemented since 2016, Italy and the EU have re-established the LYCG, and have exercised *strategic control* over and its activities. The LYCG has *operated as their proxy*, to intercept migrants and bring them back to Libya. While this policy predates the appointment of Matteo Salvini as Italian Interior Minister in June 2018, he continued it and his drastic "closed port" policy led to the emergence of several new patterns of practice—including privatized pushbacks—which are exemplified by the Nivin incident, and to which we now turn.

⁷⁰ European Commission, Support to Integrated border and migration management in Libya - Second phase (T05-EUTF-NOA-LY-07), December 2018, p. 2. https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-07.pdf.

⁷¹ European Commission, Support to Integrated border and migration management in Libya - Second phase (T05-EUTF-NOA-LY-07), December 2018, p. 2. https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-07.pdf.

⁷² IOM, 'Mediterranean Migrant Arrivals Reach 76,558 in 2019; Deaths Reach 1,071', 10 November 2019, https://www.iom.int/news/mediterranean-migrant-arrivals-reach-76558-2019-deaths-reach-1071

PATTERNS OF PRACTICES

THE OPERATIONAL COMPONENTS OF THE NIVIN INCIDENT: AERIAL EARLY WARNING, ITALIAN INFRASTRUCTURE, AND PRIVATIZED PUSHBACKS

The push-back by proxy of the migrants in the Nivin incident was enabled by a shared operational infrastructure and a sequence of coordinated practices linking European, and in particular Italian actors, the LYCG, and the Nivin:

- a EUNAVFOR MED aircraft sighted the boat and passed on the information to MRCC Rome and the Libyan coast guards;
- MRCC Rome contacted the Nivin "on behalf" of the LYCG;
- the LYCG contacted the Nivin via the **Libyan Navy Communication Centre located on an Italian flag ship**;
- a **merchant ship** rather than a LYCG asset was used to rescue them.

This section locates each of these core operational components of the Nivin incident within broader patterns of practices so as to reveal the deeper logics and dynamics to which they correspond.

EUNAVFOR MED: naval retreat, early warning via aircrafts

EUNAVFOR MED - Sophia (ENFM) has never had rescue at the core of its mission, by contrast to the Italian Mare Nostrum operation between 2013-4. Nevertheless, because of the relative proximity of the operation's ships to areas frequented by migrant boats and "due to the obligation deriving from international law, Sophia rescued a large number of migrants in distress". From its launch in June 2015 to the end of May 2019, the operation contributed to rescuing "45,000 migrants in 312 [...] events" which represent just below "10% of the total number of migrants since 2015". In the 6 months prior to Matteo Salvini's appointment (between January and June 2018), 10% is precisely the rate of rescue the operation contributed to. However, following June 2018, the rescue activities operated by ENFM practically stopped. As ENFM's 30 November 2018 Six-monthly report details: "during the reporting period Operation Sophia was directly involved in 1 SOLAS event (...), compared to 19 events attended in the previous reporting period, rescuing a total of 106 migrants (minus 95% in comparison with the 2,155 in the previous reporting period)". The solution of the previous reporting period)". The previous reporting period peri

This rapid decrease in rescues performed by ENFM naval assets can partly be attributed to the operation's long-term strategy of handing over border control functions to the LYCG, but it was mainly triggered by Matteo Salvini's closed ports policy. As ENFM underlines in its 2019 report, "to force the LCG&N [Libyan Cost

⁷³ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 December 2018-31 May 2019, 9 July 2019, p. 3.

⁷⁴ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 December 2018–31 May 2019, 9 July 2019, p. 3.

⁷⁵ Presentation by Rear Admiral Enrico Credentino, EUNAVFOR MED Operation Sophia Operation Commander, the European Parliament Committee on Security and Defence 10 October 2018, Brussels, http://www.europarl.europa.eu/cmsdata/155265/06_181010%20-%20Presentation%20to%20-EP%20Committee%20on%20SEDE%20-%20Credendino.pdf

⁷⁶ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June – 30 November 2018, Part A, 18 January 2019, p. 7.

Guard and Navy]⁷⁷ to become the primary actor and progressively take full ownership of their area of responsibility, ENFM decided to gradually assume a "second line" posture with its naval assets", meaning that it would geographically and operationally recede and defer to the LYCG.⁷⁸ Starting from June 2017, as a result of the different policy initiatives outlined above, "the LCG&N became increasingly more capable in conducting all Coast Guard functions in their area of responsibility".⁷⁹ While its naval assets assumed a "second line" posture, ENFM air assets went rather to the front line, and have been essential to "enhance the maritime situations awareness in the AOO [area of operation], to provide the "early detection" capability of SOLAS events (essential for the LCG&N to successfully operating saving lives at sea)".⁸⁰ Thus ENFM has implemented a strategic shift to air "early detection" followed by LYCG interceptions as opposed to presence of and rescue by European naval assets close to the Libyan coast, a strategy which has also been used by Frontex.⁸¹

The way this operational shift is implemented was further detailed in ENFM's 30 November 2018 report:

"The combination of a reduced migratory flow and an increased LCG activity at sea has allowed ENFM to adapt its tactics in the use of naval and air assets (...): the presence of **naval assets** (**operating at a distance from TTW** [territorial waters]) continue to provide surveillance and deterrence, whilst intervening as necessary (...). Meanwhile **air assets** (**operating near the Libyan TTW**), complement the naval presence, contributing to the **early detection of migrants boats and passing the information to the relevant MRCC authorities** (**including Libyan MRCC** when this is appropriate) **through the Force Headquarters on board the flagship**. Both naval and air assets remain ready to intervene in the case of SOLAS [Safety of Life at Sea] events."82

From the beginning of the ENFM operation, its "flagship" - the ship that carries the commander of a fleet and flies the commander's flag - has consistently been Italian. On the 1 August 2018, the San Marco took over from the San Giusto, and acted as flagship until 30 December 2018, when it was replaced by Luigi Rizzo. It was thus the Italian San

²⁷⁷ ENFM uses the LCG&N to refer to the Libyan Cost Guard and Navy overall. We do not find this conflation to be useful, since these are interrelated but distinct agencies. The LYCG–formally known as the Libyan Coast Guard and Port Security, is part of the Libyan Navy, officially within the Ministry of Defence. As summarized by EUBAM-Libya's report, the LYCG is responsible for exercising the sovereignty and law enforcement within Libyan waters, with duties including "surveillance of the national waters, controlling and combating any illegal activities at sea (smuggling, illegal migration, pollution, fishing, etc.), Search and Rescue (SAR), as well as relations and cooperation with other national and international agencies." Council of the European Union, European External Action Service, EUBAM Libya Initial Mapping Report Executive Summary, Brussels, 18 January 2017, p.40. http://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf

⁷⁸ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 December 2018-31 May 2019, 9 July 2019, p. 4.

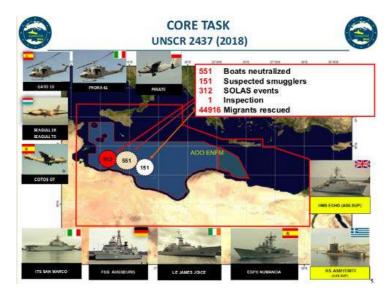
⁷⁹ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 December 2018-31 May 2019, 9 July 2019, p. 4.

⁸⁰ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 December 2018–31 May 2019, 9 July 2019, p. 4.

^{81 &}lt;u>Daniel Howden</u>, <u>Apostolis Fotiadis</u> and <u>Antony Loewenstein</u>, 'Once migrants on Mediterranean were saved by naval patrols. Now they have to watch as drones fly over', The Guardian, 4 August 2019, https://www.theguardian.com/world/2019/aug/04/ drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu

⁸² EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June - 30 November 2018, Part A, 18 January 2019, p. 4.

Marco that was acting as flagship for the operation at the time of the Nivin incident.83



Slide indicating EUNAVFOR MED naval and air assets deployed in October 2018. Presentation by Rear Admiral Enrico Credentino, EUNAVFOR MED Operation Sophia Operation Commander, the European Parliament Committee on Security and Defence 10 October 2018, Brussels.⁸⁴

As the passages above show, the increasing retreat of ENFM naval assets into a second line, and the use of air assets as a front line of early detection to enable LYCG interceptions thus began as of summer 2017, and has corresponded to the operation's longterm aim of enabling border control by Libyan actors. However—and while this is not mentioned in ENFM reports - the abrupt drop in the operation's rescue activities registered after June 2018 can only be attributed to the effects of the drastic policies of closure implemented by the Italian government after the appointment of Matteo Salvini as Interior Minister. Put in the blunt words of Matteo Villa, a migration expert at Italy's Institute for International Policy Studies (ISPI), "Nobody in the EU wanted to see a mission ship with migrants on board being refused port entry, so the 'solution' was to suspend Sophia's naval tasks."85 Thus suspension had already been partly put into practice since June 2018, as of when ENFM assets practically ceased rescuing migrants, for fear of being unable to disembark them as a result of Salvini's "closed ports" policy. In January 2019 Germany simply suspended its participation in the operation as a result,86 and the tensions surrounding disembarkation ultimately led the EU to temporarily suspend the deployment of naval assets as part of ENFM in March 2019.87 As a result, as El Pais has commented, the ENFM became "a naval operation without any ships", which in turn led to an even greater emphasis on the use of aerial assets.88

⁸³ EUNAVFOR MED Op SOPHIA, 'Welcoming the new Sophia Task Force flagship', 01 Aug 2018, https://www.face-book.com/EunavforMed/posts/2026976040711633

⁸⁴ Available from http://www.europarl.europa.eu/cmsdata/155265/06_181010%20-%20Presentation%20to%20EP%20Committee%20on%20SEDE%20-%20Credendino.pdf

Silvia Blanco, Sophia: The EU naval mission without any ships, El Pais, 2 September 2019, https://elpais.com/elpais/2019/08/29/inenglish/1567088519_215547.html

Deutsche Welle, 'Germany pulls out of Mediterranean migrant mission Sophia', 23 January 2019, https://www.dw.com/en/germany-pulls-out-of-mediterranean-migrant-mission-sophia/a-47189097

⁸⁷ Euractiv, 'EU to end ship patrols in scaled down Operation Sophia', 27 March 2019 https://www.euractiv.com/section/justice-home-affairs/news/ eu-to-end-ship-patrols-in-scaled-down-operation-sophia/

⁸⁸ Silvia Blanco, Sophia: The EU naval mission without any ships, El Pais, 2 September 2019, https://elpais.com/elpais/2019/08/29/inenglish/1567088519_215547.html

While we have established that ENFM has led a long-term strategy of withdrawing naval assets, and using aircrafts instead for early detection to enable LYCG interceptions, there is no publicly available data on the number of LYCG interceptions the ENFM aerial early warning mechanism has enabled. ENFM did respond to our information request, stating that: "since September 2016, a total of 94 rescues have been conducted by the Libyan Cost Guard and Navy under competent Maritime Rescue Coordination Centers (MRCCs), including the Libyan MRCC, following a sighting by ENFM assets".89 Our investigation of specific incidents has further allowed us to achieve a better understanding of the mechanics of how this cooperation works. In our Mare Clausum report, in four out of the 16 pull-back incidents we analysed over 2017 and early 2018, we collected evidence of early detection by ENFM aircrafts enabling LYCG interceptions.90 In three out of the 13 cases of attempted privatized push-back we will analyse further on in this report, we can also observe the central role of ENFM air assets. In the other cases the evidence available does not allow to determine if ENFM involvement occurred or not. In relation to the 25 March 2019 El Hiblu 1 case in particular (which we will discuss further on), journalist Zach Campbell has argued that while ENFM often emphasises that following early detection through its aircrafts the operation only passes on the coordinates of the vessel to the LYCG, as responsible rescue authority,91 the evidence he has collected indicates, on the contrary, a high degree of collaboration between ENFM and the LYCG, with the ENFM's sightings, but also active direction of LYCG assets during operation being essential to enable interceptions and pull-backs to Libya.

This discussion of ENFM's shifting strategy and practice since 2017 demonstrates that the characteristics of ENFM's involvement in the Nivin case reflect a deliberate strategy of the ENFM operation: the passengers were first sighted by a ENFM aircraft, there was no ENFM naval asset in vicinity, and ENFM passed on the information to the MRCC Rome and LYCG thereby enabling interception and return to Libya. This series of practices and conditions correspond to a well-planned strategy and intentional mechanisms for establishing extraterritorial control, while pretending not to have the corresponding responsibilities.⁹²

An Italian Communication Infrastructure for Libyan Coordination

We have seen that MRCC Rome initially contacted the Nivin "on behalf" of the LYCG, and that later the LYCG contacted the Nivin via the Libyan Navy Communication Centre. Since 2017, the centre has been located onboard the Italian ship docked in

⁸⁹ Email correspondence with the author, 29 November 2019.

We refer the reader back to our Mare Clausum report concerning these cases. Charles Heller and Lorenzo Pezzani, "Mare Clausum: Italy and the EU's undeclared operation to stem migration across the Mediterranean", May 2018, p. 67-84, https://content.forensic-architecture.org/wp-content/up-loads/2019/05/2018-05-07-FO-Mare-Clausum-full-EN.pdf. On 6 November 2017, a Portuguese patrol aircraft, the MPA P3C Wolf operating as part of ENFM, contributed to locate the migrants' boat before part of the passengers were intercepted by the LYCG. On 8 December 2017, the migrants' vessel had been spotted by a military aircraft, part of the EUNAVFOR MED operation, and was later intercepted by the LYCG. On 3 March 2018, a boat spotted by a EUNAVFOR MED aircraft, was intercepted by the LYCG. On 15 March 2018, several boats that were sighted by a drone and helicopters operating under ENFM were intercepted and pulled back by the LYCG.

^{91 &}lt;a href="https://twitter.com/notzachcampbell/status/1184477664872206341">https://twitter.com/notzachcampbell/status/1184477664872206341

On the notion of extraterritoriality and the evasion of responsibility, see Itamar Mann, "Maritime Legal Black Holes: Migration and Rightlessness in International Law", *The European Journal of International Law* Vol. 29, no. 2, 2018.

Tripoli. The Italian communication infrastructure allowing for the coordination of this instance of privatized push-back is essential to the unfolding of events, and demands further discussion.

To understand the centrality of Italian communication infrastructures in the current LYCG activities, we must start from the destruction of LYCG equipment in 2011. When, as of 2016, Italy and the EU embarked upon the task of re-creating a LYCG agency that might intercept migrants on its behalf, amongst the many challenges they faced was that of the lack of communication infrastructure that is central to coordinating operations at sea. The LYCG's Operations Room in Tripoli had its communication and radar equipment destroyed during the 2011 revolution and NATO-led military intervention, which has meant that, as recently as February 2018, as acknowledged in a EUNAVFOR MED (ENFM) monitoring report, in the Operations Rooms ashore, the lack of effective and reliable communication systems hampers Libyan capacity for the minimum level of execution of command and control, including that necessary to coordinate SAR/SOLAS events. Furthermore, a lack of infrastructure services (e.g. personal computers, power supply and internet connection) represent a known limitation for operations". 94

A number of the EU and Italian projects we have highlighted in the "Policy" section have sought, precisely, to develop the LYCG's communication and coordination capability, or to replace them where they are lacking. Thus the EU-funded project implemented by the Italian Coast Guard in support of the LYCG which began 4 July 2017 aimed at drawing up a detailed project for a new Libyan MRCC planned for 2020, 95 while the second phase of this project that began in December 2018 entails its actual construction. 96 Importantly, since July 2017, in absence of a fully operational Libyan MRCC, the EU and Italy have sought to erect a temporary communication and coordination infrastructure for Libyan agencies by "setting up of basic operational rooms in a joint building in Tripoli: interagency National Coordination Centre - NCC (Mol) and Maritime Rescue Coordination Centre - MRCC (MoD)".97 The aim has been for this NCC and MRCC structure to be connected "to the Italian National Coordination Centre (NCC), and those of other relevant Member States, Guardia di Finanza headquarters in Pratica di Mare hosting Frontex International Coordination Centre (ICC),

⁹³ Council of the European Union, European External Action Service, EUBAM Libya Initial Mapping Report Executive Summary, Brussels, 18 January 2017, p.41. http://statewatch.org/news/2017/feb/eu-eeas-libya-assessment-5616-17.pdf

⁹⁴ EUNAVFOR MED Op Sophia - Monitoring of Libyan Coast Guard and Navy Report October 2017 - January 2018, 9 March 2018, p. 26.

⁹⁵ European Commission, Support to Integrated border and migration management in Lib-ya - First phase (T05-EUTF-NOA-LY-04), 27 July 2017, https://ec.europa.eu/europeaid/support-integrated-border-and-migration-management-libya-first-phase-t05-eutf-noa-ly-04_en

⁹⁶ European Commission, Support to Integrated border and migration management in Libya - Second phase (T05-EUTF-NOA-LY-07), December 2018, p. 9-12. https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/t05-eutf-noa-ly-07.pdf. See Parliamentary questions. Answer given by Mr Hahn on behalf of the European Commission. Question reference: E-000190/2019, 4 May 2019, http://www.europarl.europa.eu/doceo/document/E-8-2019-000190-ASW_EN.html

⁹⁷ European Commission, Support to Integrated border and migration management in Lib-ya - First phase (T05-EUTF-NOA-LY-04), 27 July 2017, p. 2. https://ec.europa.eu/europeaid/support-integrated-border-and-migration-management-libya-first-phase-t05-eutf-noa-ly-04_en

Italian Coast Guards Maritime Rescue Coordination Centre (MRCC), as well as to SeaHorse Med network".98

While the EU's 2017 project allocated a budget of 5,850,000 Euros to this activity, 99 it has only been partly successful. In a phone interview conducted for this report in November 2019, Commodore Masoud Abdalsamd of the LYCG described the office located in the centre of Tripoli that serves as temporary MRCC and explained: "We lack equipment that we can use for SAR activities. We are using only phone, fax and internet". 100 As a result, during an evaluation meeting with ENFM concerning the LYCG's activities, Commodore Toumia admitted that "their capacities ashore in the LCG&N Operation Rooms does not allow properly carrying out the institutional tasks as MRCC". 101 This incapacity is demonstrated in the Nivin incident–since the Alarm Phone contacted by phone the LYCG dozens of times without managing to get through, an unresponsiveness reported by many other NGOs too. 102

When the LYCG do receive and register signals concerning boats in distress—which Commodore Masoud Abdalsamd said mostly come from MRCC Rome, they lack the means to communicate with and coordinate vessels at sea. As such, the LYCG relies on the infrastructure of a number of different actors. In our interview, describing his response, Commodore Masoud Abdalsamd explained: "But when I lack communication means, I try to use all the possibilities. I try to use the communication equipment from the Libyan Navy, if not from the Libyan Communication Ministry, if not from the Libyan petrol companies, if not from the Libyan fishery authorities. I have to find a solution". These different Libyan infrastructures are not however sufficient, and as such Commodore Masoud Abdalsamd explained that the LYCG routinely call upon other MRCC's to contact ships at sea. In the Nivin case, it was MRCC Rome that contacted the merchant ship "on behalf of the Libyan coast guard". This practice has occurred in other instances, some of which are included in the other cases of privatized push-backs we discuss.

One particularly important communication and coordination infrastructure for the LYCG interception activities since 2017 has been the "Libyan Navy Communication Centre", from which the LYCG finally succeeded in contacting the Nivin. As we have seen in the "Policy" section above, the successive Italian military ships docked in the port

⁹⁸ European Commission, Support to Integrated border and migration management in Lib-ya - First phase (T05-EUTF-NOA-LY-04), 27 July 2017, p. 10. https://ec.europa.eu/europeaid/support-integrated-border-and-migration-management-libya-first-phase-t05-eutf-noa-ly-04_en

⁹⁹ European Commission, Support to Integrated border and migration management in Lib-ya - First phase (T05-EUTF-NOA-LY-04), 27 July 2017, p. 16. https://ec.europa.eu/europeaid/support-integrated-border-and-migration-management-libya-first-phase-t05-eutf-noa-ly-04_en

¹⁰⁰ Interview with the author conducted by phone on 29 November 2019.

¹⁰¹ EUNAVFOR MED Op Sophia, Monitoring of Libyan Coast Guard and Navy Report October 2017, January 2018, 9 March 2018, annex C.

¹⁰² Marcus Engert, 'Refugee Ships Are Trying To Call Them During Emergencies — But They Aren't Answering'. BuzzFeed, March 27, 2019 https://www.buzzfeednews.com/article/marcusengert/libya-coast-guard-not-answering-emergency-refugee-rescue-cal

¹⁰³ Interview with the author conducted by phone on 29 November 2019.

of Tripoli since summer of 2017¹⁰⁴ (initially as part of operation Nauras¹⁰⁵) have on the one hand contributed to the refurbishment and maintenance of Libyan Navy and Coast Guard ships, and on the other hand, housed the "Libyan Navy Communication Centre". During a phone interview conducted with Commodore Masoud Abdalsamd in March 2018, he explained to us that, for example, when the LYCG has an asset on the high seas, and faces difficulties in communicating with it, the LYCG uses the communication equipment on board the Italian Navy's maintenance ship.¹⁰⁶ Commodore Masoud Abdalsamd has confirmed this use once again in our recent interview in reference to the Nivin incident.¹⁰⁷





Libyan Navy officer on board the Italian Navy ship Caprera docked in the port of Tripoli, March 2018. Photographs: Italian Navy. 108

The crucial function of the Italian naval ships docked in the Tripoli harbour was revealed by an Italian judge in relation to a near pull-back incident occurred on 15

- 104 Italian Navy, 'Missioni Militari: Nave Caprera sostituisce la Capri nella missione bilaterale di assistenza e supporto in Libia', 30 March 2018. https://www.difesa.it/OperazioniMilitari/op_intern_corso/Libia_Missione_bilaterale_di_supporto_e_assistenza/notizie_teatro/Pagine/Nave_Caprera_sostituisce_la_Capri_nella_missione_bilaterale_di_assistenza_e_supporto_in_Libia.aspx. See also Insideover, Fausto Biloslavo
 - 'I marinai Italiani sul fronte di Tripoli', 30 April 2019, https://it.insideover.com/reportage/guerra/i-marinai-italiani-sul-fronte-di-tripoli.html; La lena, 'Sigarette di contrabbando sulla nave militare italiana: "5 militari indagati", 27 September 2018, https://www.iene.mediaset.it/2018/news/siga-rette-contrabbando-nave-militare-caprera-militari-indagati_183450.shtml
 - The Nauras operation tasks have been detailed in a report compiled by the Italian government on 28 December 2017. 'Analytic report on the ongoing international military missions and on the state of the development cooperation to sustain peace and stabilization processes', 28 December 2017, http://www.senato.it/service/PDF/PDFServer/BGT/1063681.pdf. As of January 2018, some of the tasks assigned to this mission have been subsumed into a new "bilateral mission of assistance and support in Libya". See: Deliberazione del consiglio dei ministri in merito alla partecipazione dell'Italia a missioni internazionali da avviare nell'anno 2018 (DOC CCL, n.3), 28 December 2017
- 105 The Nauras operation tasks have been detailed in a report compiled by the Italian government on 28 December 2017. 'Analytic report on the ongoing international military missions and on the state of the development cooperation to sustain peace and stabilization processes', 28 December 2017, http://www.senato.it/service/PDF/PDFServer/BGT/1063681.pdf. As of January 2018, some of the tasks assigned to this mission have been subsumed into a new "bilateral mission of assistance and support in Libya". See: Deliberazione del consiglio dei ministri in merito alla partecipazione dell'Italia a missioni internazionali da avviare nell'anno 2018 (DOC CCL, n.3), 28 December 2017
- 106 Interview conducted by the authors by phone on 23 March 2018.
- 107 Interview conducted by the authors by phone on 10 December 2019.
- 108 Italian Navy, 'Missioni Militari: Nave Caprera sostituisce la Capri nella missione bilaterale di assistenza e supporto in Libia', 30 March 2018, <a href="https://www.difesa.it/OperazioniMilitari/op_intern_corso/Libia_Missione_bilaterale_di_supporto_e_assistenza/notizie_teatro/Pagine/Nave_Caprera_sostituisce_la_Capri_nella_missione_bilaterale_di_assistenza_e_supporto_in_Libia.aspx

March 2018 and involving the NGO rescue ship Open Arms¹⁰⁹, and which we have reconstructed in our Mare Clausum report. While in official documents the Italian government has framed its contribution in terms of "assistance" and "support" to Libyan actors rather than control or coordination, 110 from this case it emerges clearly that the Navy ship present in the port of Tripoli is functioning as a communication and coordination centre providing a decisive contribution to the LYCG's command and control capabilities. 111 The pre-trial investigating judge of Catania into events involving the rescue NGO Open Arms went as far as to affirm that the coordination of rescue operations by Libya, is "essentially entrusted to the Italian Navy, with its own naval assets and with those provided to the Libyans". 112 Since this incident, further cases have confirmed this analysis and the crucial role of the Italian naval asset docked in Tripoli. In particular from a case that occurred on 18 March 2019, documented by Mediterranea and subsequently investigated by the prosecutor of Agrigento, it has emerged that in certain instances not only do LYCG officials use Italian communication equipment on board the Italian ship, but Italian officials actually communicate on behalf of absent LYCG officials. 113 In these instances, we see the fiction of the autonomy of the LYCG merely "supported" by Italy and the EU fall apart, and the plain reality of Italian and EU control emerge clearly. In our interview concerning the Nivin, Commodore Masoud Abdalsamd has confirmed that his officer went on board the Italian Navy ship to contact the Nivin, emphasising however that the LYCG only used the Italian equipment and retained control over the coordination of the rescue/interception activities.¹¹⁴ Even if this is formally the case, the capacity of the LYCG to coordinate activities at sea is clearly dependent on the use of Italian communication infrastructure, and LYCG officials are acting within the framework set out by the Memorandum of Understanding signed between Italy and the GNA on 2 February 2017, which has, at its core, the aim of "stemming illegal migrants" flows".115

- 109 Tribunale di Catania, Sezione del Giudice per le Indagini Preliminari, Decreto di convalida e di sequestro preventivo, 16 April 2018, http://questionegiustizia.it/doc/decreto_rigetto_sequestro_preventivo_tribunale_Ragusa_gip.pdf
- 110 The framing of Italian support to the LYCG as assistance instead of coordination is well illustrated by the Italian Navy's response to an article which had precisely described this relation as one of coordination by the Italian Navy. See Ilaria Sesana and Duccio Facchini, 'ProActiva, la vera notizia è che l'Italia coordina i libici', Altreconomia, 28 March 2018, https://altreconomia.it/proactiva-italia-coordina-libici/.
- 111 Tribunale di Catania, Sezione del Giudice per le Indagini Preliminari, Decreto di convalida e di sequestro preventivo, 16 April 2018, http://questionegiustizia.it/doc/decreto_rigetto_sequestro_preventivo_tribunale_Ragusa_qip.pdf
- 112 The same judge has further affirmed in relation to the Open Arms case that the intervention of the Libyan patrol vessels happened "under the aegis of the Italian navy ships present in Tripoli". In: Tribunale di Catania, Sezione del Giudice per le Indagini Preliminari, Decreto di convalida e di sequestro preventivo, 16 April 2018, http://questionegiustizia.it/doc/decreto_rigetto_sequestro_preventivo_tribunale_Ragusa_gip.pdf. See also: Marina Petrillo and Lorenzo Bagnoli, 'The Open Arms case continued: new documents and Malta', 12 April 2018, Open Migration, https://openmigration.org/en/analyses/the-open-arms-case-continued-new-documents-and-malta/
- 113 Cristin Cappelletti, 'La Libia abbandonò un barcone in mezzo al mare»: ecco gli audio dell'ultimo salvataggio della Mare Jonio', Open, 18 April 2019, https://www.open.online/2019/04/18/la-libia-abbandono-un-barcone-in-mezzo-al-mare-ecco-gli-audio-dell-ultimo-salvataggio-della-mare-jonio/; Republica, "Migranti, le carte false sui soccorsi "I fax dei libici scritti dagli italiani", 18 April 2019. https://ricerca.repubblica.it/repubblica/archivio/repubblica/2019/04/18/migranti-le-carte-false-sui-soccorsi--i-fax-dei-italiani04.html
- 114 Interview conducted by the author by phone on 10 December 2019.
- 115 Memorandum of understanding on co-operation in the fields of development, the fight against

In summary, as the Nivin case illustrates, even when Italian or EU agencies do not fully replace the LYCG (to make up for its continuing deficiencies), the LYCG relies on a communication infrastructure that has been provided by Italy and the EU. While the EU and Italy have tried to generate the impression that communication and coordination is occurring *between* the agencies of distinct sovereign states, in fact communication and coordination always remain firmly *within* Italian and EU hands. Libyan officials do play a role, but are dependent on equipment given by or belonging to Italy and the EU. In this context, the LYCG act according to a script that has been written by others, aiming to prevent migrants from crossing the sea.

The enlistment of merchant ships towards privatized push-backs

The Nivin incident crucially hinges on the enlistment of a merchant ship to operate a form of privatized push-back. We must now seek to understand how and why merchant ships have come to be enlisted towards such a function. We will do so by analysing the changing role of merchant ships in rescue and border control operations in the central Mediterranean over the last years. We will argue that privatized push-backs via merchant ships have been used as a second best option when the LYCG is not able to intercept migrants itself, and that this practice has consolidated into a pattern since Matteo Salvini's institution as Interior Minister in June 2018.

Merchant ships have a number of **legal obligations with regard to migrants encountering situations of distress** during their crossing of the Mediterranean, which are important to summarize briefly since they frame the practices of merchant ships. ¹¹⁶ As any other vessel at sea, they are first under an **international legal duty to render assistance to vessels in distress**, based both upon an international treaty, and upon customary international law. Apart from rare exceptions, merchant vessels cannot fulfil their duty or rescue effectively without the assistance and support of coastal states. The latter have a duty to establish search and rescue (SAR) zones, where they are responsible to coordinate rescue operations. In practice, rescue activities performed by merchant ships will normally be **coordinated by Maritime Rescue Co-ordination Centres (MRCCs)**, **the operational authorities in charge of a state's SAR zones**, who's instructions the merchant ships must follow.

Once persons are rescued, vessels must deliver the rescuees to a "place of safety", which will usually be determined by the MRCC. Delivery of persons to a place where they risk persecution, torture, or inhuman or degrading treatment, such as Libya, is contrary to the rule of non-refoulement enshrined by international refugee law.¹¹⁷ It therefore is not considered to fulfill the obligation of delivery to a place of

illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, 2 February 2017, www.governo.it/sites/governoNEW.it/files/Libia.pdf An English translation of the "Memorandum" is available here: https://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf

¹¹⁶ For an overview, see International Maritime Organization (IMO) and the Office of the United Nations High Commissioner for Refugees (UNHCR), 'Rescue at sea, a guide to principles and practice as applied to migrants and refugees', September 2006. URL: www.unhcr.org/450037d34.html and Violeta Moreno-Lax, Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law, 2017, Oxford Studies in European Law, Oxford University Press.

¹¹⁷ For a discussion, see Fenella M.W. Billing, 'Delivering Refugees and Migrants to a 'Place of Safety'

safety under the law of the sea either. A state MRCC that nevertheless determines that a vessel should disembark its rescuees where they risk such forms of ill-treatment, is therefore likely in violation both of its duties under refugee law, and of its duties under the law of the sea. Merchant ship captains may choose to disobey such instructions to avoid complicity with this violation, but by breaching the orders of state agencies, they risk to be sanctioned in different ways by states—ranging from denial of disembarkation in their ports to prosecution for assisting irregular migration.

As we have shown in relation to the **2011 "Left-to-die boat case"**, the conflicts between Mediterranean coastal states over responsibility for rescue and disembarkation, as well as instances of criminalization of fishermen who had engaged in rescue, had long discouraged merchant ships from operating rescue, leading to recurrent violations of the obligation to perform rescue by all type of vessels, including merchant ships, with tragic consequences. However, as migrants' crossings increased as of Summer 2013, merchant ships were increasingly called upon by MRCCs to perform both privatized rescue and privatized push-backs.

The enlistment of merchant ships towards *privatized push-backs* is not entirely new, but was, until recently, an isolated and rare practice. In 2013, for example, the WatchTheMed platform recorded two instances in which privatized push-backs were attempted, and Amnesty International conducted further investigation into the events.

On **August 4 2013**, a Liberian-registered tanker, the **MV Salamis**, that was travelling from Al Khoms to Malta, rescued 102 migrants from a boat in distress some 45 nm off the Libyan coast.¹¹⁹ According to the Council of Europe Parliamentary Assembly's reconstruction of the events, the **Salamis was instructed by Rome RCC on behalf of the Libyan authorities to transport those rescued back to Libya and disembark them in Tripoli.¹²⁰ The shipmaster, however, proceeded on his planned route towards Malta in order to disembark the rescued migrants there. Malta denied entry to the vessel and only**

- Following Rescue by States at Sea', MarSafeLaw Journal, 2019, issue 20, http://www.marsafelaw-journal.org/wp-content/uploads/2019/10/MarSafeLawJournal_Issue-6_Billing.pdf
- 118 Charles Heller, Lorenzo Pezzani and SITU Research, 'Report on the Left-to-die boat", April 2012, https://content.forensic-architecture.org/wp-content/uploads/2019/06/FO-report.pdf
- 119 WatchTheMed, http://watchthemed.net/reports/view/18. See also Amnesty International, 'Lives Adrift', 30 September 2014, p. 40. https://www.amnesty.org/en/documents/ https://www.am
- 120 CoE Parliamentary Assembly, Doc. 13532, 9 June 2014, The "left-to-die boat": actions and reactions, Report, Committee on Migration, Refugees and Displaced Persons, Rapporteur: Ms Tineke Strik, p11. See also the message sent by MRCC Rome to RCC Malta: "SUBJECT: RUBBER BOAT ADRIFT WITH 250 MIGRANTS ON BOARD IN UNKNOWN POSITION THURAYA PHONE NUMBER ON BOARD 008821655527133.
 FOLLOWING OUR FAX N, 03.03.01/9519/C.O. DATED 04TH AUGUST 2013. TEXT: DEAR SIRS, WE NEED TO CLARIFY THAT, M/V SALAMIS WAS DIVERTED IN POSITION LAT. 33°30.22'N LONG. 014°19.03'E BY THIS MRCC. ON BEHALF LIBYAN AUTHORITIES.
 FURTHERMORE, AT THE END OF RESCUE OPERATIONS THIS M.R.C.C. GAVE INSTRUCTIONS TO M/VSALAMIS TO DIVERT TOWARDS CLOSEST PORT, IN ORDER TO COMPLETE THE RESCUE OPERATION. AT THE MOMENT, THE CLOSEST PORT WAS TRIPOLI. MASTER OF THE SHIP HAS REPLIED US THAT, AS MASTER OF THE SHIP, HIS OWN DECISION WAS TO PROCEED TOWARDS MALTA AS ORIGINAL PORT OF CALL." Published in Amnesty International, 'Lives Adrift, 30 September 2014, p. 73. https://www.amnesty.org/en/documents/EUR05/006/2014/en/

provided food, water, and medical aid to the migrants on board, determining that evacuations were unnecessary. An impasse followed as Malta refused to allow disembarkation, claiming that the shipmaster had ignored calls to turn back to Libya. On 7 August, Italy agreed to allow the migrants to disembark in Syracuse, ending the crisis on the Salamis.

On **August 5 2013**, the Turkish cargo ship **Adakent**, was tasked by MRCC Rome with rescuing 96 migrants in distress some 60nm off the Libyan coast.¹²¹ According to interviews with MRCC Rome conducted by Amnesty International, by the time the Adakent reached the boat, Libyan SAR authorities had been in direct contact with Adakent and instructed it to direct towards Tripoli.¹²² This time **the privatized push-back was successful and the migrants were handed over to the Libyan authorities**.

While there may have been other instances of privatized push-back over the last years beyond these cases, these clearly remained exceptional. They were far from constituting a routine practice, and were harshly criticised by human rights NGOs such as Amnesty International or WatchTheMed. The norm, in the period immediately following these 2013 incidents, has rather been the crucial role merchant ships came to play towards *privatized rescue* operations coordinated by the Italian coast guard, which ended either with the transfer of passengers onto Italian and EU ships (which would disembark them in Italy), or with the direct disembarkation from the merchant ships themselves in Italian ports.

As we have shown in our "Death by Rescue" report, 123 merchant ships were increasingly called upon in 2014, to help respond to the large numbers of migrants crossing the central Mediterranean, that even the unprecedented military humanitarian operation Mare Nostrum could not face on its own. The ending of the Mare Nostrum operation in Autumn 2014 left a rescue gap, and merchant ships were called upon even more frequently to operate rescue: they rescued 11,954 people within the first five months of 2015, becoming the actor performing the highest number of rescues in the central Mediterranean. However, two tragic shipwrecks occurred in April 2015, at the very moment merchant ships were attempting to perform rescue. In the wake of these tragedies, rescue NGOs as well as ENFM assets partly filled the gap in rescue capabilities, and the share of rescues operated by merchant ships declined again-without however ceasing entirely. As long as Italy accepted to swiftly transfer or disembark rescued passengers, merchant ships demonstrated a remarkable commitment to abide by their obligations under international maritime law and engaged in challenging rescue operations. They have done so despite the potential risks entailed by rescuing migrants fleeing a war-torn country, and despite the interruptions of their commercial activities, which are only partially covered by insurance. 124

¹²¹ WatchTheMed, http://watchthemed.net/reports/view/19. See the investigation in Amnesty International, 'Lives Adrift', 30 September 2014, p. 41. https://www.amnesty.org/en/documents/EUR05/006/2014/en/

¹²² Amnesty International, 'Lives Adrift', 30 September 2014, p. 41. https://www.amnesty.org/en/documents/EUR05/006/2014/en/

¹²³ Charles Heller and Lorenzo Pezzani, 'Death by Rescue. The Lethal Effects of the EU's Policies of Non-Assistance', April 2016, http://deathbyrescue.org/

¹²⁴ See Amaha Senu, 2019, "Migration, Seafarers and the Humanitarian-Security-Economic Regimes Complex at Sea". In: Otto, L. ed. Global Challenges in Maritime Security: An Introduction. Springer. Senu writes (p.8) that "While P & I Clubs [Protection and Indemnity Insurance Clubs] usually cover the direct liability costs associated with rescue, the costs of delay or chartering are not, which need to be settled between ship owners and their customers."

The new rise in the mobilisation of merchant ships towards rescue as of summer 2018 is not difficult to understand in relation to the trends discussed above. The new level of criminalisation of NGOs that was reached under far-right Interior Minister Matteo Salvini meant that, between June and the end of November 2018, "there was an average of one (NGO) vessel operating at any given time", 125 meaning also that at times there were none at all. As we have seen above as well, as a result of Salvini's drastic policy of closure, naval assets taking part in ENFM were kept in "second line" and refrained from operating rescue. The same is true for other European state assets. This sudden gap in rescue capabilities could not be entirely filled by a still unreliable LYCG, the capacity of which to intercept migrants effectively "is often subject to equipment availability, fuel, and a variety of other factors that can hamper their efforts to conduct activity at sea". 126 As has been the case in the past, it appears that the Italian and Libyan coast guard sought to respond to this gap by mobilising, once again, merchant ships. As the cases discussed below demonstrate, in the wake of Salvini's closed ports policy however, they were systematically directed away from Italian (and Maltese) ports, to either Libyan or Tunisian ones. Since June 2018 then, merchant ships were enlisted by state actors coordinating SAR operations towards a second best modality of strategic delegation of border control, that of privatized push-backs. Contrary to previous marginal instances of this practice, privatized push-backs emerged as a routine pattern of practice. 127

While no official list of cases or statistics have been made available, Borderline Europe, as well as Sea Watch and Alarm Phone have been monitoring the practice closely. Combining their internal monitoring and analysis which they shared with us, we can see that while from July 2017 to June 2018 not a single instance of privatized push-back was registered, over the year that followed Matteo Salvini's appointment as Italian Interior Minister, between July 2018 and May 2019, a total of 13 privatized push-back attempts were recorded—and this list is most probably incomplete. While it is possible that this practice began to be used more often by the LYCG slightly earlier, this is difficult to document. However it makes little doubt that, from a marginal and episodic practice, since July 2018 privatized push-backs became structural.

¹²⁵ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June - 30 November 2018, Part A, 18 January 2019, p. 7.

¹²⁶ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 December 2018–31 May 2019, 9 July 2019, p. 19.

¹²⁷ In response to the first recorded case of privatized push-back in the series that began in Summer 2018 - the 8 August 2018, Asso Ventotto case we discuss below - Amnesty International concurred with the analysis offered here, arguing that this instance of privatized push-back was the "foreseeable by-product" of the recent shifts that had occurred in the wake of Matteo Salvini's institution as Interior Minister. It is worth quoting a passage from this report at length, because Amnesty was able to identify this new trend when it was only beginning to emerge: "The Asso Ventotto incident is the foreseeable by-product of a situation deliberately created by European governments, with Italy having special responsibility in it. The policy of "closing ports"; the criminalization of NGOs and consequent reduction in their presence at sea, which makes merchant vessels more likely to be called to carry out rescues; (...) the public statements by the Italian Minister of Interior suggesting that Libya should be considered as a safe place of disembarkation; the Europe-led creation of a Libyan SAR Region and building up of the Libyan Coast Guard; and Europe's increasing reliance on the Libyan Coast Guard to coordinate rescues in the central Mediterranean: all these factors explain why 101 people-including five children and five pregnant women-were sent back to Libya, where they are almost certainly facing serious human rights violations." See Amnesty International, 'Between the Devil and the Deep Blue Sea'. August 2018, p. 21. Available at: https://www.amnesty.org/ en/documents/eur30/8906/2018/en/

Dec 2017- May 2018

18.162

LIBYAN CG

NGO VESSELS

EUNAVFORMED

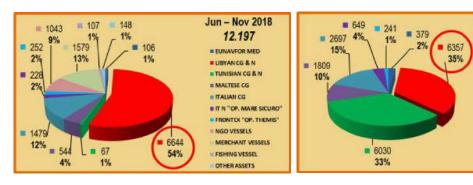
III ITA MARE SICURO

FRONTEX/THEMIS

II ITALIAN CG

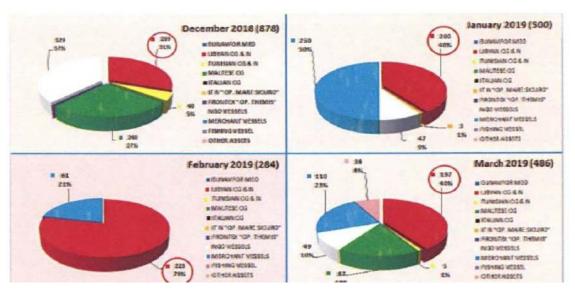
■ MERCHANT VESSELS

The regularity of this pattern was also noted in ENFM's November 2018 Six-monthly report, observing (in a passage appearing to refer exclusively to migrants being brought back to Libya) that while "LCG&N rescued between 40% and 60% of all migrant launches", an "additional 15% to 20% of all launches are rescued by civilian vessels under direction from Libyan authorities (SAR Centre, LCG&N Command). 128 ENFM's leaked reports also contain statistical graphs for the rate of rescue/interception per actor in the central Mediterranean, which clearly shows a sharp increase in the mobilisation of merchant ships for rescue (although the data does not indicate where the rescued passengers were disembarked). While from December 2017 to May 2018 2% (379 persons) of migrants departing from Libya were rescued by merchant ships, the rate increased to 13% (1579 persons) from June 2018 to November 2018. For the same periods, the share of rescues operated by ENFM dropped from 15% to 1%, and that of NGOs from 33% to 9%. The figures for early 2019 are even more impressive as they show that in January 2019 merchant ships became the first SAR actor in the central Mediterranean with 50% of all rescues (290 persons), before the LYCG at 40% (200 persons). In February 2019 merchant ships' contribution remained high with 21% and in March as well with 23%. These figures do not allow us to determine which proportion of the migrants rescued by merchant ships have been brought to European ports, and which have been brought back to Libya. They clearly demonstrate however that merchant ships' share of rescue has starkly risen since June 2018. An important share of these rescues have resulted in privatized push-backs, but this is difficult to quantify.



Statistical graph indicating the share of rescue/interception per actor in the central Mediterranean. EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June - 30 November 2018, Part B, 18 January 2019, p. 2.

¹²⁸ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June - 30 November 2018, Part B, 18 January 2019, p. 2.



Statistical graph indicating the share of rescue/interception per actor in the central Mediterranean. EU-NAVFOR MED Op SOPHIA - Six Monthly Report 1 December 2018–31 May 2019, 9 July 2019, p.13.

We can now analyse in more detail the 13 cases of attempted privatized push-back which Borderline Europe, as well as Sea Watch and Alarm Phone have recorded in the year that followed Matteo Salvini's appointment in June 2018, 11 of which were successful, so as to better understand the practices and mechanisms at work in this new pattern. We should note at the outset that these have been documented with variable precision, with detailed investigations being possible for some, while for others evidence is scarce. We summarize these cases here to demonstrate the recurrent pattern of the practice of privatized push-back, not to offer a definite account of any one of them.

8 July 2018: VOS Thalassa case

On **8 July 2018**, an instance of privatized push-back was *averted* after the migrants resisted being brought back to Libya. This case is particularly well documented thanks to the legal process in front of the Trapani Court that ensued. MRCC Rome was contacted that day concerning a boat that had left the coast of Libya with some 60 people on board. MRCC Rome informed the LYCG. However, at 15:18, the **VOS Thalassa**, an offshore supply vessel operating near the Al Jurf oil field off the coast of Libya and flying the Italian flag, contacted MRCC to inform that it had rescued the 67 passengers. As **MRCC Rome was not receiving any response from the LYCG**, it directed the **vessel towards Lampedusa**. However, **at 22:00**, the captain of the VOS Thalassa contacted MRCC Rome again, indicating it had now **received orders from the LYCG to sail towards the Libyan coast** and transfer the passengers to a LYCG vessel. When the migrants realised they were being brought back to Libya, where they feared for their lives, they threatened verbally the crew and captain. After the captain informed MRCC Rome of the dangerous situation onboard an Italian commercial vessel, MRCC Rome

¹²⁹ The temporal boundary for the analysis of patterns corresponds to that of the data collected by Borderline Europe, Sea Watch and Alarm Phone. While as we will see instances of privatized push-back have occurred since then, this time-frame is sufficient to establish the emergence of a pattern of practice.

¹³⁰ Tribunal of Trapani, decision of the 23 May 2019, https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/GIP-Trapani%20%281%29.pdf

sent the Italian coast guard vessel *Diciotti* and took on board the refugees and migrants. After a long standoff in the port of Catania-during which the passengers went on hunger strike to oppose being sequestrated onboard the Italian ship - they were eventually disembarked in Sicily.¹³¹ While the migrants were initially accused of hijacking the VOS Thalassa, the Trapani judge considered that they acted in self-defence when they resisted being returned to Libya.

13 July 2018, Sarost 5 case

On 13 July 2018, 40 people who were travelling on a wooden boat that had left from an undisclosed location on the North African coast were rescued by a merchant ship, the Sarost 5, after they had reached the Maltese SAR zone. However, after Italy and Malta refused to allow disembarkation, the ship directed itself towards Tunisia, where, after a long stand-off, the passengers were disembarked on July 30. The Alarm Phone was contacted by the passengers, and has collected detailed testimonies from them. 132 The 40 people were first discovered nearby the Miskar platform operated by British gas¹³³ in the Maltese SAR zone and the RCC in Malta ordered a ship to the scene on July 13. Initially, the Caroline III - the closest vessel - provided food and water but the vessel kept some distance and only allowed 8 people who had jumped in the water on board. These people were eventually transferred to the Sarost 5, another supply vessel operating nearby, which rescued the remaining passengers, allegedly on the orders of the company operating the nearby platform. At this point, the Sarost 5 called Italy, Malta as well as France, searching for a port to disembark the people. However, all these States denied the supply vessel permission to disembark the migrants in their harbours, arguing that the closest port was in Tunisia. 134 In a statement, the Maltese government confirmed having directed the rescue ship to disembark in Tunisia, but rejected claims that this may have involved a breach of international law, as Tunisia could be regarded as the nearest place of safety that satisfied international law requirements. 135 This claim was echoed by Special Envoy of the UNHCR for the Central Mediterranean situation, Vincent Cochetel in his communications¹³⁶ who criticized the migrants for refusing disembarkation elsewhere than in Europe. The legality of disembarkation in Tunisia

¹³¹ Richard Brodie, A victory won by a joint resistance on land and at sea, Global Justice Now, 29 August 2018. https://www.globaljustice.org.uk/blog/2018/aug/29/victory-won-joint-resistance-land-and-sea

¹³² WatchTheMed, http://watchthemed.net/reports/view/953; WatchTheMed Alarm Phone, 'Press Release, Migrants rescued in Distress in Maltese Search and Rescue Zone illegally transferred to Tunisian territorial waters', 18 July 2018, <a href="https://alarmphone.org/en/2018/07/18/press-release-mi-grants-rescued-in-distress-in-maltese-search-and-rescue-zone-illegally-transferred-to-tunisian-ter-ritorial-waters/?post_type_release_type=post; Kiri Santer, 'The case of the Sarost 5: black holes of responsibility in the central Mediterranean', OpenDemocracy, 15 August 2018, https://www.open-democracy.net/en/can-europe-make-it/case-of-sarost-5-black-holes-of-responsibility-in-central-med-iterrane/. See also Amnesty International, 'Between the Devil and the Deep Blue Sea'. August 2018, p. 12. Available at: https://www.amnesty.org/en/documents/eur30/8906/2018/en/

¹³³ FTDES, 'Après 5 jours d'errance en mer, 40 rescapé.e.s attendent toujours l'autorisation d'entrer au port de Zarzis', 17 July 2018, https://ftdes.net/apres-5-jours-derrance-en-mer-40-rescape-e-s-atten-dent-toujours-lautorisation-dentrer-au-port-de/?fbclid=lwAR3cg0FfFzyugCs04PkAoBPUJ-lhaj349jG-fjyyu-n6FbAQ0657wmDvQgiQ

¹³⁴ Kiri Santer, 'The case of the Sarost 5: black holes of responsibility in the central Mediterranean', OpenDemocracy, 15 August 2018, https://www.opendemocracy.net/en/can-europe-make-it/case-of-sarost-5-black-holes-of-responsibility-in-central-mediterrane/

¹³⁵ Government of Malta, Statement by the Government of Malta, 19 July 2018, www.gov.mt/en/Government of Malta, Statement by the Government of Malta, 19 July 2018, www.gov.mt/en/Government of Malta, 19 July 2018, www.gov.mt/en/Government/Press%20Releases/Pages/2018/July/19/PR181615.aspx

¹³⁶ https://twitter.com/cochetel/status/1019476611882737664

however, has been contested by NGOs such as Alarm Phone, the Forum Tunisien des Droits Economiques et Sociaux and Euromed Rights, which have argued that Tunisia could not be considered a port of safety due to the lack of legislation on asylum and the documented struggle that asylum seekers face there. With no conclusive response, the vessel headed for Sfax, Tunisia and then, once the authorisation to disembark in Sfax was refused, towards Zarzis, Tunisia. In Zarzis, however, they were also denied entry to the port. From then onwards, the Sarost 5 waited in front of the port of Zarzis for more than two weeks, and the people onboard were made to sleep on cardboard on deck, exposed to the spray from the waves and the heat of the sun. See Finally, with the humanitarian situation on board deteriorating for the rescued, including two pregnant women, and for the crew, **Tunisia eventually relented and allowed the disembarkation** of the refugees and migrants on 30 July.



Map showing the AIS track of the Asso Ventotto offshore supply vessel bringing migrants back to Tripoli on 30 July 2018. Screen grab from Marinetraffic. com. 140

30 July 2018, Asso Ventotto case

On **30 July 2018**, the offshore supply vessel **Asso Ventotto**, operated by the Naples based Augusta Offshore company and flying the Italian flag to assist operations at the Mellita Oil & Gas fields some 57 nautical miles off Tripoli, disembarked in Libya 101 people it had rescued in international waters near the oil rig earlier on the same day. While the unfolding of this incident has been described by the Augusta Offshore company managing the Asso Ventotto ship, 141 there remain a number of open questions that we do not claim to clarify here. 142 According to Augusta Offshore, at 15:30 CET, the **Asso Ventotto** received **instruction from the Navy centre in Sabratha** to direct itself towards a migrants' boat located close to the oil platform — how the Libyans had

¹³⁷ Kiri Santer, 'The case of the Sarost 5: black holes of responsibility in the central Mediterranean', OpenDemocracy, 15 August 2018, https://www.opendemocracy.net/en/can-europe-make-it/case-of-sarost-5-black-holes-of-responsibility-in-central-mediterrane/.

¹³⁸ Kiri Santer, 'The case of the Sarost 5: black holes of responsibility in the central Mediterranean', OpenDemocracy, 15 August 2018, https://www.opendemocracy.net/en/can-europe-make-it/case-of-sarost-5-black-holes-of-responsibility-in-central-mediterrane/.

¹³⁹ Amnesty International, 'Between the Devil and the Deep Blue Sea'. August 2018, p. 12. Available at: https://www.amnesty.org/en/documents/eur30/8906/2018/en/

¹⁴⁰ Augusta Offshore, 'Salvataggio di 101 migranti-Chiarimenti dell'azienda armatrice dell'Asso Ventotto', press release, 31 July 2018, http://www.informatorenavale.it/wp-content/uploads/2018/07/ASSO-28-LUGLIO-BIS-LUGLIO1.png

¹⁴¹ Augusta Offshore, 'Salvataggio di 101 migranti-Chiarimenti dell'azienda armatrice dell'Asso Ventotto', press release, 31 July 2018, http://www.informatorenavale.it/news/salvataggio-di-101-migranti-chiarimenti-dell%E2%80%99azienda-armatrice-dell%E2%80%99asso-ventotto/

¹⁴² Agi, 'Cosa è successo a bordo della nave Asso Ventotto', 31 July 2018, https://www.agi.it/cronaca/migranti_asso_ventotto-4224246/news/2018-07-31/

been informed of it is not clear — with a representative of the Libyan authorities on board. It rescued the 101 passengers, and was ordered by the Libyan representative to direct itself to Tripoli. It was escorted by a LYCG vessel, and disembarked the passengers at 22:00. According to Augusta Offshore, there was no resistance on the part of the rescued migrants to being returned. According to information Amnesty International received from the Italian Coast Guard, the IMRCC did not coordinate the rescue and was only informed about the situation, while the Asso Ventotto was already directed towards Tripoli. 143 This incident was particularly revealing of the turn towards the new practice of privatized push-back, since, prior to this incident, over several years the different vessels of Augusta Offshore operating around Libyan oil and gas fields were regularly involved in rescue operations coordinated by the Italian coast guard in which the passengers were ultimately brought to Italy. In a press release Augusta Offshore indicated it's vessels had been involved in 262 SAR operations between 2012 and July 2018, rescuing at total of 23.750 migrants. 144 While not specified in the company's press release, it is clear that until this recent incident, in the very wide majority of the cases, the passengers were not returned to Libya.

20 January 2019, "Gesina Schepers" case

On 20 January 2019, a boat carrying over 100 migrants that had left from Khoms on January 18th was rescued by a merchant ship and brought back to Libya, after MRCC Rome passed on the coordination of the rescue to the LYCG. The Alarm Phone was involved in this case, and has summarized it in its report: "the Alarm Phone shift team received a direct call from a boat in distress in the Central Mediterranean Sea. Communication was very difficult due to bad connection, but we learned that they were 100 travellers, including 12 children and 20 women, of which one was pregnant. The travellers had left from Al Khoms, Libya, on a rubber boat at around 9pm Libyan time the previous evening and were several times able to send us their updated positions. The travellers were very distressed and informed us that the weather was bad, and they feared for their lives. At 12.58pm we alerted the Italian coast guard, who told us to forward the information to Malta as well, which we did immediately. At 1.58pm the travellers told us that they were no longer able to move forward. 20 minutes later the Italian coast guard informed us that they had handed over the operation to the Libyan coast guard, who would coordinate the search and rescue of the boat. (...) We tried many times to contact the Libyan coast guard in order to obtain information about the progress of the search and rescue operation, but we were not able to get through to them. In the meantime, we kept forwarding the updated positions we received from the boat to the Italian and Maltese coast guard. From talking to the travellers we learned that the situation on the boat was gradually getting worse as water was entering the boat. At 7.45pm we spoke to the travellers for the last time, after this it was no longer possible to reach them".145 Ultimately, it appears that it is the cargo ship "Gesina Schepers" that was ordered by the Libyan coast guard to perform the rescue. 146

¹⁴³ Amnesty International, 'Between the Devil and the Deep Blue Sea'. August 2018, p. 20. Available at: https://www.amnesty.org/en/documents/eur30/8906/2018/en/

¹⁴⁴ Augusta Offshore, 'Salvataggio di 101 migranti-Chiarimenti dell'azienda armatrice dell'Asso Ventotto', press release, 31 July 2018, http://www.informatorenavale.it/news/salvataggio-di-101-migranti-chiarimenti-dell%E2%80%99azienda-armatrice-dell%E2%80%99asso-ventotto/

¹⁴⁵ WatchTheMed, http://watchthemed.net/index.php/reports/view/1133

¹⁴⁶ Lorenzo Bagnoli, 'Libia, i 144 migranti a bordo della Lady Sham portati in centro detenzione: 'Sono debilitati. Ci sono donne incinte e minori'', Il Fato Quotidiano, 22 January 2019, https://www.ilfattoquotidiano.it/2019/01/22/

The LYCG then transhipped the 106 passengers to one of its own patrol boats and brought them to a detention centre in Khoms port. "Upon disembarkation, several people were in need of urgent medical care, and we intervened to provide medical assistance," explained Julien Raickman of MSF France. 147 MSF organized 10 medical referrals to a nearby hospital. Despite this response, a 15-year-old boy later died at the hospital. 148 It is feared that at least six people drowned while the group was at sea.

20 January 2019, Lady Sham case

On the very same night of the 20 January 2019, another boat with some 150 passengers that had departed from Al Khoms was also rescued by a merchant ship, the Lady Sham and brought back to Libya. This incident also involved the Alarm Phone, and MSF personnel in Libya were able to meet the survivors. According to their testimonies, the boat had left on 19 January. In the afternoon of the 20 January, around 4 PM, the passengers referred having been flown over by a helicopter, and later, around 6pm, an unidentified aircraft with "SAR" written on its side (thus resembling the Spanish aircraft operating within ENFM that sighted the passengers in the Nivin case). Shortly thereafter, the boat's engine stopped working. Around 10:30 pm the cargo ship **Lady** Sham, flying the Sierra Leone flag, rescued 144 passengers - several had already fallen overboard. It was only the following day that the rescued passengers contacted the Alarm Phone. According to the AP report, "at 2.51pm CET on January 21st, 2019, the Alarm Phone shift team was contacted by travellers on the Lady Sham merchant vessel which had rescued them in distress but then refouled them back to Libya. The people on the phone were screaming, asking for help to not be returned to Libya, and that they would rather kill themselves than be returned. A few minutes later, the shift team was contacted by another person on the same boat, again asking for help. The shift team members tried to support the people, who reported that they were told they would be brought to Italy. (...) The following morning, the Alarm Phone was alerted to the fact that the travellers had been violently disembarked over the course of the night. Throughout the day, women from this group called the Alarm Phone repeatedly while in detention, attesting to having been beaten while disembarking (including pregnant women). They asked for help and for their voices to be heard. They also reported about a rebellion in the camp where people were trying to escape, that was ended violently, with the Libyans entering with guns. All the men were also reported to have been beaten". 149 One of the contacts of the Alarm Phone was able send photos of the Karareem Detention Centre in Misrata that show the traces of beatings born by some of the men. 150

libia-i-144-migranti-a-bordo-della-lady-sham-portati-in-centro-detenzione-sono-debilitati-ci-sono-donne-incinte-e-minori/4915893/

¹⁴⁷ MSF, Press Release 'Sharp increase in migrants, refugees and asylum seekers in overcrowded detention centres after being returned to Libya', 23 January 2019, https://www.msf.ie/article/sharp-increase-migrants-refugees-and-asylum-seekers-overcrowded-detention-centres-after

¹⁴⁸ MSF, Press Release 'Sharp increase in migrants, refugees and asylum seekers in overcrowded detention centres after being returned to Libya', 23 January 2019, https://www.msf.ie/article/sharp-increase-migrants-refugees-and-asylum-seekers-overcrowded-detention-centres-after

¹⁴⁹ WatchTheMed http://watchthemed.net/reports/view/1135

¹⁵⁰ Marta Serafini, 'Una delle migranti della Lady Sham: «Sono chiusa in un centro di detenzione e ho un aborto in corso»', Corriere Della Sera, 25 January 2019, https://www.corriere.it/esteri/19_gen-naio_25/migranti-lady-sham-sono-chiusa-un-centro-detenzione-ho-aborto-corso-7e471f50-2074-11e9-926b-daa18cae285e.shtml





Photos sent via WhatsApp to the Alarm Phone by some of the migrants returned to Misrata. 151

12 February 2019, BFP Galaxy case

On 12 February 2019, yet another boat carrying 62 people was returned to Libya by a merchant ship, following early detection by an aircraft and having contacted the **Alarm Phone**. On the morning of the 12 February 2019, the AP was "called by members of a group of 62 people who were in a situation of distress in the Central Mediterranean. (...) At approximately 11am CET, we understood that the group had already been rescued from their boat and were now on a cargo vessel". 152 The cargo vessel was the BFP Galaxy, flying the Liberian flag. The shipping company managing the vessel - Contships-Management - confirmed to the AP the rescue of 62 people and that they had been returned to Tripoli in Libya. It is only once the passengers arrived in Libya that they could contact the AP again and testify to what had happened: "After several attempts we re-established contact with the group at 1.26pm when they were already back in Libyan detention. We were informed that the people had left from Al-Khoms/Libya on Sunday evening and had headed north. Water had entered the boat and the people got tired". 153 Contacted by the AP, the Italian coast guard explained "that it had been informed by an aerial asset about this boat in question and then passed this information on to the 'competent Libyan Authorities, which communicated to us to be already aware regarding the situation and that they were coordinating SAR activities'."154 It is unclear by whom the BFP Galaxy was directed, but when it approached and rescued the passengers, "the crew had told them that they would be brought to Europe, but instead they were returned to Libya". 155 One of the survivors told the AP: "If we had known before what they would do with us, we should have better died". 156

¹⁵¹ Maurice Stierl, 'Migrants calling us in distress from the Mediterranean returned to Libya by deadly 'refoulement' industry', The Conversation, 7 February 2019, https://theconversation.com/migrants-calling-us-in-distress-from-the-mediterranean-returned-to-libya-by-deadly-refoulement-in-dustry-111219

¹⁵² WatchTheMed, http://watchthemed.net/index.php/reports/view/1151

¹⁵³ WatchTheMed, http://watchthemed.net/index.php/reports/view/1151

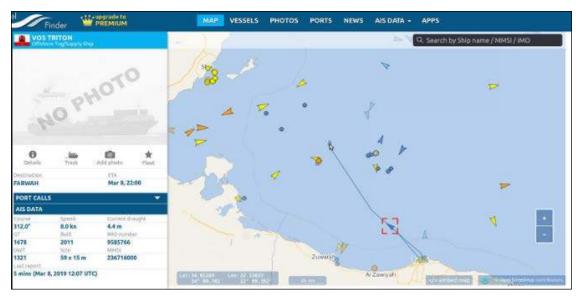
¹⁵⁴ WatchTheMed, http://watchthemed.net/index.php/reports/view/1151

¹⁵⁵ WatchTheMed, http://watchthemed.net/index.php/reports/view/1151

¹⁵⁶ WatchTheMed, http://watchthemed.net/index.php/reports/view/1151

6 March 2019, Sarost 5 case

Mid-March 2019, a series of similar instances of privatized push-back occurred, all of which involved offshore supply vessels. On the **6 March 2019**, the supply vessel *Sarost 5* was once again involved in the rescue of 63 persons who had left Libya and brought them to Zarzis/Tunisia two days later. ¹⁵⁷ This was confirmed by Libyan Colonel Abdelbari, according to whom the 64 migrants were initially in Libyan waters and were sighted by the LYCG, when they approached the Al Jurf oil field. The Sarost 5 rescued them and handed them over to the Tunisian Navy in agreement with the LYCG. ¹⁵⁸



Maps of the AIS trajectory of the Vos Triton ship bringing rescued migrants back to Libya on 8 March 2019. Screen grab of VesselFinder.com.

8 March 2019, Vos Triton case

On **8 March 2019**, the "blog monitoring NGO activities" Migrant Rescue Watch, ¹⁶⁰ tweeted that 54 migrants who had departed from Libya were rescued by the Gibraltar flagged *Vos Triton* when they approached the Bouri oil field. They were brought back to Tripoli and transferred to Tariq al Sekka detention centre. ¹⁶¹

12 March 2019, OOC Emerald case

On **12 March 2019**, Migrant Rescue Watch tweeted that the *OOC Emerald* offshore supply ship rescued 23 people when they approached the Bouri oil field. They were brought back to Tripoli and transferred to Tariq al Sekka detention centre.¹⁶²

¹⁵⁷ WatchTheMed, http://watchthemed.net/index.php/reports/view/1151

¹⁵⁸ Vanessa Tomassini 'Libia. Il comandante Guardia costiera, 'Se tornano le ong aumenteranno i migranti' ', Notizie Geopolitiche, 11 March 2019, https://www.notiziegeopolitiche.net/libia-il-comandante-guardia-costiera-se-tornano-le-ong-aumenteranno-i-migranti/

¹⁵⁹ WatchTheMed - Alarm Phone, https://alarmphone.org/en/2019/07/04/cm-regional-analysis/#_ftnref21

¹⁶⁰ Migrant Rescue Watch (http://migrantrescuewatch.blogspot.com/) is known for spreading conspiracy theories concerning rescue NGOs but it's close ties with the LYCG make it an important—at times the only - source of information.

¹⁶¹ https://twitter.com/rgowans/status/1104332561520738304

¹⁶² https://twitter.com/rgowans/status/1104332561520738304



Migrants being disembarked from OOC Emerald on 12 March 2019. Photograph: Libyan Coast Guard. 163

25 March 2019, El Hiblu 1 case

On 25 March 2019, a case of privatized push-back was averted when the rescued passengers resisted being brought back to Libya by the El Hiblu 1. Zach Campbell's investigation has revealed that the merchant ship had initially been directed by an ENFM aircraft, coordinating on behalf of the LYCG. As such this case is of particular importance in relation to the Nivin incident, since it demonstrates a similar set of actors and interactions. An investigation is ongoing in Malta, where several of the passengers taken on board the El Hiblu 1 are being tried upon suspicion of having hijacked the vessel. We draw here extensively from Amnesty International's summary of these events, 164 as well as from the account of journalist Zach Campbell's in-depth investigation. 165 The 114 passengers left Garabulli in Libya on board a rubber boat in the early morning of 25 March 2019. The rubber boat showed signs of deflating already at the point of departure. As they advanced, they saw a helicopter overhead, which came back a second time and eventually a third time, in the latter instance together with the El Hiblu 1, an oil tanker flying the Palau flag. It appears that the rescue happened on the high seas, in the Libyan search and rescue region. It is not clear which MRCC initially coordinated the rescue. However, according to radio communication transcripts published by Zach Campbell, an aircraft deployed by ENFM contacted the El Hiblu 1 via radio and instructed the tanker to approach and assist the refugees and migrants in distress. 166 In a radio communication, it said: "We are coordinating with the Libyan Coast Guard. Sir, you need to rescue those people, because the Libyan Coast Guard boat is out of service". 167

¹⁶³ https://twitter.com/rgowans/status/1104332561520738304

¹⁶⁴ Amnesty International, 'Malta: The El Hiblu 1 case: Three teenagers in the dock for daring to oppose their return to suffering in Libya', 23 October 2019, https://www.amnesty.org/en/documents/eur33/1270/2019/en/

¹⁶⁵ Zach Campbell, 'The Rescue. A Flimsy raft, more than 100 souls, and three teenage heroes-or are they pirates?', The Atavist Magazine, September 2019, https://magazine.atavist.com/ the-rescue-mediterranean-migrants-malta-europe-crisis

¹⁶⁶ Zach Campbell, 'The Rescue. A Flimsy raft, more than 100 souls, and three teenage heroes—or are they pirates?', The Atavist Magazine, September 2019, https://magazine.atavist.com/ the-rescue-mediterranean-migrants-malta-europe-crisis

¹⁶⁷ Zach Campbell, 'The Rescue. A Flimsy raft, more than 100 souls, and three teenage heroes—or are they pirates?', The Atavist Magazine, September 2019, https://magazine.atavist.com/ the-rescue-mediterranean-migrants-malta-europe-crisis

Upon reaching the rubber boat as instructed, the El Hiblu 1 crewmen told the people on the rubber boat to stop the engine and climb up the net along the side of the vessel. Realizing that the El Hiblu 1 was not a rescue ship, the passengers on the rubber boat asked where the ship was headed. One member of the crew said that the vessel was headed to Tripoli. There was uncertainty and fear on board the rubber boat. Most, scared of the immediate danger of drowning, decided to climb onboard. However, two men from Guinea, two from Ivory Coast, one from Mali and one from Sudan were too scared at the prospect of being taken back to Libya and decided to remain in the damaged rubber boat. Their fate is unknown. One of the youths interviewed by Amnesty International said: "I do not know what happened to the six who stayed in the rubber boat... We were very happy when we saw the helicopter and the petrol vessel came and saved us, because the rubber boat was deflating, we would have died in that boat. When we got near the petrol vessel, the Indian crewmen said they were going to Libya, but then the chief officer came and said: 'good news!'. He said it like that: 'good news, the helicopter gave me a rendezvous point'. He swore on the Koran that he would never take us back to Libya. He said that two boats will come and take us to Europe. We were so happy. The way he spoke-people felt they were in Europe already...".168 The investigation into the Hiblu case in Malta is still ongoing, and whether the promise of the crew was founded upon actual instructions that the captain planned to follow, or whether it was a lie aimed at keeping the passengers calm, is still being investigated. However, what has been revealed by Campbell's investigation is that, that evening, the ENFM aircraft told the El Hiblu 1 via radio communication to go to Libya: "Sir, we are cooperating with the Libyan Coast Guard. They tell us to say to you that you can move those people to Tripoli". 169

At about 6am on the following day, the 26 March, when the passengers began to wake up, they realised they were in front of the Libyan coastline. The El Hiblu 1 was at this point at six nautical miles from the Libyan coastline, in Libyan territorial waters. One of the youths interviewed by Amnesty International recounted: "People started crying and shouting because they were afraid to go back, and some had children. They shouted: 'We don't want to go to Libya', 'We prefer to die', because if they take you back to Libya they put you in a room, they torture you, you eat only once per day. When they take women to prison, the Libyans choose the ones they like and take them by force. And some people put you in the private prison and call your family and ask to bring money to give freedom". '170 Fearing unrest, the captain of the El Hiblu 1 turned around, and headed towards Malta, and the rescued passengers calmed down. Upon arrival, the captain of the El Hiblu 1 communicated to Maltese authorities that the migrants had taken control of the ship and had forced the crew to proceed towards Malta, '171 despite instructions by the Maltese authorities not to

¹⁶⁸ Amnesty International, 'Malta: The El Hiblu 1 case: Three teenagers in the dock for daring to oppose their return to suffering in Libya', 23 October 2019, https://www.amnesty.org/en/documents/eur33/1270/2019/en/

¹⁶⁹ Zach Campbell, 'The Rescue. A Flimsy raft, more than 100 souls, and three teenage heroes – or are they pirates?', The Atavist Magazine, September 2019, https://magazine.atavist.com/ the-rescue-mediterranean-migrants-malta-europe-crisis

¹⁷⁰ Amnesty International, 'Malta: The El Hiblu 1 case: Three teenagers in the dock for daring to oppose their return to suffering in Libya', 23 October 2019, https://www.amnesty.org/en/documents/eur33/1270/2019/en/

¹⁷¹ Armed Forces of Malta, Press release, 28 March 2019, https://twitter.com/MaltaGov/status/1111164298154389504?s=20

do so. The event was hence quickly described "hijacking" and "an act of piracy". 172 Upon arrival, five passengers were arrested under suspicion of criminal activities, and three youth were charged with a number of serious offences, including under counter-terrorism legislation. 173 The three teenagers were released on bail on 20 November 2019 after almost eight months of detention. 174



View of the Farwah oil fields, the Vos Triton, and a LYCG patrol boat arriving to intercept the migrants, 11 May 2019. Photographs: Moonbird.

10-11 May 2019, Vos Triton case

Between 10 and 11 May 2019, the Moonbird civilian aircraft operated by Sea-Watch and the Humanitarian Pilots Initiative¹⁷⁵ and the Colibri operated by Pilotes Volontaires¹⁷⁶ spotted several rubber boats, and witnessed from the air the privatized pushback of one of the them. This summary is based on Moonbird's internal report. During its flight on 10 May 2019 in the area of the Farwah oil fields of the coast of Libya, at 14:00 the Moonbird spotted a white rubber boat carrying approximately 100 persons heading north. On board, only a few of the people were wearing life vests. The Moonbird radioed nearby fishing boats as well as RCC Malta within a few minutes. It further sent out a "Mayday Relay" on behalf of the boat 40 minutes after discovery, which was not copied by any vessel in the area. With no information on any action being undertaken to rescue the passengers in distress, and having to return to Lampedusa airport, the Moonbird crew resolved to return early the following morning. At 05:10 on 11 May, the Moonbird crew spotted the vessel again, this time very close to Farwah oil fields and with three merchant vessels in close vicinity, but not rescuing the passengers: the Vos Triton, Vos Aphrodite, and Melody 5. The Moonbird crew established radio contact with the closest vessel, the Vos Triton, which responded that a LYCG asset was

¹⁷² Maurice Stierl, 'From Migrants to Pirates: How Identities Change During Mediterranean Passage', The Globe Post, 3 April 2019, https://theglobepost.com/2019/04/03/migrants-pirates-identities/

¹⁷³ Amnesty International, 'Malta: The El Hiblu 1 case: Three teenagers in the dock for daring to oppose their return to suffering in Libya', 23 October 2019, https://www.amnesty.org/en/documents/eur33/1270/2019/en/

¹⁷⁴ Matthew Vella, 'El Hiblu teenagers out on bail after eight months in detention', Malta Today, 21 November 2019, https://www.maltatoday.com.mt/news/court_and_police/98772/el_hiblu_teenagers_out_on_bail_after_eight_months_in_detention#.Xfdmjuso8nM

¹⁷⁵ See https://sea-watch.org/en/project/moonbird/

¹⁷⁶ See https://www.pilotes-volontaires.org/en/who-are-we/

on its way-indicating that there had been coordination between the merchant ships and LYCG. Continuing to search the area, the Moonbird located a patrol boat of the LYCG which was heading to another oil field, and the Tunisian Navy warship 508 Hannibal which was heading at a fast speed in the direction of the distress case. The aircraft also spotted a second rubber boat heading north. As the aircraft circled back to the location of the first rubber boat, it observed the LYCG starting interception. At 07:03 the Moonbird saw one of the captured passengers jump overboard and start swimming in the direction of the Vos Triton which was about 500m away.





A migrant (left) swimming towards the Vos Triton, and then climbing on board (right) before being handed over to the LYCG. Video stills by Moonbird. 177

As the swimmer grew nearer, the Vos Triton started its engines and moved away from the swimmer. Only after the Moonbird radioed the vessel urging it to stop did it do so, and the swimmer was able climb on board. But the LYCG approached the Vos Triton, and climbed onboard - where two other migrants who must have swam during the night were also seen. The Moonbird had to leave the scene due to low fuel at 07:50, urging Vos Triton to not hand back the people to the LYCG. Arriving at the scene at 10:00, another civilian aircraft, the Colibri saw only the Vos Triton remaining, with no migrants to be seen on the deck. At 10:46 the Colibri saw a LYCG vessel heading towards Libya with the foredeck crowded with captured people. Therefore we can assume that the three people were handed to the LYCG and deported back to Libya along with the rest of the intercepted passengers. At 12:11 the Colibri saw the second rubber boat spotted earlier by the Moonbird, with its engine stopped, about 1 nm from the Melody 5 and Vos Triton. Contacted via radio, the **Melody 5** indicated that they were refraining from rescuing the passengers until instruction from the Farwah oil fields security coordinator had been received, and that he feared security threats if he rescued the passengers. The fate of this second boat is not known as the Colibri had to leave the scene soon after.

In this case, in which little information is available regarding the chain of communication between different state actors and the merchant ships, we clearly see **another negative outcome of the use of merchant ships towards privatized pushbacks**. While rescuing migrants and seeking to bring them to a European port entails standoff and potential criminal charges, handing migrants back to the LYCG violates migrants' rights and will be met with resistance from the migrants on board. Faced with these two options, merchant ships opt for a third: **refraining from rescuing the migrants altogether**.

31 May 2019, Maridive case

On 31 May 2019, 75 passengers on a boat that had left Libya were rescued by the merchant ship Maridive 601, and, after Italy and Malta refused permission to use their ports, were finally allowed to disembark in Tunisia nearly 3 weeks later. 178 ENFM, when we contacted them about this case, offered the following account of events: "MRCC Rome reported they had received a satellite phone call reporting a boat with 70 people onboard. Malta MRCC assumed responsibility for the event. MRCC Rome reported an Italian military aircraft (which was not an ENFM asset) had reported the boat in the vicinity of SV MARIDIVE. On 30 May an ENFM air asset reported the boat in the vicinity of SV MARDIVE before going off task and there was no further involvement of ENFM assets. On 31 May MRCC Rome sent a fax that SV MARIDIVE had rescued 71 people". 179 However, despite the involvement of several European assets and the RCC Malta coordinating the rescue, Italy and Malta refused permission to use their ports, and the merchant ship was directed to Tunisia, were the passengers were allowed to disembark nearly 3 weeks later. 180 Later, the group of 64 Bangladeshis told the FTDES [Tunisian Forum for Economic and Social Rights] they felt pressed by the IOM to sign a "voluntary return" paper, or risk arrest. They also said diplomats from the Bangladeshi embassy had warned them that if they did not sign the voluntary return document, they would become victims of organ trafficking. 181

July 2018-May 2019: The consolidation of privatized push-backs as a new pattern

In the year that followed Matteo Slavini's appointment as Interior Minister, between July 2018 and the end of May 2019, we have documented no less then 13 attempted privatized push backs-those described above, as well as the Nivin incident. Except for the two that failed as a result of migrants' resistance, at least 11 privatized push-backs were successful - with three of these diverted to Tunisia. We do not claim to be exhaustive, though. There are most probably more cases that were not documented-and further incidents have been recorded since, even following the formation of a new Italian government in September 2019.182 These 11 cases are, however, sufficient to demonstrate that the practice of privatized push-backs is now no longer exceptional, but a routine, consolidated pattern - part of the strategy of refoulement by proxy. It has emerged out of the necessity for Italian and European state actors, as well as the LYCG, to fill the gap left through the combination of the side-lining

¹⁷⁸ Lorenzo Tondo and Maurice Stierl, 'Migrants stranded at sea for three weeks now risk deportation, aid groups warn', The Guardian, 19 June 2019, https://www.theguardian.com/global-development/2019/jun/19/migrants-stranded-at-sea-for-three-

weeks-now-face-deportation-aid-groups-warn-tunisia

¹⁷⁹ Email communication to the author, 29 November 2019.

¹⁸⁰ Lorenzo Tondo and Maurice Stierl, 'Migrants stranded at sea for three weeks now risk deportation, aid groups warn', The Guardian, 19 June 2019, https://www.theguardian.com/global-development/2019/jun/19/ migrants-stranded-at-sea-for-three-weeks-now-face-deportation-aid-groups-warn-tunisia

¹⁸¹ Lorenzo Tondo and Maurice Stierl, 'UN migration agency accused of pressuring Bangladeshis to return home', The Guardian, 26 August 2019, https://www.theguardian.com/global-development/2019/ aug/26/un-agency-accused-of-pressuring-refugees-to-return-to-bangladesh

¹⁸² It has for example emerged that at the end of November the OOC Jaguar returned 33 people to Libya after it had rescued them. Die Welt, 'Gerettete Migranten entziehen sich in Panik Rückkehr nach Libyen', 1 December 2019, https://www.welt.de/politik/deutschland/article203966038/Aus-Angstvor-Rueckkehr-nach-Libyen-springen-Migranten-ins-Mittelmeer.html

of rescue NGOs, the withdrawal of European naval assets, and the insufficiency of the LYCG capability. By mobilising merchant ships to act as their proxy to rescue and return migrants to Libya, Italian and EU actors seek to avoid the prospect of being condemned for directly operating an illegal push-back, sanctioned by the European Court of Human Rights in its 2012 landmark "Hirsi" judgment. Today it constitutes an established modality of strategic delegation of rescue towards refoulement. The cases we have discussed are documented with an uneven level of detail. For some, ample information is available from multiple sources, while for others evidence is scarce. But taken together they demonstrate that several of the characteristics of the Nivin case correspond to recurring patterns of practice. These include the use of European aerial assets for early detection (in particular those of the ENFM), the unresponsiveness of the LYCG, the use of MRCC Rome and other Italian and European actors to coordinate supposedly "on behalf of" the LYCG, the refusal of European coastal states to allow for disembarkation, and the push-back of migrants rescued by merchant ships to Libya. The resistance of migrants, expressed in different ways, is also registered in several of the cases discussed—and it succeeded in preventing two of the 13 attempts at privatized push-back. In the Nivin incident, the resistance of the rescued passengers was no match for the indiscriminate use of violence by the Libyan security forces that forcefully disembarked them.

As we have shown above and in previous reports, while the conflicts between coastal states over responsibility for rescue and disembarkation had long discouraged merchant ships from operating rescue, leading to recurrent violations of the obligation to perform rescue with tragic consequences, 183 the merchant shipping community has in the last several years courageously engaged in the rescue of migrants in the central Mediterranean. This has particularly been the case after the launch of the Italian Mare Nostrum operation in October 2013, following which migrants were swiftly transferred onto European assets or disembarked in Italy.¹⁸⁴ It has done this despite the financial cost, and despite the fact that its means are not always adapted and its crews not always trained for what are the most difficult rescue operations one can imagine. However, as a result of Matteo Salvini's "closed ports" policy, which Italy began to implement in June 2018, merchant ships have been caught in an even more difficult situation. 185 Increasingly called upon to operate rescue towards privatized push-backs, they have had to choose between two main options: (1) either they obey state agencies coordinating rescue and accept to be enlisted in their strategy of refoulement by proxy, but then become complicit in a violation of the obligation of non-refoulement, and face the active resistance of the rescued migrants to being brought back to Libya; or, (2) they comply with their obligation of non-refoulement by refusing to disembark rescued migrants in Libya, but then risk entering into conflict

¹⁸³ Charles Heller, Lorenzo Pezzani and SITU Research, 'Report on the Left-to-die boat", April 2012, https://content.forensic-architecture.org/wp-content/uploads/2019/06/FO-report.pdf

¹⁸⁴ Charles Heller and Lorenzo Pezzani, 'Death by Rescue. The Lethal Effects of the EU's Policies of Non-Assistance', April 2016, http://deathbyrescue.org/

¹⁸⁵ We have contacted two companies whose vessels operate off the coast of Libya and have been involved in rescue and privatized push-back cases, Augusta Offshore company, as well as Opielok. Neither have wished to comment. However, the challenges and dilemmas faced by merchant ships have been acknowledged Christopher Opielok, director of the Opielok company. Caterina Lobenstein, 'Christopher Opielok: "Es ist ein Desaster", Die Zeit, 3 April 2019, https://www.zeit.de/2019/15/christopher-opielok-reederei-rettungsschiffe-fluechtlinge-mittelmeer/komplettansicht?print

with states, lengthy standoffs to ensure disembarkation in Italian or Maltese ports, and possibly the criminalisation of the captain and crew on charges of assisting migrants' irregular entry into European territory. Since both these choices have negative consequences for merchant ships operating in the area, some have opted for a third option: (3) staying away from the areas crossed by migrants, and refraining from assisting them if they come in the vicinity of boats in distress, violating the obligation to provide assistance to any person found in distress. Merchant ships operating or transiting in the central Mediterranean are thus put in a nearly impossible situation, faced with a range of actions that all have negative consequences. However, by accepting to comply with the orders of European and Libyan state agencies, the merchant vessels involved in the above documented cases of privatized push-backs have accepted to become complicit in the policy and practice of refoulement by proxy. As a result, they have contributed to the extreme forms of violence the passengers rescued have been subjected to in Libya.

We have analysed above the emergence of Italy and the EU's policy and practice of refoulement by proxy, and the new modalities through which it has been performed since June 2018. We can now turn to a detailed discussion of the Nivin case, as an outcome and paradigmatic example of these recent trends in delegated border control, but also of migrants' resistance to them.

¹⁸⁶ This tension was recognized by Christopher Opielok, director of the Opielok company. Caterina Lobenstein, 'Christopher Opielok: "Es ist ein Desaster", Die Zeit, 3 April 2019, https://www.zeit.de/2019/15/christopher-opielok-reederei-rettungsschiffe-fluechtlinge-mittelmeer/komplettansicht?print

THE NIVIN CASE

If the Nivin case is only one among several others that demonstrate the pattern of privatized push-backs, it is, nonetheless, unique for at least three reasons. First, returns to Libya via the Libyan coast guard or via merchant ships usually make it very difficult to trace survivors, and thus to understand what happened to them and ultimately allow legal teams to represent them to demand justice, if they so desire. **Thanks to the field presence of MSF France in Libya, it was possible to re-establish contact with the Nivin survivors after they were forcefully disembarked.** The testimonies of the survivors allow for uniquely detailed insights into the unfolding of events.

Second, while, as we have seen in the cases discussed above, it is often very difficult to access evidence concerning the precise unfolding of events and the chain of communication and interaction between different actors, in addition to the testimony of survivors, here we can rely on several different sources which, together, shed a unique light on the internal mechanisms of privatized push-backs. The reconstruction of the events provided by Forensic Oceanography is first based on the testimonies of several passengers, as collected by MSF- France in Libya while they were in detention, a situation which did not allow them to account for the events in detail. At the request of the Global Legal Action Network (GLAN) legal team specialising in border violence, 187 MSF further undertook on 5 May 2019 a detailed interview with a 20-year old South Sudanese national, known here as SDG, who is represented by GLAN lawyers. While SDG gave his extensive testimony in Libya, we have conducted a follow-up interview with him on 7 November 2019, after he succeeded to cross the sea and arrived on European soil. We corroborated these testimonies with the reports and witness accounts of the Watch The Med - Alarm Phone, which was in contact with the passengers while at sea; a report by the captain of the merchant ship Nivin concerning the incident, as well as records of his communication with the Italian and Libyan coast guard, which the captain shared with Mediterranea. 188 We have further included limited official responses to our inquiries from military actors in operation at the time-in particular EUNAVFOR MED (ENFM). We finally relied on vessel tracking data (AIS) to reconstruct the trajectory of the Nivin, in relation to which we mapped the different coordinates available for the migrants' boat. By cross-referencing these different elements of evidence, we are able to reconstruct the unfolding of events. While, as a result of the lack of disclosure from some actors, in particular the Italian coast guard, there are still a number of open questions in the chain of events, the overall picture is clear: that of an operation of privatized push-back, operated by the Italian coast guard through the merchant ship Nivin, which resulted in denying the migrants fleeing Libya the right to seek protection in Italy and their return to a country in which they have faced grave violations of their human rights.

¹⁸⁷ https://www.glanlaw.org/migrationandborders

¹⁸⁸ Mediterranea's rescue vessel *Mare Ionio* was in the port of Lampedusa at the time of events. When the coordinator of Mediterranea was made aware of the unfolding events, it contacted the ship owner Omran Alame, offering help to avert the privatized push-back. Omran Alame then instructed Basam Sbat, the Nivin captain, to share the different documents. Mediterranea has in turn shared them towards this investigation.

There is a third reason why the Nivin case is unique: it not only provides us with a detailed perspective into some of the new patterns of bordering practices that have emerged since June 2018, but also into migrants' resistance to them. While such resistance has been documented in a number of the cases analysed in the "pattern" section, here, thanks to the survivor testimonies, we are able to go deeper into the ways the passengers resisted their privatized push-back, and can observe their remarkable intelligence, courage and solidarity.

BEFORE THE NIVIN INCIDENT

Multiple failed crossing attempts and violence in Libya

Because SDG's testimony is the main one upon which this reconstruction lies, and because it is in many respects revealing of the dire situation migrants face both on Libyan soil and while attempting to cross the sea, it is important to start our reconstruction of the Nivin incident by evoking the trajectory of SDG, prior to his departure from the Libyan coast on the night of the 6-7 November 2018.

SDG, who was 20 years old at the time of events, comes from Bentiu state, in South Sudan. His family belong to the Nuer people. SDG decided to leave his home as a result of the ongoing conflict between the Nuer and the Dinka tribes. SDG's father was killed on the 22nd of April 2014, when Dinka militias seized control of Bentiu. 189 Fleeing the Dinka soldiers, he was separated from the rest of his family, remaining only with his brother K. After staying in South Sudan for two more years, SDG and his brother decided to seek refuge in Europe, leaving South Sudan in May 2016. "I wanted to go to Europe... that's why I entered Europe. I cannot go back to South Sudan as I risk being killed by the Dinka, only because I belong to the Nuer tribe".

SDG and his brother entered Libya from Sudan in January 2017. From Al Kufrah, they were brought to Bani Walid, which SDG describes graphically:

"It was a place of criminals. We stayed up in the mountain in a small house. We were around 70 people, we had to stay inside the whole time. We stayed there for five months. In the house there were six men working inside but there were more men working outside the house. They could shoot people. Each person was asked to pay \$4000. I did not have that money. They used to beat us every day, with everything they could find. There was only little food and water, sometimes once a day at 11am. People died, because they were starving. They used to shoot with their gun inside the room we were locked in, just to kill people. They used to burn the body of my brother with melted plastic. They burned his leg, the arm, the stomach and the shoulder. They used to beat me as well. I still have marks of the beating and they broke my big toe. Because they used me as translator, they did not burn me, but just beat me. My brother died out of beating. When it happened I decided to escape. Together with two other guys (they are in Spain and in Belgium now) we managed to break out from the toilet in June. We ran away and the criminals shot at us with their guns, but they didn't catch us".

¹⁸⁹ For further background on the South Sudan conflict, see Amnesty International, 'Nowhere Safe: Civilians Under Attack in South Sudan', May 2014. https://www.amnesty.org/en/latest/news/2014/05/south-sudan-civilians-killed-and-raped-violence-spirals-and-famine-looms/

After escaping Bani Walid in June 2017, SDG tried to reach Tripoli, but he was caught once again and brought back to Bani Walid, where, in a different location, he was forced into labour and requested to pay money. After he managed to escape again and to reach Tripoli, SDG attempted to cross the sea several times, but was each time intercepted and detained.

"I attempted several times to cross but every time I was intercepted and brought back to detention places, including Tajoura DC in February 2018, then Zuwara from, which I managed to escape, then I was brought to Ain Zara DC in March 2018, where I stayed for 5 months. During this time, I registered with the UNHCR. Despite my registration with them, I never received any documentation and was not interviewed. UNHCR used to evacuate only Eritreans from that DC. I attempted again to cross and I was again intercepted and sent to a detention facility near El Souhalat in August 2018 where I stayed for 10 days. Then, after another failed attempt, I was brought back to Khoms DC in October 2018, from which I escaped."

Thus, before embarking on the boat in November 2018, SDG had repeatedly attempted the crossing, but was intercepted at sea five times. While in the first four attempts it was the LYCG who intercepted him, in the fifth, in October 2018, it was a merchant ship that rescued the 84 passengers, but then brought them back to Libya. While in his testimony SDG could not recall the identity of this merchant ship, as we will see later on, when SDG climbed onboard the Nivin he recognised some of the very same crew members that had been on board the merchant ship in October.

THE DEPARTURE

November 2018: Leaving Libya (again)

SDG attempted once again to escape Libya in the night of the 6-7 November 2018, from the coast of Zlitan. **The 93 passengers departed on a small rubber boat around midnight**, heading towards Italy. The passengers were mostly male, from seven different nationalities: Sudan and South Sudan, Somalia, Ethiopia, Eritrea, Bangladesh, and Pakistan. There was also one Sudanese woman and her then four months child. On board, SDG recalls they had no food and only little water, but were equipped with a compass and a satellite phone.

During the first hours of navigation, the passengers described seeing the lights of **several boats in the distance**. The AIS data does not reveal the presence of any vessels north of Zlitan at this time, but these may have been other unidentified vessels, such as fishermen or state operated vessels.

Spanish aircraft sighting

According to SDG, towards the end of the afternoon the following day, they were **flown over by a dark green surveillance aircraft**, which circled around them for about 30 minutes. Several other testimonies collected by MSF France described seeing the "SAR" acronym and possibly a yellow band recalling the Spanish flag painted on its side. The description provided by the passengers corresponds to the characteristics of the *Vigma* type maritime patrol aircraft operated by the Spanish Military under the command of EUNAVFOR MED during the month of November 2018, which, as we have seen in the "pattern" section, have played a growing role in providing early warning to the LYCG enabling pullbacks to Libya.



The Spanish aircraft Vigma photographed as it returned from its EUNAVFOR MED mission on 17 November 2018. 190

The passengers' testimony has been corroborated by EUNAVFOR MED (ENFM). Responding to our questions, ENFM has confirmed that the migrants' boat–later registered as SAR event 937–was spotted on 7 November by a Spanish aircraft (COTOS) at 15:25 UTC. According to ENFM 's response, with "no ENFM naval assets (...) in the vicinity", "the information was passed to the relevant MRCC which relayed the information to the Libyan Coast Guard (the event occurred in the Libyan SAR region)".¹⁹¹ According to ENFM's standard procedures, the Spanish aircraft first communicated the boat sighting to the ENFM Force Headquarters on board the flagship, ¹⁹² which was the Italian ship San Marco at the time of events.¹⁹³ As in past incidents, "the relevant MRCC" was most probably that of the Italian coast guard. While ENFM has refused to disclose any further information about this sighting (including its exact location, photographs taken, and records of communication with state actors in charge of coordinating rescue activities), and neither have Italian and Maltese Coast Guards, the LYCG has responded to some of our questions in a way that partly clarifies the reception of the information concerning the sighting, and the subsequent action it undertook.

In a phone interview, **Commodore Masoud Abdalsamd of the LYCG**, ¹⁹⁴ indicated that he was coordinating the LYCG response during the Nivin events. He **first received the information from MRCC Rome**, "because they are the active MRCC in the Mediterranean". ¹⁹⁵ Then, "because we have a coordination with [EUNAVFOR MED] Sophia, we received the information again from Sophia". He specified that this was according to the common pattern of information circulation: "most cases come from MRCC Rome. MRCC Rome are usually the first. Even when boats are spotted by EUNAVFOR MED or by Frontex, MRCC Rome is first centre that receives information". Commodore Masoud Abdalsamd did not specify at what time he received the signal, or the timing

¹⁹⁰ Available at: https://twitter.com/EMADmde/status/1063789497429762049

¹⁹¹ EUNAVFOR MED Op SOPHIA, email communication to the author, 24 January 2018.

¹⁹² EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June - 30 November 2018, Part A, 18 January 2019, p. 4.

¹⁹³ EUNAVFOR MED Op SOPHIA, 'Welcoming the new Sophia Task Force flagship', 01 Aug 2018, https://www.face-book.com/EunavforMed/posts/2026976040711633

¹⁹⁴ Commodore Masoud Abdalsamd , interview with the author conducted by phone on 29 November 2019.

¹⁹⁵ Commodore Masoud Abdalsamd , interview with the author conducted by phone on 29 November 2019.

of his response - there are nearly four hours that separate the time of the sighting at 15:25 UTC and the time of the first instructions given by MRCC Rome to the Nivin at 19:39 UTC. He did however confirm that at the time of receiving the signal, the LYCG vessel patrolling in the area was already engaged in another interception, and thus was unable to intervene. This offered the migrants a temporary respite. However, with the first modality of delegated rescue towards refoulement—that operated via LYCG assets—impracticable, Italy and the LYCG would resort to the second modality: privatized push-back.

Before continuing to describe the series of communications linking MRCC Rome, the LYCG, and the Nivin that would lead to the operation of privatized push-back, we must describe another strand of communication that occurred in the afternoon of the 7 November, as the migrants continued to navigate towards Italy: that linking the migrants, the Alarm Phone (AP), MRCC Rome and the LYCG, in which the AP did everything it could to avert refoulement. We account for each of these strands in turn, even though their temporality partly overlaps: both occurred over the afternoon and night of 7 November, into the early hours of 8 November.

FIRST STRAND OF COMMUNICATION

Calling the Alarm Phone

With the LYCG assets unable to intercept the boat following the ENFM sighing, the passengers continued to navigate towards Italy. SDG recalls that "after the plane left, we continued the navigation. Later, when it was already dark, we saw one boat. A big one. We saw the lights." All passengers recall contacting the WatchTheMed-Alarm Phone (AP) via satellite phone at the beginning of the evening to inform them of their distress and request assistance. The AP recorded this first call on 7 November at 17:18 UTC.¹⁹⁷ The member of the AP on shift at the time wrote down: "the man says they are on a rubber-boat with 100ppl (among them 5 women and 3 children) the boat is "not good" and they try to send the position via Thuraya [satellite communication]". The communication with the passengers on the boat was difficult. The shift member recalled in our interview that during the successive attempts to determine the vessel's position "the phone line broke down". The passengers communicated the position verbally at 18.48 UTC. The passenger on the phone read the position in good English, but the audio quality was poor, and indicating only the digits: N3337008, E01438954. The position however appears erroneous, as it does not correspond with the two other positions we have accessed concerning the boat's trajectory, that provided by MRCC Rome to the Nivin and the position later received by the AP, and is thus not included in our synthetic map. The AP continued for some time to contact the passengers, monitor the boat's condition, and assess the presence of vessels in the area that might operate rescue. However, the Mare Ionio of Mediterranea, the only rescue NGO left in the area at the time of events, was in the port of Lampedusa, and no merchant ship appeared in the immediate vicinity.

¹⁹⁶ This involvement is corroborated by Facebook posts of the Libyan Navy referring to several interceptions performed on 7 November 2018 by the LYCG: https://www.facebook.com/libyan.navy/ posts/2197523500490923; https://www.facebook.com/libyan.navy/ posts/2197522673824339

¹⁹⁷ WatchTheMed, '07/11: About 100 people in distress, intercepted by Libyan forces', 8 November 2018, http://www.watchthemed.net/index.php/reports/view/1065. In the report the timings are indicated in CET but all times have been changed in our reconstruction from CET to UTC for consistency

Alarm Phone-ITMRCC - LYCG communication

Unable to reach the passengers anymore, the AP informed MRCC Rome by phone at 19:50 UTC. In its report on the incident, the AP summarizes the interaction with MRCC Rome as follows: "The Italian authorities suggested that despite the boat's position in the international SAR zone [on the high-seas], the so-called Libyan coastguards should be notified". 198 At 20:05 UTC, AP also contacted MRCC Malta by phone to inform them of the boat in distress, and they responded to say they would inform the Libyan coast guard, but without specifying which action they would undertake. At 20:14 UTC, the AP emailed MRCC Rome and the Armed Forces of Malta (AFM) Malta.

Email sent at 20:14 UTC by the Alarm Phone to MRCC Rome and AFM Malta:

Urgent distress: 100pl including 5 women and 3 children in the Central Mediterranean To itmrcc@mit.gov.it

Distress call from Thuraya: + 88 216 2101 0449 Position: 33° 22' 12.3" N, 14° 23' 22.3" E

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

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

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

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

If you add also SAR NGOs: We informed the NGO Mario Junio in the vicinity as well.

They are urgently asking for help.

Thank you for your attention, Watch the Med - Alarmphone

Following its attempt to reach the Italian and Maltese MRCCs, faced with their refusal to launch SAR operations which MRCC Rome communicated over the phone, and considering "that MRCC Rome would notify the Libyan authorities in any case, Alarm Phone members sought to contact the Libyan authorities—but without success". 199

The AP shift team registered calling the LYCG on several different numbers multiple times at **20:20 UTC**, **21:07 UTC** and **23:49 UTC**. As the AP report indicates "We spoke to MRCC Rome again at 9.16 pm and explained that the Libyan authorities could not be reached. MRCC Rome stated that they could not provide us with any information on the distress case".²⁰⁰

Following this phone call, the AP report summarizes a series of email exchanges between AP and MRCC Rome: "At 9.23 pm, we received an email from MRCC Rome, suggesting that the boat was clearly in the Libyan rescue zone and thus not of their responsibility. They asked the Alarm Phone to direct information to the 'competent' Libyan authority and not to them. In response, we stressed that the Libyan authorities could not be reached and demanded MRCC Rome to launch a SAR operation. At 10.13pm, we

¹⁹⁸ WatchTheMed, '07/11: About 100 people in distress, intercepted by Libyan forces', 8 November 2018, http://www.watchthemed.net/index.php/reports/view/1065.

¹⁹⁹ WatchTheMed, '07/11: About 100 people in distress, intercepted by Libyan forces', 8 November 2018, http://www.watchthemed.net/index.php/reports/view/1065.

²⁰⁰ WatchTheMed, '07/11: About 100 people in distress, intercepted by Libyan forces', 8 November 2018, http://www.watchthemed.net/index.php/reports/view/1065.

received another response, suggesting again that MRCC Rome was not the responsible authority. They informed us that they had been in regular exchange with the Libyan authorities who confirmed their launch of a SAR operation. At **10.50pm** we called MRCC Rome to once more exert pressure to engage in rescue—to no avail.".²⁰¹

21:23 Email received by AP from MRCC Rome:

Good evening,

first of all thank you very much indeed for the information about thuraya number 008821621010449, that we have immediately sent to Libyan Authorities that have assumed the coordination of the sar case.

Nevertheless, as you know, Libya, as United Nations recognized government, has clearly declared her "Search and Rescue Region" and she has posted her contacts in the "Web INTERNATIONAL MARITIME ORGANISATION GISIS" where you can find them.

For these reasons kindly we suggest you, for the future, to contact directly Libyan Authorities to spare precious time. Otherwise your behaviour could add a lot of time for an information in reaching the right competent "RCC". Furthermore we take the opportunity to remember that ITMRCC is neither the competent or the closest RCC to Libyan SRR.

We know "Watch the Med" is a good and well aware organisation so it is strange that you call and write us for competence instead of info.

We are gratefully for your work and for your infos and we appreciate a lot your efforts to save the human life and beings and we hope you continue in the right way.

We are in touch with UNHCR, IOM and UNICEF, ITMRCC will always be ready to help, save and assist anyone at sea because this is our mission.

Have a great night. Best regards. IMRCC

21:56 Email reply from AP to MRRC Rome

Re: R: Urgent distress: 100pl including 5 women and 3 children in the Central Mediterranean To itmrcc

Hello,

Thank you very much for the response.

We would like to make clear that we tried to phone the Libya MRCC multiple times on different numbers, however, they were unresponsive.

We therefore had no other option other than to call ITMRCC and Malta MRCC to act as the responsible coordinating authority to find information of the boat.

What actions are you currently taking to prevent deaths at sea?

What assets are you sending?

Thank you for your communication.

Watch the Med - Alarmphone

22:13 Email received by AP from MRCC Rome:

Dear Madam,

we don't understand your questions, we have told you that JRCC Tripoli has assumed the coordination of the case. So they are responsible and coordinating authority.

We are not in charge of any sar cases now. We don't know why you say that Libyans were unresponsive. We have talked with them, passed the information and received the assumption of the sar

²⁰¹ WatchTheMed, '07/11: About 100 people in distress, intercepted by Libyan forces', 8 November 2018, http://www.watchthemed.net/index.php/reports/view/1065.

cases. So, according to SAR CONVENTION HAMBURG 79, they are now in charge of the ops. For example yesterday they have saved about 320 persons in three sar cases. So, in our opinion, they are able to performing sar activities.

Thanks a lot again.

Best regards.

Italian Maritime Rescue Coordination Centre Italian Coast Guard Headquarters

Just before the rescue: AP and migrants re-establish communication

In the early hours of 8 November 2019, after trying for several hours to reach the passengers via their satellite phone, the AP finally reached them again. The AP's report summarizes this second series of communication with the migrants:

"At 0.22am, the Alarm Phone was contacted by the boat but the connection was too bad to understand them. We reached them briefly at 0.24am but could not understand them properly. We informed MRCC Rome at 0.56am that the boat had reached out to us again. They stated that they would forward this information to the Libyans".²⁰²

Seeking to put pressure on the Italian and Maltese authorities, at 01:08, the AP sent the following email to MRCC Rome, MRCC Malta, with the UNHCR in copy:

Dear Sir and Madam,

we have been contacted by the boat again at 01:24 CET. They are still in distress at sea. The Libyan Maritime Authorities did not rescue the people.

We demand to respect the international agreements at sea on SAR and SOLAS and ask you to react to the Alarm and safe peoples life.

100 people(including 5 women and 3 children) in distress at sea are urgently asking for help.

Thank you for your attention Watch the Med- Alarmphone

The AP report continues:

"At 2.58am, the travellers tried to forward their GPS position but the call was interrupted. At 3.06am, we received their updated coordinates (33°58′N 014°40′E) and at 3.09am they informed us that they had water coming into the boat. Their boat was a blue rubber dinghy. We informed MRCC Rome at 3.20am and they said they would forward the information to the Libyans".²⁰³

At 03:25 UTC the AP also called MRCC Malta, which did not specify which action it would undertake. At 03:30 UTC, the AP again wrote to MRCC Rome and MRCC Malta, copying the UNHCR:

Dear Sir and Madam,

we have been recently contacted again by the boat with the Thuraya-Number: 0088 216 2101 0449 the Position at 4:06 am CET is N 33 58 849 E 014 40 702.

The 100 people, among them 5 women and 3 children are still suffering at sea. More and more water is entering to the boat. The people are travelling in a blue rubberboat and they are very urgently

²⁰² WatchTheMed, '07/11: About 100 people in distress, intercepted by Libyan forces', 8 November 2018, http://www.watchthemed.net/index.php/reports/view/1065.

²⁰³ WatchTheMed, '07/11: About 100 people in distress, intercepted by Libyan forces', 8 November 2018, http://www.watchthemed.net/index.php/reports/view/1065.

THE NIVIN CASE

asking for help.

Obviously the Libyan Authorities do not appear to rescue.

We once again ask you to act and to start a rescue-operation to safe peoples life at sea.

Thanks for the attention Watch the Med Alarmphone

Following this time, which as we will now see corresponds to the time the migrants were rescued by the Nivin, the AP was no longer able to communicate with the distressed passengers, and was not informed of their fate. The AP shift members assumed that the passengers had been intercepted by the LYCG, but kept the case open.

SECOND STRAND OF COMMUNICATION

ITMRCC -LYCG-ITMRCC - Nivin communication: The fiction of Libyan coordination

In the afternoon and night of 7 November, another series of communications and interaction occurred between the Nivin, MRCC Rome and the LYCG, which the AP had not been informed of by MRCC Rome, and to which we now turn. We have compiled an account of this strand of communication through: our interview with Commodore Masoud Abdalsamd of the LYCG,²⁰⁴ the report signed by the Captain of the Nivin, Bassm Sbat, which he shared with the coordinator of the NGO Mediterranea while their rescue vessel, the *Mare Ionio*, was in Lampedusa. The captain of the Nivin also shared with Mediterranea a series of email communications he received from MRCC Rome and the LYCG.

In the afternoon of 7 November, after receiving the information of the 15:25 ENFM sighting via MRCC Rome and ENFM, and after determining that the LYCG assets in the area were already involved in an interception and could thus not be direct towards the boat, Commodore Masoud Abdalsamd sought to assess the presence of other vessels in the area. However Commodore Masoud Abdalsamd was at the time located in the LYCG's temporary MRCC in the centre of Tripoli, which, despite Italian and EU support, lacks adequate communication and coordination equipment. As he explained in our phone interview: "We lack equipment that we can use for SAR activities. We are using only phone, fax and internet".²⁰⁵ As such he used the rudimentary means at hand: "We looked on Marinetraffic.com, and we saw this ship coming from Italy and heading to Misrata. It was not far from the boat".²⁰⁶

²⁰⁴ Commodore Masoud Abdalsamd , interview with the author conducted by phone on 29 November 2019

²⁰⁵ Commodore Masoud Abdalsamd , interview with the author conducted by phone on 29 November 2019.

²⁰⁶ Commodore Masoud Abdalsamd , interview with the author conducted by phone on 29 November 2019.



The Nivin, June 2018.²⁰⁷

Commodore Masoud Abdalsamd is referring here to the *Nivin*, an 88m long car carrier flying the Panama flag that was heading towards Misrata. However, the Nivin was not the only vessel in the area. While as a result of the criminalisation of rescue NGOs, there was not a single civilian rescue boat in operation at the time, our AIS data analysis shows that, at approximately the same distance to the migrants' position at 20:42 UTC on 7 November, was the *Omega Star*, a 103m livestock carrier which was heading towards Malta instead. Requesting the assistance of the Omega Star might have allowed this ship to continue towards its next port of call and disembark the passengers in a European port, where their lives would not have been put at immediate risk and where they might have requested international protection. This however would not have been in line with the overall strategic aim of Italy and the EU of preventing migrants from setting foot on European soil.

Having located the *Nivin* as the merchant ship that could be tasked with rescue, Commodore Masoud Abdalsamd faced a second problem: communicating with it. As we have seen in the "Pattern" section, the communication means available in the LY-CG's temporary MRCC do not allow to reach vessels in the open sea. As such, as Commodore Masoud Abdalsamd sought alternative means. He first contacted MRCC Rome, asking it to contact the ship on its behalf, a practice he described as routine, and which we have observed in several cases discussed in the "pattern" section. According to the Nivin's report, at 19:39 UTC, thus shortly before the AP informed MRCC Rome of the distress call it had received, the Nivin was contacted by MRCC Rome via the Inmarsat C system, and directed "on behalf of Libyan Coast Guard" to rescue the passengers in distress.

```
From: "maricogecap@DISTRESS" <maricogecap@DISTRESS>
To: "437472910@csat.srmsitalia.interbusiness.it" <437472910@csat.srmsitalia
.interbusiness.it>
Subject: sar case 937
Date: 07/11/2018 19:39:00

FM IMRCC ROME - ITALIAN COAST GUARD
TO M/V NIVIN INMARSAT C 437472910 437472911
BT
ON BEHALF OF LIBYAN COAST GUARD FOR SAFETY OF LIFE AT SEA PLEASE DIVERT YOUR COU
RSE AND PROCEED TO THE MAXIMUM SPEED TO LAT. 33 39N LONG. 014 39E AT 1810UTC T
O RENDER ASSISTANCE' TO A BOAT IN DISTRESS WITH ABOUT 70 PEOPLE ON BOARD.
PLEASE CONTACT URGENTLY JRCC LIBYA THROUGH THIS MRCC AT FOLLOWING NUMBERS:
TELEPHONE NUMBERS ARE: 0039 06 5924145 06 59084409
FAX NUMBERS ARE: 0039 06 5922737 06 59084793
INMARSAT "C" IS: 424744220
EMAIL IS: itmrcc@mit.gov.it
BEST REGARDS
BT
++++
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Distress signal sent at 19:39 UTC by the Italian Coast Guard "on behalf of Libyan Coast Guard" to the captain of the Nivin and directing it to rescue the passengers in distress. Message shared by the Nivin captain with Mediterranea.

This message demands careful attention. We should first note the timing of this message: it was sent at **19:39 UTC**, that is *before* 19:50 UTC when the AP contacted ITMRCC to provide the boat's position, and refers to the boat position 33 39 N, 014 39 E at **18:10 UTC**, that is before 18:48 when the AP first received the boat's position. **These elements thus confirm that MRCC Rome received the vessel's position from EUNAVFOR MED.**

We can further read that, in its message, MRCC Rome requested the Nivin "on behalf of Libyan coast guard" to proceed with maximum speed to the position of the boat in distress. It continues that it should "contact urgently JRCC Libya through this MRCC" –that is MRCC Rome, providing several Italian numbers. This indicates that the JRCC Libya, which the AP had not succeeded in reaching, was not considered by MRCC Rome to be operational at the time.

The sequence of communication we have just described therefore goes as follows: following the ENFM aircraft sighting, MRCC Rome is the first MRCC to be informed of the situation of distress. In function of Italy and the EU's strategy of refoulement by proxy MRCC Rome passed on the details of the vessel's location to the LYCG for interception, however they neither had the capacity to respond to it with their own assets, nor the adequate means to assess the presence of other vessels at sea, let alone communicate with them. MRCC Rome thus sought to pass on the coordination of the SAR event to a temporary MRCC that was unable to respond to it, and that effectively passed the coordination of rescue back to MRCC Rome. In this sense, we might argue that despite the circulation of information we have traced, the coordination of the SAR event remained with MRCC Rome since it was notified of the ENFM sighting at 15h25.

Communicating from a "Libyan Naval Communication Centre" onboard an Italian ship

The Nivin's report indicates that following MRCC Rome's message, the vessel immediately altered its course, which is corroborated by the vessel's AIS track. However, between its AIS position at 20:42 on the 7 November, and its next available AIS position at 13:35 on 8 November, no AIS positions are available. Since other vessel's positions are available for that time and area, the lack of positions for the Nivin does not seem to be the result of poor coverage by AIS stations, as can be the case off the coast of Libya. While we may thus conclude that the Nivin was not transmitting its position, the available evidence does not allow us to determine the cause of this lack. The Nivin's

AIS transponder may have been malfunctioning or it may have been intentionally turned off, a practice often associated with illicit practices.²⁰⁸

According to the Nivin's report, "On 07/11/2018 21:34 receive an e-mail from Lib-yan coast guard *order us* to proceed to the same position which we receive from MRCC. Vessel confirm to Libyan coast that she sailing with her full speed to the position which she receive from MRCC Rome". This is corroborated by the email communication between the "Libyan Navy and coast guard" and the Nivin, provided by the Nivin's captain to Mediterranea, in which the LYCG indicates having assumed coordination of the SAR event. It is worth analysing this email closely.

From: Libyan Navy Date: Wed, 7 Nov 2018 21:34 +0100 Msg: AMOS-1312763885 Subject: RUBBER BOAT IN DISTRESS To: master.nivin1@amosconnect.com Cc: cincnav.uss@marina.difesa.it Cc: Cincnav.Coan@Marina.Difesa.It Cc: COMANDO MARICOGECAP Cc: EUNAVFORMED\\FHO\\CJ3-06 BWC Cc: RCC Malta at AFM Good evening Sir. I am the Libyan Coast Guard, the authority responsable for SAR operations I take the responsability of the coordination of this SAR event: • rubber boat in PSN: 33 40N 014 38E, 70 people on board not good buoyancy conditions MRCC Rome informed me that you have received my request of cooperation and you are sailing towards this contact. As Libyan Authority I order you to rescue the people of rubber boat I will provide ivou astruction for disembarcation Please aknowledge this message Regards. *Libyan Navy Coast Guard * *Libvan Naval Communication Centre* *القوات البحرية البيبا* e-mail: libvan.naval.comms.centre@gmail.com

Email sent from the Libyan Coast Guard to the Nivin from onboard the Italian Navy ship docked in Tripoli harbour. Email shared by the captain of the Nivin with Mediterranea.

The message, sent to the Nivin by the LYCG, demands once again careful consideration. In copy, are several different units of the Italian Military, EUNAVFOR MED, RCC Malta, thus clearly underlining the level of communication and cooperation between them. Furthermore, the email is sent by the "Libyan Naval Communication Centre" (LNCC), with the email <u>libyan.naval.comms.centre@gmail.com</u>. As we have seen in the "patterns" section, since August 2017, the LNCC has been "located on board the Italian warship moored in Tripoli"²⁰⁹ in the aim of supporting the "coordination of the joint activities of the Libyan Coast Guard and Navy".²¹⁰ In our interview, Commodore

²⁰⁸ See for example Sarah Gibbens, How Illegal Fishing Is Being Tracked From Space, National Geographic, 12 March 2018, https://www.nationalgeographic.com/news/2018/03/illegal-fishing-ais-data-going-dark-protected-ocean-reserve-spd/

²⁰⁹ EUNAVFOR MED Op Sophia - Monitoring of Libyan Coast Guard and Navy Report October 2017 - January 2018, 9 March 2018, p.26. At the time of events, the ship was probably the Capri again, since the Caprera had just ended its mission. La lena, 'Sigarette di contrabbando sulla nave militare italiana: "5 militari indagati", 27 September 2018, https://www.iene.mediaset.it/2018/news/siga-rette-contrabbando-nave-militare-caprera-militari-indagati_183450.shtml

^{210 &#}x27;Analytic report on the ongoing international military missions and on the state of the development cooperation to sustain peace and stabilization processes', 28 December 2017, http://www.senato.it/

Masoud Abdalsamd confirmed that a LYCG officer initially went onboard to use the communication equipment and contact the Nivin. "We are using the communication equipment because maybe our internet is not very well working", he explained. Later, as the Nivin drew closer to the Libyan coast, Commodore Masoud Abdalsamd explained they communicated with the Nivin via "VHF from the Tripoli radio station, and then from the port harbour in Misrata".

From the facts we have established so far, it is striking to observe once again how, despite the formal expressions of passage of information and coordination between European state actors and the LYCG, coordination remains constantly within the firm hands of European, and in particular Italian, actors. Summarizing our reconstruction so far, we can see that:

- the migrants' boat is initially sighted by a Spanish aerial asset operating within the EUNAVFOR MED (ENFM) operation, in which Italy plays a leading role as general commander;
- according to ENFM's standard procedures, the information of the vessel sighting first transits through the Force Headquarters on board the operation's flagship,²¹³ which was at the time the Italian ship San Marco²¹⁴;
- the information is passed on to the LYCG depending on the boat's location in the "Libyan SAR zone", which Italy and the EU helped the Libyan authorities in Tripoli declare;
- while the aim is for the LYCG to intercept and pull-back the boat based on this sighting, using patrol boats donated and repaired by Italy, these are already engaged, and the LYCG seeks to identify a merchant ship to perform the rescue;
- being unable to contact and coordinate the Nivin despite the temporary LYCG MRCC being equipped with Italian and EU funding, the LYCG requests MRCC Rome to temporarily assume coordination of the SAR event "on behalf of the Libyan coast guard";
- When the LYCG re-assumes coordination of the SAR event, it is from a "Libyan Naval Communication Centre" using the communication equipment located onboard an Italian Navy ship.

From the above, we can only concur with the Italian judge in the tribunal of Catania, who concluded that the coordination of rescue operations by Libya is "essentially entrusted to the Italian Navy, with its own naval assets and with those provided to the Libyans".²¹⁵

service/PDF/PDFServer/BGT/1063681.pdf

²¹¹ Commodore Masoud Abdalsamd , Interview with the author conducted via phone on the 10 December 2019.

²¹² Commodore Masoud Abdalsamd , Interview with the author conducted via phone on the 10 December 2019.

²¹³ EUNAVFOR MED Op SOPHIA - Six Monthly Report 1 June - 30 November 2018, Part A, 18 January 2019, p. 4.

²¹⁴ EUNAVFOR MED Op SOPHIA, 'Welcoming the new Sophia Task Force flagship', 01 Aug 2018. https://www.operationsophia.eu/welcoming-the-new-sophia-task-force-flagship/; https://www.facebook.com/EunavforMed/posts/2026976040711633

²¹⁵ The same judge has further affirmed in relation to the Open Arms case that the intervention of the Libyan patrol vessels happened "under the aegis of the Italian navy ships present in Tripoli".
In: Tribunale di Catania, Sezione del Giudice per le Indagini Preliminari, Decreto di convalida e di sequestro preventivo, 16 April 2018. See also: Marina Petrillo and Lorenzo Bagnoli, 'The Open Arms

THE INTERCEPTION

As the Nivin approaches the boat: military helicopters update positions

According to the report of the captain of the Nivin, he received updated positions provided by helicopter sightings as he approached that position of the migrants' boat.

The Nivin captain's report states:

"On 07/11/2018 at **23:00** a NATO helicopter contact with us by VHF given an updated position for the rubber boat. Vessel alter her course to the new position On 08/11/2018 at **02:00** vessel arrive in the position which received from Nato helicopter but

she didn't see the rubber boat. Immediately we inform the Libyan navy which contact with MRCC-Malta asking assistance for updating the rubber boat position. MRCC-Malta sent immediate a helicopter to investigate the area.

On 08/11/2018 at **02:30** Malta helicopter contact us by VHF and give us an update position.

Vessel alter her' course proceeding to the updated position."

The sighting by two helicopters is consistent with SDG's testimony. He recalls that, before they were rescued by the Nivin:

"We came across one aircraft. Or maybe two. It was night. We saw the red lights in the sky. First one aircraft came. And then left. Then another one came after about one hour. It is difficult to say if it was the same one or two different aircrafts because it was dark and only saw the lights. It made circles above us and then would just move to a direction. I had the impression that it was showing us the way as the compass was showing/indicating the same direction taken by the plane. None of them, threw anything at us (eg food, water)."

Based on these concurring accounts, we have sought to ascertain the identity of the helicopters in question. However, a NATO official responded to our request for information that its naval command "confirms that there were no ships or helicopters under NATO's command in the central Mediterranean on 7-8 November 2018. As you know, navies from many countries and organizations operate in the Mediterranean on a daily basis and military forces from Europe and North America are often mistakenly called 'NATO units'". ²¹⁶ The Armed Forces of Malta have so far not responded to our requests for information. The identity of the helicopters is thus so far unconfirmed.

Rescue and lies by the Nivin

SDG states that around 2 AM the passengers saw two ships close by that remain unidentified "one on our left side and one on our right side. They looked like big ships." The ships were far away, and SDG could not identify them clearly, recalling that the shape of one of them looked similar to a merchant ship (but was not the Nivin), while the other closer to a rescue boat. Because of SDG's prior experience of being brought

back to Libya by a merchant ship, SDG explains that "during our navigation, we did not try to catch the attention of these big boats because I knew that they would bring us back to Libya."

SDG recalls that during the night, another series of exchanges with the Alarm Phone occurred: "around 3am we opened the phone again and got some messages. They were in English. The messages where from some human rights organizations. The messages were saying: "Where are you we are looking for you"." The passengers sent their position and closed again the phone. This is consistent with the Alarm Phone's report, which describes how, after the Alarm Phone's last call with the distressed passengers, during which they had described water increasingly entering the boat, they received a last position at 03.09 UTC on 8 November.

Shortly thereafter, the Nivin approached the passengers. The approach of the Nivin is accounted for in the captain's report:

"08/11/2018 03:30 vessel arrive to the new and meet and collect the immigrant. We inform the Libyan coast guard by e-mail which they order us to proceed to Misurata for disembark the Immigrant."

While we have not been able to access the exact position of the rescue after 03:30 UTC, since it occurred only a few minutes after the Alarm Phone's last call with the distressed passengers, the position of the rescue must be very near the last position received by the AP at 03.09 UTC.

SDG recalls the Nivin's approach as follows:

"It stopped and flashed with the lights. We did not want to stop. The boat then approached us, and by doing this, moved the water around us creating waves. Our rubber boat started taking water. We had to stop although the rubber boat was in condition to continue."

The large waves and the manoeuvre the Nivin made, as it approached the migrants' boat, risked making it capsize—as had happened in several other instances we have documented in our report "Death by Rescue". The passengers were reluctant to let themselves be rescued by the Nivin, knowing the risk of being returned to Libya. The Nivin crew was visibly cognizant of the passengers' distrust, and, contrary to the orders received from the LYCG directing the Nivin to Misrata (the ship's next port of call), the crew lied to the passengers, telling them they were going to Italy in order to reassure them. SDG recalls:

"Once they came closer, they talked to us. They said 'Italy. We'll take you to Italy'.

(...) When they said they would take us to Italy I had doubts. How could they go to Italy? The crew we could see were wearing mechanic clothes and, when they opened a door, we could see from the rubber boat, they had cars [he explained that these kind of ships with a cargo of boats usually go to Libya not the other way around]."

²¹⁷ Charles Heller and Lorenzo Pezzani, 'Death by Rescue. The Lethal Effects of the EU's Policies of Non-Assistance', April 2016, http://deathbyrescue.org/

While SDG's doubts were amplified when he recognised one of the crew members as belonging to the crew of the merchant ship that already brought him back to Libya in October 2018, eventually, the passengers were persuaded to climb inside the Nivin, where they were given food, water and clothes.

According to the Nivin's report, the captain was instructed to meet the LYCG North of Khoms:

"08/11/2018 on **06:00** receive instruction from Libyan coast guard to alter course and proceeding 20 N.Miles north of Khums port for the discharge of immigrant. Vessel follow the instruction and alter her course."

PUSH-BACK TO LIBYA

Seeing Libya, and being told it was Malta

SDG recalls some of the interactions that day as they were navigating in the direction of the Libyan coast, during which the passengers were once again lied to by the crew of the Nivin:

"We navigated for several hours. I think from 6am to 5pm. At one point they said to us that we reached Malta. It was still light outside. About five of us could see from a window some buildings. And ships. Small and big ships. They were not moving. At that moment the Nivin had also stopped. I think it stopped for about 30 minutes. The tall guy who speaks English, used to go and see the Captain and come back. The Lebanese and Egyptian men said that they called Malta, but Malta replied that did not want to take us. At that time some of us wanted to take picture of Malta but the Lebanese and Egyptian guys ran to close the window. These same people said that he would take us to Sicily. They said to us 'We'll now head to Sicily. We should arrive around 3am'. We couldn't sleep while we kept navigating."

As the Nivin's AIS data track shows, it was not Malta that the passengers were seeing, but one of the cities on the Libyan coast.

The migrants resist being transferred to the Libyan coast guard

While the passengers were repeatedly lied to and deceived by the Nivin crew which made them believe they were heading towards Italy, when **the Libyan coast guard approached the Nivin in the early hours of 9 November in the open sea**, the reality that they were being pushed back to Libya could no longer be concealed.

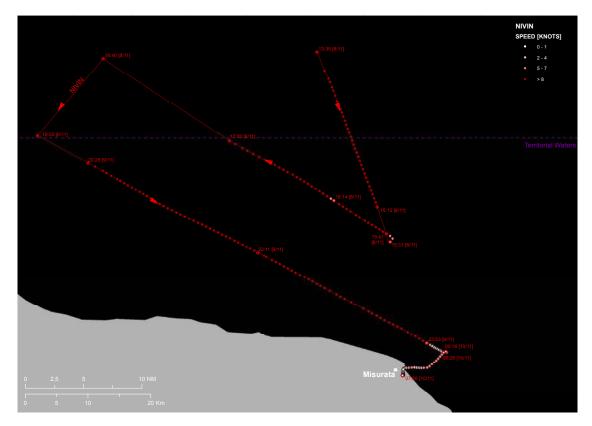
The Nivin's report describes the night-time rendezvous with the LYCG that occurred in the night of 8-9 November 2018:

"On 09/11/2018 **01:00** vessel arrive to meeting position with Libyan coast guard Libyan officer coast guard joining the vessel and try to disembark the immigrant which they refuse to return to any Libyan port. Only two immigrants at **02:37** accept to disembark with the Libyan coast guard officer. Libyan coast guard left"

This timing of events is also recalled by the survivors met by MSF. SDG was one of the passengers whom the Nivin crew attempted to transfer to the LYCG, before he realised who they were. SDG recalls:

"Around 3 or 4 am he the tall guy who speaks English said we arrived in Sicily. He said, 'Follow me, I'll take ten by ten'. I was among the first ten. I was number four in the line. They transferred the first three, an Eritrean, a Somalian and a Sudanese, to a ship. When my turn came, I saw the water (the sea). And heard the men in the other boat speaking English with a Libyan accent saying, 'Sit down sit down' and offering cigarettes. And then I saw the same Libyan guy in uniform that I had met when I was disembarked in October in Khoms. The tall guy tried to push me. I grabbed the door and refused to go outside. I pushed myself back and the Libyans started to speak in Arabic. At that moment everyone understood they were Libyans. The three people already onboard came back to the Nivin. We said that we refuse to go back to Libya. The Libyans tried to convince us saying that if we return to Libya some organizations would help us to go to Europe. We refused. They called the captain. The captain came and spoke in Arabic. I said to him that they told us that they would bring us to Malta so now we wouldn't go back to Libya. The captain replied that Malta refused to take us. We said to him that he said that they could take us to Sicily. At that moment he only said 'Now just go outside'. We refused. The captain asked the Libyan guards to take us and then left. One of the Libyans said to the others 'Go and bring the guns'. They came back with guns and said to us 'go now'. Some people started running away and hiding among the cars. We informed the rest of the 93 that we were not in Sicily and instead Libyan were there. The Libyan came and tried to convince the rest of the people, but we all refused. The Libyan stayed until around 5am then left saying they were going to take additional forces. They then spoke to the Lebanese and Egyptian guys from the Nivin crew and ordered them not to feed us anymore. Two armed Libyan guards stayed with us on the Nivin. Two Somalian guys from our group left with the Libyans as they were scared."

The passengers recall that for most of the rest of the day, the boat did not move. SDG recalls that "The Nivin crew closed all the windows. Until 3 pm we did not move." The approximate position of this encounter is indicated on the AIS data map, since the Nivin's AIS transponder had been emitting again since 13.35 on 8 November. Corroborating the survivors testimonies, it shows the Nivin covering very little distance between the evening of the 8 November at 18:40 and the evening of the 9 November at 19:55, when the AIS track shows the vessel navigating with speed again towards the port of Misrata. The change in direction of the Nivin occurred just after (according to the Nivin's report), the LYCG had made one last attempt at persuading the passengers to follow them. SDG recalls this interaction as follows: "It was around 5pm. It was when the Libyan came back. They came onboard. They were about nine plus the two who were already there with us. They are all armed. We still refused. They tried to take one Sudanese guy but we grabbed him back. The Lebanese and the Egyptian guys tried to talk to us. They advised that we should go to Misrata for one day, to unload the cars and then we would go back. They said that once in Misrata we should remain quiet, avoid making noise and sit in silence. Even the Libyans told us this. We accepted to go to Misrata. When the 11 Libyans left the Nivin started moving again. I think it was around 6:30pm". Having once more failed to disembark the passengers, the LYCG directed the Nivin towards Misrata again.



Map of the Nivin's trajectory as accounted for by AIS vessel tracking data. Figure by Forensic Oceanography. GIS analysis by Rossana Padeletti, design by Samaneh Moafi.

STANDOFF IN MISRATA

As the AIS data map indicates, the Nivin navigated through the night of the 9 November, arriving in the early morning of the **10 November** in the **port of Misrata**. Despite the threat by Libyan security forces, the 91 remaining passengers (33 of which were reportedly minor), refused to disembark in Misrata, since many had spent months or even years in detention and violence in Libya before embarking. SDG recalls:

"Around 8am Libyans in soldiers uniform came to us and said 'Now, willing or not, you need to disembark'. They loaded the guns as they were preparing to shoot. They tried to catch and grab us. They also had taser but they did not use on anyone. We ran where the cars were parked and could not get us. So they left. We closed the entrance and there was no way they could come back. They could only talk to us from a window."

Later that day, a representative of the UNHCR called O. and others of the Libyan Red Crescent and the IOM attempted to persuade them to disembark, but to no avail:

"They asked us to go outside. And they said that organizations would take care of us. We did not want to go outside; we saw a lot of soldiers outside and cars. We could see it from a window. Soldiers used to talk to Libyan Red Crescent and then the Libyan Red Crescent would then talk to us. The UNHCR person said that we needed to let the cars disembark otherwise they wouldn't be able to take us to Europe. Some of us knew O. from before, from Karareem DC, and were disappointed because they said that when they needed, he wouldn't show up in the DC for several months, but now that they were not in prison he would come to talk.

They did not trust O. (...) They asked us if we wanted to return to our countries. We refused. O. said 'if you don't leave the boat we cannot take food for you and you can die inside'. We had no food and no water. We replied that it was fine 'We'll die here. Because we used to die in Libya every day'. Then they left. At night there was no food no water and we spent the night there."

The captured migrants barricaded themselves in the hold of the Nivin, while the Nivin's captain and crew settled in on the top deck of the ship. Six injured persons of Bangladeshi nationality were also moved up with the crew.

The following day, **11 November**, humanitarian organisations visited the passengers once again. O., the UNHCR representative, was allowed in to assess the condition of a baby, and MSF was allowed in as well. "We said that we only wanted doctors because some of us were very sick, injured and burned" SDG recalls. MSF provided 90 medical consultations in the following days, mainly treating burns from the engine petrol spills. The passengers then accepted to allow for the disembarkation of the cars carried by the Nivin, which lasted for the following two days. Meanwhile, the passengers were also visited by representatives of the embassies of the migrants' nationalities, who also attempted to convince them to disembark, but "they couldn't ensure that we would not go to jail", SDG recalls.

Thanks to a mobile phone on board, the passengers were able to contact the international press, and their plight and resistance was publicised worldwide. SDG, thanks to his English language skills and leadership, was one of those who communicated with the press. On the **13 November**, a first article was published by *Le Monde*,²¹⁹ and on the next day Reuters titled its own publication "Shipbound migrants in Libya port say would rather die than disembark".²²⁰ Several other articles appeared in prominent news outlets over the following days, including *La Republica*, *The Guardian*, and *Al Jazeera*.²²¹ The mediatization of the standoff, however, was not enough to prevent its violent ending, and SDG would pay a heavy price for voicing his refusal and visibilizing the revolt.

²¹⁸ MSF, 'Open letter to the UN on the fate of refugees trapped in dangerous Libya', 10 December 2018, https://www.msf.org/open-letter-un-fate-refugees-trapped-dangerous-libya

²¹⁹ Frédéric Bobin, 'Libye : la résistance désespérée de migrants interceptés en mer dans le port de Misrata', Le Monde, 13 November 2018, <a href="https://www.lemonde.fr/international/article/2018/11/13/a-misrata-la-resistance-desesperee-de-migrants-interceptes-en-mer_5383107_3210.html?xtmc=misrata&xtcr=1-

²²⁰ Ahmed Elumami and Aidan Lewis, 'Shipbound migrants in Libya port say would rather die than disembark', Reuters, 14 November 2018. https://www.reuters.com/article/us-europe-migrants-libya/shipbound-migrants-in-libya-port-say-would-rather-die-than-disembark-idUSKCN1NJ2QY

²²¹ Francesca Mannocchi, 'L'incubo dei migranti della Nivin, sequestrati in Libia con l'aiuto dell'Italia', La Repubblica, 15 November 2018, https://rep.repubblica.it/pwa/generale/2018/11/15/news/nave_nivin_bloccata_a_misurata-211763109/ Lorenzo Tondo, 'Migrants fleeing Libya refuse to leave ship and be sent back to camps', The Guardian, 17 November 18, https://www.theguardian.com/world/2018/nov/17/migrants-fleeing-libya-refuse-to-leave-ship-and-be-sent-back-to-country; Sally Hayden, 'Barricaded refugees 'ready to die' than return to Libya detention', Al Jazeera, 18 November 2018. https://www.aljazeera.com/news/2018/11/barricaded-refugees-ready-die-return-libya-detention-181118162855287.html



The captured migrants hiding in the hold of the Nivin. Photograph taken by the passengers using a mobile phone and sent to Informigrants.net.²²²

On **14 November**, MSF was informed of an order issued by the Libyan General Prosecutor to intervene and terminate the occupation of the Nivin by the migrants. That day, Libyan Special Forces were dispatched to the port and stood ready for an armed intervention. SDG recalls this vividly:

"One day, we were given 45 hours to leave the boat. They came with many soldiers. And asked us to leave. They came with about 30 cars and the police or the soldiers wearing balaclava. (...) **The Libyans said they would drop a bomb inside [the Nivin].** Some people got scared and jumped outside. **They used a megaphone to talk to us.** They said they would burn the ship. This lasted until 6pm."

MSF urged the Libyan authorities to avoid the use of force, reminding them that the migrants and refugees on board were unarmed and highlighted the necessity of guaranteeing human treatment in particular of minors and injured persons. Terrified by the threats, six injured Bangladeshi nationals, a Sudanese woman with her 4 month old baby, along with six other Sudanese and Nigerien nationals left the ship and were transferred to the Karareem Detention Centre in Misrata. Thus, 81 captured passengers remained on board resisting the forcible disembarkation.

²²² Leslie Carretero, 'Migrants refusant de débarquer en Libye : "Je préfère mourir sur ce bateau que de retourner en Libye"', Informigrants.net, 14 November 2018, https://scd.infomigrants.net/media/resize/my_image_big/be80770e787a559de16dda4be57472f63b9deb4e.jpeg

A violent disembarkation

On **20 November**, after a 10 day stand-off in the port of Misrata, **security forces intervened and forcefully disembarked the 81 remaining persons on board**. SDG recalls this violent episode:

"The day they forcefully disembarked us they came cars, many soldiers and a ship. It was around 8 am. At that time, we had spent 14 days inside the boat. One of the guys said he heard a gunshot. At that moment, I was talking to journalist and I said we were expecting something from the Libyans."

Journalist Francesca Mannocchi was communicating with one of the passengers at the time over the phone and via WhatsApp. In her article, she wrote:

"At 11:11am local time (9:11 GMT) Mohammed, an 18-year-old migrant from South Sudan with whom Middle East Eye had been in touch by phone, sent an ominous message. "Now the coast guard come to us with guns," he wrote. Some 20 minutes later, he sent a photo of an armed member of the Libyan security forces standing on the dock".²²³



Photograph taken by a passenger onboard the Nivin, as Libyan Security Forces arrived on the morning of 20 November 2018, and sent to journalist Francesca Mannocchi.²²⁴

SDG recalls how the Libyan forces entered the space the migrants had locked themselves in:

"Around 9am we heard a bomb sound coming from the top, from the area where the captain used to be. Then, they cut the electricity. And everything inside the boat became immediately dark. Then, we started hearing gun shootings in all directions

²²³ Francesca Mannocchi, 'Libya forcibly removes migrants from ship after 12-day stand-off', Middle East Eye, 20 November 2018, https://www.middleeasteye.net/news/ libya-forcibly-removes-migrants-ship-after-12-day-standoff

²²⁴ Francesca Mannocchi, 'Libya forcibly removes migrants from ship after 12-day stand-off', Middle East Eye, 20 November 2018, https://www.middleeasteye.net/news/ libya-forcibly-removes-migrants-ship-after-12-day-standoff

coming from laser guns sights. I and other four were guarding the doors. The Lib-yan forces opened the door and **shot everywhere**. The security forces grabbed me from my hair, and I was beaten with the guns. At one point, they blocked me in front of a door and ordered me to open it. I said I don't not know how to open. At that moment I had several guns pointed at me. I saw the lights of the guns on me. All over my body and on my eyes. They were close, something like 2m away. Then, I saw the smoke of the gun when they shot at me. But I had not realized that I had been shot. When I tried to move my leg wouldn't move and then I lost consciousness. When I woke up, I was at the hospital."

Several other passengers were also wounded. According to MSF's internal report, between 8 and 11 persons were transferred to Misrata hospital. Despite the serious wounds, SDG did not believe anybody died during the violence. Twenty-seven persons were transferred to the Karareem Anti-Crime Department. The rest were scattered between Zlitan and Karareem DCs.

SDG describes the violence he was subjected to in the hospital, where he and other fellow detainees were interrogated, beaten and tortured:

"When I woke up in the hospital, I found some people there, including two Eritreans and one Sudanese that were later taken to Tripoli. I was supposed to be brought to Tripoli but was not allowed. I believe the security forces already knew me. I think because of the media. After a few hours I was transferred to the security place with a soldier's car. They just dumped me like this in the car. We were three south Sudanese and two Sudanese together. They kept the five of us for five days. The place is in Misrata. Is building with an office and cells. They made us change our clothes. Initially we were together, however we were not authorized to talk, but then they separated us. There we met a Nigerian guy, he is Christian and had been there for a year. He had a broken leg. And a Libyan guy who had been detained there for five years. During the five days I was interrogated and beaten: in the morning I would be brought to a room where two men with a computer would ask many questions. At night, men in plain clothes would come and bring water and shampoo and put it in my eyes. They would do this until I fell. No one knew what else they could do. I was also beaten. They would take one person per time and bring me in a room for beating. They used to ask me if my name is S. I denied it. They asked if I am Christian, they asked the name of my mother and I lied. That's why I changed my name. I said that my name is Yousef. I was accused of being the one talking in English and sending messages to media. They took a picture of me. They also showed a picture of me and say to me: you are the one who did this (talk to journalists and refuse to disembark). They wouldn't believe that we were just migrants refusing to disembark. After five days I was sent to Zlitan. (...) When I first arrived in Zlitan DC I was beaten for the first three days. Not by Zlitan DC guards. They never beat us. It was the security. They came to Zlitan DC and beat me. They would bring me to the court inside the DC and bring the phone (...) brought to us. (...) They also brought me a photo of myself published by the media. I did take pictures while I was onboard and sent to TV. I don't think anyone is dead from the shooting."

After these first days of systematic beating and torture, as SDG still did not admit to the accusations put forward by the Libyan guards, they stopped beating him. He believes the visits of MSF and UNHCR to the Nivin passengers in the Zlitan DC also acted as a deterrent to the Libyan guards and security, and SDG reported no further hardship apart from inadequate and insufficient food. Some passengers were put to forced labour,

but SDG was spared this because his wounded leg did not allow him to work. **SDG** remained for over 6 months with the rubber bullet in his leg without receiving adequate treatment. In early May 2019, he was finally brought to a hospital in Misrata, where he was treated for approximately 3 weeks. MSF doctors contributed to the operation during which the rubber bullet was extracted. On 5 May 2019, following the operation, MSF undertook a detailed interview with SDG. It is from the hospital that, seizing the opportunity of less intense surveillance, SDG escaped.



Rubber bullet extracted from SDG's leg in the hospital of Misrata in June 2019. The bullet has a diameter of approximately 17mm, and its plastic case (also removed from SDG's leg), is 17mm wide and 27mm long.

Following SDG's escape, he attempted to flee Libya for Europe again, in fact, twice. The first time on 24 July 2019, he departed from Khoms. But, like in his previous attempts, he and his fellow passengers were intercepted by the LYCG after one day. While SDG feared being brought back into captivity again, at least he survived, which was not the case for more than another 150 people who drowned, when two boats that had left around the same time as SDG's capsized.²²⁵ After being brought back to Khoms, he was amongst a group of four other north and south Sudanese who were selected for forced labour (which he could hardly perform), which lasted two to three weeks. SDG eventually escaped again and attempted the crossing a second time, on 24 August 2019. This time, fearing to be brought back to Libya again, he and his fellow passengers refrained from calling upon any actor for rescue and managed to arrive autonomously close to Malta on 26 August 2019, where they were intercepted by an AFM patrol vessel.²²⁶ Today, there are 12 former Nivin passengers present in Malta, who arrived on different boats in early June, August, and September 2019. While the whereabouts of all migrants who were pushed back by the Nivin is not know, SDG is in contact with several passengers who are still detained in Libya to this day.

The privatized push-back operated by Italy and EU actors through the Nivin thus predictably resulted in the passengers being subjected to multiple forms of ill treatment, including being shot at during forced disembarkation by Libyan security forces, being beaten and tortured, arbitrarily detained, deprived of sufficient food and water,

²²⁵ Al Jazeera, 'Up to 150 feared dead in 'year's worst Mediterranean tragedy'', 26 July 2019, https://www.aljazeera.com/news/2019/07/100-migrants-refugees-feared-drowned-mediterrane-an-sea-190725150839996.html

subjected to forced labour and denied medical care. Italy, implementing an EU strategy of refoulement by proxy via the LYCG, along with the captain of the Nivin who followed the orders of state agencies coordinating rescue at sea, knowingly sent back these passengers to a country in which their lives were at serious risk. In the Nivin case, as in others we have reviewed above, migrants stated, again and again, at times under the threat of guns, that they would rather die than being brought back to Libya—which, as Italy's Deputy Minister for Foreign Affairs, Mario Giro, admitted on 6 August 2017, "means taking them back to hell".²²⁷ In the Nivin case, as in other instances of privatized pushback we have documented, migrants put their lives on the line to resist this new form of strategic delegation of rescue for the purposes of border control that has emerged as a structural pattern of practice during Matteo Salvini's term as Interior Minister and as a result of his drastic policies of closure.

²²⁷ Marco Menduni, 'Giro: "Fare rientrare quelle persone vuol dire condannarle all'inferno"', La Stampa, 6 August 2017, http://www.lastampa.it/2017/08/06/italia/cronache/giro-fare-rientrare-quelle-persone-vuol-dire-condannarle-allinferno-SXnGzVlzftFl7fNGFCMADN/pagina.html

CONCLUSION

The Nivin case offers a unique insight into "privatized push-backs": the refoulement of migrants to an unsafe country via merchant ships. As we have shown, privatized push-backs have emerged as new modality of abusive border control at work across the central Mediterranean. Our report has demonstrated that this practice, which had been exceptional until Matteo Salvini (as new Interior Minister from June 2018) implemented his "closed ports" policy, has since been consolidated into a routine pattern of operation. It is a modality of delegated rescue/interception in the aim of border control which Italian and EU actors rely upon when their preferred partner for outsourced border control - the Libyan coast guard (LYCG) - is unable to intercept and pull back migrants to Libya.

The report has demonstrated, relying on statistical data from leaked EUNAVFOR MED (ENFM) reports, as well as the summary reconstruction of 13 privatized push-back attempts that occurred between July 2018 and the end of May 2019, that the Nivin case is not an isolated event. The unique evidence we have accessed in relation to the Nivin case provides unprecedented insight into the mechanics of privatized push-backs. Our reconstruction has revealed that the outcome of the migrants being returned by the merchant ship depended on the migrants' boat being initially sighted by a EUNAVFOR MED aircraft; the passing on of this information to Italian and Libyan coast guard authorities; the initial communication with the Nivin by the Italian coast guard "on behalf" of its Libyan counter parts; and the later use of an Italian warship docked in Tripoli by the Libyan coast guard to contact and coordinate the merchant ship.

In the Nivin case, we thus see revealed a chain of interlinked actors, coupled with operational means and communication infrastructures, that are aggregated by Italy and the EU into one indistinguishable operational mechanism of refoulement by proxy. Although the actors involved may give the impression of coordination between European state actors and the LYCG, control and coordination remained constantly within the firm hands of European - and in particular Italian - actors. Since Italy remained in control of the practices that prevented the migrants from exercising their right to flee Libya and seek protection in Italy, and ultimately led to them being returned to a country in which they have faced grave violations, we argue that Italy breached its obligation of non-refoulement.

While the fate of migrants in Libya is well known, the experiences of the Nivin passengers in Libya both before they embarked on their perilous journey across the sea and after they were forcefully disembarked from the merchant ship, exemplify the multiple forms of violence and violations migrants are subjected to. However, in the Nivin incident, what is also brought to the fore is the tremendous courage, collective intelligence and solidarity enacted by the passengers as they resisted the violation of their rights. The nongovernmental actors involved, in particular the WatchTheMed Alarm Phone, Mediterranea, and MSF, also did everything that was in their power to oppose the refoulement, ultimately unsuccessfully. The Nivin case illustrates the confrontation which crystallises around every single boat seeking to cross the Mediterranean Sea today: that which opposes the coalition of actors seeking to prevent the deaths and violations of

migrants rights, and those which accept them as a necessary evil towards the aim of containing migrants.²²⁸

The suffering that is the outcome of Italy and the EU's policy of refoulement by proxy is unacceptable. The delegation of Italy and the EU's illegal actions along an ever-expanding chain of actors does not put an end to their responsibility for these actions. To put an end to these gross violations and human suffering, Italy and the EU should abandon their aim of containing migrants at all cost, and embark instead on a fundamental re-orientation of the EU's migration policies to grant legal and safe pathways to migrants. Only in this way, will the smuggling business, the daily suffering of thousands of migrants in distress, and the need to rescue them, finally come to an end.

²²⁸ Sandro Mezzadra and Maurice Stierl, 'The Mediterranean Battlefield of Migration'. Open Democracy, 12 April 2019, https://www.opendemocracy.net/en/can-europe-make-it/mediterranean-battle-field-migration/?fbclid=lwAR0cy8Zz6TMQGPTXdZCVCk0s4sIT2umOE8Q7wwAJwdICKdHA9Zdg-pAxW0g

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This report is dedicated to SDG and all the passengers who resisted being pushed-back by the Nivin.

ANNEXES

TESTIMONY OF SDG

Testimony of SDG as collected by Médecins Sans Frontières (MSF) in Misrata, Libya on May 5th, 2019

- My name is SDG. I am from Bentiu state in South Sudan. I was born in Gandor in Leer county in 28/08/1999. My father's name is P. G. My mother's name is A. N. We were four siblings. My brother K. (m, DOB 1997) was the oldest, then myself, my sister S. (f, DOB 2005), and my little brother R. (m, DOB 2007). We were all born in Bentiu and we belong to the Nuer tribe as my parents are from Nuer tribe.
- 2. I left South Sudan due to the ongoing conflict between my tribe and the Dinka tribe. The fight between the two tribes began on December 18, 2013. The fighting started because Salva Kii, the president of South-Sudan, who is Dinka, tried to kill Dr. Riak Machar, the Vice president, who is Nuer, because he was his opponent in the coming elections. The Dinka wanted to kill my people. When Dr. Riak Machar ran away after the killing attempt, Salva Kii announced that he would kill all Nuer people. Until today, they are still trying to kill the Nuer people. They recruited people from Darfur, Uganda and Kenya to kill us.
- 3. In 2013, when the conflict started, I was in Juba as I was enrolled in Kondial Kel Primary School. I lived three years in Juba. I came back to Bentiu on 02.01.2014, because in Juba they (the Dinka) tried to kill us. It was dangerous, we lived in the UNMISS building in Juba. Until now, my people in Juba are living there. My father was killed 22/04/2014, when the Dinka people came to Bentiu. We tried to run to the UNMISS, but my father was shot. After that I went back to my county, Leer but the Dinka soldiers followed us there. Me and my family ran away from them. We got separated. I stayed with my brother K., but I don't know where the rest of the family is and I have no possibility to contact them. My brother K. and I stayed in South Sudan for two years then we left together to Sudan in 2016. ... I cannot go back to South Sudan as I risk being killed by the Dinka, only because I belong to the Nuer tribe.
- 4. I left South Sudan in 2016 around May. We went to Sudan and then entered Libya together with my oldest brother Kuol. We crossed through Sudan and arrived in Libya in January 2017 in Kufra. From Kufra we were brought to Beni Walid. It was a place of criminals. We stayed up in the mountain in a small house. We were around 70 people, we had to stay inside the whole time. We stayed there for five months. In the house there were six men working inside but there were more men working outside the house. They could shoot people. Each person was asked to pay 4000\$. I did not have that money. They used to beat us every day, with everything they could find. There was only little food and water, sometimes once a day at 11. People died, because they were starving. They used to shoot with their gun inside the room we were locked in, just to kill people. They used to burn the body of my brother with melted plastic. They burned his leg, the arm, the stomach and the shoulder. They used to beat me as

- well. I still have marks of the beating and they broke my big toe. Because they used me as translator, they did not burn me, but just beat me. My brother died out of beating. When it happened I decided to escape. Together with other two other guys ... we managed to break out from the toilet in June. We ran away and the criminals shot at us with their guns, but they didn't catch us. From that moment I tried to reach Tripoli but I was brought back to Beni Walid, in different other places where I was forced into labour, and requested to pay money.
- 5. When I finally reached Tripoli, I stayed for about one month there before attempting to cross the sea. I attempted several times to cross but every time I was intercepted and brought back to detention places, including Tajoura DC in February 2018, then Zuara from which I managed to escape, then I was brought to Ain Zara DC in March 2018 where I stayed for 5months. During this time, I registered with the UNHCR. Despite my registration with them, I never received any documentation and was not interviewed. UNHCR used to evacuate only Eritreans from that DC. I attempted again to cross and I was again intercepted and sent to a detention facility near El Souhalat in August 2018 where I stayed for 10 days. Then, after another failed attempt, I was brought back to Khoms DC in October 2018 from which I escaped. I then attempted to cross at the beginning of November 2018 but I got intercepted by a commercial ship that returned me and more than 90 other people back to Libya. It was the Nivin Panama.

Sea crossing and return to Libya by Nivin Panama Ship November 6, 2018 - Tuesday

- 6. I tried to cross the sea on November 6th, 2018. It was around midnight. We moved from Zlitan. We took the sea with a rubber boat, one of those boats inflated with air. The color of the boat was grey. I remember I could see big mountains and roads. And some trees around. We were 93 people from seven different nationalities: three South-Sudanese, Ethiopians—I don't recall exactly how many, maybe two, about eight Eritreans (I think four of them travelled to Niger now), 31 Bangladeshi, six Pakistani, Sudanese and Somalians. There was only one woman from Sudan. I think she is now in Karareem DC. Her name is [H.]. She has a little baby with her. There was also an old man, in his sixties. He must be in Karareem DC as well.
- 7. We had no food and water with us. Initially we had some (little) water but we had to throw it at sea because we had oil in the boat. We had a compass and a satellite phone. After one-hour navigation, we saw a big ship with many lights. We navigated to the direction the ship was coming from. That night we did not see any other boats.

November 7, 2018 - Wednesday

8. In the evening of the first day of navigation, around 5/6pm we saw an aircraft. It was dark green color and the word SAR on it. I cannot remember any more if it also had a yellow band. The plane used to go and come back for about 30 minutes. At one point it opened a door. After the plane left, we continued the navigation. Later, when it was already dark, we saw one boat. A big one. We saw the lights.

- 9. Around 10 pm we called the rescuing number starting with +33. The guy who gave us the phone [smuggler] said this is the Italian number. When we called the +33 a woman answered. She spoke in English. She asked: 'Does the boat have any problem?' we replied that we had no problems. She said 'Keep navigating'. At that time, we had navigated for about 175 km.
- 10. Then we called a German number, the code was +49. We called them first and then they called us back. They asked if the boat was in good condition or broke. We replied that the boat was okay. They asked how many km of navigation we had, and they asked to send the location. We sent them our location.
- 11. Many numbers used to call us. They were from human rights organizations. They wanted to rescue us. We closed the phone and continued the navigation all the night.

November 8, 2018 - Thursday

- 12. Around 2am we saw two ships one on our left side and one on our right side. They looked like big ships.
- 13. Around 3am we opened the phone again and got some messages. They were in English. The messages where from some human rights organizations. The messages were saying: "Where are you we are looking for you". They called back. They said "We are searching for you now, where are you? We are coming to you. We need to know where you are. We are not far, in about one hour we might be there". We sent the location and closed again the phone.
- 14. Later, we came across one aircraft. Or maybe two. It was night. We saw the red lights in the sky. First one aircraft came. And then left. Then another one came [it is difficult to say if it was the same one or two different aircrafts because it was dark and only saw the lights] after about one hour. It made circles above us and then would just move to a direction. I had the impression that it was showing us the way as the compass was showing/indicating the same direction taken by the plane. None of them, threw anything at us (eg food, water).
- 15. Around that time, we saw another big ship. It's one of those merchant ships. During our navigation, we did not try to catch the attention of these big boats because I knew that they would bring us back to Libya. It already happened to me when, in October 2018, I was brought back to Libya along with other 84 people and then we were transferred to Khoms DC.
- 16. Around 4/5am a big ship came from our left and approached us. At that time, I think we had navigated more than 200 km (perhaps 270km but now cannot remember well- at that time I checked the compass). It stopped and flashed with the lights (kind of signal to ask them to halt). We did not want to stop. The boat then approached us, and by doing this, moved the water around us creating waves. Our rubber boat started taking water. We had to stop although the rubber boat was in condition to continue.
- 17. Once they came closer, they talked to us. They said 'Italy. We'll take you to Italy'. I recognized one guy. He speaks English and belonged to the crew of the ship that, back in October, returned me and many others to Libya. When they said

- they would take us to Italy I had doubts. How could they go to Italy? The crew we could see were wearing mechanic clothes and, when they opened a door, we could see from the rubber boat, they had cars [he explained that these kind of ships with a cargo of boats usually go to Libya not the other way around].
- 18. Eventually we accepted to get inside the boat. They took us inside. They gave us food, water and clothes. I cannot remember all the crew members, but I recall a Lebanese guy and another man from Egypt that talked to us (mainly to the Sudanese in Arabic), they told us their nationality. And the other man, the one I recognized that speaks English. I do not know his nationality. They also took pictures and video of us.
- 19. We navigated for several hours. I think from 6am to 5pm. At one point they said to us that we reached Malta. It was still light outside. About five of us could see from a window some buildings. And ships. Small and big ships. They were no moving. At that moment the Nivin had also stopped. I think it stopped for about 30 minutes. The tall guy who speaks English, used to go and see the Captain and come back. The Lebanese and Egyptian men said that they called Malta, but Malta replied that did not want to take us. At that time some of us wanted to take picture of Malta but the Lebanese and Egyptian guys ran to close the window. These same people said that he would take us to Sicily. They said to us 'We'll now head to Sicily. We should arrive around 3am'. We couldn't sleep while we kept navigating.

November 9, 2018 - Friday

- 20. Around 3 or 4 am he the tall guy who speaks English said we arrived in Sicily. He said, 'Follow me, I'll take ten by ten'. I was among the first ten. I was number four in the line. They transferred the first three, an Eritrean, a Somalian and a Sudanese, to a ship. When my turn came, I saw the water (the sea). And heard the men in the other boat speaking English with a Libyan accent saying, 'Sit down sit down' and offering cigarettes. And then I saw the same Libyan guy in uniform that I had met when I was disembarked in October in Khoms. The tall guy tried to push me. I grabbed the door and refused to go outside. I pushed myself back and the Libyans started to speak in Arabic. At that moment everyone understood they were Libyans. The three people already onboard came back to the Nivin.
- 21. We said that we refuse to go back to Libya. The Libyans tried to convince us saying that if we return to Libya some organizations would help us to go to Europe. We refused. They called the captain. The captain came and spoke in Arabic. I said to him that they told us that they would bring us to Malta so now we wouldn't go back to Libya. The captain replied that Malta refused to take us. We said to him that he said that they could take us to Sicily. At that moment he only said 'Now just go outside'. We refused. The captain asked the Libyan guards to take us and then left. One of the Libyans said to the others 'Go and bring the guns'. They came back with guns and said to us 'go now'. Some people started running away and hiding among the cars. We informed the rest of the 93 that we were not in Sicily and instead Libyan were there. The Libyan came and tried to convince the rest of the people, but we all refused. The Libyan stayed until around 5am then left saying they were going to take additional forces. They then spoke to the Lebanese and Egyptian guys from the Nivin crew and ordered them

- not to feed us anymore. Two armed Libyan guards stayed with us on the Nivin. Two Somali guys from our group left with the Libyans as they were scared.
- 22. The Nivin crew closed all the window. Until 3 pm we did not move. Around that time, we heard the motor and we started moving. Then again, the boat sopped. It was around 5pm. It was when the Libyan came back. They came onboard. They were about nine plus the two who were already there with us. They are all armed. We still refused. They tried to take one Sudanese guy but we grabbed him back.
- 23. The Lebanese and the Egyptian guys tried to talk to us. They advised that we should go to Misrata for one day, to unload the cars and then we would go back. They said that once in Misrata we should remain quiet, avoid making noise and sit in silence. Even the Libyans told us this. We accepted to go to Misrata.
- 24. When the 11 Libyans left the Nivin started moving again. I think it was around 6.:30 pm. The Nivin crew did not feed us anymore. Even the woman and the baby did not receive anything.

November 10, 2019-Saturday

- 25. We navigated all the night and we arrived in Misrata around 6am. Around 7 am they opened the big door and took about 100 cars. Around 8am Libyans in soldiers uniform came to us and said 'Now, willing or not, you need to disembark'. They loaded the guns as they were preparing to shoot. They tried to catch and grab us. They also had taser but they did not use on anyone. We ran where the cars were parked and could not get us. So they left.
- 26. We closed the entrance and there was no way they could come back. They could only talk to us from a window. A person called [O.], from UNHCR, came. Initially we wouldn't let him in. Then the red crescent came. But they are all Libyans. They talked to us. They asked us to go outside. And they said that organizations would take care of us. We did not want to go outside; we saw a lot of soldiers outside and cars. We could see it from a window. Soldiers used to talk to Libyan red crescent and then the Libyan red crescent would then talk to us. The UNHCR person said that we needed to let the cars disembark otherwise they wouldn't be able to take us to Europe.
- 27. Some of us knew [O.] form before from Karareem DC and were disappointed because they said that when they needed, he wouldn't show up in the DC for several months but now that they were not in prison he would come to talk. They did not trust [O.]. Until now, even in Zlitan, [O.] only came once, and I couldn't talk to him.
- 28. When I was on the Nivin he used to talk to me every day. He used to say to us: 'If you don't want to leave the boat I'll leave'. [O.] went. And then the Libyan Red Cross came back and asked us to go outside. Then IOM came back again. This was the first day. Libyan soldiers, old people used to come to us to talk from the window. They asked d us if we wanted to return to our countries. We refused. [O.] said 'if you don't leave the boat we cannot take food for you and you can die inside'. We had no food and no water. We replied that it was fine 'We'll die

here. Because we used to die in Libya every day'. Then they left. At night there was no food no water. And we spent the night there.

November 11, 2019-Sunday

29. The day after, in the afternoon, the Libyan came back and talked to us over the window. They asked to go outside. Then they came back with [O.] from UNHCR. We repeated to him we don't want to go outside. He asked us why we wouldn't leave the boat. We said 'We see you speaking with the Libyan soldiers. There are international organization. You only come Libyan soldier". However, at one point we allowed [O.] in alone as he wanted to see the baby. He brought water and food inside. Then [C.] and [I.] came to us too [read MSF]. And also, CESVI came. When we saw all these organizations, we said that we only wanted doctors because some of us were very sick, injured and burned. We accepted for all the cars to be taken outside. We did not do anything to them. It took two days to take the cars out. There were many soldiers. In the meantime we had not toilet and no water for shower.

Next days

- 30. In the following days we kept refusing to disembark because we knew they would detain us. We know Libya well. Some ambassadors came to us and try to convince us. But they couldn't ensure that we would not go to jail.
- 31. One day, we were given 45 hours to leave the boat. They came with many soldiers. And asked us to leave. They came with about 30 cars and the police or the soldiers wearing balaclava. On that day around 14 people left the Nivin boat. The Libyans said they would drop a bomb inside. Some people got scared and jumped outside. They used a megaphone to talk to us. They said they would burn the ship. This lasted until 6pm.
- 32. The day they forcefully disembarked us they came cars, many soldiers and a ship. It was around 8 am. At that time, we had spent 14 days inside the boat. At the beginning however we had not seen the ship. One of the guys said he heard a gunshot. At that moment I was talking to journalist and I said we were expecting something from the Libyans. Around 9am we heard a bomb sound coming from the top from the area where the captain used to be.
- 33. Then they cut the electricity. And everything inside the boat became immediately dark. Then we started hearing gun shooting in all directions coming from laser guns sights. I and other four were guarding the doors. The Libyan forces opened the door and shot everywhere. The security forces grabbed me from my hair, and I was beaten with the guns. At one point they blocked me in front of a door and ordered me to open it. I said I don't not know how to open. At that moment I had several guns pointed at me. I saw the lights of the guns on me. All over my body and on my eyes. They were close, something like 2mt away. Then I saw the smoke of the gun when they shot at me. But I had not realized that the I had been shot. When I tried to move my leg wouldn't move and then I lost consciousness. When I woke up, I was at the hospital. When I woke up in the hospital, I found some people there, including two Eritreans and one Sudanese that were later taken to Tripoli.

- 34. I was supposed to be brought to Tripoli but was not allowed. I believe the security forces already knew me. I think because of the media. After a few hours I was transferred to the security place with soldier's car. They just dumped me like this in the car. We were three south Sudanese and two Sudanese together. They kept the five of us for five days. The place is in Misrata. Is building with and office and cells. They made us change our clothes. Initially we were together however we were not authorized to talk, but then they separated us. There we met a Nigerian guy, he is Christian and had been there for a year. He had a broken leg. And a Libyan guy who had been detained there for five years.
- 35. During the five days I was interrogated and beaten: in the morning I would be brought to a room where two men with a computer would ask many questions. At night men in plain clothes would come and brig water and shampoo and put it in my eyes. They would do this until I fall. No one knew what else they could do. I was also beaten. They would take one person per time and bring in a room for beating. They used to ask me if my name is S. I denied it. They asked If I am Christian, they asked the name of my mother and I lied. That's why I changed my name. I said that my name is Y.. I was accused of being the one talking in English and sending messages to media. They took a picture of me. They also showed a picture of me and say to me: you are the one who did this (talk to journalist and refuse to disembark). They wouldn't believe that we were just migrants refusing to disembark.
- 36. After five days I was sent to Zlitan. There I found out the names of the other four that had been -like me- at the security office. [T. J.] (18); [R. G.] (19); they are South Sudanese like me. Then the two Sudanese. One is called [M. A.] ... from Darfur, Sudan; And another one called [H.] (not sure). In Zlitan DC, I also found out that about 20 other people had initially been brought to a place in Misrata where women were detained. The 20 were however kept in a single room. But it was not a security place. When I first arrived in Zlitan DC I was beaten for the first three days. Not by Zlitan DC guards. They never beat us. It was the security. They came to Zlitan DC and beat me. ... They also brought me a photo of myself published by the media. I did take pictures while I was onboard and sent to TV. I don't think anyone is dead from the shooting.

Conditions in Zlitan DC

Food is not good and not enough. They would bring cheese with bread around 3pm. Then around 8pm they would bring pasta. And is not enough. Some organizations bring food (lentils) and fruit. We drink water from the tap. Once per month we are authorized to go to the court. We have no access to phone to contact our families.

NIVIN CAPTAIN REPORT

Report written by the captain of the Nivin, Bassam Sbat, on 10 November 2019, and send to the rescue NGO Mediterranea

M/V NIVIN

PORT : MISURATA DATE: 10-11-2018

TO WHOM IT MAY CONCERN

On 07/11/2018 at 19:39hrs UTC vessel receive via Inmarsatic message from MRCC Rome on behalf of Libyan coast guard to proceed with maximum speed to position Lat: 33 39 N Long: 014 39 E for rendering assistance to a boat in distress with about 70 people on board.

Vessel immediately alter her course proceeding to the given position.

On 07/11/2018 21:34 receive an e-mail from Libyan coast guard order us to proceed to the same position which we receive from MRCC. Vessel confirm to Libyan coast that she sailing with her full speed to the position which she receive from MRCC Rome.

On 07/11/2018 at 23:00 a NATO helicopter contact with us by VHF given an updated position for the rubber boat. Vessel alter her course to the new position

On 08/11/2018 at 02:00 vessel arrive in the position which received from Nato helicopter but she didn't see the rubber boat

Immediately we inform the Libyan navy which contact with MRCC-Malta asking assistance for updating the rubber boat position.

MRCC-Malta sent immediate a helicopter to investigate the area.

On 08/11/2018 at 02:30 Malta helicopter contact us by VHF and give us an update position. Vessel alter her course proceeding to the updated position.

08/11/2018 03:30 vessel arrive to the new and meet and collect the immigrant. We inform the Libyan coast guard by e-mail which they order us to proceed to Misuarata for disembark the immigrant

08/11/2018 on 06:00 receive instruction from Libyan coast guard to alter course and proceeding 20 N.Miles. north of Khums port for the discharge of immigrant

Vessel follow the instruction and alter her course, On 09/11/2018 01:00 vessel arrive to meeting position with Libyan coast guard. Libyan officer coast guard joining the vessel and try to disembark the immigrant which they refuse to return to any Libyan port, Only two immigrants at 02:37 accept to disembark with the Libyan coast guard officer. Libyan coast guard left

On 09/11/2018 19:25 Libyan coast return back and try one more time to disembark the immigrants which they effuse to leave the vessel. Libyan cost left again and order us to proceed to Misuarata for disembark them their . they keep on board three coast guard people for our

safety when they found that the immigrants on board are very dangerous for crew life. The Libyan Patrol Zuwara Number 644 follow during our trip to Misurata.

On 10/11/2018 at 01:25 vessel arrive and drop anchor in Misurata anchorage area waiting instruction for berthing

At 07:30 vessel receive instruction for entering the port

At 08:50 vessel alongside Misurata. Libyan coast guard, Police and medical assistance was ready on jetty for receiving the immigrant from the ship. Immigrant refuse to leave the vessel and they said that they will make damage to the cargo and ship.

Libyan coast guard and police refuse to use any violence against the immigrants. Therefore the situation became worst .

Vessel and crew are in very bad and risky condition due to the master who follow the instruction and order of the MRCC-Rome, Libyan Navy, NATO Helicopter, MRCC-Malta and the regulation of the safety of life at sea.

Therefore vessel will remain alongside Misurata port until all immigrants left the vessel are the master and crew will sign off in Misurata port and left the vessel for owners Libyan authorities and immigrants. OUR LIFE ARE NOT SAFE ON BOARD M/V NIVIN

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