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strategic litigation

UpRights

UpRights and StraLi – Submission in Response to the Call for Inputs on the Externalization of Migration and the Impact on the Human Rights of Migrants by the Special Rapporteur on the human rights of migrants

Submitted to:

- Special Rapporteur on the Human Rights of Migrants, at: hrc-sr-migrant@un.org;

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I. Introduction

1. UpRights is a non-profit initiative that works alongside civil society, judicial bodies and international organisations to advance accountability and justice for victims of international crimes and serious human rights violations.[1] StraLi is an Italian NGO that aims to promote and protect human rights through the judicial system and, in particular, through strategic litigation tools.[2]
2. UpRights' and StraLi's work and cooperation are rooted on the belief that accountability for serious human rights violations and international crimes committed against migrants and refugees requires innovative approaches to address obstructive policies and behaviours of certain states and non-state actors. In 2022, we submitted a joint Article 15 Communication to the International Criminal Court (ICC) on war crimes and crimes against humanity perpetrated against migrants and refugees intercepted at sea and trapped in official detention centres once returned to Libya. The Communication underlines that the ICC Prosecutor should scrutinise, in addition to Libyan actors, the potential criminal conduct of Italian and Maltese authorities and officials for the support they provided to Libyan actors.[3] Our work subsequently expanded to the human rights violations perpetrated by state and non-state actors at sea, including the breach of international obligations of state authorities during distress situations in states' search and rescue (SAR) regions and in international waters in the Mediterranean Sea. In 2024, we published a joint report on the memorandum of understanding (MoU) between Italy and Libya explaining that its implementation situate Italy in violation of its human rights obligations

[1] UpRights – available here.
[2] StraLi – available here.
[3] StraLi, UpRights, Adala for All, 'Article 15 Communication on War Crimes and Crimes Against Humanity Committed Against Migrants and Asylum Seekers in Libya', 17 January 2022 – available here.

through a policy of externalisation.[4] In March 2025, with SOS Humanity, we have submitted a request for interim measures to the United Nations (UN) Human Rights Committee (HRC or the Committee) to urge Malta to rescue a boat with over 30 individuals in distress in the Maltese SAR region. The interim measures were granted.[5]

3. UpRights and StraLi welcome the opportunity of contributing to the call for inputs from the Special Rapporteur on the externalisation of migration and its impact on the human rights of migrants for his forthcoming report to the 80th session of the UN General Assembly.[6] We are pleased to submit the following contribution in relation to the thematic area 'responsibility and jurisdiction'.

II. Background

4. Migrants and refugees departing from Libya (and other coastal states in Northern Africa, like Tunisia and Egypt) in the attempt to reach the European shores are increasingly putting their lives at risk. Crossing the Mediterranean Sea involves risking losing life at sea because of non-assistance from state actors, or risking being subjected to ill-treatments or other forms of violence while at sea, including during the systematic interceptions at sea conducted by the so-called Libyan Coast Guard (LCG).
5. The recurring pattern of death and disappearance of migrants embarked on journeys in the Mediterranean Sea is and has been widely and regularly documented by the United Nations ('UN'),[7] NGOs and news agencies.[8] International Organisation of Migration ('IOM') defines the Central Mediterranean route as 'the deadliest known migration route in the world'.[9] Since 2014, reports show that more than 24,597 persons have died or disappeared in the Central Mediterranean route.[10]
6. If they do not lose their life at sea, migrants and refugees in distress at sea are likely to be intercepted by the so-called Libyan Coast Guard and returned back to Libya, where they re-enter the vicious cycle of human rights violations and abuses that may amount to serious international crimes, as the ICC Office of the Prosecutor (OTP)[11] and the UN Fact-Finding Mission on Libya[12] affirmed.

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[4] StraLi, UpRights, 'Navigating Troubled Waters: Italy's Human Rights Dilemma in the Mediterranean' ('Navigating Troubled Waters'), 2 February 2024 – available here.
[5] StraLi, UpRights, SOS Humanity, 'United Nations Human Rights Committee requests Malta to rescue people from distress at sea', 5 March 2025 – available here. For further information, see also: Civil MRCC, 'The UN Human Rights Committee requests Malta to urgently act', 29 April 2025 – available here.
[6] Office of the High Commissioner on Human Rights ('OHCHR'), Special Rapporteur on the human rights of migrants, 'Call for inputs: Externalization of Migration and Impact on the Human Rights of Migrants' – available here.
[7] United Nations Security Council ('UNSC'), United Nations Support Mission in Libya ('UNSMIL'), Report of the Secretary-General, S/2021/62, 19 January 2021, para 62; UNSC, UNSMIL, Report of the Secretary-General, S/2022/409, 20 May 2022, para. 70; UNSC, UNSMIL, Report of the Secretary-General, S/2023/589, 8 August 2023, para 54; Human Rights Council, Report of the Independent Fact-Finding Mission on Libya, A/HRC/52/CRP.8, 24 March 2023 ('UN FFM 2023 Report'), para. 162; IOM, UN Migration, IOM Chief: Nearly 100 Disappeared or Dead in Mediterranean in 2024 Underscoring Need for Regular Pathways, 29 January 2024.
[8] See ANSA, At least 7 dead in 2 shipwrecks in Malta SAR area, 25 March 2023 - available here. The Shift, Over 300 dead in last 10 days as Malta continues its 'non-response tactics', 29 April 2023 - available here. Gaia Pianigiani, New York Times, Dozens of Migrants Die After Their Dinghy Deflates in the Mediterranean, 14 March 2024 – available here. Info Migrants, IOM: Over two thirds of all migrants who die in transit are unidentified, 28 March 2024 – available here. Ansa, Migranti morti in naufragi, a Porto Empedocle 11 bare, 13 April 2024 – available here.
[9] IOM, MMP, Migration within the Mediterranean, Overview of migrant deaths in the Mediterranean, Central Mediterranean - available here; OHCHR, Lethal Disregard: Search and rescue and the protection of migrants in the central Mediterranean Sea, May 2021, pp. 3 and 8 – available here.
[10] IOM, MMP, Central Mediterranean (since 2014) – available here.
[11] International Criminal Court, Office of the Prosecutor, 'Twenty-Third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)', 21 April 2022, para. 25.
[12] Human Rights Council, Report of the Independent Fact-Finding Mission on Libya, A/HRC/48/83, 29 November 2021, para. 58; Human Rights Council, Report of the Independent Fact-Finding Mission on Libya, A/HRC/50/63, 27 June 2022, para. 75; 'UN FFM 2023 Report', para. 124.

7. The **capacity of the so-called Libyan Coast Guard to perform interception operations** in the Mediterranean Sea is linked to and has been **boosted by the assistance received by the European Union ('EU') and its Member States** in the context of **their policies of externalising European borders and of migration containment strategies**, aimed at **preventing migrants from reaching the jurisdiction of the EU**. Notably, since 2017 the EU and its Member States have agreed to provide the so-called LCG, among others, with financial, logistical and technological support to increase its efforts and ability to conduct interception operations.[13]
8. Through such support, the so-called LCG's capabilities to intercept migrants at sea increased dramatically over the years: in 2022 an estimate of at least 19,308 migrants were intercepted and forcibly returned to Libya.[14] The UN and various NGOs have also repeatedly documented that during interceptions, the LCG engages in aggressive behaviour against migrants (physical abuse, threats, use of firearms, and dangerous manoeuvres) and violates the human rights of the very persons that they were supposed to rescue.[15] Violations and abuses are also systematically carried out by both the LCG and Libyan armed groups in charge of the detention centres where migrants are transferred once returned to Libya.[16]
9. Against this backdrop, UpRights and StraLi work to ensure some forms of accountability for the EU and its Member States, despite the efforts to externalise European borders and to avoid migrants and refugees entering European jurisdictions. As illustrated by the example below, breach of international law obligations has become an EU and EU Member States' policy.

II. The Interim Measures Request to the UN Human Rights Committee

10. Following a distress situation in the overlapping Maltese and Tunisian SAR region the first days of March 2025, on 3 March 2025, UpRights, StraLi and SOS Humanity jointly submitted i) an individual complaint to the UN Human Rights Committee on behalf of the individuals in distress at sea against Malta; and ii) an urgent request for interim measures on behalf of the individuals in distress. The request urged Malta to take all necessary measures to coordinate a search and rescue operation and to ensure that the individuals in distress were promptly rescued and disembarked at a place of safety. As exemplified above and as repeatedly stated by NGOs[17] and recognised by the Council of Europe[18] and two Italian courts,[19] Libya cannot be considered as such.

[13] UN FFM 2023 Report, para. 138.
[14] Amnesty International, 'Amnesty International Report 2022/23: The state of the world's human rights' – available here.
[15] UNSC, UNSMIL, Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya 20 December 2018, pp.36-38; UNHCR, 'UNHCR Position on the Designations of Libya as a Safe Third Country and as a place of Safety for the Purpose of Disembarkation Following Rescue at Sea', September 2020, para.14; Amnesty International, 'No one will look for you': Forcibly returned from sea to abusive detention in Libya', 2021, pp. 27-29 – available here;
[16] UN Secretary General, Report of the Secretary-General Antonio Guterres on the United Nations Support Mission in Libya, S/2022/409, 2022.
[17] See, above all, Navigating Troubled Waters, Op. Cit.
[18] Council of Europe, Commissioner for Human Rights of the Council of Europe, 'Report following her visit to Malta from 11 to 16 October 2021', 15 February 2022, p. 5 – available here.
[19] Court of Cassation, V Criminal Section, n. 4557, 1 February 2024; and Civil Court of Crotone, 26 June 2024 - SOS Humanity Press Release – available here.

11. On 4 March 2025, the Committee issued interim measures against Malta, ordering the state to coordinate a SAR operation to rescue the people in distress and to ensure that they will not be disembarked to a port where they will be at risk of torture or any other inhumane treatment.
12. The legal reasoning on the jurisdiction, that was accepted and shared by the Committee in the case at stake, stems from the so-called **functional approach to the jurisdiction** that the Committee developed through paragraph 63 of the General Comment 36 (2018) and subsequently applied in the landmark cases *A.S. v. Italy*[20] and *A.S. v. Malta* (2021).[21]
13. According to article 2 (1) of the International Covenant on Civil and Political Rights (ICCPR or the Covenant), State Parties are required to respect and ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. General Comment 15 (1986) clarifies that the enjoyment of Covenant rights must be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons subject to the jurisdiction of the state party.
14. The Committee broadened the scope of the Covenant's human rights obligations beyond the state's territory elaborating on the concept of extraterritorial jurisdiction.[22] It extends state parties' responsibilities under the Covenant over territories over which the state exercises effective control (spatial model);[23] and individuals which fall under the state's control (personal model).[24] In paragraph 63 of the General Comment 36 (2018), **the Committee further enhanced the concept of jurisdiction to a functional model**. The Committee recognised state parties' human rights obligations to 'persons located outside any territory effectively controlled by the *state whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner*'. This entails that **each time a state has the power to exercise functions that have an impact on the human rights of individuals – in a direct and reasonably foreseeable manner – those individuals are within the jurisdiction of the state** pursuant to article 2 (1) of the Covenant.
15. In paragraph 63 of the General Comment 36 (2018), the Committee clarified that the existence of human rights obligations under the Covenant also arises for state parties with regards to 'those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea'.
16. Further international law conventions and related obligations were taken into consideration to show the international obligations of Malta *vis-à-vis* the situation of the authors of the complaint, in distress

[20] UN Human Rights Committee, *A.S., D.I., O.I. and G.D. v. Italy*, *CCPR/C/128/D/3042/2017*, 27 January 2021 ('*A.S. v. Italy'*) – available here.
[21] UN Human Rights Committee, *A.S., D.I., O.I. and G.D. v. Malta*, *CCPR/C/128/D/3043/2017*, 28 April 2021 ('*A.S. v. Malta'*) – available here.
[22] Similar reasoning has been developed by other regional human rights bodies. See on all, on a similar matter: ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), Application no. 27765/09, 23 February 2012.
[23] UN Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36, 30 October 2018 ('General Comment 36'), para. 63 ("States parties must respect and protect the lives of individuals located in places, which are under their effective control, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant").
[24] UN Human Rights Committee, General Comment 36, para. 63 ("Given that the deprivation of liberty brings a person within a State's effective control, States parties must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory").

at sea. The United Nations Convention on the Law of the Sea (1982)[25] and the International Convention for the Safety of Life at Sea (1974) envisage the duty to assist those in distress at sea. The International Convention on Maritime Search and Rescue (SAR Convention) (1979)[26] provides that '[p]arties having accepted responsibility to provide search and rescue services for a specified area shall use search and rescue units and other available facilities for providing assistance to a person who is, or appears to be, in distress at sea' (chapter 2.1.9).

17. In the concerned case, the distress case was located in the Maltese SAR region and Malta was made aware through several communications – that remained unanswered – about the case. Malta had, therefore, binding obligations to intervene, at minimum, to coordinate the search and rescue operation and ensure that the individuals were disembarked in a place of safety.
18. In light of the above, we submitted that **the acts or omissions** of Malta **could affect in a 'direct and reasonably foreseeable manner' the fate of migrants in the vessel in distress**. The jurisdiction of Malta over the victims in the boat in distress was, therefore, established.
19. The Committee, by granting the interim measures and thus acknowledging its jurisdiction over the case, appears to share this legal reasoning.

III. Conclusions

20. The development of the functional approach to the jurisdiction and its successful applications in the above-mentioned landmark cases – including through the novel angle of interim measures requests –, could be replicated before the UN Human Rights Committee as well as other international and national bodies and mechanisms to ensure that states comply with their international obligations.
21. In particular, relying on the functional approach to the jurisdiction in the context of interim measures offers a legal path to respond in real time to states negligence *vis-à-vis* their international obligations and a legal tool to prevent imminent risk(s) of irreparable damage(s) to the human rights of people in distress in the Mediterranean Sea. **Such a model could represent the judicial path to debunk the policy of externalisation of borders**, implemented in the context of the migration route in the Central Mediterranean Sea by the EU and its Member States, notably Italy and Malta, through the provisions of financial and assets support to states as Libya and Tunisia combined with a failure to comply with international obligations on sea rescue.

[25] Article 98 (2), which codifies a long-standing norm of international customary law, affirms that "Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose" – available here.
[26] Regulation 33.1 (as amended in 2004) states that "[M]aster of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, […] to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so" – available here