PRACTICAL GUIDE

on Strategic Litigation Against Pushbacks in the Mediterranean and for the Right to Enter

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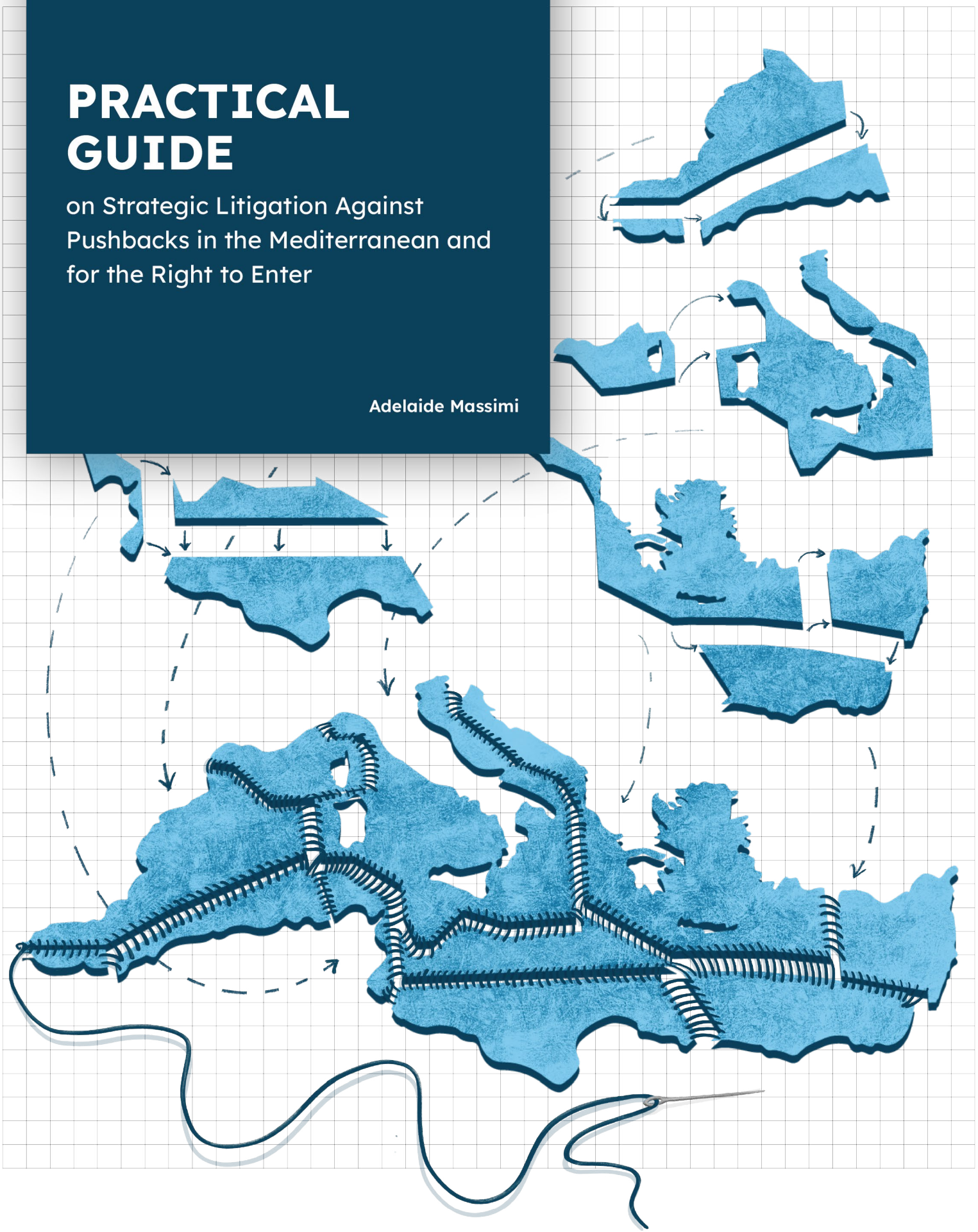

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Introduction

This guide is a working tool designed for civil society organizations, legal practitioners, and university legal clinics, with the aim of supporting the dissemination of a specific litigation strategy to secure the right to enter for people subjected to delegated pushbacks in the Central Mediterranean.

Pushbacks are a key instrument of current migration management policies. From a political and narrative standpoint, they encapsulate both the act of preventing entry—presented, in a certain imaginary, as a form of protection for destination societies—and the act of deportation, which represents an extreme expression of power: exercising control over a person's life and mobility, seizing them and taking them elsewhere. Counterbalancing this power is a set of norms and principles protecting human rights, such as the prohibition on returning a person to a place where their safety is at risk or carrying out collective expulsions.

Within externalization policies, multiple strategies have been tested to block people on the move and return them to their country of origin or to third countries or previous transit countries, often by circumventing or avoiding legal safeguards meant to protect those subjected to pushbacks. This includes so-called voluntary return programs from transit countries, where, in situations of extreme danger and lack of alternatives, even vulnerable people—those trafficked or seeking asylum—are returned to their home countries.

In the Central Mediterranean, as in other seas, pushbacks consist materially of intercepting and stopping people attempting to cross a border and returning them to the departure place.

Over the last fifteen years, these actions have taken various forms. In particular, the actors carrying them out have progressively changed, and European authorities have adjusted their conduct in order to delegate the physical execution of pushbacks to third parties. As we will see, the European Court of Human Rights (ECtHR) judgment in the Hirsi case condemned Italy for pushing back and handing over to Libyan authorities a group of people rescued at sea. Delegation mechanisms subsequently emerged to distance the responsibility for unlawful conduct from Italian authorities. The political objective, however, has remained unchanged: preventing as many people on the move as possible from reaching Italy and Europe. Achieving this objective has led—and continues to lead—to serious human rights violations by European and Italian authorities, who have systematically and knowingly disregarded protective norms and principles while implementing multifaceted policies aimed at deterring and selecting mobility.

This guide introduces one legal instrument capable of countering such violations: litigation seeking the issuance of entry visas for the purpose of requesting protection when Italian or European authorities have acted unlawfully in carrying out pushbacks.

Using strategic litigation to obtain entry visas as a means of challenging delegated pushback policies presents several advantages, which will be addressed throughout the guide but are useful to outline here.

First, entry visas make it possible to undo the outcome of the unlawful conduct—namely, the impossibility of entering Italian territory to seek protection. In this way, one of the main effects of externalization policies is countered: the hollowing out of the right to asylum. Access to international protection is generally possible only once a person reaches the territory of the state where they intend to apply for asylum. Policies that block mobility and externalize border controls may nominally preserve the right to asylum, but they render it effectively inaccessible by preventing people from reaching states capable of providing protection.

Second, the proposed litigation allows the chain of responsibility to be reconstructed, tracing it back to Italian—and, where relevant, European—authorities. In a context such as externalization, establishing judicial responsibility is inherently complex. Litigation obliges the State to adopt remedial measures for the harm caused through its unlawful actions.

The question of defining a State's jurisdiction and responsibility for violations committed is central when examining human rights consequences of externalization policies. Delegation mechanisms are designed precisely to distance the execution of actions from the decision-making center that ordered them, thereby weakening the thread connecting the harm suffered by migrants to the authorities responsible for causing it.

It is useful to refer to the definition of externalization offered by the Refugee Law Initiative (RLI), which frames it as an umbrella concept and describes it as "the process of transferring functions that are normally carried out by a State within its own territory so that they are performed, in whole or in part, outside its territory. Such externalized functions may be carried out by a State unilaterally, jointly with other States and/or entities—including international organizations (IOs) and private actors—or delegated, in whole or in part, to other States and/or entities." The concept therefore goes beyond migration policies alone and reflects a broader governance trend[1].

Regarding the recognition of Italian responsibility, it is noteworthy how case law has progressively evolved in defining Italy's obligations—including positive obligations of protection—as illustrated in the appendix, with cases recognizing the right to enter for individuals coming from the Gaza Strip in the past year.

In the Central Mediterranean, a process of normalizing extreme forms of violence has been underway for years: from policies of letting people die—namely, the omission of rescue by European authorities—to the aggression exhibited by the so-called Libyan Coast Guard during interceptions and in attacks against civil society organizations engaged in maritime rescue operations.

The possibility of seeking and obtaining, through litigation, an entry visa that allows for safe travel to Italy is a powerful act, both legally and symbolically. It exposes the abnormal and unlawful nature of the actions carried out by Italian authorities, acknowledges and attributes responsibility, and opens alternative pathways.

Multiplying such initiatives is essential to strengthen their impact and foster change toward policies that support rescue operations and the opening of borders.

[1] RLI, Declaration on externalization, available online: https://academic.oup.com/ijrl/article/34/1/114/6619234

The guide begins with an analysis of border-management dynamics in the Central Mediterranean, focusing on the progressive withdrawal of Italian and European naval units in favor of remote surveillance—through aircraft and drones—and the increased presence of vessels of the so-called Libyan Coast Guard (LCG) and Navy, which have been donated, equipped, and trained by Italian authorities with European funding.
The second chapter examines the concept of pushback and the human rights consequences of its use on people on the move.

The central section of the guide presents three litigation cases for entry visas to counter different forms of pushback: from the direct pushback in the "Orione" case to case recognizing Italian responsibility even where no Italian vessels were involved, but where Italian authorities—despite knowing of the risk of return to Libya—failed to prevent the pushback even though they had the capacity to intervene and complete the rescue operation in a safe place.

Finally, litigation aimed at affirming the right to enter allows us to move beyond a discretionary approach to migration—a result of years of restricting migrants' rights and responding with humanitarian and often apolitical measures that reinforce the image of an omnipotent State before which people on the move are left unprotected. Embassies often justify visa refusals by pointing to the existence of humanitarian corridors. These are considered the only legitimate mechanism for entering regularly, even though they are subject to numerous limitations and selective criteria that make them valuable humanitarian tools but unsuitable instruments for claiming a right to enter. Litigation, by contrast, makes it possible to recognize the State's responsibilities and obligations and to affirm the right to protection.

Presenting these cases allows us to share an intervention methodology, the tools used, and the main challenges faced.

We hope this guide will serve as a useful tool for disseminating this type of litigation and the methodologies through which it develops.
The author gratefully acknowledges the scientific supervision provided by attorneys Cristina Laura Cecchini and Lucia Gennari.

Management of the Central Mediterranean: from Direct Pushbacks to Remote Control

Over the last ten years, the management of maritime borders in the Central Mediterranean has changed radically, leading to a progressive withdrawal of European naval assets and leaving space to vessels operated by Libyan and, to some extent, Tunisian authorities. This shift has been made possible through two parallel processes: the strengthening of the so-called Libyan and Tunisian border guards, and the development of greater aerial capacity of European authorities, allowing remote monitoring of what happens in the Central Mediterranean.

For several years, the main operation for the "control of migratory flows" in the Central Mediterranean, carried out by the Italian Navy, was Operation Constant Vigilance[2], active since 2004 with maritime surveillance tasks. It relied on two naval units constantly ready to intervene, as well as helicopters and maritime patrol aircraft. Alongside this operation, the Italian Coast Guard carried out rescue activities, assisting more than half a million people on the move at risk of shipwreck in the Adriatic and the Central Mediterranean between 1991 and 2015[3].

The presence of Italian naval assets at sea allowed them to intervene directly in cases of distress or interception, and thus to conduct such operations materially. The first decade of the 2000s was marked by a progressive securitization of migration policies, increasingly focused on adopting tools to control and block arrivals. This signalled the beginning of a political trend that would intensify over time, eventually normalizing cooperation with authoritarian states and regimes that openly violate human rights and have been found responsible for crimes against humanity against people on the move.

In this context, the naval forces tasked with patrolling the area and controlling migratory flows—at that time the only actors capable of intervening at sea—carried out pushbacks directly: they intercepted vessels, brought people on board, and handed them over to the Libyan authorities, as occurred in the "Orione" case described in this guide.

In 2012, the European Court of Human Rights, in its well-known judgment in Hirsi Jamaa, condemned the Italian authorities for the pushback to Libya of the 24 applicants—out of a total of around 200 people who were returned—and their handover to Libyan authorities in 2009. The Court found that the pushback violated Article 3 and Article 13 of the European Convention on Human Rights (ECHR), relating to the prohibition of torture and the right to an effective remedy, as well as Article 4 of Protocol No. 4 to the ECHR, on the prohibition of collective expulsions. The Court rejected Italy's submissions, in which the

[2] 17th Legislature, Bills and Reports, Doc. XXXVI No.1 https://documenti.camera.it/_dati/leg17/lavori/documentiparlamentari/indiceetesti/036/001/00000004.pdf

[3] Hearing of the Commandant General of the Italian Coast Guard, Senate of the Republic, 1st Committee on Constitutional Affairs, 17 June 2015. https://www.senato.it/application/xmanager/projects/leg17/attachments/documento_evento_procedura_commissione/files/000/002/813/CAPITANERIE_DI_PORTO.pdf

State denied having jurisdiction over the people pushed back and invoked the cooperation agreements signed with Libya in 2007 and 2008 to combat "irregular migration" as a basis for the lawfulness of its conduct.

The judgment helped raise public awareness of what was happening in the Central Mediterranean and prompted the Italian authorities to change their operational methods, without altering the underlying political goal of blocking departures.

On 3 October 2013, one of the most shocking shipwrecks in the Central Mediterranean occurred: just a few miles off the coast of Lampedusa, more than 386 people lost their lives, initially rescued by local fishers. A few days later, another shipwreck in the Central Mediterranean caused the death of 268 people, including 60 children. The proximity of the 3 October tragedy to the Lampedusa coast, the direct experience of the fishers and their public testimonies, combined with the death of such a high number of children within a short time span, triggered a, albeit brief, wave of indignation. In response, the Letta government launched Operation Mare Nostrum in October 2013, involving personnel and naval and aerial assets from the Navy and Air Force, as well as other security bodies, the Red Cross and the Coast Guard. The mission deployed a series of naval assets from the Italian Navy, including an amphibious ship, two corvettes, two patrol vessels and several aircraft[4].

From an operational perspective, Mare Nostrum consisted in strengthening the existing migratory-flow control mechanism already in place under Constant Vigilance, but with a broader area of operations and a dual, specific mandate: ensuring the safeguarding of life at sea and combating human smuggling. The results of Mare Nostrum, which ended after just one year in 2014, were summarized by the Minister of the Interior as follows: "The migrants rescued in the 563 operations totalled 101,000, of whom 12,000 were unaccompanied minors. A total of 499 bodies were recovered, while the number of missing persons, based on survivors' testimonies, may be more than 1,800. 728 smugglers were arrested and eight vessels seized."

Within a few years, the situation changed radically. In 2017, the Italian government requested that NGOs operating in the Central Mediterranean in search and rescue (SAR) activities sign a "code of conduct" in order to continue their operations[5]. This was one of many measures adopted to criminalize civil society activities in the Mediterranean. That same year marked the beginning of a renewed push towards externalization policies, leading to the conclusion of a new agreement with Libya, known as the Memorandum of Understanding. Under this agreement, the two governments committed to a joint effort to block departures from Libya, despite the already well-documented horrific conditions experienced by migrants in the country.

In 2015, Italy also approved a new mission called Mare Sicuro ("Safe Sea")[6] - renamed Mediterraneo Sicuro ("Safe Mediterranean")[7] in 2022 - with an operational area expanded from around 160,000 to roughly 2,000,000 square kilometres, significantly extending into the Eastern Mediterranean. Its primary objective is to monitor and protect ENI's offshore platforms and to prevent and counter criminal activities at sea[8]. The mission also provides for a naval

[4] See: https://www.senato.it/show-doc?id=912705&leg=17&tipodoc=DOSSIER&part=dossier_dossier1-sezione_sezione11-table_table7 e https://www.marina.difesa.it/cosa-facciamo/per-la-difesa-sicurezza/operazioni-concluse/Pagine/mare-nostrum.aspx

[5] See: https://www.internazionale.it/bloc-notes/annalisa-camilli/2017/08/01/ong-codice-condotta

[6] Si veda: https://www.senato.it/service/PDF/PDFServer/BGT/1357167.pdf e https://www.senato.it/service/PDF/PDFServer/BGT/01373655.pdf

[7] https://www.marina.difesa.it/cosa-facciamo/per-la-difesa-sicurezza/operazioni-in-corso/Pagine/Mediterraneo_sicuro.aspx

unit moored in the port of Tripoli—as already occurred in the past—equipped with a liaison and communication centre to inform and support Libyan vessels involved in controlling migratory flows at sea[9].

At the EU level, in May 2015 the Council adopted Decision 2015/778, launching Operation EUNAVFOR MED Sophia, under Italian command[10]. This was "a crisis management military operation contributing to disrupting the business model of human smuggling and trafficking networks in the Southern Central Mediterranean [...] through systematic measures to identify, capture and dispose of vessels and enabling assets used or suspected of being used by smugglers or traffickers, in accordance with applicable international law, including UNCLOS and UN Security Council resolutions[11]." Although its stated aim was to combat smuggling networks, the operation carried out rescue activities at sea in cooperation with Italian authorities and the European Border and Coast Guard Agency (Frontex). In 2016, cooperation with the Libyan Navy and the so-called Libyan Coast Guard became an additional operational objective. In March 2019, one year before the mission's end, Operation Sophia officially terminated its patrols at sea and significantly shifted its focus away from conducting its own SAR operations towards strengthening aerial surveillance.

On 31 March of the following year, Sophia was replaced by Operation IRINI, with a specific mandate to implement the UN Security Council's arms embargo on Libya. The naval assets deployed under IRINI do not have a specific search and rescue mandate, and its operational area is located further east than the main crossing routes used by migrants in the Central Mediterranean.

At the same time, support for the establishment, equipment, funding and training of the so-called Libyan Coast Guard enabled Libya to declare its own search and rescue (SAR) region on 27 June 2018[12].

[8] In particular, the mission is tasked with: protecting national merchant shipping in the area; safeguarding naval units engaged in SAR operations; acting as a deterrent and countering illicit trafficking; gathering information on the activities of terrorist-linked groups and on the points of departure of vessels; and cooperating in the establishment of a maritime operations centre on Libyan territory for surveillance, maritime cooperation, and the coordination of joint activities.

[9] https://www.senato.it/service/PDF/PDFServer/BGT/1357167.pdf e https://www.senato.it/service/PDF/PDFServer/BGT/01373655.pdf

[10] https://eur-lex.europa.eu/legal-content/IT/TXT/HTML/?uri=CELEX:32015D0778&from=it

[11] Art. 1 Decision (PESC) 2015/778 of the Council

[12] In 2017, the EU Commission launched the "Support to Integrated Border and Migration Management in Libya" (IBM) programme, which provides €55 million in funding from the EU Emergency Trust Fund for Africa for activities to be carried out by the Italian Ministry of the Interior. The IBM programme aims to strengthen the capacities of Libyan authorities in border areas and in managing migratory flows both on land and at sea. In this way, Italy, with EU financial support, has trained and provided essential logistical assistance to the Libyan authorities, setting up the so-called Joint Rescue Coordination Center (scJRCC) and a basic National Coordination Centre (NCC) for inter-agency cooperation. The Libyan authorities declared the Libyan SAR zone in June 2018, where they would formally begin operating. The Libyan coastal control system is not managed by a single entity: its operations are supported by various factions, such as the General Administration for Coastal Security (GACS) under the Ministry of the Interior, while the so-called Libyan Coast Guard and Port Security is subordinate to the Ministry of Defence. Phase 1 of the SIBMMIL programme was approved in 2017, while Phase 2 was approved in 2018 and revised in 2020 following the COVID-19 health crisis. Between 2017 and 2020, Italy allocated €22 million to the military mission supporting the Libyan Coast Guard (LCG) and provided Italian personnel for technical support and training. With the extension of the mission from 2020 to 2021, further practical training was ensured through the creation of a shipyard and a nautical school in Libya. For 2021–2022, an additional €500,000 in funding is expected, for a total of €10.5 million. During the implementation of the MoU, Italian authorities were present in Libya to ensure the establishment of the Libyan SAR zone. See: https://trust-fund-for-africa.europa.eu/our-programmes/support-integrated-border-and-migration-management-libya-first-phase_en https://trust-fund-for-africa.europa.eu/our-programmes/support-integrated-border-and-migration-management-libya-second-phase_en https://www.thebigwall.org/risultati-ricerca/?provenienza=false&paese=Libia&ambito=false&attuatore=false&inizio=false&fine=false

In these years, a new practice appears to have emerged on the part of the Italian authorities: involving private actors in the rescue, interception and return to Libya of vessels in distress in the Central Mediterranean. This practice, made partly "necessary" by the progressive withdrawal of Italian and European naval assets from the area, avoids direct contact between the Italian authorities and the people intercepted or rescued. The authorities limit themselves to issuing instructions, which are then carried out in practice by merchant ships engaged in cargo transport, often within the supply chain of offshore oil extraction from platforms off the Libyan coast. The lack of direct contact with those being pushed back makes it more difficult to demonstrate Italy's jurisdiction and responsibility for the unlawfulness of the pushback. Merchant vessels and the so-called Libyan Coast Guard thus become the material executors of pushbacks that are politically driven, operationally coordinated and made materially possible by Italian authorities, in a context of increasing disengagement from, and obstruction of, rescue activities by third-party actors.

This phase is also marked by an exponential increase in Frontex's tasks in controlling borders and so-called pre-frontier areas, and in defining strategic frameworks for preventing so-called irregular arrivals. The closure of Mare Nostrum was immediately followed, in November 2014, by the launch of the Joint Operation Triton, focused primarily on border control and surveillance, with a much more limited maritime area of operations.

Today, Frontex is present in the Central Mediterranean mainly in two ways: through Joint Operation Themis, with Italy as host Member State, and through aerial surveillance services (FASS) and multipurpose aerial surveillance (MAS) within the framework of the European Border Surveillance System, EUROSUR Fusion Services[13].

Launched on 1 February 2018 to replace Triton, Joint Operation Themis aims to provide technical and operational assistance to Italy by coordinating operational activities at the external maritime borders in order to manage "illegal immigration flows", combat cross-border crime and strengthen European cooperation on coast guard functions. Its operational area extends across the Central Mediterranean, covering arrivals from Algeria, Tunisia, Libya, Egypt, Turkey and Albania.

Border surveillance tasks are carried out using aerial and naval assets to detect, locate and intercept all vessels suspected of carrying people who are crossing or intending to cross the maritime border irregularly. However, since Frontex's area of competence is strictly limited to 24 nautical miles from the European coasts, Frontex vessels generally do not intervene to assist migrants in distress in the Central Mediterranean, but instead report their presence to the relevant coastal State authorities.

Within the broader framework of the European border surveillance system, Frontex provides information and situational awareness on the EU's pre-frontier areas[14] through a common application of surveillance tools[15], facilitating the production of information and analysis used to enable the functioning of the European Border and Coast Guard.

Thanks to its resources, assets and cooperation

[13] For more details see: https://home-affairs.ec.europa.eu/policies/schengen/eurosur_en

[14] The pre-frontier area, as defined in Article 2 of EU Regulation 2019/189, is "the geographical area situated beyond the external borders which is relevant for the management of the external borders through risk analysis and situational awareness."

[15] This refers to the Eurosur Fusion Services which, according to Article 28 of Regulation 2019/1896, "provide national coordination centres [of the Member States], the Commission and themselves with information on the external borders and the pre-frontier area on a regular, reliable and cost-efficient basis," and directly contribute to the European situational picture.

capacity with other EU entities, Frontex holds the highest level of knowledge—both in real time and through long-term analysis—of what happens in the Central Mediterranean.

The main pre-frontier surveillance tool is the Multipurpose Aerial Surveillance (MAS) service. Using Frontex's aerial surveillance capabilities, information collected through MAS is shared in real time with neighbouring Member States via EUROSUR's official channels. Launched in 2015 as part of Frontex Aerial Surveillance Services (FASS), the system is based on aircraft chartered by Frontex to conduct aerial surveillance operations[16].

The aircraft, including planes and drones, fly along pre-defined search patterns, well beyond the Themis operational area, or respond to real-time information on vessels at sea from various sources, including civilian and military assets[17]. All information is transmitted in real time to Frontex headquarters in Warsaw, where decisions are taken on the operational measures to be adopted[18].

According to reconstructions based on analysis of the 2021 flight routes of the Frontex Heron drone, published on the ADSB-exchange platform by Border Forensics[19], it is possible to map an area of intervention that seems to be concentrated off the Libyan coast, west of Tripoli, from where most migrant boats depart.

If aerial assets carry out their patrols at night, they are very likely to detect vessels when they are still close to the Libyan coast, soon after departure.

Although the Agency has repeatedly claimed that it does not share information with the so-called Libyan Coast Guard, except where such sharing is necessary to ensure the rescue of people at sea, numerous reports and reliable information sources suggest that Libyan authorities are also involved in interception and law-enforcement operations, as we will see in more detail in the chapter dedicated to litigation against Frontex.

In many cases, at least until 2019, Frontex reportedly alerted only the Libyan authorities—by radio and email—about sightings of vessels within the Libyan SAR zone. Public exposure of this practice led to a partial change in Frontex's conduct. In recent years, the Agency appears to send written communications to the Maritime Rescue Coordination Centres (MRCCs) of all coastal States, while still communicating by radio only with Libyan authorities where no NGO vessels are present in the area that could monitor and denounce such practices.

[16] FASS is the acronym for Frontex Aerial Surveillance Services for Border & Coast Guard Functions Framework Contract. The framework contracts (FWC) under this name provide all aerial surveillance services in support of both joint operations and pre-frontier multipurpose aerial surveillance (MAS). Frontex is currently implementing the MALE RPAS FWC, registered as Frontex/OP/888/2019/JL/CG, conducting flights integrated into existing MAS aerial surveillance activities and following the same operational concept. This information comes from the reply to a written question submitted by Özlem Demirel, in her capacity as a Member of the European Parliament, to the European Commission (Question for written answer E-003297/2021, Rule 138: "Multipurpose aerial surveillance at Frontex").

[17] https://op.europa.eu/it/publication-detail/-/publication/b96286e0-1aa8-11e8-ac73-01aa75ed71a1

[18] https://www.europarl.europa.eu/RegData/questions/reponses_qe/2022/001757/P9_RE%282022%29001757%28ANN02%29_XL.pdf

[19] Statistical analysis of the relationship between Frontex aerial surveillance and migrants' interceptions in the central Mediterranean (2021-2022), Stanislas Michel, Geospatial Analyst, December 2022.

The Breadth of the Concept of Pushback and the Development of Case Law in Opposition

THE BROAD SCOPE OF PUSHBACKS

As mentioned in the introduction, pushbacks are a key tool in policies aimed at controlling and selecting migration.

It is useful to understand this term as covering a wide range of instruments and practices aimed at preventing migrants from reaching destination countries and, in certain situations, sending them back to countries of origin.

Generally, the term pushback refers to the act of preventing entry and forcibly returning foreign nationals to the country from which they departed when they do not meet the requirements to cross the border. Unlike expulsion, it is therefore usually characterised by the temporal proximity between the measure and the moment of border crossing. In practice, however, the situation is more complex. In the Italian legal system, for instance, in addition to "refusal of entry at the border" (respingimento alla frontiera), there is also a form of "deferred" pushback, applied when the measure is not adopted immediately at the time of crossing, but later, after the person has been temporarily admitted to the territory, for reasons of "public assistance" or in other circumstances. The length of this "temporary" period is undefined, to the point of raising serious doubts as to the lawfulness of this type of pushback.

The concepts of border and border crossing have been subjected to physical and temporal expansions, shaped around control needs of the authorities, and end up being embodied in the very people who cross without authorization. In recent years, the legal fiction of "non-entry" has been increasingly relied upon, allowing for de facto detention in border facilities that are physically located on State territory, while the foreigner is still treated as if they had not yet entered. This trend has been confirmed and institutionalized through the reform of the European asylum system, in particular with regard to screening and border asylum procedures[20].

Similarly, the ability of destination States to intervene preventively on arrivals appears to shift European borders further south by training and funding transit States' police forces, strengthening their external borders, and expanding control at sea—albeit via remote tools and proxy execution of pushbacks. A striking example of this expansion is the recent agreement between Frontex and Cabo Verde for the deployment of aerial assets to monitor the stretch of sea between West Africa and the Canary Islands[21].

The concept can be further broadened to include measures such as so-called assisted

[20] See ECRE, An analysis of the fiction on non-entry as appears in the Screening Regulation, https://ecre.org/wp-content/uploads/2022/09/ECRE-Commentary-Fiction-of-Non-Entry-September-2022.pdf

[21] Si veda: Frontex launches aerial surveillance in West Africa – its fundamental rights officer raises concerns | Matthias Monroy

voluntary return programmes used as a tool to prevent arrivals from transit countries. These programmes are presented as humanitarian measures to support people stranded in countries such as Libya and Tunisia but, under a more rigorous legal lens, they emerge as a disguised form of expulsion. In fact, they are implemented in contexts where the minimum conditions for a free and informed choice are absent: they are often the only way to escape violence, torture and indefinite detention, while effective evacuation and protection mechanisms are largely unavailable[22].

THE EFFECTS OF PUSHBACKS IN THE CENTRAL MEDITERRANEAN: RETURN TO LIBYA

In the Central Mediterranean, the strengthening of Libyan border authorities and the gradual withdrawal of European assets have had a dramatic impact on the rights of people crossing this route for several reasons: those intercepted are taken back to Libya, where they are subjected to treatment so severe that it has been qualified as crimes against humanity by the UN Independent Fact-Finding Mission[23]; Libyan authorities do not have adequate technical and operational capacity to conduct rescues safely, and in many cases the lack of response from Libyan authorities and the failure of other coastal States to intervene has led to a worsening of shipwreck situations and even to deaths among those awaiting rescue; finally, there are several documented cases of violence by the so-called Libyan Coast Guard against people on the move during interceptions.

As to the first aspect, in November 2023 the Office of the Prosecutor of the International Criminal Court noted "witness accounts describe a harrowing journey by Sub-Saharan Africans who have been treated and used as property or merchandise. They describe alleged acts of rape, torture, and cruel treatment in warehouses and detention centres run by militia and traffickers, where hundreds of migrants are held hostage sometimes for years. Smugglers reportedly extort ransom from family members in African and European countries. Accounts include victimisation of a large number of children and women in these detention centres[24]."

The UN Independent Fact-Finding Mission, in its report of 3 March 2023, "the Mission found that crimes against humanity were committed against migrants in places of detention under the actual or nominal control of Libya's Directorate for Combating Illegal Migration, the Libyan Coast Guard and the Stability Support Apparatus. These entities received technical, logistical and monetary support from the European Union and its member States for, inter alia, the interception and return of migrants.[25]"

[22] Regarding the assisted voluntary returns see: OHCHR Nowhere but Back (https://www.ohchr.org/en/documents/reports/nowhere-back-assisted-return-reintegration-and-human-rights-protection-migrants) and the campaign Voluntary Humanitarian Refusal (https://migreurop.org/article3395.html?lang_article=en)

[23] https://www.ohchr.org/en/hr-bodies/hrc/libya/index

[24] Statement of ICC Prosecutor Karim A.A. Khan KC to the UN Security Council on the Situation in Libya, pursuant to Resolution 1970 (2011), https://www.icc-cpi.int/sites/default/files/2023-11/2023-11-08-report-prosecutor-unsc-libya-eng.pdf

[25] Human Rights Council, Fifty-second session, 27 February–31 March 2023. Agenda item 10. Report of the Independent Fact-Finding Mission on Libya, A/HRC/52/83." Libyan authorities, including the Directorate for Combating Illegal Migration, the Libyan Coast Guard and the Stability Support Apparatus, and third States have been on notice for years regarding the ongoing widespread and systematic attacks on migrants, including violations occurring at sea, in detention centres, along trafficking and smuggling routes and in trafficking hubs.1 Nonetheless, in accordance with memorandums of understanding between Libya and third States, the Libyan authorities have continued their policy of intercepting and returning migrants to Libya, where their mistreatment resumes. Based on the substantial evidence and reports before it, the Mission has grounds to believe that the European Union and its member States, directly or indirectly, provided monetary and technical support and equipment, such as boats, to the Libyan Coast Guard and the Directorate for Combating Illegal Migration that was used in the context of interception and detention of migrants."

In light of this situation, the Mission recommended that the United Nations, the international community and third States "abide by the customary international law principle of non-refoulement and cease all direct and indirect support to Libyan actors involved in crimes against humanity and gross human rights violations against migrants, such as the Directorate for Combating Illegal Migration, the Stability Support Apparatus and the Libyan Coast Guard"[26].

With regard to the second aspect, the UN Office of the High Commissioner for Human Rights (OHCHR), in a May 2021 report[27], noted that despite a significant decrease in arrivals along the Central Mediterranean route since 2017, the mortality rate had more than doubled[28]. Numerous testimonies describe long waits after distress calls, failures by coastal authorities to intervene, serious delays in rescue operations or total lack of intervention, and "behaviour by the LCG in the course of interceptions at sea which endangers the lives of migrants in distress."[29] The risk during the crossing is further increased by the fact that "due to the increasing role of the LCG in intercepting migrants at sea and returning them to Libya, many migrants are now attempting the dangerous central Mediterranean route multiple times before successfully arriving to Europe."[30] Finally, many individuals interviewed by OHCHR reported violent and dangerous manoeuvres by the so-called LCG during interceptions[31].

The risks associated with pushbacks and pullbacks to Libya are such that OHCHR has called for "a moratorium on all interceptions and returns to Libya."[32]

LIMITS ON STATES' POWER TO PUSH BACK AND POSITIVE OBLIGATIONS TO RESCUE

A State's power to refuse certain foreign nationals access to its territory is limited by international, European and domestic law.

First, foreign nationals have the right not to be sent back to a country where they risk torture, inhuman or degrading treatment, or where their safety is at risk. The principle of non-refoulement is expressed in Article 33 of the 1951 Geneva Convention: "No Contracting State shall expel or return ('refouler') 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." This principle is a cornerstone of customary international law and is recalled in several other instruments, such as the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3) and, at national level, Article 19 of Legislative Decree No. 286/1998 (the Consolidated Immigration Act). The latter provides that "in no case may expulsion or

[26] Ivi, par. 103.

[27] OHCHR, Lethal Disregard. Search and rescue and the protection of migrants in the central Mediterranean Sea, https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf

[28] If in 2017, with 119,310 arrivals through the Central Mediterranean, the mortality rate—already extremely high—was 1 in 51 people (1.98%), in 2019, despite a drastically reduced number of arrivals (14,560 people), at least 1 person out of 21 is estimated to have died during the crossing, resulting in a mortality rate of 4.78%. To these figures, one must of course add the people who died or went missing after being intercepted and returned to Libya by the country's Coast Guard.

[29] Lethal disregard p. 15

[30] Lethal disregard, p. 8

[31] Many witnesses report that their boats were rammed or struck by the LCG, causing them to capsize. In other cases, the engines of the boats were damaged while people were still on board, and the individuals themselves were threatened or assaulted in order to force them to transfer onto LCG vessels. See p. 15

[32] OHCHR, P. 15

refoulement be ordered to a State where the foreign national may be subject to persecution on grounds of race, sex, sexual orientation, gender identity, language, nationality, religion, political opinions, or personal or social conditions, or may risk being sent to another State where they would not be protected from persecution." It also states that "refoulement, expulsion or extradition may not be ordered to a State where there are substantial grounds to believe that the person would be in danger of being subjected to torture or inhuman or degrading treatment, or where the obligations under Article 5(6) apply. In assessing such grounds, account shall also be taken of the existence in that State of systematic and serious human rights violations."

Article 4 of Protocol No. 4 to the European Convention on Human Rights prohibits the "collective expulsion of aliens", a prohibition that the European Court of Human Rights in Hirsi v. Italy has held to apply to pushbacks as well[33]. The prohibition of refoulement gives substance to the right not to be subjected to torture expressed in Article 3 ECHR and Article 7 of the International Covenant on Civil and Political Rights. In addition, reference must be made to Article 10 of the Italian Constitution, which recognises the right of asylum for foreign nationals who are prevented in their own country from effectively exercising the democratic freedoms guaranteed by the Constitution. Finally, Article 19 of the Charter of Fundamental Rights of the European Union enshrines the principle of non-refoulement and expressly prohibits collective expulsions.

As regards States' obligations in relation to rescue at sea, the International Convention for the Safety of Life at Sea (SOLAS) and the 1979 International Convention on Maritime Search and Rescue (SAR Convention, adopted in Hamburg) establish the duty to "ensure that necessary arrangements are made for maritime Search and Rescue services for persons in distress at sea round their coasts"[24] and to take the necessary measures to provide search and rescue services to persons in distress at sea off their coasts[35]. These obligations are further detailed in subsequent provisions, which require States to provide assistance at sea to any person in distress, regardless of nationality, status or the circumstances in which the person is found.

The 2004 Resolution of the IMO Maritime Safety Committee (MSC 167(78)), containing Guidelines on the Treatment of Persons Rescued at Sea, clarified that a Search and Rescue operation can only be considered completed once the persons rescued have been disembarked as soon as reasonably possible, with the least possible deviation from the ship's intended route, in a place that is genuinely and effectively safe. The Resolution specifies that the rescue vessel itself cannot be considered a place of safety, except for a limited and strictly necessary period. Rather, a place of safety must be understood as "a location where rescue operations are considered to terminate; where the survivors' safety of life is no longer threatened; where their basic human needs (such as food, shelter and medical needs) can be met; and from which transportation arrangements can be made for the survivors' next or final destination." The Resolution also requires States, in order to ensure proper functioning of SAR services, to adopt operational plans to manage incidents occurring within their SAR region and, if necessary, beyond it when the responsible Rescue Coordination Centre (RCC), or another centre able to intervene more effectively, does not formally assume coordination of the operation. Paragraph 6.7 further clarifies that "the first RCC[36] […] remains responsible for

[33] https://hudoc.echr.coe.int/fre?i=001-109230

[34] SOLAS Convention, Chapter V Regulation 7, https://library.arcticportal.org/1696/1/SOLAS_consolidated_edition2004.pdf

[35] SAR Convention Chapter 2, https://www.sosmediterranee.org/app/uploads/2023/10/sar-convention-1979.pdf

[36] Rescue Coordination Center

coordinating the case until such time as the responsible RCC or other competent authority formally assumes responsibility."

EU Regulation No. 656/2014, which regulates, among other things, multiple aspects of safety at sea (Article 3), reiterates the principle of non-refoulement (Article 4(1) and (2), and expressly in Article 4(12)), stating that "in accordance with that principle, no person shall be disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country where, inter alia, there is a serious risk of being subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a risk of expulsion, removal or extradition to another country in violation of the principle of non-refoulement."

CASE LAW

Litigation brought over the years, both to challenge pushbacks and to defend the SAR activities of NGOs targeted by criminalising legislation, has given rise to interesting case law on Italy's obligations in relation to rescue and interception dynamics at sea.

For the purposes of this guide, we will see in the following chapters how Italian courts have progressively recognised Italy's jurisdiction over people subjected to pushbacks and its responsibility for carrying them out, even in cases where the material execution of the act has been delegated. This evolution appears to have stumbled, however, in the ECtHR's decision in S.S. and Others v. Italy, which is briefly outlined below.

On 12 June 2025, the Court ruled on Italy's responsibility for a violent pushback carried out on 6 November 2017 against some 130 people on board a rubber dinghy that was sinking. A rescue vessel operated by the NGO Sea-Watch was present on the scene and was conducting rescue operations. The so-called LCG, using a patrol boat previously donated by Italy, interfered with these operations and returned 47 people to Libya, while others were rescued by the NGO and 20 people died at sea. Those taken back to Libya, including some of the applicants, were subjected to arbitrary detention, torture and inhuman and degrading treatment.

The Court acknowledged the systematic nature of human rights violations in Libya and the risks arising from externalization policies, stressing that "notwithstanding the right of States to establish sovereignly their immigration policies, the difficulties in managing migratory flows cannot justify the States' resort to practices incompatible with their Convention obligations." It also reiterated that "the specific nature of the maritime context cannot lead to the creation of a legal vacuum where individuals are not covered by any legal regime capable of guaranteeing them the enjoyment of the rights and safeguards provided by the Convention, which States have undertaken to secure to those within their jurisdiction."[37] However, the Court adopted a disappointingly restrictive approach to jurisdiction, unanimously declaring the application inadmissible on the ground that the criteria for establishing that Italy exercised jurisdiction over the applicants within the meaning of Article 1 ECHR had not been met.

The applicants argued that the Italian authorities exercised exclusive and continuous control over them from the moment the Rome MRCC received the distress call and at least until the Libyan patrol boat arrived and took over the operation. In their view, coordination of the rescue by the Italian MRCC—even assuming it was limited to the initial stages—amounted to the opening of proceedings which, according to the Court's own case law, is capable of

[37] First Section Decision, Application nr S.S. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-244024%22]} and Others against Italy.

establishing a jurisdictional link with Italy. Moreover, the events were clearly foreseeable for the Italian authorities, which had requested the intervention of Libyan authorities despite the availability and presence of the Sea-Watch 3 for on-site coordination. The applicants went further still, targeting the core of externalization policies by arguing that Italy's responsibility also stemmed from its support for Libyan migration policies through the 2009 and 2017 agreements, under which Italy provided significant logistical and financial support to the Libyan authorities to enable them to autonomously manage migratory flows off their coast: the role and functioning of the Libyan coordination centre were made possible by Italian support under those agreements. The Court rejected these arguments, declining to adopt a functional interpretation[38] of the jurisdiction clause[39].

By contrast, at national level, Italian courts have recognised Italy's jurisdiction and responsibility even where no Italian naval assets were present, but the Italian MRCC was nonetheless involved. In the three cases discussed in the following chapters, the progression in case law is evident. In the Orione case, Italy's jurisdiction and responsibility were grounded in the fact that the people had been taken on board a Navy vessel, which then physically handed them over to the so-called LCG. Later, in the Asso 29 case, where the material execution of the pushback was entrusted to an Italian-flagged merchant vessel, jurisdiction was derived from the vessel's Italian flag and from the fact that the pushback took place in the presence of the Italian Navy ship Duilio. Finally, in the Vos Triton case, where a non-Italian merchant ship carried out the pushback, the court found jurisdiction based on the remote control exercised by the Italian MRCC (IMRCC). In this latter case, the Court of First Instance of Rome held that where Italian authorities possess sufficient information and are sufficiently involved to be able to ensure the rescue of those concerned, they are under an obligation to "act by all means to achieve that purpose, preventing refoulement to Libya."[40]

This conclusion has also been made possible by a series of decisions—mostly in proceedings concerning the defence of NGOs engaged in SAR operations—in which domestic courts have held that activities carried out by the so-called Libyan Coast Guard cannot be considered rescue operations because they do not end with the disembarkation of people in a place of safety (POS), as Libyan territory cannot be considered such.

In June 2024, in proceedings concerning the administrative detention order imposed on the Humanity 1 vessel, the Ordinary Court of Crotone held that, under international law on rescue obligations at sea, "it cannot be considered that the activity carried out by the Libyan Coast Guard is to be qualified as a rescue operation, given the manner in which such activity was conducted", referring both to the fact that the so-called LCG was armed and fired shots, and to the POS: "Libya cannot be considered a place of safety within the meaning of the Hamburg Convention, as the Libyan context is characterised by serious and systematic human rights violations and Libya has never ratified the 1951 Geneva Refugee Convention."[41] This approach was confirmed by the Court of Appeal

[38] V. Moreno-Lax, The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model", https://www.cambridge.org/core/journals/german-law-journal/article/architecture-of-functional-jurisdiction-unpacking-contactless-controlon-public-powers-ss-and-others-v-italy-and-the-operational-model/AA2DADF2F1DCDD19E8F9E6E316D7C110

[39] https://rli.blogs.sas.ac.uk/2025/11/26/s-s-and-others-v-italy-when-the-ecthr-chose-borders-over-rights/

[40] Court of first Instance of Rome, decision dated 29 November 2024 no. 26758/2024, available on the ASGI website at the page: https://www.asgi.it/sciabaca-oruka/vos-triton-italia-responsabile-respingimento-delegato-libia/

[41] https://www.asgi.it/wp-content/uploads/2024/07/2024_06_26_Court-of-Crotone_final-decision_ITA_geschwarzt.pdf

of Catanzaro in judgment No. 603/2025[42]. The latter decision expressly emphasised the primacy of international rules on rescue at sea over bilateral agreements—in particular those with Libya—when defining the conduct required of authorities[43], and reaffirmed that, in determining a "place of safety", "the prevailing conditions on the ground are decisive, including those arising from any treaty commitments undertaken—and concretely implemented or implementable—on migrants, shipwrecked persons and refugees."[44]

Also important in this context are the criminal proceedings in the Asso 28 case[45], in which the master of the Italian-flagged merchant vessel that rescued and then handed over more than 100 shipwrecked persons to Libyan authorities was found guilty of abandoning minors or incapable persons in danger (Article 591 Criminal Code) and unlawful disembarkation and abandonment of persons (Article 1155 Navigation Code). The master of the Asso 28 was convicted by the Naples Preliminary Hearing Judge (GUP) and the Court of Appeal of Naples, which upheld the first-instance judgment. On 1 February 2024, the Fifth Criminal Chamber of the Court of Cassation, in judgment No. 4557, confirmed the conviction. The case concerned a rescue operation carried out by the Asso 28 in July 2018, when, after taking shipwrecked persons on board on the instructions of a presumed Libyan officer stationed on the nearby oil platform, the vessel followed his directions and returned them to Libya, without identifying those rescued and without contacting Italian authorities. The master also failed to verify in any way whether the place of disembarkation could qualify as a POS.

The picture that emerges from these decisions is clear: Libya does not meet the requirements to be considered a POS, and the activities of the so-called LCG cannot be classified as search and rescue operations. In the following chapters, we will see how litigation for entry visas in response to direct or proxy pushbacks in the Central Mediterranean has led to an expansive interpretation of Italian jurisdiction and a more complex understanding of the resulting responsibilities and the forms of reparation required.

[42] https://www.asgi.it/asilo-e-protezione-internazionale/libia-soccorsi-humanity-criminalizzazione/

[43] In this regard, see also the Italian Supreme Court, Civil United Sections, Order No. 5992 of 6 March 2025, concerning the well-known "Diciotti" case, where it states that "the duty to render assistance at sea constitutes the foundation of the main international conventions and must be considered as prevailing over all rules and bilateral agreements aimed at combating irregular migration, pursuant to which each Member State is obliged to ensure that assistance is provided to every person in distress at sea, administering initial care and transferring them to a place of safety." https://www.cortedicassazione.it/resources/cms/documents/5992_03_2025_civ_oscuramento_noindex.pdf

[44] https://www.asgi.it/wp-content/uploads/2025/07/2025_06_17_court-of-appeals_Catanzaro_Humanity-1_IT_blackened.pdf

[45] On this matter, see also the Italian Supreme Court (Criminal Division), Third Section, judgment of 16 January 2020, No. 6626, the "Rackete Case" (https://www.sistemapenale.it/it/scheda/cassazione-sea-watch-illegittimo-larresto-di-carola-rackete) and the Supreme Court, Sixth Section, judgment of 16 December 2021, No. 15869, the "Vos Thalassa Case" (https://www.sistemapenale.it/it/scheda/masera-cassazione-legittima-difesa-per-migranti-che-si-erano-opposti-al-respingimento-verso-libia?out)

Methodology and Preparatory Work

WHAT IS NEEDED TO BUILD A LITIGATION ACTION

Bringing litigation aimed at obtaining entry visas for people unlawfully pushed back in the Central Mediterranean requires complex and demanding work, which can only be carried out through broad networks and multidisciplinary collaborations. It is thanks to these alliances—between activists, journalists, researchers, and NGOs engaged in search and rescue—that it becomes possible to reconstruct events, identify claimants, build relationships of trust and overcome practical and logistical obstacles, as well as legal ones.

The first step is to become aware of the pushback. This can happen through news reports, contacts established by people who were pushed back with solidarity networks, or through direct testimonies from aircraft or vessels operated by organizations active in the Central Mediterranean. From that moment, a complex process begins, involving different forms of expertise and requiring strong coordination capacity.

RECONSTRUCTING THE CASE

Once a pushback incident has been identified, it is necessary to reconstruct its dynamics as accurately as possible.

In some cases, information available from the press, social media accounts of the authorities involved (for instance the so-called LCG or Italian authorities), or journalistic investigations provide an initial picture of events. Maritime and aerial traffic-tracking websites can also help identify the assets involved—data that can then be cross-checked with testimonies from people who were pushed back.

Knowledge of the events starts from gathering memories and testimonies of those who experienced the pushback and must include detailed information on the dynamics of the incident—date and time of departure, time spent at sea, any distress calls, flyovers by aircraft, etc.—and on the consequences of the pushback: what happened afterwards—detention, violence, deprivation of fundamental rights.

Networks with organizations active in the Mediterranean that carry out rescues or engage in monitoring and in receiving distress calls are of crucial importance[46]. Materials such as audio recordings, logbooks, written communications, photos and videos constitute essential evidence to corroborate the accounts of those involved. In cases where Frontex is involved, the JORA database can be used to verify some information relating to SAR events and border control operations conducted by the Agency.

[46] In addition to the NGOs engaged in SAR operations, the information and expertise held by Alarm Phone – Watch the Med are essential; since 2014, it has been receiving distress calls and monitoring events occurring in the Mediterranean.

ACCESSING UNPUBLISHED INFORMATION

One of the most complex phases concerns obtaining information that cannot be accessed through open sources. The structural opacity that characterises border management makes it difficult to obtain necessary documents.
Tools such as FOIA (Freedom of Information Act)[47] requests and administrative access requests, which once played a key role, have gradually lost their effectiveness. The reasons are many: increasingly restrictive internal rules, growing refusal by the public administration to disclose information, and case law that has often endorsed such denials. A crucial turning point in this process was the adoption of the Minister of the Interior's Decree of 16 March 2022, which identified "categories of documents drawn up by, or otherwise held by, the central and peripheral offices of the Ministry of the Interior that are excluded from access under the cases of exclusion" set out in Article 24(1) of Law No. 241 of 7 August 1990. In practice, public authorities have systematically denied access to documentation relating to SAR activities and maritime border-control operations, invoking national security, international relations and the need to protect documents relating to the "planning and conduct of national and NATO operational activities and exercises", which also include those carried out by the National Operations Centre of the Coast Guard – IMRCC, falling under national operational activities, surveillance and patrols.

At the same time, the administration has refused access to information on individual incidents even when requests were made under Articles 22 and following of Law 241/90 and were clearly aimed at defending the legal position of the person pushed back, generally dismissing them as insufficiently reasoned. Yet, knowledge of what Italian authorities did or failed to do is obviously essential in order to bring legal proceedings. Faced with these obstacles, it becomes crucial to understand the general functioning of operations: command chains, usual procedures, recurring patterns. This knowledge makes it possible to fill—at least in part—the gaps created by the lack of access to specific data.

ARCHIVES, KNOWLEDGE NETWORKS AND THE ROLE OF CIVIL SOCIETY

Knowledge produced by civil society plays a fundamental role.

This information is generally contained in monthly reports published by organizations that are part of the Civil MRCC—the network of civil society organizations conducting SAR operations in the area—as well as in analyses by academics, journalists and activists. The knowledge developed in these contexts is increasingly being gathered into archives and other information-collection tools, which can be accessed at different levels.

An excellent example is the archive created by the Josi & Loni Project (JLProject)[48], a volunteer-run initiative that reconstructs pushback events and has the capacity—thanks to a dense network of relationships within migrant communities in Libya—to get in touch with people who were pushed back, build relationships of trust, and maintain contact over the long periods of time often needed to prepare litigation.

[47] The FOIA is a tool allowing every citizen to access information and documents held by public administrations without the need to provide specific reasons. It serves as a mechanism that guarantees transparency and enables citizens to monitor the activities of state bodies. For further information, see: https://www.asgi.it/antidiscriminazione/foia-accesso-atti/

[48] https://jlproject.org/it/home/

Equally valuable is SARchive[49], the archive created and maintained by the Civil MRCC, which systematically collects information on SAR operations and on the conduct of Italian and Libyan authorities.

Organizations engaged in rescues are themselves often indispensable witnesses and hold the broadest knowledge on these issues. They may also maintain contacts with people who were pushed back, as well as with witnesses, friends, and relatives of those affected.

CONTACTING AND IDENTIFYING PEOPLE WHO WERE PUSHED BACK

Litigation can only be brought if it is possible to prove that the claimant was in fact a victim of the unlawful conduct and therefore has standing to bring a claim. This aspect, which in many legal contexts is straightforward, becomes particularly complex in the context of pushbacks, especially where pushbacks are carried out by proxy.

The case of the pushback carried out by the Asso 28, whose criminal-law developments we recalled earlier, is emblematic: in that instance, the ship's master did not identify the people on board, and it was not possible to access information collected by humanitarian organizations present at disembarkation in Tripoli. This made it impossible to prove that certain individuals—who had been in contact with JLProject volunteers—were on board. Although the events were extensively reconstructed in the criminal proceedings, it was therefore not possible either to join one of the women as a civil party in those proceedings or to launch a separate civil action.

Often, identification is made possible through passenger lists kept by vessels involved in pushbacks, or through photos taken and published by international organizations (primarily UNHCR and IOM). Once the existence of such photos is known, it is possible to ask these organizations to provide clear images of those with whom one is in contact. This is often a lengthy and not obstacle-free process: in several cases, these organizations have been reluctant to share information in their possession even with the individuals concerned, as in the pushback cases involving the Orione and the merchant vessel Asso 29 that we will discuss.

POWERS OF ATTORNEY AND LEGALISATION

People on whose behalf litigation is brought often reside in countries that do not have agreements simplifying notarial procedures with Italy and have not acceded to the 1961 Hague Convention abolishing the requirement of legalisation for foreign public documents. It is therefore necessary to follow consular legalisation procedures for powers of attorney signed abroad, working with local notaries. This process requires the creation of networks in the claimants' countries of residence—Libya and Sudan in the cases presented here—with sympathetic notaries and civil society organizations.

The Rome Ordinary Court has, in several proceedings, raised of its own motion a preliminary question on the validity of powers of attorney for litigation, pointing to failure to comply with the requirements of Articles 82 and 83 of the Code of Civil Procedure. In practice, the Court considered that the legalisation procedures adopted by Italian embassies in Sudan and Libya were insufficient to render the powers of attorney valid in court. This position—though not uniform across all cases—has in fact prevented some claimants from accessing justice.

[49] https://civilmrcc.eu/sarchive/

In certain conflict situations, signing a power of attorney before a notary and having it legalised is simply impossible due to the level of risk or the closure of services and Italian embassies. This was the case in Sudan, where, for one of the claimants in the Vos Triton case, it was necessary to sign the power of attorney via video call, as the claimant was unable to reach a notary due to the conflict. In that situation, the Rome Ordinary Court referred the matter to the Court of Cassation in order to clarify the "correct interpretation of Article 83 of the Code of Civil Procedure, which may raise a new and particularly important question of law within the meaning of Article 363-bis of the Code of Civil Procedure, namely whether, in the specific and documented circumstances in which the claimant in Sudan finds himself, characterised by armed conflict and the closure of Italian consular representations, the power of attorney signed in the manner produced in these proceedings may nonetheless be considered valid." The specific situation of these claimants raises new questions regarding access to justice and the very enforceability of their rights.

The Orione Case: Direct Pushback by Italian Authorities

THE FACTS

On 27 June 2009, a group of about 89 people from Eritrea departed from the Libyan coast, aiming to reach Italy and have their right to international protection recognised. On 30 June, as they approached the coast of Lampedusa, about 26 nautical miles from the island, in international waters, the boat's engine broke down. A military dinghy from the Italian Navy ship Orione reached the vessel in distress and took the shipwrecked people on board the military vessel. Each person taken on board was photographed individually and assigned an identification number. They were also reassured that the ship would take them to Italy. Instead, the vessel set course for Libya.

Once they realised that they were being taken back, the rescued people explicitly expressed their intention to seek protection and their inability to return to Libya. This did not prevent their handover to Libyan authorities.

According to the applicants, later confirmed during the proceedings, when the Italian ship was approached by a Libyan vessel, panic increased, many people shouted that they needed international protection and wanted to apply for asylum, asking not to be handed back to the Libyans and explaining that in Libya they had been tortured, imprisoned and persecuted just as they had been in their countries of origin.

Once back in Libya, they were mistreated and then detained for many months in prisons under inhuman and degrading conditions. Some of those pushed back tried again to cross the sea; two of them died during the journey, while others managed to reach Europe, where they applied for and obtained international protection.

After the pushback, the group of applicants tried to reach Europe overland, leaving Libya and crossing Egypt and the Sinai desert, eventually reaching Israel in 2010. There, they were arrested, detained and later released. They applied for international protection in Israel, but received neither an answer nor guarantees regarding the risk of refoulement. On the contrary, in Israel two of them were forcibly returned to Eritrea, while the others were systematically subjected to further discrimination and violations of their rights[50].

THE LITIGATION

The case was made possible thanks to collaboration with Amnesty International which, in providing legal assistance to asylum seekers in Israel, learned of the events and of the documentation held by some of them. Some of those pushed back had recorded a video on board the boat showing the group during the journey and the moment of rescue by the Navy ship Orione, visible in the distance.

[50] The events were recounted by Andrea Segre and Stefano Liberti in the documentary film Mare Chiuso, produced by Zalab in 2012. https://zalab.org/projects/mare-chiuso/

Through this material, it was possible to identify the people who had been pushed back. During the proceedings, evidentiary activity led to the acquisition of the photographs taken on board by Navy personnel and to the disclosure of several previously unpublished documents in the pushback file. Institutional reports noted the presence at disembarkation of UNHCR staff and the presence of Guardia di Finanza officials on board the Libyan patrol boat. Although the Rome Tribunal requested from UNHCR the identification documentation and any further documents in its possession relating to the pushback, UNHCR invoked its immunity and refused to produce them.

In June 2014, 14 of the 89 people who had been pushed back formally served a notice of default on the Presidency of the Council of Ministers, the Ministry of Defence, the Ministry of the Interior and the Ministry of Foreign Affairs and International Cooperation. They sought compensation for the damage suffered and measures to remove the continuing effects of that damage, including all steps necessary to allow those who were still outside EU territory to enter Italy to lodge an application for international protection. No response was received.

They therefore brought proceedings before the Italian courts, seeking interim relief authorising entry into Italian territory, or an order requiring the competent administrations to take all appropriate measures to enable such entry. They asked the court to establish the extra-contractual liability of the defendant administrations under Article 2043 of the Civil Code, and to order them to pay each applicant €30,000 (or a higher or lower amount deemed equitable) by way of damages, and, as specific reparation, to order the adoption of all acts necessary to allow the applicants to enter Italy and apply for international protection.

In November 2016, the Tribunal rejected the application for interim relief, finding that the conditions of fumus boni iuris and periculum in mora[51] were not met. As to the former, the judge held that at that stage, in the absence of adequate evidentiary proceedings, it was impossible to state with certainty that the applicants were the same persons who had been pushed back in the Orione operation. As to periculum, he considered that the long time that had elapsed between the events and the bringing of the action meant that it was not made out.

By contrast, with judgment No. 22917/2019 of 28 November 2019, the Rome Tribunal for the first time recognised that those who had been pushed back had the right to enter Italy on a regular visa in order to seek protection and awarded each of them €15,000 in damages for the unlawful conduct of the Italian authorities. The evidentiary proceedings had, in fact, made it possible to correctly identify the people who were pushed back, thanks also to witness statements from others who had been on the same boat, had later managed to reach Europe and recognised the applicants, through the photographs taken by the Navy on board the Orione, as their fellow travellers. As to the characterisation of the conduct, the court relied on the principles laid down by the ECtHR in Hirsi, holding that "the conduct of the Italian authorities was in breach of Italy's obligations under domestic law (of constitutional rank) and international law and was therefore unlawful, rendering the contested conduct illegitimate."

After analysing the relevant national and international rules, the court held that "when the authorities of a State intercept migrants on the high seas, they are under an obligation to examine the personal situation of each individual and to refrain from refouling

[51] These are the two prerequisites required to obtain interim relief in civil proceedings. Fumus refers to the plausible existence of the right for the protection of which the interim measure is sought, whereas periculum indicates the potential harm that the subjective right may suffer if left without protection for the duration of the main proceedings.

refugees to a territory where their life or freedom would be threatened and where they risk persecution, it being understood that the absence of an asylum request does not allow the authorities to disregard the fact that in some countries there exists a systematic failure to respect human rights."

The Court stressed the importance of the fact that the Italian authorities were in a position to know that Libya did not have a national asylum system and had not ratified the Geneva Convention, and therefore "could not, at the time of the events in question, be considered a safe place of disembarkation, with a real risk that the migrants would be arrested, subjected to violence and returned to Eritrea."[52] It clarified that the bilateral agreement with Libya in no way exempted the Italian authorities from compliance with obligations arising from ratification of international instruments. It therefore found that "the contested conduct was not excusable and was accompanied by the mental element (intent or negligence) required by Article 2043 of the Civil Code for establishing liability in tort."

Regarding the request for entry into Italian territory to access the international protection procedure, the judgment held for the first time that such a right is a fundamental corollary of the right of asylum as enshrined in Article 10 of the Constitution. Innovatively, it argued that "qualifying the right of asylum as a full subjective right, part of the catalogue of human rights and deriving not only from the Constitution but also from international conventions, requires the identification of a form of protection for those situations that, while not falling within the scope of domestic legislation implementing Article 10 of the Constitution, are nevertheless deserving of protection. It is considered that in this area the scope of international protection can be expanded through direct application of Article 10(3) of the Constitution, aimed at protecting the position of those who, as a result of unlawful acts by the Italian authorities, are unable to lodge an application for international protection because they are not present on Italian territory, having been prevented from entering that territory by a collective pushback carried out in violation of constitutional principles and of the Charter of Fundamental Rights of the European Union. In the light of these considerations, it is held that the right of asylum under Article 10(3) of the Constitution can be understood as a right to enter State territory to be admitted to the international protection procedure."

This was the first time that a court reached such a conclusion, legally and materially undoing the effects of a pushback at sea and ordering the issuance of entry visas for those who had been pushed back.

In August 2020, more than ten years after the pushback, five applicants were finally able to enter Italy by plane. They applied for international protection, and all were recognised as refugees[53].

The State Attorney appealed the judgment, but it was upheld in full by the Rome Court of Appeal on 11 January 2021. The appeal judgment also contains several noteworthy elements. In particular:

- On witness evidence to prove identity and standing: as to the testimonies of persons who had been pushed back together with the applicants, used to prove their identity and thus their standing to sue, the Court rejected the State Attorney's objections of inadmissibility, stating that "identification by the authorities may indeed be considered the only or main item of evidence when it has taken place.

[52] Judgment No. 22917/2019 of 28 November 2019, Court of Rome, First Civil Section

[53] https://www.asgi.it/sciabaca-oruka/storica-vittoria-del-diritto-di-asilo-un-visto-dingresso-in-italia-per-richiedere-protezione-2/

If it has not, its absence cannot be relied upon to argue that proof of standing is lacking; in such cases, alternative evidence must instead be weighed and deemed admissible and relevant, including the well-established use of photographs alongside oral evidence, which in this case support the applicants' claims."

- On Article 10 of the Constitution and the right to enter: it reaffirmed the principle that, in order for Article 10 of the Constitution not to remain ineffective, where there has been a violation of the right of access to asylum, the necessary corollary must be the recognition of the right to enter the territory of the person whose access has been prevented.

- On visas: with respect to entry, while taking note of the restrictive case law of the Court of Justice on humanitarian visas under Article 25 of the Visa Code, the Court underscored that this has no impact on the domestic legal relevance of that provision for two reasons: first, the Administration has consistently applied it in the context of humanitarian corridors; second, it is fully applicable in the domestic legal order, as confirmed by earlier decisions of the Rome Tribunal.

The Asso 29 Case: Pushback Executed by Private Actors

THE FACTS

This case concerns the pushback to Libya of around 270 people carried out by the ship Asso 29, operated by the company Augusta Offshore, on 2 July 2018 under the coordination of Italian authorities stationed in Tripoli. Although the pushback was materially executed by the Asso 29, the Tribunal recognised Italian jurisdiction and responsibility because the merchant vessel sailed under the Italian flag and the Italian Navy ship Duilio was present.

In the days before, several boats had set out to escape Libya. On 2 July 2018, the Libyan Zuwara patrol boat of the so-called Libyan Coast Guard intercepted three vessels adrift and in serious distress, thanks to information provided by the Italian Navy ship Duilio.

According to evidence gathered by the lawyers from official sources and through the reconstruction and analysis work of the Josi & Loni Project—based on aerial and maritime traffic-tracking sites and social media of the authorities involved—when the Libyan patrol boat Zuwara began having serious engine problems, Italian authorities on board the Navy ship Caprera, stationed in the port of Tripoli, instructed the master of the Asso 29, part of the Augusta Offshore fleet, to assist the patrol boat.

The private vessel was at that time heading from Tripoli to the Bouri Field oil platform, one of the largest in the Mediterranean. When the Asso 29 arrived on scene, the Italian Navy ship Duilio, also stationed in Tripoli, was already present and itself acting on instructions from the Italian Navy. The Duilio ordered the master of the Asso 29 to comply with requests from the Zwara patrol boat. The passengers were then transferred onto the private vessel. Once the transfer was completed, the Asso 29 set course for Tripoli, towing the Libyan patrol boat behind it. A Libyan officer was also on board the Asso 29 and, in the presence of the ship's captain, told the shipwrecked people that if they did not protest, they would be taken to Italy. Throughout the journey, the officer remained in charge of organising the rescued people.

On 2 July, the ship reached Tripoli harbour but did not dock: the survivors were transferred onto smaller boats that took them ashore. The Asso 29, after completing the transfers, resumed its original route.

The proceedings established, among other things, that:

- The interceptions by Libyan authorities were the result of support and coordination by Italian authorities, which had located the vessels in distress and, despite being nearby, deliberately decided not to intervene, facilitating the arrival of the Libyan patrol boat in order to avoid being required to bring the rescued people to Italy.
- The Asso 29 intervened at the request of Italian authorities, which gave instructions while formally stating that they were

acting "on behalf of" Libyan authorities.
- Italian authorities should have intervened in compliance with their positive obligations under the law and should have prevented the people from being taken back to Libya.

After disembarkation, those who had been pushed back were arbitrarily detained in various centres: Tarik Al Sikka, Zintan, Tarik Al Matar, Gharyan. They were subjected to atrocious living conditions: overcrowding, insufficient food and water, appalling hygiene conditions and little to no access to outdoor spaces. In these conditions they suffered ill-treatment and abuse, extortion, and witnessed killings and torture. One young man fell ill with tuberculosis and died in detention. Some of those pushed back later managed to reach Europe[54], where they were recognised as needing international protection, a right from which the pushback had effectively excluded them.

THE LITIGATION

In relation to this pushback, a first action was brought in 2020, seeking damages for five people who, in the months and years following the events, had managed to reach Europe. In June 2024, the Rome Civil Tribunal held that the ship's master and the Italian authorities involved, far from being obliged to comply with Libyan coastguard requests, should have taken the people to a place of safety, i.e. Italy, and ordered the defendants—apart from the Ministry of the Interior—to compensate the applicants for the harm suffered. On that occasion, the Tribunal clarified that "the specific nature of the maritime environment cannot preclude respect for human rights," stressing that the identification of a SAR zone "gives rise only to obligations and responsibilities for the State, and not to rights", since a SAR region is not an area of sovereignty or exclusive jurisdiction[55]. In the years that followed, thanks to the work of JLProject, it was possible to reach other people who had been pushed back in that incident and to submit visa applications for those who were still in Libya or had even been returned to Sudan.

Decisions by Italian embassies in Sudan and Libya refusing visas for humanitarian reasons were thus challenged. The visas had been requested in order to enable entry into Italy to apply for international protection in view of the unlawful pushback suffered. The challenges were brought by way of urgent applications under Article 700 of the Code of Civil Procedure. Many of these proceedings were declared inadmissible due to alleged defects in the legalisation of powers of attorney signed abroad and are still pending. In one case, however, despite the public administration's appeal against the interim order, the case proceeded to a decision on the merits in the first instance. The issues relating to the power of attorney were overcome and the court recognised the person's right to enter Italy on a regular entry visa, in view of Italy's breach of its non-refoulement obligations, so that he could seek recognition of his right to

[54] In particular, the five applicants asked the Court, following an unsuccessful attempt at negotiation, to establish that the Ministry of Infrastructure, the Ministry of the Interior, the Ministry of Defence, the Presidency of the Council of Ministers, and the shipping company Augusta OffShore had engaged in conduct that violated their fundamental human rights, including the right not to be subjected to inhuman or degrading treatment; the right to lodge an asylum application and to have it examined; the right not to be collectively expelled or refouled; the right to access a court to assert their claims; the right to be assigned a safe port, among others. They further requested that the Court find that the collective pushback operation in which the claimants were also involved gave rise to civil liability on the part of the defendants, jointly or according to their respective responsibilities; that the defendants be ordered, jointly or according to their respective responsibilities, to compensate the damage, quantified at €30,000.00 for each claimant or such other amount as deemed appropriate; and (4) that the defendants be ordered, by way of injunctive relief, not to repeat such conduct in the future.

[55] https://www.asgi.it/asilo-e-protezione-internazionale/caso-asso-29-arriva-a-sentenza-la-libia-non-e-un-luogo-sicuro-dove-condurre-i-migranti/

international protection.
According to the judge, "Italian authorities providing assistance, and the master of the Italian merchant vessel sent to the scene, should in any event have ensured that the shipwrecked persons were disembarked in a place of safety, regardless of the presence of a Libyan officer on board and of the fact that the request for assistance had come from Libyan authorities."[56]

By virtue of the "qualified contact" with the shipwrecked people, who had boarded a vessel flying the Italian flag in international waters, the authorities violated their obligation to take measures to prevent acts of torture and inhuman treatment: "the Italian State should not have assisted the Libyan coastguard in disembarking the shipwrecked persons in Libya, but should instead have ensured their transport to a place of safety, precisely at the moment when they were on a ship under its jurisdiction." Particularly important in grounding Italian responsibility were the facts that the merchant vessel sailed under the Italian flag and that an Italian Navy ship was present in the area.

[56] https://www.asgi.it/sciabaca-oruka/libia-visto-ingresso-asso-29/

The Vos Triton Case (June 2021): An Expansive Interpretation of "Qualified Contact"

THE FACTS

In this case, a group of shipwrecked people initially rescued by the merchant vessel Vos Triton, flying the flag of Gibraltar, was transferred onto a Libyan patrol boat and taken back to Libya thanks to constant coordination and control by the Rome Maritime Rescue Coordination Centre (MRCC). Although the events occurred in international waters (Libyan SAR zone) and involved vessels flying the flags of third States, the Rome Tribunal recognised Italian jurisdiction and responsibility on account of the control exercised by Italian authorities over all phases of the operation—interception and rescue—and their role in making the pushback materially possible.

On 12 June 2021, a group of 170 people left Zuwara on a small wooden boat bound for Italy. During the night of 13–14 June, the boat broke down and those on board called the Alarm Phone rescue hotline, a network of activists that immediately forwarded the alert to all relevant authorities: Italian, Maltese, Tunisian and Libyan. At 2:17 a.m., when the boat contacted Alarm Phone, it was in international waters, just 6 nautical miles from the Maltese SAR zone, in the area nominally assigned to Libya.

The Italian National Maritime Rescue Coordination Centre confirmed that it had received the emails about the boat in distress both from Alarm Phone and from Frontex during the night of 14 June, and that it had only been able to contact the Joint Rescue Coordination Centre (JRCC) in Tripoli several hours later. The JRCC stated that it was assuming coordination of the operation but did not confirm the presence of rescue assets at sea. Some hours later, the Italian MRCC again contacted the JRCC asking for updates and was told that a Libyan patrol boat, the Zawiya, was heading towards the rescue area. The JRCC then asked the Italian MRCC to check for merchant vessels in the area capable of aiding. The Italian MRCC sent an INMARSAT message to the ships Vos Triton and Vos Aphrodite, informing them that a vessel carrying around 150 people in distress was nearby, and shortly afterwards contacted the Vos Triton directly. The Vos Triton replied that it was heading towards the vessel in difficulty and expected to reach it in about three hours. Over the following hours, the Italian MRCC remained in constant contact with the Vos Triton.

Around midday, Seabird, the aircraft operated by the NGO Sea-Watch, sighted the merchant vessel Vos Triton—flying the flag of Gibraltar and owned and operated by the Italian office of the Dutch shipping company Vroon—approaching the wooden boat and stopping at some distance. The boat was severely overcrowded, and people had no life jackets. Some threw themselves into the water to try to swim to the merchant vessel to be rescued, and only then did the rescue operations begin. They lasted about an hour, during which the Vos Triton managed to secure the wooden boat with a line and transfer the people on board.

Seabird repeatedly attempted to contact the merchant ship, reminding it of its obligations to rescue and to ensure disembarkation in a place of safety. The ship never responded.

The Vos Triton then started sailing south. The ship's master, who remained in constant contact with the Italian MRCC, reported that people on board were agitated because they feared being taken back to Libya. The Italian MRCC instructed him to stop the vessel in order to prevent incidents and to await further instructions. Later, the master again contacted the MRCC about the agitation on board. At that point, the Libyan patrol boat was about an hour away from the Vos Triton, and only then did the MRCC tell the master to decide how best to handle the situation and that, if public-order issues arose, he could decide to sail to Italy. Shortly afterwards, the Zawiya reached the Vos Triton and took the shipwrecked people on board, transporting them to Tripoli.

Upon arrival at the port, the men were taken to the Garian detention centre where they were subjected to inhuman and degrading treatment.

THE LITIGATION

Thanks to the testimony and reconstruction work of Alarm Phone and Sea-Watch—essential allies in preparing the case—it was possible to reconstruct the facts, even though the full role of the Italian MRCC was not initially clear. Much information emerged during the proceedings and confirmed the reconstruction put forward by civil society organisations.

The work of JLProject made it possible to contact two people who had been pushed back, one in Libya and the other in Sudan, where he had been returned, and to build a relationship of trust that eventually led to the submission of visa applications.

One of the two applications, filed after the embassies refused to issue visas, is still pending. The issue of the power of attorney, signed via video call because the applicant was unable to reach a notary due to the ongoing conflict in Sudan, has been referred to the Court of Cassation.

In the second case, by contrast, the application lodged with the Rome Civil Tribunal, combined with a request for interim relief, sought a declaration of the applicant's right to be issued an entry visa for Italy, following a finding that the Italian Embassy in Tripoli had unlawfully refused it. The interim application was granted in November 2024. The court ordered the Ministry of Foreign Affairs and International Cooperation and the Italian Embassy in Tripoli "to urgently issue, within five days, an entry visa for humanitarian reasons, or otherwise to take appropriate measures to ensure the applicant's immediate entry into Italian territory."[57]

Italian jurisdiction and responsibility were recognised even though the events occurred in international waters and the vessels involved flew non-Italian flags. The Tribunal acknowledged the central role played by Italian authorities in organising the pushback and, consequently, their responsibility towards the applicant. In particular, it held that the acts and omissions of the Rome MRCC were sufficient to establish a "qualified relationship" between the applicant and Italy and thus "his right to a measure of reparation for the violations of his fundamental human rights resulting from Italy's conduct, in this case by allowing him to enter Italy."

A key part of the reasoning states that "it is abundantly clear, in light of the above, that the role played by Italian authorities in the events at issue—if not one of de facto

[57] https://www.asgi.it/sciabaca-oruka/vos-triton-italia-responsabile-respingimento-delegato-libia/

coordination, then certainly of support for the entire operation, in constant contact with the vessel that intervened and to which they gave instructions that were followed (including the instruction to stop sailing), fully aware that an overcrowded vessel was adrift on the high seas and that, if rescued by Libyan authorities, those on board would be taken back to Libya and exposed there to real risks to their life and safety—placed those authorities in a position of responsibility to ensure the rescue of all shipwrecked persons, including the applicant, from recovery at sea through to disembarkation in a place of safety, which Libya could not and cannot in any circumstances be considered."

The Tribunal also recognised that Italy bore positive obligations in the circumstances of the case: "Italian authorities had, ultimately, sufficient information and a sufficient degree of involvement to enable them to ensure the rescue of the shipwrecked persons, including the applicant, and to guarantee their disembarkation in a place where their lives would not be at risk. The international rules that Italy has undertaken to respect required them to act by all possible means to achieve this aim and to prevent refoulement to Libya. By failing to do so, as they did in this case, Italian authorities breached international law to the detriment of the applicant, at least by omission, and contributed to the unlawful pushback and the very serious abuses he suffered in Libya."

This decision is crucial, as it exposes the ongoing attempt by Italian authorities to act "on behalf of" Libya and shift civil and criminal responsibility for violations onto that State—a typical mechanism of externalization policies and at the core of the Italy–Libya Memorandum of February 2017.

Conclusions

Beyond Pushback Policies: Visas as a Tool for Global Justice and Compliance with International Obligations

The litigation developed so far has shown how entry visas can be an essential tool for building an alternative perspective on mobility: asserting the right to safe travel and to enter in order to seek protection makes it possible to expose State authorities' responsibility and to reconstruct their obligations to act protectively, in the Central Mediterranean and beyond.

In closing this guide, we would like to highlight the work carried out by groups of lawyers within ASGI on applications for entry visas by people from the Gaza Strip. In the exceptionally dramatic circumstances of the Israeli military offensive, a series of applications were filed to allow Palestinian families to escape the Strip.

The outcome of these actions is extremely interesting from a legal point of view.

The Rome Civil Tribunal ordered the issuance of an entry visa in order to access protection, as a measure that Italy is required to adopt in compliance with its obligations under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and Law No. 962 of 1967, adopted pursuant to Article 5 of the Convention, including the duties to prevent and punish genocide and to protect victims. According to the court, the situation in the Gaza Strip "imposes on the Italian State a reinforced obligation of means to take action to enable applications for the visas in question to be submitted and granted, and to actively engage through diplomatic channels to physically rescue and ensure the safety of the applicants."

In order No. 41193/2025, the Ordinary Tribunal held that, in the case at hand, compliance with the duty to protect occurs through issuing the visa: "The existence of such a stringent obligation eliminates any discretion in granting the visa, transforming the faculty to act into a true legal duty to protect the applicants," because "in the face of a risk of irreversible harm to life […] the failure to exercise the State's discretionary power translates into an omission that denies the protection owed and amounts to an indirect refoulement, in violation of the principle of non-refoulement and of the right to life (Article 2 ECHR)." Administrative discretion regarding visa issuance therefore falls away, since "non-derogable international obligations and supreme constitutional principles are at stake, which require the protection of fundamental rights."

Furthermore, unlike in the earlier cases discussed in this guide, the court ordered the administration to issue humanitarian visas under Article 25 of Regulation (EC) 810/2009 (the Schengen Visa Code), engaging in an extensive analysis of case law on the use of that provision and framing such visas as a

[58] Civil Court of Rome – Section for Individual Rights and Civil Immigration, Order No. 41193/2025 of 10 September 2025, available online: https://static-r.giuffre.it/EDITORIALI/127/4bis.Tribunale%20Roma_GAZA%20visti%20umanitari.pdf

necessary precondition for accessing the constitutionally protected right of asylum. In the cases discussed earlier, visas bore generic labels and the Tribunal had limited itself to ordering the Ministry to "adopt all acts deemed necessary to ensure the applicant's immediate entry into Italian territory" or the "issuance of an entry visa for humanitarian reasons."

These more recent examples clearly illustrate the potential of visas to reconnect the chain of State responsibilities, bringing States back to their obligations to protect and respect rights, and indicating, with clarity, the concrete steps required to make the rights enshrined in international and national instruments real and tangible.

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