



**Submission to the UN Special Rapporteur on the human rights of migrants’
report on pushback practices and their impact on the human rights of migrants**

Jointly submitted by

**The Irish Centre for Human Rights, National University of Ireland Galway and the
Global Legal Action Network**

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Introduction

1. The Irish Centre for Human Rights (ICHR) and the Global Legal Action Network (GLAN) welcome the Special Rapporteur's decision to allocate his forthcoming report to the human rights impact of pushback practices on migrants. We remain at the Special Rapporteur's disposal to present these issues orally should he require.
2. While pushback practices exist across the globe,¹ this submission focuses on the EU and its Member States' involvement in such practices at the external borders, particularly in the Mediterranean and in the Aegean Seas. Following the European Court of Human Rights' (ECtHR) ruling in *Hirsi Jamaa & Others v Italy*,² the EU and its Member States have moved beyond traditional pushback practices. Instead, they developed and implemented new policies, which nonetheless result in asylum-seekers and other migrants being summarily forced back to the country from where they attempted to reach Europe, without an individual assessment of international protection and human rights claims.³

Migration and financial cooperation to implement illegal pushbacks

3. While most pushback practices are developed and implemented in a legal *vacuum*, certain EU Member States have signed Memoranda of Understanding (MoU) establishing co-operation frameworks on 'combatting illegal immigration' – including the 2017 MoU between Italy and Libya, renewed in February 2020.⁴ The MoU is part of a longer history of European support to the LYCG, at sea and on land. The Rapporteur has previously held that the border control strategies enabled through co-operation between Italy and Libya amount to illegal pushbacks. Member States have benefited from political support under the Malta Declaration,⁵ as well as opaque and unaccountable financial support through illegally disbursed development funds for quasi-military purposes and mismanages them with serious consequences to human rights protection.⁶

¹ Violeta Moreno-Lax and Efthymios Papastavridis (eds), *Boat Refugees' and Migrants at Sea* (Brill 2016); Bríd Ní Ghráinne, 'Left to Die at Sea: State Responsibility for the May 2015 Thai, Indonesian, and Malaysian Pushback Operations' (2015) 10 Irish Yearbook of International Law 109.

² [Hirsi Jamaa and Others v Italy](#) App No 27765/09 (ECtHR GC, 23 February 2012).

³ Violeta Moreno-Lax, '[Protection at Sea and the Denial of Asylum](#)' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford: Oxford University Press, Forthcoming), 2.

⁴ The renewal was met with widespread criticism, see Yasha Maccanico, '[Italy renews Memorandum with Libya, as evidence of a secret Malta-Libya deal surfaces](#)' (Statewatch, March 2020). In May 2020, Malta signed a similar MoU with Libya on combatting illegal migration, '[Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combatting Illegal Immigration](#)' (adopted 28 May 2020).

⁵ Council of the European Union, '[Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route](#)' (3 February 2017), para 6(j). See also ARCI, '[Steps in the process of externalisation of border controls to Africa, from the Valletta Summit to today](#)' (2016).

⁶ See [GLAN et al's complaint](#), supporting expert legal opinion, and NGO coalition statement on the EU's financial complicity in illegal pushbacks.

Pushbacks by proxy

4. Following the signing of the 2017 MoU, Italy intensified capacity-building programmes for the LYCG.⁷ In addition, Italy obtained EU funding for border management and migration control in Libya, which includes strengthening authorities' capacity in maritime surveillance and rescue at sea.⁸ On the basis of this cooperation, Libya was able to notify the designation of its SAR region to the International Maritime Organization (IMO).⁹ The EU and Italian funding of the LYCG has led to a situation whereby the LYCG would not be able to exist, nor to function, without such support. Against this background, instances of 'contactless' interception and pushback of migrants, although 'exercised through remote management techniques and/or in cooperation with a local administration acting as a proxy,'¹⁰ may nonetheless engage the coordinating State's human rights obligations through a functional approach to jurisdiction.
5. The case of *S.S. and Ors v Italy*¹¹ concerns the LYCG interception/rescue of a migrant dinghy on the high seas on November 5, 2017. The LYCG was, at that point, still far from being fully operational, incapable of operating at a self-sustaining level, and still needing further sustainment, including in operational terms. As the LYCG was lacking effective and reliable communication systems, which hampered its capacity for the minimum level of execution of command and control, including that necessary to coordinate SAR/SOLAS events, it was Italy that secured these necessary functions. The case 'offers a paradigmatic example of the kind of policy and operational control that portrays the functional approach to jurisdiction [as] it entails a series of elements characteristic of public powers that are exercised by the Italian State—both territorially and extraterritorially; both directly and through the intermediation of the LYCG—that taken together generate overall effective control.'¹²

Constructive *refoulement*: Prosecution and criminalisation of SAR NGOs to diminish their capacity to conduct rescue at sea

6. There is a causal link between the shrinking space for solidarity with migrants and conditions conducive to constructed *refoulement*. State efforts to oust humanitarian organisations from the Mediterranean by criminalising those engaged in SAR activities,

⁷ Including the provision of €2.5 million for the maintenance of Libyan boats and the training of their crews.

⁸ EU Commission, '[EU Trust Fund for Africa Adopts €46 Million Programme to Support Integrated Migration and Border Management in Libya](#)' (July 28, 2017).

⁹ See [IMO COMSAR](#).

¹⁰ Violeta Moreno-Lax, '[The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the “Operational Model”](#)' (2020) German Law Journal 21, 389.

¹¹ Currently pending before the ECtHR. A detailed account of the subject of *S.S. and Ors v. Italy* is well documented by [Forensic Oceanography](#).

¹² Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the “Operational Model”' (2020) pp. 404-405.

and thereby preventing them from operating, are detrimental to the rights of migrants. These efforts have most notably included charges against SAR NGOs related to human smuggling.¹³ Bureaucratic obstacles have also been used to target such organisations in order to impede their work.¹⁴ In Italy, a code of conduct imposed on SAR NGOs in 2017 impedes their operational capabilities and undermines humanitarian principles such as impartiality and neutrality.¹⁵ The net effect of such criminalisation is the elimination of humanitarian search and rescue activities from the Mediterranean, rendering migrants *de facto* ‘rightless’,¹⁶ further exposed to preventable death, and depriving them from protection against *refoulement*.

7. At stake are also the civil and political rights of those practicing solidarity with migrants, including those providing lifesaving assistance, who have been detained on oftentimes baseless charges.¹⁷ This is exemplified by the complaint filed at the ECtHR on behalf of Salam Kamal-Aldeen, founder of the non-profit Team Humanity.¹⁸ The case concerns the ‘persecution by prosecution’ of humanitarian workers, who were arrested and charged with attempted smuggling, stood trial and were acquitted only following a two-and-a-half-year legal ordeal. The case challenges the reliance by Greece on sanctions and anti-smuggling regulations, including the EU Facilitation Directive,¹⁹ to bring solidarity-based humanitarian action to a halt, and it exposes the illegality of the crackdown on human rights defenders working to render assistance to persons in distress at sea.

The weaponisation of life-saving equipment for pushbacks

8. In a pattern of pushbacks widely documented across the Aegean since March 2020, asylum-seekers attempting to apply for protection in Greece are taken on board Hellenic Coast Guard (HCG) vessels and forcibly transferred into inflatable, non-navigable life-rafts and left to drift at sea.²⁰ The now systematic practice risks violating, *inter alia*, the principle of non-*refoulement* and the prohibition on torture and other forms of cruel,

¹³ Eugenio Cusumano and Matteo Villa, ‘From “Angels” to “Vice Smugglers”’: The Criminalization of Sea Rescue NGOs in Italy’ [2020] Eur J Crim Policy Res.

¹⁴ [‘Mare Liberum: Human Rights Monitoring at Peril in the Aegean’](#) (SAROBMED).

¹⁵ Eugenio Cusumano, ‘Straightjacketing Migrant Rescuers? The Code of Conduct on Maritime NGOs’ (2019) 24 Mediterranean Politics 106.

¹⁶ Itamar Mann, ‘Maritime Legal Black Holes: Migration and Rightlessness in International Law’ (2018) European Journal of International Law 29(2): 347–372.

¹⁷ Itamar Mann, ‘The Right to Perform Rescue at Sea: Jurisprudence and Drowning’ (2020) German Law Journal 21(3): 598-619; [‘Greece: Rescuers at Sea Face Baseless Accusations’](#) (Human Rights Watch, 5 November 2018).

¹⁸ See GLAN, [Salam Aldeen](#).

¹⁹ European Parliament, [‘Fit for Purpose?’ The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants’](#), 2018 Update.

²⁰ [‘Greece: Investigate Pushbacks, Collective Expulsions’](#) (Human Rights Watch, 16 July 2020); Just Niamh Keady-Tabbal and Itamar Mann, [Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations](#) (Just Security, 22 May 2020); [‘Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea’](#) (The New York Times, 4 August 2020); [‘UNHCR Concerned by Pushback Reports, Calls for Protection of Refugees and Asylum-Seekers’](#) (UNHCR Greece, 21 August 2020).

inhuman and degrading treatment.²¹ Asylum-seekers are subject to these expulsions either after being intercepted by HCG assets in Greek territorial waters or, once apprehended by Greek law enforcement officials following their arrival on Greek islands. In the latter case, asylum-seekers are arbitrarily detained in unofficial detention sites in inhuman and degrading conditions, deprived of adequate food and water, medical assistance and denied access to legal assistance or information, prior to their expulsion.²² These expulsions are carried out without any assessment of the migrants' identity nor their individual protection needs.

9. The case of *A.N. v Greece*,²³ concerning a maritime expulsion near Samos, illustrates the consequences of these violent and life-threatening pushback practices on the human rights of migrants seeking international protection. The applicant was denied his right to seek asylum, and exposed to the risk of chain *refoulement*.²⁴ During and as a result of the pushback operation, he was deliberately subjected to severe 'mental and physical suffering',²⁵ amounting to torture. The dinghy the applicant was travelling on was intercepted by the HCG, who proceeded to disable the craft's motor. The applicant and those with him were taken onto a HCG vessel where they were beaten and had their personal belongings confiscated by Greek officials. This case is reflective of a systematic asylum-seeker 'deterrence' policy, employed to intimidate and coerce—including by means of physical force—for the specific purpose of expelling the asylum-seekers and 'sending a message' to intimidate and thus deter migrants from seeking asylum in Greece.²⁶

²¹ ['Torture by Rescue: Asylum-Seeker Pushbacks in the Aegean'](#) (*Just Security*, 26 October 2020).

²² [Collective Expulsions Documented in the Aegean Sea](#) (*Legal Centre Lesbos*, 13 July 2020).

²³ The submission raises violations of Article 2 (Right to life), Article 3 (Prohibition of torture) and Article 13 (Right to an effective remedy) of the European Convention on Human Rights; ['Videos and Eyewitness Accounts: Greece Apparently Abandoning Refugees at Sea'](#) (*Der Spiegel*, 16 June 2020).

²⁴ *Ilias and Ahmed v. Hungary*, 14 March 2017 no. 47287/15 § 115; *M.S.S. v. Belgium and Greece*, 21 January 2011, no 30696/09, § 366.

²⁵ *Ireland v. The United Kingdom*, 5310/71, 13 December 1977, § 167.

²⁶ In March, Greek Prime Minister, Kyriakos Mitsotakis, publicly addressed asylum seekers, stating: "Once again, do not attempt to enter Greece, you will be turned back." Webteam, ['Statements by Prime Minister Kyriakos Mitsotakis in Kastanies, Evros, Following His Visit with the Heads of the EU Institutions at the Greek-Turkish Border'](#) (*Ο Πρωθυπουργός της Ελληνικής Δημοκρατίας*, 3 March 2020).

Collective expulsions as systemic discrimination

10. Migrants who arrive in Greece to seek international protection, as well as migrants who already have international protection, are regularly apprehended in public spaces in the geographically vast Evros region near Greece's north-eastern border. *F.A.J. v Greece*, submitted to the UN Human Rights Committee (HRC), concerns Greece's unlawful expulsion to Turkey of a Syrian refugee.²⁷ Mr FAJ, who had received refugee status from Germany in 2015, travelled lawfully to Greece in November of 2016 to search for his missing 11-year-old brother. He was apprehended at a bus station by Greek police on the basis of his origin and looks, stripped of his belongings, including his German residency document, arbitrarily detained incommunicado for hours, and proceeded to be summarily expelled to Turkey the same night.²⁸ Mr FAJ's nationality was the decisive grounds for his arrest. The Greek police's acts of racial profiling and racial discrimination are what commenced his arbitrary arrest, detention and expulsion.²⁹
11. Mr FAJ is only one of several known Syrian individuals whom Greek police apprehended, detained and expelled to Turkey across the Evros-Meriç River despite being a recognized refugee in the EU and in possession of a German residency permit. For example, in 2017, another Syrian refugee with German refugee status travelled to Greece to meet his relative, where he was arrested on the street by Greek officials, stripped of his German documentation, and summarily expelled across the Evros at night with around 40 other people, at least one of whom was also another holder of German residency and EU refugee status.³⁰
12. Greek authorities have denied the occurrence of all pushbacks, let alone their racial motivation. Hellenic border forces engage an unofficial policy that has no institutional trail, and resultantly blocks all prospect of remedies and accountability by administrative

²⁷ *FAJ v. Greece*, Individual complaint submitted to the United Nations Human Rights Committee (2020). See also Forensic Architecture, '[Pushbacks Across the Evros/Meric River: Situated Testimony](#)' (2020); Katy Fallon, '[Greece faces legal action over alleged expulsion of Syrian to Turkey](#)' (*The Guardian*, 17 November 2020).

²⁸ See UN, '[Preventing and Countering Racial Profiling of People of African Descent: Good Practices And Challenges](#)' (2019): "Racial profiling refers to the process by which law enforcement relies on generalizations based on race, colour, descent or national or ethnic origin, rather than objective evidence or individual behaviour, to subject people to stops, detailed searches, identity checks and investigations, or for deciding that an individual was engaged in criminal activity."

²⁹ Discriminatory intent is not required for establishing discrimination: discrimination may be found in both purpose and effect. See UN Human Rights Committee (HRC), '[CCPR General Comment No. 18: Non-discrimination](#)' (10 November 1989), citing Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination. See also *Lecraft v Spain* (1493/06), finding a violation of ICCPR Article 26, read in conjunction with Article 2, where the Human Rights Committee concluded that "the author was singled out for the identity check in question solely on the ground of her racial characteristics and that these characteristics were the decisive factor in her being suspected of unlawful conduct," with the Spanish police failing to meet requirements of "reasonableness and objectivity."

³⁰ Dimitris Angelidis, '[Επαναπροώθηση χωρίς... εισιτήριο](#)' (19 October 2017).

and criminal courts, thus shielding state officials from racist crimes.³¹ Greek police have a long practice of dismissing and obstructing complaints by foreign nationals that institutionalise racial discrimination.³² The structural racial discrimination exemplified by Greece's practice of racial profiling to target individuals for pushbacks is an aggravated systemic violation of the peremptory international prohibition on racial discrimination.³³

Pushbacks as enforced disappearances of migrants

13. The Greek authorities continuously implemented a systematized practice of deprivation of liberty, followed by repeated denial of and refusal to acknowledge such deprivations of freedom, and the concealment and refusal to investigate the fate and whereabouts of those whom they summarily expelled to Turkey. Pushbacks like that of Mr FAJ are to be properly understood as enforced disappearances under international law,³⁴ in the context of which individuals are expelled, often collectively, following their incommunicado arrest and detention, and then deprived of the protection of their human rights in the EU through clandestine re-expulsion from the territory, thus resulting in the violation of several substantive and procedural ICCPR rights through the removal of the victim's protection from the law.³⁵
14. The Greek police, acting as authorized agents of the State, excluded Mr FAJ from the protection of the law by holding him in an unofficial detention centre without access to legal counsel or the outside world. In confiscating Mr FAJ's documentation before expelling him, the Greek authorities in effect deprived him of international protection for the entire three years that then elapsed before the German authorities reissued his legal documents. For a person like Mr FAJ whose own country has become a source of persecution rather than protection, the stripping of refugee status is analogous to the stripping of nationality. Having been expelled to Turkey without documentation, and being denied assistance by the German Embassy, Mr FAJ reattempted entry into Greece 14 times over the course of the following year, and was continually subjected to further summary expulsions by Greek authorities, which maintained his exclusion from protection by the

³¹ See Racist Violence Recording Network, [Annual Report 2018](#); Racist Violence Recording Network, [Annual Report 2016](#).

³² *Ibid.* See also, ECtHR, *Sakir v Greece*, Application No 48475/09, judgment of 24 June 2016, paras 70-72.

³³ Similarly, Croatian police highlighted the role of racial profiling in their pushback practices in December 2019, when two Nigerian students, lawfully present in Croatia with visas, were racially profiled by police on the streets of Zagreb, arbitrarily arrested and summarily expelled at gunpoint into Bosnia and Herzegovina without cause. Lorenzo Tondo, '[Croatia police criticised for attacking refugees at border](#)' (*The Guardian*, 13 December 2019); Zoran Arbutina, '[Nigerian students experience a nightmare in Croatia](#)' (*Deutsche Welle*, 07 December 2019); '[Nigerian table tennis players home from Bosnia camp](#)' (*BBC*, 21 December 2019).

³⁴ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 Dec. 2006, entered into force 23 Dec. 2010) 2716 UNTS 3 (ICPPED), Article 2; Rome Statute of the International Criminal Court, Article 7, paragraph 2 (i).

³⁵ See, for example, *Boucherf v Algeria* (1196/2003), para 9.2; *Sharma v Nepal* (1469/06), para 7.4; *Sarma v. Sri Lanka* (950/00), para. 9.3. See also General Comment No 36, Right to life, para 8.

law. Following his successful crossing, he remained in Greece for two years before the German authorities finally reissued his documents and allowed him to return to Germany.

15. Greece's deprivation of Mr FAJ's liberty fulfils the criteria of an enforced disappearance for removing him from the protection of the law through arbitrary detention for the remainder of his time in Greek territory, and proceeding to prevent him from formally re-entering the EU. FAJ's exclusion from EU legal status was perpetuated by his repeated summary expulsion as he continued to attempt re-entry into European jurisdiction.

Private *refoulement*: The use of private merchant vessels to perform interdictions

16. Due to the increasing reliance on constructive *refoulement* and on interdiction by omission,³⁶ seafarers are being compelled to take responsibility for the rescue of migrants and make risky choices of their own – choices that may lead them to act illegally, not to mention bearing the costs of imposing border control.³⁷ Although the role of merchant ships had already become relevant in 2014, where they were increasingly called upon to support the response to the large scale migrant crossings registered in that period, the new rise in their mobilisation differs substantially from the previous one in purpose and effect. Merchant ships, rather than being called upon to perform rescue, are strategically mobilised for interdiction and *refoulement*. This policy threatens to annul fundamental rules of public international law, such as the *jus cogens* norm of *non-refoulement*, as well as the principle of disembarkation in a place of safety, recognised under customary norms of the law of the sea.
17. The *Nivin* incident, which led to the submission of the individual complaint of *SDG v Italy* to the UN HRC, is the quintessential example of this development in the externalisation of border control and of this new modality of delegated containment of migrants.³⁸ The case concerns a privatised pushback operation carried out in November 2018. In the course of the operation, MRCC Rome directed a Panamanian merchant vessel, the *Nivin*, to rescue, or arguably to intercept, a migrant boat adrift on the high seas in the Central Mediterranean, and to liaise thereafter with the so-called LYCG *through* the Italian MRCC. As a result of this operation, many of the 93 survivors were prevented from escaping Libya, where they had suffered torture and abuse, and were exposed to, *inter alia*, arbitrary detention, forced labour, and inhuman and degrading treatment. In light of General Comment No. 36, the conduct of Italian authorities, including their coordination with and 'on behalf of' the LYCG of the *Nivin*, instructing it to intercept and disembark Mr SDG and his fellow

³⁶ Moreno-Lax, Violeta, '[Protection at Sea and the Denial of Asylum](#)' (2020), in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford: Oxford University Press, Forthcoming).

³⁷ See e.g. Cusumano, Eugenio, "Migrant Rescue as Organized Hypocrisy: EU Maritime Missions Offshore Libya between Humanitarianism and Border Control" (2019), *Cooperation and Conflict* 54(1): 3–24.

³⁸ *SDG v. Italy*, Individual complaint submitted to the United Nations Human Rights Committee (2019). See also Forensic Oceanography, '[The Nivin case: Migrants' resistance to Italy's strategy of privatized push-back](#)' (2019).

survivors in Libya, had major effects on the right to life of the individuals concerned, in a direct and foreseeable manner, such as to engage the responsibility of Italy under the ICCPR.

Aerial *refoulement*: The use of aerial assets, including drones, to assist and direct interdictions by non-EU actors

18. The *Nivin* incident also highlights another key development with respect to the modalities in which *refoulement* is being delegated, or operationalised through ‘contactless’ measures. Indeed, it was a Spanish surveillance aircraft operating within the Italian-coordinated EUNAVFOR MED that first sighted the migrants’ boat, and passed the information on to the Italian MRCC, which in turn relayed the information to the LYCG, to conclude their interception and push-back by proxy. This is not a novel practice, as the increasing retreat of EUNAVFOR MED naval assets into a second line, and the use of air assets as a front line of early detection to enable LYCG interceptions, has been recorded as early as the summer of 2017.³⁹ However, it has now been established as the norm. In a letter addressed to Frontex Executive Director, the European Commission Director-General for Migration and Home Affairs confirms that ‘many of the recent sightings of migrants in the Libyan SRR have been provided by aerial assets of EUNAVFOR MED and were notified directly to the Libyan RCC responsible for its own region.’⁴⁰ Yet, the Commission and Frontex did not express concerns with respect to how this procedure facilitates *refoulement*, impedes access to asylum and exposes migrants to abuse by the LYCG.

³⁹ Forensic Oceanography, ‘The *Nivin* case: Migrants’ resistance to Italy’s strategy of privatized push-back’ (2019).

⁴⁰ See [Letter of Director-General for Migration and Home Affairs to Frontex Executive Director, Ref. Ares\(2019\)1755075](#), 18 March 2019, pp. 46-47. See also European Parliament, Policy Department for External Relations Directorate General for External Policies of the Union, ‘[EU External Migration Policy and the Protection of Human Rights](#)’ (2020).