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Litigation Strategies in the Mediterranean Sea: Analysis of Cases on Search and Rescue Joint Operations before the International Courts

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Abstract

In this paper, we analyse the phenomenon of designing a litigation strategy. To do this, we study the case of search and rescue operations in the Mediterranean. In particular, we observe how teams of lawyers (supported by foundations and private donations) are trying to challenge EU immigration policies by developing different litigation strategies before the main international courts. To this end, we examine cases before the International Criminal Court, the European Court of Human Rights, and, more recently, the Court of Justice of the European Union (CJEU). By providing pro bono legal advice and representation to individual and organizational victims of EU migration policies, these law firms aim to change EU migration policies, provide redress to victims and hold to account those considered responsible.

Keywords: Strategic litigation, EU migration policies, search and rescue operations, Frontex, International Criminal Court (ICC), European Court of Human Rights (ECtHR), Court of Justice of the European Union (CJEU).

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1. Introduction

Maritime safety is regulated by a number of international treaties and agreements, which aim to prevent and reduce marine pollution¹, set standards for the training and certification of seafarers², establish safety standards for fishing vessels³, regulate the marking and construction of ships⁴, and ensure the safe handling and transport of containers⁵. In addition to these treaties, UNCLOS⁶ and IMO⁷ Conventions are particularly relevant in the context of migration as they provide a legal framework

1 International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) (MARPOL).

2 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (adopted 7 July 1978, entered into force 28 April 1984) (STCW).

3 International Convention for the Safety of Fishing Vessels (adopted 11 June 1977, entered into force 12 September 1994) (SFV).

4 International Convention on Load Lines (adopted 5 April 1966, entered into force 21 July 1968) (LL).

5 International Convention for Safe Containers (adopted 2 December 1972, entered into force 6 September 1977) (CSC).

6 United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

7 International Maritime Organization, Convention on the International Maritime Organization (adopted 6 March 1948, entered into force 17 March 1958).



for the interception of migrants at sea, while also ensuring the safety and security of both migrants and those involved in migration operations, including commercial and humanitarian ships. These international legal frameworks help to ensure that maritime operations are conducted in a safe, legal, and responsible manner, while also protecting the human rights and dignity of migrants.⁸

The origins of the European Union's (EU) external migration policy can be traced back to the creation of a high-level group on 'migration and asylum' by the Council of the European Union in December 1998. The group's mandate was to develop action plans for some main countries of origin or transit of asylum seekers and migrants. In 1999, the Tampere Council welcomed the group's proposals to combat irregular immigration, including the establishment of systems to detect false documents, the sending of European liaison officers to countries of departure or transit, and the signing of readmission agreements. These proposals were considered useful tools 'to fight against the reasons for immigration and refugee flows' and 'to help reduce migratory tensions'.

The integration of immigration policy into the EU's relations with third countries was also on the agenda of the Seville European Council (2002). As a result, all future cooperation or association agreements signed between the EU and third countries were required to include a mandatory readmission clause in the case of illegal immigration. Furthermore, the Hague Programme, entitled 'Strengthening freedom, security, and justice in the European Union', formalizes and reinforces this dynamic, including the external dimension of migration policy.⁹

The Hague Programme was adopted by the European Council in Brussels on 4 and 5 November 2004. It structures European migration policy into two parts: on the one hand, 'ad intra', which refers to the establishment of a foreign asylum and immigration policy, and, on the other, 'ad extra', which involves the export of some migratory controls to the territory of third countries and the transfer to third countries of some responsibilities in terms of asylum and border control. Therefore, three dynamics are combined: first, extraterritoriality (migration controls beyond the borders of the Member States); second, cooperation (the conclusion of agreements with and deployment of liaison agents in so-called sensitive third countries); and third, privatization (in the absence of an adequate public maritime search and rescue service, this activity is privatized, mainly on the basis of interventions by commercial and humanitarian ships).

The interception operations carried out by the EU are essentially extraterritorial¹⁰, since their aim is to arrest undocumented persons before they reach European territory. Hence, they can only be undertaken in two areas: on the high seas or in the territory of a third country. Having said that, it is

8 In the context of migration, these international legal frameworks are crucial for ensuring the safety and protection of migrants at sea. UNCLOS provides a legal basis for interception operations, but also establishes the obligation of the intercepting state to respect the human rights of the intercepted migrants, including the right to seek asylum. The IMO Conventions and protocols, on the other hand, provide the necessary guidance and regulations for ensuring the safety and security of both migrants and those involved in migration operations, including commercial and humanitarian ships. These frameworks help to ensure that migration operations at sea are conducted in a safe, legal, and responsible manner, while also protecting the human rights and dignity of migrants.

9 The Hague Programme: strengthening freedom, security and justice in the European Union [2005] OJ C 53/1.

10 Lisa Heschl, *Protecting the Rights of Refugees Beyond European Borders: Establishing Extraterritorial Legal Responsibilities* (1st published, Intersentia 2018) 141.



necessary to identify the legal basis of these operations. In fact, if the interception takes place on the high seas, the absence of a legal basis would not be sufficient to declare the procedure illegal.

However, this absence could have repercussions and lead to the liability of the intercepting European state if there is a violation of the intercepted migrants' fundamental rights. In this case, the plaintiffs would be obliged to demonstrate that there was 'effective control' by the state authorities, which is particularly complex in those cases where there was no physical contact between the applicants and the agents of the intercepting state. If the interception is accomplished in the territory of a third country, we must study the bilateral agreements between the Member State and the third country or the agreements that directly link the European Union with the third country. We should also note that Frontex has the legal capacity to enter into agreements directly with third countries to enhance the operational cooperation in joint operations.¹¹

2. The assignment of roles in a SAR operation

A search and rescue operation (also called a SAR operation) assists people in a situation of danger at sea, regardless of their nationality, the state in which they are located, or their circumstances, under international law and the maritime conventions. Additionally, in the European Union context, the Member States' SAR operations must comply with the primary law provisions (Treaty of the European Union, Treaty on the Functioning of the European Union, and Charter of Fundamental Rights),¹² and respect the obligations derived from secondary legislation created by the different EU institutions.¹³ Finally, a SAR operation must respect all the rights and freedoms derived from the territorial application of the European Convention on Human Rights (which can be applied extraterritorially to specific and assessed cases).¹⁴

The Schengen Borders Code¹⁵ stipulates that entry to the territories of the Member States will be refused to third country nationals who do not fulfil all the entry conditions. In such cases, the authorities must issue a decision stating the precise reasons for the refusal, without prejudice to the special provisions concerning the right to asylum and international protection. Moreover, Member States may decide not to apply the Return Directive¹⁶ to third-country nationals who are subject to such a

11 To date (October 2022), Frontex has signed at least seventeen agreements with third countries (Albania, Armenia, Azerbaijan, Belarus, Bosnia, Canada, Cape Verde, Georgia, Macedonia, Moldova, Montenegro, Nigeria, Russia, Serbia, Turkey, Ukraine, and the United States of America), and two agreements with regional organizations whose members are third countries (the Coordination Service of the CIS Border Commandants' Council and MARRI).

12 Article 78 of the Treaty on the Functioning of the European Union and Articles 18 and 19 of the EU Charter of Fundamental Rights.

13 Inter alia, Directive 2008/115/EC on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L348/98 sets out the standards and procedures governing the return of such nationals 'under fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.

14 In particular, as we will see in greater detail in subsequent sections, Article 4 of Protocol 4 to the European Convention on Human Rights formally prohibits the 'collective expulsions of aliens of the kind who were a matter of recent history'.

15 Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77/1.

16 Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.



refusal of entry. The Return Directive can also be applied to third-country nationals who are intercepted in connection with the irregular crossing of the external border of a Member State and who have not subsequently obtained authorization or a right to stay in that Member State. In such cases, Member States may apply simplified national return procedures but must comply with the conditions laid down in Article 4(4) of the Return Directive, including the principle of non-refoulement.

Regulation no. 656/2014 (also known as the Sea Borders Regulation)¹⁷ governs the surveillance of external sea borders by EU Member States within the context of operational cooperation with Frontex. Article 4 of this Regulation ensures the protection of fundamental rights and the principle of non-refoulement. According to Article 4(3), before any rescued person is disembarked into, forced to enter, conducted to, or otherwise handed over to the authorities of a third country, the Frontex operation must conduct a case-by-case assessment of their circumstances and provide information on their destination. The rescued persons must also be allowed 'to express any reasons for believing that disembarkation in the proposed place would violate the principle of non-refoulement'.

Theoretically, border control is an exclusive competence of the Member States.¹⁸ This argument has served to limit the liability of the high authorities to the mere planning of the European Union's migration policies, and to delimit the operational role of Frontex in the coordination of teams and additional experts in those border areas that are under significant pressure.¹⁹

Thus, in a joint operation, a whole series of actors can be involved, ultimately coordinated under the supervision of the Frontex Executive Director: first, there are border guards seconded by the Member States; secondly, there are Member State border guards hosting the operation; thirdly, there are border guards seconded by the Member States who have temporarily joined the Frontex staff; and finally, Frontex has its own uniformed service.²⁰ Regarding these 'official actors', we must add the usual presence of Non-governmental organizations' (NGO) humanitarian aid ships and boats. After the process of 'crim-

17 Regulation (EU) establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ L189/93.

18 The EU and its agencies have no mandate to conduct SAR operations, as this remains a competence of the Member States. The Regulation constrains Frontex's actions by establishing that 'under Union law and those instruments, the Agency should assist Member States in conducting search and rescue operations to protect and save lives whenever and wherever required'. The Agency must also set up an independent and effective complaints mechanism to monitor and ensure respect for fundamental rights in all its activities. It must also suspend or terminate any (funding of) activities when serious or persisting violations occur.

19 In SAR operations, Regulation (EU) No 2019/1896 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and No 2016/1624 [2019] OJ L295/1 enshrines Frontex's role. This Regulation also applies to operations launched and carried out under Regulation (EU) No 656/2014 establishing Rules for the Surveillance of the External Sea Borders in the Context of Operational Cooperation Coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2014] OJ L189/93 and international law. These operations occur in situations that may arise during border surveillance operations at sea. In these circumstances, Frontex must provide Member States and non-EU countries with technical and operational assistance in support of SAR operations.

20 SAR is a specific objective of the operational plan of every Frontex joint maritime operation. For this reason, vessels deployed by Frontex to an operational area should be ready to provide national authorities with support in SAR operations. It is important to underline that SAR operations are always coordinated by the national rescue and coordination centres (RCC). The RCC orders those vessels that are the closest to the incident or the most capable to assist in the rescue. These vessels may include national commercial or military vessels, vessels deployed by Frontex, private boats, and others.



inalization' that they have experienced in recent years,²¹ they tend to remain in the background and/or to follow the coastguard's orders under the coordination of Frontex. Otherwise, they could face arrest and proceedings before the judicial authorities of the Member State leading the joint operation.

These joint Frontex operations are planned and developed based on annual risk analysis reports that analyse the likely future risk of irregular migration and cross-border crime along the external border of the European Union²². Throughout the year, the competent authorities of the Member States hold a series of meetings at which joint operations are prioritized based on their importance and the resources available to guarantee an effective response. In this way, Frontex consults the representatives in each Member State and assesses the number of experienced officers and the amount and type of technical equipment required. Frontex then sends a request to all Member States and Schengen Associated Countries requesting a certain number of agents, indicating their specific profile and the equipment needed for the operation. Each state must then assess its contribution to the start and/or maintenance of the mission and the extent of that contribution.

Each joint operation has an operational plan, which details the numbers and types of technical and official teams participating. Many procedures require the deployment of interrogation officers, who conduct interviews with immigrants and migrants to gather information about human smuggling networks. At this stage, the border guards and the technical team are deployed in the operational area to carry out their duties under the operational plan. Deployed officers (known as guest officers) work under the command and control of the authorities of the host country of the operation. During deployment, guest officers can perform all the tasks and powers of border control and border surveillance under the Schengen Borders Code. These tasks include, *inter alia*, border controls, border surveillance, interviewing undocumented persons, and consulting databases²³.

All officers deployed in agency-coordinated operations are bound by the Frontex Code of Conduct,²⁴ including in missions outside the EU territory. This Code of Conduct includes specific provisions on respect for fundamental rights and the right to international protection. Likewise, it establishes a set of rules of behaviour to be followed by all personnel involved in a Frontex joint operation. However (as we will see in the following sections), an ethical problem arises when Frontex coastguards delegate their responsibilities to guards from third states, who are not bound by the said Code of Conduct.

21 There is a causal link between the shrinking space for solidarity with migrants and the conditions conducive to constructive refoulement. State efforts to oust humanitarian organizations from the Mediterranean by criminalizing those engaged in SAR activities, and thereby to prevent them from operating, are detrimental to the rights of migrants. These efforts have most notably included charges against SAR NGOs related to human smuggling. We have also verified the use of bureaucratic obstacles to target such organizations to impede their work. In Italy, a code of conduct imposed on SAR NGOs in 2017 hinders their operational capabilities and undermines humanitarian principles such as impartiality and neutrality. The net effect of such criminalization is the elimination of humanitarian search and rescue activities from the Mediterranean, rendering migrants *de facto* rightless (further exposed to preventable death) and preventing them from protection against refoulement.

22 Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (1st edn, Cambridge University Press 2016) 205.

23 Bas Schotel, 'EU Operational Powers and Legal Protection: A Legal Theory Perspective on the Operational Powers of the European Border and Coast Guard' (2021) 22 *German Law Journal* 625.

24 European Border and Coast Guard Agency (Frontex), *Code of Conduct applicable to all persons participating in frontex operational activities*, 2020.



3. Evolving form(s) of refoulement at EU maritime borders

The traditional refoulement phenomenon (that of pushback practices) consists of ‘various measures taken by States which result in migrants, including asylum seekers, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied of [sic] any individual assessment of their protection needs which may lead to a violation of the principle of non-refoulement’.²⁵

This type of state measure lead to a doctrinal debate. On the one hand, following Seline Trevisanut’s line of thought,²⁶ some authors support the application of border control measures (regardless of where they occur). On the other hand, the majority position within academia is that the non-refoulement principle must be applied to all actions of states, both on land borders and in maritime areas, including on the high seas. As a result of adopting one or other of these positions, the state(s) in question will consider the (greater or lesser) extension of its human rights obligations towards those persons who are within its (effective) jurisdiction.

Unfortunately, all these phenomena (in praxis) have resulted in European Union Member States not offering their support to those that are on the front line²⁷. As a result, some EU countries (e.g., Italy²⁸, Greece, and Malta) have extended their protection of their ‘own’ external borders, focusing their efforts on developing cooperation with third countries (mainly Libya and Turkey). So, while most pushback practices are developed and implemented in a legal vacuum, these EU Member States have signed memoranda of understanding (MoUs)²⁹ establishing cooperation frameworks under the pretext of ‘combating illegal immigration’. Among these MoUs are the 2017 memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking, and fuel smuggling, and reinforcing the security of borders between the State of Libya and the Italian Republic, which was renewed in February 2020.

Following the signing of the 2017 MoU, Italy intensified its capacity-building programmes for the so-called Libyan Coast Guard (LYCG). In addition, Italy obtained EU funding for border management and migration control in Libya, which includes strengthening the capacity of the authorities in maritime surveillance and rescue at sea. Based on this cooperation, Libya was able to notify the designation of its SAR region to the International Maritime Organization (IMO). The EU and Italian funding of the LYCG has led to a situation in which the LYCG would not be able to exist functionally

²⁵ There is no internationally agreed definition of the term ‘pushback’ in the migration area. This definition is taken from the United Nations Human Rights Office of the High Commissioner’s *Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea* (12 May 2021) A/HRC/47/30.

²⁶ Seline Trevisanut, ‘The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea’ (2014) 27 *Leiden Journal of International Law* 661.

²⁷ Francesca Ippolito and Seline Trevisanut (eds), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press 2016).

²⁸ Francesca Cimino, ‘Human Rights Implications for Vulnerable Migrants in Light of the EU and Italian Migration Policies’ in Philip Czech and others (eds), *European Yearbook on Human Rights* (Intersentia 2019).

²⁹ Zakariya El Zaidy, ‘EU Migration Policy Towards Libya. A Libyan Perspective on the Memorandum of Understanding between Italy and Libya’ (2017) *Friedrich Ebert Stiftung* 1, 11.



without such support. Against this background, instances of the ‘contactless’ interception and push-back of migrants, although ‘exercised through remote management techniques and/or in cooperation with a local administration acting as a *proxy*,³⁰ may nonetheless engage the coordinating state’s human rights obligations in a functional approach to jurisdiction.³¹

These collaboration policies in the framework of MoUs have significantly reduced the number of migrants arriving in Europe from Libya (mainly through Italy), although they have increased the number of persons detained at sea being transferred to detention centres by the Libyan Coast Guard. The detainees have high protection needs there, as they have no legal status and often face severe abuses, including rape, torture, extortion, forced labour, slavery, dire living conditions, and extrajudicial executions.³² Furthermore, as a result of this increasing reliance on constructive refoulement and on interdiction by omission,³³ we can see how, in parallel, in the areas where ‘search and rescue missions’ are being carried out, seafarers are being compelled to take responsibility for the rescue of migrants. Consequently, they make risky choices of their own, choices that may lead them to act illegally, not to mention bearing the costs of imposing border controls.³⁴ Although the role of merchant ships had already become relevant in 2014, since they were increasingly called upon to support the response to the large-scale migrant crossings registered in that period, the new increase in their mobilization differs substantially from the previous one in purpose and effect. Rather than being called upon to perform rescues, merchant ships are strategically mobilized for interdiction and refoulement. This policy threatens to annul the fundamental rules of public international law, such as the *jus cogens* norm of non-refoulement and the principle of disembarkation in a place of safety recognized under the customary norms of the Law of the Sea.

30 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) 21 German Law Journal 385.

31 Riccardo Faini and Pentti Vartiainen, ‘Migration in the Integrated EU’ in Richard Baldwin, Pertti Haaparanta and Jaakko Kiander (eds), *Expanding Membership of the European Union* (Cambridge University Press 1995).

32 The REACH initiative estimated that, as of June 2021, 597,611 migrants were residing in the country, while the UNHCR recorded 41,404 individuals as registered refugees or asylum seekers in November 2021. The UN report also noted that the UN Mission in Libya (UNSMIL) continues to document cases of arbitrary detention, torture, sexual violence, and other violations of international law within facilities operated by the country’s government and other groups. According to Guterres, thousands of detainees who do not appear in the official statistics provided by the Libyan authorities are unable to challenge the legal basis for their continued detention. Thus, ‘female and male migrants and refugees continued to face heightened risks of rape, sexual harassment, and trafficking by armed groups, transnational smugglers and traffickers as well as officials from the Directorate for Combating Illegal Migration, which operates under the Ministry of Interior’. The report highlighted several abuse cases in the Mitiga prison facility and in several detention centres run by the Directorate for Combating Illegal Migration in al-Zawiyah and in Tripoli, about which the UN mission had received ‘credible information on trafficking and sexual abuse of around 30 Nigerian women and children’. As of 14 December 2021, the Libyan Coast Guard had intercepted 30,990 migrants and returned them to Libya during the year 2021, around three times the total number of people returned to the country in 2020 (12,000 people). Guterres added that more than 1,300 people have died or disappeared attempting the journey. Since Libya’s security operations in late 2021, thousands of people were sleeping rough in front of a UNHCR-run reception centre in Tripoli, which closed on 10 January 2022. Shortly after the UNHCR announced the impending closure of the facility, in late 2021, the Libyan authorities reportedly violently arrested hundreds of migrants, refugees, and asylum seekers.

33 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 University Press 2021).

34 Eugenio Cusumano, ‘Migrant Rescue as Organized Hypocrisy: EU Maritime Missions Offshore Libya Between Humanitarianism and Border Control’ (2019) 54(1) Cooperation and Conflict 3, 24.

4. The design of litigation strategies

In recent years, we have witnessed a process for the defence of migrants (including individual petitions) before the main international courts, and this has focused on three main axes. In the first place, the presentation of a report before the International Criminal Court denounces the commission of crimes against humanity as a result of the design and management of the European Union's public policies. Secondly, we find a very rich jurisprudence in the European Court of Human Rights that deals with the issue of the (re)interpretation of the precepts of the European Convention on Human Rights and its Protocols in the light of today. Thirdly, and lastly, we also find a very flourishing line of work in the Court of Justice of the European Union, which is trying to hold EU officials and agents to account as a result of the damage caused during the execution of joint search and maritime rescue operations in the Mediterranean, through the filing of lawsuits by the migrants who were directly affected. As we will see below, this is a three-headed process in which the decision of one of these courts inevitably conditions the work of the rest, so lawyers must choose with great caution and care the procedural strategy they follow in each of these leading cases.

4.1 The strategy before the International Criminal Court

In 2019, a complaint was brought before the International Criminal Court (ICC) that European Union Member States' migration policies in the Mediterranean constitute crimes against humanity. The plaintiffs argued that EU policies were responsible for causing thousands of migrant deaths in the Mediterranean and for returning some 40,000 migrants to militia-controlled camps in Libya. In their communication, the international lawyers Advocate Omer Shatz and Advocate Juan Branco provided evidence that 'implicates European Union and Member States' officials and agents in Crimes against Humanity, committed as part of a premeditated policy to stem migration flows from Africa via the Central Mediterranean route, from 2014 to date',³⁵ and asked the International Criminal Court to open an investigation into the matter. This complaint focuses on three main aspects of the European Union's migration policies between 2015 and 2019: first, the transition from the Italian Mare Nostrum rescue operation to the Frontex Joint Operation Triton; secondly, the ousting of NGOs that carry out search and rescue (SAR) missions; and finally, the EU cooperation with the Libyan Coast Guard.

The redesign of European migration policies is said to have caused the death by drowning of thousands of migrants (more than 20,000 deaths since 2015), the return of tens of thousands of migrants who had tried to flee Libya, and complicity in the subsequent crimes which have taken place in Libyan detention camps since 2016. Therefore, we will now analyse the elements of the different crimes against humanity attributed to the authorities, officers, and agents of the European Union (all of them contained in Article 7 of the Rome Statute).

35 Omer Shatz et al., 'Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute. EU Migrations Policies in the Central Mediterranean and Libya (2014-2019)' (*Statewatch*, 2019) <www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf> accessed 15 December 2022.



Rome Statute. Article 7. Crimes against humanity. 1. For the purpose of this Statute, 'crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The multiple prohibited acts and omissions can be divided into two categories: the first are crimes committed between interception and disembarkation, jointly with or through the LYCG; the second are crimes occurring after disembarkation, typically committed in detention compounds, by co-perpetrators that may include militias other than the LYCG.

In the framework of the first category, it is considered that the EU may have orchestrated a systematic policy of 'deportation or forcible transfer.' This is because European Union agents are accused of knowingly having intercepted more than 40,000 victims (between 2016 and 2018)³⁶ within the meaning of Article 7(1)(d) of the Rome Statute.³⁷ EU and Member State officials and agents are alleged to have carefully designed and meticulously implemented highly coordinated naval border control operations with full awareness of the lethal consequences of their conduct. Specifically, in the interception of migrants in distress at sea, the active participation of EU military units includes providing key information (such as the location of migrant boats in distress) and giving orders to the LYCG related to the interception and refoulement of the boats. In addition, the EU provides material support for the LYCG to build its capacity. The military vessels of Member States also provide command and control capabilities to the LYCG. Beyond the prohibited acts of a violent nature occurring in Libya (which we will elaborate on below), the violent nature of the attack would be entrenched in the phase from interception to disembarkation in the course of the mass refoulement.

Once the forced displacements had been executed, the second category is more difficult to prove, as this is complicity in the subsequent crimes of deportation, murder, imprisonment, enslavement, torture, rape, persecution, and other inhumane acts occurring in the Libyan detention camps. According to this argument, European Union agents also knowingly caused members of the civilian population to die, which falls under Article 7(1)(a) of the Rome Statute. Thus, the purpose of intentionally distancing EU vessels from certain areas was twofold: (1) to manipulate the law in bad faith to avoid the interna-

³⁶ Between 2016 and 2018, the EU and Italy, via the LYCG, intercepted and pushed back to Libya more than 40,000 persons. In September 2018, out of 1,066 individuals who crossed, it is estimated that 22% died (or are missing), 66.9% were forcibly transferred back to Libya by the LYCG (or others), and only 11.2% disembarked in Europe.

³⁷ 'Deportation or forcible transfer of population' means the forced displacement of the persons concerned by expulsion or other coercive acts from the area where they are lawfully present, in the absence of grounds permitted under international law.



tional duties and obligations arising from EU control over the commanded region and (2) by causing the death by drowning of innocent civilians, to deter, or otherwise have an impact on the behaviour of, others seeking to flee Libya. EU agents are alleged to have had foreknowledge that this policy change, specifically the decision to move from the Italian Mare Nostrum operation to the EU and Frontex Joint Operation Triton, would result in lethal consequences and thousands of preventable deaths. As a paradigmatic example, the 'Black April' incidents took the lives of 1200 asylum seekers in one week.

Instead of prioritizing an urgent humanitarian response to tackle the loss of life of individuals under its control, the EU is using the category of illegal immigrants to facilitate the mistreatment of its members. So, EU and Italian agents had a key role in commanding, and coordinating these unlawful operations as part of a clear strategy in which the EU, Italy, and other Member States actively avoided SAR and non-refoulement obligations to ensure the pushback of tens of thousands of civilians fleeing persecution, within the meaning of Article 7(1)(h) of the Rome Statute.

As is set out above, the European Union and the leaders of its Member States are alleged to have been fully aware that individuals who were returned to Libya would be placed in detention camps or otherwise be deprived of their physical liberty. These detentions of individuals in Libya clearly violate the minimum standards for the protection of migrants in international law, both because of the lack of any rights to due process and because of the detention conditions.³⁸ These detentions should be considered as the crime of the 'imprisonment' of members of a civilian population in contravention of the fundamental rules of international law within the meaning of Article 7(1)(e) of the Rome Statute.

The refugees are in terrible conditions in these detention centres. Torture and ill-treatment are systematic in detention facilities across Libya, particularly in the initial period of detention and during interrogations. The most commonly used methods of torture include beatings with objects such as metal bars and water pipes, flogging on the soles of the feet, suspension in a stress position, burning with cigarettes or hot rods, and the administration of electric shocks.³⁹ Because of the scale, gravity, and increasingly systematic nature of these practices, they are described as constituting the crime of the 'torture' of members of a civilian population within the meaning of Article 7(1)(f).

For those immigrants who manage to survive the detention camps, one of the known consequences of systematic refoulement is that of human trafficking, which has been pointed to as a practice that constitutes the crime of slavery within the meaning of Article 7(1)(c) of the Rome Statute. In the specific case of women, these practices also lead to the crimes of rape, sexual slavery, and other forms of sexual violence of comparable gravity to members of a civilian population, within the meaning of Article 7(1)(g) of the Rome Statute. These practices often include selling, lending, or bartering the civilian population while they are stripped of their liberty, for sexual exploitation purposes, domestic servitude, forced labour, and/or criminal exploitation.

38 To this end, we must highlight that Libyan law criminalizes undocumented entry, stay, and exit, and this crime is punishable by imprisonment and forced labour. Furthermore, the law does not specify the maximum period for immigration detention. As such, immigration detention in Libya can be indefinite.

39 United Nations Office of the High Commissioner for Human Rights 'Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya' (1 April 2018) Country Report, 5, <www.ohchr.org/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful_EN.pdf> accessed 15 December 2022.



Furthermore, the residual clause or category ‘other inhumane acts’ may also be found in any violence that occurs during the interception. Any inhumane treatment faced by the deportees after their disembarkation in Libya, such as poor conditions and degrading treatment in detention centres, trafficking, forced labour, and various forms of exploitation, abuse, and extortion, may also fall within the meaning of Article 7(1)(k) insofar as it does not meet the requirements for the other crimes listed in Article 7.

As a result of all the dynamics and crimes indicated above, the potential mode for the liability of EU agents is divided into two parts. On the one hand, there is the entire system of laws, regulations, policies, and decisions that enabled the operations through which the LYCG was funded, trained, and equipped in order for it to be falsely presented as a sovereign and competent national coastguard with the legitimacy and capability to conduct SAR operations under maritime and human rights law. Effective control over these actions accompanied this process through the determination of its goals, the distribution of means, and the use of other venues of the concerned territories and seas. On the other hand, there is the involvement of EU agencies and agents in the interception and pushback operations in the period 2016-2018. This complicity includes the entire process, starting from the reception of a distress call by a European body such as the Maritime Rescue Co-ordination Centre (MRCC) in Rome or by an EU or Member State body, unit, or vessel, and the on-scene coordination of the operation(s).

The concrete involvement of the European Union refers to multiple acts and omissions aimed at preventing NGOs or other efficient forces from being involved in SAR operations that would have resulted in lawful disembarkation in a safe port, that is, on EU soil. Instead, EU agents acted directly to ensure that LYCG was assigned command over the situation, with information on the location of the migrants’ boats and real-time assistance and guidance. The direct acts and omissions were part and parcel of the overall official EU immigration policy to stem the migration flow from Libya by ensuring that all intercepted migrants would disembark not in European ports but in Libya. Subsequently, EU agents had foreknowledge of the crimes to which the migrants would be subjected in Libya. In addition, they were aware of the inevitable, immediate, and direct consequences of their acts and omissions. In other words, if the migrants had not been forced back to Libya, these crimes would not have happened. Without the EU and Italy orchestrating and coordinating the LYCG operations, the migrants would not have been pushed back to Libya, as the LYCG could have had neither the technical capabilities nor the political will to intercept migrants seeking to reach Europe. Thus, everything seems to indicate that, in this case, the task for the judges of the International Criminal Court will be to analyse the potential scope of the modes of liability that may be attributed to EU agents involved in EU migration policies in the Mediterranean and Libya and subsequently to evaluate the extent of their responsibility.⁴⁰

4.2 The strategy before the European Court of Human Rights

The ICCPR Human Rights Committee’s work has significantly influenced the jurisprudence of the ECtHR in relation to human rights protection, including in the context of search and rescue operations at sea. The General Comments and Concluding Observations issued by the ICCPR Human Rights

⁴⁰ In 2020, the ICC Chief Prosecutor confirmed to the EU Parliament that the Office of the Prosecutor (OTP) was bringing a case. Shortly after that, the Prosecutor confirmed that the case had been declared admissible. To this day (2022), we are still waiting for the investigation to progress.



Committee provide important guidance on the interpretation and application of the ICCPR, which has in turn contributed to the development of international human rights law⁴¹. The ECtHR has cited the ICCPR Human Rights Committee's jurisprudence in several cases, such as *Hirsi Jamaa and Others v. Italy*⁴², where the Court referred to the Committee's General Comment No. 31 on the nature of the general legal obligation of states parties to the ICCPR, and *N.D. and N.T. v. Spain*⁴³, where the Court cited the Committee's Concluding Observations on the report of the European Union.

In this field, the European Court of Human Rights (the Court) has developed the scope of Article 4 (the prohibition on the collective expulsion of foreigners) of Protocol 4⁴⁴ to the European Convention on Human Rights through various leading cases. As a starting point, the Court defined 'collective expulsion' to mean any measure compelling aliens as a group to leave a country. Thus, there is an exception when the Court accepts a measure, based on its reasonable and objective examination of the particular case. In *Hirsi Jamaa and Others v. Italy*⁴⁵, the Court was required, for the first time, to examine whether Article 4 of Protocol 4 of the Convention applied to a case involving the removal of aliens to a third state carried out outside national territory⁴⁶. This case concerned Somali and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities and sent back to Libya. The Court observed in particular that the notion of expulsion, like the concept of 'jurisdiction', was principally territorial, but found that where a state had, exceptionally, exercised its jurisdiction outside its national territory, the exercise of extraterritorial jurisdiction by that state could be accepted by the Court to form the basis for collective expulsion. The Court also noted that the applicants' transfer to Libya had been carried out without examination of each situation. Thus, the Italian authorities had embarked the applicants and then disembarked them in Libya. In this particular case, the Court found that the applicants fell within the jurisdiction of the state authorities for the purposes of Article 1 of the Convention (obligation to respect human rights) in the period between boarding the ships and being handed over to the Libyan authorities, because the applicants had been under the continuous and exclusive de jure and de facto control of the Italian authorities.

The extent and limits of the precept contained in Article 4 of Protocol 4 to the European Convention on Human Rights regarding the 'prohibition on collective expulsion' have been developed in greater detail in cases such as *Georgia v. Russia*,⁴⁷ *Shiashvili and Others v. Russia*,⁴⁸ *Berdzenishvili*

41 M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd edn, Cambridge University Press 2005) 146.

42 *Hirsi Jamaa and Others v. Italy* [2016] ECHR 27765/09.

43 *N.D. and N.T. v. Spain* [2020] ECHR 8675/15 and 8697/15.

44 Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms secures certain rights and freedoms other than those already included in the Convention and the First Protocol thereto. Article 4 (Prohibition of collective expulsion of aliens) states that 'Collective expulsions of aliens is prohibited'.

45 *Hirsi Jamaa and Others* (n 42).

46 Protocol No. 4 to the European Convention on Human Rights (Right to Free Movement and Choice of Residence; Prohibition of Exile, Collective Expulsion of Aliens, and Imprisonment for Civil Debts) (1968) 7 International Legal Materials 978.

47 *Georgia v. Russia* [2014] ECHR 13255/07.

48 *Shiashvili and Others v. Russia* [2016] ECHR 19356/07.



and Others v Russia,⁴⁹ *M.K. and Others v Poland*,⁵⁰ *D.A. v Poland*,⁵¹ *M.H. and Others v Croatia*⁵² and *Moustahi v France*.⁵³ Likewise, the Court has also defined a whole series of measures, factual conduct, and practices that do not constitute a 'collective expulsion'. For this purpose, see *Sultani v France*,⁵⁴ *Shioshvili and Others v Russia*⁵⁵ and *Berdzenishvili and Others v Russia*.⁵⁶

For our study, we will focus on a series of specific cases. In *Sharifi and Others v Italy and Greece*,⁵⁷ thirty-two Afghan nationals, two Sudanese nationals, and one Eritrean national alleged, in particular, that they had entered Italy illegally from Greece and been returned to that country immediately, with the fear of subsequent deportation to their respective countries of origin, where they faced the risk of death, torture or inhuman or degrading treatment. They also submitted, concerning Italy, that they had been subjected to indiscriminate collective expulsion. The Court held, in particular, that it shared the concerns of several observers concerning the automatic return, implemented by the Italian border authorities in the ports of the Adriatic Sea, of persons who, in the majority of cases, were handed over to ferry captains to be removed to Greece, thus depriving them of any procedural and substantive rights.

Another case of a similar nature is *Khlaifia and Others v Italy*.⁵⁸ This decision concerns the detention of migrants in a reception centre on Lampedusa and subsequently on ships moored in Palermo harbour. It also addressed the repatriation to Tunisia of clandestine migrants who had landed on the Italian coast in 2011 during the events linked to the Arab Spring. The Grand Chamber found, in particular, that Article 4 of Protocol 4 does not guarantee the right to an individual interview in all circumstances. The requirements of the provision were satisfied if each alien could raise arguments against his or her expulsion that could then be examined by the respondent state authorities. However, the Grand Chamber recognized a violation of Article 5(1) of the Convention (right to liberty and security), a violation of Article 5(2) (right to be informed promptly of the reasons for the deprivation of liberty), a violation of Article 5(4) (right to a speedy decision by a court on the lawfulness of detention), and a violation of Article 13 (right to an effective remedy) taken in conjunction with Article 3, which concerns the lack of a route to allow the applicants to complain about the conditions in the Lampedusa reception centre or on the ships.⁵⁹

49 *Berdzenishvili and Others v Russia* [2016] ECHR 14594/07, 14597/97, 14976/07, 14978/07, 152221/07, 16369/07 and 16706/07.

50 *M.K. and Others v Poland* ECHR [2020] 40503/17, 42902/17 and 43643/17.

51 *D.A. v Poland* [2021] ECHR 51246.

52 *M.H. and Others v Croatia* [2022] ECHR 15670/18 and 43115/18.

53 *Moustahi v France* [2020] ECHR 9347/14.

54 *Sultani v France* [2007] ECHR 45223/05.

55 *Shioshvili* (n 48).

56 *Berdzenishvili* (n 49).

57 *Sharifi and Others v Italy and Greece* [2014] ECHR 16643/09.

58 *Khlaifia and Others v Italy* [2016] ECHR 16483/12.

59 The ECtHR has developed Article 3 of the European Convention on Human Rights (ECHR), which prohibits torture, inhuman or degrading treatment or punishment, in the context of search and rescue operations at sea. The Court has held that states have an obligation to respect the human rights and dignity of all persons, including migrants, during interception and rescue operations at sea. In the case of *Hirsi Jamaa and Others v. Italy*, the Court found that the applicants, who were migrants intercepted at sea and returned to Libya by Italian authorities, had been exposed to a real risk of being subjected to inhuman and degrading treatment, in violation of Article 3 of the ECHR. The Court held that states must ensure that their interception and rescue operations are conducted in a manner that respects the human rights and dignity of migrants, and that all persons intercepted at sea have the right to an effective remedy for any violations of their rights.



Aside from all the previous cases, without a doubt the most controversial case has been *N.D. & N.T. v Spain*⁶⁰. The applicants were two migrants from Morocco who, with a group of several other sub-Saharan migrants, had attempted to enter Spain by scaling the fences surrounding the city of Melilla (a Spanish enclave on the North African coast). The applicants maintained that they had been subjected to a collective expulsion without an individual assessment of their circumstances and in the absence of any procedure or legal assistance. They complained of a systematic policy of removing migrants without prior identification, which, in their view, had been devoid of legal basis at the relevant time. They also complained of the lack of an effective remedy with suspensive effect by which to challenge their immediate return to Morocco.

Therefore, the Grand Chamber held, unanimously, that there had been no violation of Article 4 of Protocol No. 4 to the Convention⁶¹. It noted in particular that the applicants had in fact placed themselves in an unlawful situation when they had deliberately attempted to enter Spain on 13 August 2014 by crossing the Melilla border protection structures as part of a large group and at an unauthorised location, taking advantage of the group's large numbers and using force. They had thus chosen not to use the legal procedures which existed in order to enter Spanish territory lawfully. Consequently, the Court found that the lack of individual removal decisions could be attributed to the fact that the applicants – assuming that they had wished to assert rights under the Convention – had not made use of the official entry procedures existing for that purpose, and that it had thus been a consequence of their own conduct. The Grand Chamber also held that there had been no violation of Article 13 (right to an effective remedy) of the Convention taken together with Article 4 of Protocol No. 4. In this regard, the Court considered that, in so far as it had found that the lack of an individualised procedure for their removal had been the consequence of the applicants' own conduct, it could not hold the respondent State responsible for the lack of a legal remedy in Melilla enabling them to challenge that removal.

As of today (2022), this line of jurisprudence is in constant evolution, which is why there are many opportunities to develop a myriad of litigation strategies. Starting from this premise, we can find a whole series of cases on 'collective expulsions' pending resolution (see, inter alia, *W.A. and Others v Italy*,⁶² *S.S. and Others v Italy*,⁶³ *A.B. v Italy*,⁶⁴ *J.A. and Others v Italy*⁶⁵ and four other applications⁶⁶). Among these, we can highlight the case of a European citizen who claims to have been a victim of 'pushback'. The case was filed on behalf of a French student. She left the EU to study at a Turkish university. After she was persecuted politically and condemned to six years in prison by the Turkish

60 *N.D. & N.T.* (n 43).

61 The Court reached a similar conclusion – namely, that the respondent state provided genuine and effective access to procedures for legal entry and that the applicants did not have cogent reasons for not using those procedures – in *A.A. and Others v North Macedonia* (2022) ECHR 55798/16 and in four other cases.

62 *W.A. and Others v Italy* [2017] ECHR 18787/17.

63 *S.S. and Others v Italy* [2018] ECHR 21660/18.

64 *A.B. v Italy* [2018] ECHR 13755/18.

65 *J.A. and Others v Italy* [2018] ECHR 21329/18.

66 *H.B. v Italy* [lodged on 13 June 2018] ECHR 33803/18; *H.L. v Italy* [lodged on 2 November 2018] ECHR 52953/18; *C.L. v Italy* [lodged on 7 November 2018] ECHR 53788/18; and *M.J. v Italy* [lodged on 7 November 2018] ECHR 53790/18.



regime, she fled to Greece to enter EU territory and return to her family and home in France. After crossing the Evros river in October 2021, the victim presented her French passport and ID, permitting her to enter the Schengen zone, informed the Greek forces of the grave risk to which she was exposed in Turkey, and begged the Greek forces to let her in. Her family in France contacted the Greek and French consular authorities multiple times to alert them of the situation, and requested urgent diplomatic protection, but to no avail. Based on racial profiling, the Greek forces abducted, detained, abused, and forcibly transferred the young woman to an unsafe dinghy and expelled her with others on a life-threatening voyage to a military zone in Turkey, where soldiers captured her. She is now serving six years in a Turkish prison in cruel, degrading, and inhuman conditions. This case shows us the dynamics between the Greek government and Frontex at the external borders of the EU. Whether they are EU citizens or foreign nationals, tens of thousands of toddlers, women, and men have been victims of the application of the policy of pushback across the Evros river.

4.3 The strategy before the Court of Justice of the European Union

In May 2021, the CJEU⁶⁷ submitted its first legal action against Frontex. This legal action was submitted on behalf of two asylum seekers (an unaccompanied minor and a woman). While they were seeking asylum on EU soil (Lesbos), they had been violently rounded up, assaulted, robbed, abducted, detained, forcibly transferred back to sea, expelled with others, and ultimately abandoned on rafts with no means of navigation, food, or water. The applicants were also victims of other 'pushback' operations when they attempted to seek protection in the EU. During these operations, a friend of one of the applicants drowned and died while European officials were watching. His body was never recovered. The subject of the dispute is an action against Frontex under Article 265 of the Treaty on Functioning of the European Union. The claim is that Frontex, by not suspending or terminating its activities in the Aegean Sea region within the meaning of Article 46 of the European Border and Coast Guard Regulation, committed an infringement of the Treaties.

However, the EU Court of Justice dismissed this action, stating that it was inadmissible. The Court declared that 'irrespective of whether the applicants' plea is well founded –their complaint that Frontex's position lacks clarity, is not sufficiently detailed and does not provide duly substantiated reasons, could, where appropriate, have formed the basis of an action for annulment under Article 263 TFEU – it must, however, be stated that the applicants did not intend to bring the present action under that article. It is only in the context of an action for annulment that they could, if necessary, and subject to being able to demonstrate standing and sufficient legal interest to bring proceedings against that decision, dispute the reasons provided by Frontex to justify its decision not to take the measures requested in the invitation to act.'⁶⁸

In April 2022, another ground-breaking legal action against Frontex was submitted, the first in a potential avalanche of damages lawsuits⁶⁹. A Syrian asylum seeker filed a case against the European

⁶⁷ Case T-282/21 S.S. and S.T. v Frontex [2022] CJEU OJ C 289.

⁶⁸ *ibid.*

⁶⁹ Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 German Law Journal 532.



Border and Coast Guard Agency for a seventeen-hour-long ‘pushback’ operation in the Aegean Sea.⁷⁰ Alaa Hamoudi filed this action for damages in the EU Court of Justice after he was ‘kidnapped from a Greek island, transferred to an unseaworthy raft, abandoned at sea for seventeen hours, and expelled with others to Turkey’. In support of the action, the applicant is relying on three points of law.

First, the applicant alleges that Frontex approved the launching of RBI Aegean in violation of Article 46(5) of Regulation 2019/1896, in a manifest error of assessment, misuse of power, and failure to act with due diligence, thereby failing to observe the principle of sound administration. The applicant then alleges that Frontex committed an unlawful omission capable of giving rise to non-contractual liability when failing to act under Article 46(4) of Regulation 2019/1896. Third, they allege that Frontex committed an unlawful act capable of giving rise to non-contractual liability. At this stage of the process, the details of the procedural strategy cannot yet be revealed. However, it is a very promising case that could open up a whole line of work before the Court of Justice of the European Union for the defence of migrants who have been harmed during joint Frontex operations in the Mediterranean Sea.

5. Conclusions

A successful litigation strategy requires a meticulous analysis of the relevant legal framework, including international conventions, treaties, and domestic laws. However, the legal team must also understand the social, economic, and political context in which the case is taking place. By combining legal expertise with a broader understanding of the issues at stake, the legal advisors can identify the most effective arguments and evidence to advance their client’s case. Moreover, a litigation strategy may involve engaging with other stakeholders, such as civil society groups, international organizations, and governments, to increase the legal team’s influence and raise awareness of the issues at stake. Depending on the circumstances, a litigation strategy can have multiple goals, including securing legal remedies, holding governments and other actors accountable for human rights violations, and setting legal precedents that can benefit other individuals or groups in similar situations. Pursuing multiple legal avenues simultaneously, such as filing complaints with national and international human rights bodies, pursuing civil litigation, and engaging in advocacy and public outreach, may also be necessary.

In the Mediterranean migration and asylum seeker context, *pro bono* legal services are crucial because these individuals often lack the financial resources and legal expertise to navigate complex legal systems. Large law firms provide free legal representation to help level the playing field and ensure that vulnerable individuals have access to justice. *Pro bono* legal services may involve designing litigation strategies, providing legal advice, conducting training sessions, and raising awareness of legal rights and remedies.

Several large law firms offer *pro bono* litigation strategies to safeguard the rights of migrants and asylum seekers in the Mediterranean. These firms are committed to identifying the most effective legal avenues to protect their clients, while ensuring that their rights are respected during the legal process. However, these organizations have identified several critical issues related to migration policies, including the criminalization of NGOs providing aid to migrants and refugees, lack of coordination between

⁷⁰ Case T-136/22 Hamoudi v Frontex [2022] CJEU OJ L 295.



Member States, and the absence of a human rights-based approach. These firms have also criticized the inadequate resources and support measures provided to migrants and refugees, resulting in overcrowding and precariousness in reception centres. Moreover, the externalization policies of the EU, where Member States enter into agreements with third countries to curb irregular migration at the cost of violating the human rights of migrants and refugees, have been widely denounced by these firms.

Effectively addressing the challenges faced by migrants and asylum seekers in the Mediterranean necessitates a coordinated and multi-disciplinary approach. In addition to litigation strategies, interventions such as providing humanitarian aid, promoting social inclusion, and addressing the root causes of migration may also be essential. By partnering with other actors, including NGOs, government agencies, and international organizations, pro bono legal firms can help create a more comprehensive and sustainable response to the needs of migrants and asylum seekers. It is crucial to coordinate developments across this ecosystem while taking into account the unique characteristics of each court. This includes consulting the jurisprudence of each court, as well as human rights doctrine, to ensure that the approach taken is effective and appropriate.

Firstly, the International Criminal Court requires a litigation strategy that focuses on presenting solid evidence and cooperating with the prosecutor to ensure a thorough investigation and the presentation of robust charges. It's also important to be prepared to deal with the complexity of legal proceedings and possible opposition from some Member States. For example, a successful litigation strategy led to the prosecution of EU and Member State authorities, officials, and agents for their involvement in crimes against humanity arising from SAR operations in the Mediterranean, which prompted an investigation. However, given the Court's track record, it is challenging to imagine it determining their responsibility as possible accomplices of Libyan coastguards in committing crimes against humanity. Nonetheless, if such a request were successful, it would have far-reaching implications, upending the (re)design, implementation, and execution of European migration policies in ways that are difficult to anticipate today. The recognition of malpractice in search and rescue operations as an essential or constituent element of crimes against humanity could lead to the development of mechanisms that would ensure the effective protection for migrants and refugees attempting to cross the Mediterranean.

Secondly, the European Court of Human Rights presents a constantly evolving line of jurisprudence. Therefore, a litigation strategy should identify emblematic cases that demonstrate severe human rights violations and use them to seek a precedent-setting decision if we intend the petition or lawsuit to succeed. Additionally, the strategy should consider the particularities of the ECtHR system, which permits third-party intervention, including human rights organizations. The court's application of Article 4 of Protocol No. 4 to the European Convention on Human Rights has evolved significantly, from *Hirsi Jamaa and Others v. Italy* (2012) to *N.D. and N.T. v. Spain* (2020). In *Hirsi Jamaa*, the ECtHR held that refoulement of migrants to countries where they face the risk of torture or inhuman or degrading treatment is unlawful, whereas in *N.D. and N.T.*, it held that summary refoulement is not unlawful per se, but must be carried out with adequate safeguards, and the concerned persons must have access to an effective remedy. After the *Melilla* case, the Spanish government appears to distinguish between asylum seekers and a category of individuals who 'attack' EU borders and the agents working at those borders. Meanwhile, the ECtHR seems to be relaxing its demands on the conditions that state authorities must meet in what has so far been considered the constituent elements of the minimum standard of protection for migrants both at sea and on land.



As a result, the legal battle may focus on preventing this (re)interpretation from restricting the rights achieved to date, rather than achieving an expansive interpretation of the Convention.

Thirdly, the Court of Justice of the European Union (CJEU) is becoming an increasingly important forum for new litigation strategies that rely on presenting clear and convincing arguments based on EU case law. Given the complexity of the EU legal system, it is essential to stay up-to-date with CJEU decisions and relevant EU law. As of 2022, the lawsuit in the Hamoudi case is still pending, which is based on Frontex's alleged responsibility for violating the applicant's fundamental rights, including the right to liberty and security, the right to protection from torture and inhuman or degrading treatment, the right to an effective remedy, and the right to a fair trial. The case is significant in light of the growing international attention on the EU's migration and border control policies and the responsibility of European institutions and Member States to protect the human rights of migrants and refugees. Moreover, it raises crucial questions about the responsibility and accountability of European security agencies for protecting human rights. The Luxembourg judge faces a challenging task of ruling in a context in which the Executive Director of Frontex has recently resigned due to scandals related to SAR operations. Thus, maintaining the appearance of a prudent judge while dealing with a complex and controversial case will require a delicate balancing act. It is clear that the responsibility of calming the waters lies in the judge's hands.