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## Lives lost in the Mediterranean Sea: Who is responsible?

### Report<sup>1</sup>

Committee on Migration, Refugees and Displaced Persons  
Rapporteur: Ms Tineke STRIK, Netherlands, Socialist Group

### Summary

The starting point for this report is that at least 1 500 people are known to have lost their lives attempting to cross the Mediterranean in 2011. This report, however, focuses on one particularly harrowing case in which a small boat left Tripoli with 72 people on board and after two weeks at sea drifted back to Libya with only nine survivors. No one went to the aid of this boat, despite a distress call logged by the Italian Maritime Rescue Coordination Centre, which pinpointed the boat's position. There were also a number of alleged direct contacts between the boat in distress and other vessels, including a helicopter that dropped biscuits and water, but never returned, two fishing vessels, both of which refused to provide assistance, and a large military vessel which came into close contact with the boat, but ignored obvious distress signals.

From this story, a catalogue of failures became apparent: the Libyan authorities failed to maintain responsibility for their search and rescue zone, the Italian and Maltese Maritime Rescue Coordination Centres failed to launch any search and rescue operation, and NATO failed to react to the distress calls, even though there were military vessels under its control in the boat's vicinity when the distress call was sent (including the *Méndez Núñez* frigate which was estimated to have been 11 miles away, although this distance is disputed by Spain). The flag States of vessels close to the boat also failed to rescue the people in distress. Furthermore, two unidentified fishing vessels also failed to respond to the direct calls for assistance from the boat in distress. Alongside these failures, a number of shortcomings contributed to the distress calls not being answered, including gaps in the maritime legal framework and a failure by NATO and the States militarily involved in Libya to anticipate adequately for an exodus of asylum seekers and refugees. Perhaps of most concern in this case is the alleged failure of the helicopter and the military vessel to go to the aid of the boat in distress, regardless of whether these were under national command or the command of NATO.

In this case, many opportunities for saving the lives of the people on board the boat were lost. A series of recommendations are made in the draft resolution to reduce the likelihood of similar tragedies in the future. There is also a request for further information from NATO and relevant member States to identify or carry out an investigation into the identity of the helicopter and ship that allegedly failed to go to the rescue of the boat in distress.

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1. Reference to committee: Doc. 12617, Reference 3774 of 27 May 2011.

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## A. Draft resolution<sup>2</sup>

1. In 2011, at least 1 500 persons lost their lives attempting to cross the Mediterranean Sea.
2. One tragedy, revealed by the British newspaper *The Guardian*, involved a small rubber dinghy which left Tripoli on 26 March 2011 with 72 people on board. It was washed up on the shores of Libya 15 days later with only nine survivors. What made this case different, beyond the tragedy of the lives lost, was that the boat's distress calls would appear to have been ignored by a range of fishing vessels, a military helicopter and a large military vessel. Whereas many people were reported missing, the people involved in this boat tragedy could have been rescued if all those involved had complied with their obligations.
3. Concerned about the implications of these allegations, the Parliamentary Assembly launched its own investigation in order to establish what happened and who might be responsible for failing to go to the rescue of the people in the boat.
4. From the survivors' testimonies and other sources, a credible story emerges. It takes place during the conflict in Libya and at a time when NATO's Operation Unified Protector was ongoing off the shores of Libya. The Sub-Saharan passengers, 50 men, 20 women and two babies, were accompanied to the boat by Libyan militia. They were boarded by the smugglers who removed most of their water supplies and food in order to get more people into the boat. After over 18 hours at sea with almost no petrol, little food and water and no sight of land, the "captain" called an Eritrean Priest living in Italy by satellite phone, sending a distress alert. The Italian Maritime Rescue Coordination Centre (MRCC) was immediately informed and it had the position of the boat plotted by the satellite provider and sent out a large number of calls to the ships in the area to look out for the boat. Some of these messages clearly indicated that the boat was in distress. It was from this point that things went seriously wrong.
5. Within a few hours of the first distress signal, a military helicopter hovered over the boat and provided water and biscuits and indicated to the passengers that it would return. It never did. The boat also encountered at least two fishing vessels, neither of which came to its assistance. The boat drifted for several days. With no water and food, people started to die. On about the tenth day of its voyage, when half of the passengers were dead, a large aircraft carrier or helicopter-carrying vessel sailed near to the boat, close enough for the survivors to see the sailors on board looking at them with binoculars and taking photos. Despite obvious distress signals, the military vessel sailed away. The boat eventually washed up on the Libyan shores after 15 days at sea. The ten survivors were imprisoned, where one of them died from lack of medical care. Eventually nine survivors were released after which they fled the country.
6. From this tragedy a catalogue of failures becomes apparent. The Libyan authorities were responsible for what was a *de facto* expulsion of the Sub-Saharan passengers and they failed to maintain responsibility for their search and rescue (SAR) zone. The smugglers showed reckless disregard for the lives of the passengers, overloading the boat and failing to provide adequate provisions.
7. Although the Rome MRCC verified the position of the boat and made a general broadcast of the distress calls, it did not ensure that the passengers were rescued. It failed to contact the vessels which were close to the boat in distress and to request them to rescue the boat people. Since it was known that the Libyan SAR zone was not covered, Italy, as the first State to receive the distress call, should have taken responsibility for the co-ordination of the SAR operation.
8. NATO had declared the region a military zone under its control but failed to react to the distress calls sent out by the Rome MRCC. According to a reliable source, at least two vessels involved in NATO's operations were in the boat's vicinity when the distress call was sent, namely the Spanish frigate *Méndez Núñez* (11 miles away) and an Italian ship, the *ITS Borsini* (37 miles away). Both had helicopter-carrying facilities. Although the Spanish vessel was under NATO command, the flag State of this ship and of other ships in the area also failed to act in accordance with their search and rescue obligations.
9. Of particular concern to the Assembly was the worrying failure of a military helicopter and a large military vessel to intervene and rescue the boat after they had come into contact with it. The same applies to at least two fishing vessels. None of these have as yet been identified with any certainty.
10. There was also a failure of the maritime legal framework, which left it unclear who was responsible for an SAR zone when a country was unable to fulfil its obligations.

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2. Draft resolution adopted by the Committee on 29 March 2012.

11. Finally, there was a failure by NATO and individual member States involved in planning Operation Unified Protector off the Libyan coast. It was foreseeable that there would be an exodus of people fleeing the country, including by the dangerous sea route. In the present case, NATO did not fully take up its responsibilities, with communications about the boat in distress not being forwarded by NATO headquarters in Naples to vessels under its control.

12. In short, there were failures at different levels and many opportunities to save the lives of the people on board the boat were lost. In the light of information from reliable sources, it has become apparent that NATO was not very approachable with regard to requests for SAR operations. Although it was known that many refugees were leaving Libya by the Mediterranean Sea route in order to reach Europe, there seemed to be no working agreement between the SAR authorities and NATO headquarters in Naples. This non-communication contributed to the situation in which those on the boat were denied help.

13. While the investigation focused on a single incident, the lessons learnt have implications for the way in which search and rescue should be carried out in the future. As a consequence, the Assembly recommends that member States:

13.1. fill the vacuum of responsibility for an SAR zone left by a State which cannot or does not exercise its responsibility for search and rescue, such as was the case for Libya. This may require amending the International Maritime Search and Rescue Convention (SAR Convention). In the case in question, two Maritime Rescue Coordination Centres (Rome and Malta) were aware that a boat was in distress, but neither took the responsibility to start a SAR operation. Rome, being the first MRCC informed of the distress situation, had a greater responsibility to ensure the boat's rescue;

13.2. ensure that there are clear and simple guidelines, which are then followed, on what amounts to a distress signal, so as to avoid any confusion over the obligation to launch a SAR operation for a boat in distress;

13.3. avoid differing interpretations of what constitutes a vessel in distress, in particular as concerns overloaded, unseaworthy boats, even if under propulsion, and render appropriate assistance to such vessels. Whenever safety requires that a vessel be assisted, this should lead to rescue actions;

13.4. tackle the reasons why commercial vessels fail to go to the rescue of boats in distress. This will require dealing with:

13.4.1. the economic consequences for the rescuing vessel and its owners, and the issue of compensation;

13.4.2. the disagreement between Malta and Italy as to whether disembarkation should be to the nearest safe port or to a port within the country of the SAR zone. The International Maritime Organization should be urged to find a solution to the matter and step up its efforts towards a harmonised interpretation and application of international maritime law;

13.4.3. the fear of criminalisation (trafficking or aiding and abetting irregular migration) by those who go to the rescue of boats carrying irregular migrants, asylum seekers and refugees;

13.4.4. legislation to criminalise private shipmasters who fail to comply with their duty under the law of the sea, as is already the case in certain Council of Europe member States;

13.5. ensure that, in accordance with the *Hirsi v. Italy* judgment of the European Court of Human Rights, after the rescue operation, people are not pushed back to a country where they risk being treated in violation of Article 3 of the European Convention on Human Rights;

13.6. tackle the issue of responsibility sharing, particularly in the context of rescue services, disembarkation, administration of asylum requests, setting up reception facilities and relocation and resettlement, with a view to developing a binding European Union protocol for the Mediterranean region. The heavy burden placed on frontline States leads to a problem of saturation and a reluctance to take responsibility;

13.7. respect the families' right to know the fate of those who lose their lives at sea by improving identity data collection and sharing. This could include the setting up of a DNA file of the remains of those retrieved from the Mediterranean Sea. In this context, the ongoing work of the International Committee of the Red Cross (ICRC) and other organisations should be acknowledged and supported;

13.8. follow up Assembly Resolution 1821 (2011) on the interception and rescue at sea of asylum seekers, refugees and irregular migrants;

13.9. ensure that the lack of communication and understanding between the Rome MRCC and NATO, which led to no one taking responsibility for the boat, is not reproduced in future NATO operations, and ensure that NATO introduces a mechanism to co-ordinate its assets in SAR operations in direct contact with relevant MRCCs wherever possible.

14. In the light of the seriousness of the allegations that vessels under national or NATO command failed in their duty to rescue a boat in distress, the Assembly recommends that:

14.1. NATO and the member States involved in NATO's operation provide a comprehensive reply to the Assembly's outstanding requests for further information on the involvement of their respective assets. This is in order to identify the military helicopter that allegedly dropped provisions and never returned, as well as the large military vessel that allegedly ignored the boat's distress calls after half the passengers had already died;

14.2. NATO, including its Parliamentary Assembly, conduct an inquiry into this incident, and take whatever steps are required in the light of the findings of that inquiry;

14.3. NATO, when preparing its operations, takes into account possible refugee movements and reaches agreement with neighbouring countries to ensure that refugees are protected;

14.4. national parliaments, or their relevant committees, on the basis of relevant leads, launch parliamentary inquiries into the possible responsibility of their respective countries;

14.5. the European Parliament makes use of its institutional power to request and obtain further information, including relevant satellite imagery, so that the full facts concerning this incident can be brought to light.

15. Finally, the Assembly recommends that, in view of the ordeal of the survivors, member States use their humanitarian discretion to look favourably on any claims for asylum and resettlement coming from these persons.

## B. Explanatory memorandum by Ms Strik, rapporteur<sup>3</sup>

### 1. 2011 – The deadliest year in the Mediterranean Sea

1. When we talk about the Mediterranean, we are not talking about a deserted sea. On the contrary, we are talking about a sea with a complex and dense network of maritime traffic, with a developed system of monitoring movements and dealing with boats in distress. During and in the aftermath of the Arab Spring, and in the framework of NATO's Operation Unified Protector off the Libyan shores, the monitoring of the Mediterranean was, if anything, even more closely monitored. During that period, it was often referred to as the sea with the best surveillance in the world and, as an Italian official rightly described it, "I expect that sailing from Libya towards Italy should be a bit like doing a slalom between military ships".

2. Paradoxically, 2011 set a record for being one of the deadliest years for boat people in the Mediterranean.

3. While we are aware of many tragedies in these waters, one particular incident shocked the Parliamentary Assembly of the Council of Europe to such an extent that it considered it essential to carry out an inquiry. In May 2011, the British newspaper *The Guardian* published an article entitled "Aircraft carrier left us to die, say migrants".<sup>4</sup> The article recounted the story of a boat that left Tripoli and floundered at sea for two weeks before being washed up on the Libyan shores of Zlitan, near Misrata. The article told of how 72 people attempted to escape the ongoing Libyan conflict and reach Europe. The boat never made it to Europe, and by the time it grounded on Libyan soil there were only nine survivors. According to the survivors, their calls for help were ignored by various vessels, including at least one military helicopter, various commercial fishing vessels and even a large military vessel.

4. The President of the Parliamentary Assembly reacted immediately to the article, expressing distress and deep concern, saying that if the allegations were true, then it was a dark day for Europe as a whole.<sup>5</sup> On the basis of this concern, the President called for an inquiry.

5. This report is the consequence of that call for an inquiry and it has been prepared on the basis of an in-depth investigation into what happened to the "left-to-die boat". The report shows the failures – human, institutional and legal – that contributed to the death of 63 people and makes recommendations to avoid such tragedies happening again in the future. These deaths could have been avoided, as, undoubtedly, could many of the hundreds of other deaths at sea in 2011.

6. This story is singular in two ways: we know what happened to the boat because of the testimonies the survivors were able to give us, and we know that their request for help had been registered by several competent authorities. They did not go missing, they were located and observed, which implies that their deaths could have been avoided if one of the informed actors had come to their rescue. But their story is unfortunately in no way unique as a number of silent tragedies occur every year in the Mediterranean. Based only on confirmed cases, it is estimated that more than 1 500 lives were lost in the Mediterranean in 2011.<sup>6</sup> The real number will be much higher.

### 2. Methodology - Steps of a still ongoing investigation

7. It was clear from the outset that it was essential to have in-depth interviews with the survivors. I collected the direct testimonies of four of the survivors and obtained transcripts of the testimonies of the other five survivors from different sources.

8. I carried out three fact-finding visits. The first was to Rome on 6 and 7 September 2011 where I met three of the survivors along with Father Zerai, the Eritrean Priest who raised the initial alarm with the Italian Coast Guard after having been contacted by the boat. On 28 November 2011, in Brussels, I met with NATO officials at their headquarters, and also with a number of European Union officials. On 15 and 16 December 2011, I

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3. Ms Strik has a doctorate in European migration law and is a member of the Dutch Senate for the Greens.

4. 8 May 2011, [www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants](http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants).

5. "President calls for an inquiry into Europe's role in the deaths of 61 boat people", 9 May 2011, [http://assembly.coe.int/ASP/NewsManager/EMB\\_NewsManagerView.asp?ID=6619](http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=6619).

6. <http://www.unhcr.org/4f27e01f9.html>

met, in Malta, members of the Armed Forces responsible for search and rescue operations at sea. Meetings with representatives of international organisations and civil society also took place in the context of these three fact-finding visits.

9. To better understand the relevant international maritime, humanitarian, human rights and refugee law, the Committee on Migration, Refugees and Displaced Persons organised a hearing with invited experts and specialists on 29 November 2011 in Paris. On the same day, a restricted round table discussion took place with others investigating the incident in question. These included an investigative journalist Emiliano Bos, who was making a documentary for Swiss television on the “left-to-die boat”,<sup>7</sup> and representatives of a collective of associations (including Migreurop and the International Federation for Human Rights (FIDH) as well as Goldsmiths, University of London) investigating this case with a view to lodging complaints against member States and/or NATO.<sup>8</sup>

10. I also requested written information from NATO, Frontex, the European Union, the International Maritime Organization and the ministers of defence of countries involved in NATO operations with vessels with aircraft-and/or helicopter-carrying facilities (Canada, France, Greece, Italy, Romania, Spain, Turkey, the United Kingdom and the United States). To date, despite reminders, not all these letters have been responded to (see paragraph 146).

11. Notwithstanding the disappointing lack of response and lack of information from certain quarters, I am grateful for the professional help and assistance provided to me by those who have met with me and responded to my requests for information. While criticisms will be raised in my report, nothing should detract from the respect I have for those people who have worked and continue to work to save lives in dangerous conditions at sea.

12. I would also like to thank Mr Neil Falzon for his extensive work as a consultant assisting in the drafting and research of the report.<sup>9</sup>

### 3. The “left-to-die boat” – a 15-day fatal journey

#### 3.1. *Early spring 2011: Migrants, asylum seekers and refugees had no choice but to leave Libya*

13. In mid-February 2011, inspired by the uprisings in neighbouring Tunisia and Egypt, large segments of the Libyan population started a dramatic process of social and political change which ultimately led to the removal of the Libyan leader, Colonel Muammar Gaddafi. Within weeks, the situation deteriorated into a violent conflict between pro-government forces and anti-government militia. This conflict adversely affected a large number of refugees, migrant workers and other migrants living in Libya. Left unprotected with nowhere to turn for assistance, hundreds of thousands of these people were forced to flee Libya. Many left by land, but a large number were trapped and could only escape by sea.

14. By 19 March, with the first air strikes on Libyan territory taking place, the situation seriously deteriorated. The United Nations Security Council Resolution 1973 of 17 March expressed concern about “the plight of refugees and foreign workers forced to flee the violence”, and the Office of the United Nations High Commissioner for Refugees (UNHCR) reported its concerns on 29 March that violence was “being specifically targeted towards the large groups of foreigners in the country, including refugees and asylum-seekers”.<sup>10</sup> Sub-Saharan Africans were in particular being targeted as they were suspected of being pro-Gaddafi mercenaries.<sup>11</sup>

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7. The documentary “Mare deserto” (“Deserted Sea”) can be viewed in the following link:  
<http://la1.rsi.ch/falo/welcome.cfm?idg=0&ids=0&idc=42593>.

8. Since June 2011, Migreurop, FIDH, CIRE (Centre d’information des résidents étrangers), GISTI (Groupe d’information et de soutien des immigrés) and the LDH (Ligue des droits de l’Homme) have been carrying out research with a view to possibly lodging complaints against NATO and States with a military presence in the Mediterranean in spring 2011 in relation to their actions or inactions. In this, they are receiving technical support from the Centre for Research Architecture of Goldsmiths, University of London.

9. Mr Neil Falzon is a Human Rights Advocate and Academic with particular expertise in the area of asylum and interception and rescue at sea.

10. UNHCR, “Protection considerations with regard to people fleeing from Libya – UNHCR’s recommendations” (as at 29 March 2011). Update No. 1, 29 March 2011, <http://www.unhcr.org/4d67fab26.html>.

11. UNHCR, “UNHCR fears for the safety of refugees caught in Libya’s violence”, 22 February 2011, <http://www.unhcr.org/4d6393e06.html>.

15. By 23 March, the UNHCR estimated that a total of 351 673 persons had fled Libya, escaping to Tunisia (178 262), Egypt (147 293), Niger (11 949) and Algeria (9 168).<sup>12</sup>

16. In the midst of this chaos, blocked in the city of Tripoli, groups of sub-Saharan men, women and children were faced with a difficult choice: stay in Tripoli and risk becoming scapegoats or being caught in the fighting, or attempt the perilous and expensive journey across the Mediterranean, the escape to Tunisia over land also being very dangerous. Smugglers took advantage of the situation and made money by "organising" journeys by sea to the Italian island of Lampedusa.

### **3.2. Day 1 - Departure from Tripoli on what would be for most of them a fatal journey**

17. At night, either in the very early hours or late in the evening of what was probably Saturday 26 March, a group of 72 sub-Saharan men, women and children boarded a small inflatable rubber dinghy, possibly not much more than 7 meters long, in order to escape from Libya. Ghirma Halefom, Bilal Yacoub Idris, Abu Kurke Kebato and Dan Haile Gebre, the persons I interviewed, were four of the 50 men travelling with 20 women. Some of the women were pregnant, and there were also two babies crammed into the dinghy. The 70 adults were between 20 and 25 years of age. They were from Ethiopia (47), Nigeria (7), Eritrea (7), Ghana (6) and Sudan (5). A Ghanaian, travelling with his wife, was the designated "captain".

18. Some of the survivors recounted that a few days before their fateful trip they had met on the coast intending to leave, but they were discovered and prevented from leaving by the Libyan military. On the day of their departure, however, Libyan soldiers did not prevent them from leaving and even accompanied them to their rubber dinghy.

19. When the passengers boarded the dinghy, their provisions were taken away from them by the smugglers who wanted to cram as many people as possible into the boat. Bilal said, "It was completely overcrowded. Everyone was sitting on everybody else. I had someone sitting on top of me, and this person had someone sitting on top of him. They don't really care how many people can fit into the boat all they want is to get the money from each person". It seems that amongst the passengers they only had a box of biscuits and a few bottles of water. Once the dinghy was fully inflated, it left in the darkness of the night.

20. They were told by the smugglers that 18 hours of navigation would take them to Lampedusa. Despite a rough sea, the first day passed smoothly.

### **3.3. Day 2 - A small aircraft flies over the dinghy**

21. On Sunday 27th, after well over 18 hours of navigation, Lampedusa was nowhere to be seen. People started to become increasingly sea sick, the mood changed and worry set in.

22. At this point, the passengers noticed an aircraft flying high above them. This raised hope of being rescued. Ghirma said the aircraft was white, and not a helicopter but rather a small patrolling aircraft.

### **3.4. The boat calls Father Zerai – Rome Maritime Rescue Coordination Centre (MRCC) is informed**

23. It was not long, however, before the men and women aboard the boat started to panic with the rough sea tossing them around and dark clouds looming overhead. In view of the situation, they decided to use a satellite phone to call Father Zerai, an Eritrean Priest living in Rome, whose number had been given as a contact person in case of an emergency. The "captain" had the phone, but nobody knew where he had got it from or who had added Father Zerai's number to it. In a short conversation Father Zerai was informed that they were having problems, that there were women and children on board, that they were running out of fuel and that the sea was getting increasingly rough.

24. The Priest informed them that he would contact the Italian authorities to request assistance. Father Zerai subsequently contacted the Italian Coast Guard at the Rome Maritime Rescue Coordination Centre (Rome MRCC) explaining the difficulty the boat was in: drifting, without fuel and taking in water. He also provided them with the number of the satellite phone on board. Father Zerai's initial call, which was logged and recorded by the Rome MRCC, took place on 27 March at 18:28. After further contacts with the boat, Father Zerai kept the Rome MRCC updated, first informing them that the boat still had a very small amount of fuel but was no longer

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12. UNHCR, Update No. 13: Humanitarian Situation in Libya and the Neighbouring Countries, 24 March 2011, <http://www.unhcr.org/4d8b6a1f9.html>.



taking in water, and later, after a further contact with the boat, informing the Rome MRCC that he did not know what exactly was happening, but that those on board the boat kept on shouting over the phone “we have an emergency, we have an emergency” and “help, help, be quick, be quick!”.

25. Father Zerai and the Italian Coast Guard sent the boat an SMS with instructions on how to trigger the satellite phone’s GPRS, to enable the Coast Guard to establish their precise location on the basis of satellite data. However, the attempt to trigger the GPRS did not succeed. Following the exchange with Father Zerai, the “captain” received a call from the Italian Coast Guard asking him to provide details of their location. This was the last telephone contact with the boat, as the phone’s battery died as the request was being made.

26. The calls made from the satellite phone nevertheless enabled the Italian Coast Guard, via the satellite provider Thuraya, to establish the boat’s location at around 60 miles off the shore of Tripoli.

### **3.5. Hope for rescue: a military helicopter drops water and biscuits to the boat**

27. With no means of communication, the 72 people drifted with the current, saving the little amount of petrol left in the tank. A number of hours after their exchange with Father Zerai, a military helicopter appeared and hovered above them. The helicopter is described as being relatively small, dark grey-green military in colour and, according to more than one survivor, with the writing “ARMY” on the side. They remember that there were at least two people inside the helicopter and that they were dressed in military uniform and were carrying weapons.

28. Many people on board the boat started singing and clapping for joy, holding the babies above their heads and pleading for rescue and assistance. The helicopter then left the boat. It, or another helicopter returned within a short time and used a rope to lower down small bottles of water, in a six-pack format, together with packets of biscuits.

29. Some of the survivors described the plastic bottles as having the word “ACQUA” (“water” in Italian) written on them, and Dan Haile insisted that the biscuit packaging showed they had come from Italy. Ghirma told us that the biscuits had green packaging. The biscuits and water were distributed to the women and children. Elias, interviewed in Tunisia by journalist Emiliano Bos, recalled reading the numbers “+39” (the dialling prefix for Italy) in front of what seemed to be a telephone or fax number.

30. The military personnel in the helicopter indicated to the people on the boat that they would return, and instructed those on the boat not to change their current position.

### **3.6. The “captain” throws the compass overboard and the boat runs out of fuel**

31. The “captain” reassured everyone that a ship would come to their rescue within hours. The engine was turned off and everyone aboard started praying and waiting.

32. After several hours, an argument broke out between the “captain” and other passengers. The “captain” insisted on remaining in the same position, while some passengers who had lost hope of being rescued urged the “captain” to return to the original instructions given to him by the smugglers. However, in the meantime, the “captain” had thrown the compass and the satellite phone overboard when he thought the helicopter was going to rescue them. He explained that he did not want to be arrested for possession of the telephone and the compass. He feared that these items would be used as evidence of his involvement in a smuggling network.

33. When several more hours passed and there was no sign of a rescue, they decided to attempt the onward journey, in a north-westerly direction. The “captain” managed to navigate for a number of hours using the sun to provide direction.

34. The boat soon ran out of fuel. At this point it was stranded in the middle of the Mediterranean. There was no food and almost no drinking water left.

35. This point, although still at an early stage of the trip, marked a dramatic turn in the general mood on the boat. Fits of panic broke out. The wind became stronger and the waves larger. The stormy weather tossed the boat around, filling it with seawater. Some persons were thrown into the sea by the rough weather, and attempts to rescue them failed.

### **3.7. Encounter with fishing boats**

36. The survivors also remember encountering a number of fishing boats at about the time they ran out of fuel. They saw at least one fishing boat flying the Italian flag and another flying a Tunisian flag. As they attempted to approach the Italian boat the fishermen drew in their nets and sailed away.

37. The Tunisians told them that they were navigating in the wrong direction and gave them new directions for Lampedusa. When the people on the boat told the fishermen that they had run out of fuel, the fishermen replied that they had none to give them. They then just “ran away from us.”

38. There is no indication that any of the fishermen called or warned any national coast guard about the boat in distress that they had encountered. If they had done this, many lives could have been saved.

### **3.8. “People started to die, one after the other”**

39. The situation on board the boat deteriorated quickly. Some people were hallucinating and speaking incoherently, perhaps because of drinking seawater. Many could not sleep, and one young woman threw herself into the sea in a panic attack.<sup>13</sup> “Every day, there were more and more people who would die.”

40. The survivors all recounted how, at this stage, on roughly the fifth or sixth day at sea, many people started dying, including the children. By the tenth day, around half of the people had died and had to be thrown overboard due to the smell. The fact that they had to do this further compounded the desperation and sense of hopelessness of the survivors.

### **3.9. Approximately day 10 – A large military vessel comes close to the boat**

41. The survivors all concur that on what could have been day 10 of their trip they drifted close to a very large military vessel. It was possibly an aircraft carrier or at least a vessel with helicopter facilities, with helicopters on board and possibly also fighter jets. The ship was of an off-white or light grey colour and the boat was close enough for them to see people on board wearing different coloured military uniforms.

42. “Some were looking through binoculars and others were taking pictures of us”, Ghirma told me. The ship remained at a distance, so the people in the boat started shouting and waving their hands. “They’re just watching that there are dead children and other bodies.”

43. In an attempt to approach the ship, some of the survivors jumped into the sea and starting pushing their boat in its direction. These efforts were, however, in vain. None of the survivors could remember seeing the ship’s flag. They held up the dead babies and the sick women, and also the empty fuel tanks. There was no communication from the ship and no assistance was provided. After a short while, the military vessel sailed away, abandoning the stranded boat.

44. “But instead they wandered off, their ship sailed off. Initially, we thought that this vessel was pointing in the right direction by sailing off, expecting us to follow; they were trying to show us the way. But then, you know, they kept wandering off and we kept following, and in spite of our many gestures, they were not responding at all. And gradually, they just disappeared, and we realised that they were not responding, replying to our distress calls at all”, Ghirma recalled.

### **3.10. After day 10 – “We were just waiting for our own time or turn to die”**

45. The boat drifted with the current and with the wind. To survive they drank their urine mixed with the little toothpaste they had managed to bring with them. The death toll kept rising, and on about the fifteenth or sixteenth day of their trip only 11 persons were still alive. “We were just waiting for our own time or turn to die.” remembered Ghirma. Bilal recalled how the group shrunk. “While we were talking to one another, four of us just died, four of the people in that group, talking, just passed away ...”

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13. Reported effects of drinking seawater include excessive thirst, increased heart rate, headaches, dizziness and nausea, vomiting, brain damage, impairment of judgment and dehydration. For summary information, see MarineInsight, “10 Effects of Drinking Salt Water of the Sea”, 20 September 2011, [www.marineinsight.com/misc/marine-safety/10-effects-of-drinking-salt-water-of-the-sea/](http://www.marineinsight.com/misc/marine-safety/10-effects-of-drinking-salt-water-of-the-sea/).

46. On 10 April, their boat was washed up on the rocks close to Zilten, a Libyan town situated 160 km east of Tripoli and 60 km west of Misrata. By then only 11 people were left from the group of 72. One woman died when they landed ashore. They were immediately arrested. Their possessions were confiscated, including wedding rings, necklaces, photos, documents and SIM cards. At this stage, the survivors were so exhausted that most lost consciousness.

47. The survivors were imprisoned for 24 hours and given tea and bread. Due to the lack of appropriate medical assistance, one of the survivors died in prison. They were then transferred from one prison to another. Their medical condition deteriorated and their open wounds from the trip became infected.

48. Eventually, with outside assistance, they managed to bribe their way out of prison and made their way to the Tripoli Catholic church, where they received some medical assistance. Since the situation in Libya remained dangerous, the survivors sought a way to escape. Some of them found refuge in Tunisia while others, once again, decided to attempt the maritime trip to Lampedusa. Ghirma, for example, reached Lampedusa on 11 June 2011.

49. The credibility of the story: I am aware of minor variations in the stories told by the survivors. I must, however, underline that there is nothing in these variations which undermines the overall credibility of the testimony. For the most part, the survivors were interviewed separately. Many of them had not seen each other since fleeing Libya, yet they all had the same basic story. For the sake of the investigation, the survivors interviewed had to relive traumatic events. The interviews were therefore moments of emotional intensity and I am grateful to the survivors for sharing their stories with me in all honesty.

50. The credibility of their testimonies is also confirmed by Father Zerai's account, as well as by objective elements gathered in the course of the investigation. In addition, the Rome Maritime Rescue Coordination Centre (Rome MRCC) provided me with extensive information and evidence supporting key elements of the story.

#### 4. The issues – Seven questions of responsibility

51. Before looking at the question of responsibility, it is necessary to clarify the legal framework in place.<sup>14</sup> The principal international maritime law instrument, containing core definitions, jurisdiction issues and rights and duties of States and other seafarers, is the 1982 United Nations Convention on the Law of the Sea (UNCLOS).<sup>15</sup> Article 98 of UNCLOS (Duty to render assistance) contains two State obligations, both relevant to the present case:

- All States should take all necessary steps to ensure that shipmasters of ships flying their flags assist persons in distress, proceed to the rescue of persons in distress and render assistance in collision situations. This obligation is not limited to coastal States and essentially requires that legislation is adopted at the national level obliging shipmasters to act as required by UNCLOS;
- Coastal States are required to “promote the establishment, operation and maintenance of an adequate and effective search and rescue service.”

52. These obligations are further expanded in two international legal instruments: the 1974 International Convention for the Safety of Life at Sea (SOLAS) and the 1979 International Convention on Search and Rescue (SAR). The two instruments complement UNCLOS insofar as they strengthen the duty to render assistance. They do this by, *inter alia*, clarifying that the duty is to be fulfilled without consideration of the nationality, status or circumstances of the persons in distress, and spelling out the operational details regarding the establishment by coastal States of search and rescue services.

53. The spirit of the SOLAS and SAR Conventions is also reflective of UNCLOS' aim, namely that search and rescue activities should be conducted within a co-operative framework between neighbouring States. The SOLAS and SAR Conventions together create the so-called SAR (search and rescue) regime, according to which the world's seas are divided into defined areas within which coastal States provide their search and rescue services: SAR zones. The definition by a coastal State of a SAR zone entails the triggering of SAR responsibilities, including the establishment of appropriate rescue co-ordination centres (RCC) tasked with ensuring the operational fulfilment of SAR obligations.

14. For a detailed description of the relevant legal framework, see Assembly Doc. 12628, report on the interception and rescue at sea of asylum seekers, refugees and irregular migrants (rapporteur: Mr Arcadio Díaz Tejera).

15. Full text available at [www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf).

54. Essentially, the SAR regime does not require that coastal States actually conduct search and rescue operations for every vessel in distress in their SAR zone, but rather that the State co-ordinates such operations to ensure their efficiency in saving lives.

55. Furthermore, as also emphasised by NATO officials in their meeting with me, the obligation to rescue applies to all masters of ships and makes no distinction on the basis of the nature of the ship or the purpose of the ship's presence in the maritime region. Military vessels are therefore equally bound under international law "to render assistance to any person found at sea in danger of being lost; to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him [the shipmaster]".<sup>16</sup>

#### **4.1. Was there a failure in the co-ordination of search and rescue?**

##### *4.1.1. Rome Maritime Rescue Coordination Centre*

56. On 27 March at 18:28, Father Zerai made the first of several calls to the Rome Maritime Rescue Coordination Centre (Rome MRCC) to report that the boat was in distress.

57. Following that phone conversation, the Rome MRCC undertook several steps.

58. The Rome MRCC first tried to contact the boat. From the audio records, it is clear that the conversation was interrupted before any substantial exchange could take place. This confirms the survivors' story that their satellite phone ran out of battery at the moment they were called.

59. On 27 March at 18:40, the Rome MRCC contacted Thuraya, the satellite provider, requesting it to provide the boat's co-ordinates based on the last call made from the boat's satellite phone. The co-ordinates obtained were:

Latitude:	33 degrees, 58.2 minutes North
Longitude:	12 degrees, 55.8 minutes East.

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16. Article 98.1.a and b, UNCLOS.

60. The Rome MRCC then sent out a number of messages, using different networks and satellites, to make sure they reached a maximum number of vessels in the area.

- On 27 March at 19:54, the Rome MRCC launched a DISTRESS call on the Inmarsat<sup>17</sup>-C Gateway Enhanced Group Call (EGC) addressed to all ships transiting in the Sicily Channel. I should stress that “Distress” is the highest emergency phase foreseen in the SAR Convention.

“PRIORITY: DISTRESS  
FM MRCC ROME – ITALIAN COAST GUARD TO ALL SHIPS TRANSITING IN SICILY CHANNEL  
BT  
ON 27 MARCH 2011 SICILY CHANNEL SEA IN POSITION LAT 33°58’ 2”N – LONG 012°55’ 8”E AT 16:52 GMT  
A BOAT WITH ABOUT 68 POB PROBABLY IN DIFFICULT. ALL SHIPS TRANSITING IN THE AREA ARE REQUESTED TO KEEP A SHARP LOOKOUT AND REPORTING ANY SIGHTING URGENTLY AT MRCC ROME AT THE FOLLOWING (...)”

- The Rome MRCC then informed the Malta MRCC by phone. The call was followed up by a fax alert sent at 20:40:

“FROM: MRCC ROMA  
TO: RCC MALTA  
SUBJECT: BOAT WITH APPROX. 68 P.O.B. PROBABLY IN DIFFICULT  
TEXT: DEAR SIR,  
FOR ANY APPROPRIATE ACTION, PLEASE BE INFORMED THAT TODAY WE RECEIVED THE INFORMATION ABOUT A BOAT WITH 68 P.O.B. PROBABLY IN DIFFICULT IN POS. LAT 33°58.2’N – LONG 012°55.8’E (16.52 UTC) ON BOARD THERE IS A THURAYA SAT PHONE (NUMBER 0088 216 21256157). NO OTHER INFORMATION IS AVAILABLE AT THE MOMENT.”

- At 21:40, the Rome MRCC sent a fax to NATO headquarters allied command in Naples:

“FROM: MRCC ROMA  
TO: NATO HEADQUARTER ALLIED COMMAND – NAPLES  
SUBJECT: BOAT WITH APPROX 68 P.O.B. PROBABLY IN DIFFICULT IN POS. LAT 33°58.2’N – LONG 012°55.8’E (16.52 UTC)  
TEXT: DEAR SIR/MADAMS  
FOR ANY APPROPRIATE ACTION, PLEASE BE INFORMED THAT TODAY THIS MRCC RECEIVED THE INFORMATION ABOUT A SMALL BOAT WITH ABOUT 68 P.O.B. IN DIFFICULT IN THE SOUTH MEDITERRANEAN SEA. ON BOARD THERE IS THE THURAYA SAT PHONE WITH THE NUMBER 008821621256157.  
WE CARRIED OUT SOME INVESTIGATION ABOUT THIS CASE WITH THE PURPOSE TO LOCATE THE CALLER. “THURAYA” COMPANY INFORMED US THAT THE POSITION OF THE SATELLITE DEVICE AT 16.52 UTC WAS LAT 33°58.2’N – LONG 012°55.8’E.  
PLEASE KEEP US UPDATED IN CASE OF SIGHTING OF THE ABOVE MENTIONED BOAT BY ANY NATO NAVAL ASSETS.”

- Frontex, at the time involved in an operation in the vicinity of Lampedusa, was also specifically informed.

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17. Inmarsat is a digital satellite communication system facilitating the fulfilment by maritime vessels of their obligations under the Global Maritime Distress and Safety system (GMDSS); primarily, those obligations relating to satellite communications requirements. Inmarsat-C EGC is one of the services available within the Inmarsat network, allowing authorised maritime safety information providers, particularly MRCCs to broadcast messages and alerts to all ships within a specified geographic area. For more information see information on the Inmarsat site, [www.inmarsat.com/Support/Inmarsat\\_C/FAQs/default.aspx?language=EN&textonly=False](http://www.inmarsat.com/Support/Inmarsat_C/FAQs/default.aspx?language=EN&textonly=False), and, [www.inmarsat.com/Support/Inmarsat\\_C/FAQs/00022710.aspx](http://www.inmarsat.com/Support/Inmarsat_C/FAQs/00022710.aspx).

- On 28 March at 06:06, the Rome MRCC sent out to all vessels another form of alert message, a Hydrolant<sup>18</sup> navigational warning (Warning No. 512/2011):

"EASTERN MEDITERRANEAN SEA.  
VESSEL, 68 PERSONS ON BOARD, IN NEED OF ASSISTANCE IN 33-58.8N. 012-55.8E AT 271652Z MAR.  
VESSELS IN VICINITY REQUESTED TO KEEP A SHARP LOOKOUT, ASSIST IF POSSIBLE, REPORTS TO  
MRCC ROME,  
INMARSAT-C: 424744220"

61. All maritime vessels, be they private, commercial or military, are supposed to be equipped to receive these messages. The Inmarsat message was not just sent once, but the Rome MRCC – probably nevertheless aware of the seriousness of the situation – kept sending this DISTRESS message every four hours for 10 days. Many boats must therefore have received it.

62. It is clear that all maritime vessels in the region were alerted to the situation of the boat. The hydrolant message, in particular, is unambiguous on the degree of distress of the boat "in need of assistance ... assist if possible".

#### 4.1.2. Void of responsibility

63. The boat was clearly within Libya's Search and Rescue (SAR) zone. The launching and co-ordination of a search and rescue operation was therefore, in principle, the responsibility of Libya's Maritime Rescue Coordination Centre (MRCC). A State's responsibilities with regard to its SAR zone is primarily to ensure, through co-ordination, that all persons in distress within the zone are promptly rescued and disembarked at a place of safety.

64. A standard SAR procedure would have seen the Rome MRCC handing over responsibility for the incident to Tripoli MRCC. Libya, as we know, was in a situation of internal armed conflict and upheaval. While the boat was in Libya's zone, it is clear that there was nobody on the Libyan side capable of co-ordinating a search and rescue operation.

65. At this stage, two MRCCs were informed of the boat's situation: Rome and Malta. No search and rescue mission was initiated however.

66. Indeed, there is no evidence that Libya MRCC was actually informed about the boat in distress and its position. None of the over 40 analysed telephone recordings provided by the Rome MRCC refer to such a notification to Tripoli. On the contrary, the reference to Tripoli MRCC in these calls seems to indicate that forwarding the distress alert to Libya was either not necessary or, more likely, a futile exercise. I have sought clarification on this issue and the Rome MRCC has confirmed to me that at the relevant time Tripoli MRCC did not respond to attempts by the Rome MRCC to communicate or to have an exchange of information.

67. Notwithstanding that the Rome and Malta MRCCs knew, or should have known that there was no Libyan search and rescue capacity, neither felt an obligation to mount a full search and rescue operation as the ship in distress was not within their SAR zone. The boat in distress was thus left floating in a responsibility vacuum.

68. During my visit to Malta, the Malta MRCC noted that its helicopters, being one-engine assets, were not able to travel such long distances and get back and that its boats usually required around 20 to 24 hours to reach the end of its SAR zone. The Maltese search and rescue authorities told me they had never considered starting a SAR operation, as they considered the Rome MRCC, the first MRCC informed, to be responsible on the basis of maritime law, and indeed the Rome MRCC had not requested them to start a search and rescue operation. Malta did, however, verify the location of the boat, which was slightly different from the location provided by the Rome MRCC, and informed the Rome MRCC accordingly. It should be noted that according to the Goldsmiths analysis of the reconstruction of the boat's drifting, it is possible the boat could have entered into the Maltese SAR zone before moving back into the Libyan SAR zone (see Appendix 1).

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18. For information on Hydrolant see:

[http://msi.nga.mil/NGAPortal/MSI.portal?\\_nfpb=true&\\_pageLabel=msi\\_portal\\_page\\_63](http://msi.nga.mil/NGAPortal/MSI.portal?_nfpb=true&_pageLabel=msi_portal_page_63); and for a map indicating the Mediterranean as falling within Hydrolant's geographical coverage, see: <http://msi.nga.mil/MSISiteContent/StaticFiles/Images/navwarnings.jpg>.

69. The Rome MRCC stated that during the period in question their assets were working around the clock, with between 20 to 25 incidents requiring attention on just one day. Between 26 and 28 March, the Italian authorities were engaged in incidents involving approximate 4 300 people. Over 2 200 of these people were assisted at sea and around 2 000 were rescued from distress situations. From the Rome MRCC's perspective, priority needed to be given to the large number of incidents occurring within Italy's SAR zone rather than incidents occurring elsewhere. The Italian authorities did not consider themselves as the responsible authority, as the boat was not located in their SAR zone. They explicitly let me know that if this had been the case, they would have certainly co-ordinated the SAR operation. At the same time, they remarked that they did not interpret the message from Father Zerai as an explicit request to be rescued, and that they lacked precise information on the situation of the boat. To illustrate that this had influenced their attitude, the coast guards told me about an SAR action they undertook in the Libyan SAR zone in response to a call for help with detailed information provided by a tug boat in August 2011.

70. Furthermore, some of the information available to the Rome and Malta MRCCs indicated that the boat was not adrift but that it was moving ahead with the use of its engines, possibly implying that the call was not an urgent distress call.

71. In this context, I am worried by this narrow interpretation of distress, according to which as long as the boat is still moving it is not in distress. I should like to recall here the definition of distress as stated in the SAR Convention: "Distress phase: A situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance."

72. That this boat was in distress and thus triggered an obligation to assist is clear to me. The "captain" had signalled distress, the boat was an overloaded rubber dingy lost in the middle of the sea with little or no food, water or fuel aboard. I would also like to stress that while virtually all migrant boats may, according to SAR standards, be considered to be in distress, this in no way means that a higher threshold should apply to such vessels.

73. Based on the analysis of the telephone recordings provided by the Rome MRCC, it appears that the Rome MRCC tried to find a solution but did not seem able to request proper assistance from the military assets involved in NATO's operations. At the same time, the Rome MRCC did not explicitly request anybody's direct intervention, be it Malta, NATO or any other party. I find this hard to understand as the Rome MRCC was aware that no one would take responsibility for the search and rescue operation. This attitude may be the result of the sensitive handling of defence matters and the unclear relationship with NATO. NATO should have introduced a mechanism to co-ordinate its assets in SAR operations in direct contact with the relevant Maritime Rescue Coordination Centres.

#### **4.2. Was there a failure of the legal norms?**

74. While a standard Search and Rescue procedure would have seen the Rome MRCC handing over responsibility for the incident to the Tripoli MRCC, it is clear that Libya's SAR zone was not being controlled by Libya. While the obligation to rescue at sea is crystal clear, the institutional obligations of neighbouring countries for a non-functioning or inadequately functioning SAR are not so clear.

75. Apparently this situation is not foreseen in the existing legal framework. The SAR Convention merely foresees that in the event of a boat in distress at an unknown position, an MRCC "shall, unless it is aware that other centres are taking action, assume responsibility for initiating suitable action and confer with other centres with the objective of designating one centre to assume responsibility" (Article 4.5.4).

76. In the case in question, the boat's location was known. Based on the International Aeronautical and Maritime Search and Rescue (IAMSAR) manual,<sup>19</sup> jointly published by the International Maritime Organization and the International Civil Aviation Organization, the Rome MRCC, as the first MRCC informed, should have maintained SAR responsibility over the incident in view of Tripoli's inability and failure to assume responsibility. The IMO Guidelines on the treatment of persons rescued at sea<sup>20</sup> confirms this. Article 6.7 states: "When

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19. IAMSAR's primary purpose is "to assist States in meeting their own search and rescue (SAR) needs, and the obligations they accepted under the Convention on International Civil Aviation, the International Convention on Maritime Search and Rescue, and the International Convention for the Safety of Life at Sea. Mission Coordination volume (volume II) assists personnel who plan and co-ordinate SAR operations and exercises".

20. See Annex 34, Resolution MSC.167(78) (adopted on 20 May 2004):  
[www.imo.org/OurWork/Facilitation/IllegalMigrants/Documents/MSC.167\(78\).pdf](http://www.imo.org/OurWork/Facilitation/IllegalMigrants/Documents/MSC.167(78).pdf).

appropriate, the first RCC contacted should immediately begin efforts to transfer the case to the RCC responsible for the region in which the assistance is being rendered. When the RCC responsible for the SAR region in which assistance is needed is informed about the situation, that RCC should immediately accept responsibility for co-ordinating the rescue efforts, since related responsibilities, including arrangements for a place of safety for survivors, fall primarily on the Government responsible for that region. The first RCC, however, is responsible for co-ordinating the case until the responsible RCC or other competent authority assumes responsibility.”

77. These standards contain operational guidelines but they are of a non-binding character. Insofar as the SAR Convention does not explicitly provide a clear solution to scenarios involving "absent" or "inactive" SAR States, it could be suggested that a legal vacuum exists requiring specific provisions in order to avoid similar incidents in the future.

78. As one of the very purposes of the system of applicable international laws is to preclude the possibility of people finding themselves in a legal no-man's land, the rule to provide assistance therefore takes precedence over any contractual relations between the different parties. One can conclude that not being responsible on the basis of SAR zones doesn't relieve another State which is informed about an incident at sea of its responsibility to ensure the rescue operation.

79. Furthermore, one of the negative aspects of the international law of the sea as it stands, is that it does not penalise those who fail to exercise their responsibility.

80. What also transpires from this incident is the apparent lack of clarity as to what amounts to distress. It should be ensured that there are clear and simple guidelines, which are then followed, on what amounts to a distress signal, so as to avoid any confusion over the obligation to search for and rescue a boat in distress.

81. In 2004, a series of amendments were adopted to the SAR and SOLAS conventions, coming into force two years later in 2006. The amendments, *inter alia*, provided further guidance on the locations where such rescued persons ought to be disembarked.

82. It should be noted that the 2004 amendments are the subject of ongoing disagreements between the Italian and Maltese authorities owing to the fact that Malta exercised its sovereign right to object to the set of amendments, including by not ratifying them. Malta's understanding of the 2004 amendments is that they would oblige Malta to accept the disembarkation in its ports of all persons rescued within its very large SAR zone.<sup>21</sup>

83. The main impact of the situation where neighbouring coastal States are regulated by two different sets of legal obligations is the consequential lack of legal certainty with regard to the most appropriate place of disembarkation for persons rescued in the central Mediterranean Sea.

84. This situation has led to a number of incidents where migrants, asylum seekers and refugees rescued on the high seas, including by fishermen or by military assets, were left waiting for days for the relevant States to decide where they ought to be disembarked. I am concerned that such situations contribute to the increasing unwillingness of private, commercial vessels, but also possibly of military vessels, to fulfil their legal obligation and rescue persons in distress, a failure also witnessed by the persons on the "left-to-die boat".

### **4.3. Was there a failure to intervene?**

#### **4.3.1. The French aircraft**

85. Information provided by the Rome MRCC indicated a sighting of a boat full of migrants by a French aircraft on 27 March at 14:55, just a couple of hours before the migrants made their first call to Father Zerai. According to the French sighting, the boat was a rubber dinghy, had about 50 persons on board and was under propulsion, as opposed to drifting. A photograph taken by the aircraft was also provided to me by the Rome MRCC, showing distinctly a blue boat packed with people and steadily moving ahead.

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21. See [Doc. 12628](#), *op. cit.*, paragraph 49.



86. The boat's position at this time, as recorded by the French aircraft, was not far away from Thuraya's estimate of the boat just a few hours later.

Latitude: 33 degrees, 40 minutes North  
Longitude: 13 degrees, 05 minutes East

87. The boat in the picture was identified as the boat in question by one of the survivors. Another survivor recalled that it was blue. Taking these facts into account, I am convinced that this is indeed a picture of the "left-to-die boat".

88. I was not provided with the name of the French aircraft.

89. I have written to the French authorities with questions relating to this picture, including one regarding the identity of the aircraft from which the photograph was taken and one regarding the identity of the vessel from which the aircraft was operating and its location. I also requested them to respond to my earlier requests concerning the location and activities of their assets at the time.

90. On 5 March 2012, I received a reply from the French Minister of Defence stating that, according to information provided by the French military, no such event occurred off the Libyan shores during the NATO operations. The Minister added that the French vessel "*Meuse*" encountered a vessel carrying migrants on 28 March 2011 approximately 12 nautical miles south of Malta, which could not have been the boat in question. The Minister went on to say that all other French assets were operating in the Gulf of Sidra, therefore not in the area of concern. While this reply is interesting, it fails to provide any concrete answers as to the identity of the French aircraft that took a picture of the boat and transmitted it to the Rome MRCC.

91. In relation to this specific incident, NATO's written reply to my letter of 8 December states that "based on a review of existing records in NATO operational headquarters, there is no record of any aircraft or ship under NATO command having seen or made contact with the small boat in question".

#### 4.3.2. *The helicopter*

92. The military helicopter that came and lowered a few bottles of water and biscuits to the boat did so after Father Zerai had informed the Italian Coast Guard of the boat in distress.

93. It is likely, but not certain, that the distress call and the intervention of the helicopter were linked.

94. The helicopter must have understood that the lives of the persons on the boat were in danger. The survivors recalled that the soldiers in the helicopter made gestures to them to wait. They were then confident that someone would come back and rescue them.

95. Why did this not happen? This is hard to understand. Perhaps the engine of the boat was running at the time and it was therefore not adrift? While this might have been an indication that the boat was not in immediate distress, the other characteristics of the boat (a simple dinghy, overcrowded, miles from the coast, people on board showing clear signs of distress) should have been clear. Furthermore, the message of the Rome MRCC was significant, and even if the helicopter had not considered the boat to be in distress it should have contacted the Rome MRCC and kept them informed of the reported sighting and intervention.

96. I therefore conclude that there was a clear failure of the helicopter and its command to take appropriate follow-up action linked to the boat and the people in distress.

#### 4.3.3. *The large military vessel*

97. Having established the credibility of the survivors' story, I have no reason to doubt that at one point during their journey they did encounter a large military vessel and that this vessel did not provide them with any assistance. In the light of NATO's statements regarding States' commitments vis-à-vis their international obligations at sea, and a number of SAR activities which took place successfully involving NATO assets, it is difficult to understand why no assistance was offered to the boat, regardless of whether the military vessel was under NATO command or not.

98. It should be noted that at the time of the sighting of the large military vessel (around day 10 of the boat's journey, therefore well after 31 March), NATO had taken sole command of the international military effort concerning Libya and it is my understanding that all military vessels in the region were under the command of NATO. My request to NATO for clarification on this point has, however, remained unanswered. In the reply from the French Minister of Defence, I was informed that the aircraft carrier *Charles de Gaulle* (explicitly mentioned in *The Guardian* article) was never operating closer than 150 nautical miles from Tripoli at the time of concern and could therefore not have been the large vessel encountered by the boat. I was also informed by NATO that the Italian aircraft carrier *ITS Garibaldi* was also 120 to 150 miles away at this time.

99. According to the survivors' accounts, the situation on board their boat when they encountered the ship was very different to the situation when they encountered the helicopter. When the ship came across them, many persons had already died and there was no food and water. It should have been clear to onlookers that the survivors and the boat were in distress and required immediate rescue. In these circumstances there was a clear failure to intervene.

#### 4.3.4. Commercial shipping

100. There are also serious concerns about the failure of the fishing boats to take any action when coming into contact with the boat in distress.

101. According to the survivors, the Tunisian fishermen pointed them in the direction of Lampedusa. It is clear that the fishermen failed to go to their aid and did not provide any material form of assistance. What is of particular concern is that the fishermen failed to inform any maritime authority of the boat's presence and distress.

102. Fishing boats have a radio on board. It would have been simple for a call to have been made indicating the location of the boat in distress.

103. It is also unclear why the Cypriot supply vessel *Sea Cheetah* did not intervene. From the analysed telephone recordings provided by the Rome MRCC, I understand that it was not far from the boat's location on 27 March 2011. However, apparently the *Sea Cheetah* took no action, nor did the Rome MRCC ask it to do so.

104. In their meeting with me, UNHCR officials highlighted a number of concerns about measures being taken by coastal States that negatively affect the willingness of fishing vessels and other commercial shipping to fulfil their obligation of rescue at sea. Such measures include the criminalisation of irregular migration and problems of delays in agreeing a place of disembarkation. For commercial vessels, this can lead to serious financial losses and also the threat of criminal sanctions for aiding and abetting irregular migrants. It is clear that commercial vessels, including small fishing vessels, seem to be increasingly reluctant to rescue mixed flows of migrants in distress at sea.<sup>22</sup>

#### 4.4. Was there a failure by NATO?

105. As previously explained, NATO was informed of the situation of the boat via a fax sent by the Maritime Rescue Coordination Centre (MRCC):

*"FOR ANY APPROPRIATE ACTION, PLEASE BE INFORMED THAT TODAY THIS MRCC RECEIVED THE INFORMATION ABOUT A SMALL BOAT WITH ABOUT 68 P.O.B. IN DIFFICULT IN THE SOUTH MEDITERRANEAN SEA. ON BOARD THERE IS THE THURAYA SAT PHONE WITH THE NUMBER 008821621256157. WE CARRIED OUT SOME INVESTIGATION ABOUT THIS CASE WITH THE PURPOSE TO LOCATE THE CALLER. "THURAYA" COMPANY INFORMED US THAT THE POSITION OF THE SATELLITE DEVICE AT 16.52 UTC WAS LAT 33058.2'N – LONG 012055.8'E. PLEASE KEEP US UPDATED IN CASE OF SIGHTING OF THE ABOVE MENTIONED BOAT BY ANY NATO NAVAL ASSETS."*

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22. Specific examples include: the prosecution by Italy of seven Tunisian fishermen who rescued 44 migrants at sea, the Cap Anamur incident (<http://news.bbc.co.uk/2/hi/8295727.stm>), the Francisco y Catalina incident (<http://news.bbc.co.uk/2/hi/europe/5205084.stm>), and the long-standing disagreement between Italy and Malta on their respective interpretations of SAR responsibilities.

106. NATO did not reply to the Rome MRCC's fax. However, no reply would have been expected unless maritime assets were in the vicinity of the vessel, the subject of the alert. Interestingly, however, on 28 March at 11:58, NATO replied to another alert the Rome MRCC had disseminated, informing them that no NATO assets were in the vessel's vicinity. It is not clear why NATO replied to that particular alert and not to the alert relating to the "left-to-die boat".

107. NATO's responses to this incident were inconsistent, as illustrated by NATO's initial comments to the media:

*"It had not logged any distress signals from the boat and had no records of the incident",<sup>23</sup>*

*"There is no absolute evidence of NATO ships being involved in such events",<sup>24</sup>*

*"I have no evidence of having received such alerts",<sup>25</sup>*

*"The only aircraft carrier attached to the NATO mission at the time in question, which is the 29th and the 30th of March, was an aircraft carrier which was operating more than 100 nautical miles away from the possible location of the migrant vessel",<sup>26</sup>*

*"NATO units at sea neither saw nor heard any trace of distress calls from that area",<sup>27</sup>*

*"Basically, NATO was not involved because it had no signs, okay?"<sup>28</sup>*

108. During my meeting with NATO officials in Brussels, I was informed that NATO's closest asset to the boat was 24 miles away. Despite my official and repeated request, NATO has not disclosed the name of the vessel in question.

109. However, I have gathered evidence that NATO assets were indeed in close proximity to the boat at that time, namely one only 11 miles from the boat.

110. On 27 March at 20:07, the Italian Naval Fleet Command (CINCPNAV) made a call to the Rome MRCC during which the boat in distress was discussed. Importantly, the CINCPNAV officer confirms that a military vessel under NATO command was located around 11 miles away from the boat in distress: the Spanish military vessel *Méndez Núñez*.

111. Given the *Méndez Núñez's* distance from the boat, it seems that it could have reached the boat in distress in less than two hours. It remains unclear why NATO, or the *Méndez Núñez* itself, failed to provide this information to the Rome MRCC following the launch of the distress alert. What is clear is that no attempt was made by the Spanish vessel to approach the boat. Furthermore, the *Méndez Núñez* is a military vessel with the capacity to carry a helicopter. If it had a helicopter on board it would have been an even simpler operation to check on the boat in distress.

112. During the above-mentioned telephone conversation between the CINCPNAV and the Rome MRCC, shortly after referring to the *Méndez Núñez*, mention is made of the Italian vessel *ITS Etna* as being within the specified region as well as the *ITS Borsini*. In information provided by NATO, it is confirmed that the *ITS Borsini* was 37 nautical miles away, but that the *ITS Etna* was much further away (155 miles). The presence of an Italian military vessel within the specified region could provide a link to the origin of the water and biscuits dropped by the helicopter to the boat in distress. The *ITS Borsini* has a helicopter capacity. More information is needed from the authorities to establish whether or not this vessel was aware of or involved in the incident.

113. It also transpires from the aforementioned conversation between the Rome MRCC and the CINCPNAV officer that the CINCPNAV officer left it to NATO to deal with its own assets which were "the nearest of all in absolute terms".

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23. Spokesman for NATO, in The Guardian article of 8 May 2011.

24. Brigadier General Claudio Gabellini, NATO, Press briefing on Libya, 10 May 2011, [www.nato.int/cps/fr/natolive/opinions\\_73660.htm](http://www.nato.int/cps/fr/natolive/opinions_73660.htm).

25. Ibid.

26. NATO Deputy Spokesperson Carmen Romero, during the press briefing referred to above.

27. Ibid.

28. Ibid.

114. It is not clear whether the NATO vessel located at 24 miles from the boat was the *Méndez Núñez*, or another military vessel. It can be noted that 24 miles is a relatively close sailing distance. Indeed, I was told by the Malta MRCC that when organising a SAR operation they look for assets in a 100-mile radius. As one NATO official said: "it would have been a piece of cake" to sail to the boat.

115. NATO officials have confirmed in a meeting, in follow-up written communications, as well as in several press briefings, that NATO's operations are fully aware of their international maritime law responsibilities. Their active involvement in a number of SAR operations during this period resulted in the saving of hundreds of lives. This is clear evidence of their general readiness to assist when and as required.<sup>29</sup> Yet despite this understanding of international maritime law rules and a willingness to save lives at sea, no asset known to be close to the boat headed to its rescue.

116. According to NATO, the contents of the message they received from the Rome MRCC in the evening of 27 March were unclear. NATO told us that the message was not sent in the required format, standardised for ease of comprehension, and that it was therefore not a clear distress call requesting specific action. NATO specified that the message's text "did not convey a sense of seriousness or urgency".

117. Whilst the indication that the vessel was in difficulty appears to be clear, the message does not request any prompt specific action and the word "DISTRESS" is not used. The Malta MRCC also commented on the nature of the alert, saying that there was no specific query as to availability of assets.

118. This possible lack of clarity on the alert level is not seen in the Inmarsat-C Enhanced Group Call (EGC) launched by Rome (27 March 2011 at 19:54), which clearly indicated the alert's priority as "DISTRESS". The Hydrolant Warning Message launched on 28 March at 06:06 specifically stated that the persons were in need of assistance, requesting all vessels in the vicinity to keep a sharp lookout and to "ASSIST IF POSSIBLE."

119. It is my understanding that the messages were sufficiently clear to indicate that action was necessary and that they should not be ignored. If authorities were considering not intervening because of the lack of clarity, asking for clarification from the Italian coast guards would have been the most appropriate step to take.

120. In order to understand the situation better, I wrote to the Ministry of Defence of Spain with respect to the *Méndez Núñez* and to NATO with respect to the *ITS Etna* (which I was informed was under NATO command) seeking the following information:

- The specific location of the *Méndez Núñez* and the *ITS Etna* at the time of the Rome MRCC's fax alert to NATO, as well as the logs of their respective aircrafts/helicopters;
- The name and nationality of the military vessel located at around 24 miles from the boat;
- The details of any communications between NATO Naples Headquarters and the *Méndez Núñez* and the *ITS Etna*, and also the vessel 24 miles away. Most importantly, I am attempting to ascertain the specific considerations and decision-making processes that led to these vessels taking no action.

121. On 8 March 2012, I received a reply from the Spanish Minister of Defence assuring me that the *Méndez Núñez* "never had any contact at all with [the] vessel adrift" and that it "never was at the distance of 11 nautical miles" referred to in my letter. Furthermore, the Ministry added that "this frigate did not receive any fax from MRCC Rome or any other communication" regarding the matter mentioned in my letter. Finally, the Ministry underlined that the helicopter from the frigate "did not overfly, and consequently had no chance to provide any assistance to the boat".

122. While I was aware that the Rome MRCC did not contact the military vessels directly, I have to conclude that NATO Naples Headquarters did receive the distress fax. Whether they passed it on to vessels operating under its command is unclear and contradictory. NATO confirms to me that they did, while the Spanish

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29. See for example statements made during NATO's 13 May 2011 press briefing on Libya: "In accordance with the Safety of Life at Sea, the SOLAS convention, all NATO ships will maintain a constant lookout for vessels in distress. Captains of ships will follow international law and responsibilities in rendering assistance to any known ship to be in distress. Furthermore, NATO is working with the maritime authorities of neighbouring countries and with the commercial shipping industry in order to spot and assist vessels whenever necessary." [www.nato.int/cps/fr/natolive/opinions\\_74038.htm](http://www.nato.int/cps/fr/natolive/opinions_74038.htm). On 26 March, the Italian vessel *Etna* was involved in a SAR operation seeing the rescue of around 300 migrants, photos available here: [www.nato.int/cps/en/natolive/photos\\_73676.htm](http://www.nato.int/cps/en/natolive/photos_73676.htm). Other examples include: Reuters Africa, "NATO answers refugee boat's mayday off Libya", 10 July 2011, <http://af.reuters.com/article/libyaNews/idAFL6E7IA06W20110710>.

authorities contradict this saying that they did not receive the message. I also have difficulties in understanding how the *Méndez Núñez*, and other vessels could not have received the general Inmarsat and Hydrolant distress messages which were sent to all vessels in the area.

123. The letter from the Spanish Minister of Defence, while stating that the *Méndez Núñez* was never at a distance of 11 nautical miles from the boat, does not provide me with its exact position. It is highly likely that it was nevertheless extremely close to the boat.

124. Without full information on this matter it is difficult to conclude on the responsibility of NATO or boats under national command. It is, however, clear to me that there was a failure by NATO to react to the distress signals. Bearing in mind that the Italian MRCC had no independent way of identifying military vessels in the area or having direct contact with them, it was up to NATO to take action. Furthermore, the helicopter that went to the aid of the boat and then disappeared had to be attached to some military vessel. No explanation has come forward from any quarter recognising the role of the helicopter or explaining the lack of follow-up to its mission, including the lack of communication with the MRCC about this flight.

#### **4.5. Was there a failure to prepare for the consequences of the Libyan conflict by the United Nations and NATO?**

125. "Before starting a war, you have to know: Where do you put the prisoners? Where do you put the dead? What do you do with the refugees?"<sup>30</sup>

126. This statement sums up my concern with the overall manner in which the exodus of migrants, asylum seekers and refugees from Libya was handled by the international community.

127. United Nations Security Council Resolution 1970, adopted on 26 February 2011, followed by Security Council Resolution 1973 on 17 March 2011, created the basis for the agreement to launch NATO's Operation Unified Protector. Surprisingly, these resolutions contain minimal references to persons forced to leave Libya as a result of the conflict and violence.

128. For several years Libya was known to be one of the main departure points for thousands of refugees, asylum seekers and migrants trying to reach Europe. Furthermore, there were public threats by Colonel Gaddafi that Europe would be flooded with immigrants. The exodus was therefore not a surprise and should have been catered for, including in terms of preparations for rescue at sea, particularly in Libya's SAR zone. There should have been greater clarity in terms of responsibilities for co-ordination and co-operation, particularly between MRCCs, NATO and States with military vessels in the region. Adequate resources should also have been made available for sea rescue operations and reception of mixed flows of migrants, asylum seekers and refugees.

129. NATO's extensive presence in the region seems to have been planned and implemented with insufficient consideration of search and rescue structures. I understand that the Rome MRCC did not consider that its SAR responsibilities extended to military vessels operating under NATO command. When informed of the *Méndez Núñez*'s location, the Rome MRCC concluded that it must have received the Inmarsat-C alert, but stopped short of taking further specific action.

#### **4.6. Was there a failure on the side of the Libyan authorities?**

130. Even in times of war, a State has the responsibility for the safety of civilians, be this on land or at sea. Libya can therefore not be absolved of all responsibility on this matter.

131. Furthermore, Libya breached all international obligations by encouraging and even forcing the migrants, asylum seekers and refugees to take the dangerous sea route. Not only did Colonel Gaddafi threaten Europe that he would put these people to sea, it actually happened. In the case in question the survivors told me how the military accompanied them to the boat. On other occasions, I have listened to vivid testimonies of people being forced at gunpoint to embark on unseaworthy boats heading towards Lampedusa. There is no doubt that there was a massive failure on the side of Colonel Gaddafi's Libyan authorities and that they therefore also carry a heavy share of the responsibility for the deaths on this boat. At the same time, Gaddafi also threatened the refugees in Libya by forcing them to support his regime. As the rebels suspected the refugees originating from Sub-Saharan Africa of supporting Gaddafi, many of them chose to flee.

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30. Statement by the Italian navy during our meeting of 7 September 2011.

#### **4.7. Was there a failure on the side of the smugglers?**

132. The conclusion here is simple. The smugglers showed reckless disregard for the lives of the migrants. To make money, they overloaded the boat, they took away food and water, they did not provide sufficient fuel and they did not provide adequate means of communication in case of distress. Furthermore, the so-called “captain” of the boat was clearly unqualified to get the boat to Lampedusa.

### **5. Who is responsible?**

#### **5.1. A collective failure**

133. As can be seen from the answers to the seven questions posed: there were failures at every step of the way and by all key actors. There was a collective failure of NATO, the United Nations and individual States in planning the Libyan military operations and preparing for an expected exodus by sea. There was a failure in co-ordinating the specific rescue of the boat, despite the fact that a distress signal had been sent and the co-ordinates of the boat had been logged. This failure was in part due to the lack of clarity for responsibility under Maritime Law and in part due to lack of co-ordination by the Italian or the Maltese Maritime Rescue Control Centres with other actors in the region in the absence of a functioning Libyan MRCC. The Rome MRCC broadcast an emergency call over a long period of time, but failed to ensure that the boat was rescued. Yet, as the first authority to be informed about their difficulties, and in view of the obviously ineffective Libyan SAR, the Rome MRCC can be regarded as the first authority responsible for ensuring their rescue. The *Méndez Núñez* and the *ITS Borsini*, although in the near vicinity of the boat, failed to go to its assistance, thereby engaging the responsibility of both NATO and their respective flagship countries (Spain and Italy). The Libyan authorities were responsible not only for what they didn’t do (maintain responsibility for their SAR zone), but more worryingly for what they did do (directly or indirectly forcing persons to climb in boats and flee Libya). The smugglers showed reckless disregard for the lives of the persons who boarded the boat. The boat was spotted and photographed by a plane. The existence of a packed rubber dingy in the middle of the Mediterranean, even if under propulsion, should have been a signal for high alert.

134. What concerns me most, however, are the allegations that the boat was ignored by a helicopter and a military vessel. A helicopter provided food and water and then disappeared. Neither NATO nor any State has come forward to provide information as to the identity of the helicopter and the actions taken by it and its command. Similarly no one has come forward with the possible identity of the military vessel which ignored the calls for assistance from the survivors of the boat in distress about ten days into its trip.

135. At the time of writing, there exist a number of information gaps and certain questions remain unanswered.

136. Some information is not available because of the passage of time and the unavailability of data. In other cases, information gaps exist because specific questions to specific agencies and authorities remain unanswered, despite the gravity of the incident. At the core of these gaps are three of the investigation’s most fundamental questions. The first is the State responsible for the helicopter that first assisted the boat in distress. The second is the State responsible for the military vessel that ignored the plight of the survivors and thirdly, a question which should be simple to answer, whether the military and air vessels concerned were under national or NATO command.

#### **5.2. Which helicopter left the boat to die?**

137. All of the survivors, including those interviewed by other agencies and individuals, corroborate the story that a military helicopter approached them and lowered water and biscuits onto the boat using a rope. Although the survivors’ accounts are almost all consistent in recalling Italian writing on the water bottles and possibly also on the biscuit packaging, this information, while pointing a finger towards an Italian vessel is not conclusive. For example, the water and biscuits could have been loaded onto a foreign vessel in an Italian port. Every military asset should in principle maintain a detailed log of all material boarded, transported and distributed. I am certain that if a military helicopter distributed water and biscuits, the log would show this. Access to these logs would therefore facilitate the determination of whether or not helicopters operating in the region were or were not involved in the incident.

138. The helicopter must almost certainly have come from a ship. From the information I gathered, I can state that at least two military ships under NATO or national command were in close proximity to the boat at the time the distress call was made. These boats were the Spanish ship *Méndez Núñez* and the Italian ship *ITS Borsini*; both have aircraft facilities, which means that they are capable of launching helicopters.

139. As noted above, NATO's written reply to my letter of 8 December states that "based on a review of existing records in NATO operational headquarters, there is no record of any aircraft or ship under NATO command having seen or made contact with the small boat in question".

140. In the light of the information I have received concerning the whereabouts of the *Méndez Núñez*, the *ITS Etna*, I have sent a further letter to NATO and the Spanish authorities asking for information on the precise location of these ships and the detailed logs of their respective helicopters. As stated above, the Spanish Minister of Defence replied to me that the helicopter from the *Méndez Núñez* "did not overfly, and consequently had no chance to provide any assistance to the boat". NATO replied, as already mentioned above, that the *ITS Etna* was not in the region but that the *ITS Borsini* was 37 miles away. No mention is made in this reply of the *ITS Borsini* helicopter activities or its rescue activities.

### **5.3. Which military vessel ignored the calls for assistance?**

141. To try and identify the large military vessel I sought the co-operation of the European Union, whose Satellite Centre (EUSC) gathers a great deal of data and pictures across the globe. A letter was therefore sent to Lady Ashton, the High Representative of the European Union for Foreign Affairs and Security Policy and Vice-President of the European Commission.

142. On 19 March, I received Lady Ashton's reply which states that the European Union Satellite Centre does not have archived products available for the indicated area and the indicated time frame. It continues stating that "Considering that the area of interest for which your requested imagery is located less than 130 km from the Libyan shores and that the period under investigation coincides with the NATO operation "Unified Protector", the envisaged investigation could involve classified "NATO CONFIDENTIAL" information. I would therefore suggest that the committee requests assistance from NATO, including through the NATO Parliamentary Assembly." This implies that satellite data and imagery might be available, but only to NATO.

143. Access to satellite imagery of the area would be an invaluable tool to identify the location of ships and assets at the time. Military vessels are certainly large enough to be spotted, and possibly identified from such data. There is little doubt that a region in which NATO military operations were ongoing was monitored by satellite and NATO must have access to this information.

144. I asked the Rome and Malta MRCCs' assistance in trying to reconstruct as accurately as possible the drifting itinerary of the boat. While Rome replied that the backtracking calculation of the itinerary is very difficult considering the high number of variables and unknown elements, Malta did not reply.

145. I was nevertheless provided with a drift model by Goldsmiths, Centre for Research Architecture (see Appendix 1). It gives a rather precise indication of the whereabouts of the boat during its drifting back to Libya.

146. A number of States have responded saying that they had no military vessels in the area during the specific time frame in question. These replies were received from Canada, France, Greece, Italy, Romania and Turkey. However, in the Italian Ministry of Defence's reply, I was invited to contact NATO concerning Italian assets under its command. This was the case for the *ITS Etna* and I thus addressed NATO specifically to obtain clarification. I have received clarification regarding the *ITS Etna*, but a number of questions remain outstanding as regards the *ITS Borsini*. This illustrates how responsibility is easily shifted back and forth at national and supranational level.

147. The United Kingdom and the United States have not yet replied to my letters.

148. The replies I have received so far do not allow me to identify the vessel. However, I have no doubt that this information is available. NATO certainly has access to the detailed logs of the vessels participating in its operations. Until I receive adequate replies, I have no option but to reach the conclusion that one of these States' vessels could be responsible for ignoring the calls for assistance from the boat in distress. Whatever the nationality of the vessel, it must have been under the command of NATO, as at that time all vessels in the area were under NATO command. NATO must therefore take responsibility for the ship's ignoring the calls for assistance from the "left-to-die boat".

149. Here again, NATO's reply states that it has no record of any ship under NATO command having seen or made contact with the boat.

## 6. Conclusions

150. As stated at the beginning of this report, I have an immense respect for those persons who work to save lives in dangerous conditions at sea. Thousands of lives have been saved and will continue to be saved thanks to their courage and dedication.

151. At no point during the preparation of my investigation and report did anyone question the basic obligation to rescue at sea. This obligation is known to every shipmaster, professional or amateur.

152. Nevertheless, too many persons have lost their lives in circumstances similar to the 63 persons on board the "left-to-die boat". With this investigation, it is hoped that this striking story will also draw attention to the many other tragedies of this kind.

153. Things went terribly wrong for the passengers of the boat which is the subject of this investigation. These people did not need to die. If different actors had intervened or had intervened correctly, they could have been rescued on several occasions. More has to be done to avoid people dying in their desperate attempts to reach Europe.

154. In the specific case in question, I will continue to look for answers. Those responsible have to be called to account and the incident needs to serve as a reminder that there are gaps in both law and practice concerning rescue at sea which need to be remedied.

155. The Mediterranean is one of the busiest seas in the world, and at the same time one of the best monitored. Yet, in 2011, the Mediterranean was also the sea in which the most people disappeared. I am not talking about somewhere in the middle of the Pacific, but about the Canal of Sicily which is full of ships, with many radars and with satellite imagery available. This boat could and should certainly have been rescued and not left to wash up on the shores of Libya with only a handful of survivors.

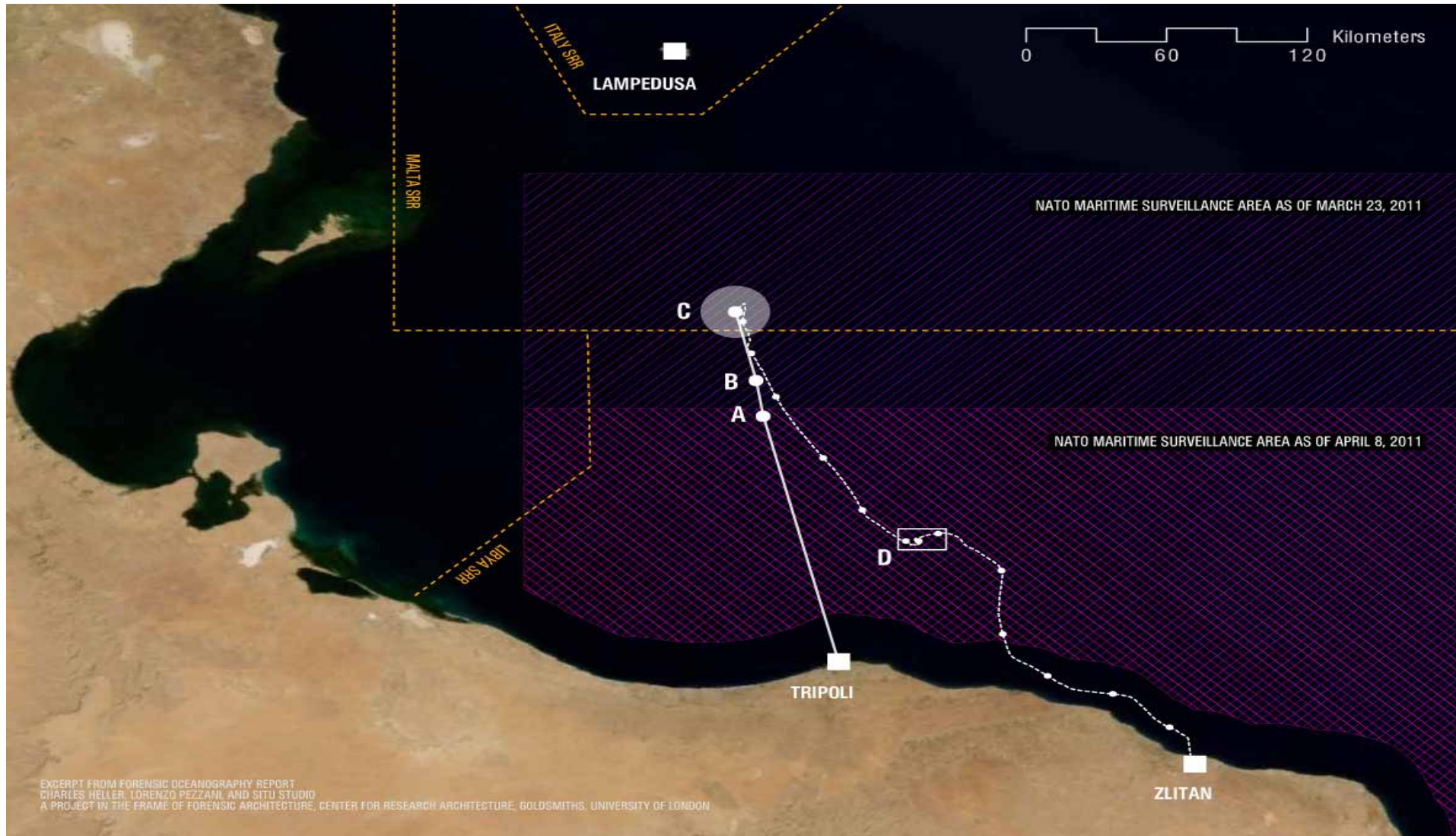
## 7. Post script on the survivors

156. Without the willingness of the survivors to share their stories, this investigation would have no foundation. Some of them lost loved ones on their journey, all of them have to live with physical and psychological scars from the traumatic trip and build new lives.

- Bilal Yacoub Idris, 30 years old, is Ethiopian. He took another boat and reached Italy, where he now lives in a centre for asylum seekers. His claim for asylum is still pending.
- Ghirma Halefom is Eritrean. He arrived in Lampedusa in June 2011 and now lives in a centre for asylum seekers near Turino. His claim for asylum is still pending.
- Dain Haile Gebre is Eritrean. He now lives in Italy, where he has been granted asylum.
- Abu Kurke Kebato, 23 years old, claimed asylum in Italy. Later he moved to the Netherlands together with his wife, where he made a further claim for asylum, which is still pending.
- Mahmmd Ahmed Ibrhaim, 23 years old, Kabbadi Asfao Dadi, 19 years old, and Elias Mohammed Kadi, 23 years old, are Ethiopian. They live in the Choucha refugee camp in Tunisia. They have been granted asylum and will be resettled to Australia.
- Filmon Weldemichail Teklegergis, who used to call himself Johannes, is Ethiopian. He lives in Norway where his first claim for asylum has been rejected. The appeal procedure is pending.
- Mariam Moussa Jamal, 22 years old and Ethiopian, is the only female survivor of the tragedy. After having spent several months in the Choucha refugee camp in Tunisia, she was resettled to Norway by the International Organization for Migration (IOM).



Appendix 1 – Reconstruction of the itinerary and of the drifting of the “left-to-die boat”<sup>31</sup>



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31. [Link to the PDF file.](#)

**Figure caption:**<sup>32</sup>

Trajectory followed by the “left-to-die boat” with indication of key events:

- The migrants’ vessel leaves the Port of Tripoli between 00:00 and 02:00 UTC on 27 March 2011 with 72 people on board.
- **(A)** After proceeding in the direction of Lampedusa for 15 to 18 hours, the migrants place a distress call by satellite phone. The GPS location of the vessel is located at 16:52 GMT on 27 March 2011 at position LAT 33 58.2 N – LON 12 55.8 E by the satellite phone provider Thuraya. Shortly after this call, the Italian Coast Guard publishes an Enhanced Group Call alert that a vessel is in distress and provides its geographic co-ordinates.
- **(B)** The boat proceeds for around two hours until it is overflown by a helicopter. After this encounter, the satellite phone is thrown into the water. The last signal detected by the satellite phone provider is LAT 34 07.11 N – LON 12 53.24 E at 19:08 GMT on 27 March 2011. This location thus presumably corresponds to that of the encounter with the helicopter. The boat remains in approximately the same area for 4-6 hours before it is visited for a second time by a military helicopter that drops biscuits and water before leaving. Still without moving very much from the location of the last signal, the migrants encounter several fishing vessels, which do not provide assistance. They then decide to move again between 00:00 and 01:00 GMT and continue presumably NNW towards Lampedusa for 5 to 8 hours with an estimated speed of 4.43 kt (the average speed held during the navigation from Tripoli to point **A**).
- **(C)** The vessel runs out of fuel and begins to drift within a 8 nm radius (indicated with a white shade) of position 34 24.792 N – 12 48.576 E at approximately 07:00 GMT on 28 March.
- **(D)** The boat drifts (the estimated vessel drift was more strongly dominated by the south-eastwards winds) and between 3 and 5 April the migrants encounter a military ship that fails to assist them in any way.
- On 10 April 2011, the boat lands back at Zlitan. Upon landing 11 migrants are still alive. Two die shortly after landing.

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32. FORENSIC OCEANOGRAPHY: Charles Heller, Lorenzo Pezzani and Situ Studio.

Drift Model: Richard Limeburner, Woods Hole Oceanographic Institution (WHOI).

This work is produced in the framework of the ERC funded Project “Forensic Architecture” – Goldsmiths, Centre for Research Architecture and towards a report that will be published in April 2012.

DRIFT MODEL CREDITS: Ocean currents were obtained from the MyOcean website

(<http://www.myocean.eu.org/index.php/products-services/catalogue>). MyOcean provides data mainly from EuroGOOS Regional alliances which have deeply contributed to structure the European Operational Oceanography community. The ocean currents were actually provided by the Istituto Nazionale di Geofisica e Vulcanologia (INGV) in Italy. INGV uses NEMO (Nucleus for European Modeling of the Ocean), a state-of-the-art modeling framework for oceanographic research, operational oceanography, seasonal forecasts and climate studies. See <http://www.nemoocean.eu/>. Wind data at the Lampedusa Island airport was obtained from EuroWeather (<http://www.eurometeo.com/english/home>). Weather data at Libyan meteorological stations was unreliable in early 2011.

## **Appendix 2 – Selection of official replies sent to the Rapporteur**

- NATO (8 February and 27 March 2012)
- FRONTEX
- Ministers of Defence of
  - a. Italy
  - b. France
  - c. Spain
- Lady Ashton, High Representative, Vice-President of the European Commission

### **Letter from Mr Richard Froh, Deputy Assistant Secretary General, Operations Directorate of NATO, to Ms Strik, rapporteur of the Committee on Migrations, Refugees and Displaced Persons, dated 8 February 2012**

I am now in a position to respond to your letter of 8 December 2011, regarding the tragic loss of life in an incident that occurred in the Mediterranean Sea at the end of March and the beginning of April 2011.

Our military colleagues have carefully examined all available records. With the exception of the 27 March initial notification from the Maritime Rescue Coordination Centre Rome of a small boat probably in difficulty, they confirm that the relevant military headquarters have no record of any of the follow-on events mentioned in your letter.

Specifically, the NATO operational headquarters in Naples, which was responsible for the conduct of Operation Unified Protector (OUP), has no record, following the initial 27 March notice, of any further notifications from the Rescue Coordination Centre. Nor does it have any record of a phone call from Father Zerai on 28 March. With regard to the reported sightings of a helicopter and of the large military vessel, I can confirm that, again based on a review of existing records in NATO operational headquarters, there is no record of any aircraft or ship under NATO command having seen or made contact with the small boat in question.

Just to be clear, not all military ships in that part of the Mediterranean were operating under NATO command. As you requested, I have also asked our member nations if they had any ships or helicopters in the relevant area under their national command that may have come in contact with the small boat. They may decide to respond to you directly or do so through me, should they have any further information on either the reported helicopter or military vessel.

I can assure you that forces under NATO command and the navies of NATO member states are aware of their relevant obligations under maritime law, including those with respect to rendering assistance to persons or ships in distress. As we mentioned during our meeting with you in November and to which you referred in your subsequent letter, during the campaign NATO vessels actively assisted many vessels in distress.

As we also discussed on the occasion of your visit, there is an outstanding question whether vessels responded appropriately to the March 27 Maritime Rescue Coordination Centre Rome notification, and specifically whether it should have been understood as a "distress call". (I enclose a copy of that notification for completeness.) The subject of the notification is 'Boat with approx 68 P.O.B. probably in difficult (sic) in pos (sic) ... '. The last paragraph gives no sense of urgency, and the only action requested is to advise of any sighting of the boat by NATO naval assets. The 27 March notice did not include the standard indicators that are found on "distress messages". Its text did not convey a sense of seriousness or urgency with respect to the vessel's condition. As I said above, NATO headquarters have no record of having received any follow-up messages. While we greatly regret the subsequent events, we cannot conclude that there was any error in the response by any forces under NATO command to this message.

I wish you all the best in your investigation and look forward to seeing your recommendations

### **Letter from Mr Stephen Evans, Assistant Secretary General for Operations of NATO, to Ms Strik, rapporteur of the Committee on Migrations, Refugees and Displaced Persons, dated 27 March 2012**

Thank you for your letter of 10 February 2012, in which you ask for further detailed information on specific points.

Regarding the location of, and actions taken by, the ITS ETNA operating under NATO command at the period concerned, we have received the following information from the Italian authorities.

ETNA received only one distress call on 26th March 2011 and performed a Search and Rescue operation saving 243 people on a boat. On 27th March 2011 at the moment of the MRCC fax to which your letter refers the ITS ETNA was 155 nautical miles from the position reported by the MRCC fax. On the following day, the ship conducted various operational activities (flight operations included) 120/150 nautical miles away from the position reported by the MRCC fax. The helicopter on board never established contact with boats in difficulties on the sea and never released food or material to boats with people on board. In general, no Italian helicopter operated in rescue or in support of boats in need.

As for any other Italian ship, on 27th March at the moment of the MRCC fax, the closest Italian ship to the distress point was ITS Borsini at 37 nautical miles away from the position reported by the distress call.

Finally, the only other Italian ship operating in the area was ITS Garibaldi 120/150 nautical miles away from the MRCC fax point.

Regarding the location of, and actions taken by, the ESPS MENDEZ NUNEZ operating under NATO command at the period concerned, the Spanish delegation in NATO provided the following information, which was separately sent to you by the Minister of National Defence of Spain in response to your letter of 10 February 2012:

Regarding the reception of the 27 March 2011 initial notification from the Maritime Rescue Coordination Centre Rome of a small boat probably in difficulty, the Spanish authorities confirm that neither a fax nor any other kind of communication was received by the Spanish frigate MENDEZ NUNEZ related to this issue or events referenced in your letter. They add that, on the 26th and 27th of March, the ship participated in two other search and rescue operations.

With regard to the reported sightings of one helicopter, the Spanish authorities confirm that the helicopter of the frigate MENDEZ NUNEZ did not see or make contact with the small boat in question.

Finally, the Spanish authorities reiterate that all Spanish vessels are aware of their relevant obligations under maritime law, including those with respect to rendering assistance to persons or ships in distress, and recall that during Operation Unified Protector the Spanish frigate MENDEZ NUNEZ actively assisted many vessels in distress.

In response to your third question, concerning the fax sent to MCHQ Naples by the MRCC Rome on 27 March 2011 and asking if it was passed to all assets involved in the NATO operations in the area of concern, I can confirm that during the period concerned, all information on the possible movement of migrant vessels was systematically and subsequently passed to the NATO units at sea for their maritime situational awareness. In the tragic incident in question, despite the imprecise nature of the request for information contained in the MRCC fax, which was not a formal request for assistance or "distress call", it was forwarded to NATO Task Force units under its operational control.

In addition, it should be noted that during Operation Unified Protector, SHAPE had meetings with the International Organisation for Migration (IOM), United Nations High Commissioner's Office for Refugees (UNHCR) and the International Maritime Organisation (IMO) to better coordinate in terms of migrants at sea. Contact details were exchanged to improve smooth and functional communication. When migrants were spotted, this was notified to both the responsible national coast guard in that particular Search and Rescue (SAR) area as well as the IOM and UNHCR, in order to be better prepared for a possible landing of migrants. This system worked to the satisfaction of the organisations involved.

It is also worth noting that during the entire period of Operation Unified Protector, NATO maritime assets directly aided the rescue of over 600 migrants in distress at sea, including hundreds the day before the MRCC fax. In all cases, NATO warships did everything they could to respond to distress calls and provide help when necessary. In addition, through coordination with national authorities, NATO has indirectly facilitated the rescue of many hundreds more. Commanders of warships under NATO command were, and remain, fully aware of their obligations under the International Law and Law of the Sea and responded appropriately.

I hope these elements answer your questions and remain available should you have further questions.

**Letter from Mr Ilkka Laitinen, Executive Director of Frontex, to Ms Strik, rapporteur of the Committee on Migrations, Refugees and Displaced Persons, dated 16 February 2012**

Please accept my apologies for the delay in replying to your letter. I used this time to verify all the details of joint operations that were taking place in the Centre Mediterranean between 22nd of March and 10th of April, which you wrote was the period during which the boat was drifting in the open sea.

You will find the outcome of our internal examination related to the deployment of assets in the two attached documents. The Agency will not be able to answer one of your questions in a precise manner. It is difficult to provide you with exact coordinates of the vessels between 22nd of March and 10th of April, as they were in constant motion. However we indicate precisely the operational area they were moving in.

Furthermore, I would like to use this opportunity to ensure you that one of the main objectives of all joint maritime operations coordinated by the Agency is to be ready to provide search and rescue (SAR). Hence all SAR cases are coordinated by a competent MRCC (Maritime Rescue Coordination Centre) according to internationally applicable SAR regime and procedures. In addition, at the EU level there were guidelines issued (Council Decision of 26th of April 2010 (2010/252/EU)) to the Schengen Borders Code.

Ultimately, as you precisely identified rescue of people in distress at sea were one of the key elements highlighted during the joint maritime operation EPN Hermes 2011. In 2011, there were 241 search and rescue cases and 23,192 migrants in distress were saved. It means that on average, Frontex coordinated assets were involved in saving 64 persons per day, the majority of them south of Lampedusa.

Also I would like to ensure you that FRONTEX has not used satellite imagery in the framework of its joint maritime operation EPN Hermes 2011.

To this end, I would like to confirm that in the framework of joint maritime operation EPN Hermes 2011 Frontex has operated only in Italy's and Malta's SAR zones.

I hope this answer will be of help in your examination of this tragic incident. I remain at your disposal for any further questions you might have.

Enclosure:

1. Deployment of assets between 22nd of March and 10th of April 2011
2. Summary of maritime Joint Operations coordinated by Frontex

**Letter from Mr Giampaolo Di Paolo, Minister of Defence of Italy, to Ms Strik, rapporteur of the Committee on Migrations, Refugees and Displaced Persons, dated 2 December 2012**

[Courtesy translation]

I refer to your letter of 26 October last requesting information on the position of Italian naval units in the area of the Mediterranean Sea from where a distress call was made by a boat "probably in difficulty".

Further to your request, I can inform you that Navy Command Headquarters has informed me that the boat concerned was never spotted by any of the units operating under national command in the periods and areas indicated.

With regard to naval units under NATO command (Operation Unified Protector), I would point out that any requests for information should be made to NATO headquarters in Brussels.

**Letter from Mr Gérard Longuet, Minister of Defence and Former Combatants of France, to Ms Strik, rapporteur of the Committee on Migrations, Refugees and Displaced Persons, dated 5 March 2012**

I have given your letters of 26 October 2011 and 20 February 2012 my closest attention and now wish to reply to your questions.

I deeply regret the death of the migrants concerned.

First of all, I would underline that the French Navy is fully aware of the duty to assist persons in distress at sea, in accordance with international law and, still more, with the values of solidarity and mutual assistance championed by France. Every year, French warships regularly provide assistance to boats or vessels in distress, in accordance with the SOLAS (Safety of Life at Sea) Convention.

On the basis of the information provided to me by the General Headquarters of the Armed Forces, I can inform you that this scenario did not arise off the coast of Libya during the military campaign designed to protect the Libyan population and enforce the arms embargo.

It would appear that only one French vessel, the MEUSE supply tanker, passed a boat carrying migrants, on 28 March 2011. Located 12 nautical miles south of Malta, this boat, whose position did not correspond to that which you mentioned, was not in difficulty. In keeping with the applicable procedures, its position was reported to the Maltese authorities.

The other French vessels were operating in the Gulf of Sirte area on those dates. None was in the zones of 30-nautical-mile radius around the points mentioned in your letter. In particular, the aircraft carrier Charles de Gaulle, which was specifically named in the article in the Guardian, was never any closer than 150 nautical miles to Tripoli during that period.

**Letter from Mr Pedro Morenés Eulate, Minister of Defence of Spain, to Ms Strik, rapporteur of the Committee on Migrations, Refugees and Displaced Persons, dated 6 March 2012**

Once I have made the appropriate inquiries and after carefully examining all the available information, I am now ready to reply to your request for information concerning the tragic death of several people as a result of the incident occurred off the Libyan coast from March 27 to April 10. Hence, I am sure that the frigate "Méndez Núñez" never had any contact at all with vessel adrift.

In this sense, I wish to inform you that I have already forwarded this information to NATO's Deputy Assistant Secretary General, Mr. Richard Froh, in order to cooperate in the Atlantic Alliance's response to the request for collaboration of the Parliamentary Assembly of the Council of Europe.

As regards to the position of the frigate "Méndez Núñez" of the Spanish Navy on 26 and 27 March while participating in Operation "Unified Protector" under NATO command, I can confirm that it never was at the distance of 11 nautical miles to which you refer in your letter. While under NATO command, the organisation was always informed of its movements. Furthermore, I would like to stress that on March 26 and 27 the ship took part in two other search and rescue operations after receiving orders from the appropriate allied command.

I also wish to ratify that this frigate did not receive any fax from MRCC Rome or any other communication regarding the matter you mention in your letter.

As regards to the helicopter that was seen from the boat in distress, I can confirm that the helicopter from the "Mendez Nunez" did not overfly, and consequently had no chance to provide any assistance to the boat.

I would like to conclude by assuring you that all the vessels of the Spanish Navy are aware and responsible of their obligations under the Law of the Sea, including providing assistance to people and vessels in distress. Such commitment was made evident during Operation Unified Protector, when the frigate "Méndez Núñez" provided assistance to several vessels at risk.

I hope I have been helpful and have duly answered your request for information. Wishing you all the best in your investigation.

**Letter from Lady Ashton, High Representative, Vice-President of the European Commission, to Mr Giacomo Santini, Chairperson of the Committee on Migration, Refugees and Democracy, dated 19 March 2012**

Your predecessor, Mr Chope, requested the support of the European Satellite Centre (EUSC) into the inquiry being conducted by the Committee on Migration, Refugees and Displaced Persons into the circumstances surrounding a tragic incident in the Mediterranean Sea involving boat people escaping from Libya.

I would like to take this opportunity to convey our appreciation of the commitment of your Committee to this issue and to the wider problem of the large-scale arrival of migrants, refugees and asylum seekers on Europe's southern shores.

I have asked the EUSC if archived products were available for the indicated area and the indicated time frame (27, 28 and 29 March and 4, 5 and 6 April). Unfortunately, there are no such products available as at that time the EUSC was monitoring the humanitarian situation at the borders with Tunisia and Egypt and around the harbours of Jazour and Tripoli.

Considering that the area of interest for which your requested imagery is located less than 130 km from the Libyan shores and that the period under investigation coincides with the NATO operation "Unified Protector", the envisaged investigation could involve classified "NATO CONFIDENTIAL" information. I would therefore suggest that the Committee requests assistance from NATO, including through the NATO Parliamentary Assembly.