



**Article 15 Communication to the Office of the Prosecutor  
of the International Criminal Court**

**Re: Situation in Libya – Crimes against Migrants  
and Refugees in Libya**

**CONFIDENTIAL - NOT FOR PUBLICATION -**

**Submitted by  
the European Center for Constitutional and Human Rights,  
the International Federation for Human Rights and  
Lawyers for Justice in Libya  
on  
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## TABLE OF ABBREVIATIONS

AI	Amnesty International
AO	Advisory Opinion
CARIM	Consortium for Applied Research on International Migration
CCTV	Closed circuit television
CEDAW	Committee on the Elimination of All Forms of Discrimination Against Women
CEN-SAD	Community of Sahel-Saharan States
CGRS	Office of the Commissioner General for Refugees and Stateless Persons
CNN	Cable News Network Inc.
CoI	Commission of Inquiry on Libya
DC	Detention Centres
DCIM	Directorate for Combatting Illegal Migration
DRC	Democratic Republic of Congo
DTM	Displacement Tracking Matrix
ECCHR	European Centre for Constitutional and Human Rights
ECtHR	European Court of Human Rights
Eds	Editions
EU	European Union
FDLR	Forces Démocratiques de Libération du Rwanda
FFM	UN Independent Fact-Finding Mission on Libya
FFRC	Fact-Finding and Reconciliation Commission
FIDH	International Federation for Human Rights
GDP	Gross Domestic Product
GI-TOC	Global Initiative Against Transnational Organized Crime
GNA	Government of National Accord
GNC	General National Congress
GNS	Government of National Salvation
GNU	Government of National Unity
HAF	Khalifa Haftar
HoR	House of Representatives
HRC	Human Rights Committee
HRW	Human Rights Watch
HVO	Hrvatsko vijeće obrane
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Person
IOM	International Organization for Migration
ISA	Libyan Internal Security Agency
ISIL	Islamic State of Iraq and the Levant
ISS	Institute for Security Studies
LAAF	Libyan Arab Armed Forces
LCG	Libyan Coast Guard
LFJL	Lawyers for Justice in Libya
LNA	Libyan National Army
LPA	Libyan Political Agreement

LPDF	Libyan Political Dialogue Forum
LROR	Libyan Revolutionaries Operations Room
LSF	Libya Shield Force
MEDU	Medici per i Diritti Umani
MLC	Mouvement pour la Libération du Congo
MOU	Memorandum of Understanding
MSF	Médecins sans Frontières
NATO	North Atlantic Treaty Organization
NFA	National Forces' Alliance
NGO	Non-governmental Organization
NIAC	Non-international Armed Conflict
No.	Number
NTC	National Transitional Council
OAU	Organization of African Unity
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OHCHR	Office of the High Commissioner for Human Rights
OTP	Office of the Prosecutor
p.	Page
Para	Paragraph
PE	Preliminary Examination
PTC I	Pre-Trial Chamber I
PTSD	Post-Traumatic Stress Disorder
RES	Resolution
RI	Refugees International
SCSL	Special Court for Sierra Leone
SEA	Sexual Exploitation and Abuse
SGBV	Sexual and Gender-based Violence
SSC	Supreme Security Committee
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
UNSMIL	United Nations Support Mission in Libya
UPR	Universal Periodic Review
USD	United States of America dollar
WRC	Women's Refugee Council

## **FILING PARTIES**

This Article 15 Communication to the International Criminal Court (ICC) is being filed by ECCHR, FIDH and LFJL (hereafter ‘the Organisations’), that have been working on international criminal law and the human rights situation in Libya over the past decade.

### **ECCHR**

The European Center for Constitutional and Human Rights (ECCHR) is an independent, non-profit legal and educational organisation based in Berlin, Germany. Since 2007, ECCHR has been dedicated to enforcing civil and human rights worldwide. Together with persons affected and partners around the world, ECCHR uses legal means to end impunity for those responsible for torture, war crimes, sexual and gender-based violence, corporate exploitation and fortified borders. In cooperation with transnational networks, universities and artists, we initiate, develop and support high-impact strategic human rights litigation and other legal interventions to hold State and non-State actors accountable for violating the rights of the most vulnerable. Over the past 10 years ECCHR has filed several Communications to the ICC OTP regarding a number of situations where grave international crimes have been committed. Together with those affected, ECCHR fights to uphold the fundamental right to have rights to which all people, including migrants and refugees, are entitled.

### **FIDH**

FIDH is an international non-governmental human rights organisation representing 192 member organisations from 117 countries. Among other activities, and in close collaboration with its national member and partner organisations, FIDH documents human rights violations and international crimes; supports victims in seeking justice and reparations at national, regional and international levels, including through strategic litigation; undertakes advocacy towards decision makers; carries out awareness raising activities on situations of human rights abuses; and strengthens the capacity of member and partner organisations to meaningfully engage with accountability mechanisms. Having had a permanent representation in The Hague since 2004, FIDH also closely monitors proceedings, as well as strategies and policies at the International Criminal Court. Together with member organisations based in ‘situation countries,’ it works directly with victims and affected communities, documents allegations of international crimes, assesses national justice efforts for these crimes, and provides substantiated information to the Office of the Prosecutor.

**LFJL**

Lawyers for Justice in Libya (LFJL) is a Libyan and international independent non-governmental organisation and UK-registered charity. LFJL works on and in Libya with a growing network of lawyers, activists and grassroots communities across and outside the country. LFJL seeks justice in Libya through advocacy and outreach, accountability, transitional justice initiatives and capacity building, underpinned by independent research, which includes a particular focus on enforced disappearances, the protection of civic space, the rights of women and the rights of migrants and refugees. LFJL's work is rooted in a rights-based approach: we believe that all engagement and policies must be founded on a human rights framework and ensure that individuals and communities can participate fully as a fundamental part of leading dignified lives.

# EXECUTIVE SUMMARY

## 1. Introduction

1. The European Center for Constitutional and Human Rights (ECCHR), Lawyers for Justice in Libya (LFJL), and the International Federation for Human Rights (FIDH), file this Communication to the Office of the Prosecutor (OTP) of the International Criminal Court (ICC or the Court) under Article 15 of the Rome Statute. This Communication addresses the commission of grave crimes under the jurisdiction of the Court against migrants, refugees, and asylum seekers (hereinafter, migrants and refugees) in the context of the Situation in Libya and requests the Prosecutor to urgently open an investigation into these crimes.

2. The undersigned organisations worked in collaboration and exchange with survivors, conducting particularly extensive and in-depth interviews with 14 witnesses. Their interview protocols [REDACTED] provide the basis for the Communication's submission. The work was conducted according to the 'Do No Harm' principle. All witnesses are migrants or refugees who entered and transited through Libya after the 2011 anti-Gaddafi uprising and who are no longer located in the country. They are now in places of safety with access to assistance and psycho-social support if needed. Each witness gave informed consent to being interviewed and their participation was entirely voluntary and without financial or other forms of incentive. The first-hand witness accounts are complemented and corroborated by thorough documentation from various reliable sources. These include specific information gathered from individual experts interviewed for the purpose of this filing.

3. Over the past years, unspeakable violence against migrants and refugees, and violations of their basic human rights—including their right to life—by State and non-State actors in Libya, have been well-documented by international organisations, as well as humanitarian and civil society organisations on the ground. Most recently, the UN Independent Fact-Finding Mission on Libya (the FFM), found that 'from the moment that migrants and refugees enter Libya, they are systematically subjected to a litany of abuses.'<sup>1</sup> Through this Communication, the undersigned organisations aim to clarify how the system of human trafficking and

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<sup>1</sup> UN Human Rights Council, Independent Fact-Finding Mission on Libya, Report of the Independent Fact-Finding Mission on Libya, A/HRC/48/83, 1 October 2021, p. 15.



exploitation of migrants and refugees in Libya, beyond its transnational crime dimension, amounts to the commission of crimes against humanity and possible war crimes by coordinated actors in the country. In particular, for the sake of this submission, the focus of the legal analysis is on the commission of crimes against humanity. However, this does not rule out the possible (alternative or additional) qualification of such acts as war crimes. This Communication also seeks to frame and analyse the individual criminal responsibility of several perpetrators, in particular those in command and control of the detention sites where migrants are unlawfully detained, and more broadly, those profiting from the criminal exploitation and abuse of migrants and refugees.

4. Multiple actors—State and non-State actors alike—are involved in this system of exploitation, which reduces migrants and refugees to commodities. This system subjects them to the worst violence and abuse, which amount to the crimes against humanity of imprisonment, killings, torture, sexual violence, persecution, and ultimately, enslavement. Migrants and refugees are commonly forcibly transported throughout the country, held in official and unofficial detention sites under inhumane conditions and the constant threat of violence. They face forced labour, extortion, rape, beatings, and oftentimes are sold to smugglers or for the purpose of labour.

5. When migrants and refugees manage to reach the Libyan coast, often after unspeakable suffering, many embark on a highly risky and often deadly attempt to cross the Mediterranean Sea to Europe fleeing the atrocities in Libya. Despite the well-known situation, migrants and refugees have been more likely in recent years to be intercepted at sea by the Libyan Coast Guard (LCG) and subsequently returned to indefinite detention in Libya, where the cycle of abuse continues.

6. The commission of grave crimes, and in particular of crimes against humanity, is supported by victim accounts, as documented in the witness testimonies attached to this Communication. Their accounts indicate the existence of consistent patterns of criminal conduct and serve as example cases for the analysis of each underlying crime. Along with extensive, reliable, and publicly available documentation on the violence and abuses facing migrants and refugees in Libya, these personal accounts provide the basis for establishing the commission of crimes that must be thoroughly investigated by the Court.

7. Historically, as Libya has been both a prominent destination and transit point for migrants and refugees from Arab and African countries, human smuggling and trafficking networks have long existed in the country. However, since the fall of the Gaddafi regime in 2011 and the ensuing armed conflict, the breakdown of the rule of law and the environment of

impunity emboldened human smuggling and trafficking networks in Libya. Indeed, as part of the ongoing conflict since 2011, smuggling and trafficking activities have become a pillar of the conflict economy, serving as a means of revenue for militias and armed groups, and thus also providing them with means to perpetuate their participation in the conflict. At the same time, some non-State actors and competing government authorities have taken advantage of Europe's attempts to curb migration flows, in order to gain legitimacy externally and internally. This has contributed to the continued existence of a system of migrant and refugee exploitation, particularly through violent interceptions at sea, followed by the detention of migrants in a myriad of official and unofficial detention sites in Libya. These sites are controlled by State authorities as well as a number of militias and armed groups.

8. The undersigned organisations submit that the commission of international crimes against migrants and refugees in Libya since 2011 falls under the ICC jurisdiction pursuant to United Nations Security Council (UNSC) Resolution 1970 (2011). The Communication first provides background context on Libya, before setting out the information collected through survivor testimony and open-source information. The Communication then focuses on the analysis of the Court's jurisdiction *in casu*, the characterisation of the different crimes against humanity, and the individual criminal responsibility of some alleged perpetrators. Finally, the Communication concludes that the investigation of such crimes is admissible and in the interest of justice. Therefore, the undersigned organisations respectfully request the Prosecutor to urgently open an investigation into the commission of crimes against migrants and refugees within the Situation in Libya.

## **2. Jurisdiction (Section IV.A)**

9. UNSC Resolution 1970 (2011) referred the situation in the Libyan Arab Jamahiriya (now State of Libya) on 15 February 2011 to the ICC Prosecutor.<sup>2</sup> Following the referral, the OTP opened an investigation, which currently includes three cases, respectively against Saif Al-Islam Gaddafi, Al-Tuhamy Mohamed Khaled, and Mahmoud Mustafa Busayf Al-Werfalli. None of the cases include charges for crimes committed against migrants and refugees.<sup>3</sup>

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<sup>2</sup> UN Security Council (UNSC), Resolution 1970 (2011), S/RES/1970, 26 February 2011, available at: <https://undocs.org/S/RES/1970%282011%29>.

<sup>3</sup> ICC, Situation in Libya, The Prosecutor v. *Mahmoud Mustafa Busayf Al-Werfalli*, Warrant of Arrest, Pre-Trial Chamber I (15 August 2017); The Prosecutor v. *Mahmoud Mustafa Busayf Al-Werfalli*, Second Warrant of Arrest, Pre-Trial Chamber I (4 July 2018); *The Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and

10. As thoroughly analysed in the Communication and based on Resolution 1970, the ICC has jurisdiction over possible crimes against humanity committed against migrants and refugees in the context of the Libyan situation. The territorial jurisdiction of the Court encompasses the whole territory of the State of Libya, including the mainland and territorial waters. Resolution 1970 does not limit the temporal jurisdiction of the Court, and thus covers crimes committed from 15 February 2011 onwards, as long as they are connected with the situation as referred to by the UNSC. In terms of personal jurisdiction, Resolution 1970 covers the conduct of Libyan nationals, as well as nationals of ICC States Parties potentially involved in the commission of international crimes in the Libyan context. The Resolution only exempts nationals, current or former officials, or personnel of non-States Parties in relation to operations established or authorised by the UNSC in Libya, ‘unless such exclusive jurisdiction has been waived by the State.’<sup>4</sup> Finally, Resolution 1970 does not restrict the Court’s subject matter jurisdiction.

11. The ICC jurisprudence has established that in cases where a situation is referred to the Court, there must be a sufficient link between the referred situation and the crimes under investigation.<sup>5</sup> In previous cases stemming from the situation in Libya, Pre-Trial Chamber I (PTC I) has interpreted the UNSC referral broadly, establishing two alternatives for ICC jurisdiction.<sup>6</sup> First, there must be a sufficient link to the armed conflict in Libya since 2011. Second, there must be a sufficient link with the relevant actors already active in the commission of crimes since 2011. Beside the criteria established by PTC I, nothing prevents the Prosecutor from establishing additional jurisdictional links to the situation referred by Resolution 1970.

12. With regard to the crimes committed against migrants and refugees in Libya that have been brought to the Prosecutor’s attention, the Communication proves the existence of jurisdictional links to the Situation as referred to the Court by the 2011 UNSC referral in three ways.

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Abdullah Al-Senussi, Pre-Trial Chamber I (27 June 2011); *The Prosecutor v. Al-Tuhamy Mohamed Khaled*, Warrant of Arrest for Al-Tuhamy Mohamed Khaled, Pre-Trial Chamber I (18 April 2013).

<sup>4</sup> S/RES/1970, para. 6.

<sup>5</sup> ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Callixte Mbarushimana*, Decision on the ‘Defence Challenge to the Jurisdiction of the Court’, Pre-Trial Chamber I (26 October 2011), para. 27; Situation in the Democratic Republic of the Congo, *The Prosecutor v. Callixte Mbarushimana*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I (28 September 2010), para. 6; Situation in Darfur, Sudan, *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad al abd-al-Rahman*, Decision on the prosecution application under Article 58(7) of the Statute, Pre-Trial Chamber I (27 April 2007); Situation in Darfur, Sudan, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (“*Omar Al Bashir*”), Pre-Trial Chamber I (4 March 2009).

<sup>6</sup> *Al-Werfalli*, Warrant of Arrest, para. 23; Second Warrant of Arrest, para. 20.

13. First, a sufficient link exists between the armed conflict and the commission of crimes against migrants and refugees. Although they have been subjected to discrimination and violence since the Gaddafi era, the emergence of an armed conflict in 2011 led to further instability and a security crisis. This laid the conditions for increased discrimination and hostility against migrants and refugees and for their exploitation. This link is direct, as witness accounts show, with migrants and refugees at times being forced to work for armed groups, including by transporting weapons and even directly participating in the hostilities. They have also been the subject of attacks, including airstrikes on migrant detention sites as well as severe deterioration of their living conditions in and outside of detention sites. These have included the deprivation of food or shelter as a result of hostilities.

14. Second, there is a sufficient link between actors prominently involved in the Libyan armed conflict and the commission of crimes against migrants and refugees. The political instability and security crisis which ensued from the 2011 uprising resulted in the strengthening of armed groups and militias, as well as in the division among Libyan governmental authorities. Later in the conflict, militias and armed groups were also incorporated into the State's security apparatus by competing governmental authorities, often blurring the distinction between State and non-State actors. This is evident, for instance, in the Directorate for Combatting Illegal Migration (DCIM). This entity *de jure* controls migrant detention sites across the country as part of the Ministry of Interior. At the same time, some of its officials, such as its former deputy head, have strong ties to militias. It is not only because of the collusion between armed groups and State authorities, however, that some detention sites are under the control of militias and armed groups. Indeed, because of the breakdown of security and the fragmentation of State authority due to the armed conflict, many armed groups and militias exercise territorial control over certain areas. As a consequence, several detention centres are only nominally run by DCIM, and *de facto* fall under the control of armed groups and militias involved in the armed conflict. In these detention centres, as well as in other unofficial detention sites, migrants and refugees fall victim to abuse on a daily basis.

15. Third, there is a sufficient link between the conflict economy and the crimes included in this Communication in the sense that, the commission of crimes against migrants and refugees serves to perpetuate the conflict. With the breakdown of Libya's economy due to the armed conflict, individuals as well as armed groups and militias have turned to the exploitation of migrants and refugees to secure revenue. The revenue generated by the system of migrant and refugee exploitation also provides the armed groups and militias with additional resources to sustain their military operations. Thus, the exploitation of migrants and refugees by different

actors in Libya has been instrumental in the country's conflict economy, to the point that it became a pillar of the Libyan conflict economy.

16. As the Communication thoroughly shows, the crimes committed against migrants and refugees in Libya since 2011 squarely fall under the jurisdiction of the Court, as several links can be established to the armed conflict and its different actors. It thus falls within the scope of the Situation referred to the Court by the UN Security Council back in 2011.

### **3. Crimes against Humanity (Section IV.B)**

17. The myriad of well-documented egregious human rights violations against migrants and refugees in Libya amount to the commission of heinous crimes against humanity. Most recently, the FFM mandated by the UN Human Rights Council reported in October 2021 that evidence of such crimes had been collected to the point that it surpasses the threshold of 'reasonable grounds to believe,'<sup>7</sup> suggesting that crimes against migrants and refugees have taken place during the period of its mandate, 'form[ing] part of a systematic and widespread attack directed at this population, in furtherance of a State policy.'<sup>8</sup> With this in mind, and supported by first-hand witness accounts, this Communication brings to the attention of the ICC Prosecutor a thorough documentation and analysis of how migrants and refugees in Libya have been victims of imprisonment, enslavement, murder, torture, rape, sexual slavery, enforced prostitution, persecution, and other inhumane acts amounting to crimes against humanity.

18. The Communication establishes that such crimes were knowingly committed as part of a widespread or systematic attack against a civilian population, pursuant to Article 7 of the Rome Statute. In Libya, such an attack takes the form of a broad criminal system aimed at the exploitation of migrants and refugees through their subjection to violence and inhumane living, detention, and transport conditions. The Communication highlights how the methods employed in the exploitation of and violence against migrants and refugees are not singular or isolated, but rather part of a course of conduct. Migrants and refugees are categorised as civilians and are the primary targets of the attack, as evidenced in several reports of UN bodies and non-governmental organisations working in and on Libya.<sup>9</sup>

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<sup>7</sup> A/HRC/48/83, para. 26.

<sup>8</sup> *Id.*, para. 70.

<sup>9</sup> Amnesty International (AI), *Libya: Rule of Law or Rule of Militias?*, 5 July 2012, available at: <https://www.amnesty.org/en/documents/mde19/012/2012/en/>; *Libya's Dark Web of Collusion: Abuses against Europe-bound Refugees and Migrants*, 11 December 2017, available at: <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>; 'Between Life and Death':

19. The attack is widespread, being directed at thousands of migrants and refugees of different nationalities, religions, genders, racial and ethnic groups, across the entire Libyan territory. The attack is also systematic and follows clear patterns. The crimes are committed in pursuance of an apparent policy, grounded foremost in Law No. 19 of 2010, which authorises the detention and forced labour of migrants. Documents by Libyan authorities, such as a report by the Director of the Al-Kufra Detention Centre sent to the DCIM in July 2017 and explicitly endorsing violence against migrants and refugees, serve as proof of this policy.<sup>10</sup> Moreover, both State and non-State actors participate in the implementation of this policy. The situation is aggravated by historic discrimination against Black migrants in Libya and governmental instability.

20. These crimes have been committed with the different alleged perpetrators—be they State authorities, militias, armed groups, or private actors—fully aware of the overall context and demonstrating a strikingly similar *modus operandi*, as described in the analysis of each crime. There is no doubt that the overall context of violence and attacks against migrants and refugees is well-known to Libyan authorities. This is not only reflected in several public statements by Libyan officials, but also by international authorities, and third States' officials.

21. **Severe deprivation of liberty or imprisonment (Article 7(1)(e)).** This crime is one of the most prominent components of the attack against migrants and refugees occurring in Libya. All of the witnesses interviewed for the Communication had been deprived of their liberty at some point during their journey in Libya. Migrants and refugees are frequently detained in transit vehicles, at checkpoints, and in official or unofficial detention sites. Given that exploitation and violence occur in detention places of all kinds, the detention of migrants and refugees in centres nominally under DCIM control, despite being set out by Libyan domestic law, is also always arbitrary due to its conditions, the absence of procedural safeguards or legal oversight, as well as the length of detention. Moreover, the detention of migrants and refugees in other places of captivity is *per se* always unlawful and arbitrary. Migrants and refugees are often at the mercy of traffickers, who promise release upon payment of their 'debts,' either through ransom payment, forced labour, or sexual exploitation. The gravity of these acts is indicated by the absolute deprivation of procedural safeguards for

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*Refugees and Migrants Trapped in Libya's Cycle of Abuse*, September 2020, available at: <https://www.amnesty.org/en/documents/mde19/3084/2020/en/>; Human Rights Watch (HRW), *No Escape From Hell: EU policies contribute to Abuse of Migrants in Libya*, 21 January 2019, available at: <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>.

<sup>10</sup> UN, Final report of the Panel of Experts established pursuant to resolution 1970 (2011), 5 September 2018, Annex 18, pp. 100-106, available at: <https://digitallibrary.un.org/record/1640692?ln=en>.

migrants and refugees during detention, effectively placing them beyond the protection of law and due process.

22. **Enslavement (Article 7(1)(c)).** As thoroughly analysed throughout the Communication, the commodification of migrants and refugees, which happens most blatantly through their sale, but also through forced labour or sexual slavery, can be characterised as the crime of enslavement. While this crime bears resemblance and even overlaps substantively with the transnational crime of trafficking in persons, the Communication focuses on how human trafficking serves as the underlying conduct for crimes included under the Rome Statute. The crimes of enslavement and sexual slavery require the exercise of powers attaching to the right of ownership, which can be found when a person is regarded as property and deprived of any form of autonomy.<sup>11</sup>

23. In Libya, smugglers, traffickers, armed groups, or even private citizens have exercised property powers over migrants and refugees. This is evidenced by the sale of migrants and refugees, including through ‘market auctions’ or forced labour. Furthermore, the crime of enslavement is notably gendered and racialised. Black, able-bodied, men are forced into labour under inhumane conditions, usually involving construction work, burying other dead bodies, supporting militias in warfighting and war-sustaining activities, or working on farms and in domestic settings. In turn, women and girls are often forced into sexual slavery. All these crimes are committed with full awareness of the victims’ vulnerability and status, and are connected to the broader attack against migrants and refugees, representing the commodifying attitude which uses human beings as means for militias, armed groups, and private citizens to make economic gains. Witnesses testified to being called slaves or ‘*ibeidad*’ and being confined in inhumane conditions.

24. **Murder (Article 7(1)(a)).** Migrants and refugees have been killed in a variety of situations, either intentionally or collaterally during armed hostilities, or as a result of lethal force deployed by smugglers, traffickers, militias, or even detention guards. Indeed, migrants have been killed in official and other places of captivity as punishment for refusing to surrender to criminal acts of extortion, detention, or sexual exploitation. Many migrants have also died as a result of the inhumane conditions experienced in transit and detention, such as deprivation of food, water, essential sanitation, and medical care. The widespread character of the murder of migrants and refugees can be inferred, *inter alia*, from data collected by Medici per i Diritti

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<sup>11</sup> ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Germain Katanga*, Judgment pursuant to Article 74 of the Statute, Trial Chamber II (7 March 2014), para. 975.

Umani ('MEDU'), an Italian organisation working with survivors of torture. MEDU reported that 30% of the over 3,000 migrants and refugees it interviewed between 2014 and 2020 had witnessed the killing of a relative or friend, and 40% had been close to death at least once.<sup>12</sup> These crimes were committed with knowledge that deaths would result from the actions of the perpetrators.

**25. Torture (Article 7(2)(e)).** Torture is committed against migrants and refugees in Libya on a great scale and in a systematic manner. All witnesses interviewed and included in the Communication detailed how they were subjected to torture in one way or another. MEDU reported that over 85% of the over 3,000 migrants and refugees it assisted have been subjected to violence amounting to torture or inhumane treatment in Libya.<sup>13</sup> Different individuals, including members of armed groups, trafficking networks, militias, and State institutions have been reported to have inflicted severe physical and mental pain on migrants and refugees. The cruel methods used by such actors range from beatings with various objects and burnings with heated metals, chemicals or liquids, to suspensions in stress positions, shootings, and floggings. Sexual violence amounting to torture has also been reported through rape, forced nudity, or forced intercourse with animals. Physical and mental pain is also caused through conditions inflicted with the intent of bringing severe suffering, including being forced to sleep outside and the imposition of other inhumane living conditions. Some of the witnesses even reported being locked in freezers or containers. All these acts were committed while migrants and refugees were within the custody and control of the perpetrators at official detention sites as well as in places of captivity. Torture is perpetrated with a variety of motives—primarily to 'discipline' detainees or extort them or their families for ransom, indicating the requisite intent. The severity of the torture inflicted on migrants and refugees is often documented by the perpetrators themselves, who record the infliction of pain and use images and films as a tool in the extortion process to elicit payment from migrants and refugees' families.

**26. Rape, sexual slavery, enforced prostitution, and other forms of sexual violence of comparable gravity (Article 7(1)(g)).** Migrants and refugees are often subjected to various forms of sexual violence. Several of the witnesses interviewed reported that rape was a daily occurrence at detention sites and that many women became pregnant as a result.

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<sup>12</sup> Medici per i Diritti Umani (MEDU), *The Torture Factory: Report on Human Rights Violations Against Migrants and Refugees in Libya (2014-2020)*, March 2020, p. 12, available at: [https://mediciperidirittiumani.org/medu/wp-content/uploads/2020/03/report\\_medu\\_2020\\_ing\\_web.pdf](https://mediciperidirittiumani.org/medu/wp-content/uploads/2020/03/report_medu_2020_ing_web.pdf).

<sup>13</sup> *Id.*, p. 11.



27. These crimes are committed within coercive environments involving physical and psychological oppression, the abuse of official positions, blackmail, reprisals, unlawful detention, and the threat or use of force against victims, their family members, or fellow detainees. Witness testimony also depicts the widespread nature of these crimes. Furthermore, the repeated commission of these crimes, the multiplicity of perpetrators, the severity of the conduct and its consequences, along with the extreme vulnerability of the victims, make clear that perpetrators are aware of the gravity of their conduct.

28. Other forms of sexual violence documented in the Communication include forced nudity, conditions leading to the creation of an environment of constant fear of sexual violence, forced masturbation, and molestation. These forms of sexual violence inflicted on migrants and refugees are acts of a sexual nature, which have been recognised as meeting high gravity thresholds by the UN and international tribunals.<sup>14</sup> Thus, they are of comparable gravity to the crimes enumerated under Article 7(1)(g). While women and girls are often targeted for sexual slavery and enforced prostitution, men and boys are also victims of other forms of sexual violence of comparable gravity.

29. Within the above-mentioned coercive environment, migrants and refugees have further been forced into prostitution and sexual slavery. Perpetrators have established ‘businesses’ of prostitution and slavery, obtaining profit from the exploitation of migrants and refugees—for example, by allowing men to come to detention sites to rape women. Migrant women and girls are often forced into sexual slavery and prostitution until they ‘pay off’ perceived debts or ransoms. These factors demonstrate the coercive context of their exploitation.

30. **Persecution (Article 7(1)(h)).** Many of the crimes committed against migrants and refugees in Libya also feature a persecutory component, on grounds of the victims’ status as migrants or refugees. Migrant and refugee status may be the factor underlying a ground of prohibited discrimination under international law. Migrants and refugees are targeted separately or simultaneously for their racial, gender, religious, nationality, and political attributes. The sorts of crimes committed against migrants and refugees in Libya have varied depending on the intersectional attributes of their identities. For instance, Black males appear more likely to be exploited through forced labour, while women face greater sexual exploitation. Non-Muslim migrants and refugees often suffer worse conditions of detention,

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<sup>14</sup> See Inter-American Court of Human Rights (IACtHR), *Miguel Castro Castro Prison v. Peru*, Judgment (Merits, Reparations and Costs), 25 November 2006, paras 304-308; International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v Zlatko Aleksovski*, Trial Chamber Judgment, Trial Chamber (25 June 1999), paras 184-210, 226, 228; International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Jean-Paul Akayesu*, Judgment, Trial Chamber I (2 September 1998), paras 688, 697.

and migrants and refugees of nationalities considered more ‘valuable’ in terms of ransom payments are treated differently. These crimes have been committed with the special persecutory intent to cause injury on grounds of membership in the aforesaid groups.

31. **Other inhumane acts (Article 7(1)(k)).** Many of the acts characterised as crimes against humanity under Articles 7(1)(a-j) could also be classified as crimes of other inhumane acts. This can be the case when the conduct in question fails to satisfy the threshold specifically provided for other crimes against humanity (torture, for instance), or when the conduct breaches a norm of international human rights law of comparable gravity to other crimes against humanity. In the situation at stake, the crime under Article 7(1)(k) can encompass, *inter alia*, the inhumane conditions of land transit and sea travel of migrants; inhumane conditions of detention falling short of the threshold of torture; forced family separations violating the right to family life under Article 23(1) of the ICCPR; and the slave trade and related conducts precursory to enslavement.

#### **4. War Crimes (Section IV.C)**

32. Considering that many of the violations described previously have taken place in the context of an armed conflict, the Communication submits that such conduct can also be characterised as war crimes. This is particularly true with respect to the war crimes of murder, torture, cruel treatment, outrages upon personal dignity, rape, sexual slavery, enforced prostitution, and sexual violence under Article 8(2)(c) and (e).

#### **5. Criminal Responsibility of Individual Perpetrators and Modes of Liability (Section V)**

33. The pervasive commission of crimes against humanity against migrants and refugees in Libya involves State and non-State actors at different levels. However, in accordance with the OTP’s strategic approach, the Communication focuses on those ‘most responsible.’<sup>15</sup> In particular, it highlights the responsibility of persons in positions of control—be it direct or indirect, official or unofficial.

34. The Libyan context depicts the fluidity between State and non-State actors, making it difficult to clearly distinguish between them. This is so because, as thoroughly analysed in the Communication, the ongoing armed conflict has featured competing government authorities over the past decade, and because militias have been incorporated into State security

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<sup>15</sup> OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, para. 42, available at: [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf).

apparatuses, including the DCIM. Furthermore, allegiances and affiliations have shifted throughout the conflict, warranting further investigation to establish with which groups an alleged perpetrator was affiliated at relevant points in time.

35. The Communication includes documentation relevant for the attribution of individual criminal responsibility to alleged perpetrators, pursuant to Art. 25(3)(a) of the Rome Statute. It analyses in particular the responsibility of 19 individuals as principal perpetrators. The Communication also provides the OTP with a broader list of alleged perpetrators, ranging from guards at detention sites to well-known militia commanders, including specific information on their role and responsibility. Some of the individuals are currently subject to UN Security Council sanctions and/or have been named by the UN Panel of Experts on Libya. This demonstrates that their role in the commission of crimes in Libya is well-known to all relevant actors, including at the international level.

36. The responsibility is often multi-layered, as the alleged perpetrators participate in different power structures concomitantly and committed different crimes. Further, it is possible to identify micro and macro ‘cosmoses,’ in which an individual may be a direct or indirect (co-) perpetrator, pursuant to Article 25(3)(a) of the Rome Statute, in relation to several other alleged perpetrators within the same group.

37. The analysis focuses in particular on the individual criminal responsibility of actors in four main locations that have served as hubs for the commission of crimes since 2011—Zawiya, Bani Walid, Sabratha, and Tripoli—where migrants and refugees have been victimised by different actors. It provides background information on the armed groups, militias, and smuggling and trafficking rings active in each location and how they are connected to each other. It also specifically describes the responsibility of individuals who exercise control over the system of exploitation of migrants and refugees.

38. In light of all the information provided in the Communication, the undersigned organisations urge the OTP to investigate the individuals named therein, as well as other suspects that will be identified by the OTP upon thorough investigation. The assessment of the individual responsibility of alleged perpetrators under Art. 25(3)(a) is of course without prejudice to any other finding regarding alleged perpetrators being investigated by the OTP, in relation to whom the Prosecutor may find other modes of liability suitable, including command responsibility.

## 6. Admissibility and Interest of Justice (Section VI)

39. The Communication elaborates further on the admissibility of the cases as included therein, pursuant to Art. 17(1) of the Rome Statute. Indeed, the Libyan State is unwilling and unable to genuinely carry out investigations into or prosecutions of the commission of international crimes against migrants and refugees on its territory. Alleged perpetrators have not been tried in the past for the conduct attributed to them. The crimes are of sufficient gravity to justify the Court's intervention.

40. Despite Libya's primary responsibility to investigate serious crimes and gross human rights violations, its domestic legislation is inadequate for this purpose. Libya has no legislation that implements crimes against humanity. Even when the underlying acts have been criminalised, domestic provisions fail to provide sufficient definition of these acts, such as torture and enslavement, and are inconsistent with international human rights law to which Libya is a party. Likewise, Libyan law is limited when it comes to detailing the modes of criminal liability and superior responsibility. Finally, the Libyan legal framework contains several amnesty laws for crimes committed during and subsequent to the 2011 uprising. While legislation has been enacted to exclude amnesties for certain crimes, it is not in line with international criminal law standards, as already found in the case against Saif Gaddafi.<sup>16</sup>

41. In addition, Libya's criminal justice system has been considerably weakened since the armed conflict erupted in 2011 and is currently ineffective. According to the International Commission of Jurists, both State and non-State actors 'pose a serious threat to the independence of Libya's justice system,'<sup>17</sup> as certain armed groups, militias, and government authorities exercise control over some defendants and judicial members. The United Nations Support Mission in Libya (UNSMIL) and the Office of the High Commissioner for Human Rights (OHCHR) have also reported the non-compliance of the Libyan justice system with international fair trial standards.<sup>18</sup>

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<sup>16</sup> ICC, Situation in Libya, *The Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the 'Admissibility Challenge by Dr. Saif Al-Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute', Pre-Trial Chamber I (5 April 2019), para 78.

<sup>17</sup> International Commission of Jurists (ICJ), *Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System*, July 2019, p. 19, available at: <https://www.icj.org/wp-content/uploads/2019/07/Libya-Accountability-serious-crimes-Publications-Reports-Thematic-reports-2019-ENG.pdf>.

<sup>18</sup> United Nations Support Mission in Libya (UNSMIL) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), *Report on the trial of 37 former members of the Qadhafi regime (Case 630/2012)*, 21 February 2017, available at: [https://www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime\\_EN.pdf](https://www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime_EN.pdf).

42. Libyan authorities are unwilling to conduct genuine proceedings and alleged perpetrators have so far escaped accountability. For example, following Al-Werfalli's second ICC arrest warrant, the suspect was neither arrested nor transferred to the Court. In fact, it was reported in July 2019 that he had been promoted to lieutenant colonel by Khalifa Haftar, the head of the Libyan Arab Armed Forces (LAAF), only a few days after the public issuance of the arrest warrant.<sup>19</sup> Thus, it is evident that Libya is unwilling and unable to genuinely investigate and prosecute international crimes, including those committed against migrants and refugees on its territory. Concomitantly, proceedings in other States, in particular Italy, however commendable, are scarce in number and do not necessarily reflect the gravity of the crimes committed against migrants and refugees as crimes against humanity or war crimes. The few domestic proceedings conducted by third States should not bar the Court from exercising its jurisdiction over these crimes.

43. Finally, the Communication assesses the scale, nature, manner of commission, and impact of the relevant crimes,<sup>20</sup> concluding that the gravity criterion under the Rome Statute is fulfilled. Every year, thousands of migrants are reported to be victims of the crimes described in the Communication, with crimes taking place across the whole Libyan territory and involving many different actors. Moreover, the nature of the crimes committed is egregious *per se*: noticeable, several crimes not only integrate gross violations of human rights but also have a sexualised and gendered component. In this respect, the manner of commission takes advantage of migrants and refugees' extreme vulnerability in this insecure environment. These crimes heavily affect their victims, leaving long-lasting physical and psychological scars, while also affecting local Libyan population.

44. As thoroughly analysed in the Communication, there is no reason to believe that the investigation and prosecution of the crimes committed against migrants and refugees in Libya would not serve the interest of justice. On the contrary, the gravity of these crimes makes it precisely in the interest of justice to actively investigate and prosecute these cases. The victims testimonies clearly indicate their wish to see the alleged perpetrators held accountable for the

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<sup>19</sup> Middle East Eye, 'Libya's Haftar promotes accused war criminal wanted by international court,' 9 July 2019, available at: <https://www.middleeasteye.net/news/libyas-haftar-promotes-accused-war-criminal-wanted-international-court>.

<sup>20</sup> Regulation 29 of the Regulations of the OTP; OTP, *Policy Paper on Preliminary Examinations*, November 2013, para. 61, available at: [https://www.icc-cpi.int/iccdocs/otp/otp-policy\\_paper\\_preliminary\\_examinations\\_2013-eng.pdf](https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf); OTP, *Policy Paper on Case Selection and Prioritisation*, para. 42

crimes committed against them, their families and friends. The fact that no prosecutions have been carried out to date denies the victims' right to justice.

## **7. Request**

45. The ICC Prosecutor must urgently take steps to bring to justice those responsible for the commission of the crimes, as thoroughly documented and analysed throughout the Communication. Indeed, besides the commendable efforts of some domestic prosecutors, an ICC investigation is needed as the Court can properly deal with the structural dimension of the crimes committed beyond the responsibility of low-level perpetrators and hold accountable those at higher echelons, whose immunities bar prosecution in domestic courts. Specifically, the context in Libya with the incorporation of militias and other criminal actors into the State apparatus presents an additional challenge, blurring the division between State authority, armed groups, and criminal networks. It is thus clear that the ICC is the only possible avenue for breaking the cycle of impunity and assessing the individual criminal responsibility of high-level perpetrators.

46. In light of the documentation collected and upon thorough analysis, ECCHR, FIDH, and LFJL respectfully request the Prosecutor to urgently proceed with the investigation and prosecution of those responsible for the grave crimes, under the ICC jurisdiction, committed against migrants and refugees in Libya. This is also in keeping with the Court's essential purpose of ending impunity and contributing to the prevention of international crimes in situations falling under its jurisdiction, including in the context of the Situation in Libya, which has been under ICC investigation since 2011.

# ARTICLE 15 COMMUNICATION

## I. Introduction and Methodology

### A. Introduction

1. The European Center for Constitutional and Human Rights (ECCHR), Lawyers for Justice in Libya (LFJL), and the International Federation for Human Rights (FIDH), in collaboration with 14 survivors, file this Communication to the Office of the Prosecutor (OTP) of the International Criminal Court under Article 15 of the Rome Statute. The Organisations request that the Prosecutor urgently investigates the alleged commission of grave crimes, including crimes against humanity and war crimes committed against migrants, refugees, and asylum seekers (hereafter ‘migrants and refugees’) in the framework of the current investigation on the Situation in Libya since February 2011.<sup>1</sup>
2. The violence against migrants and refugees in Libya is well-documented. Evidence shows that they are tortured, beaten, enslaved, and face physical, sexual, and psychological abuse at various stages of their journey in Libya. As acknowledged by the EU Migration Commissioner Dimitri Avramopoulos: ‘We are all conscious of the appalling and degrading conditions in which some migrants are held in Libya.’<sup>2</sup> This situation has been widely reported by international<sup>3</sup> and civil society organisations, as well as media outlets.<sup>4</sup>
3. In particular, the recent UN Fact-Finding Mission on Libya (the FFM), which relied on 50 interviews with migrants and refugees to fulfil its mandate of documenting international human rights and humanitarian law violations, has expressly concluded that the scale of

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<sup>1</sup> For the purpose of this Communication, a migrant is a person staying outside their country of origin, who is not an asylum seeker or a refugee; a refugee is ‘a person who has fled their own country because they are at risk of serious human rights violations and persecution there;’ and an asylum seeker is ‘a person who has left their country and is seeking protection from persecution and serious human rights violations in another country, but who hasn’t yet been legally recognized as a refugee.’ Throughout the Communication, the terms ‘migrants and refugees’ are used in a broad sense to also include asylum seekers. Where ‘asylum seekers’ are not explicitly mentioned in the report, they should be understood as covered by the terms ‘migrants and refugees.’ See Amnesty International (AI), *Refugees, asylum-seekers and migrants*, available at: <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/>.

<sup>2</sup> Human Rights Watch (HRW), *No Escape From Hell: EU policies contribute to Abuse of Migrants in Libya*, 21 January 2019, available at: <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>.

<sup>3</sup> As described in Section III, this Communication relies, among others, on the reports of the UN Panel of Experts, the Office of the High Commissioner for Human Rights (OHCHR), the UN Stabilisation Mission in Libya (UNSMIL) and the International Organisation for Migration (IOM).

<sup>4</sup> See *infra* Section III (Factual analysis).

violence and abuse inflicted on migrants and refugees in Libya may amount to crimes under the Rome Statute. The FFM's October 2021 report further indicated that, in some instances, evidence was available that surpassed the threshold of 'reasonable grounds to believe.'<sup>5</sup>

4. Additionally, judicial rulings in third countries, such as Italy,<sup>6</sup> and before the European Court of Human Rights,<sup>7</sup> provide a valuable source of documentation of the system of migrant exploitation in Libya. Evidence cited in these rulings refers to, for example, the inhumane detention conditions migrants and refugees face, and the widespread use of torture.
5. Most importantly, this public documentation, systematised and incorporated throughout, corroborates a first-hand account of the 14 witnesses whose testimony is included in this Communication. This information altogether provides reasonable basis to believe that crimes against migrants and refugees within the jurisdiction of the Court have been committed. Furthermore, the gravity of the crimes is such that an investigation into these facts should be conducted without further delay. While this Communication focuses on crimes against humanity, the fact that several of these crimes occurred in the context of an ongoing non-international armed conflict warrants that the OTP also investigate the commission of war crimes.
6. The plight of migrants and refugees is a consequence of smuggling and trafficking. Often, these two terms are used interchangeably, although they are distinct crimes, as Section IV analyses in detail. Indeed, while many migrants and refugees certainly enter Libya through smuggling networks, they are often deceived, coerced, or forced into cycles of abuse and exploitation that, in many cases, makes them victims of trafficking.<sup>8</sup>
7. Besides smuggling and trafficking, it is necessary to recognize that many other acts such as enslavement, imprisonment, murder, torture, or sexual violence are committed against migrants and refugees in Libya. Such acts can be characterised as crimes against humanity

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<sup>5</sup> UN Human Rights Council, Independent Fact-Finding Mission on Libya, Report of the Independent Fact-Finding Mission on Libya, A/HRC/48/83, 1 October 2021, paras. 26 and 70.

<sup>6</sup> Tribunale di Messina, N. 149/2020 (28 May 2020), Corte d'Assise di Milano, N.10/17 (10 October 2017), Tribunale di Roma, Decree 8290/2018 (20 April 2018); Tribunale di Roma, Decree 7886/2018 (11 May 2018); Tribunale di Roma, Decree [censored] (15 December 2020), Corte d'Assise di Agrigento, N. 3/18 (12 June 2018); Corte di Cassazione, Judgment 48250/19 (12 September 2019).

<sup>7</sup> European Court of Human Rights, *Hirsi Jamaa and Ors. v Italy* (Application no. 27765/09), Judgment, Grand Chamber, 23 February 2012, para. 125, available at: [https://hudoc.echr.coe.int/spa#{%22itemid%22:\[%22001-109231%22\]}](https://hudoc.echr.coe.int/spa#{%22itemid%22:[%22001-109231%22]})

<sup>8</sup> To reflect this, the Communication usually refers to both 'smugglers and traffickers' to avoid forejudging into each particular situation.



and war crimes. Thus, this Communication details how the acts underlying and concomitant to smuggling and trafficking amount to crimes under the Rome Statute. It also underlines how transnational criminal networks, Libyan State actors, militias, and armed groups are directly involved in committing these crimes. In fact, the trafficking of migrants and refugees represents a profitable business for these actors. To take advantage of migrant vulnerability and the difficulty for them to return to their country of origin, due to different circumstances, these actors regularly detain migrants and refugees. To maximise their profits, these actors also inflict significant suffering on migrants and refugees for the purpose of obtaining higher—and often multiple—payments in exchange for their freedom and/or transport towards Europe.

8. The acts regularly perpetrated against migrants and refugees in this context include imprisonment, enslavement, murder, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, other forms of sexual violence, inhumane treatment, and persecution. These acts strategically and intentionally target migrants and refugees due to their vulnerability in the country. This vulnerability is inhumanely and criminally exploited, amounting to crimes against humanity.
9. Within this context, this Communication intends to draw the Prosecutor’s attention to those who bear the greatest responsibility for the crimes committed against migrants and refugees in Libya, focusing on those individuals directing and coordinating the imprisonment and systematic exploitation of migrants and refugees. The facilities where migrants and refugees are held are controlled both by State institutions and by militias and armed groups.<sup>9</sup> While these actors engage in hostilities against one another, many allegiances and connections can be traced between different groups within the various categories. This means the line between official detention sites and other places of captivity is often blurred.<sup>10</sup> The Communication has given primary importance to highlighting connections between the main perpetrators operating in each detention site, and the competent State authority, militia, or armed group.

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<sup>9</sup> The terms ‘armed group(s)’ and ‘militia(s)’ are used throughout this Communication with the meaning ascribed to each by the 1949 Geneva Conventions and the Additional Protocols thereto. This reflects the Libyan context, in which the term ‘militia’ covers those armed groups that are affiliated with the State, and often on the State payroll. The term ‘armed group’ refers to those not affiliated with the State, which operate independently and are not on the State payroll.

<sup>10</sup> The terms ‘official’, ‘unofficial detention sites’ and ‘places of captivity’ are used throughout this Communication to refer to all places where migrants are held, encompassing detention centres affiliated with the DCIM, as well as other places of captivity, which have an unidentifiable nature and location.

10. As this Communication elaborates, domestic authorities, both in Libya and in third States, have failed to investigate these acts and prosecute those responsible. The Libyan justice system, weakened by a decade of ongoing armed conflict and the lack of unitary and recognised institutions, lacks appropriate legislation. This creates a situation on the ground of ‘near total impunity.’<sup>11</sup> On the investigation and prosecution of crimes committed against migrants and refugees specifically, the Libyan judiciary—in coordination with Italian authorities—has adopted a perspective strictly limited to smuggling and trafficking.<sup>12</sup> Both countries have initiated investigations and occasional proceedings centred on the protection of public order and aimed at halting the flow of individuals from Libyan coasts to Europe, rather than addressing the violent attacks directed against migrants and refugees in Libya.<sup>13</sup>
11. For all the above reasons, the ICC is the only institution that is in a position to conduct a thorough and complete investigation on the complex networks underlying the attacks and targeting of migrants and refugees in Libya, as well as the systematic patterns of violence which makes them amount to crimes against humanity. The Organisations call upon the Prosecutor, Mr Karim Khan, to finally give impulse and actively investigate and prosecute these crimes in observance of the mandate received by the UN Security Council. This is also in keeping with its essential purpose of fighting impunity and helping to prevent international crimes in situations falling under the Court’s jurisdiction. In order to support such an investigation, this Communication first provides some background context on the situation of migrants and refugees in Libya since 2011, before setting out the information collected through witness testimony and other documentation. Then, it analyses the Court’s jurisdiction *in casu*, the characterisation of the different crimes against humanity, and the individual criminal responsibility of alleged perpetrators. Finally, it concludes that the investigation of such crimes is admissible and in the interest of justice. In conclusion, the Organisations respectfully request the Prosecutor to urgently open an investigation into the commission of crimes against migrants and refugees within the Situation in Libya.

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<sup>11</sup> International Commission of Jurists (ICJ), *Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System*, July 2019, p.9, available at: <https://www.icj.org/wp-content/uploads/2019/07/Libya-Accountability-serious-crimes-Publications-Reports-Thematic-reports-2019-ENG.pdf>; see also ICJ, *Impunity No More, A Roadmap to Strengthening Transitional Justice in Libya*, July 2020, p.2, available at: <https://www.icj.org/wp-content/uploads/2020/07/Libya-Transitional-justice-Publications-Reports-thematic-report-2020-ENG.pdf>.

<sup>12</sup> See *infra* Section IV.

<sup>13</sup> See *infra* Section VI.A.

## **B. Methodology**

12. This Communication is based on the research carried out over the course of several years by each of the three organisations, as well as on joint research and analysis conducted by the Organisations over the past two years. The undersigned organisations worked in collaboration and exchange with survivors, conducting particularly extensive, remote and in-person, semi-structured interviews with 14 migrants and refugees (referred to as ‘witnesses’ throughout the Communication). Each of the witness interviews was conducted with the help of an interview template jointly elaborated and validated by the Organisations, over the course of multiple sessions and resulted in detailed testimonies, [REDACTED] ([REDACTED]). Their interview protocols provide the basis for the Communication’s submission. The work was conducted according to the strictest ‘do no harm’ principle, as better explained below. The first-hand witness accounts are complemented and corroborated by thorough documentation from various reliable sources including from experts interviewed for the purpose of this filing.
13. All witnesses are migrants, refugees, or asylum seekers who entered and transited through Libya after the 2011 anti-Gaddafi uprising and who are no longer located in the country. Of the 14 witnesses three individuals are from Cameroon, three from Sudan, three from Eritrea, two from The Gambia, one from Ethiopia, one from Guinea and one from Mali. Eleven of the witnesses interviewed are male, and three are female. The Organisations faced numerous barriers while attempting to access women for interviews, partly due to the nature of the abuse that women and girls experience in Libya, notably sexual violence, and the stigma and humiliation that is still associated with this type of abuse. The gender ratio of the interviewed witnesses is not a proportionate representation of the number of women among the migrants and refugees travelling through Libya and is thus an underrepresentation of the reality on the ground.
14. Due to the COVID-19 pandemic and the subsequent travel restrictions and social distancing measures, as well as the Organisations’ own selection considerations based on a risk assessment, outreach to witnesses was limited and most of the interviews were conducted remotely across several sessions, between January and March 2021, via a secure video conferencing platform. Three interviews were conducted in-person and two were hybrid, including both in-person and remote conversations. During interviews, interpreters were only used in limited instances when necessary.

15. The Organisations jointly established the selection criteria for witnesses to be interviewed. Due to safety concerns, all interviewed witnesses are migrants and refugees that are no longer located in Libya; rather, they are in places of safety with guaranteed access to assistance (including psycho-social support) if needed. In addition, to avoid the particular high risk of re-traumatisation and the difficulty of providing necessary support for minors, increased by the remote setting of interviews, all witnesses are over the age of 18. Prior to the interviews, each witness also gave informed consent. This was obtained by informing the participant of the purpose of the interview, the confidentiality procedures, all possible uses of the information gathered, and how it would be shared with third parties. No financial reward was given in exchange for participation, and witness testimony was provided on a strictly voluntary basis. Throughout the interview, participants were reminded that they may withdraw consent at any point, in which case all records would be destroyed.
16. All interviews were carried out in accordance with a strict risk assessment to recognise and prevent the risk of re-traumatisation as well as external risk factors, including security from retaliation. Throughout the process, the Organisations followed security and safeguarding measures that conform to the ‘Do No Harm’ principle. These included, but were not limited to, training interviewers to recognise signs of trauma; conducting the interviews via secure channels and storing information securely and confidentially; giving the interviewee the option to stop the interview or to withdraw their consent at any time; and putting in place a referral system for mental health, psycho-social, and legal support where necessary.
17. In addition to the first-hand accounts from these witnesses, the Organisations conducted in-depth interviews with experts and informants, including aid and researchers currently working in and on migration in Libya. Additional information was collected and analysed from reliable reports and open-source data, including court documents and reports from UN bodies, such as the International Organization for Migration (IOM), the UN High Commissioner for Refugees (UNHCR), the UN Support Mission in Libya (UNSMIL), the Office of the UN High Commissioner for Human Rights (OHCHR), and the UN Special Rapporteur on the human rights of migrants. Other sources included reports and statements from EU institutions and NGOs working on the ground, as well as third-State government statements on violations of international human rights law and international criminal law committed against migrants and refugees on Libyan territory.

## **II. Background: crimes against migrants and refugees in the context of the armed conflict in Libya and the ICC investigation of the Situation**

### **A. Crimes against migrants and refugees in the context of the ongoing ICC investigation into the Situation in Libya**

18. As of 2021, the ICC has been investigating the situation in Libya for over ten years. However, despite five arrest warrants issued by the ICC, little progress has been made on accountability for the international crimes committed in Libya, due to several ongoing circumstances. This is particularly true when it comes to crimes committed against migrants and refugees, where no concrete steps have yet been taken, despite the Prosecutor's welcome attention to this aspect of the conflict.
19. Since 2017, ICC Prosecutor Fatou Bensouda and her office have shown an increasing interest in crimes committed against migrants and refugees by militias and armed groups in Libya. In her thirteenth report to the UNSC on the situation in Libya on 9 May 2017, Bensouda indicated that 'my Office continues to collect and analyse information relating to serious and widespread crimes allegedly committed against migrants and refugees attempting to transit through Libya.'<sup>14</sup> She further stated:

*I am similarly dismayed by credible accounts that Libya has become a marketplace for the trafficking of human beings. This Council has itself expressed concern that the situation in Libya is exacerbated by the smuggling of migrants and human trafficking into, through and from Libya. These activities could further provide fertile ground for organised crime and terrorist networks in Libya. [...] my Office is carefully examining the feasibility of opening an investigation into migrant-related crimes in Libya should the Court's jurisdictional requirements be met.<sup>15</sup>*

20. In her report to the UNSC in November 2019, Prosecutor Bensouda noted that: 'Migrants and refugees continue to be at risk of torture, sexual violence, abduction for ransom, extortion, forced labour, unlawful killings and detention in inhumane conditions.'<sup>16</sup> In May 2020, she reiterated to the UNSC that 'migrants and refugees in Libya continue to be

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<sup>14</sup> ICC, *Statement of ICC Prosecutor to the UNSC on the Situation in Libya*, 9 May 2017, para. 25, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib>.

<sup>15</sup> *Id.*, paras 27, 29.

<sup>16</sup> ICC, *Statement of the ICC Prosecutor to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)*, 6 November 2019, <https://www.icc-cpi.int/Pages/item.aspx?name=191106-stat-icc-otp-UNSC-libya>.

routinely subjected to arbitrary detention, unlawful killing, enforced disappearance, torture, sexual and gender-based violence, abduction for ransom, extortion, and forced labour.’<sup>17</sup> In her statement of May 2021, she further noted:

*The recent reports about another shipwreck in the last week of April 2021 leading to the death of over 100 migrants as well as reports about the ongoing abuse and exploitation of migrants and refugees, underline the urgent need for national authorities, partners and agencies to intensify their efforts to prevent further tragedies and crimes.*<sup>18</sup>

21. In August 2021, she further highlighted that, according to UNSMIL reports, more than 8,850 individuals were arbitrarily detained in official sites, with migrants and refugees making up 5,826 of them.<sup>19</sup> An additional 10,000 individuals, she noted, were held in unofficial detention sites run by militias and armed groups.<sup>20</sup>
22. As first indicated in the Prosecutor’s briefing to the UNSC on 8 May 2019, the OTP has adopted a two-pronged strategy when it comes to crimes against migrants and refugees: 1) to monitor, investigate and analyse allegations of crimes committed against migrants in Libya in both official detention sites and other places of captivity, in order to determine whether crimes committed fall within the jurisdiction of the Court; and 2) to cooperate with key stakeholders and strengthen national capacities to exercise their prosecutorial responsibility through positive complementarity.<sup>21</sup> However, these efforts do not reflect the priority level necessary to effectively prosecute these crimes. The material and evidence available, as well as the ICC’s unique powers, place the Court in the best position to investigate and prosecute the crimes committed against migrants and refugees in Libya. While cooperation with key local institutions and stakeholders is fundamental, the OTP must assess the egregiously grave crimes committed in this context, in order to break the cycle of impunity and guarantee justice for the victims.

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<sup>17</sup> ICC, *Statement of the ICC Prosecutor to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)*, May 2020, para. 28, <https://www.icc-cpi.int/Pages/item.aspx?name=201110-icc-prosecutor-statement-UNSC-libya>.

<sup>18</sup> ICC, *Statement of the ICC Prosecutor to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)*, 17 May 2021, para. 25, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=210517-otp-statement-UNSC-libya>

<sup>19</sup> UN Security Council (UNSC), Report of the Secretary General, S/2021/752 (25 August 2021), para. 51.

<sup>20</sup> *Statement of the ICC Prosecutor*, 17 May 2021, para. 17.

<sup>21</sup> ICC, *Statement of the ICC Prosecutor to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)*, 8 May 2019, para. 36, available at: <https://www.icc-cpi.int/itemsDocuments/190508-rep-otp-UNSC-libya-ENG.pdf>.

## **B. The armed conflict and its impact on the situation of migrants and refugees in Libya**

23. This Communication is set against the context of a non-international armed conflict ('NIAC') in Libya that has been taking place since 2011. The NIAC features multiple actors, including competing Libyan State authorities. With this in mind, this section first sets out Libya's current political situation, followed by a description of the armed conflict's chronology, including the main parties involved and other relevant actors. Finally, it describes the conflict economy constituting the smuggling and trafficking industry, which has fuelled the crimes committed against migrants and refugees in Libya.

### **1. Libya's Current Political Situation**

24. Currently, the Government of National Unity (GNU) serves as an interim governing body in Libya. It was appointed by the Libyan Political Dialogue Forum (LPDF) in Geneva on 5 February 2020, and was mandated to create the conditions and circumstances conducive to elections<sup>22</sup> which have been scheduled on 24 December 2021.

25. The armed conflict that gave rise to the current political fragmentation stemmed from the fall of the Gaddafi government in 2011, followed by national elections in the summer of 2012, resulting in the General National Congress (GNC) being established.<sup>23</sup> However, the GNC government was unable to impose its authority over the whole of Libya. It became divided and unable to control the country's numerous armed groups and militias, whose accumulated size and firepower vastly exceeded those of the regular army and police, both already severely weakened following the uprising. As a result, different militias, including former Libyan military forces, engaged in violent clashes, as the conflict proliferated throughout the country.

26. By 2014, infighting within the GNC had worsened. In February 2014, the GNC extended its own mandate, sparking protests in Tripoli and Benghazi.<sup>24</sup> Meanwhile, violent attacks against Gaddafi-era officials and the rise of extremists groups in the east laid the groundwork for Khalifa Haftar, a former general from the Gaddafi era, to consolidate power and establish the self-proclaimed Libyan National Army (LNA), later known as the

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<sup>22</sup> UNSMIL, *Roadmap "For the Preparatory Phase of a Comprehensive Solution"*, 19 November 2020, available at: [https://unsmil.unmissions.org/sites/default/files/lpdf\\_-\\_roadmap\\_final\\_eng\\_0.pdf](https://unsmil.unmissions.org/sites/default/files/lpdf_-_roadmap_final_eng_0.pdf).

<sup>23</sup> D.D. Kirkpatrick, *Libyans Vote in First Election in More Than 40 Years*, The New York Times, 7 July 2012, available at: <https://www.nytimes.com/2012/07/08/world/africa/libyans-vote-in-first-election-in-more-than-40-years.html>.

<sup>24</sup> P. Markey and G. Shennib, *In standoff, Libyans protest over parliament extension*, Reuters, 7 February 2014, available at: <https://www.reuters.com/article/us-libya-crisis-idUSBREA161MH20140207..>

Libyan Arab Armed Forces (LAAF).<sup>25</sup> In May 2014, Haftar launched his military operation ‘Operation Dignity,’ bringing together Gaddafi-era army units and other armed groups against Islamist militants in Benghazi and the East. On 18 May 2014, pro-Haftar militias stormed the GNC in Tripoli in protest of the mandate extension.<sup>26</sup>

27. In June 2014, parliamentary elections yielded a low turnout.<sup>27</sup> As a result, some GNC members refused to accept the legitimacy of the newly elected House of Representatives (HoR) and re-established the GNC—later turned Government of National Salvation (GNS)—as a rival legislative authority in Tripoli. Violence and fighting escalated in Tripoli, which resulted in the burning of Tripoli’s international airport and the evacuation of all foreign entities in the country, including UNSMIL and embassies. As a consequence of the conflict, the HoR was forced to relocate to the eastern city of Tobruk. As a result of this division, two rival governments were formed in the same year, with two different prime ministers and two legislative authorities. These were the HoR based in Tobruk in east Libya and the GNC/GNS based in Tripoli in west Libya.

28. Armed groups and militias, some of which had links to political parties, repeatedly threatened and used force to influence political processes, and were further empowered by the government split into the GNC and HoR in 2014. Each side had its own armed factions, while some armed groups had no political affiliation and were purely tribal or regionally based. The local dynamics of armed groups and militias varied between regions, but all fought for power and influence. By the end of 2014, an estimated 1,600 armed groups were operating in Libya – 1,300 more than in 2011.<sup>28</sup> A large majority of the armed groups and militias were incorporated into umbrella groups and coalitions. For example, the Libyan revolutionaries ‘Operations Room’ (LROR) was established in May 2013 to counter the influence and power of the Zintanian militias in Tripoli.<sup>29</sup> The two other major State-affiliated bodies formed during this period were the Supreme Security Committee (SSC),

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<sup>25</sup> The term ‘LAAF’ is used throughout this Communication to refer to Gen. Khalifa Haftar’s forces, sometimes referred to elsewhere as ‘LNA’.

<sup>26</sup> A. Elumami and U. Laessing, *Gunmen loyal to ex-general storm Libyan parliament, demand suspension*, Reuters, 18 May 2014, available at: <https://www.reuters.com/article/us-libya-violence-idUSBREA4G04A20140518>.

<sup>27</sup> BBC, *Libyan elections: Low turnout marks bid to end political crisis*, 26 June 2014, available at: <https://www.bbc.co.uk/news/world-africa-28005801>.

<sup>28</sup> Office of the Commissioner General for Refugees and Stateless Persons (CGRS) et al., *Libya: Militias, Tribes and Islamists*, p. 7, 19 December 2014, available at: <https://www.justice.gov/eoir/page/file/989511/download..>

<sup>29</sup> *Id.*, p. 9.



established in Tripoli in 2011, and the Libya Shield Force (LSF), established in 2012. Both comprised Islamist militias based mainly in Benghazi, Khums, and Misrata.<sup>30</sup>

29. In 2015, the UN helped establish and formally endorsed the Government of National Accord (GNA), to unify the two rival administrations through the signing of the Libyan Political Agreement (LPA) in Skhirat, Morocco.<sup>31</sup> In March 2016 the GNA was installed in Tripoli led by Prime Minister Fayez al-Sarraj. However, the LPA was highly contested for many reasons, including its lack of legitimacy, for failing to include Libyan communities in the process. As a result, three governments now rivalled for power, two in Tripoli, the GNA and the GNC/GNS, and the HoR in the east head by Abdullah Al-Thini. Haftar and his affiliates, rejecting the LPA, continued his efforts to seize control of the country militarily. Eventually the GNC/GNS self-dissolved, leaving two main centres of power, the GNA and the HoR under the guidance of the LAAF. Protracted conflict and proxy wars persisted and in April 2019, Haftar's forces launched an offensive on Tripoli a few days before a planned UN-led national conference to broker a power-sharing deal.<sup>32</sup>
30. While the rivalry intensified following the GNA's formation by the Skhirat Agreement in December 2015, both governments were soon forced to turn their attention to the Islamic State of Iraq and the Levant (ISIL) and its growing presence. In Sabratha, a coalition of armed groups named the Anti-ISIL Operations Room was created in response to the ISIL presence in the city and involved all local brigades. This included the al-Dabbashi Brigade and the Al-Wadi Battalion. However, once the threat of ISIL subsided, the brigades consolidated their power and turned to controlling the smuggling and trafficking routes, which eventually led to internal fighting as they began to compete for control of the networks.<sup>33</sup>
31. Between 2014 and 2019, there were numerous localised conflicts being fought across the country.<sup>34</sup> These conflicts directly influenced smuggling and trafficking routes and

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<sup>30</sup> *Id.*, p. 19.

<sup>31</sup> UNSMIL, *Libyan Political Agreement*, 17 December 2015, available at: <https://unsmil.unmissions.org/sites/default/files/Libyan%20Political%20Agreement%20-%20ENG%20.pdf>.

<sup>32</sup> D. Finnan, *Libya: Haftar forces thwarted as offensive to take Tripoli begins*, RFI, 5 April 2019, available at: <https://www.rfi.fr/en/africa/20190405-libya-haftar-forces-thwarted-offensive-take-tripoli-begins>.

<sup>33</sup> A. Malakooti, *The Political Economy of Migrant Detention in Libya*, Global Initiative against Transnational Organized Crime (GI-TOC), April 2019, pp. 73-74, available at: <https://globalinitiative.net/wp-content/uploads/2019/11/Final-Report-Detention-Libya.pdf>; UNSC, Panel of Experts on Libya, Final Report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011), S/2017/466, June 2017, paras 53-57, <https://www.undocs.org/S/2017/466>; UNSC, Final report of the Panel of Experts established pursuant to resolution 1970 (2011), 5 September 2018, paras 32-50, available at: <https://digitallibrary.un.org/record/1640692?ln=en>.

<sup>34</sup> 2017 UN Panel of Experts Report, paras 53-57.

endangered the lives of migrants and refugees, as the conflicts were happening between groups that controlled smuggling networks and in places where migrants were gathered. One example involves the conflict that raged between the Tuareg and Tebu tribes, both involved in the human smuggling and trafficking economy,<sup>35</sup> in the southwestern town of Ubari between 2014 and 2016. At the local level, the battle revolved around economic assets as well as identity rights. Yet as the country's rival national governments and international powers increasingly meddled in the fighting, the Ubari conflict came to be viewed as a proxy war.<sup>36</sup> Tebu fighters, who controlled large swathes of Libya's southern border and smuggling routes, were included in the Ministry of Defence's auxiliary force, called the Libya Shield. The conflict spilled over into neighbouring towns, including Sabha, which had served as a major smuggling hub. Similar clashes were also triggered in other smuggling hotspots including Kufra, Sabratha, and Ghadames.

32. From 2014, the LAAF received support from the United Arab Emirates, Egypt, France, Saudi Arabia, Russia, the United States, and Italy. In turn, despite UN backing, the GNA received support from fewer States, such as Turkey and Qatar. Several diplomatic attempts by international actors failed to resolve the Libyan conflict between 2014 and 2020, including French President Macron's La Celle-Saint-Cloud meeting in 2017,<sup>37</sup> and the Italy-hosted Palermo conference in 2018.<sup>38</sup> In January 2020, the German government hosted an international conference in Berlin to bring together international actors involved in Libya. Participants committed to redoubling efforts to de-escalate the conflict and end hostilities, to support UN-backed negotiations, and to respect and implement the arms embargo.<sup>39</sup> The UNSC endorsed the Berlin conference conclusions in Resolution 2510 (2020), which set the framework for UNSMIL to facilitate the Libyan Political Dialogue Forum (LPDF).<sup>40</sup> The process also resulted in the formation of the 5+5 Joint Military

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<sup>35</sup> International Crisis Group, *How Libya's Fezzan Became Europe's New Border*, 31 July 2017, available at: <https://www.crisisgroup.org/middle-east-north-africa/north-africa/libya/179-how-libyas-fezzan-became-europes-new-border>.

<sup>36</sup> R. Murray, *Southern Libya Destabilized: The Case of Ubari*, p. 3, April 2017, available at: <http://www.smallarmssurvey.org/fileadmin/docs/T-Briefing-Papers/SAS-SANA-BP-Ubari.pdf>.

<sup>37</sup> E. Miller and K. Mezran, *Flawed Diplomacy in Libya*, The Cairo Review of Global Affairs, Winter 2018, available at: <https://www.thecairoreview.com/essays/flawed-diplomacy-in-libya/>.

<sup>38</sup> G. De Maio, *Order from chaos: The Palermo conference on Libya: A diplomatic test for Italy's new government*, Brookings, 19 November 2018, available at: <https://www.brookings.edu/blog/order-from-chaos/2018/11/19/the-palermo-conference-on-libya-a-diplomatic-test-for-italys-new-government/>.

<sup>39</sup> Germany Federal Government, *The Berlin Conference on Libya: conference conclusions*, 19 January 2020, available at: <https://www.bundesregierung.de/breg-en/news/the-berlin-conference-on-libya-1713882>

<sup>40</sup> UNSC, Resolution 2510 (2020) S/RES/2510, 15 February 2020, available at: [https://undocs.org/S/RES/2510%20\(2020\)](https://undocs.org/S/RES/2510%20(2020)).

Commission, a commission composed of five military officers affiliated with the GNA and five affiliated with the LAAF.

33. After much delay, due to challenges amongst warring parties to reaching an agreement, the 5+5 Joint Military Commission finally agreed to a ceasefire on 23 October 2020.<sup>41</sup> The LPDF consultation process started in November 2020.<sup>42</sup> Under the LPDF framework, 75 Libyan representatives agreed on a roadmap<sup>43</sup> and selected members for an interim executive authority to lead the country to national elections scheduled for 24 December 2021.<sup>44</sup> On 10 March 2021, the LPDF-appointed interim government, the Government of National Unity (GNU), replaced the GNA and was endorsed by the HoR in Sirte. This was the first peaceful handover of government since 2012.

## 2. The Conflict Economy

34. Although Libya was already a hub for smuggling and trafficking during the Gaddafi era, it significantly transformed after 2011. The absence of a central State authority and security vacuum resulting from the 2011 uprising facilitated the continued existence of non-State armed groups and the development of smuggling networks. It also enabled an environment for the lucrative business of transnational human smuggling and trafficking. In turn, the growing development of the smuggling and trafficking industry has fuelled the conflict post-2011, thereby creating a vicious cycle.
35. Prior to the 2011 uprising, as part of a system of divide and rule, Gaddafi exerted some control over smuggling and trafficking by allowing favoured families, tribes, and groups to participate.<sup>45</sup> As highlighted in a 2017 GI-TOC report, “[h]uman smuggling was an entirely State-controlled industry,”<sup>46</sup> and there was little underground smuggling activity up until 2011. The constraints operated by the Gaddafi regime ceased to exist following

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<sup>41</sup> UNSMIL, *UN salutes new Libya ceasefire agreement that points to ‘a better, safer, and more peaceful future*, 23 October 2020, available at: <https://news.un.org/en/story/2020/10/1076012>

<sup>42</sup> For general information on the LPDF, see UNSMIL’s website, available at: <https://unsmil.unmissions.org/libyan-political-dialogue-forum>.

<sup>43</sup> UNSMIL, *Roadmap for the Preparatory Phase of a Comprehensive Solution*, available at: [https://unsmil.unmissions.org/sites/default/files/lpdf\\_-\\_roadmap\\_final\\_eng.pdf](https://unsmil.unmissions.org/sites/default/files/lpdf_-_roadmap_final_eng.pdf).

<sup>44</sup> UNSMIL, *Acting Special Representative of the Secretary-General for Libya Stephanie Williams remarks following the closing of the vote on the new executive authority*, 5 February 2021, available at: <https://unsmil.unmissions.org/acting-special-representative-secretary-general-libya-stephanie-williams-remarks-following-closing>.

<sup>45</sup> T. Eaton, *Libya’s War Economy: Predation, Profiteering and State Weakness*, Chatham House, April 2018, available at: <https://www.chathamhouse.org/sites/default/files/publications/research/2018-04-12-libyas-war-economy-eaton-final.pdf>.

<sup>46</sup> M. Micallef, *The Human Conveyor Belt: Trends in Human Trafficking and Smuggling in Post-Revolution Libya*, GI-TOC, March 2017, p. 4, available at: <https://globalinitiative.net/wp-content/uploads/2017/03/GI-Human-Conveyor-Belt-Human-Smuggling-Libya-2017-.pdf>.

the uprising and the ensuing security vacuum. The smuggling market became liberalised, with the control over smuggling routes opening up to competition amongst armed groups, thereby generating localised conflicts amongst them.<sup>47</sup> Powerful militias that previously had only secured safe passage in exchange for a fee actively entered the human smuggling and trafficking business and seized control of the main migration routes in Libya. This led to an increase in the smuggling and trafficking of migrants and refugees, which has materialised significantly since 2013.

36. In parallel, between 2011 and 2014, many armed groups and militias were integrated into State security apparatus, including migration management structures. As a result, State functions and resources became dangerously intertwined with illicit industries. Furthermore, as a result of the 2014 political crisis, the fragmentation of State institutions and the resulting lack of control of the Libyan central authorities, armed groups, and militias gained more power and extended their territorial reach. Simultaneously, they facilitated the expansion of “smugglers’ logistical capacity and further increased efficiency, opening the Libyan territory to a lot more ‘business.’”<sup>48</sup>
37. Between 2013 and 2015, conflict and insecurity, as well as external factors such as the civil war in Syria, increased migrants and refugees’ reliance on the smuggling industry to cross borders.<sup>49</sup> This is often inherently dangerous and precarious. By 2016, Libya had become the main launching point to Europe along the so-called ‘Central Mediterranean Route’ (CMR). Indeed, in 2016, the number of migrants and refugees arriving in Italy peaked at over 180,000,<sup>50</sup> with around 163,000 of them departing from Libya.
38. In response, European States strengthened the border externalisation policies and practices they already had in place, offering little room for legal pathways for refugees along the CMR, with the aim of curtailing arrivals by sea. Such actions effectively closed all pathways to Europe and trapped vulnerable migrants and refugees in Libya, where they became increasingly monetised to make up for revenue smugglers and criminal gangs previously lost. As a result, smugglers and traffickers increasingly abducted and detained

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<sup>47</sup> Eaton, *Libya’s War Economy*, p. 9.

<sup>48</sup> Micallef, *The Human Conveyor Belt*, p. vii.

<sup>49</sup> Amnesty International (AI), *Libya’s Dark Web of Collusion: Abuses against Europe-bound Refugees and Migrants*, 11 December 2017, p. 15, available at: <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>.

<sup>50</sup> UNHCR Operational Data Portal, *Mediterranean Situation, Sea arrivals*, available at: <https://data2.unhcr.org/en/situations/mediterranean/location/5205>.

migrants and refugees as a means of generating money through extorting ransom payments.<sup>51</sup>

39. Reacting to increased international pressure, armed groups and militias involved in smuggling and trafficking activities turned to anti-human smuggling and trafficking activities instead. For example, in the summer of 2017, the notorious human smuggler Ahmed al-Dabbashi (also known as al-Amu) started cooperating with the GNA in anti-human-smuggling efforts. However, this shift was in fact motivated by armed groups and militias' search for legitimacy and recognition as part of the State. In fact, in 2017-2018, the GNA invited groups to become integrated into the State in exchange for some money and designation. The deal which saw the abrupt conversion of the al-Dabbashi armed group to a government-accredited law enforcer not only disrupted the smuggling and trafficking flows from south to north but also the balance of power amongst armed groups in Sabratha. This triggered a conflict with local rivals, the al-Wadi Battalion, which emerged victorious, forcing al-Dabbashi to flee to Zawiya where he remains to date.<sup>52</sup>
40. It is a fact that the smuggling and trafficking economy is perpetuating the conflict in Libya. In 2018, the Libya Panel of Experts indicated that '[t]rafficking in persons and the smuggling of migrants are substantially benefitting armed groups. These activities fuel instability and undermine the formal economy.'<sup>53</sup> A few months later, the Office of the High Commissioner for Human Rights (OHCHR) further stated that: '[the] climate of lawlessness [in Libya] provides fertile ground for thriving illicit activities, such as trafficking in human beings and criminal smuggling, and leaves migrant and refugee men, women and children at the mercy of countless predators who view them as commodities to be exploited and extorted for maximum financial gain.'<sup>54</sup> Describing the extortion process, it stated: 'They are systematically held captive in abusive conditions, including starvation, severe beatings, burning with hot metals, electrocution, and sexual abuses of women and girls, with the aim of extorting money from their families through a complex system of money transfers, extending to a number of countries.'<sup>55</sup> Moreover, the smuggling and trafficking activities are difficult to detect and trace because they largely operate on a

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<sup>51</sup> AI, *Libya's Dark Web of Collusion*, p. 27.

<sup>52</sup> M. Micallef and T. Reitano, *The Anti-Human Smuggling Business and Libya's Political End Game*, GI-TOC, December 2017, p. 13, available at: [https://globalinitiative.net/wp-content/uploads/2018/01/Libya\\_ISS\\_Smuggling.pdf](https://globalinitiative.net/wp-content/uploads/2018/01/Libya_ISS_Smuggling.pdf).

<sup>53</sup> 2018 UN Panel of Experts Report, p. 2.

<sup>54</sup> UNSMIL and OHCHR, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, p. 5, available at: <https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>.

<sup>55</sup> *Id.*, p. 6.

money transfer system that deposits money to bank accounts overseas after going through several intermediaries located across different countries.<sup>56</sup> The system also does not usually involve direct cash transactions and rarely leaves any paper trails.

41. The collusion of armed groups implicated in smuggling and trafficking activities with State institutions, such as the Department for Combatting Illegal Migration (DCIM), itself a State body under the authority of the Ministry of Interior,<sup>57</sup> or the Libyan Coast Guard, has been repeatedly documented.<sup>58</sup> Armed groups often have *de facto* control over official detention sites in addition to the places of captivity they run. A key example is the DCIM site in Zawiya, which is in fact under the control of the al-Nasr Brigade, a local militia.<sup>59</sup> The UN Panel of Experts' report also highlighted the tripartite connection between the head of the Zawiya Coast Guard, Abd al-Rahman Milad (also known as 'Bija'), with one of the Nasr Brigade's commanders, Mohammad Kashlaf, and the al-Far and the Oil Refinery Brigade.<sup>60</sup>
42. In the face of Libya's deep economic recession, which has caused cash shortages, severe inflation, and unemployment, illicit activity has thrived. The smuggling and trafficking economy has offered opportunities to generate significant revenue for all actors involved and powerful financial incentives to remain in the industry, with little risk of accountability. In a 2017 report, Tim Eaton estimated that 'revenues from human smuggling in Libya were around \$978 million in 2016, amounting to 3.4 per cent of Libya's 2015 GDP of \$29.1 billion.'<sup>61</sup> While the number of migrants and refugees and the revenues generated may have dropped since 2016, the individual prices requested by smugglers and traffickers have increased.

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<sup>56</sup> The system is called the hawala system. Hawala, Arabic for transfer, is an honour-based system used in the Muslim world. Typically, money is paid to a hawaladar (agent) who then instructs a counterpart to pay the final recipient in another geographic location. In practice, relatives of refugees and migrants being ransomed are given the name of a local person to whom the money is to be transferred through international money transfer companies such as Western Union and Orange Money. The money is either deposited directly or through a hawaladar and is often deposited to bank accounts abroad such as Dubai, UAE. From 2012, the use of hawala, which was facilitated by the growing black economy and the malfunctioning of the banking system, significantly increased. See Micallef, *The Human Conveyor Belt*, pp. 6, 35.

<sup>57</sup> See *infra* Section II.C.2.

<sup>58</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 6.

<sup>59</sup> 2017 UN Panel of Experts Report, p. 103.

<sup>60</sup> *Ibid.*

<sup>61</sup> Eaton, *Libya's War Economy*, p. 10.

### C. Migration trends and legal framework in Libya

43. In order to understand the current context and situation of migrants and refugees in Libya, this subsection provides an overview of Libya's evolving position on migration under the Gaddafi regime. It then details Libya's legal framework in relation to migration.

#### 3. Libya's migration trends and policy before 2011

44. The discovery of oil in 1959 attracted many foreign workers in search of job opportunities. Through the early 1990s, most migrant workers were from neighbouring Arab countries. However, after UN sanctions were imposed on Libya in the early 1990s following the Lockerbie bombing,<sup>62</sup> Gaddafi turned to Africa for support. With aspirations for a pan-Africa, he signed a series of bilateral agreements between Libya and several African States and established the Community of Sahel-Saharan States (CEN-SAD), which sought to open borders and build economic ties between African nations. This marked a new era of foreign policy for Libya and with it, a new type of migration,<sup>63</sup> as sub-Saharan Africans were encouraged to come to Libya.<sup>64</sup>

45. However, the lack of a coherent immigration policy, exacerbated by arbitrary rules on regularisation, led to an uncertain status for migrant communities in Libya. In addition, the growing presence of sub-Saharan migrants and refugees in conservative coastal cities began to provoke hostile reactions among local populations,<sup>65</sup> This culminated in autumn 2000 with the killing of 130 sub-Saharan nationals in anti-African riots in Tripoli and Zawiya.<sup>66</sup> Seeking to disguise the racist elements underlying the riots, Gaddafi made public statements criminalising migrants, accusing them of violence, drug-dealing, and spreading infectious diseases.<sup>67</sup> Libya progressively introduced stricter measures for migration

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<sup>62</sup> UNSC, Resolution 748 (1992), 31 March 1992, available at: <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Disarm%20SRES748.pdf>.

<sup>63</sup> S. Hamood, *African Transit Migration Through Libya to Europe: The Human Cost*, The American University of Cairo, Forced Migration and Refugee Studies, January 2006, available at: <http://migreurop.org/IMG/pdf/hamood-libya.pdf>.

<sup>64</sup> N. Al-Dayel, A. Anfinson & G. Anfinson, *Captivity, Migration, and Power in Libya*, Journal of Human Trafficking, 31 March 2021, available at: <https://doi.org/10.1080/23322705.2021.1908032>.

<sup>65</sup> FIDH, *Libya: The Hounding of Migrants Must Stop*, 2012, p. 12, available at: <https://www.fidh.org/IMG/pdf/libyemigrantsuk-ld.pdf>.

<sup>66</sup> S. Bredeloup & O. Pliez, *The Libyan Migration Corridor*, European University Institute, 2011, pp. 7-8, available at: <https://cadmus.eui.eu/bitstream/handle/1814/16213/EU-US%20Immigration%20Systems%202011%20-%202003.pdf>.

<sup>67</sup> FIDH, *Libya: The Hounding of Migrants Must Stop*, p. 12.

management, oscillating between phases of open-door policies and mass migrant expulsions.<sup>68</sup>

46. Over a five-year period, the number of expulsions increased by 2000%, rising from 4,000 in 2000 to 84,000 in 2005.<sup>69</sup> In 2007, the open-door policy, whereby Arab and African nationals were able to enter Libya without visas, ended when Gaddafi began to shift his foreign policy towards the West. The Libyan government imposed visa regulations on foreign nationals (with the exception of those from the Maghreb countries and Egypt) and adopted a new legal framework to restrict stay and labour in Libya.<sup>70</sup>
47. As visa and documentation restrictions were imposed on most foreigners entering and staying in Libya, many in turn attempted to depart by sea to Europe. Italy, alarmed by the growing number of sea arrivals from Libya, sought to thwart such border crossings. In 2008, Italy and Libya signed the Treaty of Friendship, Partnership and Cooperation,<sup>71</sup> a €50 million agreement which, among other areas of bilateral relations, aimed to stop the flow of migrants and refugees to Europe. The agreement allowed Italian ships to intercept those attempting to reach Europe via the Mediterranean Sea and return them to Libya. This practice, which has become known as ‘pushbacks,’<sup>72</sup> has since been found by the European Court of Human Rights (ECtHR) to breach Italy’s human rights obligations.<sup>73</sup> Yet similar tactics remain integral to Europe’s border externalisation policy to this day.
48. The Libyan General Criminal Investigation Department of the Directorate for Passports, Nationality and Foreign Affairs, known as the Passport Authority, established a migrant detention centre in Zuwara in 2009 to restrict the flow of irregular migrants and refugees to Europe, illustrating the start of a system of detention for irregular migration in Libya.<sup>74</sup> Further, in 2010, Libya adopted a new legal framework by introducing Law No. 19 of 2010 (detailed further below), which criminalised the irregular entry, stay, and exit of

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<sup>68</sup> S. Bredeloup & O. Pliez, *The Libyan Migration Corridor.*, p.9.

<sup>69</sup> Consortium for Applied Research on International Migration (CARIM), *Migration profile: Libya*, European University Institute, 2011, p. 1, available at: <https://cadmus.eui.eu/bitstream/handle/1814/22438/Migration%20profile%20EN%202011%20Libya%20with%20links.pdf?sequence=1&isAllowed=y>.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Treaty of Friendship, Partnership, and Cooperation between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Italy*, 30 August 2008, available at: [https://security-legislation.ly/sites/default/files/lois/7-Law%20No.%20%282%29%20of%202009\\_EN.pdf](https://security-legislation.ly/sites/default/files/lois/7-Law%20No.%20%282%29%20of%202009_EN.pdf).

<sup>72</sup> UN Human Rights Council, Report on means to address the human rights impact of pushbacks of migrants on land and at sea, 12 May 2021, A/HRC/47/30, available at: <https://undocs.org/en/A/HRC/47/30>.

<sup>73</sup> *Hirsi Jamaa and Ors.*

<sup>74</sup> Malakooti, *The Political Economy*, p. 79.



migrants.<sup>75</sup> Under the new system, migrants and refugees are detained without due process and forced to pay a fine as well as the costs of their return journey home.<sup>76</sup> The fine was often paid directly to the staff at the detention centre. This made running such a centre a profitable business.<sup>77</sup> In 2011, the uprising and its consequences significantly impacted migration to Libya, with conflict and instability turning the country into a transit state, as people on the move sought to flee the escalating violence there.

#### **4. Legal and institutional framework for migrants and refugees in Libya**

49. As described above, the trajectory of Libya's laws around foreign nationals and labour reflected Gaddafi's changing foreign policy over the years. Law No. 6 of 1987 on Organising the Entry, Residence and Exit of Foreigners in Libya<sup>78</sup> sought to build a framework around the presence of foreign nationals in Libya. All entry, stay, and exit of foreign nationals was regulated by the General Directorate of Passports and Nationality and required obtaining a visa.<sup>79</sup> Citizens of Arab States as well as nationals from Ethiopia and Eritrea were the only nationals who could enter the country without a visa.<sup>80</sup>
50. Reflecting Gaddafi's foreign policy shifts, Law No. 2 of 2004 provided amendments to the existing Law No. 6 of 1987. For example, it increased the fine when breaching provisions of Law No. 6 of 1987 from a maximum of 200 Libyan dinars<sup>81</sup> to a minimum of 2000 Libyan dinars.<sup>82</sup> Additionally, it introduced a new Article 19(bis) to Law No. 6 of 1987, which prescribes penalties for the crime of smuggling and any form of assistance to irregular migrants in the country, including a minimum of one year of imprisonment and a fine of at least 1000 Libyan dinars.<sup>83</sup>
51. Following foreign policy shifts that eased long-standing tensions between Gaddafi and the West, Law No. 19 of 2010 on Combatting Illegal Migration sought to explicitly put an end

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<sup>75</sup> Law No. 19 of 2010 on Combatting Illegal Immigration, 28 January 2010, available at: <https://security-legislation.ly/en/law/32174>.

<sup>76</sup> Malakooti, *The Political Economy*, p. 5.

<sup>77</sup> T. Reitano *et al.*, *Responding to the Human Trafficking-Migrant Smuggling Nexus*, GI-TOC, July 2018, p. 4, available at: <https://globalinitiative.net/wp-content/uploads/2018/07/Reitano-McCormack-Trafficking-Smuggling-Nexus-in-Libya-July-2018.pdf>.

<sup>78</sup> Law No. 17 of 1962 on the Entry and Residence of Foreigners in Libya, and their exit therefrom, <https://security-legislation.ly/node/33720>

<sup>79</sup> Law No. 6 of 1987 on Organising the Entry, Residence and Exit of Foreigners in Libya, art. 2, available at: [https://security-legislation.ly/sites/default/files/lois/1214-Law%20No.%20\(6\)%20of%201987\\_EN.pdf](https://security-legislation.ly/sites/default/files/lois/1214-Law%20No.%20(6)%20of%201987_EN.pdf).

<sup>80</sup> *Id.*, art. 3.

<sup>81</sup> *Id.*, art. 19.

<sup>82</sup> Law No. 2 of 2004 amending certain provisions of Law No. 6 of 1987 organising the entry and residence of foreigners in Libya, art. 1, available at: [https://security-legislation.ly/sites/default/files/lois/841-Law%20No.%20%282%29%20of%202004\\_EN.pdf](https://security-legislation.ly/sites/default/files/lois/841-Law%20No.%20%282%29%20of%202004_EN.pdf).

<sup>83</sup> *Id.*, art. 2.

to open migration in the country.<sup>84</sup> The law criminalised what was now perceived to be ‘illegal’ entry, stay, and exit from the country, and placed thousands of foreign nationals who had previously resided in the country freely on precarious legal footing.<sup>85</sup> The law gave those present in the country a two-month grace period to register before rendering all those present illegal.<sup>86</sup>

52. Law No. 19 of 2010 is particularly problematic in that it provides a legal basis for automatic detention and forced labour for migrants and refugees. Its Article 6 provides that ‘[f]oreign illegal immigrants shall be penalised by detention with hard labour or by a fine not exceeding 1,000 LYD. In all cases, a foreigner convicted of any of the crimes set forth in this law shall be expelled from the territory of the Great Jamahiriya immediately upon execution of the sentence.’ The indiscriminate and arbitrary detention of all ‘irregular migrants’ means that refugees and asylum seekers are equally detained, a practice that violates international norms on asylum and refugee protection. Further, while Article 10 provides that those arrested under Law No. 19 shall be referred to the competent judicial authorities and be treated ‘in a humanitarian manner that preserves their dignity and rights and that does not violate their money or moveable property,’<sup>87</sup> there is no additional provision for procedural safeguards. In fact, the law allows for the indefinite detention, followed by deportation, of those considered to be irregular migrants.<sup>88</sup> Those detained do not have avenues to challenge the grounds of their detention or deportation decisions.

53. To date, Law No. 6 of 1987, amended by Law No. 2 of 2004, along with Law No. 19 of 2010, remain the applicable legal framework for migrants and refugees in Libya, which lacks an asylum system. Article 10 of Libya’s 2011 interim Constitutional Declaration recognises the right to ‘political asylum’<sup>89</sup> but remains silent on the general principle itself, with the provision not being incorporated into domestic legislation. Likewise, while Libya is not party to the 1951 Refugee Convention, it has signed and ratified the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa. However, Libya has yet to establish an asylum framework and largely fails to recognise refugee status. This places thousands of asylum seekers and

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<sup>84</sup> Law No. 19 of 2010 on Combatting Illegal Migration, available at: <https://security-legislation.ly/en/law/32174>.

<sup>85</sup> *Id.*, art. 11.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Id.*, art. 10.

<sup>88</sup> AI, *Libya: Rule of Law or Rule of Militias?*, p. 37, available at: <https://www.amnesty.org/en/documents/mde19/012/2012/en/>.

<sup>89</sup> Libya’s Constitutional Declaration, 2011, available at: [https://security-legislation.ly/sites/default/files/lois/1214-Law%20No.%20\(6\)%20of%201987\\_EN.pdf](https://security-legislation.ly/sites/default/files/lois/1214-Law%20No.%20(6)%20of%201987_EN.pdf).

refugees in precarious circumstances. In contravention of both Libyan national law and international human rights standards, migrants, refugees, and asylum seekers are often indefinitely detained. They often also have no formal registration, no legal process, and no access to lawyers or judicial authorities.

54. The United Nations High Commissioner for Refugees (UNHCR) has long had an ambiguous status in Libya. The Gaddafi regime initially invited it into Libya in 1991 to respond to the Somali refugee situation, yet the Libyan State has never officially recognised it. Without official recognition or a memorandum of understanding, its presence in Libya has remained vulnerable to the political whims of State authorities, placing large constraints on its operation in the country. In 2010, Libyan authorities declared the head of UNHCR to be *persona non-grata* and closed the agency's office in Libya. UNHCR returned to the country following the events of 2011, but it remains unable to operate according to its full mandate, granting asylum to only ten nationalities pre-profiled and accepted by the Libyan State. All those outside the recognised nationalities are unable to seek asylum in Libya.<sup>90</sup>
55. The General Directorate for Combatting Illegal Migration (DCIM) was established in 2012 under the Ministry of Interior (MoI) to oversee migration detention centres in the country, officially called 'sheltering centres,'<sup>91</sup> and to integrate militia-run centres into the State system. Today, at any given time, there are between 4,000 and 7,000 detainees held in DCIM centres.<sup>92</sup> These men, women, and children are arbitrarily detained without due process, access to lawyers, or judicial authorities to challenge the legality of their detention. Most have never been and will never be brought to court as required by Libyan immigration legislation and international law.<sup>93</sup> Moreover, the DCIM's oversight over its centres remains limited in practice.<sup>94</sup> Often, detention sites are only nominally under the control of the DCIM, and actually run by independent militias and armed groups (see Annex III for the list of sites and affiliated militias). As explained in more detail below,

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<sup>90</sup> The ten nationalities are Iraq, Palestine, Syria, Eritrea, Somalia, Ethiopia, Sudan (only Darfur), and recent additions Yemen, North Mali, and Nigeria from Boko Haram areas.

<sup>91</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 38. During Gaddafi's rule, immigration detention sites were managed by the Passport Investigation Department.

<sup>92</sup> See IOM's Displacement Tracking Matrix (DTM) and Detention Centre Profile Generator, available at: <https://dtm.iom.int/reports/libya-%E2%80%94-detention-centre-profile-generator-march-2021>

<sup>93</sup> In 2017-2018, UNSMIL documented just one case of North African migrants being convicted by a Tripoli court of charges of seeking to exit Libya unlawfully, following their interception at sea. See UNSMIL and OHCHR, *Desperate and Dangerous*, p. 39.

<sup>94</sup> Global Detention Project (GDP), *Immigration Detention in Libya: "A Human Rights Crisis"*, August 2018, p. 22, available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/GDP-Immigration-Detention-Libya.pdf>.

this makes the level of responsibility of State and non-State actors strictly intertwined, and sometimes difficult to differentiate.

56. From 2010 onwards, migrants and refugees in Libya have, in many cases, been unable to return to their home country. They have thus found themselves in an irregular situation, with limited avenues to settle their status and facing the risk of automatic detention. The combination of Libya's legal and institutional framework for migrants and the lack of access to protections for refugees and asylum seekers, left many foreign nationals on Libyan territory vulnerable to the multitude of crimes that became widespread during the post-2011 period.

#### **D. The situation of migrants and refugees in Libya since 2011**

57. The situation of migrants and refugees in Libya since the 2011 uprising can be divided into three phases: 2011-2014, 2014-2017, and 2017-present. The crimes committed against migrants and refugees and the framework that enables their unlawful treatment differs with each phase, though there is also some overlap between them. While the phases described below correlate directly with the development of the current armed conflict in Libya, other factors are also at play. Most notably, these include European border externalisation policies introduced after 2017.

##### **1. Phase I: 2011-2014**

58. When armed conflict broke out in Libya in February 2011, thousands of migrants and refugees, many of whom had been part of communities settled there for many years, were forced to flee the country. Most crossed land borders into neighbouring countries such as Tunisia and Egypt.<sup>95</sup> By the end of 2011, approximately 790,000 non-Libyans had arrived in third countries.<sup>96</sup> Their mass outward movement marked the beginning of a country-wide shift from destination country to point of transit.

59. By the time of Gaddafi's death in October 2011, the absence of a central State authority, the proliferation of armed groups, economic crisis, and general instability in the wider region, contributed to an increased need for migrants and refugees to flee to Europe, noting that migration networks in Libya move from south to north with very little opportunity to move south or seek alternative ways out. At the same time, the business of facilitating the

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<sup>95</sup> A. Greenblatt, *Libyan War Creates Far-Reaching Refugee Crisis*, NPR, 29 April 2011, available at: <https://www.npr.org/2011/04/29/135806865/libyan-war-creates-far-reaching-refugee-crisis>.

<sup>96</sup> IOM, *Migrants Caught in Crisis: The IOM Experience in Libya*, 21 Sep 2015, p. 5, available at: [https://publications.iom.int/system/files/pdf/migrationcaughtincrisis\\_forweb.pdf](https://publications.iom.int/system/files/pdf/migrationcaughtincrisis_forweb.pdf).

movement of migrants and refugees from Libya's shores to European waters became increasingly easy and highly lucrative. The lack of centralised authority and the scramble for power and resources provided ample push for non-State actors, particularly in the south of the country, to turn to smuggling and trafficking as an alternative means of revenue. Consequently, the phenomenon of facilitating the movement of people through territories and across borders became increasingly prevalent between 2011 and 2014. Thus, Libya transformed into a transit point in many migrants and refugees' journey to Europe. In 2014 alone, there were 170,000 sea arrivals in Italy from Libya, compared to the yearly average of 19,500 sea arrivals prior to the uprising.<sup>97</sup>

*i. Arrival in Libya through its southern borders*

60. Two of the most prominent entry hubs where migrants and refugees gathered after their initial entry into the country were Sabha and Kufra. Sitting at the convergence of historic trade and trafficking routes, southern desert towns like Kufra in the East,<sup>98</sup> and Sabha in the West, have long been important logistics centres for weapons, people, drugs, and goods making their way to the northern coast.<sup>99</sup> Following the outbreak of armed conflict, smuggling and trafficking by tribal communities flourished as southern communities became increasingly marginalised in the absence of law enforcement, and thus illicit operations in the south proceeded without regulation or retribution.<sup>100</sup> As the flow of migrants and refugees into Libya steadily increased from 2011, human smuggling and trafficking became the favoured source of revenue within the alternative economy. The industry was dominated by relatively independent individuals or crews, and there was little organisation between tribal actors facilitating desert crossings.<sup>101</sup>
61. Individuals from Sudan, Ethiopia, Somalia, and Eritrea mainly entered Libya through its southeastern border with Sudan, into Tebu-controlled territory. Eritrean migrants and

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<sup>97</sup> M. Micallef, *People Smuggling in Post-Revolution Libya*, People Smugglers Globally, 2017, 1 October 2017, p. 38, available at: <https://www.jstor.org/stable/pdf/resrep04260.11.pdf>.

<sup>98</sup> As a hub, Kufra shut down in the early years following the 2011 uprising as conflict broke out in the town. It later reemerged in around 2016 and 2017 reestablished as a major migration hub.

<sup>99</sup> K. Kuschminder and A. Triandafyllidou, *Smuggling, Trafficking, and Extortion: New Conceptual and Policy Challenges on the Libyan Route to Europe*, Antipode, 4 October 2019, p. 209, available at: <https://onlinelibrary.wiley.com/doi/epdf/10.1111/anti.12579>.

<sup>100</sup> M. Mohamed, *Unpacking Libya's Migration narrative*, in *Migration in North Africa: An uncomfortable position between Sub-Saharan Africa and Europe*, 2021, p. 57, available at: <https://www.kas.de/documents/282499/282548/Migration+in+North+Africa+-+KAS+PolDiMed+Study.pdf/a6f89474-078a-80f6-0230-75fcadddf341?version=1.1&t=1623168963317>.

<sup>101</sup> M. Micallef *et al.*, *After the Storm: Organized Crime Across the Sahel-Sahara Following Upheaval in Libya and Mali*, GI-TOC, 21 November 2019, p. 61, available at: [https://globalinitiative.net/wp-content/uploads/2019/11/After\\_the\\_storm\\_GI-TOC.pdf](https://globalinitiative.net/wp-content/uploads/2019/11/After_the_storm_GI-TOC.pdf).

refugees in particular were often kidnapped upon arrival and taken to compounds throughout the Kufra district, where they were extorted for ransom in exchange for passage.<sup>102</sup> Upon leaving Kufra, many East African migrants and refugees travelled through Sabha on their journey northward. Those travelling from West Africa across Libya's southwestern border with Niger, mostly originating from Nigeria, also arrived in Sabha following the initial desert crossing. As Sabha emerged as one of Libya's largest migratory hubs, the local State-run detention centre became very active, particularly between 2012 and its closure in 2014 due to the outbreak of clashes between rival armed groups. During this time, the centre also operated as the main collection point for mass expulsion. An estimated 40,000 migrants and refugees were returned to Libya's borders with Niger in the two-year period.<sup>103</sup>

62. Between 2012 and 2014, migrants and refugees from West and East Africa predominantly took 'step-by-step' journeys through Libya, in which their northward journeys were fragmented into multiple segments. Stops were made along the journey to organise the next leg and potentially find work to fund it. Each intermediary was paid individually and only in charge of a segment of travel from one location to another.<sup>104</sup>

63. Despite almost constant conflict around Sabha during this period, attributable to its proximity to the country's largest oil field, it continued to be the main funnel for migratory flows coming from both West and East Africa. This trend continued through 2016, when at least half of the 180,000 migrants and refugees who arrived in Italy via Libya that year passed through Sabha.<sup>105</sup> After 2017, however, human smuggling and trafficking in the South dramatically declined following reductions in the flow of migrants and refugees from Sudan and Niger, multiple conflicts (especially in the Fezzan region), and counter-trafficking measures enforced throughout the country.<sup>106</sup>

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<sup>102</sup> Antipode online, Video abstract, *Smuggling, Trafficking, and Extortion*, 30 October 2019, available at: <https://www.youtube.com/watch?v=vDsj7LcDjWE>; Kuschminder and Triandafyllidou, *Smuggling, Trafficking, and Extortion*.

<sup>103</sup> UN High Commissioner for Refugees, IMPACT & Altai Consulting, *Migration Trends in Libya: Changing Dynamics and Protection Challenges*, July 2017, p. 111, available at: <https://www.altaiconsulting.com/wp-content/uploads/2017/07/LIB-HCR-MAS-Final-Report.pdf>.

<sup>104</sup> *Id.*, p. 49.

<sup>105</sup> P. Hoad, *Sabha in the spotlight: the city where migrants are sold as slaves*, *The Guardian*, 19 June 2017, available at: <https://www.theguardian.com/cities/2017/jun/19/sabha-spotlight-city-migrants-sold-slaves-world-refugee-day>.

<sup>106</sup> Micallef *et al.*, *After the Storm*, p. xv.

ii. *The Spread of Militias in the North*

64. The Ministry of Interior is the principal authority responsible for managing and coordinating migration management in Libya. Between 2011 and 2014, militias and armed groups became integrated into the State security apparatus, and many detention centres were run by these groups. As already mentioned, the DCIM was established in 2012 to oversee detention centres in the country and to integrate militia-run centres into the State system.<sup>107</sup> However, the DCIM's oversight over its centres has been limited from the outset.<sup>108</sup> To this day, most detention facilities nominally under the control of the DCIM continue to be run by independent militias and armed groups. One example is the Abu Salim detention centre in Tripoli. Although the DCIM was granted control in 2014, worryingly, the centre continues to be operated by the Abu Salim Battalion. This battalion is also sometimes referred to as the Abu Salim Central Security force, Abu Salim Brigade, or the Ghneiwa forces in reference to the commander, Abdul Ghani al-Kikli, whose alias is Ghneiwa.<sup>109</sup> The Abu Salim Battalion is one of the four major militias dominating central Tripoli, and the group was heavily involved in clashes over territorial control in the capital, taking many casualties in the area around Tripoli International Airport.<sup>110</sup>

## 2. Phase II: 2014-2017

65. The outbreak of intense fighting in June 2014 allowed parties to the conflict and other criminal networks to operate with absolute impunity. Lack of State oversight and action during this period led to the consolidation of smuggling and trafficking operations, as well as the appearance of more organised, hierarchical, transnational networks.<sup>111</sup> This resulted in a profound transformation of the industry after 2014, in which highly structured networks facilitated and controlled migrants and refugees' transit from their countries of origin to the Libyan coast, where many were put on boats to Europe.<sup>112</sup> The industry gradually professionalised and by 2017, the system of managing and coordinating journeys

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<sup>107</sup> Malakooti, *The Political Economy*, p. 5.

<sup>108</sup> GDP, *Immigration Detention in Libya*, p. 22.

<sup>109</sup> BBC Monitoring, *Explainer: Militias in the Libyan capital Tripoli - who's who?*, 29 August 2018, available at: <https://monitoring.bbc.co.uk/product/c2006b45>; Malakooti, *The Political Economy*, p. 87.

<sup>110</sup> H. Johnstone and D. Naish, *Can Libya's migrant-detention system be reformed?*, GI-TOC, 14 December 2020, available at: <https://globalinitiative.net/analysis/libya-dcs-reform/>.

<sup>111</sup> UNHCR *et al.*, *Migration Trends in Libya: Changing Dynamics and Protection Challenges*, p. 75.

<sup>112</sup> *Id.*, p. 48.

to Europe operated like a ‘well-oiled machine.’<sup>113</sup> Distinct routes were established to take migrants and refugees from neighbouring countries through Libya to northern cities and coastal areas to await embarkation.

66. Expert Mark Micallef describes that:

*The new latitude to operate gave [...] smugglers the opportunity to broaden their reach beyond their immediate territory and connect better with counterparts servicing nodes further upstream. The result was a rapid shift from a reactive industry involving weakly connected localised gangs operating a relay system across Libya to a proactive model in which routes were consolidated and journeys increasingly started being centrally coordinated. Criminal syndicates started developing the ability to create their own markets, drawing in more clients from sub-Saharan hubs such as Khartoum in Sudan and Agadez in Niger.*<sup>114</sup>

67. As a result, more than 624,000 migrants and refugees, primarily departing from Libya, arrived in Italy via sea between 2014 and 2017.<sup>115</sup> Following local protests in Zuwara in 2015, the former smuggling hub shut down and the know-how shifted from east Zuwara to the now ISIL-liberated town of Sabratha. Sabratha became the main jumping-off point for migrants and refugees travelling to Europe by boat, either as the result of ‘step-by-step’ or through organised journeys. There, smugglers and traffickers operated from what became known as the ‘white house’ under the authority of al-Amu.

68. During this period, whether as part of an organised journey or a result of kidnapping by armed groups or State authorities while on the move in Libya, most migrants and refugees were held in sites strategically located next to the coast. In particular, the areas of Zuwara, Sabratha, and Zawiya succeeded one another as the epicentre of official centres and other places of captivity, where the majority of migrants and refugees were detained.<sup>116</sup>

### **3. Phase III: 2017-present**

69. The number of arrivals to Europe by sea peaked in early 2017.<sup>117</sup> The surge in the number of arrivals and deaths at sea coincided with the establishment of the GNA by the LPA. This reinforced the interaction between the EU, Member States, and the Libyan authorities

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<sup>113</sup> AI, *Libya’s Dark Web of Collusion*, p. 16.

<sup>114</sup> Micallef, *People Smuggling in Post-Revolution Libya*, p. 39.

<sup>115</sup> UNHCR Operational Data Portal, *Mediterranean Situation*, available at: <https://data2.unhcr.org/en/situations/mediterranean/location/5205>.

<sup>116</sup> See *infra* Section II.E.

<sup>117</sup> 180,000 refugees and migrants arrived in Italy by sea throughout 2016. UNHCR Operational Data Portal, *Mediterranean Situation*, available at: <https://data2.unhcr.org/en/situations/mediterranean/location/5205>.



on migration management, leading to the implementation of radical border externalisation policies and practices by the EU. According to Human Rights Watch, “the EU has intensified efforts to prevent boat departures from Libya. EU policy-makers and leaders justify this focus as a political and practical necessity to assert control over Europe’s external borders and ‘break the business model of smugglers,’ as well as a humanitarian imperative to prevent dangerous boat migration.”<sup>118</sup> Thanks to the financial support and provision of training, equipment, and coordination by European governments and institutions,<sup>119</sup> the LCG had become extremely effective at intercepting migrants and refugees at sea and returning them to Libya. Since 2016, at least 87,000 migrants and refugees have been intercepted by the LCG.<sup>120</sup> As a result, by 2018, the number of arrivals in Italy plummeted to 23,000 throughout the entire year.<sup>121</sup>

70. Although the number of arrivals to Europe and the number of deaths at sea decreased, no meaningful action was taken to remedy the push factors for migrants and refugees attempting to flee Libya. Many of them were forced to wait in limbo for limited resettlement spots and evacuation through the IOM and UNHCR as an alternative means of escape. However, this created a bottleneck as both are slow processes and UN agencies have limited capability to operate in Libya due to the security situation. This has left migrants and refugees in need of protection while trapped in a country where they are vulnerable to abuse, exploitation, and ill treatment, and where they are routinely subjected to violent crimes and serious human rights violations by State and non-State actors.
71. During this phase, migrants and refugees became highly vulnerable to being kidnapped by armed groups and criminal gangs and extorted for ransom payments. After the ransom payment is made, the captives are often passed between multiple intermediaries, including State actors, in a northward direction towards the Mediterranean Sea—even if this is not their intended destination. As previously described, migrants and refugees are often sold and resold from one intermediary to the other, each one demanding a new ransom payment. In some cases, convoys being transferred between intermediaries are attacked by rival gangs, with their passengers captured for ransom.<sup>122</sup>

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<sup>118</sup> HRW, *No Escape from Hell*, Executive Summary, available at: <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>

<sup>119</sup> AI, *Libya’s Dark Web of Collusion*, p. 8.

<sup>120</sup> A/HRC/48/83, para. 68.

<sup>121</sup> UNHCR Operational Data Portal, *Mediterranean Situation*, available at: <https://data2.unhcr.org/en/situations/mediterranean/location/5205>.

<sup>122</sup> Médecins sans Frontières (MSF), *Trading in Suffering: Detention, Exploitation and Abuse in Libya*, 23 December 2019, available at: <https://www.msf.org/libya%E2%80%99s-cycle-detention-exploitation-and-abuse-against-migrants-and-refugees>.

72. As was the case with other State institutions, militias and armed groups became integrated into the LCG in the aftermath of the 2011 uprising. These groups sought official status and control over the sea and its illicit smuggling trade route. State operations are therefore carried out by, and in close coordination with, the smuggling and trafficking networks, for example, in the case of the al-Nasr centre and the Zawiya Refinery Coast Guard.
73. The LCG and its affiliates are widely reported to use reckless and dangerous forms of threats and violence against migrants and refugees onboard boats in distress. Amnesty International reports that a boat donated by Italy in April 2017, the Ras Jadir, was used by the LCG during a horrific incident on 6 November 2017, where the LCG's reckless actions contributed to the drowning of up to 50 people.<sup>123</sup>
74. The already dire situation of migrants and refugees in Libya has been further exacerbated by the COVID-19 pandemic. Individuals inside overcrowded and unsanitary DCIM detention centres and other places of captivity remain dangerously exposed to the virus with no access to health services.<sup>124</sup> Even after the most restrictive COVID-19 measures were lifted in 2021, Libyan authorities still refused to authorise several evacuation and resettlement or repatriation flights, and migrants and refugees continue to be trapped in Libya.<sup>125</sup>

#### **E. Overview of migrant detention sites on Libyan territory**

75. The table in Annex III and the map below provide an overview of the official and unofficial detention sites and places of captivity identified across Libya. Many of the documented facilities are State-run under DCIM control, the majority of which are in the northwest of the country near coastal embarkation points and closer in proximity to the central authorities. According to UNSMIL and OHCHR, between 6,000 to 20,000 migrants and refugees were detained in DCIM-run centres at any given time between 2016 and 2018.<sup>126</sup>

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<sup>123</sup> AI, *Libya: European governments complicit in horrific abuse of refugees and migrants*, 12 December 2017, available at: <https://www.amnesty.org/en/latest/press-release/2017/12/libya-european-governments-complicit-in-horrific-abuse-of-refugees-and-migrants/>.

<sup>124</sup> M. Mohamed, *Locked up with no escape: Refugees and migrants in Libya face bombs, virus and everything in between*, Open Democracy, 18 May 2020, available at: [Locked up with no escape: refugees and migrants in Libya face bombs, virus and everything in between | openDemocracy](https://www.opendemocracy.net/en/locked-up-with-no-escape-refugees-and-migrants-in-libya-face-bombs-virus-and-everything-in-between/).

<sup>125</sup> A. Gharaibeh, *UNHCR appeals for end to arrests of asylum seekers in Libya, calls for urgent resumption of humanitarian flights*, 8 October 2021, available at <https://www.unhcr.org/news/press/2021/10/61601d7c4/unhcr-appeals-end-arrests-asylum-seekers-libya-calls-urgent-resumption.html>.

<sup>126</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 29.

In contrast, UNSMIL reported in January 2021, that only 2,300 persons are registered in eight official detention sites in Libya.<sup>127</sup>



*Major smuggling routes and hubs across Libya*  
Source: Micallef/Reitano and Shaw, 2017

76. As previously described, DCIM detention centres, for the most part, continue to be run by the militias and armed groups holding *de facto* power in that territory and are only nominally under the control of the DCIM. In some cases, when centres are officially closed by the DCIM, they in fact continue to be used and operated by non-State actors. For example, the Abu Issa detention centre in Zawiyah, which had been under the nominal control of the DCIM since 2015, was closed in early 2018 following sexual abuse allegations made by UNSMIL.<sup>128</sup> However, the facility was reopened by the armed group in charge 24 hours later under a new name.<sup>129</sup> Evidence suggests that DCIM centres are regularly opened and closed depending on demand and other factors, making it hard to consistently monitor where migrants and refugees are being detained.

<sup>127</sup> UNSC, United Nations Support Mission in Libya, Report of the Secretary General, S/2021/62, 19 January 2021, para. 61. From the information provided in this report, it is unclear whether those eight official centres refer to DCIM-run facilities.

<sup>128</sup> Malakooti, *The Political Economy*, p. 27.

<sup>129</sup> *Ibid.*

77. In addition, many thousands of migrants and refugees are also held captive by non-State actors at unofficial detention sites, such as farms, private houses, and warehouses. The prevalence of unofficial detention sites with the sole purpose of exploiting migrants and refugees for income generation has increased over the years. One example is the notorious Tobacco Factory in Tripoli. Named after its former function, the Tobacco Factory was not intended for human habitation and is unfit for that purpose. This is true of most detention facilities in Libya, including those that fall under the authority of the DCIM. The facility is under the command of the Public Security Agency, a militia affiliated with the GNA and led by Emad al-Tarabulsi. Migrants and refugees are brought to the Tobacco Factory following either arrest in the neighbourhoods where they live and work by State-affiliated security forces, transfer from a DCIM centre, or interception at sea by the LCG.<sup>130</sup> The international community has expressed grave concern for the lives and safety of individuals taken to the Tobacco Factory and other undisclosed locations.<sup>131</sup>
78. Since late 2020, the Tobacco Factory has been wrapped into the formal DCIM detention infrastructure, as a detention centre most commonly called ‘Al-Mabani’ or ‘Ghout al-Shaal’ (due to its location in that neighbourhood). It was formally renamed the ‘Tripoli Gathering and Return Centre.’<sup>132</sup> It has become one of the key detention centres holding thousands of migrants and refugees in 2021 and is another example of how the Libyan State has simply legitimised past patterns of violations and crimes against migrants and refugees.
79. Due to the direction of migration flows from the south to north of the country, and the lack of DCIM control outside northern regions, unofficial detention sites and other places of captivity are believed to be particularly prevalent in the south. Their location and other details remain largely unknown and unreported. Similar to DCIM centres, these places of captivity regularly develop, open, and close as smugglers and traffickers frequently change the location of their operations for a variety of reasons, including the presence of conflict and fighting. A recent under-documented example is a compound that reportedly emerged in 2020 or 2021 in the desert village of Tazirbu, North of Kufra. An expert witness reported that there are approximately 10 buildings associated with this trafficking enterprise and

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<sup>130</sup> AI, *‘Between Life and Death’: Refugees and Migrants Trapped in Libya’s Cycle of Abuse*, September 2020, pp. 7-23, available at: <https://www.amnesty.org/en/documents/mde19/3084/2020/en/>.

<sup>131</sup> *Id.*, p. 22.

<sup>132</sup> AI, *‘No one will look for you’: Forcibly returned from sea to abusive detention in Libya*, July 2021, pp. 16-19, available at <https://www.amnesty.org/en/documents/mde19/4439/2021/en/>.

allegedly between 700 and 1200 people being held there.<sup>133</sup> The premises are guarded by plain-clothed guards and police dogs.

80. The following sections describe the development of the main smuggling and trafficking hubs in Libya. These cities feature prominently in the testimony of the witnesses who provided the Organisations with their accounts. The role of specific criminal networks in Zawiya, Bani Walid, Sabratha, and Tripoli are analysed further under Section V regarding individual criminal responsibility.<sup>134</sup>

### **1. Zuwara**

81. Given its coastal location and proximity to the Tunisian border, Zuwara is one of Libya's historical smuggling cities. Prior to 2011, the majority of smuggling operations involved commodities such as food and fuel. However, a prosperous human smuggling and trafficking industry began to emerge in the late 1990s, making Zuwara the primary point of embarkation prior to the Libyan uprising.<sup>135</sup> While the Gaddafi regime had previously controlled smuggling operations in Zuwara, after the eruption of conflict in 2011, people smuggling activities fell into the domain of non-State actors who were able to operate without restriction. Existing smuggling networks in Zuwara opportunistically shifted to the lucrative business of people smuggling and grew in size, using fishing boats to carry migrants and refugees across the Mediterranean Sea.<sup>136</sup> There was no one militia in control, and the town was an 'open market'<sup>137</sup> for smugglers and traffickers. Zuwara quickly became the heart of Libya's people smuggling trade. Following renewed conflict in 2014 and the resulting decline in security, the industry reached its peak in 2015.

82. The journey from Zuwara to European waters is notoriously difficult and dangerous, and the boats smugglers and traffickers provide are often unsafe. The number of deaths at sea reached record levels in April 2015 when, in a number of concurrent wrecks, an unprecedented 1,308 migrants and refugees drowned or went missing in that month alone.<sup>138</sup> Dead bodies, including those of children, increasingly washed ashore on the

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<sup>133</sup> Due to the difficulty to document this location, numbers vary depending on the sources which rely mainly on eyewitnesses. [REDACTED].

<sup>134</sup> See *infra* Section V.B.

<sup>135</sup> Micallef, *People Smuggling in Post-Revolution Libya*, p. 40.

<sup>136</sup> AI, *Libya's Dark Web of Collusion*, p. 15.

<sup>137</sup> Q. Sommerville, *Inside Zuwara, the heart of Libya's people-smuggling trade*, BBC News, 4 September 2015, available at: <https://www.bbc.co.uk/news/world-africa-34157123>.

<sup>138</sup> UNHCR, *The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees*, 1 July 2015, p. 8, available at: <https://www.unhcr.org/uk/protection/operations/5592bd059/sea-route-europe-mediterranean-passage-age-refugees.html>.

beaches of Zuwara. This sparked a successful community-led mobilisation against the smuggling trade in August 2015, which effectively ended large-scale smuggling operations in Zuwara.<sup>139</sup>

## 2. Sabratha

83. Following the closure of Zuwara to smuggling activity in late 2015, Zuwaran smugglers and traffickers took their expertise and connections along the coast to Sabratha.<sup>140</sup> Compared to Zuwara, Sabratha has the geographical advantage of being closer to the European search and rescue zone. The area around Sabratha experienced some of the most intense overlaps between militia groups, making smuggling and trafficking activity highly factionalised.<sup>141</sup> Competition between different factions for control of smuggling and trafficking routes meant that militias operated more efficiently, with greater strength and territorial control. As a result, Sabratha became the epicentre of an interconnected area of coastal activity in the new phase of the smuggling and trafficking economy. The shift from Zuwara to Sabratha happened so quickly that there was no noticeable drop in operations or in the number of departures.<sup>142</sup>
84. The principal competition over the smuggling and trafficking economy during this period was between the Anas al-Dabbashi Brigade, commanded by Ahmed al-Dabbashi, also known as Al-Ammu ('the uncle,' in Arabic), and the Al-Wadi Battalion. The UN Security Council suggests that there is extensive evidence that al-Dabbashi's militia controls departure areas, camps, safe houses, and boats.<sup>143</sup> Ahmed al-Dabbashi appeared to run his smuggling operation from what was known as the 'White House,' an abandoned resort complex from the Gaddafi era. The 'White House' has been described by migrants and refugees as a vast space that could hold over a thousand individuals at any given time. Al-Dabbashi has reportedly exposed migrants, including minors, to brutal conditions and sometimes fatal circumstances on land and at sea.<sup>144</sup>
85. In July 2017, embarkations from Sabratha all but ceased after reports that Ahmed al-Dabbashi struck a deal with Tripoli authorities under Italian pressure to desist from human

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<sup>139</sup> Micallef and Reitano, *The Anti-Human Smuggling Business*, p. 8.

<sup>140</sup> Micallef, *The Human Conveyor Belt*, p. 14.

<sup>141</sup> Micallef and Reitano, *The Anti-Human Smuggling Business*, p. 13.

<sup>142</sup> AI, *Libya's Dark Web of Collusion*, p. 16.

<sup>143</sup> UNSC, Ahmad Oumar Al-Dabbashi, 7 June 2018, available at: <https://www.un.org/securitycouncil/sanctions/1970/materials/summaries/individual/ahmad-oumar-al-dabbashi>.

<sup>144</sup> *Ibid.*

trafficking operations.<sup>145</sup> The deal fuelled deadly clashes between opposing militias. In September 2017, conflict engulfed the city, embroiling thousands of migrants and refugees in the intense fighting. Libyan authorities took control of various unofficial detention sites previously run by criminal networks. More than 14,000 migrants and refugees, including pregnant women, new-born babies, and unaccompanied children, were transferred from unofficial to official detention sites in Zuwara and Tripoli under DCIM control.<sup>146</sup>

86. Following the conflict, the al-Dabbashi militia was driven out of Sabratha, and in October 2017 the militia became active in Zawiya. Although mass boat departures subsequently stopped, migrants and refugees continue to be detained and extorted in Sabratha. The town remains a disembarkation point for individuals intercepted at sea and returned to Libya by the LCG. The Sabratha Detention Centre remains in use under DCIM management despite concerns raised by the international community about chronic overcrowding and dire conditions.

### 3. Zawiya

87. By 2018, most migrant and refugee boats were departing from points between al-Matrad and al-Harsha, two small towns to the west of Zawiya, and migrants and refugees were gathered in farms on the southern outskirts of the city.<sup>147</sup> Due to the high number of individuals arriving in Zawiya, several detention sites became very active under the control of both State and non-State actors. One example is the Abu Issa detention centre, which is managed by the DCIM.<sup>148</sup>

88. Another example is the al-Nasr detention centre, which is controlled and operated by the al-Nasr Battalion, despite the fact that it is under nominal DCIM control.<sup>149</sup> The al-Nasr Battalion is known to cooperate with the Anas al-Dabbashi Brigade, and Ahmed al-Dabbashi has reportedly purchased migrants and refugees from the centre.<sup>150</sup> Their transfer out of the al-Nasr centre following payment to the al-Nasr Battalion is a common practice. Migrants and refugees are usually transferred to locations in the south, such as Sabha and

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<sup>145</sup> A. Lewis and U. Laessing, *Migrant flows slow to trickle in Libyan former smuggling hub*, Reuters, 27 November 2018, available at: <https://www.reuters.com/article/uk-europe-migrants-libya-idUKKCN1NWOIQ>.

<sup>146</sup> GDP, *Immigration Detention in Libya*, p. 44.

<sup>147</sup> Malakooti, *The Political Economy*, p. 75.

<sup>148</sup> GDP, *Az-Zawiyah Abu Issa*, available at: <https://www.globaldetentionproject.org/countries/africa/libya/detention-centres/2218/az-zawiyah-abu-issa>.

<sup>149</sup> Malakooti, *The Political Economy*, p. 76.

<sup>150</sup> *Id.*, p. 75.

Ubari. Heads of centres reportedly pay between 50 and 300 dinars per person transferred, with the intention of extorting them to make a profit.<sup>151</sup>

89. The al-Nasr centre also works closely with the Zawiya Refinery Coast Guard, a branch of the LCG led by Osama al-Kuni Ibrahim's cousin, Abd Al-Rahman Milad, also known as Bija. According to the UN Security Council, 'several witnesses in criminal investigations have stated they were picked up at sea by armed men on a Coast Guard ship called Tallil (used by Milad) and taken to the al-Nasr detention centre, where they are reportedly held in brutal conditions and subjected to beatings.'<sup>152</sup> Migrants and refugees intercepted at sea by the Zawiya Refinery Coast Guard and taken to the al-Nasr detention centre are also vulnerable to extortion or sold to other detention sites. According to IOM data, the Zawiya Refinery Coast Guard was responsible for more than half of the migrants and refugees intercepted at sea between January and 31 June 2017.<sup>153</sup>

#### 4. Tripoli

90. Given its proximity to north-western coastal towns and its economic pull as the country's capital, Tripoli also became a centre where migrants and refugees in transit to Europe gathered between 2014 and 2017. Many came in search of work to finance their onward journey. This is particularly true in the case of West and Central Africans taking 'step-by-step' journeys, who often engage in daily employment in the construction, maintenance, and agricultural sectors.<sup>154</sup> However, similar to desert towns in the south, migrants and refugees seeking work in Tripoli are vulnerable to labour exploitation and other forms of abuse. From 2014 onwards, the migrant population in Tripoli and other Libyan cities became increasingly commoditised because of their potential to generate income for armed groups and militias either through labour exploitation, abduction for ransom, extortion, and/or sale to another intermediary.

91. Country-wide, the practice of generating revenue through the systematic exploitation of migrants and refugees became more prevalent after the implementation of aggressive Libyan and European migration management practices in 2017.

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<sup>151</sup> *Id.*, p. 77.

<sup>152</sup> UNSC, Abd Al Rahman Al-Milad, 7 June 2018, available at: <https://www.un.org/securitycouncil/sanctions/1970/materials/summaries/individual/abd-al-rahman-al-milad>.

<sup>153</sup> Micallef and Reitano, *The Anti-Human Smuggling Business*, p. 11.

<sup>154</sup> UNHCR *et al.*, *Migration Trends in Libya: Changing Dynamics and Protection Challenges*, p. 117.



## 5. Bani Walid

92. According to the UN Panel of Experts, most trafficking networks in 2021 continue to operate through Bani Walid.<sup>155</sup> Bani Walid emerged as a smuggling hub in 2018 as smugglers and traffickers shifted away from Tripoli and eastern areas to avoid areas of direct conflict. It remains a major transit point for migrants and refugees from East and sub-Saharan Africa who originate from or travel through Sudan, Chad, or Niger to western coastal cities. Almost all migrants and refugees coming from Sabha in the South and Kufra in the East travel via Bani Walid to reach the coast.<sup>156</sup> There are a large number of informal holding locations where migrants and refugees are systematically detained and subjected to extreme abuse and violence.<sup>157</sup>
93. Informal detention sites in Bani Walid are typically farms located in the Tasni al-Harbi area. One example is a farm owned by Mousa Adyab, who controls a smuggling network between Eritrea and Libya.<sup>158</sup> Adyab allegedly secures his activities by giving food and financial support to the members of the Petroleum Facilities Guard, the Benghazi Defence Brigades, and ISIL.<sup>159</sup> Operations are run in conjunction with three Eritrean nationals, known as Welid, Kidane, and Wedi Ishaq. Warehouses on the farm hold up to 1,200 people and are guarded by 70 armed men. Migrants and refugees report being tortured and starved on the farm. Some reported people suffocating and falling out of speeding trucks on the journey to the coast.<sup>160</sup>
94. As many as 90% of the migrants and refugees currently in DCIM centres<sup>161</sup> have been returned to Libya following interception at sea by the LCG. Today, Khoms, Tripoli, and Zawiya are the main disembarkation points following interception.<sup>162</sup> However, not all migrants and refugees returned to Libya are transferred to DCIM centres. Thousands remain unaccounted for amid grave concerns for their whereabouts.<sup>163</sup> These individuals have likely been placed back into the hands of militias and criminal networks, such as the

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<sup>155</sup> UNSC, Final report of the Panel of Experts on Libya established pursuant to Security Council resolution 1973 (2011), 8 March 2021, para. 46, p. 11, available at: <https://digitallibrary.un.org/record/3905159?ln=en>.

<sup>156</sup> Malakooti, *The Political Economy*, p. 83.

<sup>157</sup> UNSC, Final report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011), 29 November 2019, p. 16, available at: <https://digitallibrary.un.org/record/3838591?ln=en>.

<sup>158</sup> 2018 UN Panel of Experts Report, p. 16.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> 2021 UN Panel of Experts Report, p. 12.

<sup>162</sup> 2019 UN Panel of Experts Report, p. 17.

<sup>163</sup> IOM, *Migrants Missing in Libya a Matter of Gravest Concern*, 17 April 2020, available at: <https://www.iom.int/news/migrants-missing-libya-matter-gravest-concern>.

Public Security Agency.<sup>164</sup> Even those that have been returned directly to DCIM centres often go missing, thus suggesting that State actors are in collusion with non-State actors in these crimes.<sup>165</sup>

### III. Factual analysis

95. This section provides a thorough description of the patterns of violence against migrants and refugees throughout Libya since 2011 and will set the factual backdrop for the legal analysis introduced in Section IV. As explained below, we identified six particular patterns of abuse and violence against migrants and refugees, on the basis of the first-hand witness accounts and the documentation contained in other numerous reports.

96. Indeed, national and international organisations, as well as journalists, have thoroughly documented the cycle of abuse, exploitation, and violence against migrants and refugees since 2011. This information has been crucial to determining the long-lasting, grave, and continued character of this violence. Throughout the years, NGOs such as Amnesty International (AI),<sup>166</sup> Human Rights Watch (HRW),<sup>167</sup> Refugees International (RI),<sup>168</sup> Women's Refugee Council (WRC),<sup>169</sup> Médecins Sans Frontières (MSF),<sup>170</sup> Global Initiative Against Transnational Organized Crime (GI-TOC),<sup>171</sup> and Medici per i Diritti Umani (MEDU),<sup>172</sup> among others, as well as international bodies like the UN Office of the High Commissioner for Human Rights (OHCHR) and the UN Support Mission In Libya

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<sup>164</sup> AI, *'Between Life and Death'*, p. 22.

<sup>165</sup> AI, *'No one will look for you'*, pp. 5-6.

<sup>166</sup> E.g., AI, *'No one will look for you'; Libya: Rule of Law or Rule of Militias?; Libya's Dark Web of Collusion; 'Between Life and Death'*.

<sup>167</sup> E.g., HRW, *No Escape From Hell*.

<sup>168</sup> RI, *'Death Would Have Been Better': Europe Continues to Fail Refugees and Migrants in Libya*, April 2018, available at: <https://www.refugeesinternational.org/reports/libyaevacuations2018>; *'Hell on Earth': Abuses Against Refugees and Migrants Trying to Reach Europe from Libya*, May 2017, available at: <https://www.refugeesinternational.org/reports/2017/libya>.

<sup>169</sup> WRC, *'More Than One Million Pains': Sexual Violence Against Men and Boys on the Central Mediterranean Route to Italy*, March 2019, available at <https://s333660.pcdn.co/wp-content/uploads/2020/04/Libya-Italy-Report-03-2019.pdf>.

<sup>170</sup> E.g., MSF, *Human Suffering – Inside Libya's Migrant Detention Centres*, 2 November 2017, <https://www.aerzte-ohne-grenzen.de/sites/default/files/attachments/2017-libya-publication-human-suffering-in-detention-centres.pdf>; *Out of Sight, Out of Mind: Refugees in Libya's Detention Centres*, July 2019, <https://www.msf.org/out-sight-out-mind-refugees-libyas-detention-centres-libya>; *International Activity Report 2017*, August 2018, available at [https://www.msf.org/sites/msf.org/files/2018-08/msf-international-activity-report-2017\\_1.pdf](https://www.msf.org/sites/msf.org/files/2018-08/msf-international-activity-report-2017_1.pdf); MSF, *Trading in suffering*.

<sup>171</sup> Malakooti, *The Political Economy*; Micallef, *The Human Conveyor Belt*.

<sup>172</sup> Medici per i Diritti Umani (MEDU), *The Torture Factory: Report on Human Rights Violations Against Migrants and Refugees in Libya (2014-2020)*, March 2020, available at: [https://mediciperidirittiumani.org/medu/wp-content/uploads/2020/03/report\\_medu\\_2020\\_ing\\_web.pdf](https://mediciperidirittiumani.org/medu/wp-content/uploads/2020/03/report_medu_2020_ing_web.pdf).

(UNSMIL),<sup>173</sup> the UN Panel of Experts,<sup>174</sup> IOM,<sup>175</sup> and the UN Independent Fact-Finding Mission on Libya (FFM),<sup>176</sup> have gathered numerous testimony and a range of physical and digital documentation of this violence.

97. Section II above already described how, in the aftermath of the uprisings against Gaddafi and the ensuing armed conflict, migration, smuggling, and trafficking patterns in Libya shifted and worsened. Particularly in combination with the DCIM's formation in 2012, and a State policy of mass detention, deprivation of liberty, and exploitation of migrants and refugees rose precipitously. By 2015, OHCHR described how the detention of migrants and refugees had become 'widespread and prolonged, particularly affecting those originating from sub-Saharan Africa,'<sup>177</sup> as well as the dire conditions and violence they faced during detention.<sup>178</sup> Since then, the reports have been consistent in describing how migrants and refugees have been subjected to different forms of violence and exploitation, either during their journey through the country, or while in detention.
98. Despite the existence of ample documentation, it was not until 2017 that the gravity of the situation of migrants and refugees in Libya began to receive significant public attention and outrage. The IOM started reporting on the existence of modern 'slave markets' in the country,<sup>179</sup> and CNN published footage of Black migrant men being sold at auctions.<sup>180</sup> In light of the exponential increase in migrant and refugee arrivals in Italy that year, this contributed to a response from the Libyan government and the EU aimed at tackling the situation through radical border externalisation policies.<sup>181</sup> This had little consequence in

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<sup>173</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 5; UNSMIL and OHCHR, *Torture and Deaths in Detention in Libya*, October 2013; UNSMIL and OHCHR, *Detained and Dehumanised: Report on Human Rights Abuses Against Migrants in Libya*, 13 December 2016; UNSMIL and OHCHR, *Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya*, April 2018, available at: [https://www.ohchr.org/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful\\_EN.pdf](https://www.ohchr.org/Documents/Countries/LY/AbuseBehindBarsArbitraryUnlawful_EN.pdf); UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Libya and on related technical support and capacity-building needs, 12 January 2015, A/HRC/28/51, available at <https://digitallibrary.un.org/record/789121>; see also periodic reports of the UN Secretary General to the Security Council on UNSMIL since 2011 available at: <https://unsmil.unmissions.org/reports-secretary-general>.

<sup>174</sup> Since 2012, the UN Panel of Experts on Libya established pursuant to resolution 1973 (2011) of the Security Council has reported yearly on the situation in Libya, including that of migrants. See <https://www.un.org/securitycouncil/sanctions/1970/panel-experts/reports>.

<sup>175</sup> IOM, *Migrants Caught in Crisis*.

<sup>176</sup> A/HRC/48/83.

<sup>177</sup> A/HRC/28/51, para. 32.

<sup>178</sup> *Id.*, para. 33.

<sup>179</sup> UN News, *African migrants reportedly being sold in 'slave markets' in Libya, UN agency warns*, 11 April 2017, available at: <https://news.un.org/en/story/2017/04/555152-african-migrants-reportedly-being-sold-slave-markets-libya-un-agency-warns#.WO4aCaIIgU>.

<sup>180</sup> CNN, *People for sale: Where lives are auctioned for \$400*, 14 November 2017, available at <https://edition.cnn.com/2017/11/14/africa/libya-migrant-auctions/index.html>.

<sup>181</sup> See *supra* Section II.D.3.

stopping the cycles of violence, abuse, and exploitation against migrants and refugees, which continues until this date.

99. Instead, it paved the way for violent interceptions at sea by the LCG and subsequent detention based solely on migration status to become commonplace. This situation has been sufficiently documented and denounced as well.<sup>182</sup> Most recently, in October 2021, the FFM report for the first time described these abuses as likely to amount to crimes against humanity.<sup>183</sup>

100. The following subsections describe six patterns of conduct that potentially amount to crimes against humanity. These patterns include, but are not limited to:<sup>184</sup>

- deprivation of liberty of migrants and refugees in deplorable conditions, associated with their exploitation and subjugation;
- killings;
- physical and mental suffering;
- sexual and gender-based violence;
- discrimination;
- violence against migrants and refugees directly related to the armed conflict.

101. Each subsection below introduces cases of the particular forms of violence and abuse that the witnesses included in this Communication either experienced directly or witnessed, thus offering new evidence of the trends highlighted in public documentation over the years. The cases outlined below have a two-fold aim: (a) they introduce new, first-hand evidence to the OTP, which is later used in Section IV of this Communication, to argue how these abuses amount to crimes against humanity under the Rome Statute; and (b) they illustrate and provide in-depth details on the patterns of violence already documented in reports by NGOs and international organisations.

102. The testimonies collected illustrate a detailed and sombre picture of the experiences of migrants and refugees in Libya. The witnesses spent anywhere from two months to over two years in Libya, until they were able to leave, either to Europe or other locations. While their testimonies present different realities, each with their own nuances, they also contain

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<sup>182</sup> E.g., AI, *'No one will look for you'*.

<sup>183</sup> A/HRC/48/83, para. 70.

<sup>184</sup> For instance, patterns of enforced disappearances have been documented, among others, in AI, *'Between Life and Death'*, p. 22; *'No one will look for you'*.

some common elements that give way to understanding the widespread and systematic character of the violence they faced.

103. For instance, all but one of them were, at some point in their journey, held captive at a detention site, whether official or unofficial. Some were controlled by Libyan armed groups or smuggling and trafficking networks. In total, they were held in at least 22 detention sites, with Tripoli and Bani Walid being the most oft-cited locations. As detailed below, they all consistently described the inhumane conditions in which they were held and the episodes of mistreatment and violence they witnessed or endured themselves. Reports of sexualised violence against women were also common. The witness accounts are structured according to the criminal behaviours they report, fitting them into the overall patterns of violence observed.

#### **A. Deprivation of liberty, extortion, and exploitation**

104. The most common pattern of violence against migrants and refugees refers to their widespread detention, extortion, and exploitation that occurs therein. Thus, they are analysed jointly in this subsection.

##### **1. Deprivation of Liberty**

105. Migrants and refugees in Libya have faced deprivation of liberty in multiple different settings and by different actors. These actors include Libyan authorities and their associated militias, following interceptions at sea, where they are disembarked and funnelled into detention immediately on return; and smugglers or traffickers, who *de facto* deprive them of their liberty during their time in Libya.

106. All but one of the victims interviewed were held against their will during their time in Libya.<sup>185</sup> An example testimony collected by MEDU in September 2017 from an individual from Nigeria captures the severity of the deprivation of liberty faced by migrants and refugees in Libya:

*I entered Libya 15 months ago and in this time I never had a day of freedom. For the whole time of my stay I have been sold and bought and transferred from prison to prison until the last camp before my departure to Italy. [...] I was the slave of the traffickers. I*

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<sup>185</sup> [REDACTED].

*had no money to pay for the journey. I had to work for them in the camp and then they let me leave.*<sup>186</sup>

*i. Detention by Libyan authorities and associated actors*

107. Widespread and indefinite detention is most extensively carried out by Libyan authorities as part of the country's primary migration management system that continues to criminalise irregular entry, stay, and exit. In the past, UNSMIL and OHCHR reported that 6,000 to 20,000 migrants and refugees were detained in DCIM-run centres at any given time between 2016 and 2018.<sup>187</sup> Migrants and refugees are routinely detained either on land or at sea, including following interception at sea. In its most recent report, the UN Fact-Finding Mission on Libya (FFM) established that since 2016—when arrivals to Europe via Libya reached their peak—at least 87,000 migrants and refugees were intercepted by the LCG.<sup>188</sup> In 2021 alone, at the time of submission, the IOM documented that the LCG had intercepted and returned a record number of 28,636 migrants and refugees, including at least 1,092 minors.<sup>189</sup>

108. Witness 1 was detained after being intercepted at sea. He was first brought to an unspecified detention site in Zuwara, where he and other migrants and refugees were kept for four days in a single room:

*I think we entered on Wednesday night and Thursday, Friday, Saturday, we have 66 people in one room. That Sunday night, another group of Eritreans who were with us in Bani Walid have been arrested by them and come join us, 25 people with us. So, we were 66 and 25, so how many we are, in one room, how can we be? Even with 66 people, maybe half of us can sleep here, with the other will be standing up, then we change. Then with additional 25 people, how can we do it?*<sup>190</sup>

109. After those days, the Witness was transferred to **DCIM Janzur Detention Centre**. There, the police locked him and other migrants and refugees inside the facility:

*[...]Finally when we get inside, there is not any space, because it's crowded and everyone takes their own space. Because we are with lice and dirt, no one wants to be near us. If I*

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<sup>186</sup> MEDU, *The Torture Factory*, p. 20.

<sup>187</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 29.

<sup>188</sup> A/HRC/48/83, para. 68.

<sup>189</sup> IOM, *Libya Maritime Update 31 October – 6 November*, 8 November 2021, available at: [https://twitter.com/IOM\\_Libya/status/1457726723496218644](https://twitter.com/IOM_Libya/status/1457726723496218644)

<sup>190</sup> [REDACTED].

*stand beside his mattress, he pushes me. So, what can we do? Also, at night, where will we sleep? Nothing. Then the police close us in. Oh my god, it was a crazy night. Finally, at 8pm, they came to give us food. We said we don't have blankets, mattresses, sponges, so where can we sleep? He said, "I don't know," and closed us inside.*<sup>191</sup>

110. Witness 8 had a similar experience in an unidentified site in Gharyan, reportedly under the control of the Libyan navy: “They took us to [REDACTED]. They locked us up for two months like this. We couldn't get out.”<sup>192</sup>

111. While detention following interceptions at sea is the most common mode of detention by Libyan authorities—or those associated with them—it also occurs throughout Libyan territory. AI has reported that arrests and detention were carried out by Libyan authorities (or those associated with them) in the absence of any legislation or practical infrastructure for the protection of asylum seekers and victims of trafficking.<sup>193</sup>

112. Moreover, migrants and refugees in detention are left in a complete state of rightlessness, a direct impact of a legal framework that lacks any guarantees in this regard.<sup>194</sup> A significant amount of arrests were not based on judicial decisions, and those detained had no opportunity to challenge the legality of their detention.<sup>195</sup> Further to this, according to MSF, migrants and refugees are commonly denied contact to the outside world, unable to inform their families about where they are and that they are still alive.<sup>196</sup> For instance, at DCIM Mitiga, some migrants and refugees have reportedly been held *incommunicado* for over two years.<sup>197</sup> As explained by MSF, people are held “without knowing if and when the detention will end.”<sup>198</sup>

*ii. Detention by smugglers and traffickers*

113. In addition to official detention, migrants and refugees are regularly deprived of liberty in unofficial detention sites often run by smugglers and traffickers. In a survey carried out by IOM data collectors between February and April 2017, 64% of respondents that had travelled along the Central Mediterranean Route to Italy reported having been held in a location against their will during the journey. These detentions were often by armed

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<sup>191</sup> [REDACTED].

<sup>192</sup> [REDACTED].

<sup>193</sup> AI, *Libya's Dark Web of Collusion*, p. 7.

<sup>194</sup> See *infra* Section II.C.2.

<sup>195</sup> AI, *'Between Life and Death'*, p. 21.

<sup>196</sup> MSF, *Human Suffering*, p. 10.

<sup>197</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 48.

<sup>198</sup> MSF, *Human Suffering*, p. 10.

individuals or groups other than any relevant governmental authorities,<sup>199</sup> although sometimes they were affiliated with State institutions. These unofficial detention sites, frequently referred to by migrants and refugees as ‘campos’ or ‘prisons,’ are often warehouses, houses, hangars, farms, or other structures unfit for human habitation.<sup>200</sup>

114. For instance, large numbers of the migrants and refugees hoping to travel to Europe were brought to Zuwara when sea arrivals in Italy spiked between 2014–2017. After arriving in the coastal town, they were typically taken to and held in so-called ‘safe houses.’ Gruesome stories emerged of how migrants and refugees were treated at these nominally safe locations. They were held captive for periods ranging from days to several months,<sup>201</sup> and many have reported experiencing physical violence and mistreatment.

115. On many occasions, migrants and refugees are effectively deprived of their liberty without knowing their exact location. To this respect, Witness 7 recalls:

*They [smugglers/traffickers] brought other people with us. Then from there we left and for one day we were going. We have reached to the area where we don't even know the name. We were taken to this building, construction project, and taken inside in one house. It was empty, without any furniture or anything inside. He [smuggler/trafficker] left us there and he told us nobody moves or get out of this place until I get back.*<sup>202</sup>

116. Similarly, Witness 10 was kept in an unidentified site in Zawiya that housed over 500 people:

*Interviewer: You were staying with [REDACTED] in one small building, how many other migrants were there with you? How many other buildings?*

*Witness: Over 500 people, no one was allowed to get outside.*<sup>203</sup>

*[...] You are forced to live there, you have no choice if you run away, you will be shot. Everyone is living together. It is a small rabuka.*<sup>204</sup>

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<sup>199</sup> IOM, *Mixed Migration Flows in the Mediterranean and Beyond: Flow monitoring data analysis*, April 2017, p. 2, available at: [https://migration.iom.int/docs/Analysis\\_Flow\\_Monitoring\\_and\\_Human\\_Trafficking\\_Surveys\\_in\\_the\\_Mediterranean\\_and\\_Beyond\\_26\\_April\\_2017.pdf](https://migration.iom.int/docs/Analysis_Flow_Monitoring_and_Human_Trafficking_Surveys_in_the_Mediterranean_and_Beyond_26_April_2017.pdf).

<sup>200</sup> AI, ‘*Between Life and Death*’, p. 21.

<sup>201</sup> P. Kingsley, *Libya's people smugglers: inside the trade that sells refugees hopes of a better life*, The Guardian, 24 April 2015, available at: <https://www.theguardian.com/world/2015/apr/24/libyas-people-smugglers-how-will-they-catch-us-theyll-soon-move-on>.

<sup>202</sup> [REDACTED].

<sup>203</sup> [REDACTED].

<sup>204</sup> [REDACTED].



[...]Interviewer: *These over 500 people were all in rooms with roofs? Where did they sleep? And were women and men separated?*

*Witness: This place is surrounded. Each group may construct their small closed room for living. Me and [REDACTED], this is our rabuka. Three Eritrean girls have their rabuka, other group of male, Nigerians, have their own space. It is up to you. But you are not allowed to leave this place without their permission, the place is controlled with CCTV camera, linked with their phone, he is looking. They are not only observing who is leaving and who is coming but also the guys guarding the place.<sup>205</sup>*

117. As the cases that follow in this section demonstrate, the deprivation of liberty of migrants and refugees is often associated with other forms of violence and exploitation. To this respect, throughout Phase II (2014–2017) and Phase III (2017–present),<sup>206</sup> migrants and refugees were also held captive by militias and armed groups for the purpose of extorting money from them for their release,<sup>207</sup> or in instances of labour and other forms of physical exploitation.<sup>208</sup> For instance, Witness 8 was deprived of liberty in an unofficial camp in Sabratha, where he and other migrants and refugees were forced to work at a construction site, ‘without anything to eat, just a bit of juice.’<sup>209</sup> In turn, Witness 7 described being held captive in an unidentified site in **Murzuk**, where women were also forced into prostitution.<sup>210</sup> The same Witness later experienced deprivation of liberty in **Warshefana**, on the outskirts of Tripoli. After being sold to a Libyan man, he recounted being locked in a room with five girls and young women.<sup>211</sup>

## 2. Ransom and extortion

118. Migrants and refugees are extorted through different methods, and often at different points during their transit through Libya, or while in detention by smugglers or traffickers. In these detention sites, migrants are commonly held for the purpose of extortion. Even when migrants are not effectively detained by smugglers or traffickers, they have also described being kidnapped for ransom. In all cases extreme—and even lethal—violence is inflicted for the purpose of generating revenue. This is widely reported to be perpetrated

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<sup>205</sup> [REDACTED].

<sup>206</sup> The ‘phases’ mentioned here correspond to those defined and described above in Section II.

<sup>207</sup> See *infra* Section III.A.2 on kidnap for ransom and extortion.

<sup>208</sup> See *infra* Sections III.A.3-5 on labour exploitation, sexual exploitation, and selling of migrants.

<sup>209</sup> [REDACTED].

<sup>210</sup> [REDACTED].

<sup>211</sup> [REDACTED].

by non-State actors in informal settings. However, extortion at DCIM detention sites has also been reported.

i. *Extortion upon arrival and during detention*

119. Witness 6, upon arriving with [REDACTED] at Um Al-Aranib, was also held captive in exchange for ransom:

*As soon as we arrived to Um Al-Aranib, we were all put inside metal containers. And in there we saw the container that is just for women and one for men. There were children around 9-10 years old they left them to live within the compound but not inside the containers. [...] In this place we stayed for roughly about 15 days. One meal per day. After 15 days, one of the trafficker who is Libyan came to us. He said 'if one of you pay 2500 Libyan dinar for his freedom he will be free from here.' [...] We said that we don't have anything because we already spent our money there. We stayed for two days and he came back. He said 'you Sudanese are a strong head. Now we will deal with you. You are not listening.' From there the torture have begun: beatings, abuse, torture. Everyday day from beatings in the morning, beatings in the afternoon, burning with plastic.<sup>212</sup>*

120. For example, in the desert towns of Sabha and Kufra, migrants and refugees report being detained upon arrival and forced to make a ransom payment in order to be released.<sup>213</sup> Witness 4 experienced this in **Baheh**, along the journey to Sabha, after being sold to an unidentified man by two Gambians working for an Arab man (possibly Libyan):

*Witness: They said, 'We will talk to the mudir [boss] and probably he is a nice person, he will let you in and we can go to his house and sleep there til you have money to pay to go to Sabha' This was January 2014. But the interesting thing, this was a kidnapping point, the way of kidnapping. He closed us in his house and requested an amount of money that we had to bring before he would drive us in his car to Sabha. So, these two Gambians sold us.*

*Interviewer: They were playing the friendly role, saying 'come, we can help you?'*

*Witness: But they were kidnapping us and selling us to these people. We followed them and the mudir picked us up in his car and took us to the house. It was fancy, beautiful, really nice. We got in and we were closed, nowhere to go. Suddenly, he said we had to pay 500 dinars. We had nothing at that point.<sup>214</sup>*

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<sup>212</sup> [REDACTED].

<sup>213</sup> Malakooti, *The Political Economy*, p. 39.

<sup>214</sup> [REDACTED].

121. In turn, Witness 11 experienced extortion in **Al-Shwarif**. The survivor described how migrants and refugees were held captive at said location, with little chance of even going outside the room in which they were kept, and further described how guards would use physical violence to extort migrants or even get sold when they fail to pay:

*Interviewer: So, you can eat, sleep and go to the bathroom in the same room. And you can go outside?*

*Witness: No, no, no. You can't go outside. Only when they count us you can go outside and get some oxygen.*

*Interviewer: So how often can you leave the room?*

*Witness: Not much but after May every week.*

*Interviewer: Once a week?*

*Witness: Yes, once a week. But after May the camp became 3000 and everybody sleeps on the field and when they think there is a plane investigation or something else, they put us inside in the room. If another agent comes, they can take you and ask for more money. Sometimes another agent comes and they say we cannot do anything, we can't save you. They sell about 600 of my friends for money.*

*[...] Interviewer: So, you leave the room once a week before May?*

*Witness: Yes, before May, sometimes once a month. It is not permanent, it is not each week but whenever they come. It is not because they want to give us oxygen, it is to get money to put pressure on us.<sup>215</sup>*

122. The victims' experience with violence for the purpose of financial extortion is also represented in Witness 7's case. The victim described the violent coercion lived by migrants and refugees in **Brak Shati**, threatened to be sent to the 'torture room' if they did not manage to pay their captors.<sup>216</sup>

123. Likewise, Witness 1 recalled the violence used against migrants and refugees in an unidentified detention site in **Bani Walid**. There, the survivor witnessed a common practice of beating migrants while on the phone with their families, in order to persuade the families to pay ransom:

*There are very strong guys with their sticks. If someone makes a wrong move or makes a sound or stands from his place, they beat you. And also, there is a line-up here with*

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<sup>215</sup> [REDACTED].

<sup>216</sup> [REDACTED].

*someone with a stick in front of him. When he has a telephone ring, the director beats him and he makes sounds like “father, father, please say,[sic]” begging, and then they beat him.*<sup>217</sup>

124. Since 2017, different sources have reported that migrants and refugees have been continuously traded between different smugglers, moved between different detention sites, including DCIM centres, and asked to make ransom payments multiple times.<sup>218</sup>

ii. *Extortion during transit*

125. Witness 7 was also abducted and extorted by an armed group while in transit from **Sabratha to Tripoli:**

*Witness: We were scared because of the gun. we gave everything we had in our pocket, phone etc. They collected all the money. After this happened the armed person talked to one of his colleagues that ‘these guys now deserve to get water.’ They gave us water to drink and then put us in the car again. They took us to this store/compound, the store of [REDACTED]. This is the name of the owner of the store. We were taken inside the store. Inside there were Bangladeshi, Habash, Somalians, Sudanese... and they told us now we’re in Sabratha.*<sup>219</sup>

126. In turn, Witness 5 reported being extorted by what he described as Libyan police authorities at a checkpoint somewhere in the Libyan desert:

*We met a police patrol in Libya. They have machine guns. They ordered us to get out of the truck. For them to shoot us is very easy. Ok we pay, we said. Normally the drivers ask for money at the check point. Our driver was from Agadez. The police took the keys from the driver and let us go in the desert. They ordered us to take out everything we had, put it in front of us, money, telephones, everything, they took everything, and we had to run for three kms in the desert to the car. Then they gave back the keys to the driver.*<sup>220</sup>

127. Moreover, Witness 11 explained that even once migrants and refugees had paid ransom in **Al-Shwarif**, they were often not released until much later:

*Interviewer: Can you repeat that? Even if they pay, they don’t release them?*

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<sup>217</sup> [REDACTED].

<sup>218</sup> Kuschminder and Triandafyllidou, *Smuggling, Trafficking, and Extortion*, p. 219; UNSMIL and OHCHR, *Desperate and Dangerous*, p. 26.

<sup>219</sup> [REDACTED].

<sup>220</sup> [REDACTED].

*Witness: No even if you pay you still have to stay until everyone pay. They release by 200-300. The women, they wanted to be released quickly because they get raped. Pakistan, Eritrean and Somali women, they get raped.*<sup>221</sup>

128. In his case, he and [REDACTED] stayed nine months at **Al-Shwarif** and were made to pay ransom twice to be set free:

*Interviewer: So, [REDACTED] paid a bank account in Dubai?*

*Witness: Yes, the money paid to Dubai for both me and [REDACTED]. I have family [REDACTED], [REDACTED] and they paid money. They asked for extra money.*

*Interviewer: How much did they ask for?*

*Witness: They agreed 2000 dollars each, yes 4000 dollars to both of us. And then they asked double money.*

*Interviewer: After you paid, they said we want more?*

*Witness: Yes.*<sup>222</sup>

129. Witness 3 was also extorted multiples times at an unidentified detention site in **Sabha**:

*Interviewer: For how long where you in that centre?*

*Witness: Almost five months, after four months I paid money from [REDACTED] and then they kept me for one more month because they said that the money didn't go to the right hands, and the guy kept giving me the name of the account. [REDACTED] sent money three times, but they said that the money didn't arrive. I didn't let [REDACTED] know this. But the guy wouldn't confirm this. The next days I ask the guy what happened, and he started to beat me. So I stayed one more month.*<sup>223</sup>

130. This resonates with the experience of Witness 12, who was made to pay ransom multiple times while trying to reach Tripoli through **Ghadames**,<sup>224</sup> as well as the experience of Witness 1. Witness 1 was kept in **Bani Walid** for over six months with the

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<sup>221</sup> [REDACTED].

<sup>222</sup> [REDACTED].

<sup>223</sup> [REDACTED].

<sup>224</sup> [REDACTED].

promise of a sea crossing, but was eventually traded between different smugglers, and made to pay multiple times.<sup>225</sup>

131. Witness 6 similarly recounted being traded between different smugglers in transit from Sudan to Libya. Once the victim's group was sold to other smugglers, they extorted and threatened the victims with violence in order to bring them to **Um Al-Aranib**.<sup>226</sup>

132. This pattern was confirmed multiple times during criminal trials conducted by the Italian authorities. For instance, hearing victims from a detention site in **Zawiya**,<sup>227</sup> a criminal court in Messina confirmed that even when they managed to leave, either by paying or by fleeing, migrants and refugees would 'incur the concrete risk of being kidnapped again by the same organisation and having to pay more money to the jailers of Zawiya,'<sup>228</sup> other local gangs, or even Libyan soldiers.<sup>229</sup> Italian tribunals acknowledged this reality also in immigration proceedings. For example, the Tribunal of Rome granted asylum to a young man from Togo, based partly on the fact that, while transiting through Libya, the applicant was kidnapped, enslaved, and ill-treated.<sup>230</sup>

#### *Extortion in DCIM centres*

133. Detention centres under the control of the DCIM do not have an official policy of systematic extortion. Guards, however, very often use their position of power for their own economic benefit in exchange of releasing migrants and refugees out of detention. Witness 1 explained that extortion was taking place during his time at **DCIM Tariq al-Sika**, where guards would offer migrants and refugees the possibility to go outside in exchange of money.<sup>231</sup>

134. As highlighted in a 2019 report by GI-TOC, 'the vast majority of prison guards in the country belong to militia groups or are former militia.'<sup>232</sup> In some cases, official detention sites are run by individuals officially on the DCIM payrolls, but who actually work on behalf of, or are members of, militias.<sup>233</sup> In this respect, Witness 5 recounted how militias were embedded in the police, and police authorities commonly profit from the extortion conducted by these groups: 'In Libya the soldiers they don't have any problem, but the

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<sup>225</sup> [REDACTED].

<sup>226</sup> [REDACTED].

<sup>227</sup> [REDACTED].

<sup>228</sup> Tribunale di Messina, N. 149/2020 (28 May 2020), 5.

<sup>229</sup> *Id.*, 11.

<sup>230</sup> Tribunale di Roma, Decree 7886/2018 (11 May 2018), 4.

<sup>231</sup> [REDACTED].

<sup>232</sup> Malakooti, *The Political Economy*, p. 27.

<sup>233</sup> GDP, *Immigration Detention in Libya*, p. 22.

police is the problem. Everyone is police, even the Asma boys are police. Is better if you get controlled to by the soldiers because they would take you to the prison, the big prison, the normal prison. But the police will kidnap you and take you to the house where you have to pay money to get out, and then every morning they would beat you and make you scared. You have to find a way to get out. Asma boys are at the same time police. They mix and work together. If I'm police, if I catch some people, I would call the Asma boys to give me money for the people.'<sup>234</sup>

135. It is also reportedly common for DCIM officials to work in collusion with militias, armed groups, and criminal gangs. For example, a 16-year-old boy from Senegal detained for four months in the Garabulli DCIM detention centre in Tripoli, told UNSMIL that 'guards threatened to kill him, beat him, and repeatedly demanded money.'<sup>235</sup> He further described how 'DCIM guards cooperated with a group of four Nigerians and three Libyans in extortion and forced labour.'<sup>236</sup>

iii. *Abduction and ransom payments*

136. Having already been deprived of liberty and made to pay ransom multiple times in **Sabha**, Witness 3 described being abducted in the streets of Tripoli by the so-called 'Asma boys' and brought to a detention site called [REDACTED], where migrants and refugees were made again to pay ransom to be released.<sup>237</sup>

137. Similarly, Witness 5 was also kidnapped by the Asma boys in **Sabha-Khamsa Thamaniya**, and then brought to a captivity house and extorted:

*The place is called [REDACTED] and is in Sabha [sic, it appears to be an area, neighbourhood]. Asma boys drive the car around superfast, till they reach you and open the door against you. They kidnapped me in the area [REDACTED] and brought me to [REDACTED] a 'kidnap house.' Two Ghanaians run the house, which is like a prison, I do not know how to call it. Kidnappers sell you for 100 and ask for 600 to get you released. But they got me for free. If you want to go, to be released, you have to pay 600 Dinar. I proposed to pay 400 dinar but they did not accept.'*<sup>238</sup>

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<sup>234</sup> [REDACTED].

<sup>235</sup> UNSMIL and OHCHR, *Detained and Dehumanised*, p. 17.

<sup>236</sup> *Ibid.*

<sup>237</sup> [REDACTED].

<sup>238</sup> [REDACTED].

138. Witness 12 similarly described being arrested by an armed group at a checkpoint somewhere in **Tripoli**. He was subsequently taken to an unidentified detention site, where he was expected to pay a ransom.<sup>239</sup>

139. Witness 4 described being abducted under the false promise of getting a job in Tripoli:

*Then, I went to the chatplace [in Tripoli], standing with two, three other guys. A car came with dark windows, like diplomatic cars. They arrived and asked if we need a job. We said, 'Yes, we're searching for a job.' They said ok, they need three people, and asked us to go with them. We get into the car. They locked the doors. So, we knew, ok, I think this is not going to be just a work. [...] They drove us somewhere in the city. At some point, they pulled out guns and said, 'You are under arrest. We're going to the station.' They took us to the police station, a camp, where we found some Africans already there. Some people were in horrible condition. It's a camp where they arrest people, but they are police and arrest you either to pay money to them or they sell you, the black migrants.*

### 3. Labour exploitation

140. While in detention, migrants and refugees are often forced by their captors to work for them, without receiving payment and in deplorable conditions, including to 'pay off debts,' although such 'debts' are seemingly fictitious or unclear.<sup>240</sup>

141. Witnesses 6 and 7 both had such an experience in **Um Al-Aranib**, a common entry point to Libya. Witness 6 recalls:

*Some of us started to pay through an intermediary based in Um Al-Aranib. This intermediary received the money from Sudan and he paid for them. He managed all the contact phone, they called him [REDACTED]. After that, for those who did not pay, and those who failed to pay, the torture increased. After that they came back to us and proposed that 'if you don't have people to pay for your release, we propose you that people you can work for them to free yourselves.' This one guy came and he said he needed people to work for him in farming. I said I would go work for him in help to get myself free from torture and abuse in the place. So I went to work for this man for a period of one week. The first week I get out to work for him. He picked me up in the morning and bring [sic] me back in the evening. He picks you from this place so you have to lay on your belly until he takes you to the farm and will release you inside the farm where there are trees, onions, garlic. There was also this place for the animals.<sup>241</sup>*

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<sup>239</sup> [REDACTED].

<sup>240</sup> UNSMIL and OHCHR, *Detained and Dehumanised*, p. 18. According to MSF, 'detainees can be forced to work in order to buy their way out of detention or otherwise systematically extorted.' MSF, *Human Suffering*, p. 6.

<sup>241</sup> [REDACTED]



142. In addition to the aforementioned work in Um Al-Aranib, Witness 7 was again forced to work while being held in a *turkina*<sup>242</sup> in **Sabratha**. This included farming or other types of work including related to the conflicts between armed groups,<sup>243</sup> and later on again while in another *turkina* in **Tripoli**.<sup>244</sup>

143. On occasion, Libyans from the local area, known as ‘sponsors,’ come to detention sites to offer money in return for labour. Following payment to the operator of the detention site, detainees are released to sponsors to work under the promise that they will be returned to the centre at the end of the day. For a larger sum, migrants and refugees are released to the sponsor indefinitely and are made to work off their debt by working for the sponsor.<sup>245</sup> Witness 14 described being taken by such a sponsor for weeks at a time, five to six times during his deprivation of liberty at an unidentified detention site in **Benghazi**:

*About five or six times, someone came to the prison, and we were taken out of the prison for 10-13 days at a time. Anyone needing workers would come and take us and pay the prison. I know they paid the prison because once the man said (when we were slow leaving) that we had to be quick because he had paid money for us.*

*We travelled to the workplaces in private cars. There were only 4 or 5 men going to work at each place. I was not blindfolded or handcuffed, but we travelled at night and the car had blackened out windows so I couldn't see anything. When we were being transported we were looked after by a person from the work place who had a gun.*

*We were always taken to different places. Different people would look after us. We stayed on the construction sites, in the place that was being constructed, or on the farm we were working on. We had no way of telling the time, but we would start work early in the morning and work until it was getting dark. I was often taken to a building site or to a farm where I had to dig trenches or tunnels with poor tools, and lift heavy metal girders and stones. We were guarded by someone with a gun. We were fed once a day at lunchtime. They fed us pasta mostly. In some of these jobs we could get water whenever we wanted, but others which were outside the city, we could not get water except when we ate at lunchtime, and then again in the evening. The guard shouted us all the time that we should work faster. Although it was better than the prison because I was out in the open air, I felt like a slave and I felt very bad, but there was nothing I could do about it. Everyone had different jobs to do.<sup>246</sup>*

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<sup>242</sup> ‘Turkina’ means ‘in the corner’ and refers to places where people are gathered before being pushed into boats to cross the Central Mediterranean.

<sup>243</sup> [REDACTED].

<sup>244</sup> [REDACTED].

<sup>245</sup> Malakooti, *The Political Economy*, pp. 35-42.

<sup>246</sup> [REDACTED].

*The labour was heavy, including carrying metal and stones. I think we were building houses, although I never saw them finished. The people who took us out to work guarded us closely. When they thought that we were speaking to each other, they would beat us. This happened every day. They also beat me with a water pipe when I was standing or sitting because I was tired from working.*<sup>247</sup>

144. Similarly, Witness 1 was forced to work on a construction site for about one month, without any payment, while being deprived of liberty at **DCIM Tariq al-Sika** in Tripoli.<sup>248</sup>

145. In turn, both Witnesses 1 and 2 recounted being forced to work in **DCIM Ain Zara**, in Tripoli. While Witness 2 did cleaning and farming,<sup>249</sup> Witness 1 was forced to support a party to the armed conflict by loading weapons.<sup>250</sup>

146. These accounts are corroborated by AI findings. Construction, manufacturing, cleaning, maintenance, and farming were the most frequently mentioned sectors for potential exploitation.<sup>251</sup> MSF further reported that migrants and refugees, at times, were forced to build new detention sites.<sup>252</sup> This was the experience of Witness 11 in **Al-Shwarif**:

*Witness: [...] In room 6, after May they took us to another building and build five more rooms.*

*Interviewer: Who built the rooms?*

*Witness: The migrants, they take you out, they have guns in backside of you. No payment, you can just carry any brick or anything and there is a car and it can take 30 or 40 migrants at any time, from 9am until midnight you carry bricks.*

*Interviewer: Did you have to build?*

*Witness: If you have experience in construction, yes you have to build. If you say no, then you just carry the bricks.*<sup>253</sup>

147. The survivors interviewed were often forced to work multiple times during their stay in Libya. Witness 8, for example, described being forced to work in both **Sabratha and**

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<sup>247</sup> [REDACTED].

<sup>248</sup> [REDACTED].

<sup>249</sup> [REDACTED].

<sup>250</sup> [REDACTED].

<sup>251</sup> AI, 'Between Life and Death', p. 30.

<sup>252</sup> MSF, *Human Suffering*, p. 6.

<sup>253</sup> [REDACTED].

**Zawiya**, and witnessing other migrants and refugees coerced into working during transit to Libya:

*[While in transit] [T]hey took the passengers and dropped them off on the construction sites to make them work without paying them. So it was just an obligation to work. They said, 'Go and work on the construction sites or on the plantations.' And then they take you back to the house.*<sup>254</sup>

*[In Sabratha] There is an Arab who came to buy me. I work for him, no salary, no health, nothing, you have no demands. You had to do what he said.*<sup>255</sup>

*[In Zawiya] Witness: We worked from 8am until 4pm but we didn't have anything to eat, just a bit of juice. No money or food. There was not even any contact between us and him. He calls his driver and he takes us back to the camp.*

*[...] Interviewer: How many of you were there?*

*Witness: There were seven of us that day.*<sup>256</sup>

*[...] Interviewer: Have you worked in other construction sites besides the one of [REDACTED]?*

*Witness: Yes, they would pick you up like that to work in a construction site to do cleanings.*

*Interviewer: And you were getting some form of compensation?*

*Witness: Nothing at all. From time to time, it was bread plus a juice like that, and you have to manage with that. There was no compensation at all.*<sup>257</sup>

148. This was also the experience of Witness 4, who was forced to work by people the Witness described as 'police authorities,'<sup>258</sup> in both **Bani Walid** and **Tripoli**:

*[In Bani Walid] They said, 'You have to drill with a jackhammer.' They gave us, we had to use, really hard labour, with someone standing behind us forcing us to do it: 'No relax, just do. Continue working, working, working.'*<sup>259</sup> [...]

*[In Tripoli] If they catch you and you are big, they have profit from your labour. They come early morning, they check who was big and pick you, who is big and strong. They*

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<sup>254</sup> [REDACTED].

<sup>255</sup> [REDACTED].

<sup>256</sup> [REDACTED].

<sup>257</sup> [REDACTED].

<sup>258</sup> In the context of the interview, this can be understood as any armed actor.

<sup>259</sup> [REDACTED].

*brought us and they put us on the working task. So, either you pay or do hard labour or get mercilessly beaten.*<sup>260</sup> [...]

*One of the main labour work I did was crazy, which I couldn't forget, was constructing a five-storey building. We had to carry 50 kg of cement on top of this five-storey building. They bring sand, so we had to pack everything up. There were tasks: this amount of cement has to be done in a certain amount of time. You have to carry blocks on top, which is very dangerous.*<sup>261</sup>

149. Migrants and refugees are also commonly forced to fight or otherwise engage in activities to support armed groups.<sup>262</sup> For instance, Witness 12 recounted being forced to rebuild military barracks that had been destroyed during hostilities around **Tripoli**.<sup>263</sup>

150. Witness 10 experienced a particularly gruesome episode, where fellow migrants and refugees were forced to bury the bodies of the deceased in **Zawiya**:

*Once they chose 10 guys from the place to pick them to work. They come to name 'you, you, you.' [...] And they told them 'we have work for you to do' and they said 'ok how much you pay for us?' and they said 150 dinars for a day of work. And then they were taken in a close place where they were many bodies, dead bodies, and they said 'you will bury these bodies.' One of the guys was [REDACTED] a teenager, who for five days after this, for a week, he just keep throwing up and keep crying and said to me 'I have never buried people in my life.' After this they brought other mutilated dead bodies carried in sacks, one sack composed of heads, and the other composed of other body parts, and this is where the guys got very scared. And from that place, two guys went back to Sudan and refused to stay, they rather go back to Sudan. And then the Libyan come to look you in the face and say 'ibeidad', all you blacks you are slaves.'*<sup>264</sup>

151. Witness 7 was specifically used by [REDACTED] the Libyan Army in **Tripoli**. After escaping deprivation of liberty in Warshefana and surrendering to the Libyan Army at a checkpoint in Tripoli, Witness 7 was made to record a video speaking of the good treatment he received. However, once the video was recorded, he was once again forced to work, but eventually was able to escape again.<sup>265</sup>

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<sup>260</sup> [REDACTED].

<sup>261</sup> [REDACTED].

<sup>262</sup> See [REDACTED] Section III.F.

<sup>263</sup> [REDACTED].

<sup>264</sup> [REDACTED].

<sup>265</sup> [REDACTED].

152. Migrants and refugees have recounted that in order to force them to work, employers, smugglers, traffickers, and detention site staff often threatened to kill them, beat them with sticks, metal bars and gun butts, or shot at them.<sup>266</sup> Witness 5, while in **Gilgares** (Gergarish), was beaten on many occasions:

*Witness: I go outside, find some work, you get in trouble with the Asma boys, with the police. All Arabs will take you to work and not pay you. I remember one day I was with three of my friends, we are staying outside for work, three guys come in a car and they told us we have to get in the car to work in construction. And then we work there, he [the Arab employer] didn't give us food or water or drinks. I asked for food and then he asked 'why?'. And then he beat me because I asked. I don't care if they kill me, if I need food, I asked for food. I'm a miskeen [poor fellow]. So, I told him to pay us to buy food and so he took this stick and say if I don't go, he will sell me, so he told me to leave the place. This happened to me many times. In that moment, they didn't sell me. I don't get money or food, you just get kicked out.*

*There was one day one man come and then he told me to fill the gas and then to take it to another place. I worked with him for 2-3 days and then he refused to pay. I insisted. He also beat me a lot. He asks why I should ask him for money, why I'm insisting. I told him I need money for food, and he tells me to go, that he can't use me for nothing. I still have a wound here [he shows his wrist] because he beat me with a pipe.<sup>267</sup>*

153. These accounts resonate with the findings of the Italian Court of Agrigento (Sicily), which convicted one of the jailers in an unofficial detention site in **Sabratha** for being part of a criminal organisation directed at enslaving migrants and refugees.<sup>268</sup> The judges specifically referred to deprivation of liberty, the threats and acts of violence, and the fact that migrants and refugees were forced to work to pay for the price of the journey, as the basis for enslavement charges.<sup>269</sup>

154. Lastly, migrants and refugees that are not detained and who seek work in Libya are also vulnerable to labour exploitation. Those engaged in daily work and other manual labour, often to raise funds for the next leg of their journey, have frequently reported ill treatment by their employers and not being paid after they complete their tasks. 49% of migrants and refugees interviewed by IOM in 2017 reported having worked or provided services for someone during their journey without receiving the expected remuneration in return.<sup>270</sup>

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<sup>266</sup> [REDACTED].

<sup>267</sup> [REDACTED].

<sup>268</sup> Corte d'Assise di Agrigento, N. 3/18 (12 June 2018).

<sup>269</sup> *Id.*, p. 16.

<sup>270</sup> IOM, *Mixed Migration Flows in the Mediterranean and Beyond*, p. 2.

#### 4. Sexual exploitation

155. Physical exploitation, particularly when migrant women are held in captivity, often has a sexual component.<sup>271</sup> Overall, the UN Panel of Experts on Libya has expressed particular concern over the situation of women and children, notably, women from sub-Saharan countries and Morocco who are vulnerable to sexual and gender-based violence. These women are reportedly sold on the local market as ‘sex slaves.’<sup>272</sup>

156. The different forms of exploitation that migrants and refugees experience show a clear distinction based on gender. While men are targeted to perform forced labour, several witnesses recounted the sexual exploitation of women and girls across Libya.

157. This distinction was raised by Witness 7 who, in reference to detention sites in **Sabratha and Tripoli**, respectively, described that:

*Witness: Some of them [the Libyans] they come to select the pretty women. They take them for a period of a week and bring them back. Men they’re taking for about 3 days to work, clean, do different labours and brought back.*<sup>273</sup>

*[...] For the girls that were kept here, whenever he [the Libyan man] came in, he would take one of them to his room to sleep with them. They cooked for him, to come and eat.*<sup>274</sup>

158. This Witness further described the system<sup>275</sup> put in place by the guards so that costumers, mostly southern Libyans,<sup>276</sup> can pay and have access to girls, particularly Nigerians,<sup>277</sup> for sexual activities. For instance, at a smuggler or trafficker’s **compound in Murzuk**, he reported that:

*For the women they were used as whores, prostitutes. They have to work as prostitute and they have to bring the money for the boss. After I asked one of the girls why you’re doing this kind of work she said that ‘we were bought to this people we have to pay our way off.’ She said ‘we have to pay off the money we were sold to this boss and then we have to have even more in order to be sent to Europe.’*<sup>278</sup>

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<sup>271</sup> This section here focuses on the element of exploitation. Section III.D.5 provides further information on other forms of sexual and gender-based violence.

<sup>272</sup> 2017 UN Panel of Experts Report, p. 133.

<sup>273</sup> [REDACTED].

<sup>274</sup> [REDACTED].

<sup>275</sup> [REDACTED].

<sup>276</sup> [REDACTED].

<sup>277</sup> [REDACTED].

<sup>278</sup> [REDACTED].

159. These accounts are corroborated by other witnesses speaking about the sexual commodification of migrant and refugee women in Libya. To this respect, Witness 8 described how, in **Sabratha**, women are used as ‘sexual pleasure,’ notably by armed Libyans coming to this unofficial detention site in the evening. Witness 8 highlighted that *‘It was an open-air business, they used women as their commodity. They paid the money, they took the woman. And it was a price that was really not reasonable at all, it was 20 dinars to do what they wanted with the woman.’*<sup>279</sup>

160. In **Bani Walid**, according to Witness 1, women have been coerced into moving into the home of a well-known trafficker and performing sexual acts with him in exchange for their release and further travel to Europe:

*Witness: At this time, there were so many girls who he asked her, ‘You want to cross the sea? Let’s go to my home. You come with me?’ I stayed with [REDACTED], and more than 10 or 11 girls, he changed so many girls, as his wife.*

*[...] Who is an attractive girl, he choose and tell her, ‘You want to go to Italy? Ok, come to my home.’ If you don’t go, he says you will stay here forever. I know one girl, when she finished paying money, he asks her to sleep with him. She refused him, said never. There was one place in a corner, very dirty with lice. He ordered her to sleep on that place, for more than three months. Because she didn’t come home with him. Then, so many girls who paid and also accept him, he sent them. Finally, she didn’t have any choice. She asked him herself. Please take me to your home and then send me to Italy. She slept with him about two weeks or something. But she’s not lucky. Unfortunately, her passage did not reach Italy. She was arrested with us. Anyway, there were more than 10 girls like that.’*<sup>280</sup>

161. Also in Bani Walid, three refugee women fleeing conflict and insecurity told AI that traffickers raped them and forced them into prostitution during their months of captivity in ‘campos’ located in the area during 2018 and 2019.<sup>281</sup> Lastly, the sexual exploitation of women occurs not only while they are held at different sites, but also during transit. To this respect, Witness 4 described that: ‘One of my friends who came with women in the

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<sup>279</sup> [REDACTED].

<sup>280</sup> [REDACTED].

<sup>281</sup> AI, ‘Between Life and Death’, p. 30.

group and a woman with her husband. She was taken forcibly from the husband and raped and enslaved.’<sup>282</sup>

## 5. Selling of migrants and refugees

162. The labour and sexual exploitation of migrants and refugees is often associated with them being sold by different actors in Libya, either in ‘markets’ or along their journey. This became apparent in mainstream media in November 2017, when the broadcaster CNN released footage of a slave auction at an undisclosed location in Libya. In the video, twelve Nigerians were sold, for as little as USD 400.<sup>283</sup> Migrants and refugees have described to IOM staff ‘the risks of being sold as slaves in squares or garages in Sabha, either by their drivers or by locals who recruit the migrants for daily jobs in town, often in construction, and later, instead of paying them, sell their victims to new buyers.’<sup>284</sup>

163. Several of the survivors interviewed experienced being sold, as early as upon entry into Libya, as described by Witness 6, who was sold by one group to another when crossing the Libyan border.<sup>285</sup> He also recounted how he and [REDACTED] were deceived by a taxi driver, who was supposed to take them to Misrata, but sold them to smugglers in **Bani Walid**.<sup>286</sup>

164. This was also the experience of Witness 3, who was sold along with other migrants and refugees in **Sabha**, *en route* to Tripoli.<sup>287</sup>

165. In turn, [REDACTED] explained in detail how a network of smugglers in one detention site in **Bani Walid** sold migrants and refugees to one another:

[REDACTED]: *They said you are all ready, I bought you. [“A”] a big smuggler. Musa is the bigger smuggler, with Kidane, Welid, and [“AD”] working under the big smuggler Musa. Musa sells them for 500 dollars each to [“A”]. [“A”] is Sudanese. He sells them for 500 dollars each; when you multiply by 460 people, you can imagine his profit. [“A”] says, ‘I bought you for 500 dollars. So, call your smuggler Kidane and say if Kidane pays 1000 dollars each, then I can leave you.’ They call to Kidane: ‘We are sold to [“A”]. He says like that, so please pay 1000.’*<sup>288</sup>

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<sup>282</sup> [REDACTED].

<sup>283</sup> CNN, *People for sale: Where lives are auctioned for \$400*.

<sup>284</sup> IOM, *IOM Learns of ‘Slave Market’ Conditions Endangering Migrants in North Africa*, 4 November 2017, available at: <https://www.iom.int/news/iom-learns-slave-market-conditions-endangering-migrants-north-africa>.

<sup>285</sup> [REDACTED].

<sup>286</sup> [REDACTED].

<sup>287</sup> [REDACTED].

<sup>288</sup> [REDACTED].



166. It appears that [REDACTED] was at that same location in **Bani Walid**, where he was also sold between different smugglers and traffickers:

*Interviewer: And you were saying even if you paid, you get sold to another person, did it happen to you or to another person?*

[REDACTED]: *It happened to me, I was like sold but not to another. We had to pay again to another smuggler a second time.*

*It's the same compound but I changed the warehouse, because they bring new people and they changed us, they make us pay again. If you want to cross and come back to the place.<sup>289</sup>*

*Interviewer: And with the transfer, when you changed smugglers, was there change of money or how did it happen?*

[REDACTED]: *Before they told us, we know it was coming. After we pay our money ["WB"] made us stay for eight months, we were sure he was not going to send us, some people escaped but some people were waiting. And suddenly someone came and said the smuggler didn't pay the money so he's selling us to another one. So he's saying it's not my problem, so we were sure they were going to sell us. And they said that now we need to pay another smuggler and some people say no and then they start beating and people pay. People get beaten most of the time.<sup>290</sup>*

167. Furthermore, Witness 11 reported that traffickers from **Al-Shwarif** had dealings with others in Bani Walid, commonly selling groups of migrants and refugees to them.<sup>291</sup>

168. At times, traffickers also sold migrants to police authorities, and vice versa. While Witness 4 reported being sold by smugglers in **Bani Walid** to the police,<sup>292</sup> Witness 13, for instance, described how corrupt police authorities in **Zawiya** sold her and other migrants to a smuggler/trafficker who held them in a detention site [REDACTED].<sup>293</sup>

*Witness 4: During that journey, the craziest part was in Bani Walid. There they sold us, the traffickers, to the police. We arrived in the city and he said, 'Now I bring you to the centre where Africans are. You arrive there and find Africans.' He dropped us, which was really surprising, by arriving at these people in a crowd. We saw one car arrived*

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<sup>289</sup> [REDACTED].

<sup>290</sup> [REDACTED].

<sup>291</sup> [REDACTED].

<sup>292</sup> [REDACTED].

<sup>293</sup> [REDACTED].

*and immediately they came out with AK47s and pistol guns and said, 'Everyone step from the car! Put hands up!' They came, they chained us, and put us back to the car.<sup>294</sup>*

*Witness 13: When we arrived we knew they were fake policemen. The police, they are known as the police in Zawiya, but they make the mafia with the fake policemen. They came to sell us to the fake policemen. Normally they had to free us but they did not, they sold us to [REDACTED]. The owner of the prison is called ["I"]. He works in collusion with real policemen. We found other girls in prison there.<sup>295</sup>*

169. As referred above, in **Baheh**, Witness 4 was also sold, this time to a Libyan policeman, who was the boss of two Gambian workers.<sup>296</sup>

170. The involvement of local authorities in the selling of migrants and refugees is further confirmed by national tribunal judgments issued, for instance in Italy. In one case, some victims explained how they were sold to Libyan policemen in Zuwara and subsequently detained by them in **Tajoura**.<sup>297</sup> Others were sold by two Libyans wearing uniforms to Osama (the head of the Al-Nasr detention facility in **Zawiya**).<sup>298</sup> Another explained how he was sold multiple times, one of which was by an IOM employee for 500 dinars.<sup>299</sup>

171. In addition, Witness 13 described how smugglers and traffickers in **Zintan** also tried to sell her, and encouraged [REDACTED] to do so [REDACTED]:

*Witness: He [smuggler] started asking me questions, it's after I told him I'm with [REDACTED], and he told me to call [REDACTED]. During that time another one was talking with [REDACTED], he was telling [REDACTED] to sell me, [REDACTED].*

*Interviewer: Did they offer [REDACTED] money in exchange for keeping you with them?*

*Witness: Yes, they wanted to.*

*Interviewer: So they tried to buy you?*

*Witness: Yes, yes.<sup>300</sup>*

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<sup>294</sup> [REDACTED].

<sup>295</sup> [REDACTED].

<sup>296</sup> [REDACTED].

<sup>297</sup> Tribunale di Messina, N. 149/2020 (28 May 2020), p. 13.

<sup>298</sup> *Id.*, p. 23.

<sup>299</sup> *Id.*, p. 9.

<sup>300</sup> [REDACTED].

172. Often smugglers and traffickers refer to migrants and refugees as ‘*ibeidad*,’ or ‘slaves’ in Arabic, who remain at their mercy.<sup>301</sup> When trying to remind them of the initial agreement he made with previous contacts, smugglers in **Brak Shati** made this reality clear to Witness 7: ‘*we don’t have anyone coming here with an agreement. Whoever came here to us consider as a slave and we decide his or her fate.*’<sup>302</sup>

173. As shown in the infamous CNN video, smugglers and traffickers hold auctions to sell migrants or refugees. One of the survivors interviewed, Witness 10, actually experienced an auction. She saw a Black man being auctioned in a market square in **Zawiya**, in broad daylight, leaving her and [REDACTED] with trauma and fear of being subjected to the same treatment:

*We are standing there and first time in my life I saw in front of me, between two cars, a black man who was... had a chain on his head, on his hands, on his feet, because he was strong, and the other car was there standing and they were making an auction of how much they want to pay. And I saw first time the trade. The price started 3000 dinar until they reached 7000 dinar. All this time this man was crying, and watching me, and crying, and I am crying, for seven days I was crying because hearing the price was very shocking to me. And the man was crying.*

174. Not only smugglers and traffickers engage in the selling of migrants and refugees, but also other private actors such as drivers and shop-owners. For example, after leaving Sabratha on a taxi to Tripoli, Witness 7 was brought somewhere different than he had requested and realised the taxi driver had sold him to the owner of a store in **Warshefana**.<sup>303</sup>

175. In the same vein, Witness 6, who had already been sold in transit as mentioned above, was again sold by a taxi driver to a man in **Bani Walid** called [REDACTED].<sup>304</sup>

176. A similar experience was recorded in a judgment from the Italian Tribunal of Messina (Sicily), where a victim testified that, a few days after fleeing from a previous illegal detention site, he reached the town of **Zawiya** and asked a taxi to bring him to a neighbourhood where he was told he could work. The taxi driver, however, drove him and his comrades to the detention site, selling them to the criminal organisation running the camp.<sup>305</sup>

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<sup>301</sup> Similar accounts were described by Witness 10, as well as in the CNN video.

<sup>302</sup> [REDACTED].

<sup>303</sup> [REDACTED].

<sup>304</sup> [REDACTED].

<sup>305</sup> Tribunale di Messina, N. 149/2020 (28 May 2020), p. 7.

## **B. Deaths due to inhumane detention conditions and killings**

177. Death patterns of migrants and refugees in Libya occur through killings inside official and unofficial detention sites; as a result of conditions of detention; or in instances outside the context of detention. This form of violence is widely used as a tool for subjugation or punishment, or as the result of extreme violence, detention in inhumane conditions, or medical neglect.
178. Illustrating the widespread character of killings, a recent report by MEDU, comprising over 3,000 testimonies gathered between 2014 and 2020, reports that 1 out of 3 of the interviewees witnessed the killing of a relative or a friend, 1 out of 4 witnessed the unnatural death of a relative or friend, while almost the half of them witnessed the killing of one or more strangers. Furthermore, 40% of the testimonies detail how the person had been close to death at least once.<sup>306</sup>

### **1. Killings in detention sites**

179. The use of lethal force against migrants and refugees by non-State actors in Libya is widespread, mostly in the context of detention and exploitation. Survivors have reported deaths occurring in DCIM facilities in shootings or through other forms of assault. Witness 7 personally witnessed five deaths while in an **unidentified detention site in Sabratha**.<sup>307</sup>
180. In an unidentified facility in **Zawiya**, Witness 10 saw a Nigerian girl killed when she refused to have sexual intercourse with one of her captors:

*Witness: Once a Nigerian girl was asked to go to them, to be their wife for them, and she refused and said 'I did not come to be your wife or your commodity' and then the Libyan man wanted to slap her and she stopped him by grabbing his arm, the other one charged his gun and pop, pop, pop, killed her, in the head and in the belly, in front of us. And then, immediately, she passed away.*<sup>308</sup>

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<sup>306</sup> MEDU, *The Torture Factory*, p. 12.

<sup>307</sup> [REDACTED].

<sup>308</sup> [REDACTED].

181. In this same facility, the Witness also saw migrants and refugees being executed during an attempted escape.<sup>309</sup> In **Al-Shwarif**, Witness 11 reported that smugglers killed a man to compel others to pay ransom.<sup>310</sup>
182. These accounts resonate with similar incidents described by organisations like the UN, IOM, and MSF at DCIM sites in Zawiya and Mabani, among others.<sup>311</sup>
183. According to activists, humanitarian workers and medical professionals, several dead bodies of migrants and refugees are found every week in **Bani Walid**, in dry riverbeds, ditches, and the desert. Many bear gunshot wounds, bruises, and burns. Most bodies appear emaciated, suggesting the victims were suffering from starvation.<sup>312</sup> The UN Panel of Experts reported that on 23 May 2018, a group of 200 migrants and refugees fought against their guards and stole two weapons to escape from warehouses on a farm controlled by Mousa Adyab in Bani Walid. The Panel reported that ‘while they were attempting to escape, Mousa Adyab’s brother, Ahmed Adyab, together with Eritrean smugglers, attempted to recapture or kill them.’<sup>313</sup> According to the Bani Walid hospital, 25 people were severely injured in the incident and 15 died.<sup>314</sup>
184. In an Italian case against the commander of an unofficial detention site in **Bani Walid**, the judges found that several migrants and refugees died due to not receiving proper medical treatment, which was often necessary after the beatings and torture at the hands of the accused. According to the judgment, at least 13 people died as a consequence of their violent treatment. Dozens of further homicides were reported but not considered for the conviction since it was impossible for Italian authorities to identify these victims, or the circumstances of their deaths.<sup>315</sup>
185. In another judgment, the Tribunal of Messina convicted three men, operating in the Osama prison (al-Nasr centre) in **Zawiya**, of beating and torturing migrants and refugees and then leaving them without any medical assistance, ‘so that it was frequent that the captives would die following the violence suffered.’<sup>316</sup> Witnesses also referred to migrants

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<sup>309</sup> [REDACTED].

<sup>310</sup> [REDACTED].

<sup>311</sup> See *infra* Section III.B.

<sup>312</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 30; UNSMIL and OHCHR, *Detained and Dehumanised*, p. 17.

<sup>313</sup> 2018 UN Panel of Experts Report, p. 16.

<sup>314</sup> *Ibid.*

<sup>315</sup> Corte d’Assise di Milano, N.10/17 (10 October 2017), p. 118.

<sup>316</sup> Tribunale di Messina, N. 149/2020 (28 May 2020), p. 39.

and refugees being beaten to death,<sup>317</sup> killed through electric shocks,<sup>318</sup> and shot while attempting to escape.<sup>319</sup> A 26-year-old asylum seeker from Darfur, who lived in Libya for nearly three years, described her two months in captivity in Al-**Shwarif** to UNSMIL:

*We were 700-800 people in a large hangar... They would keep shooting [migrants and refugees] in the legs if they couldn't pay, and then let them bleed to death... My son, five years old at the time, was hit on the head with a big metal bar to pressure us to pay quickly... I saw many people die in this place, from beatings and hunger. There was a Somali boy, he was skin and bones. He couldn't even stand on his two feet and they [smugglers] would still beat him. He died... until now, when I close my eyes, I am haunted by his face.*<sup>320</sup>

186. On 27 May 2020, 30 migrants and refugees, mostly Bangladeshis, were killed and eleven others were wounded in a warehouse in **Mizdah**. Survivors recounted how they had been taken to Mizdah after being abducted in transit to Tripoli. They told the UN Panel of Experts:

*They were held for approximately 10 days in a dark warehouse with dozens of other detained migrants of various nationalities. Every day, a Libyan national accompanied by two sub-Saharan Africans repeatedly entered the warehouse, tortured the detainees and threatened to kill them. Each Bangladeshi survivor was asked to pay \$12,000 in exchange for his release. All identified Yusef Mohammed Abd al-Rahman (also known as Yusef Basoor al-Jareed al-Bousayfi) as the Libyan trafficker, referring to him as the boss or the mafia leader, who was subsequently killed by other detainees. As soon as his killing became known, a group of heavily armed men stormed the warehouse, firing indiscriminately at the detainees and subsequently running over bodies with vehicles.*<sup>321</sup>

187. Among the documentation specifically related to the killing of migrants and refugees, the UN and IOM have described an incident in which guards shot dead five migrants at an Al-Nasr Brigade controlled facility in **Zawiya**.<sup>322</sup> One survivor told AI that three Guinean nationals, including one child, were amongst those killed. The child and one of the two adults were killed while attempting to flee the centre, before the other adult was brought

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<sup>317</sup> *Id.*, p. 9.

<sup>318</sup> *Id.*, p. 12.

<sup>319</sup> *Id.*, p. 7.

<sup>320</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 28.

<sup>321</sup> 2021 UN Panel of Experts Report, p. 13.

<sup>322</sup> IOM, *IOM Joins UN Call for Investigation into Migrant Deaths in Libyan Detention Centre*, 6 April 2016, <https://www.iom.int/news/iom-joins-un-call-investigation-migrant-deaths-libyan-detention-centre>.

back inside blindfolded and subsequently shot.<sup>323</sup> MSF also reported that on 8 April 2021, one person was killed and two were injured in an incident at the DCIM-managed **Mabani detention centre**. During the incident, shots were fired indiscriminately into cells where migrants and refugees were being held.<sup>324</sup>

## 2. Deaths due to conditions in detention sites

188. Migrants and refugees are held under brutal and inhumane detention conditions. All 14 witnesses described these harrowing conditions, which included insufficient food, drinking water or hygienic conditions, overcrowding, and lack of medical support, sunlight, or proper ventilation. This leads to malnutrition and the spread of skin diseases, or tuberculosis, among others. As a consequence, migrants and refugees being held at detention sites often die due to these conditions, as extensively reported in the media.<sup>325</sup> For instance, numerous deaths have been recorded, many of which are attributed to malnutrition.<sup>326</sup>
189. Observers, including human rights organisations and UN agencies, have repeatedly called attention to the deplorable and inhuman conditions inside DCIM detention centres. After visiting DCIM centres in early 2014, UNSMIL and OHCHR found ‘conditions of grave concern, including chronic overcrowding, poor sanitation and health care, and insufficient food.’<sup>327</sup>
190. Italian judgments regarding specific perpetrators confirmed cases of death to be a direct consequence of detention facility conditions. In one case in **Bani Walid**, a young woman bled to death a month after she gave birth and being left without any treatment. Whenever she asked the jailer for medical treatment, she would be beaten. The baby died immediately after birth, due to the hygienic conditions of the camp.<sup>328</sup> A report from Foreign Policy

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<sup>323</sup> AI, *Libya’s Dark Web of Collusion*, p. 30.

<sup>324</sup> MSF, *Libya: One dead and two injured in shooting in Tripoli detention centre*, 9 April 2021, available at: <https://www.msf.org/people-dead-and-injured-following-libya-detention-centre-shooting>.

<sup>325</sup> See e.g., S. Hayden, *Libyan migration detention center Dhar El-Jebel is one of dozens across the North African country holding refugees with hopes to cross the Mediterranean Sea against their will*, Atmos, 10 July 2020, available at: <https://atmos.earth/libya-refugee-crisis/>; S. Hayden, *Deaths pile up in Libyan detention centre, leaked UN report shows*, The Irish Times, 25 June 2019, <https://www.irishtimes.com/news/world/africa/deaths-pile-up-in-libyan-detention-centre-leaked-un-report-shows-1.3937256>; S. Hayden, *Teenage boy the latest to die in Libyan refugee detention centre*, The Guardian, 21 January 2020, <https://www.theguardian.com/global-development/2020/jan/21/teenage-boy-the-latest-to-die-in-libyan-refugee-detention-centre>; R. Jawad, *Migrant crisis: Self-immolation exposes UN failures in Libya*, BBC News, 31 July 2019, <https://www.bbc.com/news/world-africa-49154959>.

<sup>326</sup> GDP, *Immigration Detention in Libya*, p. 45; Malakooti, *The Political Economy*, p. 86.

<sup>327</sup> A/HRC/28/51, p. 8.

<sup>328</sup> Corte d’Assise di Milano, N.10/17 (10 October 2017), p. 71.

recounts the testimony of a woman whose 7-year-old child died from appendicitis while in detention in **Zintan**. The boy died because the guards were initially unwilling to carry him to a hospital. When the mother's pleas were finally heeded, it was too late.<sup>329</sup>

191. In **Al-Shwarif**, Witness 11 saw 'hundreds of men, Eritrean men, die of diarrhoea.'<sup>330</sup>

Many perished from hunger and malnourishment: '20 Eritreans and six Ethiopians died of hunger. How many people died of [it], I am not sure.'<sup>331</sup>

192. Witness 8, while in detention in an **unidentified site in Sabratha**, saw a woman perish due to her jailer's refusal to get her medical care:

*Witness: I remember a woman, she was sick. And there was this man, he was a smuggler too. They called him [REDACTED]. He was adamant, he refused to go and get the medicine and the woman succumbed.*<sup>332</sup>

193. The same victim later witnessed the death of two migrants and refugees at an **unidentified detention site in Tripoli** and explained that the bodies were then put in a plastic bag, loaded to a truck and thrown in the desert.<sup>333</sup>

194. This account further demonstrates that migrants and refugees not only experience deaths, or the risk of death, but are also forced to partake in undignified disposal of bodies.<sup>334</sup> The effect on one's mental health cannot be overstated.<sup>335</sup> This was also reported by Witness 10 in Zawiya,<sup>336</sup> and by Witness 3 in an unknown location:

*Interviewer: What's your job?*

*Witness: Sometimes it's to dig dead people. They organise.... They go to the seaside, get people bodies and organise and bring them to a migrants cemetery in the backside of this military camp. We put on the ground one of our friends who died there. There is a lot of tombs and graves.*

*Interviewer: So the military was approaching the migrant camp to help them dig up the bodies?*

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<sup>329</sup> S. Hayden, *The U.N. Is Leaving Migrants to Die in Libya*, Foreign Policy, 10 October 2019, available at: <https://foreignpolicy.com/2019/10/10/libya-migrants-un-iom-refugees-die-detention-center-civil-war/>.

<sup>330</sup> [REDACTED].

<sup>331</sup> [REDACTED].

<sup>332</sup> [REDACTED].

<sup>333</sup> [REDACTED].

<sup>334</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 30.

<sup>335</sup> MSF, *Human Suffering*, p. 28.

<sup>336</sup> See Section III.A.3.



*Witness: Yeah, and we don't know this body. Sometimes you go to the seaside and you see somewhere a body. I did it once and another time it was to go there and put people and put in plastic bags and bring somewhere to the graves.*<sup>337</sup>

195. In addition to these first-hand testimonies, in 2016 the UN reported the death of 14 migrants and refugees from disease and malnutrition at an undisclosed detention site.<sup>338</sup> Between September 2018 and May 2019, at least 22 people were reported to have died in detention, mostly from tuberculosis in the **Zintan** and **Gharyan** detention centres, according to MSF.<sup>339</sup>

### 3. Deaths due to conditions in transit or at sea

196. Many migrants and refugees have also died or been killed outside detention sites, including when they are in transit. For instance, Witness 5 recounted the death of a Nigerian girl **in transit from Agadez to Libya**, although the cause of death is unclear, and how they buried her in the desert.<sup>340</sup>

197. Another common setting is that of deaths at sea. [REDACTED] recounted one incident in **Zawiya**, in which an unidentified Libyan man sank a boat of migrants and refugees, leaving them to drown:

*Shortly before, another small boat that was supposed to take off, and in that boat, there is this problem between a drunk Libyan and one of the Africans who resisted and hit him in the leg. The Libyan man say "you 'ibeidad' have something to do" and made a hole in the boat that was taking fifty something migrants, and the boat was about to sink, and they killed everybody in the boat. And then they got into their car and just went.*<sup>341</sup>

198. This testimony correlates with the 2017 UN Panel of Experts on Libya report, that described how Tareq al-Hengari, a member of the Zawiya Refinery Coast Guard, shot at boats carrying migrants and refugees, causing the death of an unknown number of people on board.<sup>342</sup>

199. Describing killings of migrants and refugees at sea, the UN detailed how 'Tareq al-Hengari is also[,] a member of the coast guard[. He] shot at migrants' boats at sea, causing

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<sup>337</sup> [REDACTED].

<sup>338</sup> UN News, *African migrants reportedly being sold in 'slave markets' in Libya, UN agency warns.*

<sup>339</sup> MSF, *Out of Sight, Out of Mind.*

<sup>340</sup> [REDACTED].

<sup>341</sup> [REDACTED].

<sup>342</sup> 2017 UN Panel of Experts Report, Annex 30, p. 133, para. 4.

the death of an unknown number of migrants, in an attempt to undermine the smuggling business of Kashlaf's competitors.<sup>343</sup>

#### 4. Other deaths and killings

200. Migrants and refugees are equally vulnerable in urban settings. Witness 7 reported the existence of a mass grave next to a **'turkina' in Tripoli**, which was used by gangs to bury individuals who refused to work for them:

*Next to this Turkina, there is a mass grave that was used by the gangs, that each one who is killed is brought there to be buried. What I was told when I was at the Turkina, is that a week before I came there were people killed, and namely one Sudanese man was killed and I was advised that if any Libyan man come to take me to labour, to work, I shouldn't refuse. They told me that if you are selected by a Libyan man to go to work, and you refuse, he will kill you and choose another man.<sup>344</sup>*

201. In a similar vein, Witness 5 reported the death of an unknown number of migrants and refugees, when the 'ghetto' where the Witness was staying in **Tripoli/Gilgares** (Gergarish) was bombed:

*Interviewer: And from there you go to Gilgares?*

*Witness: Yes. The following day they threw a bomb in the ghetto next to us and many people died.*

*Interviewer: What month or year was that?*

*Witness: This was 2014, [REDACTED]. I think in July.<sup>345</sup>*

#### C. Infliction of physical and mental pain or suffering

202. Since the outbreak of the conflict in 2011, migrants and refugees in Libya have been repeatedly subjected to a variety of forms of severe physical and mental pain or suffering, ill treatment, and inhumane acts. These are committed for the most part in the context of detention, either as part of the extortion that migrants and refugees face or as a way to exert control over them. Such treatment has been particularly evident since 2014 as migrants

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<sup>343</sup> *Ibid.*

<sup>344</sup> [REDACTED].

<sup>345</sup> [REDACTED].

and refugees became increasingly commoditised, corresponding to Phases II and III described in Section II.D of this Communication.

### 1. Through the conditions of captivity and transit

203. The conditions inside both official and unofficial detention sites have not only led to the death of many detained migrants and refugees, but are also a major cause of severe physical and mental suffering.

204. The witness interviews refer of inhumane conditions of DCIM detention sites throughout Libya. Witness 8, who was detained in the **DCIM Gharyan detention centre**, recounted how migrants and refugees were kept in so-called ‘containers:’

*Witness: There, there were no buildings, they were containers.*

*Interviewer: Can you describe what you call containers?*

*Witness: They look like iron boxes where they put luggage, goods on boats, like that. We call them containers. They had opened them, each container had a single window plus a pump so that we could drink, wash. There, it was a bit improved but it was excessively hot.*

*Interviewer: How many of you were in the container?*

*Witness: Each container had 50 people.<sup>346</sup>*

205. Witness 8 also mentioned the lack of food and water at the **DCIM Gharyan detention centre**.<sup>347</sup> Witness 7 referred to similar conditions in **DCIM Murzuk** where migrants and refugees had scarce access to potable water, were not allowed to shower, and were fed only once a day.<sup>348</sup>

206. [REDACTED] began to suffer from respiratory problems at **DCIM Tariq al-Sika** due to its lack of ventilation. [REDACTED] reported that tuberculosis was rampant in that centre:

*[REDACTED]: At that time, I was having coughing and more coughing. When I have got to change place from Salah Aldin to Tariq al-Sika, I have coughing, but no doctor. No one can treat me. So, at that time, it's a very dirty place, so many are vomiting outside, sleeping, it's very dark, no windows, very dangerous to live like that. So many people are*

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<sup>346</sup> [REDACTED].

<sup>347</sup> [REDACTED].

<sup>348</sup> [REDACTED].

*in the corner, very thin and coughing, attacked by TB [tuberculosis], they cannot move from that place.*<sup>349</sup>

207. [REDACTED] further explained that [“HN”], who was in charge of Tariq al-Sika, specifically denied migrants and refugees access to medical personnel and medication for a period between August 2018 and February 2019.<sup>350</sup> Eventually, [REDACTED] managed to get medical treatment and was hospitalised for around a month because of his condition. Afterwards, he was taken back to the site, where he continued to receive medication, once medical organisations were allowed back in.
208. Witness accounts are corroborated by public documentation that found similar conditions in other DCIM detention centres. For instance, in 2017, the UN Panel of Experts collected testimonies of inhumane conditions inside the **DCIM al-Nasr detention centre**, and described it as not suitably equipped to hold migrants and refugees.<sup>351</sup> At the same site, an individual from Cameroon described to OHCHR and UNSMIL that detention conditions were very crowded, dark, and lacking ventilation.<sup>352</sup>
209. At the **DCIM centre in Zintan**, an Eritrean refugee recounted to journalist Sally Hayden how the lack of food in that place meant that, even when MSF provided medicine to migrants and refugees, ‘taking it made them feel faint because of the lack of food.’<sup>353</sup>
210. As a consequence of these deplorable conditions, migrants and refugees in detention commonly experienced respiratory tract infections, acute watery diarrhoea, skin diseases and infections such as scabies, urinary tract infections, and illnesses related to malnutrition.<sup>354</sup> MSF reported that many of the conditions they treat are ‘caused or aggravated by the lack of consistent or adequate medical assistance and the conditions inside official and unofficial detention settings.’<sup>355</sup>
211. Considering the inhumane conditions migrants and refugees are subjected to at official detention sites, it is unsurprising that the same, or even worse, conditions exist in unofficial ones. Several witnesses described receiving food only once a day, and in insufficient

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<sup>349</sup> [REDACTED].

<sup>350</sup> [REDACTED].

<sup>351</sup> 2017 UN Panel of Experts Report, p. 133.

<sup>352</sup> UNSMIL and OHCHR, ‘Detained and Dehumanised’, p. 16, available at: [https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised\\_en.pdf](https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf).

<sup>353</sup> Hayden, *Deaths pile up in Libyan detention centre, leaked UN report shows*.

<sup>354</sup> MSF, *International Activity Report 2017*, p. 15.

<sup>355</sup> *Ibid.*

portions.<sup>356</sup> This is well-described by Witness 6, who recounted the following situation in **Um Al-Aranib**:

*As soon as we arrived to Um Al-Aranib, we were all put inside metal containers. [...] The first day we stayed there without anything to eat or drink. The second day they brought us pasta. It was cooked in a barrel. Each 10 people had 1 plate (to share, one for 10) and only one meal per day. We received very little water [interviewee shows the size of a coffee cup]. In this place we stayed for roughly about 15 days. One meal per day.<sup>357</sup>*

212. At an unofficial detention site in **Zawiya**, migrants and refugees were commonly denied access to water, as described by Witness 10:

*In Zawiya, the situation is very, very, very, unhealthy, still we have to draw water from the wall, and that wall is a dirty wall, where there are pieces of shoes, dirty clothes, you have to take the water out and drink it.<sup>358</sup> [...] When these guys get high, and they come to see people are sick, 'look what the hell you are doing here?' Sometimes they throw away what people are eating and when people ask for water they say 'ibeidad, who do you think you are, you want to wash up?'<sup>359</sup>*

213. The spread of disease is commonplace in other detention sites. Witnesses described seeing and/or experiencing skin transmitted diseases, diarrhoea, and even gangrene. Witness 2 stated that in **Bani Walid**:

*People get sick every day, there is shortage of food, it's very hot and there are no windows. Every day you see people dying in there because of illness. There the water is not clean, you are sleeping in a small place and you're sleeping together, so there are skin transmitted diseases.<sup>360</sup>*

214. In **Al-Shwarif**, the living conditions are particularly gruesome. As described by Witness 11, migrants and refugees were only allowed to shower 'every two to three

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<sup>356</sup> [REDACTED].

<sup>357</sup> [REDACTED].

<sup>358</sup> [REDACTED].

<sup>359</sup> [REDACTED].

<sup>360</sup> [REDACTED].

months,' with merely a couple litres of water. The victim developed cankers and black spots on the body.<sup>361</sup>

215. With regard to mental suffering, MSF has reported that, as a result of the conditions of detention and the violence inflicted upon migrants and refugees, '[m]any detainees have suicidal thoughts, difficulty sleeping, symptoms of post-traumatic stress disorder and suffer panic attacks, depression and anxiety.'<sup>362</sup> Similarly, around 79% of the migrants and refugees assisted by MEDU suffered from Post-Traumatic Stress Disorder (PTSD), following the traumatic events they experienced during their journey in Libya.<sup>363</sup>

216. The conditions to which migrants and refugees are subjected while in transit to Libya and between unofficial detention sites is equally inhumane. In transit, witnesses reported being commonly denied food and water.<sup>364</sup> Witness 1 even said that because of water shortages, many migrants turned to drinking urine.<sup>365</sup> Survivors described in general being transported in overcrowded vehicles, being put in stress positions,<sup>366</sup> and even a guard walking on their bodies.<sup>367</sup>

217. Witnesses have also detailed cases of migrants and refugees 'suffocating and falling out of speeding trucks' in transit from Bani Walid to coastal areas.<sup>368</sup> Witness 1 also described being told by drivers that they did not care if people would fall out of the vehicle and die: 'You are 68, even if 60 fall down, we don't care. Eight is enough.'<sup>369</sup>

218. In addition to experiencing severe physical and mental pain and suffering due to the conditions of their captivity on land, migrants and refugees also experience severe distress while captive in boats at sea. One reason for this is overcrowding and the quality of the boats. Witness 13 reported being deceived by smugglers in this regard: the survivor and [REDACTED] were promised a proper boat to travel, but once they reached the shores, it became clear that they would travel on a zodiac (an inflatable boat). She reported that there were 100 people on that boat and not all travellers had lifejackets.<sup>370</sup> Others also reported

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<sup>361</sup> [REDACTED].

<sup>362</sup> MSF, *Human Suffering*, p. 28.

<sup>363</sup> MEDU, *The Torture Factory*, p. 12.

<sup>364</sup> [REDACTED].

<sup>365</sup> [REDACTED].

<sup>366</sup> [REDACTED].

<sup>367</sup> [REDACTED].

<sup>368</sup> [REDACTED].

<sup>369</sup> [REDACTED].

<sup>370</sup> [REDACTED].

overcrowding on the boats, like Witness 14, who travelled on a boat with approximately 500 people.<sup>371</sup>

219. After leaving land, migrants and refugees spend anywhere from several hours to even days on these overcrowded, often flimsy boats. They do not have proper access to food, water, shelter, or medication, according to the accounts of Witnesses 7 and 10.<sup>372</sup> Witness 4 even became unconscious after hours at sea.<sup>373</sup>

## 2. Through acts of violence

220. Physical and mental pain and suffering are also inflicted upon migrants and refugees through physical and verbal acts of violence perpetrated by those holding them captive. Oftentimes, this form of violence is associated with acts of extortion, therefore the accounts of the interviewed victims may overlap. Nonetheless, it can also occur independently, as a way to control or subjugate migrants in detention sites or along the route in Libya.

221. Although the forms of violence committed against migrants and refugees are wide ranging, the most frequently publicly reported forms are beating with various objects, whipping, burning with plastic or various tools, electrocution, gun violence, stabbing, being forced to hold stressful or uncomfortable positions for long periods of time, and pouring boiling water or chemicals on the body.<sup>374</sup>

222. Witness 1 described being beaten by the police at **DCIM Salah Aldin**, on a frequent basis, at times with a shovel:

*'If they heard noise or something, they beat us totally. Where they are beating? They don't care, even your face or your eye. Many people have damage.'*<sup>375</sup>

223. Further, the survivor recounted a particular episode at **Salah Aldin**, in which a migrant was hit by a bullet fired by the police:

*I remember one day it was dark, the electricity was off, and also there was no generator to replace the electricity, so it is dark and more crowded. It was hot, it is June, very hot season, so many people became out of control. So, we knocked the door to get help for that person who is sick. Then the police come and bring with him a gun, stick and some*

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<sup>371</sup> [REDACTED].

<sup>372</sup> [REDACTED].

<sup>373</sup> [REDACTED].

<sup>374</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 44.

<sup>375</sup> [REDACTED].

*weapons as for building, weapons. So, they beat us, who are in front of him, whoever is in front of him. Also, at that time, I'll never forget, he shot the gun up to the ceiling, inside the room. It hit the wall and returned back and, for one [guy], it put in his leg for one guy, it's bleeding a lot.*<sup>376</sup>

224. The Witness also described being physically punished for going on a hunger strike with fellow migrants and refugees, in order to protest police treatment at **Salah Aldin**: ‘So, if they know we are in hunger strike, they will beat us even more because they are very cruel.’<sup>377</sup> Moreover, the Witness provided an account referring to a boy he met at that site, who had been beaten so violently in **Bani Walid** that he now has a hearing impairment: ‘there were three underage [children] and one who has a problem to hear noise, he had an accident in Bani Walid, to come from Sahara they beat him on his ear and he cannot hear well.’<sup>378</sup>

225. On one occasion, following an attempt to leave detention, [REDACTED] experienced a severe beating by soldiers in **DCIM Tariq al-Sika**, with a variety of weapons:

[REDACTED]: *Finally, [“HN”] said wait, and he called more than 120 soldiers from other detention centres, other places. They came, more than 120 soldiers, and keep us in one very narrow corner where they have tried to beat us with different weapons: metal, wood, plastic sticks. They have so many weapons and they have to beat us and check our bags, clothes, documents—they took everything.*<sup>379</sup>

226. Many migrants and refugees also reported being subjected to degrading, and often violent searches immediately upon arrival in DCIM detention facilities. Witness 8 reported violent and invasive searches by guards at **DCIM Gharyan**:

*Interviewer: When there were beating, were people also undressed and searched?*

*Witness: Yes, they were searching us like that. They were saying so much that the immigrants we are not good people, they come, they cut with the knife, they searched people every day to see if they had the money. I had the money with me in the belt.*

*Interviewer: They cut the belts where you had the money?*

*Witness: Yes, they were cutting the belts. They cut them off to open them and take the money.*

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<sup>376</sup> [REDACTED].

<sup>377</sup> [REDACTED].

<sup>378</sup> [REDACTED].

<sup>379</sup> [REDACTED].



*Interviewer: Were they forcing people to take their clothes off too?*

*Witness: Mandatory! Because they had the whip, the weapons, all that. In front of everyone, they forced you to undress.*<sup>380</sup>

227. Witnesses at the **Abu Salim DCIM detention centre** have described frequent gun violence, physical and verbal violence and mistreatment.<sup>381</sup> Similarly, a Libyan internally displaced person (IDP) with an undisclosed disability told UNSMIL about the ill treatment he received in the **DCIM Mitiga detention centre**:

*I was held in the ‘security wing’ (al qate’ al-amni). Even though I suffer from a disability [details redacted], I was suspended from the ceiling by metal chains and beaten until I lost consciousness. Every night I would hear screams of others being tortured... I developed an eye infection in prison, but was denied medical treatment to make me suffer more. Until now, I cannot see properly.*<sup>382</sup>

228. In this same facility, a foreign national was reportedly beaten with shovels and “suspended in a position called ‘roasted chicken’ from a metal hook attached to a ceiling in a room, known by the detainees as the ‘butchery.’”<sup>383</sup> As a result, he was unable to walk.<sup>384</sup>

229. A group of Nigerian men also described equally severe violence when detained at the **Zuwara detention centre** for two months following interception at sea in January 2018. They described ‘being beaten with water pipes and given electric shocks daily.’<sup>385</sup>

230. A Sierra Leonean man who was detained at the DCIM detention centre in **Misrata**, located in a former school in al-Karareem. He told HRW:

*This place is like hell. They pretend to be nice people but then they flog [shock] you with electricity. Three times they beat me, when getting food. They make us sit in the sun or stand up and look straight at the sun. We protested so they hit us. They take people to the front room to beat them. They took me there, they tied my hands and then they beat me on the bottom of my feet. They hit my friend in the head.*<sup>386</sup>

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<sup>380</sup> [REDACTED].

<sup>381</sup> Malakooti, *The Political Economy*, p. 87.

<sup>382</sup> UNSMIL and OHCHR, *Abuse Behind Bars*, p. 29.

<sup>383</sup> *Ibid.*

<sup>384</sup> *Ibid.*

<sup>385</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 45.

<sup>386</sup> HRW, *No Escape From Hell*, p. 35.

231. Migrants and refugees have also repeatedly described extreme levels of violence in detention facilities outside DCIM control. Witness 7 described the situation in **Warshefana, on the outskirts of Tripoli**: ‘The violence is something of daily occurrence: threats, terrorising people, firing in the air, beating.’<sup>387</sup> In **Sabratha**,<sup>388</sup> Witness 7 was imprisoned for two days for having filmed potential perpetrators, which led to her/him being badly beaten: ‘Before I was taken inside the prison, I was beaten to the point I was not conscious of what happened. I was beaten badly and then thrown inside the cell.’<sup>389</sup>

232. In turn, Witness 3 was himself burnt with a torch and stated that women were kept bonded at [REDACTED], **an unofficial detention site in Sabha**:

*Witness: The room was around 5 or 8m<sup>2</sup>, it was around 150 people, for example, and it was the biggest room, other room was 300 persons, crazy situation. Some women were bonded.*<sup>390</sup>

*[...]Interviewer: Can you tell us more about the photo and the wounds you have there?*

*Witness: I took the picture after the prison, and how I get it is when I was asking for freedom I even organised some trouble there because I was ready to fight, I told them ‘you can kill me.’ They tied me with some metal chains and were beating me, with fire, ‘chalumeau’ [torch], and they were using that to burn me - you can see that in the photo. It was for two days because I slept there that night and I was saying that I paid the money already and was asking for freedom, I was having agitation that I need to go out and the guy was saying ‘you want that? I will kill you.’ That was Friday afternoon/evening and they brought me outside and chained me and they started to burn me. Is not only what you see in the photo. If you check in my left hand you will see wound, they would use a knife and were threatening to kill me.*<sup>391</sup>

233. In December 2018, a judgment from the Tribunal of Palermo confirmed the commission of the same crimes at this very facility. In fact, two of the jailers (John Ogais, known as ‘Rambo,’ and Sam Eric Ackom, known as ‘Fanti’) were sentenced to life imprisonment

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<sup>387</sup> [REDACTED].

<sup>388</sup> [REDACTED].

<sup>389</sup> [REDACTED].

<sup>390</sup> [REDACTED].

<sup>391</sup> [REDACTED].

for kidnapping, beating, raping, torturing, and killing migrants and refugees in [REDACTED].<sup>392</sup>

234. Also in **Sabha** – although it is unclear if it was the same location, but has similarities to the accounts of Witness 3 – a survivor from Nigeria who was tortured daily described to MEDU in September 2017 that ‘the jailers seemed to hurt [captives] for personal entertainment or pleasure. Sometimes they came back drunk at night and if anyone moved, they shoot. Sometimes they let people bleed to death.’<sup>393</sup>
235. In **Jabal Onat/Jebel Uweinat**, in the triple border between Egypt, Sudan and Libya, Witness 10 described how smugglers often conducted strip searches, and resorted to physical violence when a person refused to pay.<sup>394</sup>
236. Witness 4 provided a harrowing account of the violence inflicted upon migrants and refugees in a **Tripoli location, known as a former police station**: ‘There are many means of torture, where they have hooks and they put your legs up and head down and torture your legs. People screamed, screamed, screamed.’<sup>395</sup>
237. Witness 11 also witnessed cruel treatment in **Kufra**, where perpetrators would put victims inside freezers as punishment.<sup>396</sup>
238. Several witnesses described attacks with weapons, including gunshots, beating with a weapon, and stabbings. Witness 10 saw [REDACTED], on two different occasions in **Zawiya**, be beaten with the back of a weapon when they tried to escape sexual violence.<sup>397</sup> Both [REDACTED] sustained serious injuries and one of them is still receiving medical care for the wound caused by her captor. The Witness described that [REDACTED] had to have an operation once she arrived in Europe.<sup>398</sup>
239. Similar acts at a detention site in **Zawiya**<sup>399</sup> resulted in a conviction for torture against site jailers,<sup>400</sup> while a Tribunal in Rome reversed several denials of asylum previously

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<sup>392</sup> F. Patane, *Immigrazione, torture e omicidi nel campo di prigionia libica: due condanne all'ergastolo*, La Repubblica, 18 December 2018, available at: [https://palermo.repubblica.it/cronaca/2018/12/18/news/immigrazione\\_torture\\_e\\_omicidi\\_nel\\_campo\\_di\\_prigionia\\_libica\\_due\\_condanne\\_all\\_ergastolo-214557185/](https://palermo.repubblica.it/cronaca/2018/12/18/news/immigrazione_torture_e_omicidi_nel_campo_di_prigionia_libica_due_condanne_all_ergastolo-214557185/)

<sup>393</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 28.

<sup>394</sup> [REDACTED].

<sup>395</sup> [REDACTED].

<sup>396</sup> [REDACTED].

<sup>397</sup> [REDACTED].

<sup>398</sup> [REDACTED].

<sup>399</sup> [REDACTED].

<sup>400</sup> Tribunale di Messina, N. 149/2020 (28 May 2020), pp. 7, 9.

made by the Italian authorities, based on the torture and inhumane treatment the appellants suffered at unspecified detention sites in Libya.<sup>401</sup>

240. Witness 8 reported being stabbed in the back while trying to escape an armed attack on Sabratha.<sup>402</sup> Witness 11 described migrants and refugees being shot at in **Al-Shwarif** after trying to run away.<sup>403</sup>

241. Italian judicial proceedings have found evidence for similar episodes. For instance, a judgment from the Court of Assise in Milan confirmed the violence inflicted upon migrants and refugees held at an unofficial detention site in **Bani Walid**. Witnesses 1 and 2 pointed to the constant beatings endured there:

*Witness 1: There are very strong guys with their sticks. If someone makes a wrong move or makes a sound or stands from his place, they beat you. And also, there is a line-up here with someone with a stick in front of him. When he has a telephone ring, the director beats him and he makes sounds like 'father, father, please pay,' begging, and then they beat him.*<sup>404</sup>

*Witness 2: What I observed sometimes when you're in the prison, [is that] they are drunk and they beat people with a water pump stick. They take women, they choose them when they are drunk and they can do anything. For [...] for people who don't have money they make them sleep outside and beat them and also not giving food and not seeing sunlight.*<sup>405</sup>

242. According to the findings of the Court, migrants and refugees were beaten daily, with plastic tubes, wooden and iron sticks; burnt with cigarettes and with plastic bags previously set on fire and left to melt on their body; whipped with wires; electrified; and stabbed.<sup>406</sup>

243. In addition to being forced to witness severe pain and violence, migrants and refugees have been, at times, forced to take part in acts of violence against others. For instance, also in **Al-Shwarif**, Witness 11 was appalled to see captors force migrants to partake in torturous conduct:

*Interviewer: They hang them from their feet?*

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<sup>401</sup> See e.g., Tribunale di Roma, Decree 8290/2018 (20 April 2018), p. 4; Tribunale di Roma, Decree [censored] (15 December 2020), p. 4.

<sup>402</sup> [REDACTED].

<sup>403</sup> [REDACTED].

<sup>404</sup> [REDACTED].

<sup>405</sup> [REDACTED].

<sup>406</sup> Corte d'Assise di Milano, N. 10/17 (10 October 2017), p. 56.

*Witness: Yes.*

*Interviewer: Where did they hang them?*

*Witness: In the room and they let them upside down.*

*Interviewer: How did they do that?*

*Witness: They put ropes on their legs and put small woods they slaughter them like butchers. They asked some migrants to help them, make them look at.*

*Interviewer: They made them beat them?*

*Witness: Yes, they asked other migrants to beat them.*

*Interviewer: Using what?*

*Witness: Sticks, wood that you can make a table with. They used that one and after some minutes they let them sleep outside in the field which is very hot. You cannot stay there for an hour. It was horrific that I saw.<sup>407</sup>*

244. Public reports have also documented similar situations. An individual from Niger detained for 24 days in 2018 at an unknown DCIM detention site in Tripoli told GI-TOC that Ghanaian inmates worked with centre staff to torture other migrants and refugees in exchange for better detention conditions.<sup>408</sup> Likewise, MSF reported that migrants are oftentimes appointed by guards to ‘maintain order’ inside detention cells. Therefore, migrants and refugees are also subjected to violence by their peers.<sup>409</sup>

245. Severe acts of violence are also committed against migrants and refugees outside of the physical structures where they are detained, particularly during interceptions at sea. For example, Witnesses 3 and 6 were forced, upon threats of violence, to pilot the boats in which they were put for the sea crossing to Europe.<sup>410</sup>

246. Refugees International documented the case of a 17-year-old boy from Gambia who described the abuse he faced by the LCG after his boat was intercepted at sea in November 2016. After demanding money, he said: ‘They started to beat people with the guns. They hit me on my head with their guns.’<sup>411</sup>

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<sup>407</sup> [REDACTED].

<sup>408</sup> Malakooti, *The Political Economy*, p. 50.

<sup>409</sup> MSF, *Human Suffering*, p. 22.

<sup>410</sup> [REDACTED].

<sup>411</sup> RI, ‘Hell on Earth’.

247. Public media and civil society organisations have also documented the violence the LCG exerts upon migrants and refugees.<sup>412</sup> In footage that emerged in February 2017, Abd Al-Rahman Milad (alias ‘Bija’) is seen using a plastic hose to whip migrants and refugees inside their rubber boat on the Mediterranean Sea.<sup>413</sup> On 25 May 2017, Al Jazeera reported that officers of the LCG opened fire on two boats carrying migrants and refugees while rescue attempts were underway in the Mediterranean Sea. One survivor told reporters:

*When the Libyans pointed their weapons at us, asking us to give them all our money and cell phones and telling us to jump in the water, we did what they said. I was not afraid. I preferred to die at sea than being pushed back and to die in Libya.*<sup>414</sup>

248. Of the 14 survivors interviewed for the purpose of this Communication, the LCG intercepted five at sea: [REDACTED]. In particular, [REDACTED] saw a boat, presumably from the LCG, which seemed to mock the migrants and refugees’ situation: ‘We went closer to the boat, but the boat was going away from us, not close to us. We saw them laughing at us. They were playing a game on us. Laughing. We’re all crying.’<sup>415</sup> They were subsequently brought back to land in Libya and again taken into detention, where the cycle of abuse started again.

#### **D. Sexual and Gender-based Violence**

249. There have been accounts of repeated exposure to multiple forms of sexual and gender-based violence at every stage of the migrant experience in Libya, whether during transit or inside detention facilities, both official and unofficial. While rape is prevalent, other forms of sexual violence following this pattern include, among others, forced nudity and enforced prostitution. Sexual violence is widespread and inflicted by a plethora of actors in Libya, including by all of the intermediaries involved in the detention, movement, and exploitation of migrants and refugees. This includes DCIM officials, guards, members of

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<sup>412</sup> For example, the organisation Sea Watch has documented repeated instances of violent interceptions at sea by the LCG, including most recently in April and June 2021. See Al Jazeera, *Caught on camera: Libyan coastguard shoots at migrant boat*, 1 July 2021, available at: <https://www.aljazeera.com/news/2021/7/1/caught-on-camera-libyan-coast-guard-shoots-at-migrant-boat>; Twitter, SeaWatch International, Status 30 April 2021, available at: [https://twitter.com/seawatch\\_intl/status/1388171810315902976](https://twitter.com/seawatch_intl/status/1388171810315902976).

<sup>413</sup> B. Trew, *Video shows Libyan Coastguard Whipping Rescued Migrants*, The Times, 4 February 2017, available at: <https://www.thetimes.co.uk/article/video-shows-libyan-coastguard-whipping-rescued-migrants-6d8g2jgz6>.

<sup>414</sup> J. Belhumeur, *Libyan coastguard opened fire at refugee boats: NGOs*, Al Jazeera, 25 May 2017, available at: <https://www.aljazeera.com/news/2017/5/25/libyan-coastguard-opened-fire-at-refugee-boats-ngos>.

<sup>415</sup> [REDACTED].

armed groups and militias, smugglers, traffickers, criminal gangs, and private individuals, in both official and informal settings.<sup>416</sup>

250. A WRC study from March 2019 found that sexual violence in Libya is used for ‘extortion, subjugation, punishment, and entertainment, and frequently involves elements of profound cruelty and psychological torture.’<sup>417</sup> Although migrant women and girls are most vulnerable to sexual victimisation, the study also documented high levels of sexual violence perpetrated against migrant men and boys.<sup>418</sup>

251. The WRC reports these forms of sexual violence include penile and object rape; penile- and object-anal rape; forced rape of others, including corpses; penile-oral rape; forced oral rape of others; genital violence and torture, including burning, mutilation, and electroshock of the genitals; castration and penis amputation; forced incest; forced witnessing of sexual violence; forced nudity; sexual slavery; and sexual humiliation. Lethal sexual violence was also reported.<sup>419</sup>

## **1. Rape**

252. The witnesses interviewed for this Communication reported widespread sexual and gender-based violence at both official and unofficial detention sites. Indeed, migrants and refugees themselves are aware of the pervasive and widespread character of rape and other forms of sexual violence in Libya, sometimes resulting in unwanted pregnancies, with no access to sexual and reproductive health services. Witness 10 recalled that when she arrived in Malta, five women were pregnant as a result of abuse from Libyans, and were too advanced in their pregnancies to have access to abortion services.<sup>420</sup> In knowing how pervasive rape is in Libya, the same Witness detailed how she tried to protect [REDACTED] from this violence, by keeping them close and protecting them from Libyans searching for girls among migrants and refugees held captive.<sup>421</sup>

253. Similarly, in recalling her overall experience in Libya, Witness 9 also recounted a woman who told her of people being raped and women giving birth in prisons.<sup>422</sup>

254. Even if rape remains largely underreported, sufficient public documentation exists to indicate its prevalence. A United Nations Children’s Fund (‘UNICEF’) study, based on

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<sup>416</sup> United States (US) Department of State, *2018 Trafficking in Persons Report - Libya*, 28 June 2018, available at: <https://www.refworld.org/docid/5b3e0af04.html>.

<sup>417</sup> WRC, *More Than One Million Pains*, p. 2.

<sup>418</sup> *Id.*, p. 19.

<sup>419</sup> *Id.*, p. 20.

<sup>420</sup> [REDACTED].

<sup>421</sup> [REDACTED].

<sup>422</sup> [REDACTED].

122 interviews with migrants and refugees in Libya, found that ‘nearly half the women and children interviewed had experienced sexual abuse during migration, often multiple times and in multiple locations.’<sup>423</sup>

255. The 2017 report of the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) found a similar percentage of almost 40 percent.<sup>424</sup> In 2018, UN research interviews of 1,220 migrants and refugees in Libya, both in and out of official and unofficial detention sites, found that ‘the overwhelming majority of migrant and refugee women and older teenage girls interviewed... reported either being raped by smugglers or traffickers in Libya or witnessing others being taken out of collective accommodations and returning distraught, physically hurt and/or with torn clothes.’<sup>425</sup> Unaccompanied women are the most vulnerable. But older, pregnant, and married women are also not spared.

256. One asylum seeker from Eritrea who entered Libya in 2017 was kidnapped and held captive three times in Barak al-Shatti, Bani Walid and al-Khoms. She described to UNSMIL being raped for five months. She got pregnant and was only released after her mother paid the ransom demanded by her captors.<sup>426</sup>

257. In response to the prevalence of rape, some migrant women have started to take contraceptive pills to protect themselves against unwanted pregnancies, as reported by journalists and researchers.<sup>427</sup>

258. It has been reported that sexual violence against men is also well-known. A protection officer interviewed by the WRC said, “everyone knows when a man says, ‘I’ve gone through Libya,’ it is a euphemism for rape.”<sup>428</sup>

259. Rape, or the penetration of the bodies of men and women is often used to accelerate the payment of ransom, to punish and to humiliate in front of others known to the victim,

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<sup>423</sup> UNICEF, *A Deadly Journey for Children: The Central Mediterranean Migration Route*, February 2017, p. 5, available at: <https://www.unicef.de/blob/135970/6178f12582223da6980ee1974a772c14/a-deadl-journey-for-children---unicef-report-data.pdf>.

<sup>424</sup> UNOCHA, *2018 Humanitarian Needs Overview Summary: Libya, December 2017*, p. 6, available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/2018\\_LBY\\_HNO\\_Final%20v2.1.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/2018_LBY_HNO_Final%20v2.1.pdf).

<sup>425</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 31.

<sup>426</sup> *Id.*, p. 32.

<sup>427</sup> M. Van Reisen and M. Estefanos, *Human Trafficking Connecting to Terrorism and Organ Trafficking: Libya and Egypt, in Human Trafficking and Trauma in the Digital Era: The Ongoing Tragedy of the Trade in Refugees from Eritrea*, March 2017, p. 180, available at: [https://www.researchgate.net/publication/316991680\\_Human\\_Trafficking\\_Connecting\\_to\\_Terrorism\\_and\\_Organ\\_Trafficking\\_Libya\\_and\\_Egypt](https://www.researchgate.net/publication/316991680_Human_Trafficking_Connecting_to_Terrorism_and_Organ_Trafficking_Libya_and_Egypt); J. Hackel, *Migrants desperate to flee Libya's detention camps are being turned back at sea*, 27 November 2017, available at <https://www.pri.org/stories/2017-11-27/migrants-desperate-flee-libyas-detention-camps-are-being-turned-back-sea>; AI, *Refugees and migrants fleeing sexual violence, abuse and exploitation in Libya*, 1 July 2016, available at <https://www.amnesty.org/en/latest/news/2016/07/refugees-and-migrants-fleeing-sexual-violence-abuse-and-exploitation-in-libya/>.

<sup>428</sup> WRC, ‘*More Than One Million Pains*’, p. 20.



including family members in the country of origin via video.<sup>429</sup> Ihsan Adel, Euro-Mediterranean legal advisor, is reported to have stated, ‘we have never witnessed such humiliation of persons under detention before to the extent that detainees are asked to practice mass rape as a condition of their release.’<sup>430</sup>

i. *In official detention sites*

260. Multiple accounts of rape and other forms of SGBV by DCIM guards were reported, indicating its systematic character.<sup>431</sup> For instance, Witness 7 described the **Brak Shati detention centre** as having a specific place where women were raped multiple times:

*Witness: There were another saloon where they keep women for gang raping. In these two saloon, when they take persons they stay there for 1 week.<sup>432</sup> [...]The women were being raped and they threatened with their children, life of the children.*

*Interviewer: Did you witness women being raped?*

*Witness: For the rape you know because it's done inside a dark closed room. You're not allowed to come close. Only once I saw after this take place, the woman was bleeding. Some of the women, you don't know if they're stayed for a long time and got pregnant of if they were already pregnant before coming. I remember there was one woman who gave birth in that place.<sup>433</sup>*

261. Other public reports also include information on rape in DCIM facilities. The 2018 OHCHR and UNSMIL report collected several testimonies of rapes being committed ‘on a nightly basis’ by DCIM guards and their guests.<sup>434</sup> It also included the account of a woman from West Africa who was detained at a centre in Tripoli and ‘dragged to a nearby house, where she was raped by three men, including the DCIM guard.’<sup>435</sup>

262. Two refugee men detained since 2018 at a DCIM detention centre in western Libya also told Amnesty International in July 2020 that they had regularly witnessed incidents of sexual violence against women at DCIM detention sites, particularly at night.<sup>436</sup> Consistent accounts of rape and other forms of sexual violence committed at the **Surman**

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<sup>429</sup> *Id.*, p. 24.

<sup>430</sup> Euro-Med Monitor, *Libya: Testimonies of rape and brutal torture are horrific*, 3 November 2017, available at: <https://euromedmonitor.org/en/article/2143/Libya:-Testimonies-of-rape-and-brutal-torture-are-horrific>.

<sup>431</sup> AI, ‘No one will look for you’, p. 40.

<sup>432</sup> [REDACTED].

<sup>433</sup> [REDACTED].

<sup>434</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 46.

<sup>435</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 47.

<sup>436</sup> AI, ‘Between Life and Death’, p. 30.

**detention centre** have been observed. DCIM controlled the centre between 2015 and 2019. In 2018, UNSMIL reported that survivors identified the person who was in the effective control of the centre among the perpetrators, alongside another guard the detainees frequently referred to as ‘Rasta,’ given his hairstyle. Accounts by former Surman detainees indicate that women, particularly younger women, were selected and taken out of their cells by the person in control of the centre on a nightly basis to be raped by DCIM guards and their guests.<sup>437</sup>

ii. *In unofficial detention sites and other places of captivity*

263. Sexual violence is also pervasive in unofficial facilities where migrants and refugees are held. UNSMIL received consistent testimonies from migrants and refugees about frequent rapes in captivity in Bani Walid, including by the brothers ‘Moussa and Mahmoud Diab’ and ‘Mohamed Whiskey.’ In Sabha these were reported in facilities run by men referred to as ‘Ali,’ or ‘Mohamed,’ and ‘Gateau.’ In Kufra, these reports mostly involved Tebu gangs, including a man known as ‘Mohamed Karongo.’ In Buraq al-Shati. and in Al-Shwarif, these included reports from a place under the control of a man referred to as ‘Sahban Darbuh.’ Further reports from makeshift places of captivity in Sabratha referred to as ‘campos,’ including those run by men known as ‘Genabu,’ ‘Rambu,’ and Ahmed al-Dabbashi (al-Ammu).<sup>438</sup> Ahmed al-Dabbashi is commander of the al-Dabbashi militia and is listed on the UN Security Council Sanctions List pursuant to Res 1970 (2011).<sup>439</sup>

264. More precisely, in **Bani Walid**, for example, Witness 2 reported abuse of women, particularly when captors were under the influence of alcohol.<sup>440</sup> Aware of this reality, Witness 6 raised his suspicion that [REDACTED] was a victim of rape in **Bani Walid**, particularly due to the fact that when asked about her experience there, she uncharacteristically cried and froze, and was unable to ever tell what happened to her.<sup>441</sup>

265. Systematic and repeated sexual violence in **Bani Walid** was also documented during a trial in Italy, where a detention camp guard was convicted for repeatedly raping female prisoners,<sup>442</sup> including minors,<sup>443</sup> and infibulated women whose genitals were opened by

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<sup>437</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 46.

<sup>438</sup> *Ibid.*, p. 26.

<sup>439</sup> UNSC, Ahmad Oumar al-Dabbashi.

<sup>440</sup> [REDACTED].

<sup>441</sup> [REDACTED].

<sup>442</sup> Corte d’Assise di Milano, N. 10/17 (10 October 2017), p. 120.

<sup>443</sup> *Id.*, p. 74.

force.<sup>444</sup> The Court specifically identified ten victims. Yet the judges acknowledged that several further episodes occurred, involving an unspecified number of other women.<sup>445</sup>

266. Witness 3 also heard about the constant violence against women both [REDACTED] **in Sabha** and [REDACTED] **in Tripoli**. The survivor explained:

*Witness: About women, there were abusing women every time. We can know because one girl, one woman with a guy who was with us, was sharing with us her experience. The guys used the girls, they would have sex with any girl how they wanted, the privileged women they take her to different places.<sup>446</sup> [...] About women and girls, I understood it not there in Sabha but in Tripoli [REDACTED].<sup>447</sup> There were gates there, where you can see the women. It's the same system. They took the girls by force and then the girl comes back crying and say that they abuse us. It was like a regular, normal thing there. Who are the responsible? Is not so clear, because its different kind of --- the people who are there, who are taking responsibility to guard and security, sometimes they took girls and you don't know what happened with her.<sup>448</sup> [...]*

*Interviewer: did you see incidents of sexual violence against women there?*

*Witness: It happened. The soldier comes and takes the girl there and then takes her to the end of the alley and takes them and beat them and are ready to shoot them. Sometimes they don't want. There are some girls who were sisters or friends, they wanted to take one and then the other was complaining, the guys come and forced to take one of the girls. It was so bad to watch this or see this, they don't care if you watch or are not happy. It was a bad experience.<sup>449</sup>*

267. In **Al-Shwarif**, Witness 11 reported how common rape of women was,<sup>450</sup> particularly at the hands of guards but also of other agents in some instances,<sup>451</sup> and how these would often end in unwanted pregnancies.<sup>452</sup> According to Witness 11: *'They have been raping as if it is a normal job.'*<sup>453</sup>

268. And at an undetermined facility in **Zawiya**, Witness 10 described that many women were being raped by Libyan guards.<sup>454</sup>

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<sup>444</sup> *Id.*, pp. 72-73.

<sup>445</sup> *Id.*, p. 107.

<sup>446</sup> [REDACTED].

<sup>447</sup> [REDACTED].

<sup>448</sup> [REDACTED].

<sup>449</sup> [REDACTED].

<sup>450</sup> [REDACTED].

<sup>451</sup> [REDACTED].

<sup>452</sup> [REDACTED].

<sup>453</sup> [REDACTED].

<sup>454</sup> [REDACTED].

269. Similarly, this Witness reported the rape of Somali women in an undetermined location in **Kufra**, and in particular one instance where a woman who resisted the sexual invasion by biting the guard was severely punished. This resulted in guards placing her and fellow migrants and refugees in a freezer.<sup>455</sup>

270. In a case before a court in Agrigento, Italy, victims testified that the accused, a guard in a detention camp in **Sabratha**, was routinely abusing women at the camp, one of which got pregnant as a result of the rapes.<sup>456</sup>

iii. *Outside of detention settings*

271. Rape is also committed against migrants and refugees outside of detention sites, for example during transit and at checkpoints. The violence starts as soon as migrants and refugees cross the Libyan border, as described by Witness 10, mostly with brutal strip searches.<sup>457</sup>

272. [REDACTED] provided a similar account of sexual violence against her and other women at the border:

*Interviewer: Were you also abused at that time, at the border?*

*[REDACTED]: Yes. They hit me. Then they put me in a car to take me somewhere. There are small houses in the desert. They told us to get down, I didn't have a veil, I was dressed as a Christian. They got me out of the car, they wanted to rape me. A soldier pulled out his penis to rape me. I said I was pregnant. He put me on the floor. Then one of his friends came back to pick him up. There were many of them. They wanted to have sex with me. They had big guns, and they told me that if I move, if I try to leave, they will shoot me in the foot. I made feces, to act like I'm a little crazy, driven by fear, so they don't rape me. I put my feces all over my body. Then I started to run.<sup>458</sup>*

273. Eventually, [REDACTED] managed to escape in the desert, and after a while she reunited with the group of migrants and refugees she was travelling with. At this point, she described how other girls in the group had been raped and forced to perform oral sex, while men were severely beaten.<sup>459</sup> She also recounted that she herself saw, at the border, women being stripped naked, searched, including internally, and raped.<sup>460</sup>

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<sup>455</sup> [REDACTED].

<sup>456</sup> Corte d'Assise di Agrigento, N. 3/18 (12 June 2018), p. 10.

<sup>457</sup> [REDACTED].

<sup>458</sup> [REDACTED].

<sup>459</sup> [REDACTED].

<sup>460</sup> [REDACTED].

274. This experience is particularly telling of the widespread character of sexual violence against migrant and refugee women in Libya. [REDACTED] recounted that in **Dirj**, close to the border, she was forced to fully undress during a search, in front of the person conducting the search and his teammates. She was on this occasion searched internally and molested.<sup>461</sup>

275. Afterwards, when she arrived at **Zawiya**, she was taken to a house. Upon arrival, she was separated from the rest of the group—all men—and expressed that:

[REDACTED]: *When I went to the room I started praying because I knew what was in store for me. Arabs have bad habits. When he finished working with the men he entered the room, he asked me to undress. As I knew I was bleeding, I undressed well. I remove the bottom. When he saw my 'garnish' [referring to her period], he said 'no, no.' He left, then he came back to me to ask me to remove the bra. He touched my breasts, in the meantime I was praying. At one point he takes his clothes off, he told me to lie down on him. I said no. He said, 'Come and give me a blowjob.' He takes my hand, he puts on his penis, he tells me to suck his penis. I said no, that Allah does not like it, in the middle of Ramadan to do these things. That's where he left me. I said thank God, he left.*<sup>462</sup>

276. Witness 11 also learned of the rape of multiple women and girls in an unknown location **before Kufra**.<sup>463</sup>

277. A 22-year-old Eritrean woman who left Sudan for Libya in 2018 gave a detailed account of rape during transit. She told MSF about what she experienced along her journey:

*One Thursday evening we left Sudan for Libya. On Friday morning we had already been robbed. When you're a migrant, everything gets stolen from you on the road. Two men beat us and threatened us with weapons. They told us to sit down and said they will hand us over to Libyans. Instead, a band of Chadian thieves came. There were so many, about 15 vehicles. They searched us, two of them were armed. The smuggler said 11 people could go in this vehicle, he picked us up and drive off. After driving off for about 8 hours the Chadians found us, they took us away. They kept us in the middle of the desert for a month and a half. During that time, one of them told me, 'Come here I want you.' I said I didn't want to. As I refused two men came, in the late afternoon or maybe early evening and they tried to rape me. I was struggling to keep them off me. One of them put me down while the other one pointed a knife between my legs. He ordered me to open them, and I wouldn't. I was trying to hold my legs tight. He put his knife on my neck while the other*

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<sup>461</sup> [REDACTED].

<sup>462</sup> [REDACTED].

<sup>463</sup> [REDACTED].

*one blocked me to stop me from moving. Then he slashed me and hurt me, I was fighting back. When they were tired and done, they said: 'Let her die' because I was bleeding.*<sup>464</sup>

278. MSF documented that this victim later endured captivity in Al-Shwarif, Bani Walid, and Brak Shati. She was also abducted and sequestered in Tripoli, where she was raped for months. She was sent back to another detention site after a failed sea crossing attempt.<sup>465</sup>

279. While migrant women and girls are disproportionately affected by rape and sexual violence, men and boys are increasingly vulnerable to rape and other sexual abuses while in transit in Libya, noting a rise in 2018 in cases of men and boys receiving treatment and support for the physical and psychological consequences of sexual abuse.<sup>466</sup>

## **2. Forced nudity and strip searches**

280. Rape, however, is not the only form of sexual violence perpetrated against migrants and refugees in Libya. Witnesses also provided accounts of forced nudity and strip searches, mostly when entering detention facilities for the first time, sometimes overlapping with the physical violence exerted against migrants and refugees upon arrival at DCIM detention centres. Migrant women arrested by either the police or armed groups in relation to non-migration related offences, systematically reported being strip-searched by male guards or by other female detainees while male guards watched.<sup>467</sup>

281. This form of sexual violence is directed at both men and women and often associated with other forms of physical violence and 'serves the dual purpose of retrieving money, as well as humiliation and subjugation.'<sup>468</sup>

282. Witness 7 observed how a man was treated when they brought him into in **Brak Shati detention centre**:

*Witness: Out of curiosity I went to look around and inside these isolated area, they brought a person, they stripped him, had him naked, tied him up and they burned plastic bottle and put it on his or her body. This is how they tied up the person naked on the table and how they put the plastic burning on his body [DRAWING]. And it made them scream loud.*<sup>469</sup>

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<sup>464</sup> MSF, *Trading in suffering*.

<sup>465</sup> *Ibid.*

<sup>466</sup> AI, 'Between Life and Death', p. 33.

<sup>467</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 49.

<sup>468</sup> WRC, 'More Than One Million Pains', p. 22.

<sup>469</sup> [REDACTED].

283. Based on the accounts of Witness 8, migrants received similar treatment at **DCIM Gharyan**.<sup>470</sup>

284. [REDACTED] regularly experienced forced nudity and invasion of her bodily autonomy in different detention facilities. In [REDACTED] she described:

[REDACTED]: *The first day they welcome you, they treat you correctly. Us women have to undress in front of them, they search you. Then they say they're going to go wash us because we're dirty. We walk in without underpants. They take us to the toilet and they wash us.*<sup>471</sup>

285. Later on, after being intercepted at sea, she was sent to the **Zawiya DCIM detention centre**, also commonly known as the **Osama prison**, where she experienced something similar:

[REDACTED]: *As soon as we got there, a black woman who searches you everywhere, hair, buttocks, everywhere, everywhere to get the phone or the dollars, because usually the illegals who go to Europe have the euro or the dollars. As they know that, the girl searched us. A woman had her dollars and the euro, she took all her money, although she had two children. She was a black woman like me, a Nigerian. It was horrible, shameful.* <sup>472</sup>[...] *They ask you to undress, they spray the water on you with the hose. They come to touch you, etc, breasts, buttocks. This is their way of welcoming you.*<sup>473</sup>

[...] *She searches you everywhere, in the anus, the vagina etc. That's what annoyed me, that she's searching her black sisters.*<sup>474</sup>

286. UNSMIL has also documented intrusive cavity searches. In some cases, women reported having ‘their breast and buttock fondled during searches.’<sup>475</sup> Women being held in DCIM detention centres consistently reported ‘being strip-searched by or in front [of] male guards.’<sup>476</sup> For instance, at the **Mitiga detention centre**, under the gaze of male guards, they were to undress and bend over for invasive cavity searches. A woman who protested was reportedly beaten with a hose, insulted, and touched on her breast and buttocks.<sup>477</sup>

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<sup>470</sup> [REDACTED].

<sup>471</sup> [REDACTED].

<sup>472</sup> [REDACTED].

<sup>473</sup> [REDACTED].

<sup>474</sup> [REDACTED].

<sup>475</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 45.

<sup>476</sup> *Ibid.*

<sup>477</sup> UNSMIL and OHCHR, *Abuse Behind Bars*, p. 36.

287. A woman intercepted at sea in 2017 and taken to the **Surman detention centre** following disembarkation experienced physical and sexual abuse after she complained about detention conditions. UNSMIL and OHCHR report:

*A guard forced her to undress down to her underwear. He then tied her ankles with a rope and dangled her head down from a metal bar, proceeding, together with another guard, to beat her with water pipes all over her body.*<sup>478</sup>

### 3. Enforced prostitution

288. Enforced prostitution is part and parcel of the business model at unofficial detention sites, particularly where traffickers and centre staff may be part of the same network.<sup>479</sup> A GI-TOC report noted that some unofficial centres pay to have migrants and refugees transferred to them from official centres, on the assumption that they will later make money off them, including through prostitution.<sup>480</sup>

289. UNSMIL has documented the enforced prostitution of women and girls in ‘connection houses’ by multinational criminal networks in their countries of origin. Survivors account that they are forcibly taken to ‘connection houses’ in **Tripoli’s Gergaresh and Mitiga** neighbourhoods. Such experiences are also found in **Sabha**, where women are forced into prostitution if they are unable to pay a ransom. Women and girls as young as 14 are forced to receive several clients—up to 10—per day under threat of beatings and other abuse.<sup>481</sup>

290. One survivor, a 19-year-old girl from Nigeria, was promised domestic work by her traffickers. Instead, she was forced into prostitution at a ‘connection house.’ In her words:

*‘At first, I refused to work. But if girls refused to work, they [connection house management and guards] would kill you or rape you and do anything they wanted to you. I had to stay there for nearly a year, until I paid my debt of 1.3 million Naira (\$3,500 USD).’*<sup>482</sup>

291. Three refugee women fleeing conflict and insecurity told Amnesty International that traffickers raped them and forced them into prostitution during their months of captivity in ‘campos around Bani Walid in the course of 2018 and 2019.’<sup>483</sup>

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<sup>478</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 44.

<sup>479</sup> Malakooti, *The Political Economy*, pp.7-8.

<sup>480</sup> *Id.*, p.44.

<sup>481</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 34.

<sup>482</sup> *Ibid.*

<sup>483</sup> AI, *‘Between Life and Death’*, p. 30.



292. Another woman told UNSMIL of her experiences in a connection house in **Sabratha**:

*Every night, Libyan men came to choose several women and took them to other rooms where they raped them. If a woman resisted, she would be forcibly dragged by the armed men. She said that she was forcibly taken at least five times by the men and raped by one of them. Once she was raped by two men at the same time. The men were armed with guns and knives. She also said that she heard other women and girls screaming while they were being sexually abused. At the time of the interview, she was two months pregnant, the result of being raped.<sup>484</sup>*

#### **4. Other forms of sexual violence**

293. Other forms of documented sexual violence include threats of a sexual nature, as documented by OHCHR and UNSMIL at the Mitiga detention facility, the Abu Salim, and other places of detention nominally under the control of the Ministry of Interior.<sup>485</sup>

294. Another form is forcing men and boys ‘to witness sexual violence against women and girls (including lethal rape with objects).’<sup>486</sup> This perpetuates fear and contributes to the coercive environment. There are also frequent reports of men and boys being ‘forced to rape women and girls, including family members,’<sup>487</sup> and sometimes women are also forced to perpetrate sexual violence against men and boys. A mental health provider shared reports with the WRC of how one young man was forced to rape his twin sister and another who was forced by guards to have intercourse with a female corpse.<sup>488</sup>

#### **E. Discrimination**

295. As already explained in Section II of this Communication, since 2011 migrants and refugees have been systematically targeted for attack and abuse on the basis of their suspected ‘illegal’ migration status. After the outbreak of armed conflict in Libya in February 2011, the conditions for civilians, including the migrant population, quickly deteriorated as the result of violent clashes, the proliferation of arms among the population, and the general climate of lawlessness. The perilous situation of Black migrants and refugees was compounded by racist or otherwise prejudiced beliefs held by Libyans, and they became the target of frequent physical and verbal attacks. At first, Sub-Saharan

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<sup>484</sup> UNSMIL and OHCHR, ‘*Detained and Dehumanised*’, p. 22.

<sup>485</sup> UNSMIL and OHCHR, *Abuse Behind Bars*, p. 5.

<sup>486</sup> WRC, ‘*More Than One Million Pains*’, p. 2.

<sup>487</sup> *Ibid.*

<sup>488</sup> *Id.*, p. 23.

Africans were specifically targeted because of the belief that ‘African mercenaries’ had fought alongside Gaddafi forces.<sup>489</sup> This was the experience of Witness 6 in **Um al-Aranib** in 2016, while being held by a ‘sponsor’ and forced to work for him:

*Witness: After this week this guy started to talk to me sometimes. After we began to talk with him here and there, he asked me where I was from. He said people in Darfur are slaves and asked why I am in free Libya. He talked to me in a very provocative way, ‘because you are being humiliated, outcasted by your president so now you’re coming here to destroy our country.’ I explained to him we’re not what you think of. He said ‘because you’re Sudanese when the revolution started you took side with Gaddafi to kill Libyans.’ We said we didn’t know anything about that, we just came here to have a better life.<sup>490</sup>*

296. As a consequence, armed militias captured and detained hundreds of Sub-Saharan Africans in the weeks after the conflict first erupted. Captured migrants and refugees were detained alongside thousands of suspected Gaddafi soldiers and loyalists where they faced severe ill treatment, in some cases leading to death.<sup>491</sup> Although beatings and other physical mistreatment was widespread, those suspected of being ‘African mercenaries’ were reportedly subjected to the worst treatment.<sup>492</sup> One individual told AI of his experiences after being picked up by a Libyan man near Sirte:

*Witness: He drove us to a militia in Misrata, told them that he believed we were mercenaries and left us there. We were told to remove our shirts and beaten with a rope on our back. They accused us of being mercenaries. The next day I was taken to a room where they gave me electric shocks to various parts of my body – including my arms and my back. The following night they tied my legs to a chair, forced me to bend over and beat me with a stick on my back.<sup>493</sup>*

297. By 2012, migrants and refugees were targeted less often on the suspicion of being ‘African mercenaries.’ Instead, they were targeted due to their suspected ‘illegal’ immigration status,<sup>494</sup> particularly after the shift in the conflict economy that occurred at this time and the DCIM’s formation.<sup>495</sup> From this point onwards, migrants and refugees were frequently arrested inside their homes, or seized at checkpoints or from the streets by

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<sup>489</sup> AI, *Libya: Rule of Law or Rule of Militias?*, p. 29.

<sup>490</sup> [REDACTED].

<sup>491</sup> AI, *Militias Threaten Hopes for New Libya*, February 2012, p. 5, available at: [https://www.amnesty.nl/content/uploads/2016/12/libya\\_i\\_report\\_i\\_militias\\_threaten\\_hopes\\_for\\_new\\_libya\\_-\\_no\\_pic.pdf?x65391](https://www.amnesty.nl/content/uploads/2016/12/libya_i_report_i_militias_threaten_hopes_for_new_libya_-_no_pic.pdf?x65391).

<sup>492</sup> AI, *Libya: Rule of Law or Rule of Militias?*, p. 32.

<sup>493</sup> AI, *Militias Threaten Hopes for New Libya*, p. 20.

<sup>494</sup> *Id.*, p. 19.

<sup>495</sup> *See supra* Section II.

militias and armed groups. They would then be taken to official or unofficial detention facilities. Although, in principle, migrants and refugees of all nationalities were vulnerable to detention because of their immigration status, intersectional discrimination on the grounds of race, nationality, religion, and gender was also prevalent. Sub-Saharan Africans were particularly targeted because of long-standing and widely held racist and xenophobic attitudes towards them. The testimony collected for this Communication are corroborated by the patterns evidenced in publicly available reports.

298. Targeted because of suspected illegal migration status, Witness 12 was arrested at a checkpoint in Tripoli in March 2015. He was brought to a location he identified as a prison in [REDACTED], where he was extorted and discriminated against:

*Witness: There were armed groups blocking the roads, they were taking all the black people. Him, the Syrian, he understood Arabic. There were attempts where we were able to escape them but once it was not the case, and they arrested me. They put me in jail and said, we're not going to leave you, we're going to make you travel. And if you don't pay, we're going to make you work. I did not want to but after a while, I had to accept.<sup>496</sup> [...]*

*Interviewer: And what kind of insults did they say? Did you say racist slurs?*

*Witness: Yes, racist slurs. They said, you're leaving your house to come here, we're going to kill you. A lot of things like that.<sup>497</sup>*

299. In turn, Witness 10 described the discriminatory treatment against Black Africans in **Zawiya**, where she and her family were being held. As explained above,<sup>498</sup> migrants and refugees at that location were forced to bury mutilated bodies, all of them Black.<sup>499</sup> Witness 10 particularly recounted the words of her captors: “‘ibeidad,’ all you blacks you are slaves.”<sup>500</sup>

300. The difference in treatment between ‘white’ (a term often used to describe individuals from Arab or Asian countries) and Black migrants and refugees is palpable, as evidenced by Witness 3’s experience in **Sar Adassa**, where only Libyans were given food.<sup>501</sup> This also resonates with Witness 1’s experience, during and following an interception at sea:

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<sup>496</sup> [REDACTED].

<sup>497</sup> [REDACTED].

<sup>498</sup> See *supra* Section III.A.3 and III.F.

<sup>499</sup> [REDACTED].

<sup>500</sup> [REDACTED].

<sup>501</sup> [REDACTED].

*Witness: [...] inside of 110 people, there was one Libyan guy, but we didn't know he was Libyan or another citizen, he was a white man. So, they said, 'Who is Libyan? One of you is Libyan?' We didn't know, but finally, he raised his hand and, ok, they treat him very well.*

*[...] Then finally, all 110 travelled in one very crowded bus to a big prison, or police station, it's a prison definitely, at 10pm. It's Zuwara, inside Zuwara. Then, they separate us by nationality or by colour: all the white people belongs [sic] alone and we are Eritrean and Somalian, 66 people. Even out of 66, they remove the two girls to put with other girls together.<sup>502</sup>*

301. Witness 8 described the xenophobic behaviour towards migrants and refugees at **DCIM Gharyan**: 'They were saying so much that the immigrants we are not good people.'<sup>503</sup>

302. Amongst groups of migrants and refugees of different nationalities, different treatment was commonly afforded on the basis of which nationalities were charged more for their trip or were sold as slaves at higher prices. This was explained to Witness 7 at an unofficial detention setting in **Sabratha**:

*Witness: They come to say that there is another trip to Italy. Everyone was happy to go. After that they took some Somalians, Ethiopians and people from Cap vert. The Sudanese they argued that 'why we were excluded from this trip because we too have been here for a long time.' They said 'you Sudanese are only paying in dinar but these are paying in dollars.' So they said 'we prioritise the people who pay good money.'<sup>504</sup>*

303. This account resonates with that of Witness 6 concerning a place of captivity in **Um al-Aranib**:

*When the trafficker came he said that Eritrean, Guineans, people from Burkina Faso should pay in dollars and the Sudanese should pay in dinar. We asked them why this difference. He said that 'Habash' (in reference to Eritreans and Ethiopians) have more people in Europe so they can afford to pay in foreign currency. All these nationalities (Habash), each had to pay 5000 dollars. The Sudanese should pay 2500 dinars.<sup>505</sup>*

304. These excerpts also point to certain nationalities being afforded preferential treatment in Libya. Public reports have underscored that East African nationals were the vast majority at DCIM Kufra.<sup>506</sup> GI-TOC also reported that all the detainees at the Abu Salim

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<sup>502</sup> [REDACTED].

<sup>503</sup> [REDACTED].

<sup>504</sup> [REDACTED].

<sup>505</sup> [REDACTED].

<sup>506</sup> Malakooti, *The Political Economy*, p. 61.

detention centre in Tripoli were East African, including Eritreans, Ethiopians, Somalis, and Darfuris.<sup>507</sup> Likewise, the al-Nasr detention centre was almost exclusively populated by Sub-Saharan Africans in November 2018, including nationals from Côte d'Ivoire, Mali, Eritrea, Ghana, Cameroon, and Nigeria.<sup>508</sup>

305. The discrimination faced by migrants and refugees in Libya must be understood from an intersectional perspective. As described above, nationality is only one factor that determines the difference in treatment received. The survivors interviewed for this Communication also reported experiences that explicitly integrate discrimination on the basis of migration status as well as the grounds of perceived nationality, religion, race (or ethnicity), and gender.

306. Witness 7, for instance, witnessed in **Brak al-Shati** the infliction of severe pain and suffering aimed at certain nationalities, particularly 'Habash,' Somalians, Eritreans, and individuals from Cape Verde,<sup>509</sup> while Sudanese seem to enjoy 'some sort of freedom' within the camp.<sup>510</sup>

307. Oftentimes, witnesses recounted incidents in which smugglers, traffickers, or Libyan authorities inquired whether they were Christian or Muslim, and afforded different treatment on that basis. Witness 14, who was detained at an unspecified centre in **Benghazi**, recalled that:

*Witness: We had to tell them if we were Christian, and the Muslim detainees had authority over the rest of us. But apart from this, the only difference in treatment was that the Muslim detainees got given some cigarettes.*<sup>511</sup>

308. In other cases, however, the difference in treatment translated into ill treatment. Witness 1 described the inhumane conditions inflicted by smugglers on Christians while in transit from **Sabha** to **Bani Walid**, including the deprivation of water.<sup>512</sup> Later, in **Tripoli**, the Witness again faced discrimination from a taxi driver, who claimed he would have sold the victim to another smuggler if he had not been Muslim, which Witness 1 pretended to be in order to protect himself.<sup>513</sup>

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<sup>507</sup> *Id.*, p. 87.

<sup>508</sup> *Id.*, p. 76.

<sup>509</sup> [REDACTED].

<sup>510</sup> [REDACTED].

<sup>511</sup> [REDACTED].

<sup>512</sup> [REDACTED].

<sup>513</sup> [REDACTED].

309. Notwithstanding the discrimination faced in informal settings, the same Witness also experienced discrimination based on nationality and religion from police authorities at **DCIM Janzour and DCIM Tariq al-Sika:**

*[DCIM Janzour]*

*Witness: Finally, it was, at what time I forget, there was fasting for Muslims, Ramadan, there were some police who were very kind with us, but some also very cruel with us. On that day, when it is the start for Ramadan, they said for Muslims to keep fasting, be alone here [they separated them, put them in a different area], even also persons who are Christians who are not fasting, be alone here [in another area]. Out of Eritreans, we are all, most of us, there were only five Muslims, the rest Christians. So, when we became alone as Christians, they hate us. Even the police who had been very kind to us said, 'You are Christian? Go to hell, we don't care about you.' They closed Nigerians and others, maybe 70 or 80, with us in one very narrow room and they give us food after the Muslims eat and take a rest. That means when they have food, if there is remaining food, they give us. But before them, never. Only in the morning, one bread.<sup>514</sup>*

*[DCIM Tariq al-Sika]*

*Witness: We have only 15 or 14 people, Eritreans alone, so even also the situation with everybody, from the soldiers who knows we are Eritrean, they beat us, insult us, everyone for us, because they hate Eritreans at that time. They only had a good relationship with Somalian guys. So, we were at a small corner alone. No one contacts with us, especially even also they did not give us full food as everybody [else], because they hate us, they think of us as enemies for them. We even don't have any clothes, any bags; everyone who wore good clothes or telephones or money in the pocket, they have checked and took them. And other clothes, they gave to other citizens in the detention, but don't allow any for us. Also, they took our telephones. We don't have any.<sup>515</sup>*

310. Supporting the findings of multiple publicly available reports, the testimonies of survivors interviewed for this Communication indicate that it was not only Christians who appeared to be at increased risk of ill treatment, but also members of other religious groups. This is evidenced, for example, by Witness 5's encounter with a group of 'Asma boys' in **Gilgares/Gergarish:**

*Witness: Once, when I was with friends, the Asma boys stopped us. One of them checked me, made me take off my clothes. I think they took some dinars from me. He found a 'Juju' –like a pouch/charm we use– on a friend, and they said it is haram [forbidden]*

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<sup>514</sup> [REDACTED].

<sup>515</sup> [REDACTED].

*and he beat him so bad. And then they want to kill us. He asks why we use that. We can't explain it in Arabic, so they beat us.*<sup>516</sup>

311. A further ground for discrimination is the gender of migrants and refugees. In one instance, Witness 11 described that smugglers in **Bani Walid** extorted men and women for different amounts, exploiting the women's special position of vulnerability in that setting:

*Witness: But the women sometimes they paid because they intimidated them.*

*Interviewer: So the women paid double?*

*Witness: Double, sometimes triple.*<sup>517</sup>

312. Women have been subjected to specific forms of discrimination that also intertwine with gender norms in Libyan society. For example, Witness 1 reported that [REDACTED] was forced to wear a headscarf at **DCIM Tariq al-Sika**, where female migrants and refugees were obliged to follow Islamic norms regarding dress:

*Witness: She said in Tigrinya language so the police can't listen, '[Witness], please, when you get close to me, don't kiss me or hug me. It's not allowed in Arabic, in Muslim culture. Only by your hand, shake hands. If you try to hug me, he will get angry and send us apart. He will never again let us be in contact. This is not allowed as Arabic culture.' 'Ok, I am trying,' I said. After one year of not seeing her, I wanted to hug her. But it's not Muslim culture. She's wearing Muslim clothes, covered her hair, only her face is visible. If she opened her hair or wore trousers without covering, they will never allow to do like that...*

*[...] Even you are Christian or Muslim, you have to look like a Muslim, the females did.*<sup>518</sup>

313. Oftentimes, the discrimination inflicted upon women was of a sexual nature. [REDACTED] recounted the treatment afforded to women in **Bani Walid**, where two of the smugglers, **Kidane and Welid**, would condition the women's freedom upon having sexual intercourse with him.<sup>519</sup>

314. In several instances, gender-based discrimination also intertwined with racism. This is well encapsulated by Witness 3, recounting his experience at [REDACTED] in **Sabha**:

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<sup>516</sup> [REDACTED].

<sup>517</sup> [REDACTED].

<sup>518</sup> [REDACTED].

<sup>519</sup> [REDACTED].

*Witness: [I]t was the guys there that were using the women, inviting friends, sometimes taking the women outside. The first time I met this man, Ali, was when he brought some friends to see us, like a slavery, it was kind of racism atmosphere, we were coming out to sit in there, and then they looked at us and laughed. That's the first time that I met him.*<sup>520</sup>

315. Likewise, Witness 8 described how women were forced to perform sexual acts, and were offered as commodities to men outside the camp in Sabratha.<sup>521</sup>

316. More generally, AI reported on the use of racist and offensive language against migrants and refugees by official social media pages of seven DCIM centres, as well as the circulation of racist and xenophobic views on Libyan media channels. Sub-Saharan Africans are regularly subjected to racist treatment by private individuals, officials, members of militias, and armed groups, or even staff members of international humanitarian organisations and their partners.<sup>522</sup>

#### **F. Forced involvement of migrants and refugees in the armed conflict**

317. The crucial nexus between the armed conflict and alleged crimes committed against migrants and refugees underlines the entire Communication and will be further elaborated *infra* when discussing the ICC's jurisdiction over these crimes. This section describes some accounts in which migrants and refugees were particularly targeted by Libyan armed groups during the armed conflict ongoing in the country since 2011.

318. The safety of indefinitely detained migrants and refugees has been dangerously compromised in the context of the armed conflict, particularly at times of heightened hostilities, for example in August-September 2018 and in the conflict that reignited following the attack on Tripoli in April 2019. Witness 1 recounted that, on 27 August 2018, fighting broke out around **DCIM Salah Aldin**. On that occasion, the survivor described how the police authorities abandoned the centre, locking migrants and refugees inside while they were surrounded by bombings, thereby inflicting mental suffering:

*Witness: But we stay until 27 August on Salah Aldin. At that time, on the night of 27, it started war, among each other. So, for the next morning, 28 August morning, it became very, very noisy. It became dangerous; something like a bomb made noise around us. It's very shouting. We are closed; the police left us and escaped. No one was with us, they*

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<sup>520</sup> [REDACTED].

<sup>521</sup> [REDACTED].

<sup>522</sup> AI, *Between Life and Death*, p. 43.



*have locked us in. Oh my god, how can we go outside? Nothing we can do. Finally, at 9 or 10am, I don't know, I don't remember which, was the war. One came close and entered to us, to open the door from outside. He came with guns, very small and wearing civilian clothes, they have guns: 'What are you? What are you doing?' 'We are refugees,' talking in Arabic. They said, 'Ok, no problem, now Libya has become free. We will come again, you will be free.' He closed us again and left.<sup>523</sup>*

319. Following this, a group of Somalis working in the facility opened the doors and released them. The majority of migrants and refugees escaped immediately, nonetheless Witness 1 and a group of nine other people, among them minors and an injured person, tried to seek refuge in a large **mosque** at a walking distance from **DCIM Salah Aldin**.<sup>524</sup>

320. Additionally, migrants and refugees were at times forced to take part in the fighting. Witness 1 described that he and other detained migrants and refugees were sometimes forced to transport weapons in **Tripoli**.<sup>525</sup> Sometimes shooting by other armed groups would erupt and some migrants and refugees also took part in shooting back, in the name of the al-Saraj government military.<sup>526</sup>

321. Likewise, [REDACTED] had a similar experience in **Sabratha**: 'We were continuously taken to the farming or the houses. Even some were taken to fight as well. If you know how to hold a gun, you were taken to fight.'<sup>527</sup> [REDACTED] further described how he and others were forced to support the hostilities, for example by mounting machine guns, transporting ammunition and loading missiles.<sup>528</sup>

[REDACTED]: *We were asked to make holes for snipers in the wall [...]. After we did this, they put a DShK.<sup>529</sup> [...] On the other wall there is an RPG [for Rocket Propelled Grenade] as well.<sup>530</sup>*

*[...] After we reached there, we met black Libyans in the new building. They were in uniform but a mixture of uniforms. We gave them the ammunition. They were in the second floor, they told us to carry the ammunition to the 2nd floor. The bag of bullets was very heavy. I was carrying it on my shoulder. While we're carrying this, we're bombarded heavily, fall down and drop the bag.<sup>531</sup> **The following day I was taken to the house of the father of Amu, the house of the family of Al-Dabbashi. There, there was***

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<sup>523</sup> [REDACTED].

<sup>524</sup> [REDACTED].

<sup>525</sup> [REDACTED].

<sup>526</sup> [REDACTED].

<sup>527</sup> [REDACTED].

<sup>528</sup> [REDACTED].

<sup>529</sup> Degtyarova-Shpagina Krupnokaliberny is a Russian heavy-machine gun that fires 12.7mm x 108 calibre cartridges.

<sup>530</sup> [REDACTED].

<sup>531</sup> [REDACTED].

*a storage with a missile. It had to be handed very carefully, some electronic devices, it has to be cautiously handled. [...]*

*Interviewer: And this missile was in the store where you were brought?*

*[REDACTED]: Yes. This was the house of Al-Amu's father. We transported/lifted this missile into this bulletproof land cruiser. And then the land cruiser left.<sup>532</sup>*

322. In **Zawiya**, where Witness 10 remained for nine months, she reported several bombings. Again, migrants and refugees were forced by armed groups to bury the deceased:

*Interviewer: You were mentioning that there were bombings during the nine months you were there?*

*Witness: There were many, many... There were not only one or two exploited [sic], there are many, many explosions, one of which there were many people massacre, this is why the Libyan they came to take the guys by force, they agree to pay 20 dinars per day to bury the dead people, some of which are mutilated, were carried in sacks, body parts in sacks, and many, many explosions.<sup>533</sup>*

323. Similarly, Witness 1 described how weapons were hidden in detention centres such as **DCIM Tariq al-Sika**, where he was detained. He was also forced to carry and load weapons onto vehicles:

*Witness: Also, that week there was a big store for weapons inside. We were sleeping here and this home is full of weapons, instruments for war. They have hidden them inside the people, the migrants. Then, when it was war, [they say]: 'Come on, bring this mortar, this RPG.' These weapons of war, even missiles for airplanes, it was inside.*

*Interviewer: So, they force people to work with the arms, to fight or just to organize the weapons?*

*Witness: To organise, to load from the store to the car. Also, they have to go in other stores to load the weapons.<sup>534</sup>*

324. Witness 1 went on to describe how migrants and refugees were brought to the fighting zone in **Ain Zara**, where they were directly put in harm's way:

*Witness: I have gone three times or four times at the place of war, it was Ain Zara. The soldiers from the place of the war, it's a branch of, from the detention centre. They are friends. So, if they have friends, he called to a boss in Tariq al-Sika, 'Oh, my friend, we*

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<sup>532</sup> [REDACTED].

<sup>533</sup> [REDACTED].

<sup>534</sup> [REDACTED].

*want 10 people to help us clean our room.’ He said, ‘Ok.’ Then he comes and gets us, and takes us where? We don’t know. A place of war. So many guns were being shot. You have to be quiet, take this from here to there, load weapons, take it from this side to that side. At that time, when we have gone, so many soldiers said, ‘Please do with us, we will give you 800–1000 dinar monthly to fight with us. Why do you want to go to Europe? Europe is nothing. We will cover everything if you will be a soldier.’<sup>535</sup>*

325. This was also the experience of Witness 5 in [REDACTED], a camp reportedly owned by [REDACTED].<sup>536</sup>

326. In addition to the direct dangers posed by forced participation in hostilities or in facilitating the fighting, access to food, medical treatment, and other necessities is severely restricted in times of active conflict. The armed conflict also had repercussions on access to basic livelihood, as described by Witness 5 in **Sar Adassa** sometime in 2014: ‘That was a time where you couldn’t even get bread, because of all the fighting.’<sup>537</sup> Witness 12 also spoke of armed conflict’s impact on migrants and refugees outside detention in **Tripoli**, particularly with regard to access to food and safety.<sup>538</sup>

327. Moreover, detention facilities caught in the crossfire are vulnerable to inadvertent damage and are also sometimes the target of attacks. Witness 8 described how a ‘campo’ was attacked in **Sabratha**, and how all the smugglers who usually stayed in the camp left with no explanation, aware of the imminent attack.<sup>539</sup> The uniformed attackers were very well prepared and armed with ‘rocket launchers, machine guns,’ and other weapons.<sup>540</sup>

328. On that occasion, Witness 8 was stabbed in the back while attempting to run from the attack, an injury that persists to this day.<sup>541</sup>

329. Migrants and refugees are also vulnerable to attacks related to the armed conflict even outside detention facilities. Witness 5 recalled a bombing around July 2014 that killed an unknown number of migrants living in the Tripoli neighbourhood of Abu Salim, when fighting was happening in and around Tripoli.<sup>542</sup>

330. Public reports of other violent incidents inflicted on migrants and refugees in the course of the armed conflict further corroborate the witness accounts. For instance, the DCIM-managed **Tariq al-Matar detention centre**, on the outskirts of Tripoli, where 1,900

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<sup>535</sup> [REDACTED].

<sup>536</sup> [REDACTED].

<sup>537</sup> [REDACTED].

<sup>538</sup> [REDACTED].

<sup>539</sup> [REDACTED].

<sup>540</sup> [REDACTED].

<sup>541</sup> [REDACTED].

<sup>542</sup> [REDACTED].

migrants and refugees were held, was shelled on the evening of 3 September 2018, leading to the injury of a detained migrant and material damage.<sup>543</sup> In a more deadly attack on 3 July 2019, the LAAF reportedly launched an airstrike on the GNA-operated **Tajoura detention centre** killing at least 53 migrants and refugees and injuring another 130.<sup>544</sup>

331. On 23 April 2019, armed men raided the **Qasr Ben Ghashir detention centre**, located in the south of Tripoli, and shot a number of people in detention.<sup>545</sup> According to UNHCR, at least 12 people were hospitalised as a result of their injuries,<sup>546</sup> and AI further added that while the identity of the shooters had yet to be established, some witnesses had reportedly recognised the logo of the self-proclaimed LAAF on a vehicle used by the attackers.<sup>547</sup>

## IV. Legal Analysis

332. Having documented and described the patterns of violence against migrants and refugees in Libya and introducing example cases based on witness testimonies, this Section aims to provide a legal analysis of these facts under the Rome Statute.

### *Clarification on the use of terms ‘smuggling’ and ‘trafficking’*

333. The terms ‘smuggling’ and ‘trafficking’ are recurrent in the background and facts underlying this Communication. Indeed, these terms are frequently used, often interchangeably, in public discussion and documentation of violence against migrants and refugees in Libya. Both are considered transnational crimes under the UN Convention Against Transnational Organized Crime.

334. Referring to the situation of migrants and refugees in Libya only in these terms is, however, problematic in that it unduly limits the legal framework to deal with the situation.

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<sup>543</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 41.

<sup>544</sup> MSF, *Trading in suffering*; UNSC, Report of the UN Secretary-General to the Security Council on Libya, S/2020/360, 5 May 2020, para. 43, available at: [https://unsmil.unmissions.org/sites/default/files/s\\_2020\\_360\\_e.pdf](https://unsmil.unmissions.org/sites/default/files/s_2020_360_e.pdf).

<sup>545</sup> MSF, *Time running out for evacuations of trapped refugees in Tripoli amid shooting*, 26 April 2019, available at: <https://www.msf.org/time-running-out-evacuations-refugees-tripoli-amid-shooting-libya?component=video-262778>.

<sup>546</sup> UNHCR, *UNHCR evacuates hundreds of detained refugees in Libya to safety*, 24 April 2019, available at: <https://www.unhcr.org/news/press/2019/4/5cc09a824/unhcr-evacuates-hundreds-detained-refugees-libya-safety.html>.

<sup>547</sup> AI, *Libya: Horrific attack targeting refugees and migrants at detention centre must be investigated as a war crime*, 24 April 2019, available at: <https://www.amnesty.org/en/latest/news/2019/04/libya-horrific-attack-targeting-refugees-and-migrants-at-detention-centre-must-be-investigated-as-a-war-crime/>.

It sets aside the complex and overarching system of violence and exploitation that occurs in the course of and alongside smuggling and trafficking. To the contrary, this Communication argues that many of these concomitant criminal acts against migrants and refugees can be characterised as crimes against humanity and war crimes—provided that the necessary contextual and mental elements are met, and thus investigated and prosecuted as such.

335. A short analysis of the legal concepts of smuggling and trafficking is warranted here. The first-ever agreed definition of trafficking was incorporated into the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol).

336. The Trafficking Protocol defines the term ‘trafficking in persons’ as follows:

*‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>548</sup>*

337. Three key elements must be present for the crime of human trafficking to exist: (i) the act or what is done (recruitment, transport, transfer, harbouring and the receipt of persons), (ii) the means, i.e. how the act is done (threat or the use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, and giving payments or benefits), and (iii) the purpose, why it is done i.e. for the purpose of exploitation which includes, but is not limited to, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

338. Human smuggling, on the other hand, is understood to be a consensual transaction. The Protocol against the Smuggling of Migrants defines it as ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a

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<sup>548</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Article 3(a).

person into a State party of which the person is not a national.’<sup>549</sup> Those fleeing conflict and persecution in different parts of the world often resort to paying people smugglers to cross borders irregularly, when they cannot find any legal route to reach safe countries.

339. In light of these definitions, it should be noted that **human trafficking** is to be distinguished from **human smuggling** in regard to four key aspects. First, as opposed to smuggling which involves **consent**, trafficking victims have either never consented or if they initially consented, that consent has been rendered meaningless by the coercive, deceptive, or abusive action of the traffickers. Second, migrant smuggling ends with the migrants’ arrival at their destination, whereas trafficking involves the ongoing exploitation of the victim. Third, smuggling is always transnational, while trafficking may not be and does not require the crossing of an international border to exist. Fourth, the source of profits in both cases differs. In smuggling cases, profits are derived from the transportation, facilitation of the illegal entry, or stay of a person in another country. In trafficking cases profits are derived from exploitation.<sup>550</sup>

340. Under the international definition of human trafficking,<sup>551</sup> a wide range of acts are considered as such. These include but are not limited to forced labour, slavery, servitude, child sexual exploitation, enforced prostitution, and the exploitation of prostitution. In many cases, these acts overlap with the descriptions under the Rome Statute for the crimes against humanity of enslavement, sexual slavery, and enforced prostitution,<sup>552</sup> as Section IV.B.3 analyses in detail.

341. Indeed, the prevalent narrative focused on smuggling and trafficking obscures the fact that in the course of and alongside these conducts, several other international crimes under the Rome Statute are, in fact, perpetrated against migrants and refugees in Libya. Failing to qualify the violent acts against migrants and refugees as international crimes under the Rome Statute hinders the prospect of holding the perpetrators to account for some of the most serious crimes of concern to the international community. It also hinders the chance of providing adequate avenues to justice and redress for victims.

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<sup>549</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Article 3(a).

<sup>550</sup> UN Office on Drugs and Crime (UNODC), *Migrant Smuggling FAQs*, available at: <https://www.unodc.org/unodc/en/human-trafficking/migrant-smuggling/FAQs.html#m2>.

<sup>551</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Article 3(a).

<sup>552</sup> ICC, Elements of Crimes, Articles (7)(1)(c), footnote 11; (7)(1)(g)-2, (7)(1)(g)-3.

## **A. ICC jurisdiction over the crimes committed against migrants and refugees in Libya**

342. The crimes committed against migrants and refugees in Libya fall under the United Nations Security Council (UNSC) referral to the Prosecutor of the ICC in Resolution 1970 of 2011.<sup>553</sup> The Resolution invoked Chapter VII of the UN Charter, finding that the situation in Libya constituted a threat to international peace and security, which in turn justified an ICC intervention.

343. The situation in Libya has further deteriorated since then, spiralling into armed conflict with disastrous consequences for civilians, including migrants and refugees in the country.<sup>554</sup> In such a context, as already described at length in the Section II, the system of detaining and exploiting migrants and refugees transformed itself to include new and competing actors. It also prepared the ground for the widespread commission of crimes against migrants and refugees, including crimes against humanity.

344. As part of its ongoing investigation on Libya since 15 February 2011<sup>555</sup> and, as detailed in Section II.A, at least since 2017, the OTP has been observing with great concern the commission of crimes against migrants and refugees in Libya, as evidenced in various reports and statements to the Security Council.<sup>556</sup>

345. Nonetheless, a formal investigation into these cases has yet to be opened. As argued in this Communication, Resolution 1970 gives the ICC jurisdiction to investigate and prosecute crimes against humanity and war crimes committed against migrants and refugees in Libya.

### **1. Legal standard for the exercise of ICC jurisdiction**

346. Regardless of whether a State is a Party to the ICC, pursuant to Article 13(b) of the Rome Statute, the ICC can exercise its jurisdiction with respect to the crimes listed in the Statute if the Security Council—acting under Chapter VII of the Charter of the United

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<sup>553</sup> UNSC Resolution 1970 (2011), S/RES/1970, 26 February 2011, available at: <https://undocs.org/S/RES/1970%282011%29>.

<sup>554</sup> See Section II.B on the relationship between the armed conflict and the situation of migrants and refugees in Libya.

<sup>555</sup> ICC, Situation in Libya, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Warrant of Arrest, Pre-Trial Chamber I (15 August 2017); *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Second Warrant of Arrest, Pre-Trial Chamber I (4 July 2018); *The Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Pre-Trial Chamber I (27 June 2011); *The Prosecutor v. Al-Tuhamy Mohamed Khaled*, Warrant of Arrest for Al-Tuhamy Mohamed Khaled, Pre-Trial Chamber I (18 April 2013).

<sup>556</sup> Statement of ICC Prosecutor to the UNSC on the Situation in Libya, 8 May 2017, para. 25–27.

Nations—refers a situation to the Prosecutor.<sup>557</sup> As a consequence, whenever such a referral is made, the ICC may exercise jurisdiction over crimes committed in the territory of States which are not Party to the Statute, and by nationals of States not Party to the Statute.

347. Only in two occasions has the UNSC referred situations to the Prosecutor: in 2005 for the situation in Darfur, Sudan;<sup>558</sup> and, most importantly for the purpose of this Communication, in 2011 for the Situation in Libya. Hence, precedents to interpret the scope of UNSC referrals are not abundant.<sup>559</sup> The standards developed by the Court for the cases in which a State Party refers a situation to the Prosecutor<sup>560</sup> may also become relevant here.

348. The situations referred to the Court have a general character and should not include specific crimes for the Prosecutor to investigate.<sup>561</sup> Thus, they can be defined more generally, according to temporal, territorial, and personal parameters.<sup>562</sup> Under Article 53 of the Statute, the Prosecutor may decide to open an investigation within the framework of a referred situation. In the *Lubanga* decision on the Prosecutor’s application for an arrest warrant, the PTC I determined that

*[A] case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation under investigation and fall within the jurisdiction of the Court.*<sup>563</sup>

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<sup>557</sup> Rome Statute, article 13.

<sup>558</sup> UNSC, Resolution 1593 (2005), 31 March 2005, UN Doc S/RES/1593(2005).

<sup>559</sup> On 1 November 2021, the ICC Appeals Chamber rendered a decision on an interlocutory appeal in the case of Ali Muhammad Abd-Al-Rahman (“Ali Kushayb”), in which the Defence challenged the Pre-Trial Chamber’s interpretation of UNSC referrals. This decision clarifies certain aspects of the Court’s exercise of jurisdiction and applicable law in cases stemming from UNSC referrals of situations concerning non-State Parties. See ICC, Situation in Darfur, Sudan, *The Prosecutor v. Ali Muhammad Abd-Al-Rahman (“Ali Kushayb”)*, Judgment on the Appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’ (ICC-02/05-01/20-302)”, Appeals Chamber (01 November 2021).

<sup>560</sup> Rome Statute, art. 14.

<sup>561</sup> ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Callixte Mbarushimana*, Decision on the ‘Defence Challenge to the Jurisdiction of the Court’, Pre-Trial Chamber I (26 October 2011), para. 27; *Abd-Al-Rahman*, Judgment on the Appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’”, para. 25.

<sup>562</sup> W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2016, p. 372; ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, Pre-Trial Chamber I (10 February 2006); *Abd-Al-Rahman*, Judgment on the Appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’”, para. 26.

<sup>563</sup> *Lubanga*, Decision on the Prosecutor’s Application for a Warrant of Arrest, para. 21.



349. This has been the standard consistently set by the PTC I for situations referred by States Parties to the Rome Statute or the Security Council, including in regards to the Situation in Libya.<sup>564</sup> Furthermore, in the *Mbarushimana* case, which is part of the Situation in the Democratic Republic of Congo (DRC) referred to the Court by the DRC Government, the Chamber established that:

*The territorial and temporal scope of a situation is to be inferred from the analysis of the situation of crisis that triggered the jurisdiction of the Court through the referral. Crimes committed after the referral can fall within the jurisdiction of the Court when sufficiently linked to that particular situation of crisis*<sup>565</sup> (emphasis added) [...] “It is the existence, or non-existence, of such link, and not the particular timing of the events underlying an alleged crime, that is critical in determining whether that crime may or may not fall within the scope of the referral.”<sup>566</sup>

350. Thus, the assessment of jurisdiction requires the existence of a sufficient link between the referred situation and the crimes allegedly committed. In general, such a link has been found whenever the alleged crimes occur in the context of hostilities and/or armed conflicts that underlie the referral to the Prosecutor and which ‘can stretch over a number of years.’<sup>567</sup>

351. The *Al-Werfalli* case is particularly relevant here,<sup>568</sup> where the ICC Pre-Trial Chamber I (PTC I) issued a warrant of arrest against this suspect on 15 August 2017 for murder as a war crime, due to his alleged responsibility for the execution of 33 people in the context of the Libyan situation.<sup>569</sup> On 4 July 2018, the PTC I issued a second arrest warrant against him for murder as a war crime for his alleged responsibility in the killing of 10 people in Benghazi on 24 January 2018.<sup>570</sup> In both cases, both the Prosecutor and the PTC I justified

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<sup>564</sup> See e.g. *Mbarushimana*, Decision on the ‘Defence Challenge to the Jurisdiction of the Court’, paras 21, 41 ; Situation in the Democratic Republic of the Congo, *The Prosecutor v. Callixte Mbarushimana*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I (28 September 2010), para. 6; ICC, Situation in Darfur, Sudan, *Prosecutor v Ahmad Harun and Ali Kushayb*, Decision on Prosecution application under art. 58(7), para. 14; ICC, Situation in Darfur, Sudan, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (“Omar Al Bashir”), Pre-Trial Chamber I (4 March 2009), paras 35 et seq.

<sup>565</sup> *Mbarushimana*, Decision on the ‘Defence Challenge to the Jurisdiction of the Court’, para. 21.

<sup>566</sup> *Id.*, para. 41.

<sup>567</sup> *Id.*, para. 50. See also *Abd-Al-Rahman*, Judgment on the Appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’”, paras 25-26.

<sup>568</sup> On 24 March 2021, Al-Werfalli was reportedly shot dead by unidentified attackers in Benghazi: <https://www.france24.com/en/middle-east/20210325-libyan-militia-leader-wanted-by-icc-for-war-crimes-killed-by-gunmen>; the circumstance is also mentioned in the Prosecutor statement to the UNSC of May 2021, para. 28: <https://www.icc-cpi.int/Pages/item.aspx?name=210517-otp-statement-uns-c-libya>.

<sup>569</sup> *Al-Werfalli*, Warrant of Arrest.

<sup>570</sup> *Al-Werfalli*, Second Warrant of Arrest.

the Court's jurisdiction over Al-Werfalli's criminal conduct by establishing the existence of a sufficient link, demonstrating that the alleged conduct was 'associated with the armed conflict underlying the referral by the Security Council.'<sup>571</sup>

352. In particular, such a link was found based on the fact that the Al-Saiqa Brigade, the armed group Al-Werfalli belonged to at the time, was involved in the country's non-international armed conflict (NIAC) since the days of the revolution against the Gaddafi regime until at least January 2018.<sup>572</sup> Based on this interpretation, acts amounting to crimes against humanity or war crimes committed during this conflict or in consequence thereof, may fall within the Court's jurisdiction as referred by the UNSC.

353. The PTC I thus interpreted the UNSC referral in a manner that includes conduct and actors not explicitly included in UNSC Resolution 1970. In this way, the Chamber affirmed two ways of establishing jurisdiction over crimes committed in Libya after 2011. The first one is a sufficient link with the UNSC's referral, namely the non-international armed conflict that ensued in Libya in 2011. The second is a sufficient link with relevant actors already active in the commission of crimes since 2011.

354. Notably, establishing sufficient links to the situation referred by UNSC Resolution 1970 for the purpose of jurisdiction, is not restricted to these two alternatives. Nothing would preclude the PTC I or the Prosecutor from establishing other links in different ways.

355. Based on the legal standards introduced above, the following paragraphs will show that the crimes committed in Libya against migrants and refugees, including in official and unofficial detention sites and other places of captivity, fall within the scope of the 2011, UNSC referral and under the Court's territorial, temporal, personal, and subject matter jurisdiction. This conclusion is based on an analysis of the parameters set by Resolution 1970 and the circumstances prompting it.<sup>573</sup>

*i. Jurisdiction ratione loci*

356. Territorial jurisdiction is determined by the referral to the situation in the 'Libyan Arab Jamahiriya'—now officially the State of Libya—thereby encompassing the State's whole territory, including the Libyan mainland and its territorial waters.<sup>574</sup>

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<sup>571</sup> *Al-Werfalli*, Warrant of Arrest, para. 23.

<sup>572</sup> *Al-Werfalli*, Second Warrant of Arrest, para. 20.

<sup>573</sup> Resolution 1970 (2011) states that the Security Council: '[...] 4. Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;'

<sup>574</sup> Montevideo Convention on the Rights and Duties of States, 1933, art. 1; and United Nations Convention on the Law of the Sea, art. 2.

ii. *Jurisdiction ratione temporis*

357. The UNSC framed the referral as starting on 15 February 2011, the date on which protests began in Benghazi following the arrest of human rights lawyer Fethi Tarbel and the consequent attacks against the civilian population by the Gaddafi government and other armed groups. The Communication asserts that the crisis situation in Libya is still ongoing, as the country has struggled to achieve political stability ever since the referral. Furthermore, Resolution 1970 did not include a temporal limit on the referral and the UNSC continues to remain actively seized of the matter.<sup>575</sup> The Prosecutor of the ICC continues to report periodically to the UNSC on actions taken based on the referral, further pointing out that the crisis situation has not yet ended. Hence, the ICC has temporal jurisdiction for crimes occurring after 15 February 2011 onwards, as long as they are connected to the situation underlying the UNSC referral (see *infra*).

iii. *Jurisdiction ratione personae*

358. Exceptions to the Court's personal jurisdiction are determined in Resolution 1970, in the following manner:

*6. [...] nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorised by the Council, unless such exclusive jurisdiction has been expressly waived by the State;*

359. Accordingly, the Court's personal jurisdiction extends to Libyan nationals and to citizens of States parties. Citizens of non-State parties to the Rome Statute may be included under the Court's personal jurisdiction, as long as their conduct occurs in Libya and is not related to operations established or authorised by the UNSC in Libya. The last statement issued by former ICC Prosecutor Fatou Bensouda, when addressing the Security Council in May 2021, in referring to mercenaries and foreign fighters in Libya, is a clear indication

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<sup>575</sup> This is evidenced in the continued engagement of the UNSC in the situation of Libya. See, most recently, UNSC, Resolution 2599, S/RES/2599, 30 September 2021, available at: [https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_res\\_2599.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2599.pdf)

that this is the accepted interpretation of Resolution 1970 for the sake of the Court's personal jurisdiction in Libya.<sup>576</sup>

iv. *Jurisdiction ratione materiae*

360. Resolution 1970 does not limit the Court's subject matter jurisdiction to exclude crimes committed against migrants and refugees in Libya. It is here submitted that, through the assessment of the crisis situation that triggered the UNSC referral, a sufficient link (or links) can be found to acts committed against migrants and refugees in Libya amounting to crimes under the Rome Statute. Furthermore, this assessment is also relevant for determining temporal jurisdiction for crimes committed after 2011.

361. As indicated above, Resolution 1970 was adopted in the context of the crimes allegedly committed by the Gaddafi regime against the civilian population which, according to the UNSC, represented a threat to international peace and security. In this sense, the preamble of the UNSC Resolution states:

*Deploping the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government*<sup>577</sup>

362. The situation, however, is not exclusively limited to the violence and crimes committed by the Gaddafi government against protestors, as the following clauses in Resolution 1970 (2011) reveal:

*Considering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity,*

[...]

*Expressing concern for the safety of foreign nationals and their rights in the Libyan Arab Jamahiriya*<sup>578</sup>

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<sup>576</sup> '[...] I must emphasise that crimes committed by mercenaries and foreign fighters on Libyan territory may fall under the jurisdiction of the Court, no matter the nationality of the persons involved.' Statement of ICC Prosecutor to the UNSC on the Situation in Libya, 17 May 2021, para. 22.

<sup>577</sup> S/RES/1970, Preambular clause 2.

<sup>578</sup> S/RES/1970, Preambular clauses 6 and 13:

“3. ‘Expressing concern for the safety of foreign nationals and their rights in the Libyan Arab Jamahiriya.’

363. Indeed, the Resolution not only covers violence and attacks against protestors, but is understood to cover the civilian population in Libya, including migrants and refugees, particularly through its inclusion of ‘foreign nationals.’ Hence, the protection of the safety and rights of migrants and refugees is an essential element of the crisis situation in Libya that threatened international peace and security, led to UNSC intervention, and the subsequent referral to the ICC.

## **2. Jurisdictional links between UNSC Resolution 1970 and crimes committed against migrants and refugees**

364. There are multiple ways and criteria to establish a jurisdictional link to the situation in Libya under ICC investigation since 2011, either in an alternative or cumulative manner. Following the PTC I reasoning as explained above, these criteria refer, firstly, to the existence of a jurisdictional link with the armed conflict ensuing in Libya due to the events in 2011. Secondly, the jurisdictional link exists because of the actors involved in the commission of crimes against migrants and refugees. Another important factor is the economic dimension of crimes against migrants and refugees, which fuels the ongoing Libyan armed conflict.<sup>579</sup> These criteria do not represent an exhaustive list and others may be found.

### *i. The crisis in Libya, the armed conflict and crimes against migrants and refugees since 2011*

365. The Court has jurisdiction over crimes listed in the Rome Statute committed against migrants and refugees in Libya in line with the reasoning presented in the *Al-Werfalli* and *Mbarushimana* cases. A nexus can be found between criminal conduct against migrants and the armed conflict ensuing as part of the crisis situation defined in the UNSC referral.

366. The government response to the 2011 protests led to a political crisis in Libya, which then turned into a security crisis and a NIAC following the fall of the Gaddafi regime. It is, in fact, this unstable and unsafe political scenario which caused the worsening of a dangerous, discriminatory, and violent environment against migrants and refugees.<sup>580</sup>

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<sup>579</sup> See Section II.B.3 on the conflict economy; Micallef, *The Human Conveyor Belt*, p. vii; Eaton, *Libya’s War Economy*; Malakooti, *The Political Economy*, pp. 73-74.

<sup>580</sup> *Ibid.*

367. In this setting, and as detailed in Sections II and III of this Communication, crimes against migrants and refugees, in particular those of Sub-Saharan origin, were already part of the 2011 situation. Fuelled by anti-Black sentiments, migrants were detained and targeted by armed groups fighting Gaddafi's regime, as they were thought to be used by the regime as mercenaries to quash popular protests.<sup>581</sup> Migrants and refugees have continued to be unlawfully detained, although in recent years the reasons for targeting them have changed. These have included, for instance, the possibility of profiting from the extortion of migrants and refugees (see *supra* Section III.A).
368. As previously elaborated, the current UN-supported Libyan Government is a consequence of the events of 2011. As will be further corroborated later on, State actors—including, but not limited to, the GNA (currently the GNU) and particularly the DCIM—along with non-State actors, are criminally responsible in the context of the 'widespread or systematic attack against the civilian population' included in the Security Council referral.
369. Another direct link to the situation as referred to the ICC in 2011 is that migrants and refugees have been coerced to participate, directly or indirectly, in the armed conflict in Libya. This sufficiently links the crimes committed against them with the UNSC referral. As this Communication asserts, this is the case, for instance, of Witness 1 in Tripoli,<sup>582</sup> of [REDACTED] in Sabratha,<sup>583</sup> and Witness 5 in [REDACTED].<sup>584</sup> Additionally, Witness 10 saw armed groups forcibly take migrants and refugees out of a facility in Zawiya to help dispose of deceased bodies following bombings.<sup>585</sup> These accounts are further corroborated in public documentation from Amnesty International and the US State Department, which have described that parties to the conflict force migrants and refugees to support military operations, such as through carrying weapons,<sup>586</sup> cleaning military bases, cooking food, and clearing unexploded ordnances.<sup>587</sup>
370. As part of the civilian population, migrants and refugees have also suffered attacks when getting caught in armed confrontation between warring parties, or with their living

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<sup>581</sup> HRW, *Libya: Stranded Foreign Workers Need Urgent Evacuation*, 2 March 2011, available at: <https://www.hrw.org/news/2011/03/02/libya-stranded-foreign-workers-need-urgent-evacuation>; D.D. Kirkpatrick, *Libyans Turn Wrath on Dark-Skinned Migrants*, New York Times, 4 September 2011, available at: <https://www.nytimes.com/2011/09/05/world/africa/05migrants.html?scp=1&sq=racism>.

<sup>582</sup> [REDACTED].

<sup>583</sup> [REDACTED].

<sup>584</sup> [REDACTED].

<sup>585</sup> [REDACTED].

<sup>586</sup> See also, [REDACTED]; AI, *Between Life and Death*, p. 8.

<sup>587</sup> US Department of State, *2018 Trafficking in Persons Report – Libya*.

conditions severely worsening as result of confrontations, such as lacking food or adequate shelter. Clear examples of this can be seen in the testimonies of Witness 5 on two occasions in Tripoli, one in Sar Adassa and another in [REDACTED]; of Witness 12 on a construction site in Tripoli; Witness 8 in a ‘campo’ in Sabratha; and Witness 1 after escaping DCIM Salah Aldin.<sup>588</sup>

371. Furthermore, public reporting included in Section III.F described other instances where migrants and refugees have been directly affected by the ongoing armed conflict. For instance, in the airstrike on the Tajoura detention centre on 3 July 2019, in which the LAAF reportedly attacked this GNA-operated centre, resulted in the death of at least 53 migrants and refugees.<sup>589</sup> Other examples include the shelling of the Tarik al-Matar centre on 3 September 2018<sup>590</sup> and the raid on the Qasr Ben Ghashir facility on 23 April 2019.<sup>591</sup> The fact that migrants and refugees were used as human shields to protect military objects<sup>592</sup> and to move ammunition<sup>593</sup> supports the existence of a link between the conflict and the crimes at hand. The same considerations apply to incidents where migrants and refugees were targeted during military attacks.<sup>594</sup>

372. These examples show that a sufficient link can be established with the armed conflict to grant the exercise of ICC jurisdiction over crimes committed against migrants and refugees in Libya.

*ii. Actors participating in the Libyan conflict since 2011*

373. Many of the crimes against migrants and refugees in Libya occur in State-run official detention facilities, unofficial sites and other places of captivity. Relevant actors controlling and operating these facilities have been involved in the Libyan armed conflict at some point since 2011. Regarding the crimes committed at checkpoints, or when armed

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<sup>588</sup> [REDACTED].

<sup>589</sup> S/2020/360, para. 43.

<sup>590</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 41.

<sup>591</sup> MSF, *Time running out for evacuations of trapped refugees in Tripoli amid shooting*.

<sup>592</sup> HRW, *Libya: Detained Migrants at Risk in Tripoli Clashes*, 25 April 2019, available at: <https://www.hrw.org/news/2019/04/25/libya-detained-migrants-risk-tripoli-clashes>.

<sup>593</sup> [REDACTED]; See, e.g., AI, *Between Life and Death*, p. 41: “‘Ahmed’ told Amnesty International that on one evening in May 2020 a militia affiliated with the GNA took him along with other migrants and refugees from a Tripoli DCIM detention centre, where they were all detained, and forced them to transport ammunition between two positions in Tripoli until the early hours of the following morning.”

<sup>594</sup> BBC, *Libya migrants: UN says attack could be war crime*, 04 July 2019, available at: <https://www.bbc.com/news/world-africa-48854420>.

groups intercept migrants and refugees at sea or inland, the following paragraphs also demonstrate that a sufficient link exists.

374. In the context of the crisis in Libya since 2011 and the disputes over political and territorial control, armed groups gained control of parts of Libyan territory and of formerly government-controlled migrant detention sites.<sup>595</sup> Thus, many of these groups were taking active part not only in the armed conflict, but also in the commission of crimes against migrants and refugees in the detention sites under their control. Alleged perpetrators, identified by the witnesses in their testimonies, are sometimes directly affiliated to one of the parties in conflict.<sup>596</sup> At other times, their operations are facilitated by those parties, who also control territory where migrants and refugees are detained.<sup>597</sup> Whichever the case, parties to the conflict economically profit from this system.<sup>598</sup>

375. Through the incorporation of non-State actors, especially militia brigades, into the State security apparatus, including the Ministry of Interior and the DCIM,<sup>599</sup> subsequent Libyan governments since 2011 have retained only nominal control of these centres, a detailed list of which is found in Annex III to this Communication. At the same time, these actors were not fully integrated into a centralised Libyan authority, causing militias to preserve their internal structures and exercise growing influence over the security apparatus. As a consequence, ‘it is impossible for the detention centres, even the official ones, to operate effectively without the support or buy-in of armed groups [or militias].’<sup>600</sup> Furthermore, because of the deep entanglement between armed groups, militias, law enforcement actors (such as the DCIM and the LCG), smugglers, and traffickers,<sup>601</sup> the participation of each of these actors in both the armed conflict and the commission of crimes against migrants and refugees cannot be separated.

376. As described above in the pattern on deprivation of liberty of migrants and refugees in Section III.A, uniformed men have captured migrants and taken them to detention

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<sup>595</sup> Malakooti, *The Political Economy*, p. 5.

<sup>596</sup> See *infra* Section V.B.1

<sup>597</sup> T. Eaton *et al.*, *The Development of Libyan Armed Groups Since 2014: Community Dynamics and Economic Interests*, Chatham House, 2020, p. 48, available at: <https://www.chathamhouse.org/sites/default/files/CHHJ8001-Libya-RP-WEB-200316.pdf>.

<sup>598</sup> *Ibid.*

<sup>599</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 4.

<sup>600</sup> Malakooti, *The Political Economy*, p. 6. Similarly, AI, ‘No one will look for you’, p. 16.

<sup>601</sup> M. Micallef *et al.*, *Conflict, Coping and Covid: Changing human smuggling and trafficking dynamics in North Africa and the Sahel in 2019 and 2020*, GI-TOC, April 2021, p. 29, available at: <https://globalinitiative.net/wp-content/uploads/2021/06/GI-TOC-Changing-human-smuggling-and-trafficking-dynamics-in-North-Africa-and-the-Sahel-in-2019-and-2020.pdf>.



facilities, often after interceptions at sea.<sup>602</sup> It is unclear if the captors belong to the Libyan armed forces or rebel armed groups, with several witnesses, including Witness 5, describing that many armed groups act as Libyan police.<sup>603</sup> Deprivation of liberty often occurs in tandem with other crimes in which armed actors also participate, for example in the selling or buying of migrants and refugees from detention facilities.<sup>604</sup>

377. Several reports, including by the UN Panel of Experts and UN Security Council, have identified individuals who are in control of militias, DCIM centres, and law enforcement as perpetrators of crimes against migrants and refugees.<sup>605</sup> For instance, the UNSC recognised that the (Al-Nasr) Az-Zawiya Detention Centre is under *de facto* control of the al-Nasr Brigade, a militia group,<sup>606</sup> which is reported to have sold migrants and refugees imprisoned in this centre to another militia, the Anas al-Dabbashi Brigade.<sup>607</sup> In turn, the al-Dabbashi Brigade has, at least since mid-2016, engaged in the armed conflict by fighting against the al-Wadi Battalion in Sabratha. At this juncture, militia also used places of migrant captivity and their forced labour to load and store weapons, or even to directly participate in hostilities, as described by [REDACTED].<sup>608</sup>

378. Moreover, armed groups and militias are reportedly associated with transnational trafficking and smuggling networks, often by demanding kickbacks for using certain routes and passage through checkpoints, or by allowing the operation of holding facilities for migrants and refugees.<sup>609</sup> For example, on the western coast of Libya, militias such as al-Dabbashi profit greatly from extorting migrants and refugees along the smuggling and trafficking routes they control,<sup>610</sup> while they are less concerned with controlling detention sites and places of captivity.<sup>611</sup> Without the acquiescence and cooperation of armed groups, the activities of these networks would not be possible.

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<sup>602</sup> AI, *Libya's Dark Web of Collusion*, p. 32; AI, 'No one will look for you'.

<sup>603</sup> [REDACTED].

<sup>604</sup> See e.g. Sentenza GIP Messina, 149/2020, dep. 25 August 2020, Conde' e altri.

<sup>605</sup> 2017 UN Panel of Experts Report, p. 21, para. 105; UNSC, Abd Al Rahman Al-Milad; UNSC, Ahmad Oumar al-Dabbashi; UNSC, Mohammed Kachlaf, 7 June 2018, available at: <https://www.un.org/securitycouncil/sanctions/1970/materials/summaries/individual/mohammed-kachlaf>.

<sup>606</sup> UNSC, Osama Al Kuni Ibrahim, 25 October 2021, available at: <https://www.un.org/securitycouncil/content/osama-al-kuni-ibrahim>.

<sup>607</sup> Malakooti, *The Political Economy*, p. 75.

<sup>608</sup> [REDACTED].

<sup>609</sup> [REDACTED]; O. Guerin, *Libyan migrant detention centres: It is like hell*, BBC News, 7 September 2017, available at: <https://www.bbc.co.uk/news/world-africa-41189247>.

<sup>610</sup> Eaton, *Libya's War Economy*, p.12.

<sup>611</sup> Malakooti, *The Political Economy*, pp.73-74.

379. Following the parameters set in the Al-Werfalli case,<sup>612</sup> the alleged perpetrators, armed groups, and militias preliminarily identified in this Communication have been actively participating in the Libyan armed conflict since 2011. Their actions are intertwined with smuggling and trafficking networks, and they have thereby been involved in the commission of crimes against migrants and refugees. Hence, a sufficient link exists with the situation as referred in UNSC Resolution 1970.

*iii. Crimes against migrants and refugees as part of Libya's conflict economy*

380. Coupled with ongoing violence and the resulting security vacuum following Gaddafi's overthrow and lack of central authority by subsequent governments since 2011, an economic and humanitarian crisis emerged. This has harboured and worsened the exploitation of—and the crimes against—migrants and refugees in Libya. Their exploitation by different actors in Libya has been instrumental for the country's conflict economy and the perpetuation of violence.<sup>613</sup> Through the economic dimensions of these crimes and the Libyan NIAC, a sufficient link can also be found with UNSC Resolution 1970.

381. The Libyan economy nearly collapsed after the Gaddafi regime fell. Businesses and illegal groups involved in the smuggling and trafficking of all sorts, including of migrants, intensified their activities. As set out in Section II.B, this can be explained initially by some members of rebel forces and militias not being properly integrated into the armed forces. Left without income and little access to other State revenue (particularly in Southern Libya), many turned to alternative, and often criminal, modes of income generation.<sup>614</sup> In this context, the crimes associated with the exploitation of migrants and refugees became even more profitable, generating perverse incentives to increase the levels of violence against them.

382. Armed groups as a whole, and not just their individual members, have also economically benefited from the exploitation of migrants, which in turn has funded their participation in the Libyan conflict. As described above, the funding may stem either from directly perpetrating crimes which exploit the migrant population, including illegal deprivation of liberty linked to extortion, torture, forced labour, and sexual slavery, among

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<sup>612</sup> *Al-Werfalli*, Arrest Warrant; Second Arrest Warrant.

<sup>613</sup> Malakooti, *The Political Economy*, p. 39 et seq.

<sup>614</sup> [REDACTED].

others; or from ‘taxes’ imposed on smugglers and traffickers operating in controlled territory.

383. Operating unofficial detention sites and other places of captivity, where forced labour or torture of migrants and refugees for the purpose of extorting them are common, became part of the wider set of illegal business activities carried out by armed groups and militias.<sup>615</sup> The DCIM is often unable or unwilling to effectively run many official detention centres, thus associating with armed groups or receiving money from them.<sup>616</sup> Other widespread income-generating activities involving the commission of crimes against migrants and refugees include: requiring payments at checkpoints to protect trafficking and smuggling routes; buying migrants and refugees that are in the hands of traffickers and smugglers; receiving money for detaining them—either inland or at sea—and transporting them to detention facilities.<sup>617</sup> This conduct often involves the commission of crimes against migrants and refugees, including among others imprisonment, torture, enslavement, and sexual slavery, as the following Section details.

384. Armed groups and militias in Libya have a rent-seeking character, taking an opportunistic approach to making profit out of different situations to finance their activities.<sup>618</sup> Furthermore, they are also in search of legitimacy as they aim to become part of the State, and to have the acceptance of local communities in which they are active.<sup>619</sup> For example, the al-Dabbashi militia, which controlled places of captivity in Sabratha, reportedly struck a deal with Tripoli authorities in July 2017 to desist from human smuggling and trafficking activities. However, they eventually began operating in Zawiya in October 2017.<sup>620</sup> This example depicts the latest shift in the activities of some armed groups and militias, who have started taking part in so-called ‘anti-human trafficking’ initiatives. Often, this participation is merely a way to obtain revenue from the LCG, and indirectly the EU and other international actors, while at the same time continuing to engage in the exploitation of migrants and refugees through operating detention facilities.<sup>621</sup>

385. The LCG itself has known ties to militias, such as the al-Nasr Brigade. The former head of the Zawiya Coast Guard Abd Al-Rahman Milad (a.k.a. Bija) is considered to work in

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<sup>615</sup> Malakooti, *The Political Economy*, p. 39 et seq.

<sup>616</sup> *Id.*, p. 8.

<sup>617</sup> *Id.*; 2018 UN Panel of Experts Report, para. 48; [REDACTED].

<sup>618</sup> [REDACTED].

<sup>619</sup> [REDACTED].

<sup>620</sup> See Section II.E.3

<sup>621</sup> [REDACTED]; see supra Section II.D.

collusion with that militia, intercepting migrant boats at sea and returning them to the al-Nasr Detention Centre.<sup>622</sup> The testimony of Witness 1 further corroborates this dual stance of certain militias. The Witness recounted that the same man who drove him and fellow migrants and refugees to the port in Zuwara to catch a boat, was present at the port after the boat's interception to receive the same migrants and refugees he had previously transferred.<sup>623</sup>

386. Overall, armed actors, militias and government officials are involved, either directly or indirectly, in the smuggling and trafficking of migrants and refugees in Libya and it is often difficult to differentiate clearly between these actors. The crimes committed against migrants and refugees are associated with the revenues Libyan armed groups get from these criminal activities,<sup>624</sup> thus contributing to the Libyan conflict and maintaining the country's crisis situation since 2011. To further establish this sufficient link with Resolution 1970, the possibility exists to trace the cash flows in and out of Libya and the extent to which these resources directly fund specific armed groups and their operations. This is an activity which requires investigative powers.

387. Crimes against humanity and war crimes committed against migrants and refugees in Libya, as substantiated in this Communication, fall under the territorial, temporal, and personal scope of the situation in Libya as referred by the Security Council to the ICC. Further, the existence of an armed conflict, the alleged perpetrators of these crimes, and the Libyan conflict economy associated with the economic exploitation of migrants and refugees, all establish a sufficient link to the situation set out in Resolution 1970. Not only does the ICC have jurisdiction over these crimes, but also it is respectfully argued that the Prosecutor should give priority to their investigation and prosecution given the gravity of the crimes committed, both in terms of scale and types of crimes.

## **B. Analysis of the crimes committed against migrants and refugees as crimes against humanity**

388. To demonstrate that crimes against humanity are being committed against migrants and refugees in Libya, this Section first establishes the contextual element required under Article 7 of the Rome Statute. It then proceeds to an analysis of the crimes against humanity of imprisonment or severe deprivation of liberty in violation of fundamental

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<sup>622</sup> UNSC, Osama Al Kuni Ibrahim.

<sup>623</sup> [REDACTED].

<sup>624</sup> [REDACTED].

rules of international law, enslavement, murder, torture, rape, sexual slavery, enforced prostitution, sexual violence, persecution, and other inhumane acts. For each of these crimes, the material and mental elements, along with the nexus with the contextual element, are examined.

### 1. Contextual element of crimes against humanity

389. Crimes against humanity are defined in Article 7(1) of the Rome Statute as acts ‘committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.’ Article 7(2)(a) of the Statute further specifies that an “[a]ttack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>625</sup>

390. The Section below will set out and analyse in detail the various components of such contextual elements, linking them to the conditions of migrants and refugees in Libya since 2011.

#### *i. The attack*

391. As specified in Article 7(2) of the Rome Statute, an ‘attack’ is to be understood as ‘a course of conduct involving the multiple commission of acts.’<sup>626</sup> The Elements of Crimes clarify that ‘the acts need not constitute a military attack.’<sup>627</sup>

392. Trial Chamber II in *Katanga* stated that ‘the attack need not necessarily be military in nature and it may involve any form of violence against a civilian population.’<sup>628</sup> The Rome Statute’s language in this regard reflects the jurisprudence from both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).<sup>629</sup> As held in *Prosecutor v. Kunarac* at the ICTY, ‘[i]t is

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<sup>625</sup> Rome Statute, Article 7(2)(a). See also ICC, Elements of Crimes, Introduction to Article 7 of the Statute, para. 3.

<sup>626</sup> *Ibid.*

<sup>627</sup> *Ibid.* See also ICC, Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II (15 June 2009), para. 85.

<sup>628</sup> ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Germain Katanga*, Judgment pursuant to Article 74 of the Statute, Trial Chamber II (7 March 2014), para. 1101.

<sup>629</sup> See e.g. ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Judgment, Trial Chamber (22 February 2001), para. 415 (defining attack as ‘a course of conduct involving the commission of acts of violence’); ICTR, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment, Trial Chamber II (21 May 1999), para. 122 (defining attack as the ‘event in which the enumerated crimes must form part’); *Prosecutor v. Jean-Paul Akayesu*, Judgment, Trial Chamber I (2 September 1998), para. 581 (“The concept of ‘attack’ may

sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity.’<sup>630</sup> Moreover, the notion of violence in such ‘an accumulation of acts of violence’ need not be restricted to physical violence, but may also include psychological violence, or mistreatment of the civilian population through legislation and government policy.<sup>631</sup> Hence, an ‘attack’ is to be interpreted as a ‘course of conduct,’ which can be constituted by physically violent acts and/or purely administrative acts or omissions.<sup>632</sup>

393. As specified in ICC *Prosecutor v. Laurent Gbagbo*, a ‘course of conduct’ already indicates a ‘systemic aspect’ inherent in the attack, ‘as it describes a series or overall flow of events as opposed to a mere aggregate of random acts.’<sup>633</sup> The aspect of *flow* is clearly evident in Libya, where the attack against migrants and refugees is not a simple accumulation of criminal episodes. These episodes are rather linked to each other in discernible patterns of exploitation and the infliction of violence and inhumane conditions upon migrants and refugees. As Section III of this Communication thoroughly described based on the many testimonies collected and publicly available information, migrants and refugees are at risk and in constant fear. Their exploitation, as the most evident aspect of the attack, is closely associated with the different forms of violence they experience. It is also instrumental for the country’s illicit economy, from which different actors are economically profiting. Thus, the systemic aspect inherent in the attack is evidenced.

394. Since 2011, the exploitation of migrants and refugees comprises both the ‘market’ operation of human smuggling and trafficking, as well as other violent conduct aimed at countering smuggling and trafficking activities. The dynamics of this exploitation are ever-changing, as the ‘routes, hubs, actors and modalities’ may evolve and shift ‘based on the ebb and flow of tribal militia relations’<sup>634</sup> at any given time.

395. The attack directed against the civilian population of migrants and refugees in Libya ostensibly serve a range of objectives and motives, from economic to political or security. Nonetheless, it follows a basic *modus operandi* which takes advantage of the migrants and refugees’ vulnerability, as many of them had to flee their homes and cannot return to their

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be defined as a[n] unlawful act of the kind enumerated [in the Statute] ... An attack may also be non-violent in nature, like imposing a system of apartheid ... or exerting pressure on the population to act in a particular manner”).

<sup>630</sup> *Kunarac et al.*, Trial Judgment, para. 419.

<sup>631</sup> See also Schabas, *The International Criminal Court*, p. 155.

<sup>632</sup> See D. Luban, *A Theory of Crimes against Humanity*, in *Yale Journal of International Law* (2004).

<sup>633</sup> ICC, Situation in the Republic of Côte d’Ivoire, *The Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, Pre-Trial Chamber I (12 June 2014), para. 209.

<sup>634</sup> Micallef, *The Human Conveyor Belt*, p. 9.

country of origin. Such violence, as depicted in Section III, involves different patterns of violence, such as the periodic or continuous deprivation of liberty, torture, murder, extortion, enslavement, sexual violence, and discrimination. This attack happens *in transit between and at* detention sites and places of captivity situated along routes to coastal hubs, where migrants and refugees are sent in boats across the Mediterranean. Moreover, the competition between networks and armed groups involved in these activities leads to increased violence against migrants and refugees, as the UN Panel of Experts on Libya has reported: ‘competing groups have regularly targeted migrants under the custody of their rivals, provoking death and injury of several migrants.’<sup>635</sup>

396. Furthermore, the attack continues once migrants and refugees are on the boats aimed at reaching Europe. Several actors, including State institutions like the LCG or individuals involved in smuggling and trafficking, are also involved in intercepting boats at sea. These interceptions are frequently violent and result in migrants and refugees’ forced transport to official detention sites, leading to further cycles of violence and exploitation. The acts involve, for instance, torture, murder, different forms of enslavement, sexual crimes, and other conduct, as the following Section will describe.

397. As previously described in detail under Section II of this Communication, smuggling and trafficking activities in Libya were not new in the aftermath of the 2011 Libyan revolution, but underwent significant changes at this time. Ample other research over the last ten years has also described this pattern of intensification and consolidation in the post-2011 ‘industrialisation’ of the ‘trade’ in migrants and refugees in Libya.<sup>636</sup> In this sense, the *commodification of and trade in people*, specifically migrants and refugees, through myriad of acts carried out by smuggling network members and along supply chains, are organised to the extent that they constitute a discernible country-specific market and industry within Libya’s broader post-2011 conflict economy. This organisation shows that the multiple commission of the acts mentioned are not merely isolated incidents, but constitute a course of conduct equating to an ‘attack’ in the sense of Article 7.

398. In May 2017, the former Prosecutor explicitly recognised ‘credible accounts that Libya has become a marketplace for the trafficking of human beings.’<sup>637</sup> Similarly, the 2018 UN Panel of Experts on Libya Report noted the profitable and resilient character of the

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<sup>635</sup> 2017 UN Panel of Experts Report, Annex 17, para. 6.

<sup>636</sup> See e.g., Micallef, *The Human Conveyor Belt*; T. Reitano et al., *Responding to the Human Trafficking-Migrant Smuggling Nexus*, p. 8; N. Al-Dayel, A. Anfinson & G. Anfinson, *Captivity, Migration, and Power in Libya*; Eaton, *Libya’s War Economy*.

<sup>637</sup> *Statement of ICC Prosecutor to the UNSC on the Situation in Libya*, 9 May 2017.

trafficking and smuggling business models in Libya, and the high level of organisation of networks involved in the exploitation of migrants and refugees.<sup>638</sup>

399. As noted in the factual Section of this Communication, both the methods used and the actors involved in the attack against migrants and refugees in Libya demonstrate that the multiple commission of the acts mentioned are not merely isolated incidents. The ‘course of conduct’ comprising the acts, including but not limited to those enumerated in Article 7, are a known and tolerated, if not incentivised, facet of the prevailing conflict economy (see Section II.B.3). As elaborated below, this ‘course of conduct’ is clearly directed against a civilian population, members of which share the distinguishing feature of being migrants and refugees in Libya.

*ii. Directed against a civilian population*

400. Article 7(1) of the Statute stipulates that the attack must be directed against a civilian population. The ICTY held that ‘the emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of [their] individual attributes but rather because of [their] membership of a targeted civilian population.’<sup>639</sup> Furthermore, it has been held that the potential civilian victims under Article 7 of the Statute could be of any nationality, ethnicity, or other distinguishing features.<sup>640</sup> The distinguishing feature of the civilian population against whom the above attack is directed is their status as migrants, refugees or asylum seekers in Libya. In this regard, individual migrants are not incidental victims of the attack, but actually the primary target of the attack.<sup>641</sup>

401. While there were indeed attempts to stigmatise some migrants and refugees as members of either pro-Gaddafi or pro-opposition forces, these largely turned out to be false allegations.<sup>642</sup> Moreover, ‘a person shall be considered to be a civilian for as long as there is a doubt as to his or her status.’<sup>643</sup> This means that even if there would be doubt about the status of a migrant at the time he or she was targeted, he or she should still be considered a civilian. Most importantly, the mere presence of some combatants (or non-

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<sup>638</sup> 2018 UN Panel of Experts Report, para. 48.

<sup>639</sup> ICTY, *Prosecutor v. Tadić*, Trial Judgment, Trial Chamber (7 May 1997), para. 644.

<sup>640</sup> *Bemba*, Decision on the Confirmation of Charges, para. 76. See also ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Germain Katanga*, Decision on the Confirmation of Charges, Pre-Trial Chamber I (30 September 2008), para. 399.

<sup>641</sup> This attack does not preclude the existence of other related but not coterminous attacks on different civilian populations in Libya since 2011, for instance against Libyan nationals who are forcibly displaced. See 2021 UN Panel of Experts Report, para. 34.

<sup>642</sup> E.g. AI, *Libya: Rule of law or rule of militias?*, p. 29.

<sup>643</sup> *Kunarac et al.*, Trial Judgment, para. 426.



civilians) among the population does not nullify the characterisation or status of the population as civilian. As noted by the ICTY, in fact, the term ‘civilian population’ means that the population must simply be ‘predominantly civilian in nature.’<sup>644</sup>

402. Notably, the ICC Appeals Judgement in the Ntaganda case clarifies that “Article 7 of the Statute requires a finding that the attack was ‘directed against any civilian population’ and does not require a separate finding that the civilian population was the primary object of the attack.” This means that the attack must have targeted the civilian population, but that ‘it is not required that the main aim or object of the relevant acts was to attack civilians. An attack directed against a civilian population may also serve other objectives or motives. Hence, the question of whether an attack was directed against a civilian population is essentially a factual issue.’<sup>645</sup> From such a factual standpoint, the testimonies of migrants and refugees in Libya gathered for the purpose of this Communication, coupled with descriptive accounts by third-party observers—ranging from civilian residents in Libya, to journalists and staff members of international organisations like IOM, the UN and MSF—demonstrate that the attack described above was and is directed against the civilian population of migrants and refugees.

iii. *Widespread or systematic nature of the attack*

403. As illustrated in this Communication, the attack against migrants and refugees in Libya is both widespread and systematic. While ‘widespread’ and ‘systematic’ are disjunctive elements of the attack,<sup>646</sup> meaning that they are alternatives, the analysis of acts perpetrated

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<sup>644</sup> ICTY, *Prosecutor v. Dario Kordić & Mario Čerkez*, Trial Judgment, Trial Chamber (26 February 2001), para. 180; ICTY, *Prosecutor v. Tihomir Blaškić*, Trial Judgment, Trial Chamber (3 March 2000), para. 214, where the Trial Chamber noted that ‘[c]rimes against humanity therefore do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants - regardless of whether they wear uniform or not - but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed hors de combat, in particular, due to their wounds or their being detained. It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian.’ See also ICTR, *Prosecutor v. Ignace Bagilishema*, Trial Judgment, Trial Chamber I (7 June 2001), para. 79; *Prosecutor v. Laurent Semanza*, Trial Judgment, Trial Chamber III (15 May 2003), para. 330.

<sup>645</sup> ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeals of Mr. Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019, Appeals Chamber (30 March 2021), paras 7, 424.

<sup>646</sup> For ICC case law affirming that the conditions of “widespread” and “systematic” in article 7 of the Rome Statute are disjunctive, see *Situation in the Republic of Kenya*, Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, Pre-Trial Chamber II (31 March 2010), para. 94. See also *Bemba*, Decision on the Confirmation of Charges, para. 82; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, Trial Chamber III (21 March 2016), para. 162.

against migrants and refugees in Libya as part of the attack shows that both elements are fulfilled. Notably, it is the attack as a whole, and not the individual underlying acts, that must possess these qualities.<sup>647</sup>

#### *Widespread nature of the attack*

404. The notion of ‘widespread’ can be considered a quantitative standard with regard to the number and multiplicity of civilians against whom the attack is directed, or a qualitative standard with regard to the geographic scope of the attack. According to the Trial Chamber of the ICTY in the *Kunarac* case, “[t]he adjective ‘widespread’ connotes the large-scale nature of the attack and the number of its victims.”<sup>648</sup> This interpretation of the widespread standard has also carried through in ICC jurisprudence.<sup>649</sup> In the Ntaganda case, ICC Pre-Trial Chamber II found that the attack against the civilian population was widespread ‘as it resulted in a large number of civilian victims.’<sup>650</sup> Trial Chamber III in the Bemba case held the term ‘widespread’ to connote ‘the large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.’<sup>651</sup> More specifically, the Chamber found it to necessitate ‘an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians.’<sup>652</sup> Hence, a key feature of the ‘widespread’ standard is that it refers to a ‘multiplicity of victims,’<sup>653</sup> intended to exclude

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<sup>647</sup> ICTY, *Prosecutor v. Dusko Tadić*, Appeals Judgment, Appeals Chamber (15 July 1999), fn.311 to para. 248, citing the *Prosecutor v. Mile Mrksić et al.*, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber I (3 April 1996), para. 30: “As long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specific context identified above.” See also ICC OTP, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, para. 32, reaffirming this interpretation.

<sup>648</sup> *Kunarac et al.*, Trial Judgment, para. 428. See also ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Judgment, Trial Chamber I (17 January 2005), paras 545–546; *Prosecutor v. Dario Kordić and Mario Čerkez*, Judgment [and corrigendum], Appeals Chamber (17 December 2004), para. 94.

<sup>649</sup> *Bemba*, Trial Judgment, para. 163; *Katanga*, Trial Judgment, para. 1123; *Katanga*, Decision on the Confirmation of Charges, para. 394.

<sup>650</sup> ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Bosco Ntaganda*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda, Pre-Trial Chamber II (9 June 2014), para. 24.

<sup>651</sup> *Bemba*, Trial Judgment, para. 163.

<sup>652</sup> *Bemba*, Decision on the Confirmation of Charges, para. 83.

<sup>653</sup> *Ibid*; *Kayishema and Ruzindana*, Trial Judgment, para. 123; *Akayesu*, Trial Judgment, para. 580; International Law Commission (ILC), *Draft Code of Crimes against the Peace and Security of Mankind*, art. 18 (using the phrase “on a large scale” instead of widespread). See also *Prosecutor v. Mile Mrksić et al.*, Judgment, Trial Chamber I (27 September 2007), para. 437 (“‘widespread’ refers to the large scale nature of the attack and the number of victims”).

isolated acts of violence,<sup>654</sup> such as ‘murder directed against individual victims by persons acting of their own volition rather than as part of a broader initiative.’<sup>655</sup>

405. The following paragraphs assess this standard based on, first, the number of people subject to the attack; second, the multiplicity of people against whom the attack was/is directed; and third, on the geographic scope.

406. Firstly, based on the number of arrivals in Europe from Libya in recent years, estimates of the number of migrants and refugees subject to the attack amount to anywhere from thousands to tens of thousands per year. For instance, according to the information provided by the Operational Data Portal of the UNHCR, between 2014 and September 2021, at least 733,000 people arrived by sea to Italy.<sup>656</sup> As mentioned above, the FFM concluded that at least 87,000 migrants and refugees have been intercepted by the LCG since 2016.<sup>657</sup> The IOM documented that 11,900 migrants and refugees were intercepted and disembarked back to Libya in 2020 alone.<sup>658</sup>

407. As described above, tens of thousands of migrants and refugees have been held in detention sites in Libya, in both official government-run detention facilities as well as unofficial detention sites and other places of captivity controlled by militias, armed groups or individuals with ties to such groups—always under inhumane conditions. According to UNSMIL and OHCHR, there were anywhere between 6,000 to 20,000 migrants and refugees detained in DCIM-run centres at any given time between 2016 and 2018.<sup>659</sup> The FFM also calculated that at least 7,000 migrants and refugees were being detained in

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<sup>654</sup> See ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Bosco Ntaganda*, Decision on the Prosecutor’s application under Article 58, Pre-Trial Chamber II (13 July 2012), para. 19; Situation in Darfur, Sudan, *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad al Abd-al-Rahman*, Decision on the prosecution application under Article 58(7) of the Statute, Pre-Trial Chamber I (27 April 2007), para. 62. See also ICTR, *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Judgment and Sentence, Trial Chamber I (6 December 1999), paras 67–69; *Kayishema and Ruzindana*, Trial Judgment, paras 122–123; ILC, *Draft Code of Crimes against the Peace and Security of Mankind*, Report of the Commission to the General Assembly on the work of its forty-third session, A/46/10 (1991), Yearbook of the International Law Commission, 1991, vol. II, Part Two, Commentary to Article 21, pp. 47, 103.

<sup>655</sup> ILC, *Draft Articles on Prevention and Punishment of Crimes Against Humanity with Commentaries*, 2019, para. 12, available at: [https://legal.un.org/ilc/texts/7\\_7.shtml](https://legal.un.org/ilc/texts/7_7.shtml).

<sup>656</sup> The available public data does not currently allow us to determine exactly how many of the arrivals originated from Libya, but it is likely that a great majority of arrivals are from this country. For instance, out of the 6,816 arrivals to Italy, 4,500 migrants and refugees arrived from Libya between January and March 2021 alone, this giving an estimation of the predominance of Libya as the main point of departure to reach Italy. See: UNHCR Operational Data Portal, *Mediterranean Situation, Italy*, available at: <https://data2.unhcr.org/en/situations/mediterranean/location/5205>; UNHCR Regional Bureau for Europe, *Arrivals to Europe from Libya, March 2021*, available at: <https://data2.unhcr.org/en/documents/details/86602>.

<sup>657</sup> A/HRC/48/83, para. 68.

<sup>658</sup> See IOM, *Libya — Migrant Report 34*.

<sup>659</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 29.

October 2021 in DCIM detention centres, including large percentages of children.<sup>660</sup> In contrast, UNSMIL reported in January 2021 that only 2,300 people are registered in eight official detention sites in Libya.<sup>661</sup>

408. Even if there are no consolidated figures on the number of migrants and refugees passing through Libya and subjected to violence and exploitation since 2011, the figures at hand indicate the large number of migrants, refugees, and asylum seekers are vulnerable to being attacked in networks of exploitation in Libya every year. Thus, from this quantitative perspective, the widespread character of the attack can be established.
409. Secondly, the example cases presented in the previous Section of this Communication clearly show patterns of violence targeting migrants and refugees from a variety of nationalities, religions, genders, races, and ethnic groups. While the degree to which each migrant is subjected to violence may vary depending on elements of discrimination and persecution, all migrants and refugees are subject to the overall attack.
410. Lastly, another indicator of the widespread nature of the attack on migrants and refugees in Libya relates to the geographic extension of exploitation networks operating across multiple corridors traversing Libya's entire territory. As described above, different routes were developed for the smuggling and trafficking of migrants and refugees since 2014, most of them across southern and western Libya, with a small presence in the eastern part of the country and the northwest as a main departure point to Europe. The interceptions at sea by the LCG and its affiliated actors take place all over Libyan waters, sometimes even reaching the search and rescue areas of other countries, such as Malta.<sup>662</sup> In turn, most official detention centres where migrants and refugees are taken after their interception at sea are located in western Libya.
411. Individually and when considered together, these elements—the number and multiplicity of migrants and refugees against whom the attack was/is directed, and the geographic scope of the attack along common corridors spanning large swathes of the Libyan territory—demonstrate how the attack against migrants and refugees in Libya is widespread for the purpose of Article 7(1) of the Statute.

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<sup>660</sup> A/HRC/48/83, para. 68.

<sup>661</sup> S/2021/62, para. 61. From the information provided in this report, it is unclear whether those eight official centres refer to DCIM-run facilities.

<sup>662</sup> See e.g. Sea Watch, *Airborne Monthly Factsheet July 2021*, 28 September 2021, available at: <https://sea-watch.org/en/airborne-monthly-factsheet-july-2021/>. For instance, on 30 June 2021, Sea Watch documented the LCG firing two shots at a boat in distress in the Maltese search and rescue area: So-called Libyan Coast Guard firing shots at migrant boat in distress, 5 July 2021, available at: [https://sea-watch.org/en/libyan\\_coast\\_guard\\_shots\\_fired/](https://sea-watch.org/en/libyan_coast_guard_shots_fired/).

*Systematic nature of the attack*

412. As an alternative to establishing the character of the attack necessary for the contextual element of crimes against humanity, ICC jurisprudence, in adopting the definition established by the ICTY, has consistently referred to the systematic element of the attack as ‘the organised nature of the acts of violence and the improbability of their random occurrence.’<sup>663</sup> In the Katanga decision on the confirmation of charges, ICC PTC I further specified that the term “has been understood as either an organised plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as ‘patterns of crimes’ such that the crimes constitute a ‘non-accidental repetition of similar criminal conduct on a regular basis.’”<sup>664</sup>
413. In determining whether an attack is systematic and if patterns of crimes are present, it shall be assessed if: ‘(i) identical acts took place or similarities in criminal practices can be identified; (ii) the same *modus operandi* was used; or (iii) victims were treated in a similar manner across a wide geographic area.’<sup>665</sup>
414. The multiple testimonies on different criminal conduct introduced in Section III of this Communication clearly show the existence of patterns of violence against migrants and refugees in Libya. This fulfils the requirement for the systematic character of the attack against this civilian population for the purpose of Article 7(1) of the Statute.
415. Indeed, despite the multiplicity of perpetrators, ranging from State officials to militia groups, smugglers, and traffickers—as well as the unstable dynamics between them—there are striking similarities in their criminal practices and the *modus operandi* they use to exert violence against migrants and refugees across Libya. For instance: inhumane detention conditions are deplorable regardless of who is in charge of a specific facility; many armed groups and militias are involved in extorting migrants and refugees or in forcing them to work in farms or construction sites; torture has been reported in many official and unofficial detention facilities, through the use of similar methods and tools; and finally, the detention of migrants and refugees after their interception at sea has

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<sup>663</sup> ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Bosco Ntaganda*, Judgment, Trial Chamber VI (8 July 2019), para. 692; *Gbagbo*, Decision on the Confirmation of Charges, para. 222; *Katanga*, Trial Judgment, para. 1123; *Katanga*, Decision on the Confirmation of Charges, para. 394; *Harun and Abd-al-Rahman*, Decision on the prosecution application under Article 58(7) of the Statute, para. 62.

<sup>664</sup> *Katanga*, Decision on the Confirmation of Charges, para. 397; *See also*, *Ntaganda*, Trial Judgment, para. 692; *Katanga*, Trial Judgment, para. 1123; *Ntaganda*, Decision on the Confirmation of Charges, para. 24.

<sup>665</sup> *Ntaganda*, Trial Judgment, para. 693; *see also* *Katanga*, Trial Judgment, para. 1113.

become common practice. All these factors reveal the systematic character of the attack against migrants and refugees.

*iv. Pursuant to organisational policy*

416. Article 7(2)(a) of the ICC Statute provides that the attack on a civilian population be carried out ‘pursuant to or in furtherance of a State or organisational policy to commit such attack.’ While ICC Pre-Trial Chamber I has held that a separate policy element ‘has no independent relevance as an element of crime,’ it nonetheless, ‘may serve as evidence of the systematic character of the attack.’<sup>666</sup>

417. As explained by ICC Trial Chamber II in the Katanga case, ‘it is relatively rare ... that a State or organization seeking to encourage an attack against a civilian population might adopt and disseminate a pre-established design or plan to that effect.’<sup>667</sup> A policy can therefore be ‘inferred by discernment of, inter alia, repeated actions occurring according to a same sequence, or the existence of preparations or collective mobilisation orchestrated and coordinated by that State or organisation.’<sup>668</sup>

418. In the Bemba case, ICC Trial Chamber III found that a ‘policy’ ‘need not be formalised,’ and can be ‘inferred from a variety of factors which taken together, establish that a policy existed.’<sup>669</sup> They identified that such factors may include: ‘(i) that the attack was planned, directed or organised; (ii) a recurrent pattern of violence; (iii) the use of public or private resources to further the policy; (iv) the involvement of the State or organisational forces in the commission of crimes; (v) statements, instructions or documentation attributable to the State or the organisation condoning or encouraging the commission of crimes; and/or (vi) an underlying motivation.’<sup>670</sup>

419. In Libya, a policy at the State level to attack migrants and refugees can be established according to these parameters. The policy has its legal basis under Law No. 19 of 2010, which, as already described above (see Section II.C.2), provides for the indiscriminate, arbitrary and indefinite detention of migrants and refugees, as well as forced labour. Further, an absent asylum framework and lack of legal recourse for detention create a state of rightlessness for migrants and refugees under which they can be easily targeted.

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<sup>666</sup> *Harun and Abd-al-Rahman*, Decision on the prosecution application under Article 58(7) of the Statute, para 62. The Pre-Trial Chamber in this regard, referenced the ICTY in *Kunarac et al.*, Trial Judgment, para. 98.

<sup>667</sup> *Katanga*, Trial Judgment, para. 1109.

<sup>668</sup> *Ibid.*

<sup>669</sup> *Bemba*, Trial Judgment, para. 160

<sup>670</sup> *Ibid.*

Moreover, an existing conflict situation, a historical background of racial discrimination, and an unstable government allow criminal policies to continue, which attack migrants and refugees and subject them to the violence and exploitation as detailed in Section III of this Communication.

420. The policy and systematic attack on migrants and refugees is implemented through networks of several actors, both at the State and non-State level, which go through constant change and disputes. Nonetheless, the policy underlies the attack. While the policy emanates from the State level, its implementation seeps through the different actors involved in the attack. In fact, State institutions, and armed actors associated with the State, implement this policy through the indiscriminate detention of migrants and refugees. Armed groups, smugglers, and traffickers have, for their part, adapted the policy in the way that is most convenient to them, also participating in the widespread detention of migrants and refugees.

421. Furthermore, the use of public resources is present in the attack against migrants and refugees and its underlying policy. This is most evident in cases where State authorities pay militias to undertake different activities, such as intercepting migrants and refugees at sea, or when militias de facto take over the control of DCIM detention facilities.<sup>671</sup>

422. The existence of detention facilities and other places of captivity provide another indication of this policy, as they provide economic incentives for different actors to detain migrants and refugees and exploit them while in detention, either through torture, ransom, or different forms of enslavement. Thus, an underlying motivation for actors to engage in the attack is the economic profit that results from this exploitation.

423. Additionally, there are statements and documents from which the policy to attack migrants and refugees is further evidenced under the form of combatting illegal immigration. For instance, in 2018, the UN Panel of Experts on Libya acquired a report by the Director of the Al-Kufra detention centre to the DCIM dated 20 July 2017. In it, he recognises the ‘extremely critical’ character of smuggling and illegal immigration and proposes, among others: (i) to set up ‘shelters’ for migrants and refugees and provide these with weapons and other equipment; (ii) to train DCIM personnel to treat migrants and refugees and increase their salaries to avoid ‘material inducements’ from smugglers.<sup>672</sup> This document serves as an indication that there is, in fact, a policy in place by Libyan

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<sup>671</sup> AI, ‘No one will look for you’, p. 16; *Libya’s Dark Web of Collusion*, pp. 26 et seq.

<sup>672</sup> 2018 UN Panel of Experts Report, Annex 18, pp. 100-106.

authorities to attack migrants and refugees through violent means, under the framework of battling illegal immigration and smuggling.

424. Very significantly, the UN FFM came to similar conclusions. Based on the lack of accountability for these abuses, their recent report has established the existence of ‘a State policy encouraging the deterrence of sea crossings, the extortion of migrants and refugees in detention, and the subjection to violence and discrimination. Militias (some of which manage official detention settings), criminal networks, traffickers and smugglers contribute to the implementation of this policy.’<sup>673</sup>

v. *With knowledge of the attack*

425. The final part of the contextual element is that the perpetrator must commit the act with knowledge of the attack.”<sup>674</sup> As the Elements of Crimes under the Rome Statute state, it is required that, ‘[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.’<sup>675</sup> However, it also clarifies that the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all the attack’s characteristics or the precise details of the State or organisation policy. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.<sup>676</sup>

426. Pre-Trial Chamber II, in its decision on the confirmation of charges against Laurent Gbagbo, held that ‘it is only necessary to establish that the person had knowledge of the attack in general terms.’<sup>677</sup> Further, in the *Katanga case*, PTC I found that circumstantial evidence may be used to infer knowledge of the attack and the perpetrator’s awareness.<sup>678</sup> For instance, in the *Bemba case*, Pre-Trial Chamber II found that the *Mouvement pour la Liberation du Congo* (MLC) troops’ knowledge of the attack could be ‘inferred from the methods of the attack they followed,’ which reflected a clear pattern.<sup>679</sup>

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<sup>673</sup> A/HRC/48/83, para. 69.

<sup>674</sup> Rome Statute, Article 7(1).

<sup>675</sup> Elements of Crimes, Article 7.

<sup>676</sup> *Id.*, p. 5.

<sup>677</sup> *Gbagbo*, Decision on the Confirmation of Charges, para. 214.

<sup>678</sup> *Katanga*, Decision on the Confirmation of Charges, para. 402: ‘[...] knowledge of the attack and the perpetrator’s awareness that his conduct was part of such attack may be inferred from circumstantial evidence, such as: the accused’s position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred.’

<sup>679</sup> *Bemba*, Decision on the Confirmation of Charges, para. 126; *see also* Trial Judgment, paras 166–169.



427. Similarly, at the ICTY, the *Kunarac* judgment established that it need not be proven that the perpetrator knew the specific details of the attack.<sup>680</sup> In the *Blaškić* judgment, the ICTY judges noted that knowledge of the broader context of the attack may be inferred from a number of facts, including ‘the nature of the crimes committed and the degree to which they are common knowledge.’<sup>681</sup>
428. With regard to the Libyan situation relevant to this Communication, knowledge of the broader context of the attack against migrants and refugees in Libya can be construed, as the elements of this attack are common knowledge in the country. This is mainly true regarding the ongoing exploitation of migrants and refugees, the ‘market’ for their smuggling and trafficking, and their indefinite detention under inhumane conditions.<sup>682</sup>
429. The common knowledge of the attack in which each single act fits, can be deduced, also from the fact that the *modus operandi* of these crimes is also very similar across various alleged perpetrators, whether they are State authorities, smugglers, traffickers, armed groups, or militias. They often coordinate or are in contact with detention personnel, making the trafficking industry and its violent, exploitative practices known both to the government and to the executors.
430. Libyan State authorities are aware of the profit-driven smuggling and trafficking activities in the country and the violence against migrants and refugees associated with it. The description of the situation as ‘extremely critical’ by the Director of the DCIM centre in Al-Kufra, as described above, serves as a clear indication in this regard.<sup>683</sup> At the same time, the existence of UN-imposed sanctions against well-known traffickers and smugglers and the arrest of some of them in Libya<sup>684</sup> also speak to the common knowledge of the attack. Further, the cooperation that the Libyan State has sought from international authorities, the European Union, or other States to combat smuggling and trafficking and

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<sup>680</sup> *Kunarac et al.*, Trial Judgment, para. 434.

<sup>681</sup> *Blaškić*, Trial Judgment, para. 259.

<sup>682</sup> To this respect, in 2017 the Memorandum of Understanding between Italy and Libya was challenged before a Tripoli Administrative Court. In their writ of summons, the applicants among others, argued on Libya’s inability to properly guarantee the rights of migrants intercepted at sea and pulled back into the country. It further recognizes the widely known character of the human rights violations that migrants face in Libya. See M. Achour and T. Spijkerboer, *The Libyan litigation about the 2017 Memorandum of Understanding Between Italy and Libya*, EU Migration Law Blog, 2 June 2020, available at: <https://eumigrationlawblog.eu/the-libyan-litigation-about-the-2017-memorandum-of-understanding-between-italy-and-libya/>.

<sup>683</sup> 2018 UN Panel of Experts Report, Annex 18, pp. 106.

<sup>684</sup> For instance, Abd al Rahman Milad (‘Bija’), who is currently under UNSC sanctions, was arrested in October 2020 and released the following April. L. Tondo, *Libya releases man described as one of world’s most wanted human traffickers*, The Guardian, 13 April 2021, available at: <https://www.theguardian.com/world/2021/apr/13/libya-releases-most-wanted-human-trafficker-bija>.

deter migrants and refugees from crossing to Europe, exemplifies a recognition of the violence committed against them and thus an awareness of the attack.

431. International bodies and organisations in Libya, particularly those who provide medical or humanitarian services to migrants and refugees, such as IOM, UNHCR and MSF to name a few, are in touch with Libyan authorities, militias, armed groups, smugglers, and traffickers, and who must necessarily grant them access to detention sites, have reported first-hand on the situation in such detention sites.<sup>685</sup> It can thus be deduced that those in charge of the sites must know of the conditions and the crimes committed in these locations.

432. Particularly in regard to violent interceptions at sea and the subsequent detention of migrants and refugees, the FFM asserted that ‘since the inception of boat pullbacks in the Mediterranean, Libyan authorities have been on notice of the widespread and systematic nature of the reckless interceptions at sea and the abuses within the centres.’<sup>686</sup>

433. Moreover, based on the witness testimonies included in this Communication, it appears that Libyan citizens also have broad knowledge of the existence of migrant exploitation, particularly those of Sub-Saharan origin. The patterns of indiscriminate detention, kidnapping, extortion, and enslavement, including sexual slavery and forced labour described in the previous Section are particularly telling in this regard. People not directly involved in the armed conflict or in smuggling and trafficking activities know that they can capture migrants and refugees to sell them to detention facilities, or pay militias or armed actors in control of detention facilities to exploit their labour.

434. Libyan officials, militias, armed groups, smugglers and traffickers must be aware that their conduct is part of a widespread and systematic attack on the civilian migrant population in Libya. The widespread inhumane conditions the latter suffer while in detention have been widely reported both domestically as internationally.<sup>687</sup> It is impossible that the alleged perpetrators are unaware of the commission of crimes happening under their responsibility. Given all this, there are strong reasons to believe there is broad knowledge in the Libyan population, including at the highest levels of the State apparatus, of the treatment and exploitation of migrants and refugees. The

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<sup>685</sup> See Section III of this Communication for an overview of the abuses against migrants and refugees in Libya as documented by human rights and international organisations.

<sup>686</sup> A/HRC/48/83, para. 69.

<sup>687</sup> On international media, see Hayden, *The U.N. Is Leaving Migrants to Die in Libya*; Belhumeur, *Libyan coastguard opened fire at refugee boats: NGOs*; Jawad, *Migrant crisis: Self-immolation exposes UN failures in Libya*.

widespread and systematic character of the situation, along with its long duration, make it difficult for those involved to claim ignorance about this attack against migrants and refugees.

435. In conclusion, the criminal acts committed against migrants and refugees as described and substantiated in this Communication are taking place in the context of a widespread and systematic attack against the migrant population, in furtherance of a clear policy at the State level in practice throughout the country. Thus, the contextual element for crimes against humanity is fulfilled. This assertion is further supported by the latest report of the FFM, which found that crimes ‘committed against migrants and refugees form part of a systematic and widespread attack directed at this population, in furtherance of a State policy.’<sup>688</sup>

## **2. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law**

436. Migrants and refugees in Libya are imprisoned or severely deprived of physical liberty in violation of fundamental rules of international law in a range of contexts and situations related to the widespread and systematic attack against them since 2011. Regardless of the pretences or smuggling arrangements that they may have made in other countries prior to entering Libyan territory, the factual details of their experiences reveal discernible patterns of severe deprivations of liberty while in transit in vehicles and at checkpoints; in temporary premises for the detention, extortion, and exploitation of migrants and refugees; and in detention facilities, including those under DCIM authority, and other places of captivity. These acts of imprisonment or severe deprivation of liberty qualify as crimes against humanity under Article 7(1)(e) of the Rome Statute.

### *i. Material elements*

437. According to the Elements of Crimes, the crime of imprisonment or other severe deprivation of physical liberty requires the following material elements: (i) ‘the perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty’ and (ii) ‘the gravity of the conduct was such that it was in violation of fundamental rules of international law.’<sup>689</sup>

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<sup>688</sup> A/HRC/48/83, para. 70.

<sup>689</sup> Elements of Crimes, Article 7(1)(e).

a) *Imprisonment or severe deprivation of liberty*

438. Under the Rome Statute, imprisonment is always a severe deprivation of liberty in and of itself, with no requirement to prove its severity as a separate element.<sup>690</sup> The severity requirement is thus only necessary for other forms of deprivation of physical liberty. The ICTY Appeals Chamber in the *Kordić and Čerkez case* held that ‘[t]he term imprisonment...should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law.’<sup>691</sup> In the *Krnojelac case*, the ICTY Trial Chamber held that ‘any form of arbitrary physical deprivation of liberty of an individual may constitute imprisonment...as long as the other requirements of the crime are fulfilled.’<sup>692</sup> The UN Human Rights Committee (UNHRC) further considers involuntary transportation to be a deprivation of liberty.<sup>693</sup>
439. As shown through the example cases included under Section III.A of this Communication, the first element for imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law is fulfilled in contexts and situations described (1) in places of captivity that are temporary premises for the detention, extortion, and exploitation of migrants and refugees, and (2) in detention facilities under DCIM authority.
440. Smugglers, traffickers, armed groups, and militias deprive migrants and refugees of their liberty by holding, and thus effectively detaining, them in makeshift detention premises, pending transfer to subsequent locations. The length of forcible holdings in these locations is often contingent upon the transfer of money from an external source (such as the captives’ family, friends, or other contacts) or the assessment of those controlling their liberty as to whether they have paid off their ‘debts’ through forced labour or sexual slavery (see *infra*). Often, imprisonment is used as a tool for the exploitation and extortion of migrants and refugees and not necessarily a goal in and of itself, as the pattern of deprivation of liberty and exploitation in Section III.A depicted.
441. As described by Witness 7, he and other migrants and refugees were brought by their smuggler to a house while in transit to Libya and trapped inside under the threat of

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<sup>690</sup> C.K. Hall and C. Stahn, Article 7, in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2016), p. 202.

<sup>691</sup> *Kordić & Čerkez*, Appeal Judgment, para. 114.

<sup>692</sup> ICTY, *Prosecutor v Milorad Krnojelac*, Trial Judgment, Trial Chamber II (15 March 2002), para. 112.

<sup>693</sup> UNHRC, *General comment No. 35: Article 9 (Liberty and security of person)*, CCPR/C/GC/35, 16 December 2014, para. 5.

violence.<sup>694</sup> Witness 12 recounted how he was targeted at a checkpoint in Tripoli and arbitrarily detained by the group controlling the checkpoint.<sup>695</sup> He described being arrested in Tripoli by a militia wearing military uniforms with the Libyan flag that specifically targeted black people and subsequently being held against his will: “They put me in jail and said, ‘we're not going to leave you, we're going to make you travel. And if you don't pay, we're going to make you work.’ I did not want to but after a while, I had to accept.”<sup>696</sup> The armed group forced him to travel to Europe, even though he wanted to return to Mali.<sup>697</sup>

442. All but one of the victims interviewed were arbitrarily detained at some point on their journeys through Libya. Witnesses 4 and 7 reported being detained in transit, in Baheh and Sabratha respectively, ultimately for the purpose of extortion.<sup>698</sup> In Um Al-Aranib, migrants and refugees were held in containers. Witness 6 described not being allowed to leave the container where he was held captive, except for when he was forced to work in a local bakery.<sup>699</sup> Witness 7 was also taken in Um Al-Aranib and forced to work to pay off a ‘debt.’<sup>700</sup> The same situation happened in Gharyan, where Witness 8 was locked inside a container for two months.<sup>701</sup>

443. Witness 11 was held in a building in Al-Shwarif with five rooms guarded by armed men. Each room held approximately 100 people, none of whom were allowed to leave.<sup>702</sup> In this location, people were held even after paying large sums of money to their captors.<sup>703</sup> The victim was further imprisoned in Bani Walid, in what seemed to be a warehouse, and was rarely allowed to go outside: ‘No outside, just sometimes for 20-10 min max. They were standing with their guns and for 20 minutes maximum.’<sup>704</sup> Witness 8 provided a similar account concerning Sabratha, with armed guards keeping the victim in captivity.<sup>705</sup>

444. Several victims were deprived of their liberty multiple times during their time in Libya and had to pay a ransom every time. This was reported by Witness 1 (Bani Walid),<sup>706</sup> 3

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<sup>694</sup> [REDACTED].

<sup>695</sup> [REDACTED].

<sup>696</sup> [REDACTED].

<sup>697</sup> [REDACTED].

<sup>698</sup> [REDACTED].

<sup>699</sup> [REDACTED].

<sup>700</sup> [REDACTED].

<sup>701</sup> [REDACTED].

<sup>702</sup> [REDACTED].

<sup>703</sup> [REDACTED].

<sup>704</sup> [REDACTED].

<sup>705</sup> [REDACTED].

<sup>706</sup> [REDACTED].

(Sabha),<sup>707</sup> 6 (in transit from Sudan),<sup>708</sup> 11 (Al-Shwarif),<sup>709</sup> and 12 (Ghadames).<sup>710</sup> Some migrants and refugees were even kidnapped by a taxi driver, sold to smugglers in Bani Walid, and subsequently extorted.<sup>711</sup>

445. Migrants and refugees are often transferred against their will between locations of captivity.<sup>712</sup> As mentioned before, under the standards of the UNHRC, this involuntary transportation amounts to a severe deprivation of liberty.<sup>713</sup> In general, the acts described above are all unlawful restrictions of liberty. This is further evidenced by the perpetrators' intention to receive ransom payments or to use forced labour for their personal or third parties' gain.

446. While the DCIM has the authority under domestic law to detain migrants and refugees, its centres often operate outside the law. As described in the contextual background in Section II.D and II.E of this Communication, many DCIM centres are run by militias, which calls into question the legality of detention.

447. In Zuwara, victims were kept in a walled, open-air, but heavily guarded space. Witness 1 recounted that when one man tried to escape by running away, soldiers 'picked him up and beat him.'<sup>714</sup> The same Witness described being taken to another DCIM centre in Tariq al-Sika. There, migrants and refugees were locked inside by police agents<sup>715</sup> and asked to pay in order to go outside.<sup>716</sup> Witness 8, in turn, was kept in a container at DCIM Gharyan for four months, without any freedom of movement.<sup>717</sup>

448. Concerning the treatment received in these facilities, Witnesses 7 and 8 described the lack of access to food and water and poor hygiene at DCIM centres Murzuq and Gharyan.<sup>718</sup> In addition, many migrants and refugees have developed tuberculosis due to the lack of ventilation at DCIM centre Tariq al-Sika.<sup>719</sup> Witness 1 also described being frequently beaten by officers at DCIM centre Salah Aldin and one migrant being hit by a

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<sup>707</sup> [REDACTED].

<sup>708</sup> [REDACTED].

<sup>709</sup> [REDACTED].

<sup>710</sup> [REDACTED].

<sup>711</sup> [REDACTED].

<sup>712</sup> [REDACTED].

<sup>713</sup> UNHRC, *General comment No. 35*, para. 5.

<sup>714</sup> [REDACTED].

<sup>715</sup> [REDACTED].

<sup>716</sup> [REDACTED].

<sup>717</sup> [REDACTED].

<sup>718</sup> [REDACTED].

<sup>719</sup> [REDACTED].

‘stray bullet’ from a police officer.<sup>720</sup> He was also mercilessly beaten when he and a group of migrants and refugees went on a hunger strike.<sup>721</sup>

449. These accounts show that the deprivation of liberty suffered by migrants and refugees was arbitrary and unlawful under international standards. In light of the severity of the deprivation of liberty, there is a reasonable basis to believe that imprisonment as a crime against humanity was committed in Libya.

*b) Gravity of the conduct*

450. The gravity of the conduct is determined by the violation of fundamental rules of international law. Such rules encompass the guarantees enshrined in the right to be free from arbitrary detention and the right to a fair trial. These are recognised in international treaties such as the International Covenant on Civil and Political Rights (ICCPR).<sup>722</sup> According to Articles 9, 14, and 15 of the ICCPR, those guarantees include the rights to: prompt access to counsel; to challenge the lawfulness of one’s detention and have it promptly determined by a court; to be released in cases of unlawful detention; to be heard by an independent, impartial, and competent court; representation by counsel; and appeal. The ICTY has endorsed this view, also noting that ‘the legality of imprisonment as well as the procedural safeguards pertaining to the subsequent imprisonment’ are crucial to determining whether the imprisonment constitutes a crime against humanity.<sup>723</sup> The ICTR similarly indicated that the following factors should be taken into account when assessing the unlawfulness of imprisonment: ‘whether [the arrest] was based on a valid warrant of arrest, whether the detainees were informed of the reasons of their detention, whether the detainees were ever formally charged, and whether they were informed of any procedural rights.’<sup>724</sup>

451. The deprivation of liberty of migrants and refugees in Libya is particularly grave because it breaches preemptory norms of international law. Detention or captivity in temporary locations is arbitrary *per se*, as it is carried out by militias, criminal gangs, or other individual actors acting beyond the scope of law and due process. Moreover, as detailed in Section III, the conditions in many of these premises also frequently amount to

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<sup>720</sup> [REDACTED].

<sup>721</sup> [REDACTED].

<sup>722</sup> Hall and Stahn, p. 203.

<sup>723</sup> *Kordić & Čerkez*, Trial Judgment, para. 302; confirmed on appeal.

<sup>724</sup> ICTY, *Prosecutor v André Ntagerura et al*, Trial Judgment, Trial Chamber III (25 February 2004), para. 702.

different forms of enslavement, torture, and/or other inhumane treatment. This, in turn, evidences the gravity of the conduct, as required by the second material element.

452. As for imprisonment in DCIM facilities, notwithstanding the fact that such facilities are under the control of militias (and therefore the deprivation of liberty is unlawful), it is also essentially arbitrary. None of the witnesses filing this Communication was ever brought before a judge in Libya following their detention in DCIM facilities. As described in Sections II and III, this is a common situation for migrants and refugees detained at DCIM facilities,<sup>725</sup> who have no means to challenge the legality of their detention and treatment. By this token, their detention is clearly arbitrary as there is no due process of law. Therefore, the required gravity threshold is met.

*ii. Mental element*

453. Concerning the mental element, Article 7(1)(e) of the Rome Statute does not set out specific requirements for *mens rea*. Therefore, Article 30 applies, which establishes that the crime's material elements must be committed with intent and knowledge.<sup>726</sup> The Elements of Crimes add that the perpetrator must have been 'aware of the factual circumstances that established the gravity of the conduct.'<sup>727</sup> The testimonies gathered for this Communication and public reports show that imprisonment or other severe deprivation of physical liberty were conducted either to contain migrants and refugees or to extort money, neither of which could have happened without the perpetrator's intent or knowledge. The conditions of imprisonment or other severe deprivation of physical liberty are also the result of intentional or knowing conduct by the perpetrators, who are in charge of the holding facilities.

*iii. Nexus to the contextual elements*

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<sup>725</sup> In 2017-2018, UNSMIL documented just one case of North African migrants being convicted by a Tripoli court of charges of seeking to exit Libya unlawfully, following their interception at sea. See UNSMIL and OHCHR, *Desperate and Dangerous*, p. 39.

<sup>726</sup> J. Nilsson, Article 7, in *Commentary Rome Statute: Part 2*, Case Matrix Network, 30 June 2016, available at: <https://www.casematrixnetwork.org/cmnm-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-5-10/>.

<sup>727</sup> Elements of Crimes, Article 7(1)(e).



454. The Elements of Crimes determine that the course of conduct should be committed as part of a widespread or systematic attack against a civilian population, with the perpetrator's knowledge or intent that the conduct was part of that attack.<sup>728</sup>

455. The arbitrary detention of migrants and refugees is perhaps the most central and common feature of the attack against the civilian population in Libya. In turn, the sheer number of migrants and refugees subjected to imprisonment or severe deprivation of liberty, and thus of actors engaging in such conduct, indicates that perpetrators are aware of the circumstances of the broader attack.

456. In conclusion, the acts described here fulfil all the contextual, material, and mental elements as required by Article 7(1)(e) of the Rome Statute. They thus amount to the crime against humanity of imprisonment or other severe deprivation of physical liberty.

### **3. Enslavement**

457. Section III.A of this Communication introduced example cases relating to the subjugation and exploitation of migrants and refugees in Libya. Here, it is argued that this conduct amounts to the crime against humanity of enslavement under Article 7(1)(c) of the Rome Statute. This crime, as well as related crimes, are committed in a gendered manner. Males and females are subjected to differentiated degrees and forms of violence and exploitation, which include the deprivation of sexual integrity. Furthermore, it is submitted that enslavement, along with sexual slavery as crimes against humanity, have taken place in Libya, in transit, at detention facilities and other places of captivity.<sup>729</sup>

#### *i. Material elements*

458. The Elements of Crimes for Article 7(1)(c) require that 'the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.' This element reflects the jurisprudence of the ICC

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<sup>728</sup> *Id.*, Article 7, Introduction, para. 2.

<sup>729</sup> Conducts amounting to sexual slavery will be further detailed *infra* in Section IV.B.6.ii

and the ad hoc international criminal tribunals on the crime of enslavement as a crime against humanity,<sup>730</sup> as well as sexual slavery.<sup>731</sup>

459. In *Katanga*, Trial Chamber II understood the powers attaching to the right of ownership as ‘the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy.’<sup>732</sup> Thus, the exertion of such powers can only be established on a case-by-case basis and the list of examples included in the Elements of Crimes is not exhaustive.<sup>733</sup>

460. Further, the Elements of Crimes provide that ‘such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.’<sup>734</sup> It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.<sup>735</sup> Thus, the crime of trafficking in persons and the crime of enslavement as a crime against humanity partly overlap. Despite the differences in legal characterisation, both crimes rely on the same underlying conduct.<sup>736</sup> In this sense, insofar as human trafficking indicates the exercise of powers attaching to a right of ownership, the conduct also fulfils the material elements of enslavement.

461. Additionally, the ICC has explicitly recognised the following criteria in determining the exercise of powers attaching to the right of ownership:

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<sup>730</sup> *Ongwen*, Trial Judgment, para. 2712; *Ntaganda*, Trial Judgment, para. 952; *Katanga*, Trial Judgment, para. 976. Similarly, Extraordinary Chambers in the Courts of Cambodia, Case 001 (“Duch”), Judgment, Trial Chamber (26 July 2010), para. 342; ICTY, *Prosecutor v Kunarac et al.*, Judgment, Appeals Chamber (12 June 2002), para. 119; Special Court for Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, Judgement, Trial Chamber II (18 May 2012), para. 447; *Prosecutor v. Issa Hassan Sesay et al.*, Judgement, Trial Chamber I (2 March 2009), para. 199.

<sup>731</sup> Leading experts in the field, P. Viseur Sellers and J. Getgen Kestenbaum, argue that provision for sexual slavery codified protections are already granted under enslavement, since the crime presupposes that it could encompass control over victims’ sexual autonomy or sexual integrity. See P. Viseur Sellers and J. Getgen Kestenbaum, Sexual Slavery and Customary International Law, in S. Weill *et al.* (eds), *Prosecuting the President: The Trial of Hissène Habré* (forthcoming), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3516905](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3516905); J. Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (2013), p. 270.

<sup>732</sup> *Katanga*, Trial Judgment, para. 975.

<sup>733</sup> ICC, Situation in Uganda, *The Prosecutor v. Dominic Ongwen*, Trial Judgment, Trial Chamber IX (04 February 2021), para. 2711; *Ntaganda*, Trial Judgment, para. 952; *Katanga*, Trial Judgment, paras 975-976.

<sup>734</sup> Article 1 of the 1956 Supplementary Convention defines that the following conduct reduces a person to a servile status: debt bondage; serfdom; different forms of forced marriage; and child exploitation.

<sup>735</sup> Elements of Crimes, Article 7(1)(c), fn. 11.

<sup>736</sup> Cfr. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Article 3(a); see also O. Karasapan and S. Shah, *The Slave Trade in Libya: What Can Development Actors Do?*, Brookings, 25 January 2018, available at: <https://www.brookings.edu/blog/future-development/2018/01/25/the-slave-trade-in-libya-what-can-development-actors-do/>.

(i) control or restrictions of someone's movement and, more generally, measures taken to prevent or deter escape; (ii) control of physical environment; (iii) psychological control or pressure; (iv) force, threat of force or coercion; (v) duration of the exercise of powers attaching to the right of ownership; (vi) assertion of exclusivity; (vii) subjection to cruel treatment and abuse; (viii) control of sexuality; (ix) forced labour or subjecting the person to servile status; and (x) the person's vulnerability and the socio-economic conditions in which the power is exerted.<sup>737</sup>

462. Further, the imposition of a 'similar deprivation of liberty' as required by the Elements of Crimes may take various forms, encompassing 'situations in which the victims may not have been physically confined, but were otherwise unable to leave as they would have nowhere else to go and fear for their lives.'<sup>738</sup> In *Ongwen*, Trial Chamber IX analysed charges of both enslavement and sexual slavery, finding that the objective element of exercise of powers attaching to the right of ownership of the victims was fulfilled given that the accused 'deprived these women of their personal liberty, restricted and dictated their movement, including by threats and subjecting them to armed guard, subjected them to forced labour, and physically and psychologically abused them.'<sup>739</sup>

463. Nonetheless, previous ICC jurisprudence has identified several circumstances under which a deprivation of liberty may amount to the exercise of powers attached to the right of ownership. In *Ntaganda*, Trial Chamber IV established that the accused committed sexual slavery since, following the abduction of a victim and the deprivation of their liberty that ensued, he exercised powers attached to the right of ownership over the victim. The capture was understood to be the demonstration of the accused's initial exercise of powers attached to the rights of ownership over a person.<sup>740</sup> However, without elaborating further on two other female victims that were also captured, the Trial Chamber considered that their capture was not a deprivation of liberty tantamount to exercising powers attaching to the rights of ownership over the victims.<sup>741</sup>

464. In this respect, scholars have argued that international jurisprudence has not consistently taken into consideration precursory acts of the crime of enslavement and has conflated abductions with the deprivation of liberty as equivalent to the exercise of powers

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<sup>737</sup> *Ongwen*, Trial Judgment, para. 2712. See also *Ntaganda*, Trial Judgment, para. 952; *Katanga*, Trial Judgment, para. 976.

<sup>738</sup> *Ongwen*, Trial Judgment, para. 2713, fn 7156 citing *Ntaganda*, Trial Judgment, para. 952.

<sup>739</sup> *Ongwen*, Trial Judgment, para. 3053.

<sup>740</sup> *Ntaganda*, Trial Judgment, para. 961.

<sup>741</sup> *Id.*, paras 956-961.

attaching to the rights of ownership.<sup>742</sup> In fact, there are legal gaps in charging precursory acts such as transporting a person with the intent of selling or enslaving them, which would be better characterised as slave trade. Slave trade, however, has not been explicitly included in the Rome Statute,<sup>743</sup> potentially creating an impunity gap in this regard. In light of this, this Communication includes the slave trade as conduct underlying the crime against humanity of other inhumane acts (see Section IV.B.8).

465. Finally, both the ICC and ICTY have established that, although monetary exchanges or commercial transactions are not a requirement for the crime of enslavement, they are prime indicators of the exercise of powers attaching to the rights of ownership.<sup>744</sup>

466. As for the criminal conduct and legal characterisation of the crime of enslavement, the following paragraphs analyse the different forms of exercising powers attaching to the rights of ownership, based on the example cases of deprivation of liberty and migrants and refugees exploitation introduced in Section III.A.

*a) Selling of migrants and refugees en route*

467. Selling persons fulfils the element of the exercise of powers attaching to the right of ownership. While transiting through Libya, a variety of perpetrators sell migrants and refugees. Those who cannot pay ransom are sold to centres further upstream, while middlemen within the same network who get into disputes over payments sometimes sell migrants and refugees to detention sites or to places of captivity in order to recoup their money.<sup>745</sup>

468. These ‘transactions’ are conducted by smugglers and traffickers, militias, armed groups, and even private citizens, as detailed by Witnesses 1,<sup>746</sup> 2,<sup>747</sup> 3,<sup>748</sup> 4,<sup>749</sup> 6,<sup>750</sup> 7,<sup>751</sup> 11,<sup>752</sup> and 13.<sup>753</sup> Witness 4, for instance, reported being sold to the police in Bani Walid,

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<sup>742</sup> P. Viseur Sellers and J. Getgen Kestenbaum, *Missing in Action: The International Crime of the Slave Trade* (forthcoming) in *Journal of International Criminal Justice*, 2020, p. 4, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3583564](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3583564).

<sup>743</sup> *Id.*, p. 22.

<sup>744</sup> See *Ongwen*, Trial Judgment, para. 2143 *et seq.*; in particular, *Kunarac et al.*, Appeal Judgment, para. 119, citing Trial Chamber, para. 543.

<sup>745</sup> Malakooti, *The Political Economy*, pp.43-44.

<sup>746</sup> [REDACTED].

<sup>747</sup> [REDACTED].

<sup>748</sup> [REDACTED].

<sup>749</sup> [REDACTED].

<sup>750</sup> [REDACTED].

<sup>751</sup> [REDACTED].

<sup>752</sup> [REDACTED].

<sup>753</sup> [REDACTED].

while Witness 13 recounted how the police sold her and other migrants and refugees to a group of smugglers and traffickers. As detailed above, Italian courts have also ascertained cases where formal authorities were actively selling migrants and refugees to unofficial detention sites, some of which were also run by militias party to the conflict.<sup>754</sup>

469. In this context, migrants and refugees are *de facto* under the control of their captors, have no agency whatsoever in deciding whether they want to be part of these ‘transactions,’ nor are they able to exit this arrangement freely without risking their lives and being subjected to various forms of physical violence.

470. Furthermore, Witness 3 reported to have seen an exchange of money between his driver and a white Arab upon arrival in Sabha,<sup>755</sup> after which he and his group were taken to a detention facility where he was tortured and extorted. While monetary transactions are not necessary to prove the existence of this element of the crime, it does serve as a strong indication that, in many cases, the smuggling and trafficking of migrants and refugees may amount to the crime of enslavement.

*b) Selling of migrants and refugees in ‘market auctions’*

471. At least since the publication of the CNN video in 2017, the existence of slave market auctions has become increasingly widely known to the international community. In such ‘auctions,’ Black men are sold to the highest bidder. For instance, Witness 10 described in detail how one of these auctions works in Zawiya, and the traumatising impact it has on the person being sold and on the other migrants and refugees witnessing it:

*We are standing there [a market in Zawiya] and first time in my life I saw in front of me, between two cars, a black man who was... had a chain on his head, on his hands, on his feet, because he was strong, and the other car was there standing and they were making an auction of how much they want to pay. And I saw first time the trade. The price started 3000 dinar until they reached 7000 dinar. All this time this man was crying, and watching me, and crying, and I am crying, for 7 days I was crying because hearing the price was very shocking to me. And the man was crying.*<sup>756</sup>

472. This clearly corresponds to an exercise of powers attaching to the right of ownership, which amounts to enslavement, as the victim was treated as property, his liberty deprived, and his autonomy denied.

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<sup>754</sup> Tribunale di Messina, N. 149/2020 (28 May 2020), pp. 9, 13, 23.

<sup>755</sup> [REDACTED].

<sup>756</sup> [REDACTED].

c) *Forced labour*

473. As described in Section III.A.3, once armed groups, militias, smugglers and traffickers deprive migrants and refugees of their liberty, they force many Black migrant men, in particular those perceived as strong and able-bodied, to labour. Migrants and refugees are forced to work in farming, domestic work, construction, road paving, and rubbish collection. Working conditions are often unbearable, with little or no protection against harsh weather conditions, and the workers are not provided with adequate food and potable water.<sup>757</sup>
474. Usually, forced labour occurs once migrants and refugees are intercepted, either on land or at sea, by militias and armed groups and taken to detention sites, some under DCIM control. For instance, Witness 1 recounted how a person belonging to a militia that sent him and others on a boat towards Europe was also present with the LCG when they returned from their interception at sea.<sup>758</sup> This indicates a transfer of information and potentially money between the militia and the LCG. In this case, the Witness was held in different detention facilities and forced to work while in Tariq al-Sika. For a month, he was taken to a house to do construction work along with three other men.<sup>759</sup> On another occasion, he was forcibly taken to the Ain Zara facility to load and transport weapons.<sup>760</sup>
475. Other testimonies have described similar instances of forced labour and the forced participation of migrants and refugees in the Libyan armed conflict. These include [REDACTED], in Sabratha and then in Tripoli;<sup>761</sup> Witness 5, in [REDACTED], where he was reportedly working for [REDACTED];<sup>762</sup> and Witness 12, in Tripoli.<sup>763</sup> Furthermore, Witness 10 described how migrants, including minors, were forced to carry and bury the dead bodies of deceased migrants and refugees in Zawiya.<sup>764</sup>
476. Being forced to work on construction sites is another main feature of the forced labour imposed on migrants and refugees. As Witness 11 described, this is particularly true when men are perceived to be strong, as this form of work is physically extremely taxing. In Al-Shwarif, Witness 11, [REDACTED], and other migrants and refugees were threatened

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<sup>757</sup> UNSMIL and OHCHR, *Detained and Dehumanised*, p.18.

<sup>758</sup> [REDACTED].

<sup>759</sup> [REDACTED].

<sup>760</sup> [REDACTED].

<sup>761</sup> [REDACTED].

<sup>762</sup> [REDACTED].

<sup>763</sup> [REDACTED].

<sup>764</sup> [REDACTED].

with guns and forced to build additional rooms for this facility.<sup>765</sup> Similarly, Witness 8 was forced to work on construction sites in Sabratha and Zawiya, further detailing the long working hours without receiving a salary, and little to no food or water.<sup>766</sup>

477. Forced labour also occurs in the context of debt bondage or bondage labour, where migrants and refugees held in detention facilities are forced to ‘pay debts’ to their captors to be able to continue their journey through Libya or simply to gain their freedom from detention. In many cases, migrants and refugees never agree to any amount, instalments, or due dates for these ‘debts,’ and are only given the option to pay them through their work. Moreover, migrants and refugees are not able to choose which kind of work they perform nor its conditions, including salary, working hours and duration of the activities, meaning that sometimes they have to work for months on end without receiving any payment. If they complain, they are exposed to further violence, including beatings.<sup>767</sup>

478. Another example of forced labour was described by Witness 4, when he was deceived to think he was getting a job in Tripoli. He was in fact captured by ‘police,’<sup>768</sup> arrested and taken to a facility where he was forced to work in the construction of a five-storey building. If he refused, he would be beaten and tortured.<sup>769</sup>

479. Other modes of forced labour involve detention facilities that have set up a system of ‘sponsorship,’ in which private citizens can come to a facility and ‘buy’ a group of migrants and refugees to work for a day—be it on farms or on construction sites. At the end of the day they are taken back to the facility, where this cycle repeats. This was the case of Witnesses 1, in DCIM Tariq al-Sika;<sup>770</sup> Witness 2, in DCIM Ain Zara;<sup>771</sup> Witness 6, in Um al-Aranib;<sup>772</sup> Witness 7, in Sabratha and in Tripoli;<sup>773</sup> and Witness 14, in Benghazi.<sup>774</sup>

480. As perpetrators in detention facilities have full control over the liberty, autonomy, and labour of migrants and refugees, this form of deprivation of liberty and subsequent exploitation is tantamount to an exercise of the powers attaching to the right of ownership.

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<sup>765</sup> [REDACTED].

<sup>766</sup> [REDACTED].

<sup>767</sup> [REDACTED].

<sup>768</sup> In the context of the interview, this can be understood as meaning armed actors.

<sup>769</sup> [REDACTED].

<sup>770</sup> [REDACTED].

<sup>771</sup> [REDACTED].

<sup>772</sup> [REDACTED].

<sup>773</sup> [REDACTED].

<sup>774</sup> [REDACTED].

*d) Sexual slavery*

481. In the case of many women and girls in Libya, the exercise of powers attaching to the right of ownership over them by perpetrators usually occurs together with forcing the women to engage in acts of a sexual nature. This particular crime is further analysed below in Section IV.B.6 relating to sexual crimes under Article 7(1)(g).

*ii. Mental element*

482. The crime of enslavement requires the mental element to be committed with intent and knowledge, pursuant to Article 30.<sup>775</sup>

483. From the testimony and evidence gathered for this Communication, there are sufficient grounds to conclude that perpetrators in Libya exercised powers attaching to the right of ownership of migrants and refugees with the requisite intent and knowledge. Witness 7 described how smugglers in Brak Shati said:

*'Whoever came here to us is considered as a slave and we decide his or her fate'*<sup>776</sup>

484. Witness 10 provided a similar account from Zawiya:

*"And then the Libyan comes to look you in the face and says "'ibeidad', all you blacks you are slaves"*<sup>777</sup>

485. These statements evidence that the perpetrators knew and consciously treated migrants and refugees as slaves, subjecting them to conditions that amount to enslavement. Thus, migrants and refugees are denied their autonomy and independence as human beings, which in the circumstances described above is tantamount to the mental element of the crime of enslavement.

*iii. Nexus to the contextual element*

486. According to the Elements of Crimes, the conduct shall be committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of

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<sup>775</sup> Hall and Stahn, p. 260.

<sup>776</sup> [REDACTED].

<sup>777</sup> [REDACTED].



the perpetrator that the conduct was part of that attack or intending the conduct to be a part of it.<sup>778</sup>

487. The selling of migrants and refugees in its different forms, along with the forced labour imposed on migrant men, are an integral part of the widespread and systematic attack against this civilian population as described *supra*. These forms of exploitation and commodification not only represent an exercise of the powers attaching to the right of ownership but are also intrinsically linked to the widespread detention and arbitrary deprivation of liberty of migrants and refugees in the country. As previously ascertained, armed groups, militias and private citizens profit from such exploitative conducts insofar as they receive money for selling migrants and refugees, forcing them to work for ‘sponsors,’ or directly benefitting from migrants and refugees’ unremunerated labour.

488. Having fulfilled all the contextual, material, and mental elements, there is a reasonable basis to believe that the crime against humanity of enslavement has been committed against migrants and refugees in Libya.

#### **4. Murder**

489. Based on the many instances of killings of migrants and refugees in Libya as described thoroughly in Section III.B of this Communication, this Subsection argues that these killings amount to the crime against humanity of murder under Article 7(1)(a) of the Rome Statute.

##### *i. Material element*

490. According to Article 7 (1) (a) of the Rome Statute, the material element to establish the commission of the act of murder requires that ‘[t]he perpetrator killed one or more persons.’<sup>779</sup> Further, killing is to be understood interchangeably with causing the death of another person.<sup>780</sup>

491. In Libya, migrants and refugees are killed under different circumstances. These include during raids, in response to protests, as a form of punishment, and through inducing life-threatening conditions. Based on the interviews gathered for the purpose of this

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<sup>778</sup> Elements of Crimes, Article 7 (1)(c), paras. 2-3.

<sup>779</sup> Elements of Crimes, Article 7(1)(a)

<sup>780</sup> *Id.*, footnote 7.

Communication, along with publicly available information, the paragraphs below describe how the material element is fulfilled in each of these situations.

*a) Murder during armed hostilities*

492. Migrants and refugees are killed in the context of armed hostilities, either through air strikes, or in the course of raids or confrontation between warring parties. Witness 5 reported a specific incident in Tripoli/Gilgares (Gergarish) during active hostilities around July 2014, when a bomb hit a ‘ghetto’ called [REDACTED], killing an unknown number of migrants and refugees.<sup>781</sup> In addition, Witness 10 referred to migrants and refugees being forced to bury the mutilated bodies of other black Africans following several bombings in Zawiya.<sup>782</sup>
493. Inter alia, the 2017 report by the UN Panel of Experts on Libya also documented the intentional targeting of migrants and refugees in the course of rivalry between various armed groups that are involved in the smuggling business, including the al-Nasr Brigade in Zawiya, causing the death of an unknown number of individuals.<sup>783</sup>
494. Furthermore, UNSMIL has documented many instances of the use of excessive—and therefore arbitrary—and unlawful lethal force by DCIM officials against migrants and refugees. On 19 November 2017, during a raid on a makeshift migration camp in the area of Warshefana, members of the Tajoura and Janzour groups affiliated with the DCIM opened fire without providing any verbal warning, causing a number of arbitrary deaths and injuries.<sup>784</sup>
495. The DCIM centre in Tajoura has been repeatedly targeted in air strikes by warring factions. On 7 May 2019, two individuals at a DCIM centre in Tajoura were injured during an air strike.<sup>785</sup> That same year, on 2 July, 53 migrants and refugees held in the same detention centre were killed during air strikes and 130 others were injured, including women and children.<sup>786</sup> OCHA reported that guards opened fire upon the detainees as they

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<sup>781</sup> [REDACTED].

<sup>782</sup> [REDACTED].

<sup>783</sup> 2017 Panel of Experts Report, Annex 17, para. 6; Annex 30, para. 4.

<sup>784</sup> UNSC, Report of the Secretary-General on the United Nations Support Mission in Libya, S/2018/140, 12 February 2018, p. 9, available at: <https://www.refworld.org/docid/5b4c678f4.html>.

<sup>785</sup> UNSC, United Nations Support Mission in Libya: Report of the Secretary-General, S/2019/682, 26 August 2019, para. 19, available at: [https://unsmil.unmissions.org/sites/default/files/sg\\_report\\_on\\_unsmil\\_s\\_2019\\_628e.pdf](https://unsmil.unmissions.org/sites/default/files/sg_report_on_unsmil_s_2019_628e.pdf).

<sup>786</sup> *Id.*

tried to escape during the strikes.<sup>787</sup> In this centre, detainees are kept in facilities near military facilities and obliged to move and maintain weaponry, exposing them to the heightened risk of military attacks.<sup>788</sup>

496. On 27 May 2020, 30 migrants and refugees were killed by affiliates of smugglers at an unofficial detention setting in Mizdah. A group of heavily armed men stormed the warehouse where detainees were being kept, fired indiscriminately at them and subsequently ran over bodies with vehicles.<sup>789</sup> To date, the fate of the remaining 120 to 150 migrants and refugees is unknown.

*b) Murder during detention*

497. As explained in Section III.B, deaths in detention sites and places of captivity are widespread. Murder is oftentimes used as a form of punishment, either in the context of a failure to pay ransom, unsuccessful attempts to escape detention, resistance to rape or other forced activities of a sexual nature, or protesting against inhumane detention conditions. Some survivor-victims witnessed murders, including in DCIM facilities. In a facility in Zawiya,<sup>790</sup> Witness 10 saw the killing of five individuals who attempted to escape the facility. Their bodies were later thrown into the sea.<sup>791</sup> Additionally, the Witness recounted the murder of a Nigerian girl when she refused to have sexual intercourse with a Libyan man. The Witness described that the girl was shot in the head and abdomen, and immediately died.<sup>792</sup> Similarly, Italian judges ascertained that, in the DCIM centre in Zawiya, migrants and refugees would frequently die following torture and beatings.<sup>793</sup> A female survivor recounted to Oxfam how she had a miscarriage and her sister died because of repeated beatings at this location.<sup>794</sup>

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<sup>787</sup> UNOCHA, *Libya: Attack on Tajoura Detention Center: Humanitarian Update*, 3 July 2019, available at: [https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/humanitarian\\_update\\_-\\_attack\\_on\\_tajoura\\_dc\\_03\\_july\\_2019.pdf](https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/humanitarian_update_-_attack_on_tajoura_dc_03_july_2019.pdf).

<sup>788</sup> HRW, *Libya: Deadly Attack Highlights Disregard for Civilians*, 3 July 2019, <https://www.hrw.org/news/2019/07/03/libya-deadly-attack-highlights-disregard-civilians>.

<sup>789</sup> UNSC, Report of the Secretary-General on the United Nations Support Mission in Libya, S/2020/832, 25 August 2020, para. 57; *see also* 2021 UN Panel of Experts Report, paras 47-50.

<sup>790</sup> [REDACTED].

<sup>791</sup> [REDACTED].

<sup>792</sup> [REDACTED].

<sup>793</sup> Tribunal de Messina 149/2020 (28 May 2020), 39.

<sup>794</sup> Oxfam, *'You Aren't Human Anymore'*, Oxfam Media Briefing, 9 August 2017, p. 4, available at: <https://policy-practice.oxfam.org/resources/you-arent-human-any-more-migrants-expose-the-harrowing-situation-in-libya-and-t-620324/> (Esther, 28, from Nigeria, recalls how she was locked up in Zawia prison with her sister, for around five months: '...I lost my poor little child who was in my womb due to the beatings I suffered, and my sister died from the beatings and abuse...').

498. In turn, Witness 11 reported being told at Al-Shwarif that a man was shot and killed for not paying ransom.<sup>795</sup> OHCHR and UNSMIL reported that in April 2016, Al-Fallah DCIM centre guards beat a young Eritrean man to death when his family was not able to send him any money.<sup>796</sup>

499. Witness 7 stated that the mass grave next to a turkina in Tripoli was used by gangs to bury migrants and refugees who refused to work as forced labour for them. The Witness was also told about a Sudanese man who was killed the week before she arrived.<sup>797</sup>

500. UNSMIL has further noted the use of deadly force against migrants and refugees in detention, including after protests against detention conditions, in official detention sites at Tariq al-Sika, Qasr Bin Ghashir, Zawiya and Sabha.<sup>798</sup> A recent incident at the Mabani detention centre on 9 April 2021 saw one person killed after shots were fired indiscriminately into cells, following mounting tensions in the centre created by the deplorable conditions.<sup>799</sup>

*c) Murder through inducing life-threatening conditions in official and unofficial detention settings and during transport*

501. According to the Elements of Crimes, the *actus reus* requirement of the crime can be equally met by actions and/or omissions that knowingly cause the death of civilians.<sup>800</sup> Moreover, recalling what was stated in the *Kavishema and Ruzindana* case by the ICTR Trial Chamber, the crime of murder can be caused by either a ‘premeditated act or omission.’<sup>801</sup>

502. The combination of intentionally creating life-threatening conditions and the reasonable foreseeability of death satisfies the *actus reus* element. As described in Section III.C above, there is ample evidence on the inhumane conditions and the purposeful denial of medical assistance at detention sites and places of captivity, which cause the death of migrants and refugees in Libya. Italian courts have also recognised such conditions.<sup>802</sup>

503. The witnesses provided specific accounts of deaths caused by disease and the active refusal by guards and smugglers to allow for medical care in the facilities. Witness 8, for

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<sup>795</sup> [REDACTED].

<sup>796</sup> UNSMIL and OHCHR, *Detained and Dehumanised*, p.18.

<sup>797</sup> [REDACTED].

<sup>798</sup> S/2019/682, para. 52.

<sup>799</sup> MSF, *Libya: One dead and two injured in shooting in Tripoli detention centre*.

<sup>800</sup> ICC, Elements of Crimes, Article 7(1)(a), footnote 7.

<sup>801</sup> *Kavishema and Ruzindana*, Trial Judgment, paras 136-140.

<sup>802</sup> Corte d’Assise di Milano, N.10/17 (10 October 2017), 71.

example, witnessed the death of three individuals in Sabratha and Tripoli, because smugglers denied these individuals access to medicine or neglected clear signs of disease.<sup>803</sup> This resonates particularly with [REDACTED]’s account of [“HN”], the officer in charge of DCIM Tariq al-Sika, who refused to allow doctors and humanitarian organisations into the centre.<sup>804</sup> In Bani Walid, Witness 2 witnessed people dying every day because of illness.<sup>805</sup>

504. In Al-Shwarif, Witness 11 reported seeing scores of Eritrean men die of diarrhea, and some from hunger.<sup>806</sup> Access to water is scarce in many places of captivity, as described by Witnesses 7, 8, and 10.<sup>807</sup> The lack of food is equally severe, with multiple witnesses reporting eating a very small portion of pasta only once a day.<sup>808</sup>

505. In conclusion, the situation at Libyan detention sites and places of captivity clearly shows how their custodians have killed other people by shooting them, torturing them to death to extort money from their families, or leaving them to die from starvation or untreated medical conditions.<sup>809</sup> This thus meets the first element of murder as a crime against humanity.

*ii. Mental element*

506. Article 7(1)(a) of the Rome Statute does not set out specific requirements for *mens rea*. Therefore, the standard of Article 30 applies. Article 30 establishes that the material elements must be committed with intent and knowledge.<sup>810</sup>

507. The first-hand witness accounts coupled with the findings of different courts and commissions, as well as numerous reports, tell of the ‘knowing and intentional’ *mens rea* of detention centre officials, who caused the death of migrants and refugees, including women and children, both through direct killings and the failure to provide adequate healthcare and nutrition.

*iii. Nexus to the contextual element*

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<sup>803</sup> [REDACTED].

<sup>804</sup> [REDACTED].

<sup>805</sup> [REDACTED].

<sup>806</sup> [REDACTED].

<sup>807</sup> [REDACTED].

<sup>808</sup> [REDACTED].

<sup>809</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p. 29.

<sup>810</sup> Nilsson, Article 7.

508. The remaining elements of the crime of murder pertain to the material and subjective connection to the overall attack. In light of the proximate relationship between imprisonment, murder, and the underlying causes of detainee deaths—DCIM officials, militia members, armed groups, and other actors cited above committed the act of murder as part of the widespread and systematic attack directed against migrants and refugees in Libya. They also intended for their acts of murder to form part of the said attack.

509. The widespread character of the murder of migrants and refugees can be inferred from data by the Italian organisation MEDU. In a recent report comprising over three thousand testimonies gathered between 2014 and 2020, MEDU documented that 30% of the interviewees witnessed the killing of a relative or a friend, and 46.7% have witnessed the killing of one or more strangers. Furthermore, 40% of the testimonies detail how the person has been close to death at least once.<sup>811</sup>

510. Having fulfilled all the contextual, material, and mental elements, there is a reasonable basis to believe that the crime against humanity of murder is being committed against migrants and refugees in Libya.

## 5. Torture

511. Torture as a crime against humanity is defined in Article 7(2)(e) of the Rome Statute as:

*‘[...] the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.’*

512. In Libya, migrants and refugees are systematically subjected to torture, as the cases of physical injuries and killings introduced in Section III.C has thoroughly described.<sup>812</sup> Among the migrants and refugees assisted by the medical organisation MEDU, at least 85% of them reported having suffered torture and inhumane, degrading treatment. 65% experienced serious and repeated beatings.<sup>813</sup>

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<sup>811</sup> MEDU, *The Torture Factory*, p. 12.

<sup>812</sup> Public reports have also extensively documented the situation, *see e.g.*, UNSMIL and OHCHR, *Torture and Deaths in Detention in Libya*; OHCHR and UNSMIL, *Desperate and Dangerous*; MEDU, *The Torture Factory*; 2017 UN Panel of Experts Report, Annex 21.

<sup>813</sup> MEDU, *The Torture Factory*, p. 11.

*i. Material elements*

513. The definition of torture requires the pain or suffering inflicted by the perpetrator to be severe. In that respect, the ICC has established that ‘although there is no definition of the severity threshold as a legal requirement of the crime of torture, it is constantly accepted in applicable treaties and jurisprudence that an important degree of pain and suffering has to be reached in order for a criminal act to amount to an act of torture.’<sup>814</sup> Moreover, the severity of the pain and suffering ‘may be met by a single act or by a combination of acts when viewed as a whole.’<sup>815</sup> It is also not required that the consequences of torture are visible or that the injuries are permanent.<sup>816</sup> Lastly, although different from the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and international humanitarian law, in the Rome Statute, the crime against humanity of torture does not require it to be committed with a specific purpose.<sup>817</sup>
514. The following analysis of the material elements first introduces the different manners under which pain and suffering are inflicted upon migrants and refugees in Libya. It then proceeds to analyse the severity of such pain and suffering.

*a) Infliction of physical or mental pain or suffering*

515. Members of armed groups or militias, police officers, guards, smugglers, traffickers, and criminal gangs inflict pain and suffering upon migrants and refugees in detention facilities or holding sites. Based on interviews gathered for this Communication and public reports, it is possible to identify the following methods of inflicting severe physical or mental pain or suffering:
- Repeated beatings with various objects, including: metal, wooden, or plastic sticks; shovels; water pipes; and the back of weapons ([REDACTED]<sup>818 819 820 821</sup>);
  - Extortion of migrants and refugees, which are often associated with the beatings. Occasionally, this is done while the victim is talking on the phone with their family in

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<sup>814</sup> *Bemba*, Decision on the Confirmation of Charges, para. 193.

<sup>815</sup> *Ongwen*, Trial Judgment, para. 2701.

<sup>816</sup> *Ibid.*

<sup>817</sup> ICC, Elements of crimes Article (7) (1) (f), footnote 14.

<sup>818</sup> [REDACTED].

<sup>819</sup> [REDACTED].

<sup>820</sup> [REDACTED].

<sup>821</sup> [REDACTED].

order to create more distress and pressure for ransom payments ([REDACTED]<sup>822 823 824</sup>);

- Burning with various tools, including with cigarettes, hot plastic, or heated metals ([REDACTED]<sup>825 826</sup>),
- Beatings while forced to strip down naked ([REDACTED]<sup>827</sup>);
- Hanging from bars and other stress positions such as handcuffing, standing for a long time, and hanging upside down ([REDACTED]<sup>828 829</sup>);
- Shootings, particularly in the legs, not with the intent to kill but to punish and set an example for other migrants and refugees ([REDACTED]<sup>830 831</sup>);
- Stabbing ([REDACTED]<sup>832</sup>);
- Kneeling on rocks; electrocutions, including in the genital area, which may amount simultaneously to a sexual and gender-based crime; tying and flogging; pulling nails; *Falaka* (or foot whipping); and other forms of torture that may amount simultaneously to sexual and gender-based crimes, including rape, forced nudity, or forcing a person to have intercourse with an animal.<sup>833</sup>

516. On many occasions, torture is filmed or photographed and sent to the families as proof of suffering, and sometimes migrants and refugees are forced to call their families and friends after being tortured and in distress, to recount their experience and ask them for ransom.<sup>834</sup> This causes additional mental suffering for migrants, refugees, and their families.

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<sup>822</sup> [REDACTED].

<sup>823</sup> [REDACTED].

<sup>824</sup> [REDACTED].

<sup>825</sup> [REDACTED].

<sup>826</sup> [REDACTED].

<sup>827</sup> [REDACTED].

<sup>828</sup> [REDACTED].

<sup>829</sup> [REDACTED].

<sup>830</sup> [REDACTED].

<sup>831</sup> [REDACTED].

<sup>832</sup> [REDACTED].

<sup>833</sup> Corte d'Assise di Milano, Sent. N. 10/17, dep. 1 Dec. 2017, p. 56.; AI, *A Perfect Storm: The Failure of European Policies in the Central Mediterranean*, 6 July 2017, p. 28, available at: <https://www.amnesty.org/en/documents/eur03/6655/2017/en/>; UNSMIL and OHCHR, *Torture and Deaths in Detention in Libya*, p. 7; UNSMIL and OHCHR, *Desperate and Dangerous*; UN Human Rights Council, Report on the Special Rapporteur on Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, A/HRC/37/50, 28 February 2018; AI, *'Between Life and Death'*, p. 6.

<sup>834</sup> [REDACTED]; AI, *No one will look for you*, p. 36; <sup>834</sup> MEDU, *The Torture Factory*, pp. 23, 27, 29, 38, 40; WRC, *More Than One Million Pains*, pp. 22, 24, 29; UNSMIL and UNHCR, *Desperate and Dangerous*, p. 29; AI, *Libya's Dark Web of Collusion*, pp. 8, 31, 32.



517. Physical and mental pain has also been inflicted on migrants and refugees in Libya by the conditions in which they are held, either in official DCIM centres or other types of facilities. These conditions include:

- Forcing people to sleep outside ([REDACTED]<sup>835 836</sup>);
- Confining persons inside a freezer as a form of punishment ([REDACTED]<sup>837</sup>);
- Holding people inside containers, without enough access to sunlight, proper ventilation, or sufficient water ([REDACTED]<sup>838 839</sup>);
- Holding people inside facilities without proper space, lacking food, water, hygiene, or ventilation ([REDACTED]<sup>840 841 842 843 844 845 846</sup>).

518. The UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has further argued that ‘detention based solely on migration status, as such, can also amount to torture,’<sup>847</sup> particularly when it is done with the purpose of intimidating or punishing migrants and refugees and their families. The detention of migrants and refugees in Libya, particularly after they are intercepted at sea, together with the brutal conditions in which they are held, inflict physical and mental pain and suffering on them, thereby fulfilling the first material element of this crime.

519. The systematic and widespread nature of this crime is clear, given that the infliction of physical and mental pain or suffering with similar *modus operandi* has been reported in different locations and facilities across Libya. Based on the accounts of the witnesses interviewed for this Communication and public reports, incidents of torture have taken place in the DCIM detention facilities in Gharyan and Murzuq, the al-Nasr detention centre in Zawiya, Zintan, Tariq al-Sika, Abu Salim, Salah Aldin, Janzour, Shuhada, al-Gwia, al-Fallah, Kararim, Misrata, Mitiga, Surman, Tarik al-Matar, Tajoura, Tarik al-Shouq, and

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<sup>835</sup> [REDACTED].

<sup>836</sup> [REDACTED].

<sup>837</sup> [REDACTED].

<sup>838</sup> [REDACTED].

<sup>839</sup> [REDACTED].

<sup>840</sup> [REDACTED].

<sup>841</sup> [REDACTED].

<sup>842</sup> [REDACTED].

<sup>843</sup> [REDACTED].

<sup>844</sup> [REDACTED].

<sup>845</sup> [REDACTED].

<sup>846</sup> [REDACTED].

<sup>847</sup> A/HRC/37/50, para. 28.

Zuwara.<sup>848</sup> It has also taken place in other places of captivity in Zawiya,<sup>849</sup> Bani Walid, Al-Shwarif, Sabratha, Sabha, and Warshefana, and in former police stations in Tripoli, Jabal Onat/Jebel Uweinat, and Kufra.

*b) Severity of the pain or suffering inflicted*

520. The severity of the pain and suffering is established by the sequelae experienced by a large majority of migrants and refugees. Around 80% of those assisted by MEDU reported physical consequences, and 79% suffered from Post-Traumatic Stress Disorder (PTSD) following the traumatic events—including torture—they experienced during their journey through Libya.<sup>850</sup>

521. Witness 3 was left with severe scarring in his chest and decreased mobility in his arm after being burnt with a torch and repeatedly beaten while being held in captivity in Sabha.<sup>851</sup> Similarly, [REDACTED] still have complications due to the beatings they received. One of them was hit with the back of a weapon after resisting a rape attempt, leaving her with a broken rib that later needed to be surgically repaired. The other fractured her spine and is still receiving medical care in her current place of residence.<sup>852</sup> Witness 1 describes how a boy was left with a hearing impairment after being severely beaten in a facility in Bani Walid,<sup>853</sup> which is in line with what has been documented by the OHCHR and UNSMIL.<sup>854</sup>

522. Regarding the pain and suffering inflicted by the conditions of captivity, its severity can be observed in the medical problems these conditions cause, which include respiratory tract infections, acute diarrhoea, skin diseases, and infections such as scabies, gangrene, urinary tract infections, and illnesses related to malnutrition ([REDACTED]<sup>855 856 857</sup>).<sup>858</sup> For instance, [REDACTED] contracted tuberculosis while being held in the Tariq al-Sika DCIM centre, presumably due to the lack of proper ventilation.<sup>859</sup> The disease was so

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<sup>848</sup> UNSMIL and OHCHR, *Desperate and Dangerous*; UNSMIL and OHCHR, *Detained and Dehumanised*, pp. 17-18; Corte d'Assise di Milano, Sent. N. 10/17, dep. 1 Dec. 2017, p. 56.

<sup>849</sup> [REDACTED].

<sup>850</sup> MEDU, *The Torture Factory*, p. 12.

<sup>851</sup> [REDACTED].

<sup>852</sup> [REDACTED].

<sup>853</sup> [REDACTED].

<sup>854</sup> UNSMIL and OHCHR, *Detained and Dehumanised*, p. 17.

<sup>855</sup> [REDACTED].

<sup>856</sup> [REDACTED].

<sup>857</sup> [REDACTED].

<sup>858</sup> Additionally, see MSF, *International Activity Report 2017*, p. 15.

<sup>859</sup> [REDACTED].

serious that he needed to be hospitalised for a month and take medication for several months afterwards. The severity of the pain is further compounded by the lack of access to medical facilities after the infliction of pain, which in some cases has led to the death of migrants and refugees (see *supra* Section IV.B.4).

523. Severity is further evidenced when instances of torture are filmed or photographed in order to extort the victims' family members, which not only displays the suffering of the victims, but also inflicts suffering upon their families. Moreover, in some cases where families were not able to pay the ransom, the detained migrants and refugees have died as a result of injuries inflicted during torture.<sup>860</sup>

*c) Custody and control by the perpetrator*

524. The instances of torture described above took place while victims were being held inside official or unofficial detention facilities, where the direct perpetrators had full custody and control of victims. The testimonies gathered for this Communication and public reports have consistently described a structured system of torture and extortion implemented to generate profits to the direct perpetrators themselves and to the groups controlling the detention facilities, whether they are part of the official Libyan government, militia groups (also possibly government-affiliated), or members of trafficking and smuggling networks.

525. As thoroughly described above in the example cases of deprivation of liberty and migrant subjugation and exploitation (*supra* Section III.A), irrespective of the official or unofficial character of the facility, migrants and refugees are held under the control of guards and in most cases are not free to leave of their own accord. Paying the ransom or being sold to a private Libyan citizen were the only ways for migrants and refugees to leave the detention facilities alive. This undoubtedly shows that guards in these facilities had the utmost control over the detained civilians.

526. Moreover, regarding the infliction of pain and suffering by the conditions of detention, those in control of official and unofficial detention facilities are described as having total control over access to food and water, hygienic conditions, and medical assistance, reflecting the migrants and refugees' absolute subjection to the intentions of those perpetrating such crimes. Testimonies gathered by OHCHR and UNSMIL in 2015 also described how '[...] migrants were usually forbidden to leave their cells. When the guards

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<sup>860</sup> E.g., [REDACTED]; UNSMIL and OHCHR, *Detained and Dehumanised*, p. 17

did allow them to leave, the guards spat on their faces, humiliated them, and beat them. [...] [T]he guards forced them to stand still in the sun and punished them if they moved.’<sup>861</sup>

527. It is thus evident that the requirement set by the Rome Statute for a person to be ‘in the custody or under the control of the perpetrator’ is met, based on the instances of torture described above [REDACTED], taking place in locations where armed groups, militias, government officials, smugglers, or traffickers clearly have total control over detained migrants and refugees.

*d) The pain and suffering are not inherent or incidental to lawful sanctions*

528. The detention of migrants and refugees is unlawful according to international standards, as explained in Section IV.B.2 on imprisonment or other severe deprivation of liberty. These detentions are part of a criminal system that exploits migrants and refugees and in which torture is instrumental. Hence, it is not necessary to prove that the pain and suffering inflicted on migrants and refugees is neither inherent nor incidental to lawful sanctions.

*ii. Mental element*

529. For the crime against humanity of torture, it is only necessary that the perpetrator intended the conduct: ‘it is not necessary to demonstrate that the perpetrator knew that the harm inflicted was severe.’<sup>862</sup>

530. The above-mentioned testimonies help infer that the infliction of pain was intentional as it was conducted to control, punish, and discipline migrants and refugees or with the purpose of extorting them in exchange for their freedom ([REDACTED])<sup>863 864 865 866 867 868 869</sup>. The conditions of detention that inflict pain and suffering are also intentionally set by the guards and commanders or high-ranking officers in control of detention sites and places of captivity, as they are in charge of the distribution of food, medicine, water, and all other conditions in which migrants and refugees are held. For instance, in Tariq al-Sika,

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<sup>861</sup> UNSMIL and OHCHR, *Detained and Dehumanised*, p. 16.

<sup>862</sup> *Bemba*, Decision on the Confirmation of Charges, para. 194.

<sup>863</sup> [REDACTED].

<sup>864</sup> [REDACTED].

<sup>865</sup> [REDACTED].

<sup>866</sup> [REDACTED].

<sup>867</sup> [REDACTED].

<sup>868</sup> [REDACTED].

<sup>869</sup> [REDACTED].

[REDACTED] recounted that [“HN”], the centre’s director, at some point in 2019 was not allowing either medical personnel or medicine to enter the facility.<sup>870</sup>

*iii. Nexus with the contextual element*

531. The Elements of Crimes prescribe that the criminal conduct should be committed as part of a widespread or systematic attack against a civilian population, with the perpetrator’s knowledge or intent that the conduct was part of that attack.<sup>871</sup> The instances of torture inside detention sites and places of captivity were indeed committed as part of the attack against the civilian population described above in Section IV.B.1. Torture was committed for the purpose of disciplining, controlling, punishing, or extorting migrants and refugees and is an essential element of the attack and the patterns of exploitation in Libya. Moreover, the conduct can be associated with the State policy of migration detention that allows the Libyan government, militias, armed groups, traffickers, and smugglers to benefit economically from the detention and extortion of migrants and refugees.

532. In this context, as already evidenced with regard to the deprivation of liberty of migrants and refugees, there are abundant indications that the perpetrators have knowledge that torture is part of an ongoing attack against migrants and refugees in Libya.

533. In conclusion, the acts of torture described here fulfil all the elements required by Article 7(1)(f) of the Rome Statute and thus constitute the crime against humanity of torture.

## **6. Sexual crimes**

534. According to Article 7(1)(g) of the Rome Statute, the ICC has jurisdiction over the crimes against humanity of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and any other form of sexual violence of comparable gravity. Based on the interviews conducted for the purpose of this Communication, as well as publicly available information (see Section III.D), it is here argued that the crimes of rape, sexual slavery, enforced prostitution, and other forms of sexual violence have been committed in Libya against migrants and refugees.

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<sup>870</sup> [REDACTED].

<sup>871</sup> Elements of Crimes, Article 7, Introduction, para. 2.

535. Given the similarities among the material elements of some of these crimes, this Section is divided into five main parts. The first one analyses the material elements of rape and other forms of sexual violence; the second analyses the material elements of sexual slavery and enforced prostitution; the third analyses the material element of coercion for rape, other forms of sexual violence, and enforced prostitution; the fourth analyses the mental element of the sexual crimes; and the fifth analyses the contextual element and the nexus between the sexual crimes and the contextual element.

*i. Material elements for rape and other forms of sexual violence*

*a) Material element for rape: the ‘invasion’ of a person’s body*

536. According to the Elements of Crimes, the crime against humanity of rape requires that ‘[t]he perpetrator invaded<sup>872</sup> the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.’<sup>873</sup>

537. Most testimonies gathered for the purpose of this Communication, in line with the reports mentioned above in Section III.D.1, provide evidence of the widespread commission of rape against migrants and refugees in Libya, particularly women and girls, and especially in the context of physical searches and detention (whether official or unofficial). According to the survivors, rape happened ‘every day’ in some official and unofficial detention sites ([REDACTED]<sup>874</sup>), such as in Al-Shwarif, and many women and girls became pregnant as a result of such conduct ([REDACTED]<sup>875 876</sup>). Rape was often mentioned together with or within the framework of other crimes, such as enforced prostitution and sexual slavery. While these broad statements do not contain details on the material act of rape *per se*, survivors in those cases refer almost exclusively to the forced penetration of a vagina by a penis, which falls within the definition of the crime against

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<sup>872</sup> The concept of “invasion” is intended to be broad enough to be gender-neutral. *See also Ntaganda*, Trial Judgment, para. 933; *Bemba*, Trial Judgment, para. 100.

<sup>873</sup> Elements of Crimes, Article 7(1)(g)-1. In this context, the term ‘invasion’ was consciously chosen to reflect a gender-neutral approach. *See* Elements of Crimes, Article 7(1)(g)-1, footnote 15. As confirmed in the ICC trial judgment against Bosco Ntaganda, this means that the conduct ‘includes same-sex penetration, and encompasses both male and/or female perpetrators and victims.’ *Ntaganda*, Trial Judgment, para 933. *See also Bemba*, Trial Judgment, para. 100.

<sup>874</sup> [REDACTED].

<sup>875</sup> [REDACTED].

<sup>876</sup> [REDACTED].

humanity of rape under the Rome Statute. Other forms of penetration are also mentioned in survivor accounts.

538. For instance, [REDACTED], recounting her experience at the Libyan border, explained how '[a] soldier pulled out his penis to rape [her],' and how some women have been stripped naked, internally searched by Libyans who 'put their hands in their buttocks, in their vaginas,' 'raped,' and forced to 'suck the penis.'<sup>877</sup> In this specific case, [REDACTED] referred respectively to the penetration of genital and anal openings with a non-sexual body part (the hand), of genital and anal openings with a sexual organ, and of an oral penetration with a sexual organ.

539. Noting the ICC's gender-neutral definition of rape, it is important to highlight that more situations can be considered by the Office of the Prosecutor even though the testimony gathered for this Communication reflect mostly on crimes committed against women.

*b) Material elements for other forms of sexual violence*

*An act of a sexual nature of a gravity comparable to other offences in Article 7(1)(g)*

540. The crime of 'any other forms of sexual violence' is a broad category meant to cover acts of sexual violence that do not necessarily correspond to the other enumerated crimes, but that are so serious that they may equally constitute a crime against humanity (or a war crime, under Articles 8(2)(b)(xxiii) or 8(2)(e)(vi)). The Elements of Crimes require the commission of 'an act of a sexual nature' by the perpetrator or another person.<sup>878</sup> Moreover, the conduct must be of a gravity comparable to the other offences in Article 7(1)(g).<sup>879</sup> Gravity factors include: publicity of the act(s), multiple perpetrators, repetition of the act(s), particular vulnerability of the victim, use of weapon, and long-term consequences of the act.

541. It should be noted that sexual violence can be committed by and against any person, regardless of their gender;<sup>880</sup> it can occur without any sexual gratification;<sup>881</sup> and it can be

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<sup>877</sup> [REDACTED].

<sup>878</sup> Elements of Crimes, Article 7(1)(g)-6.

<sup>879</sup> Elements of Crimes, Article 7(1)(g)-6.

<sup>880</sup> This has been particularly highlighted in the framework of the crime of rape, but is applicable to all crimes of a sexual nature contained in the Rome Statute, *see* Elements of Crimes, Articles 7(1)(g)-1, fn. 15; 8(2)(b)(xxii)-1, fn. 50; and 8(2)(e)(vi)-1.

<sup>881</sup> ICTY, *Prosecutor v Milan Milutinović et al.*, Judgement, Trial Chamber (26 February 2009), para. 199.

physical or non-physical,<sup>882</sup> as long as it affects the sexual autonomy and/or integrity of a person.<sup>883</sup>

542. Neither the Rome Statute nor the Elements of Crimes specify how to determine whether an act is ‘of a sexual nature’. However, based on interviews conducted with survivors for the purpose of this Communication and data available from public reports as introduced in Section III.D, at least the following acts committed in the situation of Libya are ‘of a sexual nature’: forced nudity, creation of constant fear of acts of sexual violence, forced masturbation, and molestation. All these acts also reach the gravity threshold pursuant to the Rome Statute.

### *Forced Nudity*

543. ‘Forced nudity refers to the act of forcing another person to undress partially or completely, including to perform different sorts of movements while in a state of nudity.’<sup>884</sup> It has been identified as a form of sexual violence by the UN,<sup>885</sup> civil society organisations,<sup>886</sup> judicial institutions,<sup>887</sup> and other key stakeholders.<sup>888</sup> It was also listed by the OTP as one form of sexual and gender-based violence allegedly committed in Ukraine.<sup>889</sup>

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<sup>882</sup> *Akayesu*, Trial Judgment, para. 688; *Policy Paper on Sexual and Gender-Based Crimes*, p. 3.

<sup>883</sup> SCSL, *Prosecutor v. Alex Tamba Brima et al*, Judgment, Trial Chamber II (20 June 2007), para. 720; ICTY, *Prosecutor v Anto Furundžija*, Judgment, Trial Chamber (10 December 1998), para. 186; ICTY, *Prosecutor v Radoslav Brđanin*, Judgment, Trial Chamber II (1 September 2004), para. 1012.

<sup>884</sup> FIDH, *Sexual and Gender-Based Violence: A Glossary from A to Z*, p. 78, available at: [https://www.fidh.org/IMG/pdf/atoz\\_en\\_book\\_screen.pdf](https://www.fidh.org/IMG/pdf/atoz_en_book_screen.pdf)

<sup>885</sup> UN, *Glossary on Sexual Exploitation and Abuse: Thematic Glossary of current terminology related to Sexual Exploitation and Abuse (SEA) in the context of the United Nations*, 24 July 2017, p. 9, available at: [https://hr.un.org/sites/hr.un.org/files/SEA%20Glossary%20%20%5BSecond%20Edition%20-%202017%5D%20-%20English\\_0.pdf](https://hr.un.org/sites/hr.un.org/files/SEA%20Glossary%20%20%5BSecond%20Edition%20-%202017%5D%20-%20English_0.pdf).

<sup>886</sup> FIDH, *Glossary on SGBV*, pp. 78-79 ‘forced nudity’; pp. 156-157 ‘sexual violence’; Women’s Initiatives for Gender Justice (WIGJ), *Civil Society Declaration on Sexual Violence*, 2019, Part 1(5) and commentary pp. 13-14; Part. 4(3)(i) and commentary pp. 25-26, available at <https://4genderjustice.org/wp-content/uploads/2019/11/English-Civil-Society-Declaration-on-Sexual-Violence.pdf>. See, *inter alia*, International Center for Transitional Justice (ICTJ), *When No One Calls It Rape: Addressing Sexual Violence Against Men and Boys in Transitional Contexts*, December 2016, p. 5, available at: [https://www.ictj.org/sites/default/files/ICTJ\\_Report\\_SexualViolenceMen\\_2016.pdf](https://www.ictj.org/sites/default/files/ICTJ_Report_SexualViolenceMen_2016.pdf).

<sup>887</sup> See e.g., Inter-American Court of Human Rights (IACtHR), *Miguel Castro Castro Prison v. Peru*, Judgment (Merits, Reparations and Costs), 25 November 2006, para. 306; *Akayesu*, Trial Judgment, paras. 688, 697.

<sup>888</sup> UK Foreign & Commonwealth Office (UK FCO), *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, March 2017, p. 18, available at: [https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict/International\\_Protocol\\_2017\\_2nd\\_Edition.pdf](https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict/International_Protocol_2017_2nd_Edition.pdf).

<sup>889</sup> ICC OTP, *Report on Preliminary Examination Activities (2017) – Ukraine*, para. 109, available at: [https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf).



544. Forcing someone to undress is an act that does not require any physical contact. It is often driven by a desire to humiliate a person, to increase a person's vulnerability, and to violate their integrity and dignity.<sup>890</sup> In Chile, it was noted that 'forced nudity in detention was nearly routine abuse [...] because it rendered the victim vulnerable and defenceless, increasing the (often-realised) fear that other forms of sexual violence would follow.'<sup>891</sup> In general, forced nudity occurs particularly during armed conflicts and in detention facilities alongside many other forms of human rights abuses, regardless of the gender of the victims.<sup>892</sup>
545. Based on the testimony gathered for this Communication, the forcible undressing of migrants and refugees in Libya often occurs during searches for money and phones, when they reach new official or unofficial detention sites, or when they are passed to a new smuggler or trafficker. While all genders are targeted, women are particularly exposed to additional sexual and sexualised violence during and after these events, including forced physical contact and molestation (see also below under molestation).
546. [REDACTED] in particular shed light on this reality. In one instance, she was forced to undress, while her perpetrator touched her breasts. He removed his clothes and told her to lie down on him, to perform oral sex on him, and he eventually forcibly put his penis in her hand.<sup>893</sup> Another time, she was asked to undress in front of the perpetrator and his teammates, before being searched externally and internally.<sup>894</sup> [REDACTED] explained how women were 'welcomed' when arriving at a prison [REDACTED]: 'They ask you to undress, they spray the water on you with the hose. They come to touch you, etc., breasts, buttocks. This is their way of welcoming you.'<sup>895</sup>
547. Body searches and the undressing attached to these procedures, particularly in detention settings, are not *per se* a violation of human rights or a crime under international criminal law when conducted in respect of international standards. Several instruments, such as the Nelson Mandela Rules, have set minimum standards to ensure that these procedures

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<sup>890</sup> UK FCO, *International Protocol*, p. 268. S. Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, in *European Journal of International Law*, 2007, pp. 253, 269; HRW, 'Welcome to Hell': *Arbitrary Detention, Torture, and Extortion in Chechnya*, October 2000, pp. 47-48, at [https://www.hrw.org/reports/2000/russia\\_chechnya4/](https://www.hrw.org/reports/2000/russia_chechnya4/); M. Sjöholm, *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems*, 2017, p. 354.

<sup>891</sup> ICTJ, *When No One Calls It Rape*, p. 7.

<sup>892</sup> F. Ní Aoláin, *Forced Nudity: What International Law and Practice Tell Us*, Just Security, 1 June 2016, available at: <https://www.justsecurity.org/31325/forced-nudity-international-law-practice/>.

<sup>893</sup> [REDACTED].

<sup>894</sup> [REDACTED].

<sup>895</sup> [REDACTED].

preserve the dignity of the persons targeted. They must only be conducted if allowed by laws or regulations in accordance with obligations under international law,<sup>896</sup> if absolutely necessary,<sup>897</sup> in adequate settings (e.g. in private, with respect to hygiene, health and safety standards, and by someone from the same gender),<sup>898</sup> and by appropriately trained staff or qualified professionals (cavity searches should be prohibited, and when conducted should only be done by doctors).<sup>899</sup> In practice, however, more often than not, body and cavity searches do not comply with these rules and amount to ill treatment or torture.<sup>900</sup> In Libya, they are mostly conducted by individuals in criminal networks, including smugglers and traffickers. When at the hand of official detention guards, none of the above-mentioned standards are respected. They often occur in front of other detainees or guards, by unqualified guards (including and often from another gender), without any consideration for the person searched, and in unsanitary environments.

548. Forced nudity, outside the context of searches, is also committed together with acts amounting to the crime against humanity of torture. For instance, Witness 7 saw someone be tied up and burned with plastic bottles,<sup>901</sup> and [REDACTED] was whipped and slapped while undressed or undressing.<sup>902</sup>

549. Forced nudity reaches the gravity threshold because the seriousness of forced nudity is widely acknowledged. The act of forcing a person (male, female, or non-binary) to undress, either partially or completely, and/or to perform some movements or activities while in this state of nudity, has been recognised by various regional and international courts and tribunals, as well as UN bodies, as a violation of the victim's integrity,<sup>903</sup> an

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<sup>896</sup> UN Office on Drugs and Crime (UNODC), *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, Rule 50, available at: [https://www.unodc.org/documents/justice-and-prison-reform/Nelson\\_Mandela\\_Rules-E-ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf).

<sup>897</sup> *Id.*, Rule 52(1).

<sup>898</sup> *Ibid.*; International Committee of the Red Cross (ICRC), *International Rules and Standards for Policing*, 9 June 2020, p. 45, available at: <https://www.icrc.org/en/publication/0809-international-rules-and-standards-policing>; OHCHR, *Human Rights and Prisons – Manual on Human Rights Training for Prison Officials*, 2005, p. 150, available at: <https://www.un.org/ruleoflaw/blog/document/human-rights-and-prisons-manual-on-human-rights-training-for-prison-officials/>.

<sup>899</sup> UNODC, the Nelson Mandela Rules, Rule 52(2); UN General Assembly, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), A/RES/65/229, 16 March 2011, Rules 19-21, available at: <https://undocs.org/A/RES/65/229>.

<sup>900</sup> UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 January 2016, paras 23, 36, available at: <https://undocs.org/A/HRC/31/57>.

<sup>901</sup> [REDACTED].

<sup>902</sup> [REDACTED].

<sup>903</sup> *Miguel Castro Castro Prison*, paras 304-308. Judges also noted that it constitutes sexual violence (para. 306). They also considered that in some cases, forcing a person to undress or to remain naked is violation of the right to humane treatment (para. 308).

outrage upon personal dignity,<sup>904</sup> an inhuman and/or degrading act or treatment,<sup>905</sup> and even a form of ‘sexual torture,’<sup>906</sup> sometimes constituting a war crime or a crime against humanity. While forced nudity can be committed in public or in private, the element of publicity has been taken into account as an aggravating factor in assessing the gravity of the act—due to the severe physical or mental pain it causes.<sup>907</sup>

550. Regarding the forced undressing of migrants and refugees in Libya, several factors can be taken into account, including: the repetition of the acts, the number of perpetrators, the fact that they are almost always committed together with other forms of violence (e.g., sexual, physical, psychological, or verbal), and the fact that it often occurs in public, either in front of other detainees or guards (usually of another gender). When it occurs in the context of searches, it must also be taken into account that they are conducted in violation of international standards and that those searches result in a total deprivation of the victims’ personal property (often phones and money), leaving them in an even more vulnerable state and at the risk of further violations.

551. Despite these circumstances being a reality in many situations, and despite the wide recognition among the jurisprudence of other courts and tribunals mentioned above, the ICC has yet to recognize the gravity of forced nudity. In the decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, it was found that ordering people to ‘undress in public in order to humiliate them[...] do not constitute forms of sexual violence of comparable gravity to the other crimes set forth in Article 7(1)(g) of the Statute.’<sup>908</sup> While forced nudity unfortunately occurs in most situations known to the Court, the Libya situation constitutes a good opportunity for the ICC to finally recognize the gravity of such conduct and align with previous jurisprudence and international standards.

### *Causing a situation of constant fear of sexual violence*

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<sup>904</sup> *Kunarac et al.*, Trial Judgment, paras 766-774, 782, 88; *Akayesu*, Trial Judgment, paras 688, 697; ICTY, *Prosecutor v Miroslav Kvočka et al.*, Trial Judgment, Trial Chamber (2 November 2011), para. 170.

<sup>905</sup> *Akayesu*, Trial Judgment, paras 688, 697; African Commission on Human and Peoples’ Rights (ACHPR), *Commission nationale des droits de l’Homme et des libertés v. Chad*, Communication n°74/92, 11 October 1995. SCSL, *Prosecutor v. Alex Tamba Brima et al*, Judgment, Appeals Chamber (22 February 2008), para. 184.

<sup>906</sup> UN Human Rights Council, Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment on his mission to Mexico (21 April to 2 May 2014), A/HRC/28/68/Add.3, 29 December 2014, para. 28, available at: <https://undocs.org/en/A/HRC/28/68/Add.3>.

<sup>907</sup> *Brdanin*, Trial Judgment, paras 1012-1013; *Furundžija*, Trial Judgment, para. 272; *Kvočka et al.*, Trial Judgment, para. 170.

<sup>908</sup> ICC, Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III (12 June 2008), paras 39-40.

552. This form of violence refers to the creation of a general fear of sexual violence through a widespread campaign of sexual violence within a specific territory or under specific circumstances. While this can be used to prove the existence of a coercive environment, creating and nourishing a situation of extreme and constant fear of sexual violence also constitutes a form of sexual violence in and of itself.

553. As highlighted in Section III.D of this Communication, the use of sexual violence against migrants and refugees in Libya, and particularly against women and girls in situations of captivity or detention, is well-documented. Most survivors interviewed, men and women alike, have shown that there is a general acknowledgement of this reality, and that the abuse of women and girls is a ‘regular, normal thing there’ ([REDACTED]).<sup>909</sup> Witness 6 raised that ‘Libyan usually don’t beat women, but they rape. They physically and sexually attack them.’<sup>910</sup> [REDACTED] shared how she knew what would happen to her as soon as she was called into a room with one of her captors: ‘When I went to the room I started praying because I knew what was in store for me. Arabs have bad habits.’<sup>911</sup>

554. At the Inter-American Court of Human Rights, judges have assessed the consequences of a climate where suffering sexual violence is a constant fear in their assessment of whether or not some acts constituted a violation of the right to humane treatment as established by Article 5(2) of the American Convention. They noted that ‘[h]aving forced the female inmates to remain nude in the hospital, watched over by armed men, in the precarious health conditions in which they were, constituted sexual violence in the aforementioned terms, which caused them constant fear of the possibility that said violence be taken even further by the police officers, all of which caused them serious psychological and moral suffering.’<sup>912</sup>

555. This was also raised by many survivors from around the world who were consulted for the Hague Principles on Sexual Violence. In particular, the Civil Society Declaration on Sexual Violence, which aimed to reflect the survivors’ own experiences and views on what constitutes sexual violence, explains what makes violence ‘sexual:’

*An example can be seen in the Ukraine consultation, in which women who experienced sexual violence in detention stated that ‘even being in a place of captivity created a sense of danger and uncertainty for them. The forced stay in a closed space with men caused*

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<sup>909</sup> [REDACTED].

<sup>910</sup> [REDACTED].

<sup>911</sup> [REDACTED].

<sup>912</sup> *Miguel Castro Castro Prison*, para. 308.

*fear and an expectation of sexual abuse by the combatants.’ As one participant explained, in some places of captivity, ‘one can sense sexual violence in the air.’<sup>913</sup>*

556. In Libya, statements on the prevalence of sexual violence against migrants and refugees in general are sufficient to show how the whole system of smuggling and trafficking creates the constant fear of being subjected to sexual violence. This is particularly true for women and young girls. Moreover, violence is used as a tool of coercion, not only towards direct victims, but also entire groups.<sup>914</sup> Indeed, committing such violence in front of witnesses within the group has the effect of creating a general fear as to whether they will suffer the same violence they witnessed. This constant and ongoing fear not only constitutes psychological oppression relevant to the next Section on coercion—but is also a form of sexual violence itself. Beyond direct witnesses, the fear can be spread to all people who enter Libya following the traditional migration route. The fear, in turn, will be reinforced by witnessing or suffering new acts of sexual violence. Hence, a cycle of fear is instilled into migrants and refugees that they will suffer from sexual violence every step of the way on their Libyan journey.

557. This form of sexual violence is of comparable gravity to the other crimes against humanity under the Rome Statute. In light of the specifics of the Balkan conflicts, in particular the unprecedented massive and organised use of sexual violence by all parties to the conflicts, the ICTY’s jurisprudence is particularly relevant here.

558. Regarding violence in general, several ICTY judges have assessed the impact of ‘threat’ and ‘constant fear’ of violence on victims, particularly on detainees. In the *Aleksovski* case, trial chamber judges referred to one testimony where the witness ‘explained that the fear of being robbed or beaten by the HVO soldiers was one of the most difficult ordeals that had to be endured.’<sup>915</sup> With that in mind, they considered that the context in which the detainees were placed, including ‘[t]he searching of some detainees accompanied by threats, the noise and screams relayed over the loud speaker and the nocturnal visits of the soldiers to the cells[,] clearly constituted serious psychological abuse of the detainees.’<sup>916</sup> In this case, they concluded that the psychological violence against the detainees was

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<sup>913</sup> WIGJ, *Civil Society Declaration on Sexual Violence*; WIGJ, *The Hague Principles on Sexual Violence*, p. 31, available at: <https://4genderjustice.org/wp-content/uploads/2020/02/MASTER-DOC-The-Hague-Principles-on-Sexual-Violence.pdf>.

<sup>914</sup> [REDACTED].

<sup>915</sup> ICTY, *Prosecutor v Zlatko Aleksovski*, Trial Chamber Judgment, Trial Chamber (25 June 1999), para. 187. See, more broadly, paras 184-210.

<sup>916</sup> *Id.*, para. 190. See, more broadly, paras 184-210.

repetitive and involved direct threats.<sup>917</sup> They also noted that this violence was aggravated by ‘the uncertainty weighing on the minds of the detainees’ as to what would happen to them.<sup>918</sup> This, together with physical violence, constituted outrage upon personal dignity as a violation of the laws and customs of war.<sup>919</sup> While the violence examined in that case was not specifically of a sexual nature, the decision is still relevant because the gravity of creating constant fear does not hinge solely upon the type of violence a person is threatened with, The focus of the analysis is on the resulting psychological (and physical) harm the victims experience.

559. Regarding sexual violence specifically, there was a similar climate of fear in Bosnia’s Omarska camp, where ‘it was commonplace for women to be subjected to sexual intimidation or violence.’<sup>920</sup> Various forms of rape and other sexual violence were committed against women detainees. ICTY judges highlighted that while detainees didn’t necessarily talk to each other about what happened to them, they knew what the situation was. Their own experience, together with the fact that some women were called at night and returned ‘absent-minded,’ ‘withdrawn or crying,’<sup>921</sup> were clear indications of the constant fear of sexual violence, sometimes coupled with actual threats. In the *Brđanin* case, the ICTY trial chamber found that ‘the threat of rape constituted a sexual assault vis-à-vis the female detainee.’<sup>922</sup>

560. In Libya, witnesses have likewise described how women, some of them very young ([REDACTED]), were called at night and returned (sometimes after several days) crying and shocked.<sup>923</sup> Such events would happen in various official or unofficial detention sites in Libya, at the hands of various perpetrators. Sometimes the violence occurred in plain sight, enhancing the general fear created within detention sites.

#### *Forced Masturbation and Molestation*

561. Molestation, forced masturbation, or any forced sexual contact, including with and of genitalia, are forms of sexual violence.<sup>924</sup> These acts often fall under the broader categories

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<sup>917</sup> *Id.*, para. 226.

<sup>918</sup> *Ibid.*

<sup>919</sup> *Id.*, para. 228.

<sup>920</sup> *Kvočka et al.*, Trial Judgment, para. 98. *See also Brđanin*, Trial Judgment, para. 515.

<sup>921</sup> *Kvočka et al.*, Trial Judgment, para. 107.

<sup>922</sup> *Brđanin*, Trial Judgment, para. 516.

<sup>923</sup> [REDACTED].

<sup>924</sup> *Kvočka et al.*, Trial Judgment, para. 180; ICTR, *Prosecutor v Emmanuel Rukundo*, Trial Judgment, Trial Chamber II (27 February 2009), para. 381; *Milutinović et al.*, Trial Judgment, paras 632, 689.

of sexual abuse or sexual assault, covering conduct that does not constitute rape due to the lack of penetration but involves physical and sexual contact. The United Nations defines sexual assault as “sexual activity with another person who does not consent. It is a violation of bodily and sexual autonomy and is broader than narrower conceptions of ‘rape,’ especially because (a) it may be committed by means other than force or violence, and (b) it does not necessarily entail penetration.”<sup>925</sup> In several reports on its preliminary examinations on the situation of Iraq/UK, the OTP referred to this form of violence, namely ‘forced masturbation,’ ‘touching of genitalia,’ ‘enforced masturbation,’ and ‘provocative physical touching of detainees’ genital and anal area.’<sup>926</sup>

562. In Libya, forced physical contact of a sexual nature occurs in various contexts, particularly in unofficial detention sites. It often happens together with other sexual crimes such as rape and enforced prostitution or sexual slavery, particularly against women and girls, and in the context of body searches (internal and external) or inhumane treatments against all genders.<sup>927</sup>

563. Similar to the previous crimes mentioned, including forced nudity and creating a constant fear of sexual violence, molestation, and other forced sexual physical contacts can be considered as being of comparable gravity to other crimes under Article 7.

564. In the *Rukundo* case, ICTR’s trial chamber found that the fact that ‘Rukundo forced sexual contact with [Witness CCH] by opening the zipper of his trousers, trying to remove her skirt, forcefully lying on top of her and caressing and rubbing himself against her until he ejaculated and lost his erection,’ was ‘clearly of a sexual nature.’<sup>928</sup> With regard to the surrounding circumstances of the sexual assault, notably the mass killings and the particular vulnerability of the victim, the chamber concluded that ‘the only reasonable conclusion is that Witness CCH suffered serious mental harm as a consequence of Rukundo’s actions.’<sup>929</sup>

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<sup>925</sup> UN, *Glossary on Sexual Exploitation and Abuse*, p. 6.

<sup>926</sup> See respectively, ICC OTP, *Report on Preliminary Examination Activities 2015*, 12 November 2015, para. 38, available at: <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf>; and ICC OTP, *Report on Preliminary Examination Activities 2016*, 14 November 2016, para. 94, available at: [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf).

<sup>927</sup> [REDACTED].

<sup>928</sup> *Rukundo*, Trial Judgment, para. 381.

<sup>929</sup> *Id.*, para. 389.

565. Additionally, several other ICTY and ICTR cases have recognised that forced oral sex, forced masturbation, or forced physical contact, including between victims themselves, can amount to a crime against humanity or a war crime.<sup>930</sup>

566. The gravity of such acts is therefore well-established, and this applies to those committed in Libya where, as highlighted below, there is a general environment of coercion, violence, and oppression that increases the gravity of the acts committed. Here again, the same factors can be taken into account. These are, notably: the repetition of the acts, the number of perpetrators, and the fact that they are almost always committed together with other forms of violence (such as forced nudity, rape, inhumane treatments, or torture). However, it is important to note that, in cases of multiple crimes being perpetrated simultaneously, each and every one of the crimes meeting the requirements can be prosecuted. Acts of molestation or forced masturbation are serious enough to constitute the crime against humanity of other forms of sexual violence.

*The act was committed by the perpetrator against one or more persons or the perpetrator caused such persons or persons to engage in the act*

567. According to the Elements of Crimes, the perpetrator must have committed the act ‘of a sexual nature’ against one or more persons or have caused such person(s) to engage in the act. The latter requirement appropriately reflects situations where one or more victims are forced by the perpetrator to engage in acts ‘of a sexual nature’.<sup>931</sup>

568. In Libya, evidence shows that the crimes included in this Communication were mostly committed by perpetrators against one or more persons. While the perpetrators vary along the journey, including guards in official and unofficial detention sites, smugglers’ personnel, traffickers, and gangs (colloquially referred to as ‘Asma boys’), they appeared to be mostly men. Most information on alleged perpetrators can be found in Section IV on individual criminal responsibility and Annex II of this Communication.

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<sup>930</sup> See e.g., *Tadić*, Trial Judgment, paras 206, 194-198; ICTY, *Prosecutor v Milan Martić*, Trial Judgment, Trial Chamber I (12 June 2007), para. 288, fn. 899; ICTY, *Prosecutor v Stevan Todorović*, Sentencing Judgment, Trial Chamber (31 July 2001), paras 38-40; ICTY, *Prosecutor v Zdravko Mucić et al*, Trial Judgement, Trial Chamber (16 November 1998), paras 1062-1066.

<sup>931</sup> See e.g., *Mucić et al*, Trial Judgement, paras 1065-1066, on the fact of forcing two brothers to perform fellatio on each other. The Chamber noted that this constitutes ‘at least, a fundamental attack on their human dignity,’ that this act is an inhuman treatment under Article 2 of the Statute, and added that this act could also ‘constitute rape for which liability could have been found if pleaded in the appropriate manner.’ See also UN Economic and Social Council (ECOSOC), Contemporary forms of slavery, systematic rape, sexual slavery and slavery like practices during armed conflict: Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur, E/CN.4/Sub.2/1998/13, 22 June 1998, para. 22: ‘Sexual violence also characterizes situations in which two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner.’



ii. *Material elements for sexual slavery and enforced prostitution*

569. According to the Elements of Crimes, the crime against humanity of sexual slavery requires that the perpetrator (1) ‘exercised any or all of the powers attaching to the right of ownership over one or more person’ and (2) ‘caused such person or persons to engage in one or more acts of a sexual nature.’<sup>932</sup>

570. As for the crime against humanity of enforced prostitution, it is required that the perpetrator (1) ‘caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion’ and (2) ‘obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.’<sup>933</sup>

a) *Material element common to sexual slavery and enforced prostitution: the perpetrator causing the victim to engage in an act of a sexual nature*

571. Both these crimes share the common element of the perpetrator causing the victim to engage in an act of a sexual nature. Similar to what has already been noted regarding the crime of other forms of sexual violence, the perpetrator of sexual slavery and enforced prostitution may not have been directly involved in the commission of acts of a sexual nature but have caused them through the establishment and implementation of the slavery or prostitution business. This means that the victim is often forced to perform a sexual act with a third party or a client, while the actual perpetrator is only remotely involved.

572. The witness testimonies gathered for the purpose of this Communication, for instance, show how different actors used the ‘services’ of or engaged in sexual activity with women and girls detained in official camps and holding sites, some even resulted in pregnancy ([REDACTED]).<sup>934</sup>

573. Within the context of sexual slavery and enforced prostitution, the Court has understood the act of a sexual nature often in the form of a sexual intercourse.<sup>935</sup> However, it is important that the understanding of these acts does not lead to the adoption of a restrictive interpretation which only includes the most conventional conducts, such as intercourse, and that do not to reflect the real experience of the victims and survivors.

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<sup>932</sup> Elements of Crimes, Article 7(1)(g)-2.

<sup>933</sup> Elements of Crimes, Article 7(1)(g)-3

<sup>934</sup> [REDACTED].

<sup>935</sup> *Ntaganda*, Trial Judgment, paras 955, 975; *Ongwen*, Trial Judgment, paras 3047, 3084.

b) *Material element for crimes of sexual slavery: The right of ownership over the victim*

574. The crime of sexual slavery requires the right of ownership over the victims. This element also constitutes the main requirement of the broader crime of enslavement and is thus not elaborated here.

575. Various testimonies gathered for the purpose of this Communication demonstrate the right of ownership. There are references to states of slavery (Witness 4)<sup>936</sup> and slavery-like conditions, such as using women and girls as ‘wives’ (Witness 1),<sup>937</sup> as well as direct quotes from captors calling the victims slaves or ‘*Ibeidad*’ (Witness 10)<sup>938</sup> to illustrate that they are merely commodities under their captors’ control and do not have any freedom or free will. Witness 7 recounted:

*WITNESS: [...] I decided to tell them that I wanted to go, and they said, ‘you’re not free to decide that you want to go, so if you want to mess around we will take you to the torture room.’ I told them my initial agreement was not like this; it was to take me to Tripoli. They replied to me, ‘we don’t have anyone coming here with an agreement. Whoever came here to us consider as a slave and we decide his or her fate.’*<sup>939</sup>

c) *Material element for crimes of enforced prostitution: The advantage in exchange of or in connection with the act of a sexual nature*

576. For the crime of enforced prostitution, the perpetrator or another person must have ‘obtained or expected to obtain pecuniary or other advantage.’ The language and drafting history<sup>940</sup> of the second element imply that the advantage resulting from the sex work can benefit a wide range of persons, including both the perpetrators and the victims. In the negotiations in Rome, delegations and other stakeholders highlighted that the advantage gained by victims could be an expectation of safety or the avoidance of being tortured or killed by their captors.<sup>941</sup> This interpretation remains relevant today, where many victims

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<sup>936</sup> [REDACTED].

<sup>937</sup> [REDACTED].

<sup>938</sup> [REDACTED].

<sup>939</sup> [REDACTED].

<sup>940</sup> A.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, 2005, p. 143.

<sup>941</sup> See The negotiations at Rome in E. La Haye, Article 8(2)(b)(xii) – Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, and Sexual Violence, in R.S. Lee et al. (eds.), *International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, 2001, p. 193; V. Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, Michigan Journal of International Law, 2004, pp. 621, 645.

are still in a situation where they are forced to engage in sex work for survival,<sup>942</sup> particularly in contexts of war or captivity. Finally, it is important to note that it is sufficient for such advantages to have been promised or envisioned, whether or not the exchange has actually taken place.<sup>943</sup>

577. In Libya, evidence shows that female (and occasionally male) migrants and refugees are forced into prostitution (characterised by Witness 8 as an ‘open-air business’)<sup>944</sup> in order to pay off a debt or ransom, or as their only chance to eat, survive, or simply continue their journey to Europe ([REDACTED]).<sup>945</sup> As such, the perpetrators and their network stand to benefit financially from the sex work. It is true that victims also expect to ‘gain’ something in exchange of the sexual services they provide—such as survival, freedom, or access to more humane living conditions. In some cases, for instance, the victims would also receive money from their ‘clients’ for the sexual acts they took part in ([REDACTED]).<sup>946</sup> However, this does not in any way change their coercive circumstances (see analysis below). The sexual acts took place while they were held in captivity, often under inhumane conditions and threats to life, and were not free to refuse to engage in the acts.

*iii. Material element of coercion for rape, other forms of sexual violence, and enforced prostitution*

578. The Elements of Crimes state that crimes of rape, other forms of sexual violence, and enforced prostitution must have been committed or caused ‘by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power,’ against a person, or by taking advantage of a coercive environment or incapacity to give genuine consent.<sup>947</sup>

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<sup>942</sup> J. Powderly and N. Hayes, Article 7, in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2016, p. 215.

<sup>943</sup> See e.g., the analysis provided by the Interagency Working Group on Sexual Exploitation of Children, with regard to child prostitution: ‘This form of exploitation consists of a child performing a sexual act in exchange for (a promise of) something of value (money, objects, shelter, food, drugs, etc).[...] [I]t is not necessary that an object of exchange is actually given; the mere promise of an exchange suffices, even if it is never fulfilled.’ Interagency Working Group on Sexual Exploitation of Children, *Terminology Guidelines for the protection of children from sexual exploitation and sexual abuse*, Adopted in Luxembourg, 28 January 2016, p. 29 available at: [https://www.ohchr.org/Documents/Issues/Children/SR/TerminologyGuidelines\\_en.pdf](https://www.ohchr.org/Documents/Issues/Children/SR/TerminologyGuidelines_en.pdf).

<sup>944</sup> [REDACTED].

<sup>945</sup> [REDACTED].

<sup>946</sup> [REDACTED].

<sup>947</sup> For rape (Article 7(1)(g)-1); for other forms of sexual violence (Article 7(1)(g)-6); for enforced prostitution (Article 7(1)(g)-3).

579. Regarding the crimes of rape and other forms of sexual violence, in the *Ongwen*, *Ntaganda*, and *Katanga* cases, regardless of the final determination of whether or not the accused could be held responsible for the crime of rape, trial judges recognised that ‘[t]he establishment of [...] one of the coercive circumstances or conditions set out in the second element is [...] sufficient alone for penetration to amount to rape’ within the meaning of Articles 7(1)(g) and 8(2)(e)(vi) of the Statute.<sup>948</sup>

580. In the *Ongwen* and *Ntaganda* cases, in line with previous jurisprudence, judges also confirmed that ‘[c]oercive circumstances need not be evidenced by a show of physical force’<sup>949</sup> and recognised several other forms of coercive circumstances, all of which are relevant to the Libyan context:

- implicit threats of force, such as by ‘carrying [...] arms in front of the victims, thereby intimidating these persons.’<sup>950</sup> Several witnesses mentioned that perpetrators fired in the air as intimidations ([REDACTED])<sup>951</sup>.
- dependence on the perpetrators for survival.<sup>952</sup> This is the situation for migrants and refugees who have been deprived of all their belongings during their journey through Libya and who find themselves at the mercy of their smugglers, traffickers, and/or captors. As illustrated by most of the testimony gathered for this Communication, migrants and refugees depend on their captors to eat, drink, get fresh air, and access medical attention when needed.<sup>953</sup> Witness 8 particularly noted that a woman died due to the refusal of her smuggler [REDACTED] to provide medical care.<sup>954</sup>
- threat and actual punishment for disobedience,<sup>955</sup> including killing victims who have resisted in front of others.<sup>956</sup> Various witnesses described the consequences of verbally or physically ‘resisting’ ill treatment (including sexual violence) that they suffered or witnessed, ranging from physical violence to specific forms of torture. These included ordering a person to sleep in a very dirty corner with lice for months

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<sup>948</sup> *Ongwen*, Trial Judgment, para. 2709; *Ntaganda*, Trial Judgment, para. 934; *Katanga*, Trial Judgment, para. 965. See also *Bemba*, Trial Judgment, para. 102.

<sup>949</sup> *Ntaganda*, Trial Judgment, para. 935; *Ongwen*, Trial Judgment, para. 2710. See also *Bemba*, Trial Judgment, para. a 103; *Akayesu*, Trial Judgment, para. 688; *Taylor*, Trial Judgment, para. 416.

<sup>950</sup> *Ntaganda*, Trial Judgment, paras 944, 946. See also *Mucić et al*, Trial Judgement, paras 958, 962.

<sup>951</sup> [REDACTED].

<sup>952</sup> *Ongwen*, Trial Judgment, para. 3080.

<sup>953</sup> [REDACTED].

<sup>954</sup> [REDACTED].

<sup>955</sup> *Ongwen*, Trial Judgment, para. 3080.

<sup>956</sup> *Ntaganda*, Trial Judgment, para. 944.

([REDACTED]),<sup>957</sup> extensive beating ([REDACTED]),<sup>958</sup> placing detainees in a freezer ([REDACTED]),<sup>959</sup> and eventually causing death ([REDACTED]).<sup>960</sup>

- direct death threats against the victims, including when carried out by or against third persons.<sup>961</sup> This was also raised during the interviews conducted for this Communication,<sup>962</sup> including against a third person ([REDACTED]).<sup>963</sup>
- any ‘forms of duress which prey on fear or desperation’<sup>964</sup> and impose a psychological oppression.<sup>965</sup> The latter can be evidenced by the use of blackmail and reprisals against migrants and refugees. This was raised by Witness 1, who explained how [REDACTED] was forcing women and girls to have sex with him in exchange for facilitating their journey to Europe.<sup>966</sup> This practice was confirmed in various reports.<sup>967</sup>

581. Moreover, the ICC has recognised that, in some instances, the ‘coercion may be inherent [...], such as [during] armed conflict, [in case of] military presence of hostile forces amongst the civilian population,’ when there are several perpetrators, when the act ‘is committed during or immediately following a combat situation, or when the act is

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<sup>957</sup> [REDACTED].

<sup>958</sup> [REDACTED].

<sup>959</sup> [REDACTED].

<sup>960</sup> [REDACTED].

<sup>961</sup> *Ntaganda*, Trial Judgment, para. 944. In the case against Dragoljub Kunarac, a witness testified having initiated sexual intercourse with the accused after her life was threatened by a third person. The judges accepted her “evidence that she only initiated sexual intercourse with Kunarac because she was afraid of being killed by ‘Gaga’ if she did not do so.” The judges noted particularly that it is “highly improbable that the accused Kunarac could realistically have been ‘confused’ by the behaviour of D.B., given the general context of the existing wartime situation and the specifically delicate situation of the Muslim girls detained”. *Kunarac et al.*, Trial Judgment, paras 645-646.

<sup>962</sup> [REDACTED].

<sup>963</sup> [REDACTED].

<sup>964</sup> *Ntaganda*, Trial Judgment, paras 935, 976.

<sup>965</sup> See *Kunarac et al.*, Trial Judgment, para. 750 ‘Notwithstanding the fact that the door may have been open while the men were there, the Trial Chamber is satisfied that the girls were also psychologically unable to leave, as they would have had nowhere to go had they attempted to flee. They were also aware of the risks involved if they were re-captured.’

<sup>966</sup> [REDACTED].

<sup>967</sup> See e.g., this testimony: ‘If a woman refuses to sleep with the smugglers, she does not eat, she gets beaten, and she doesn’t travel (cross the sea), even if she already paid....I cannot express what we went through. A man who was refusing to listen to the smugglers was shot right in front of us.’ Cited in UNSMIL and OHCHR, *Desperate and Dangerous*, p. 32.

committed together with other crimes.<sup>968</sup> In addition, the ICC, as well as other tribunals, has recognised the coercive environment in situations of detention and captivity.<sup>969</sup>

582. In Libya, migrants and refugees find themselves in a constant state of vulnerability, whether their initial intention was to establish themselves in Libya or to cross the Mediterranean Sea to reach Europe. Many had to flee their countries of origin or cannot return to their homes. The extreme and widespread violence they suffer during their journey to and in Libya, as well as their often complete dependence on smugglers' and traffickers' networks or on guards and DCIM officials, creates a continuously coercive environment in which crimes under the Court's jurisdiction are committed. In this context and in most instances, it can be presumed that the relevant conduct constituting the material element of the crimes of rape and other forms of sexual violence are committed within a coercive environment as required by the Rome Statute.

583. Furthermore, migrants and refugees find themselves almost constantly in a situation of detention and/or captivity, whether in official or unofficial sites. Most, if not all, the crimes included in this Communication are perpetrated in these circumstances, and therefore under a coercive environment as required by ICC Elements of Crimes.

584. In addition, all forms of sexual and sexualised violence committed against migrants and refugees in Libya reinforce inequality between the victims and their captors and significantly increase their vulnerability. Such violence limits the victims' ability to resist and attempts to escape, thus creating a *de facto* coercive environment in which migrants and refugees are exposed to all sorts of physical and psychological violence.

585. Importantly, case law points out that there can be no genuine consent to sexual acts in a coercive environment. In the *Furundžija* case, ICTY judges held that while '[c]onsent was not raised by the Defence, [...] in any case [the victim] was in captivity, [and] it is the position of the Trial Chamber that any form of captivity vitiates consent.'<sup>970</sup> This was also the approach taken by the ICC Trial Chamber in the *Kunarac* case, where judges

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<sup>968</sup> *Ongwen*, Trial Judgment, para. 2710; *Ntaganda*, Trial Judgment, para. 935. In para. 945, for instance, the judges noted the acts were committed in the 'immediate aftermath of the group's takeover or [the locations] on in the context of its military assaults on villages,' thus 'placing them in a position of authority vis-à-vis the local population;' *Bemba*, Trial Judgment, para. 103-104. See also *Akayesu*, Trial Judgment, para 688; *Brima et al*, Trial Judgment, para 694.

<sup>969</sup> See *Brima et al*, Trial Judgment, para. 694; *Kunarac et al.*, Trial Judgment, paras 464, 542; *Furundžija*, Trial Judgment, para. 271. In *Ntaganda*, Trial Judgment, the judges recognised that the deprivation of personal liberty of one victim who was 'kept captive in a state of extreme vulnerability' in a UPC/FPLC training camp gave the member of the group at the camp 'powers over her attaching to the right of ownership,' and that 'the conduct of the UPC/FPLC soldiers who subjected P-0883 to sexual violence was committed by threat of force or coercion.' See paras 976 and 978.

<sup>970</sup> *Furundžija*, Trial Judgment, para 271.

considered that captivity resulted in an inherent loss of a person's autonomy and therefore negates any possibility for this person to freely consent.<sup>971</sup> As such,

*“where ‘force,’ ‘threat of force or coercion,’ or ‘taking advantage of a coercive environment’ is proven, the Chamber considers that the Prosecution does not need to prove the victim’s lack of consent.”*<sup>972</sup>

586. Regarding the crime of enforced prostitution, several factors contribute to creating a coercive environment. In cases before the Batavia Court Martial, judges took into account the restriction of movement on the women and girls forced into prostitution, as well as the fact that they attempted to run away or sometimes simulated illness to be exempted from engaging in sexual acts,<sup>973</sup> and the threats that they would be surrendered to the Japanese military police should they not respect orders. Such factors were ‘rightly considered as being synonymous with ill treatment, loss of liberty or worse.’<sup>974</sup> In one case, judges issued an *obiter dictum* stating that, while the initial recruitment might have been voluntary in some instances, the subsequent inhumane conditions were so ‘contrary to morality and humanity’ that they became criminal and created a situation in which no consent can be found.<sup>975</sup>

587. This interpretation can be applied to the situation of migrants and refugees in Libya who might have ‘voluntarily’ engaged in the journey (although very often to save their lives) but found themselves detained and forced into sexual activities, including prostitution. It can also apply to cases where women and girls travelling through Libya were led to agree to take part in sex work to pay off the debt imposed on them by their captors. In these cases, no true consent can be given due to the coercive environment and inhumane conditions in which they live. This is reflected in several testimonies gathered by UNSMIL, particularly in the so-called ‘connection houses:’

*A 19-year-old girl from Nigeria promised domestic work by her traffickers found herself in a ‘connection house.’ She recounted her shock: ‘At first, I refused to work. But if girls refused to work, the [connection house management and guards] would kill you or rape*

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<sup>971</sup> *Kunarac et al.*, Trial Judgment, paras 464, 542.

<sup>972</sup> *Bemba*, Trial Judgment, para. 106.

<sup>973</sup> Findings within the case N°72/1947, cited in M. Bergsmo *et al.* (eds.), *Historical Originals of International Criminal Law*, volume 2, 2014, p. 340.

<sup>974</sup> See UN War Crimes Commission (UNWCC), Trial of Washio Awochi, in *Law Reports of Trials of War Criminals*, 1949, vol. VIII, p. 124, available at: [http://www.worldcourts.com/imt/eng/decisions/1946.10.25\\_Netherlands\\_v\\_Awochi.htm](http://www.worldcourts.com/imt/eng/decisions/1946.10.25_Netherlands_v_Awochi.htm).

<sup>975</sup> Findings within the case N°72/1947, p. 340.

*you and do anything they wanted to you. I had to stay there for nearly a year, until I paid my debt of 1.3 million Naira (\$3,500USD)*<sup>976</sup>

*'To be sold and forced to have sex with Arab or African men either to pay [for] the journey or to extract your money is a common thing to happen to you as a woman or a girl, all over the journey from day one in the desert until you depart Libya'*<sup>977</sup>

588. Another interesting element from the Batavia Court's jurisprudence is that, when determining the relevant punishment, judges looked at how the accused took advantage of victims that 'were mostly in poverty-stricken and difficult circumstances.'<sup>978</sup> This undoubtedly applies to migrants and refugees in Libya and can be relevant to the assessment of coercive environments.

589. Finally, it is important to note that the same underlying criminal acts may simultaneously constitute different sexual crimes. Therefore, the above-mentioned crimes may overlap.

*iv. Mental element for crimes of sexual violence*

590. For the crimes of rape, sexual slavery, and enforced prostitution, Article 7(1)(g) of the Rome Statute does not set out specific requirements for *mens rea*. Therefore, Article 30 applies. Article 30 establishes that the material elements must be committed with intent and knowledge. The testimony of the witnesses interviewed for the purpose of this Communication, coupled with the findings of different court and commissions, as well as numerous reports, clearly show that the perpetrators of rape, sexual slavery, and enforced prostitution committed these crimes knowingly and intentionally, thus satisfying the required mental element.

591. For the crime of sexual violence to be established, the Elements of Crimes require that the perpetrator be 'aware of the factual circumstances that established the gravity of the conduct.'<sup>979</sup> As illustrated above, the 'factual circumstances' establishing the gravity include: the well-organised discriminatory policy against migrants and refugees, the repeated nature of the commission of crimes, the multiplicity of perpetrators, and the severity of crimes committed. Such circumstances strongly suggest that most, if not all,

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<sup>976</sup> UNSMIL and OHCHR, *Desperate and Dangerous*, p.34

<sup>977</sup> Cited in *id.*, p. 31.

<sup>978</sup> Cited in UNCWW, Trial of Washio Awochi, p. 125.

<sup>979</sup> Elements of Crimes, Article 7(1)(g)-6.



individuals involved in the supposedly secretive smuggling and/or trafficking business of migrants and refugees in Libya—whether State officials or members of criminal networks—are well aware of the gravity of their acts, or at least have all the elements to reasonably conclude of such gravity. Moreover, the intensity and obvious illegality of the acts committed, as well as the severe consequences victims suffer, cannot possibly be unintended acts by the perpetrators.

v. *The contextual and nexus elements*

592. According to Article 7(1)(g), the contextual element requires that the conduct must have been committed as part of a widespread or systematic attack against a civilian population, and the perpetrator must have been aware of it. This nexus requirement is satisfied as long as the act forms ‘part of’ a widespread or systematic attack against a civilian population. It does not require that each act or conduct be widespread or systematic.<sup>980</sup> There must, however, be a nexus between the specific acts and the attack as a whole.<sup>981</sup>

593. This nexus requirement implies a general climate of violence and coercion which forms the context of individual cases.<sup>982</sup> The acts must be ‘in furtherance’ of the attack.<sup>983</sup> Even a single act may suffice in this regard if such a link exists.<sup>984</sup> ICC Trial Chamber II stated that this assessment must take into account the nature of the act at issue, the aims it pursues, and the consequences it occasions. It must be considered whether the conduct is part of the widespread and systematic attack, taken as a whole and in its different parts (i.e., not only the policy itself, but also, where relevant, the pattern of the crimes, the type of victims, etc.).<sup>985</sup> By contrast, isolated acts that clearly differ from other acts that form part of an attack in their nature, aims, and consequences—do not fall under Article 7(1) of the Statute.<sup>986</sup>

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<sup>980</sup> *Kunarac et al.*, Trial Judgment, para. 431; *Policy Paper on Sexual and Gender-Based Crimes*, para. 32, fn. 32.

<sup>981</sup> *Bemba*, Decision on the Confirmation of Charges, paras. 84-86.

<sup>982</sup> K. Ambos, Sexual Offences in International Criminal Law, With a Special Focus on the Rome Statute of the International Criminal Court, in Bergsmo et al. (eds), *Understanding and Proving International Sex Crimes*, 2012, p. 148; N. Dyani, *Sexual Violence, Armed Conflict and International Law in Africa*, in African Journal of International and Comparative Law, 2007, p. 24.

<sup>983</sup> *Katanga*, Decision on the Confirmation of Charges, para. 400.

<sup>984</sup> *Bemba*, Decision on the Confirmation of Charges, para. 151; Ambos, Sexual Offences in International Criminal Law, p. 148; Dyani, *Sexual Violence, Armed Conflict and International Law in Africa*, p. 233.

<sup>985</sup> *Katanga*, Trial Judgment, para. 1124, fn. 2647.

<sup>986</sup> *Ibid.*

594. In Libya, sexual crimes committed against migrants and refugees, together and alongside other crimes against humanity, form part of the widespread and systematic attack against the civilian population in Libya.
595. According to Italian mental health providers caring for migrant victims of torture, ‘almost all torture [their clients faced] includes sexual elements.’<sup>987</sup> For example, an ‘Italian human rights organisation reported that more than 90 percent of the migrants and refugees served by their mobile clinic in recent years were victims of extreme violence, torture, or rape, particularly in official and unofficial detention settings in Libya.’<sup>988</sup> Therefore, evidence of torture within Libyan detention sites can also serve as an indicator of sexual crimes—particularly rape—that have occurred in this context. As such, crimes of torture and rape are both committed as part of the same widespread attack against migrants and refugees in Libya. The perpetrators also intended for their acts to form part of said attack.
596. Lastly, the locations where sexual crimes allegedly occur are not random. Instead, they exist along the established migrant routes where migrants and refugees concentrate, including in detention centres that are under the control of DCIM. Sexual crimes are committed as part of a strategy to assert power over migrants and refugees in Libya. Power imbalances in official or unofficial detention sites also automatically place unarmed migrants and refugees under the control and mercy of armed guards, who are frequently referenced as perpetrators of sexual crimes. Not a single DCIM facility employs female guards, which is a blatant violation of international law, and which further tips the balance of power and control in favour of the guards relative to female detainees.<sup>989</sup>
597. In conclusion, given that the respective material, mental, and contextual elements are fulfilled, there is a reasonable basis to believe that the crimes against humanity of rape, sexual violence, enforced prostitution, and sexual slavery have been committed against migrants and refugees in Libya.

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<sup>987</sup> WRC, ‘*More Than One Million Pains*’, p. 20.

<sup>988</sup> *Id.*, p. 21, citing I. Sesana, *Inferno Libia*, Osservatorio Diritti, 16 May 2017, available at: <https://www.osservatoriodiritti.it/2017/05/16/inferno-libia-storie-migranti>.

<sup>989</sup> UNSMIL and UNHCR, *Desperate and Dangerous*, p. 33.

## 7. Persecution

598. It is here argued that many of the alleged crimes as outlined in this Communication were also perpetrated as persecutory acts against migrants and refugees in Libya, precisely because of their perceived migration status.

599. As described in Section II.C.2, Law No. 19 of 2010 enables the indefinite detention of persons who ‘illegally’ entered the country, their induction into hard labour, and the imposition of fines and costs for their deportation.<sup>990</sup> In conjunction with this legal framework, the political instability, power vacuum, and armed conflict following the fall of the Gaddafi regime in 2011 caused a shift in State policy regarding the treatment of migrants and refugees in the country. This consequentially allowed for the rapid explosion of trafficking and smuggling networks and, in turn, detention facilities and places of captivity to be established. Thus, the exploitation and violence against migrants and refugees committed by a wide range of State and non-State actors are of a level that is both widespread and systematic.

600. As a result of this general environment, migrants and refugees in Libya have been subjected to persecutory acts in the form of the conduct mentioned throughout this Communication. They have been targeted based on their very status as migrants, refugees or asylum seekers and viewed as commodities.<sup>991</sup>

601. To establish the crime against humanity of persecution, this Section adopts an intersectional approach to fully capture the multi-layered causes of discrimination<sup>992</sup> against migrants and refugees, who are frequently simultaneously<sup>993</sup> targeted on the grounds of other attributes they possess. These include race, gender, religion, nationality, and/or political opinion.

### *i. Material elements*

602. According to the Elements of Crimes, the following material elements must be satisfied for the crime against humanity of persecution:

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<sup>990</sup> Section II.C.2; Law No. 19 of 2010, Art. 6; Malakooti, *The Political Economy*, p. 5.

<sup>991</sup> Section II.D; UNSMIL and OHCHR, *Desperate and Dangerous*, p. 5.

<sup>992</sup> IACtHR, *Case of Gonzales Lluy et al. v Ecuador*, Judgement, Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, 1 September 2015, para. 7.

<sup>993</sup> *Gonzales Lluy et al.*, Concurring Opinion of Judge Ferrer Mac-Gregor, paras 9-10.

1. *The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.*

2. *The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.*

3. *Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in Article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.*

4. *The conduct was committed in connection with any act referred to in Article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.*<sup>994</sup>

a) *Severe deprivation of fundamental rights contrary to international law*

603. The crime of persecution firstly consists of the deprivation of fundamental rights. These rights may be derogable or non-derogable rights,<sup>995</sup> and can be identified from international human rights law and international humanitarian law.<sup>996</sup> Deprivations of these rights are considered contrary to international law when they are unjustified.<sup>997</sup> They are further considered ‘severe’ when they are of a gravity equivalent to other crimes against humanity.<sup>998</sup> This gravity can be ascertained by examining the context and cumulative effects of rights violations.<sup>999</sup>

604. As demonstrated above throughout Section IV.B, migrants and refugees in Libya have been murdered, tortured, deprived of their liberty,<sup>1000</sup> subjected to inhumane detention conditions,<sup>1001</sup> and forced into labour,<sup>1002</sup> enslavement, and sexual violence.<sup>1003</sup> Furthermore, they have further been returned to their countries notwithstanding claims to refugee status,<sup>1004</sup> and discriminated against inter alia on the basis of religion, race, gender, and their status as migrants and refugees.<sup>1005</sup> Thus, their rights to life,<sup>1006</sup> liberty, and

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<sup>994</sup> Elements of Crimes, Article 7(1)(h).

<sup>995</sup> ICC, *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, Pre-Trial Chamber III (14 November 2019), para 101.

<sup>996</sup> *Ntaganda*, Trial Judgment, para. 991.

<sup>997</sup> *Id.*, para 993.

<sup>998</sup> K. Ambos, *Treatise on International Criminal Law, Vol II: The Crimes and Sentencing*, 2014, p. 106.

<sup>999</sup> *Ntaganda*, Trial Judgment, para. 992.

<sup>1000</sup> [REDACTED].

<sup>1001</sup> [REDACTED].

<sup>1002</sup> [REDACTED].

<sup>1003</sup> [REDACTED].

<sup>1004</sup> *Treaty of Friendship, Partnership, and Cooperation between the Great Socialist People’s Libyan Arab Jamahiriya and the Republic of Italy*, 2008.

<sup>1005</sup> See *infra* 9.i.b.

<sup>1006</sup> ICCPR, Article 6.

security of person,<sup>1007</sup> as well as procedural rights before courts and tribunals including:<sup>1008</sup> the right to non-refoulement;<sup>1009</sup> equality;<sup>1010</sup> freedom of movement;<sup>1011</sup> freedom of religion;<sup>1012</sup> and rights against torture,<sup>1013</sup> slavery, and forced labour,<sup>1014</sup> have been consistently violated.

605. Central to the crime against humanity of persecution is that a person entitled to a fundamental right is unable to enjoy it. Notwithstanding how they entered into Libya, migrants and refugees are entitled to all the above-mentioned rights by virtue of their presence on Libyan territory. The deprivation of migrants and refugees' fundamental rights in Libya amounts in itself to various crimes against humanity and war crimes of indisputable gravity.<sup>1015</sup>

606. Both State and non-State actors may be responsible and prosecuted for the commission of persecutory acts. In Libya, the deprivation of migrants and refugees' fundamental rights has occurred at the hands of the police,<sup>1016</sup> the navy (particularly the Libyan Coast Guard),<sup>1017</sup> Libyan soldiers,<sup>1018</sup> State operatives at DCIM centres,<sup>1019</sup> and armed groups and militias<sup>1020</sup> over the course of detentions and transportation.

*b) Targeting of members of a group or collectivity by reason of its identity on grounds prohibited under international law*

607. The crime of persecution requires that the deprivation of fundamental rights be targeted at members of a group or collectivity on grounds of an identity that international law does not permit as grounds for discrimination.<sup>1021</sup> Article 7(1)(h) of the Statute explicitly mentions political status, race, nationality, religion, and gender as prohibited grounds of discrimination. All of these have constituted grounds of discrimination in Libya, as well

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<sup>1007</sup> *Id.*, Article 9.

<sup>1008</sup> *Id.*, Articles 14 and 15.

<sup>1009</sup> Convention Relating to the Status of Refugees, Article 33.

<sup>1010</sup> ICCPR, Article 26.

<sup>1011</sup> *Id.*, Article 12.

<sup>1012</sup> *Id.*, Article 18.

<sup>1013</sup> *Id.*, Article 7.

<sup>1014</sup> *Id.*, Article 8.

<sup>1015</sup> *Ntaganda*, Trial Judgment, para. 994.

<sup>1016</sup> [REDACTED]; Tribunale di Messina, N. 149/2020 (28 May 2020), 13, 23.

<sup>1017</sup> [REDACTED].

<sup>1018</sup> Tribunale di Messina, N. 149/2020 (28 May 2020), 11.

<sup>1019</sup> [REDACTED].

<sup>1020</sup> Tribunale di Messina, N. 149/2020 (28 May 2020), 11.

<sup>1021</sup> *Ntaganda*, Trial Judgment, para. 1009.

as a residual category of ‘other grounds universally recognized as impermissible under international law.’

608. Of central focus here is the targeting of migrants and refugees in Libya because of their membership to a collectivity (a conglomeration of groups<sup>1022</sup>) that bears the identity of migrants and refugees in the country. This is a form of discrimination based on nationality. A target group can be negatively or positively defined, such that both membership of a group or lack of membership of a group can constitute grounds of discrimination.<sup>1023</sup> Here, discrimination against migrants and refugees occurs because they are not members of the group sharing Libyan nationality. They may also be said to be members of a collectivity defined by alien status.

609. Targeting migrants and refugees may also be construed as discrimination based on political grounds. Political grounds encompass any matters concerning the State, government, or public affairs.<sup>1024</sup> Thus, being a member of a political party, espousing a political ideology, and holding different opinions on public affairs fall within this category.<sup>1025</sup> However, persecution on political grounds can also occur when the perpetrator nurses a political ideology against a group with no particular political identity of its own. The political identity of the group is thus created by and based on the subjective perceptions of the perpetrator, who may view the migrant group as unwanted foreigners that should be removed.<sup>1026</sup> This form of persecution on political grounds also falls under the Rome Statute, because the grounds for discrimination in Article 7(1)(h) constitute prohibited reasons for targeting a group, rather than criteria for qualifying a group as protected.<sup>1027</sup> Therefore, the targeting of people may be based on the perpetrator’s political perceptions<sup>1028</sup> of the group’s identity.<sup>1029</sup>

610. Alternatively, both ‘migrant’ and ‘refugee’ status may fall within the residual category of ‘other grounds.’ Since the list of prohibited grounds in Article 7(1)(h) of the Statute has

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<sup>1022</sup> H. Brady and R. Liss, *The Evolution of Persecution as a Crime Against Humanity*, in M. Bergsmo *et al.* (eds.), *Historical Originals of International Criminal Law*, vol. 3, 2015, p. 550.

<sup>1023</sup> *Ntaganda*, Trial Judgment, para. 1009.

<sup>1024</sup> C.K. Hall *et al.*, Article 7, in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2016, p. 223.

<sup>1025</sup> ICC, *Situation in the Republic of Burundi*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, Pre-Trial Chamber III (9 November 2017), para. 133.

<sup>1026</sup> I. Kalpouzos and I. Mann, *Banal Crimes Against Humanity: The Case of Asylum Seekers in Greece*, in *Melbourne Journal of International Law* 2015, p. 18.

<sup>1027</sup> C.K. Hall *et al.*, Article 7, p. 221.

<sup>1028</sup> *Burundi*, Decision on Authorisation, para. 134.

<sup>1029</sup> *Bangladesh/Myanmar*, Decision on Authorisation, para. 103.

been attributed to the proliferation of non-discrimination provisions in human rights treaties in the 1940s,<sup>1030</sup> the residual category can be interpreted with reference to widely accepted international human rights law. Thus, ‘other grounds’ may be sourced from grounds that are ‘widely,’ rather than unanimously, considered by States as impermissible bases of discrimination.<sup>1031</sup>

611. Migrant status is of course widely considered an impermissible ground of discrimination.<sup>1032</sup> In an advisory opinion, the IACtHR noted that while States may take measures against migrants and refugees violating their national laws, any such measures should be ‘reasonable, objective, proportionate’ and should ‘not harm human rights.’<sup>1033</sup> Additionally, States must respect and ensure the enjoyment of human rights ‘without any discrimination owing to their regular or irregular residence, or their nationality, race, gender or any other reasons.’<sup>1034</sup> Refugees have also been recognised to be equally entitled to fundamental rights as nationals, including both socio-economic rights,<sup>1035</sup> and civil and political rights.<sup>1036</sup>

612. In any case, migrants and refugees have been targeted because they are seen as outsiders and commodities with the potential to generate economic and political gains. Targeting by reason of this status is clearly evidenced through statements referring to migrants and refugees as ‘slaves.’<sup>1037</sup> This evidence also comes from exploitative acts allegedly justified by the need for migrants and refugees to pay off their ‘debts’ or pay their way through their journey.<sup>1038</sup>

613. The identity as migrants and refugees further interacts with race, nationality, religion, gender, or political opinion, which results in intersectional discrimination. Intersectional discrimination occurs where individuals are not targeted solely because of their membership of a single homogenous group, but because of multiple identities that are intrinsically connected so as to make attributing a part of discriminatory conduct to any

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<sup>1030</sup> Brady and Liss, *The Evolution of Persecution as a Crime Against Humanity*, p. 551.

<sup>1031</sup> C.K. Hall *et al.*, Article 7, p. 225.

<sup>1032</sup> UNGA, *New York Declaration for Refugees and Migrants*, A/RES/71/1, 3 October 2016, Annex II, para. 5; IACtHR, *Advisory Opinion Requested by the United Mexican States on the Juridical Condition and Rights of Undocumented Migrants* (17 September 2003), p. 113.

<sup>1033</sup> IACtHR, *AO on Migrants*, 2003, para. 119.

<sup>1034</sup> *Id.*, para 118.

<sup>1035</sup> ECOSOC, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, E/C.12/GC/20, 2 July 2009, para. 30.

<sup>1036</sup> ICCPR, Articles 2, 26; UNHRC, *General Comment No. 15: The Position of Aliens Under the Covenant*, HRI/GEN/1/Rev.1, 11 April 1986.

<sup>1037</sup> [REDACTED].

<sup>1038</sup> [REDACTED].

single identity-ground impossible.<sup>1039</sup> The experiences of individuals suffering from intersectional discrimination are different from those of individuals suffering discrimination as a result of discrete factors.<sup>1040</sup>

614. An intersectional approach helps identify the multiple factors which increase the vulnerability of victims and determine whether and how they intersect.<sup>1041</sup> This is especially relevant for migrants and refugees who have been repeatedly recognised as a population that is open to special vulnerabilities.<sup>1042</sup> The ICC has held that a combination of multiple grounds may also constitute a reason for discrimination.<sup>1043</sup> In the *Abd Al-Rahman* Decision on the Confirmation of Charges, Pre-Trial Chamber II used an intersectional approach to identify targeted groups and confirmed a count of persecution against the Fur males based on political, ethnic, and gender grounds. It was held that the victims were persecuted due to their perceived political status as rebels. This perception was founded on the combination of their ethnicity and the socially-constructed gendered roles of males as fighters.<sup>1044</sup>

615. In Libya, while the collectivity of migrants and refugees has been targeted, this collectivity is comprised of further sub-groups with intersecting identities. Different acts have been directed against these migrants and refugees on the basis of their membership to these sub-groups as well as their membership in the collectivity.

616. Illustratively, Black migrants and refugees have been separated on the basis of their race, subjected to racist slurs, and called slaves.<sup>1045</sup> These migrants and refugees have also been associated with political support for Gaddafi and have therefore been targeted due to suspicion of being mercenaries.<sup>1046</sup> For instance, Amnesty International has reported on the use of racist and offensive language against this group of migrants and refugees by official social media pages of seven DCIM centres, as well as the circulation of racist and

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<sup>1039</sup> G. Maučec, *The International Criminal Court and the Issue of Intersectionality – A Conceptual and Legal Framework for Analysis*, International Criminal Law Review, 2021, pp. 8-9.

<sup>1040</sup> *Gonzales Lluy et al.*, Concurring Opinion of Judge Ferrer Mac-Gregor, para. 11.

<sup>1041</sup> G. Maučec, *Law Development by the International Criminal Court as a Way to Enhance the Protection of Minorities – the Case for Intersectional Consideration of Mass Atrocities*, Journal of International Dispute Settlement, 2021, p. 73.

<sup>1042</sup> IACtHR AO on Migrants, 2003, para. 112; see OHCHR and Global Migration Group, *Principles and Guidelines Supported by Practical Guidance on the Human Rights Protection of Migrants in Vulnerable Situations*, available at: <https://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>.

<sup>1043</sup> *Ntaganda*, Trial Judgment, para 1009.

<sup>1044</sup> ICC, Situation in Darfur, Sudan, *The Prosecutor v Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb)*, Decision on Confirmation of Charges, Pre-Trial Chamber II (9 July 2021), para. 80.

<sup>1045</sup> [REDACTED].

<sup>1046</sup> [REDACTED]; AI, *Militias Threaten Hopes for New Libya*, pp. 5, 20; AI, *Libya: Rule of Law or Rule of Militias?*, p. 32.



xenophobic views on Libyan media channels.<sup>1047</sup> Sub-Saharan Africans are regularly subjected to racist treatment by private individuals, officials, members of militias and armed groups, and even staff members of international humanitarian organisations or their partners.<sup>1048</sup>

617. Female migrants and refugees have been told that their sexual exploitation is a way to ‘pay off’ their journey to other countries,<sup>1049</sup> indicating an attitude of targeting them based on their vulnerabilities as both migrants and women. Men have also been systematically chosen for forced labour.<sup>1050</sup> This represents gender-based discrimination against migrants and refugees pursuant to ideations about gender roles.<sup>1051</sup>

618. The treatment of migrants and refugees also worsens if they are of a nationality that is considered less ‘valuable,’ due to the decreased likelihood of payments in more valuable currencies.<sup>1052</sup> Furthermore, individuals who are not adherents to Islam (the State religion in Libya) have been subjected to special deprivations of fundamental rights, such as the withholding of essential commodities or acts of torture.<sup>1053</sup>

*c) Connection with any act under Article 7(1) of the Statute or any other crime within the jurisdiction of the Court*

619. The connection requirement is objective. Thus, it is a jurisdictional requirement, seeking to limit the jurisdiction of the Court to objectively serious crimes.<sup>1054</sup> It filters out any discriminatory acts which are not within the Court’s jurisdiction.<sup>1055</sup> As already mentioned, the acts of persecution were committed as and in connection with the other alleged crimes against humanity as detailed in this Communication.

*ii. Mental element*

620. The mental element of the crime of persecution refers to the presence of discriminatory intent.<sup>1056</sup> While the crime of persecution has a specific intent requirement as to the

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<sup>1047</sup> AI, *Between Life and Death*, pp. 43 et seq.

<sup>1048</sup> *Ibid.*

<sup>1049</sup> [REDACTED].

<sup>1050</sup> [REDACTED].

<sup>1051</sup> C.K. Hall *et al.*, Article 7, p. 225.

<sup>1052</sup> [REDACTED].

<sup>1053</sup> [REDACTED]; AI, *Between Life and Death*, p. 29.

<sup>1054</sup> Ambos, *Treatise II*, 106.

<sup>1055</sup> *Burundi*, Decision on Authorisation, para. 131.

<sup>1056</sup> ICTY, *Prosecutor v Jadranko Prlić et al.*, Judgment, Trial Chamber III (29 May 2013), para. 72.

conduct and consequences of the persecutory act,<sup>1057</sup> and a general intent requirement relating to the knowledge of the context of the acts,<sup>1058</sup> the *dolus specialis* is the special intent to cause injury to a person *because* of his or her membership in a particular group.<sup>1059</sup> Thus, while the perpetrator need not have engaged in a value judgement regarding the severity of the deprivation,<sup>1060</sup> the criminal conduct should have nevertheless been carried out deliberately with the intention of discriminating on one of the prohibited grounds.<sup>1061</sup>

621. Discriminatory intent can be inferred from the context of an attack when substantiated by the circumstances of particular acts.<sup>1062</sup> It can thus be inferred from ‘knowing participation’ in a system that discriminates on prohibited grounds, the systematicity of crimes against a group,<sup>1063</sup> and the perpetrator’s general behaviour<sup>1064</sup> that indicates a discriminatory attitude, such as use of derogatory language.<sup>1065</sup>

622. As already thoroughly explained, a discriminatory system has emerged in Libya since 2011 out of a combination of legal and institutional frameworks. These frameworks have enabled the exploitation of migrants and refugees through the authorisation of indefinite detention and hard labour, and have surged when coupled with the power vacuum following the fall of the Gaddafi regime and the extensive smuggling and trafficking networks that capitalises on the vulnerability of migrants.

623. The perpetrators of specific persecutory acts, whether State or non-State actors, have knowingly participated in this system to exploit vulnerable migrants and refugees for financial or other gain. Although exploitation for personal monetary gain may constitute isolated, personal motives, the latter do not detract from the presence of discriminatory intent against the entire group, where perpetrators have knowledge of the persecutory nature of crimes yet still participate in that system of criminal activity.<sup>1066</sup> Therefore, even when the individual perpetrators had individual motivations for profit, their wilful participation in a system of organised detentions, smuggling, trafficking, and exploitation

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<sup>1057</sup> G.J.A. Knoops, *Mens Rea at the International Criminal Court*, 2017, p. 137.

<sup>1058</sup> *Ibid.*

<sup>1059</sup> *Prlić et al.*, Trial Judgment, para. 76; *Ongwen*, Trial Judgment, para. 2739.

<sup>1060</sup> *Ongwen*, Trial Judgment, para. 2740.

<sup>1061</sup> *Prlić et al.*, Trial Judgment, para. 72; Ambos, *Treatise II*, p. 107.

<sup>1062</sup> *Prlić et al.*, Trial Judgment, para. 76.

<sup>1063</sup> ICTY, *Prosecutor v Vujadin Popović et al.*, Judgment, Appeals Chamber (30 January 2015), para. 711.

<sup>1064</sup> *Ongwen*, Trial Judgment, para. 2739.

<sup>1065</sup> *Popović et al.*, Appeal Judgment, Jan 2015, paras 711-713.

<sup>1066</sup> ICTY, *Prosecutor v Miroslav Kvočka et al.*, Appeal Judgment, Appeals Chamber (28 February 2005), para. 367.

on the basis of the victim's migrant status, indicates sufficient discriminatory intent against the collectivity.

624. The intersectional approach additionally assists in demonstrating instances of complex persecutory intent.<sup>1067</sup> Accordingly, discrimination on grounds of migrant status and race is evidenced by perpetrators employing racist slurs against black individuals and subjecting them to enslavement.<sup>1068</sup> Criminal acts justified by perpetrators on perceptions that migrants and refugees supported Gaddafi attest to discrimination on grounds of political status as well.<sup>1069</sup> Moreover, female migrants and refugees are frequently reminded by their captors that their sexual exploitation is a way to 'pay off' their journey to other countries.<sup>1070</sup> Finally, migrants and refugees also report being targeted by perpetrators who deride their religious beliefs, whether Christianity<sup>1071</sup> or other non-Islamic religions,<sup>1072</sup> before subjecting them to worse treatment than their Muslim peers. Therefore, discriminatory intent clearly exists.

*iii. Nexus with the contextual element*

625. The persecutory acts, along with the discriminatory system that targets migrants and refugees in Libya, are clearly a part of the widespread and systematic attack against this population. As already noted, the fact that the acts of persecution are committed as, or in connection with, crimes under the Court's jurisdiction shows the necessary nexus of these acts with the contextual element for crimes against humanity.

626. There is ample evidence to suggest that the material, mental, and contextual elements of the crime of persecution are satisfied. Thus, there is a reasonable basis to believe that migrants and refugees have been persecuted for their identity as such, as well as having been subjected to other crimes against humanity due to intersectional identities that add to their vulnerabilities to specific criminal acts.

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<sup>1067</sup> Maučec, *Law Development by the International Criminal Court*, pp. 75-76.

<sup>1068</sup> [REDACTED].

<sup>1069</sup> [REDACTED]; AI, *Militias Threaten Hopes for New Libya*, pp. 5, 20; AI, *Libya: Rule of Law or Rule of Militias?*, p. 32.

<sup>1070</sup> [REDACTED].

<sup>1071</sup> [REDACTED]; AI, *Between Life and Death*, p. 29.

<sup>1072</sup> [REDACTED].

## 8. Other inhumane acts as crimes against humanity

627. In the situation in Libya, most of the criminal acts, as documented in Section III, fall within the description of crimes contained in Article 7(1)(a) - (j), as thoroughly analysed in previous Subsections. It is here submitted that, in the alternative, some acts can also be legally characterised as the crime of ‘other inhumane acts.’ Moreover, there are conducts which do themselves not fall under Article 7(1)(a) - (j), but qualify as the crime of ‘other inhumane acts.’

### *i. Material elements*

628. Under Article 7(1)(k), other inhumane acts are considered a residual category of crimes against humanity. This means that acts not encompassed by the underlying acts prescribed in Article 7(1)(a) - (j) may be characterised as other inhumane acts, provided they fulfil the criteria set out in the Elements of Crimes.<sup>1073</sup>

629. As per the first element, a conduct may be characterised as an inhumane act if it caused great suffering or serious injury.<sup>1074</sup> The conduct’s inhumanity can be established in relation to the perpetrated acts and their effects.<sup>1075</sup> As established by the ICTY in the *Krnjelac* case, all factual circumstances must be considered, ‘including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim, as well as the personal circumstances of the victim, including age, sex, and health.’<sup>1076</sup>

630. In this respect, ICTY jurisprudence found that several acts fell under this category, including mutilations and other forms of severe bodily harm, beatings and other acts of violence, serious bodily and mental injury, forcible transfer, inhumane and degrading treatment, forced prostitution, and forced disappearance.<sup>1077</sup> While the Rome Statute set out specific provisions for forcible transfer, enforced prostitution, and enforced disappearance, other inhumane acts remain a residual category applicable to acts not covered in Article 7(1)(a) - (j).

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<sup>1073</sup> *Ongwen*, Trial Judgment, para. 2745.

<sup>1074</sup> Elements of Crimes, Article 7 (1)(k).

<sup>1075</sup> Hall and Stahn, Article 7, p. 236.

<sup>1076</sup> *Krnjelac*, Trial Judgment, para. 131.

<sup>1077</sup> *Kvočka et al.*, Trial Judgment, para. 208; *Tadić*, Trial Judgment, para. 730. See also *Prlić et al.*, Trial Judgment, para. 80.

631. Concerning the second element requiring that ‘[s]uch act was of a character similar to any other act referred to in Article 7, paragraph 1, of the Statute,’ similarity must be assessed in view of the nature and gravity of the acts.<sup>1078</sup> Thus, other inhumane acts encompass serious violations of customary international law and of human rights.<sup>1079</sup> The violation must be sufficiently severe to distinguish it from an isolated deprivation of rights.<sup>1080</sup> For instance, in the *Ongwen* case, ICC Trial Chamber IX invoked the ‘fundamental right to enter a marriage with the free and full consent of another person’ in finding forced marriage to be an inhumane act.<sup>1081</sup> In the *Kenyatta* case, the Prosecutor pled ‘a serious violation of international human rights law’ in relation to Article 7(1)(k).<sup>1082</sup>

632. In Libya, certain types of conduct can be categorised as inhumane acts against migrants and refugees, either because they are similar to acts under Article 7 (1)(a) - (j) but do not reach the required threshold, or because they are breaches of international human rights law of a similar gravity to other crimes against humanity. These include: the conditions of detention, conditions of transfer/transport by land and sea out of Libya, family separation, and slave trade.

*a) Inhumane conditions of detention*

633. As documented in Section III and submitted in Section IV.B.5, the deplorable conditions of detention in DCIM centres and elsewhere are severe and violate fundamental human rights such as the right to physical and mental integrity. As described by several witnesses, they were often denied access to food and water ([REDACTED]);<sup>1083</sup> were kept in overcrowded facilities where they were unable to sleep or move ([REDACTED]);<sup>1084</sup> and were consistently denied healthcare despite the lack of ventilation and sanitation conducive to the rampant spread of disease ([REDACTED]).<sup>1085</sup> The conditions also include the overall humiliating and degrading treatment by guards at detention sites and places of captivity. For instance, while in captivity in [REDACTED], Witness 3 described

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<sup>1078</sup> Elements of Crimes, Article 7 (1)(k), fn. 30; *Katanga*, Decision on the Confirmation of Charges, para. 451.

<sup>1079</sup> *Katanga*, Decision on the Confirmation of Charges, para. 448.

<sup>1080</sup> *Prlić et al.*, Trial Judgment, para. 45.

<sup>1081</sup> *Ongwen*, Trial Judgment, para. 2748.

<sup>1082</sup> ICC, Situation in the Republic of Kenya, *The Prosecutor v Francis Kirimi Muthaura et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II (23 January 2012), para. 268.

<sup>1083</sup> [REDACTED].

<sup>1084</sup> [REDACTED].

<sup>1085</sup> [REDACTED].

how Ali, the alleged head of this facility, brought some of his friends to the facility, made all the migrants and refugees sit outside, walked around, and laughed at the captives.<sup>1086</sup> For its part, UNSMIL reported that in the (al-Nasr) Az-Zawiya DCIM detention centre, migrants and refugees were usually forbidden to leave their cells. When the guards did allow them to leave, the guards would spit on their faces, humiliate them, beat them, force them to stand still in the sun, and punish them if they moved.<sup>1087</sup>

634. In addition, detention conditions had an extremely detrimental effect on migrants and refugees' mental health, with authoritative reports indicating that 79% of individuals interviewed suffered from PTSD.<sup>1088</sup> Survivors also reported several instances of grave mental distress. For example, Witness 8 recounted seeing a friend die from depression at an unidentified location in Tripoli.<sup>1089</sup> Witness 10 described how [REDACTED] was deeply scarred by seeing a man being sold in the streets of Zawiya: 'Until now [REDACTED] is scared of the people that are non-black people, she is scared of them, because in Libya all the people doing bad things, who tortured, were the Libyans.'<sup>1090</sup> [REDACTED] considered suicide.<sup>1091</sup>

*b) Inhumane conditions of transfer/transport in Libya by land*

635. The conditions to which migrants and refugees are subjected in desert crossings while in transit to and in Libya, as well as between detention sites and other places of captivity are equally inhumane. Migrants and refugees are commonly denied food and water ([REDACTED]).<sup>1092</sup> For instance, Witness 1 described being denied water by the drivers, and said many individuals turned to drinking urine.<sup>1093</sup> Survivors described in general being transported in overcrowded vehicles, being put in excruciating and stressful positions ([REDACTED]),<sup>1094</sup> and even a guard walking on their bodies ([REDACTED]).<sup>1095</sup> Witness 1 also described being told by drivers that they did not care

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<sup>1086</sup> [REDACTED].

<sup>1087</sup> UNSMIL and OHCHR, *Detained and Dehumanised*, p. 16.

<sup>1088</sup> MEDU, *The Torture Factory*, p. 12.

<sup>1089</sup> [REDACTED].

<sup>1090</sup> [REDACTED].

<sup>1091</sup> [REDACTED].

<sup>1092</sup> [REDACTED].

<sup>1093</sup> [REDACTED].

<sup>1094</sup> [REDACTED].

<sup>1095</sup> [REDACTED].

if people would fall out of the vehicle and die: ‘You are 68, even if 60 fall down, we don’t care. Eight is enough.’<sup>1096</sup>

636. As explained, these conditions (i) have inflicted great mental and physical suffering and injury, and (ii) were in violation of a fundamental human right, namely the right to physical integrity and the prohibition of ill treatment.

*c) Inhumane conditions of sea travel out of Libya*

637. Concerning sea travel, Section III.C.1 already described how migrants and refugees face extreme conditions trying to cross the Mediterranean. Some, like Witness 13, were deceived by smugglers. The survivor and [REDACTED] were promised a proper boat to travel. However, once they reached the shores, it became clear that they would travel on a zodiac (an inflatable boat). Not all travellers had life jackets. She related that there were 100 people on that boat.<sup>1097</sup> Witness 14 travelled on a boat with approximately 500 people.<sup>1098</sup> Others, like Witnesses 3 and 6, were forced to pilot the boats under the threat of murder by smugglers.<sup>1099</sup> Migrants and refugees spent from several hours or even days on these boats, without proper access to food, water, shelter, or medication ([REDACTED]).<sup>1100</sup> For example, Witness 4 even became unconscious after hours at sea.<sup>1101</sup>

638. Five of the individuals interviewed for this Communication were intercepted by the Libyan Coast Guard ([REDACTED]). Furthermore, [REDACTED] saw a boat, presumably from the LCG, which seemed to mock the migrants and refugees’ situation: ‘We went closer to the boat, but the boat was going away from us, not close to us. We saw them laughing at us. They were playing a game on us. Laughing. We’re all crying.’<sup>1102</sup> As per the usual pattern of interceptions at sea, they were brought back to Libyan land, and many were taken to detention facilities, where the cycle of violence started again and further crimes against them were committed.

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<sup>1096</sup> [REDACTED].

<sup>1097</sup> [REDACTED].

<sup>1098</sup> [REDACTED].

<sup>1099</sup> [REDACTED].

<sup>1100</sup> [REDACTED].

<sup>1101</sup> [REDACTED].

<sup>1102</sup> [REDACTED].

639. Drawing from these facts, it is evident that migrants and refugees experienced great physical and mental suffering due to the inhumane conditions of travel. These conditions were also in grave breach of fundamental human rights, such as the right to physical and mental integrity.

*d) Family separation*

640. The right to family life is enshrined in Article 23(1) of the ICCPR. It is also recognised in major regional human rights instruments.<sup>1103</sup> In this sense, migrants and refugees in Libya are still entitled to stay in their family's company. While separation by gender may be lawful in official detention sites, the same cannot be said about unofficial ones and other places of captivity. Some of the witnesses interviewed reported being separated from their partners, as well as siblings, especially when they are of a different gender ([REDACTED]).<sup>1104</sup> Witness 1 was kept from seeing [REDACTED], even though they were being held captive in the same location, and had not seen each other for a year.<sup>1105</sup> The separation thus also causes great mental suffering to the migrants and refugees, who are likely to feel even more isolated without their families.

641. Family separation, therefore, directly infringes on fundamental human rights. This not only includes the specific right to family life, but also the right to mental integrity. It also enables further violations, with men and women being subject to exploitation.

*e) Slave trade and related acts or omissions*

642. As thoroughly detailed in Section III.A.3–5 and submitted in Section IV.B.3, some conduct by militias, armed groups, DCIM officials, and smugglers constitute acts of enslavement as a crime against humanity. In particular, conduct such as selling people in auctions, trading people between different actors, forced labour, and sexual slavery should be taken into account by the Office of the Prosecutor as the basis for charges under Article 7(1)(c). That notwithstanding, in cases where an exercise of powers attached to the right of ownership cannot be established, this conduct nevertheless amount to inhumane acts.

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<sup>1103</sup> American Convention on Human Rights, Art. 17; Banjul Charter, Art. 18; European Convention on Human Rights, Art. 8.

<sup>1104</sup> [REDACTED].

<sup>1105</sup> [REDACTED].



Alternatively, there may be instances where conduct can be classified as a precursory act to enslavement when there is the intent to reduce someone to slavery. These cases can amount to slave trade<sup>1106</sup> and enable the commission of other crimes, and thus should be charged in addition to charges under Article 7(1)(c).

643. As shown in numerous reports, as well as by the survivors interviewed for the purpose of this Communication,<sup>1107</sup> the sale of migrants and refugees is the first act that sets them on a path of abuse and exploitation. Several of the individuals interviewed experienced being sold along their journey by different actors—some of them multiple times ([REDACTED]).<sup>1108</sup> After being sold, they commonly experienced forced labour, sexual slavery, and other forms of exploitation, by, for example, being extorted. The testimony of Witness 8, who was forced to work in no less than three unofficial detention sites, well encapsulates this reality: ‘There is an Arab who came to buy me. I work for him, no salary, no health, nothing, you have no demands. You had to do what he said.’<sup>1109</sup>

644. Another particularly harrowing account was that of Witness 10, who witnessed first-hand a black man being auctioned in the streets of Zawiya. She described the crying man with chains around his head, on his hands, and on his feet, while other men made bids on him.<sup>1110</sup> The survivor’s experience with slave auctions resonates with the well-known CNN footage of slave markets in Libya.<sup>1111</sup>

645. Slavery and slave trade legal expert Dr. Getgen-Kestenbaum has also described the slave trade and how it interacts with other crimes in Libya. According to her, perpetrators, both members of militias and members of institutions associated with the GNA, ‘hold migrants in detention blocks between slave trades where they are subjected to relentless rapes, genital mutilations, forced nudity and other gendered, sexualised violence until families pay the traders to release them.’<sup>1112</sup> The extortion cycle between slave traders often occurs multiple times until migrants and refugees from Sub-Saharan Africa reach the coast and, if not intercepted at sea, are able to reach the European continent.

646. The prohibition of slavery and of the slave trade is a peremptory norm of international law, including customary international law, international humanitarian law, and

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<sup>1106</sup> Cfr. Convention to Suppress the Slave Trade and Slavery, signed on September 25, 1926, entered into force on 7 March 1927.

<sup>1107</sup> See Section III.A.5.

<sup>1108</sup> [REDACTED].

<sup>1109</sup> [REDACTED].

<sup>1110</sup> [REDACTED].

<sup>1111</sup> CNN, *People for sale: Where lives are auctioned for \$400*.

<sup>1112</sup> J. Getgen Kestenbaum, *Disaggregating Slavery and the Slave Trade* (forthcoming), in *Florida International University Law Review*, 2021, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3821202](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3821202).

international human rights law.<sup>1113</sup> As enshrined in Article 8 of the ICCPR, this prohibition is multifaceted. It precludes forced labour, hard labour as punishment, servitude, and slave trade. Therefore, they may also be charged under ‘other inhumane acts,’ for they are among the most serious violations of customary law and fundamental human rights.

647. The experiences of survivors, as well as several others made public in reports, show that migrants and refugees are subjected to grave mental and physical suffering and injury by various acts constituting severe violations of customary international law and international human rights law. In this sense, the conduct described above fulfils the material elements of the crime of other inhumane acts.

*ii. Mental element*

648. With regard to the subjective element, Article 7(1)(k) of the Rome Statute does not set out specific requirements for *mens rea*. Therefore, Article 30 applies. Article 30 establishes that the material elements must be committed with intent and knowledge. The Elements of Crimes add that the perpetrator must have been ‘aware of the factual circumstances that established the character of the act.’ In that sense, it suffices that the perpetrator was aware that he/she was committing a severe violation of human rights and/or customary international law.

649. Regarding inhumane detention conditions, it is clear that the conduct of DCIM officials, militias, armed groups, smugglers, and traffickers (i) inflicted grave physical and mental suffering on migrants and refugees, and (ii) severely violated internationally recognised human rights. In this respect, they must have known that they were severely depriving victims of their basic human rights.

650. For inhumane travel conditions by land and sea, it is clear that these conditions were deliberately inflicted by smugglers and militias, disregarding the safety and well-being of migrants and refugees. By overcrowding small boats with dozens and sometimes hundreds of people, perpetrators must have been aware they were putting migrants and refugees in extreme danger.

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<sup>1113</sup> See Sellers and Kestenbaum, *Missing in Action*, pp. 2-3.

651. In cases of family separation, perpetrators deliberately separate men and women from the same family, often to enable sexual exploitation of the women, as described by Witness 13,<sup>1114</sup> and forced labour for men.

652. Regarding the slave trade and related acts, considering the well-established *jus cogens* character of the prohibition of slavery and its broader implications, it is clear that perpetrators are aware of the gravity of their conduct. Furthermore, the intent to reduce someone to slavery also has to be proven for this act.

*iii. Nexus with the contextual element*

653. Finally, concerning the nexus element of this crime, it is clear that maintaining inhumane detention conditions is closely tied to the overall attack. This is true because one of the common and widespread characteristics of the overall attack against migrants and refugees in Libya is the imprisonment and deprivation of their physical liberty, of which detention is an integral part.

654. The inhumane travel conditions by land and sea, the family separation, and the slave trade are all intrinsically linked to other criminal conduct under Article 7 (1)(a) - (j) in furtherance of the exploitation of migrants and refugees, including torture, enslavement, and murder. Thus, there are reasonable grounds to believe that perpetrators intended for this conduct to be part of the overall attack.

655. Having fulfilled the material, mental, and contextual elements under Article 7(1)(k), there is reasonable basis to believe that the crime against humanity of other inhumane acts is being committed against migrants and refugees in Libya under the methods of inhumane conditions of detention, land, and sea travel; family separation; and the slave trade and related acts.

**C. The crimes committed against migrants and refugees as war crimes**

656. Many of the acts identified in the previous Subsection as crimes against humanity against migrants and refugees in Libya may be also characterised as war crimes under the Rome Statute,<sup>1115</sup> particularly:

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<sup>1114</sup> [REDACTED].

<sup>1115</sup> See e.g., *Ongwen*, Trial Judgment, para. 2792; *Bemba*, Trial Judgment, paras 747-748; *Katanga*, Trial Judgment, para. 1695.

- Murder (Article 8(2)(c)(i)-1)
- Cruel treatment and torture (Article 8(2)(c)(i)-3 and 4)
- Outrages upon personal dignity (Article 8(2)(c)(ii))
- Rape (Article 8(2)(e)(vi)-1)
- Sexual slavery and enforced prostitution (Article 8(2)(e)(vi)-2 and 3)
- Sexual violence (Article 8(2)(e)(vi)-6)

657. The main difference in this regard, compared to the analysis of crimes against humanity, is that to constitute a war crime, the conduct must be linked to an armed conflict. Indeed, the Elements of Crimes require that the conduct be committed ‘in the context of and was associated with’ an armed conflict.<sup>1116</sup>

658. The link to an armed conflict thus represents the specific contextual element in which some of the acts of murder, cruel treatment, torture, committing outrages upon personal dignity, rape, sexual slavery and enforced prostitution, enumerated and analysed as crimes against humanity above, qualify as war crimes.

### **1. Existence of a Non-International Armed Conflict (NIAC)**

659. As found by the ICTY in the *Tadić* case,<sup>1117</sup> there are two core elements constituting a non-international armed conflict: (1) protracted armed violence is taking place, meaning a certain intensity of the armed violence, and (2) the actors taking part in it must exhibit a certain degree of organisation.<sup>1118</sup>

660. Notably, PTC-I has already recognised in the First and Second Warrants of Arrest for Al-Werfalli that ‘there are reasonable grounds to believe that an armed conflict not of an international character has been ongoing on the territory of Libya, from at least early March 2011, between governmental forces and different organised armed groups, or among various such armed groups.’<sup>1119</sup>

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<sup>1116</sup> See, e.g., Elements of Crimes Art. 8(2)(c)(i)-1.

<sup>1117</sup> ICTY, *Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber (2 October 1995), para. 70; *Tadić*, Trial Judgment, para. 562; see also *Akayesu*, Trial Judgment, paras 619–20.

<sup>1118</sup> *Tadić*, Trial Judgment, para. 562; see also *Akayesu*, Trial Judgment, paras 619–20.

<sup>1119</sup> *Al-Werfalli*, Warrant of Arrest, para. 25; Second Warrant of Arrest, para. 9.

661. As described in Section III of this Communication, numerous UN agencies and international NGOs, including UNHCR,<sup>1120</sup> UNSMIL,<sup>1121</sup> UNICEF,<sup>1122</sup> the ICRC<sup>1123</sup> and the Geneva Academy,<sup>1124</sup> Human Rights Watch and Amnesty International<sup>1125</sup> have called attention to the protracted armed conflict in Libya—which has caused hundreds of civilian casualties, massive internal displacement, and damage and destruction to homes, hospitals, schools and detention facilities. In light of PTC I’s Warrants of Arrest, it is sufficient to briefly analyse the two above-mentioned factors in relation to the conflict in Libya.

*i. Intensity*

662. The ICTY Trial Chamber in *Haradinaj et al.* set out several factors relevant for determining if the conflict’s intensity level has reached the minimum threshold to constitute an armed conflict; inter alia, the number, duration and intensity of individual confrontations; type of weapons and other military equipment used; number and calibre of munitions fired; number of people and type of forces partaking in the fighting; number of casualties; extent of material destruction; number of civilians fleeing combat zones; and involvement of UN Security Council.<sup>1126</sup> It is not necessary for all these factors to be present for the requirement of intensity to be fulfilled. Therefore, the absence of one or several of these factors would not prevent a conflict from being classified as a NIAC.<sup>1127</sup>

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<sup>1120</sup> UNHCR, *UNHCR Position on the Designations of Libya as a Safe Third Country and as a Place of Safety for the Purpose of Disembarkation Following Rescue at Sea*, September 2020, para. 2. (‘Since 2014, protracted armed conflict between rival armed groups has resulted in large numbers of civilian casualties, displaced hundreds of thousands of people, disrupted people’s access to basic services and livelihoods, and destroyed vital infrastructure. In 2019, armed conflict and political instability had a direct impact on the lives of a quarter of the population.’)

<sup>1121</sup> UNSMIL, *One year of destructive war in Libya, UNSMIL renews calls for immediate cessation of hostilities and unity to combat COVID-19*, 4 April 2020, available at: <https://unsmil.unmissions.org/one-year-destructive-war-libya-unsmil-renews-calls-immediate-cessation-hostilities-and-unity-combat>.

<sup>1122</sup> UNICEF, *Libya: Tens of thousands of children at risk amidst violence and chaos of unrelenting conflict*, Statement by UNICEF Executive Director Henrietta Fore, 17 January 2020, available at: <https://www.unicef.org/press-releases/libya-tens-thousands-children-risk-amidst-violence-and-chaos-unrelenting-conflict>.

<sup>1123</sup> ICRC, *Where We Work, Libya*, available at: <https://www.icrc.org/en/where-we-work/africa/libya>.

<sup>1124</sup> Rule of Law in Armed Conflicts (RULAC), *Non-international armed conflicts in Libya*, 15 April 2021, available at: <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-libya#collapse2accord>.

<sup>1125</sup> AI, *Libya: New government must prioritize human rights and tackle impunity crisis*, 6 May 2021, available at: <https://www.amnesty.org/en/latest/news/2021/05/libya-new-government-must-prioritize-human-rights-and-tackle-impunity-crisis/>.

<sup>1126</sup> ICTY, *Prosecutor v. Ramush Haradinaj et al.*, Judgment, Trial Chamber (3 April 2008), paras 49 *et seq.*

<sup>1127</sup> *Ibid.* See also N. Zamir, *Classification of Conflicts in International Humanitarian Law*, 2017, p. 67.

663. The two concepts, intensity and protraction, are linked.<sup>1128</sup> A shorter duration may satisfy the criterion if the intensity level is high, and the reverse is true. In *Haradinaj*, the Trial Chamber observed that the criterion of protracted armed violence in practice had been interpreted as referring more to the intensity of the armed violence than to its duration.<sup>1129</sup>

664. As evidenced in this Communication (see Section II), the armed conflict in Libya is both protracted and intense. The UN Security Council Resolution 1970 in 2011 recognized and expressed grave concern at the ‘violence and use of force against civilians’ in Libya. It is evident from the 2021 FFM report,<sup>1130</sup> as well as reports produced by the UN Panel of Experts on Libya since 2011, that armed violence between various armed groups has persisted. For example, in 2017, the UN Panel of Experts report documented clashes between armed groups, such as an armed confrontation between Tripoli Revolutionaries Brigade and the Abu Salim Brigade on one side, and Misratan brigades loyal to Al-Ghweil on the other.<sup>1131</sup> The 2018 Panel of Experts report documented Operation Karama by the Libyan National Army and the formation of the Benghazi Revolutionaries Shura Council in response,<sup>1132</sup> as well as Operation Fajr in the same year, which caused massive material and institutional damage, widespread population displacement, and egregious human rights violations.<sup>1133</sup> In 2019, the Panel of Experts report documented the armed conflict that began with the attack on Tripoli launched by armed groups affiliated with Khalifa Haftar (HAF) on 4 April 2019.<sup>1134</sup> The extent of material and institutional destruction and human cost is well-documented by the UN Panel of Experts reports. The extended duration and ongoing involvement of the UN Security Council clearly establishes that the armed violence is sufficiently intense to constitute an armed conflict. Significantly, this is further corroborated by the Court’s opinion, which in both *Al-Werfalli*’s arrest warrant decisions observed how the security situation evolved in Libya after Gaddafi’s death continued

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<sup>1128</sup> *Tadić*, Decision on Jurisdiction, para. 70 (‘armed conflict exists whenever there is ... protracted armed violence between governmental authorities and organised armed groups or between such groups within a State’ (emphasis added)); see *Haradinaj et al.*, Trial Judgment, paras 40–49 (discussing how the term ‘protracted armed violence’ has been interpreted by the ICTY).

<sup>1129</sup> International Law Association, The Hague Conference on Use of Force, *Final Report on the Meaning of Armed Conflict in International Law*, 2010, p. 21, available at: [https://www.rulac.org/assets/downloads/ILA\\_report\\_armed\\_conflict\\_2010.pdf](https://www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf).

<sup>1130</sup> A/HRC/48/83, paras 1, 35.

<sup>1131</sup> 2017 UN Panel of Experts Report, paras 53-57.

<sup>1132</sup> 2018 UN Panel of Experts Report, paras 32-50.

<sup>1133</sup> *Id.*, paras 51-87.

<sup>1134</sup> 2019 UN Panel of Experts Report, Annex 6, paras 11-14.

between 2011 and 2018, noting the clashes between insurgent groups, and clashes between these groups and the Government.<sup>1135</sup>

ii. *Organisation*

665. The second element in determining the existence of an armed conflict is the level of organisation of the parties, as better detailed by the ICTY in the *Haradinaj* case.<sup>1136</sup> Referring to the requirement of the ‘organised armed groups,’ ICC Trial Chamber III noted in the *Bemba* case that ‘this characteristic element in the context of a [non-international armed conflict] is a well-established principle in the law of armed conflict (...) [and] also applies to Article 8(2)(c) of the Statute.’<sup>1137</sup>

666. Competing State authorities in Libya each have their own armed factions, which include militias. While several militias seem to fulfil the organisation requirement, such as the Anas al-Dabbashi and the al-Nasr Brigades, they ‘belong to’ the parties to the conflict in the sense of Article 4(A)(2) of the Third Geneva Convention. Although the Article deals with prisoner-of-war status, experts have referred to it in interpreting the meaning of ‘belonging to a party to a NIAC.’<sup>1138</sup> Moreover, the ICRC commentary on the Additional Protocol II to the Geneva Conventions establishes that the term ‘armed forces’ of the State should be understood broadly, extending beyond regular forces.<sup>1139</sup>

## V. Criminal responsibility of individual perpetrators and modes of liability

667. Throughout the previous sections, this Communication established that there are reasonable grounds to believe that grave crimes under ICC jurisdiction have been committed against migrants and refugees in Libya. This section analyses the individual criminal responsibilities for such crimes. Various levels of perpetrators are involved, along

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<sup>1135</sup> 15 August 2017 Al-Werfalli Arrest Warrant, paras. 5-10; 4 July 2018 Al-Werfalli Arrest Warrant, paras. 9-12

<sup>1136</sup> *Haradinaj et al.*, Trial Judgment, paras 60 *et seq.*

<sup>1137</sup> *Bemba*, Trial Judgment, para. 132, citing *Bemba*, Decision on the Confirmation of Charges, para. 232.

<sup>1138</sup> ICRC, *Fourth Expert Meeting on the Notion of Direct Participation in Hostilities*, Summary Report, 27-28 November 2006, p. 16.

<sup>1139</sup> Y. Sandoz *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, para. 4462.

the entire chain of exploitation and victimisation of migrants and refugees, ranging from guards at camps or DCIM centres, to militia commanders and government authorities. This means it is often difficult to draw a line between State and non-State actors. This section first revisits the ties between certain State and non-State actors, before turning to the legal standards of the relevant modes of liability under the ICC Statute. Lastly, it analyses the overall context of collective criminality in Libya by providing a few examples of the roles of specifically identified perpetrators.

668. Notwithstanding the many actors involved at different levels, in accordance with the OTP's strategic approach, this Communication focuses on those 'most responsible.'<sup>1140</sup> In particular, this section highlights the responsibility of people in positions of control—be it direct or indirect, official or unofficial. Witness accounts collected for the purpose of this Communication, as well as open-source information, point to alleged perpetrators in different levels of responsibility and form the basis for the following analysis. This section identifies 19 individuals, while Annex II provides a larger list of alleged perpetrators, based on the research conducted for this Communication, which the OTP should take into consideration. The annex contains basic information of alleged perpetrators, such as aliases, physical descriptions, locations and active times, providing a basis for the OTP to carry out more thorough investigations.

669. In assessing who are the 'most responsible,' it is necessary to look at both State and non-State actors that have control over the system of migrant exploitation. As Section II.B explains, the ongoing armed conflict has gone through roughly three phases, during which different entities occupied the State government. Since 2011, competing authorities claimed to represent the government: the General National Congress and the House of Representatives, around 2014; and later, around 2017, the GNA, led by Prime Minister Fayez al-Sarraj, and the LAAF, led by Khalifa Haftar. These groups were all connected, at some point, to militias and armed groups, albeit to different extents. For example, the General National Congress and the House of Representatives each had its own armed factions.<sup>1141</sup>

670. Between 2011 and 2014, numerous armed groups and militias were integrated into the State security apparatus, and therefore, into migration management. Hence, several DCIM centres came and still are under *de facto* militia control. Among them, for instance, is the

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<sup>1140</sup> OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, para. 42, available at: [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf).

<sup>1141</sup> See *supra* Section II.B.



Tariq al-Sika Detention Centre in Tripoli, controlled by the al-Khoja militia, and the (al-Nasr) Az-Zawiya Detention Centre, also known as ‘Osama Prison’ after its director. Moreover, important actors in the migrant exploitation system gained legitimacy through their ties to government authorities. This includes Abd al-Rahman Milad (a.k.a. Bija), head of the Zawiya Refinery Coast Guard until 2020 and recently appointed Major in the Navy,<sup>1142</sup> who the UN found was involved in sinking migrant boats.<sup>1143</sup> Milad has been subject to sanctions by the UN Security Council since 2018,<sup>1144</sup> along with other alleged perpetrators Ahmad Oumar al-Dabbashi (a.k.a. Al-Ammu, Mohammed Sabratha), commander of the Anas al-Dabbashi Brigade militia,<sup>1145</sup> Mohammed Koshlaf, head of the al-Nasr Brigade,<sup>1146</sup> and Osama al-Kuni Ibrahim (a.k.a Al-Kuni), the manager of al-Nasr Detention Centre.<sup>1147</sup>

671. In addition to their relationships with government authorities, militias also maintain ties among themselves. Since 2011, most militias were incorporated into umbrella groups and coalitions, such as the Libya Shield Force and the Supreme Security Committee.<sup>1148</sup> Their ties are also reflected in the human smuggling and trafficking networks. One example is that of the al-Nasr Brigade and the Anas al-Dabbashi Brigade. The former controls the al-Nasr DCIM centre, where migrants and refugees are extorted by the militia. At the same time, the latter reportedly purchased migrants and refugees from this centre.<sup>1149</sup> Therefore, their operations intertwine, and create a link to the government.

672. Concomitantly, militias often compete for control of smuggling and trafficking routes. This is exemplified by the several localised conflicts fought in Libya between 2014 and 2019, such as the ones in Ubari (southwest Libya) between the Tuareg and Tebu tribes, and in Sabratha (northwest Libya) between the al-Dabbashi Brigade and the al-Wadi Battalion.<sup>1150</sup> In the latter case, the al-Dabbashi militia reportedly struck a deal with Tripoli

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<sup>1142</sup> In his current role, ‘Bija’ is now responsible for selecting and training officers for the coast guard. N. Scavo, *E ora Bija, sospetto trafficante, seleziona e addestra i futuri guardacoste*, Avvenire, 4 November 2021, available at: [https://www.avvenire.it/attualita/pagine/ora-bija-seleziona-e-addestra-i-nuovi-guardacoste?utm\\_medium=Social&utm\\_source=Twitter#Echobox=1636013917-1](https://www.avvenire.it/attualita/pagine/ora-bija-seleziona-e-addestra-i-nuovi-guardacoste?utm_medium=Social&utm_source=Twitter#Echobox=1636013917-1).

<sup>1143</sup> 2017 UN Panel of Experts Report, para. 105.

<sup>1144</sup> UNSC, Abd Al Rahman Al-Milad.

<sup>1145</sup> UNSC, Ahmad Oumar al-Dabbashi.

<sup>1146</sup> UNSC, Mohammed Kachlaf.

<sup>1147</sup> UNSC, Osama Al Kuni Ibrahim.

<sup>1148</sup> See *supra* Section II.B.

<sup>1149</sup> Malakooti, *The Political Economy*, p. 75.

<sup>1150</sup> See *supra* Section II.B.

authorities in July 2017 to desist from human smuggling and trafficking activities, which led to clashes in Sabratha, but eventually began operating in Zawiya in October 2017.<sup>1151</sup>

673. These examples depict the fluidity between State and non-State actors. As allegiances and affiliations changed, militias and armed groups aligned themselves with different government authorities throughout the past decade. Most importantly, as mentioned, the incorporation of militias into the State apparatus makes it difficult to clearly distinguish between the actors' origin as State or non-State. Therefore, further investigation is needed to establish to which groups an alleged perpetrator was affiliated at the time the crimes were committed. Whenever possible, information on approximate dates in which alleged perpetrators committed a certain crime is provided below.

674. Finally, it is necessary to emphasise that the list of alleged perpetrators provided herein is not exhaustive, as that is beyond the scope of this Communication. However, it provides a strong indication of who committed the grave crimes that are the subject of this Communication, and therefore shall be the target of an ICC investigation. While this Communication focuses on the gravest modes of liability, namely commission under Article 25(3)(a) of the Rome Statute, this is without prejudice to any other finding regarding alleged perpetrators being investigated by the OTP, such as the high echelons of the competing State authorities, in relation to whom the Prosecutor may find other modes of liability suitable. This may include command responsibility under Article 28 of the Rome Statute. Thus, the modes of liability analysed below are indicative, but not the only possible framing of the alleged perpetrators' respective responsibilities.

#### **A. Modes of liability under Art. 25(3)(a)**

675. The Rome Statute includes various forms of commission or perpetration. These include those individuals who, in spite of being removed from the scene of the crime, control or mastermind its commission by deciding whether and how the offence will be committed.<sup>1152</sup> Perpetration according to Article 25(3)(a) of the Statute includes various forms: direct perpetration, indirect perpetration, co-perpetration, and even indirect co-perpetration.<sup>1153</sup>

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<sup>1151</sup> *Ibid.*

<sup>1152</sup> ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, Pre-Trial Chamber I (29 January 2007), para. 330.

<sup>1153</sup> *Id.*, para. 332.

676. While direct perpetration entails that the alleged perpetrator physically carries out the objective element of the offence,<sup>1154</sup> indirect perpetration requires a tight relationship of influence,<sup>1155</sup> which can be established by the control over a power structure.<sup>1156</sup> In both cases, the alleged perpetrator must commit the offence with intent and knowledge, pursuant to Article 30, unless otherwise provided for a specific crime.<sup>1157</sup>
677. In turn, co-perpetration requires (i) the existence of a common plan or an agreement with one or more people,<sup>1158</sup> and (ii) that the suspect and other co-perpetrators must carry out essential contributions in a coordinated manner, which result in the fulfilment of the material elements of the crime in question.<sup>1159</sup> Consequently, all participants share control, because each of them could frustrate the crime's commission by not carrying out their task.<sup>1160</sup> Concerning *mens rea*, Pre-Trial Chamber I set a high standard by requiring all co-perpetrators to 'be mutually aware of, and mutually accept, the likelihood that implementing the common plan would result in the realisation of the objective elements of the crime.'<sup>1161</sup>
678. Lastly, indirect co-perpetration combines elements of indirect perpetration and co-perpetration, requiring two objective elements. These include: (i) the existence of a common plan or agreement between the alleged perpetrator and at least one other person to commit crimes or to engage in conduct that, in the ordinary course of events, would result in the commission of crimes, and (ii) that the members of the common plan control the direct perpetrator by subjugating his or her will.<sup>1162</sup> The existence of a common plan can be inferred from the conduct of persons other than the alleged indirect co-perpetrators,<sup>1163</sup> while control over the direct perpetrators is evidenced by the indirect co-perpetrator's essential contribution to the crime.<sup>1164</sup> Additionally, indirect co-perpetration requires that the alleged co-perpetrator is, at a minimum, aware of the factual circumstances that enable him or her, along with the other co-perpetrators, to exercise joint control over the crime.<sup>1165</sup>

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<sup>1154</sup> *Ibid.*; *Ongwen*, Trial Judgment, para. 2782.

<sup>1155</sup> *Ongwen*, Trial Judgment, para. 2783.

<sup>1156</sup> *Katanga*, Trial Judgment, para. 1416.

<sup>1157</sup> *Ntaganda*, Trial Judgment, para. 735.

<sup>1158</sup> *Bemba*, Decision on the Confirmation of Charges, para. 350.

<sup>1159</sup> *Id.*, para. 350.

<sup>1160</sup> *Lubanga*, Decision on the Confirmation of Charges, para. 342.

<sup>1161</sup> *Id.*, para. 404.

<sup>1162</sup> *Ongwen*, Trial Judgment, para. 2787.

<sup>1163</sup> *Ntaganda*, Appeal Judgment, para. 920.

<sup>1164</sup> *Ongwen*, Trial Judgment, para. 2787.

<sup>1165</sup> *Ntaganda*, Appeal Judgment, para. 1045.

## **B. Analysis of the individual criminal responsibility of alleged perpetrators**

679. In analysing the modes of liability of several alleged perpetrators identified for the purpose of this Communication, it emerges that the above-mentioned modes of commission are all present, albeit to different degrees. The responsibility of these alleged perpetrators is often multi-layered, as they participate in different power structures concomitantly and committed different crimes. Further, one can identify ‘micro- and macro cosmoses.’ In these cases, one single alleged perpetrator may be a direct or indirect (co)perpetrator in relation to several other alleged perpetrators within the same group.

680. For these reasons, this subsection specifically analyses the individual criminal responsibility of a few alleged perpetrators as example cases. In the following analysis, four main locations are identified—namely Zawiya, Bani Walid, Sabratha and Tripoli—that have served as hubs for smuggling and trafficking activities since 2011 and where migrants and refugees have been victimised by different actors. The Communication provides background information on the armed groups, militias, and smuggling and trafficking rings active in each location and how they are connected to each other. It then describes specifically the responsibility of individuals who exercise control over the system of migrant exploitation.

681. As already explained, this assessment is non-exhaustive. Due to the limited scope of open-source investigations, there is a lack of information for instance on actors potentially involved in the commission of crimes against migrants and refugees located in eastern Libya. This can be attributed to different factors including the different phases of conflict that the east went through, including the take-over of Islamist armed groups in this region from 2012 to 2018, which forced the migration routes to shift mainly to the west. Thus, the alleged perpetrators cited in this section are mainly located in western Libya.

### **1. Individuals in control in Zawiya**

682. This subsection establishes the responsibility of the following individuals for events in Zawiya since 2017: (i) Osama al-Kuni Ibrahim (a.k.a. Al-Kuni), the person in charge of the al-Nasr detention centre; (ii) Mohammad Koshlaf/Kachlaf, al-Nasr Brigade commander and manager of the al-Nasr detention centre; (iii) [“Ab”], head of a smuggling/trafficking network; (iv) Ahmed al-Dabbashi/Ahmad Oumar al-Dabbashi (a.k.a. Al-Ammu, Mohammed Sabratha), commander of the Anas al-Dabbashi militia and

smuggler/trafficker; and (v) Abdel Rahman Milad/Abd al-Rahman al-Milad (a.k.a Bija), former leader of Zawiya's Coast Guard.

683. As detailed above in the Communication's factual analysis, Zawiya became a major departure point of migrant boats to Europe around 2017. It also became a hub for both State and non-State actors, several of them operating in connection. This is particularly visible in the operations of the al-Nasr militia, the al-Dabbashi militia, the Libyan Coast Guard, and different smuggling and trafficking rings.

684. [REDACTED] was detained in the Zawiya detention centre, which is controlled by the al-Nasr Brigade militia. The centre's de facto manager is Osama al-Kuni Ibrahim (a.k.a Al-Kuni).<sup>1166</sup> Ibrahim is also a cousin of Milad (a.k.a. 'Bija'), who controls the local coast guard. In turn, Mohammad Koshlaf, one of al-Nasr's commanders,<sup>1167</sup> controls the camp. Both Milad and Koshlaf are also on the UNSC's and the United States' sanctions lists.<sup>1168</sup>

685. In addition to the crimes committed inside the centre, there are numerous reports, from different sources, that the al-Nasr centre is also a smuggling and trafficking hub. Following the al-Dabbashi militia's defeat in Sabratha, it moved its operation to Zawiya around October 2017, which included buying migrants and refugees from the al-Nasr centre.<sup>1169</sup> The al-Dabbashi Brigade stems from a large and influential family in Sabratha (the al-Dabbashis), of which two alleged perpetrators have been identified: ["Ab"] and Ahmed al-Dabbashi/Ahmad Oumar al-Dabbashi (a.k.a. Al-Ammu).<sup>1170</sup> While ["Ab"] was described [REDACTED] as the head of a large smuggling/trafficking network with ties to the government,<sup>1171</sup> the UNSC names Ahmad as the commander of the Anas al-Dabbashi Brigade, who is also involved in the smuggling and trafficking of migrants and refugees.<sup>1172</sup> [REDACTED].

686. Another decisive actor in Zawiya is the LCG. At the relevant time, Abdel Rahman Milad/Abd al-Rahman al-Milad (a.k.a Bija) was the head of the Zawiya Coast Guard, who the UN Panel of Experts reported committed acts of violence himself, including sinking

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<sup>1166</sup> UNSC, Osama Al Kuni Ibrahim

<sup>1167</sup> UNSC, Mohammed Kachlaf.

<sup>1168</sup> UNSC, Osama Al Kuni Ibrahim; UNSC, Mohammed Kachlaf; UNSC, Abd Al Rahman Al-Milad; OFAC, Sanctions List SDN-LIBYA 3, Osama al-Kuni Ibrahim, available at <https://sanctionssearch.ofac.treas.gov/Details.aspx?id=30526>; OFAC, Sanctions List SDN-LIBYA 3, Mohamed Koshlaf, available at: <https://sanctionssearch.ofac.treas.gov/Details.aspx?id=24311>; OFAC, Sanctions List SDN-LIBYA 3, Abd al-Rahman Milad, available at: <https://sanctionssearch.ofac.treas.gov/Details.aspx?id=24312>.

<sup>1169</sup> Malakooti, *The Political Economy*, p. 75.

<sup>1170</sup> See also *infra* ii.

<sup>1171</sup> [REDACTED].

<sup>1172</sup> UNSC, Ahmad Oumar al-Dabbashi.

migrant boats.<sup>1173</sup> The Zawiya Coast Guard was responsible for over half of the individuals intercepted at sea in the first semester of 2017.<sup>1174</sup> The UNSC, in its narrative of the sanctions imposed on Milad, describes that several witnesses were picked up by Milad and other armed men in a boat called Tallil and subsequently taken to the al-Nasr detention centre.<sup>1175</sup> Although Milad was arrested in October 2020 by Libyan authorities, he has since been released and charges dropped on lack of evidence.<sup>1176</sup> In fact, he has been recently appointed as a Navy Major, entrusted with selecting and training recruits of the LCG.<sup>1177</sup>

687. The ties between Milad, Koshlaf and Ibrahim were expressly found by the UNSC, which pointed out that Mr Ibrahim ‘has acted for or on behalf of or at the direction of’ the other two.<sup>1178</sup> In addition, the UN Panel of Experts has noted the links between the Zawiya LCG and the al-Nasr Brigade, underscoring Milad’s ties with Koshlaf in terms of tribal affiliation,<sup>1179</sup> and their alliance in fighting armed groups that attempted to establish control over Zawiya.<sup>1180</sup> Likewise, the UNSC has reported that Koshlaf seems to provide Milad with protection to carry out smuggling and trafficking activities.<sup>1181</sup>

*i. Osama al-Kuni Ibrahim and Mohammad Koshlaf’s responsibility for crimes against humanity committed in the al-Nasr detention centre*

688. Both Osama al-Kuni Ibrahim and Mohammad Koshlaf control the internal structure of the al-Nasr detention centre, where migrants and refugees are commonly killed, tortured, sold, ill-treated, and subjected to inhumane detention conditions. Within this detention centre, both men are thus indirect perpetrators in relation to their underlings, *e.g.* the guards. They have control over how migrants and refugees are treated, because they control the actions of their subordinates. These subordinates have killed migrants and refugees held captive,<sup>1182</sup> deprived them of liberty in order to obtain ransom payments,<sup>1183</sup>

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<sup>1173</sup> 2017 UN Panel of Experts Report, para. 105.

<sup>1174</sup> Section II.B.

<sup>1175</sup> UNSC, Abd Al Rahman Al-Milad.

<sup>1176</sup> Tondo, *Libya releases man described as one of world’s most wanted human traffickers*.

<sup>1177</sup> Scavo, *E ora Bija, sospetto trafficante, seleziona e addestra i futuri guardacoste*.

<sup>1178</sup> UNSC, Osama Al Kuni Ibrahim.

<sup>1179</sup> 2017 UN Panel of Experts Report, Annex 17, para. 4.

<sup>1180</sup> 2017 UN Panel of Experts Report, Annex 17, paras 4-8.

<sup>1181</sup> UNSC, Abd Al Rahman Al-Milad.

<sup>1182</sup> IOM, *IOM Joins UN Call for Investigation into Migrant Deaths in Libyan Detention Centre; AI, Libya’s Dark Web of Collusion*, p. 30. [REDACTED].

<sup>1183</sup> Tribunale di Messina, N. 149/2020 (28 May 2020), p. 5.

tortured them to death,<sup>1184</sup> raped women and girls,<sup>1185</sup> and performed other acts of sexual violence.<sup>1186</sup> As the people in charge of the al-Nasr centre, both Koshlaf and Ibrahim exercised control over the commission of crimes and were in a position to stop them, which they did not. From their position of power, it is also possible to infer that they had knowledge of the commission of crimes at this centre and intended to engage in that conduct in order to also subjugate the migrants and refugees imprisoned there. Therefore, it is safe to conclude that Koshlaf and Ibrahim can be responsible as indirect perpetrators of murder, imprisonment, torture, rape, and other forms of sexual violence as crimes against humanity. In addition, Ibrahim can be considered a direct perpetrator of enslavement, since there are reports of him directly buying migrants and refugees from and selling them to Libyan soldiers.<sup>1187</sup>

- ii. ["Ab"], *Ahmad al-Dabbashi and Mohammad Koshlaf's responsibility in enslavement as a crime against humanity*

689. In assessing the individual criminal responsibility of actors in this smuggling network, the dealings to sell and buy migrants and refugees constitute a common plan or agreement at a higher level, involving the two militias and therefore implicating ["Ab"] and Ahmad al-Dabbashi, and Koshlaf, as a commander of the al-Nasr Brigade in charge of the centre. Each of these alleged co-perpetrators made an essential contribution to the crime of enslavement, as either the selling or purchasing party in the common plan. Consequently, they shared control over the commission of the crime because there would not be a crime without both parties being involved. Regarding their *mens rea*, it can be reasonably inferred from their positions in each of their militias and their conduct, that ["Ab"] and Ahmad al-Dabbashi and Koshlaf were mutually aware and in fact, intended for crimes to be committed as a foreseeable result of their common agreement. Thus, there are reasonable grounds to believe that Ibrahim can be responsible as a direct perpetrator of enslavement as a crime against humanity, while ["Ab"], Ahmad al-Dabbashi, and Koshlaf can be responsible as co-perpetrators of that same crime.

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<sup>1184</sup> *Id.*, 39.

<sup>1185</sup> [REDACTED].

<sup>1186</sup> [REDACTED].

<sup>1187</sup> [REDACTED]; Tribunale di Messina, N. 149/2020 (28 May 2020), p. 23.

iii. *Abd al-Rahman Milad and Mohammed Koshlaf's responsibility for crimes committed against migrants and refugees intercepted by the Libyan Coast Guard*

690. All forms of commission under Article 25(3)(a) could encompass the conducts of Abd al-Rahman Milad and Mohammed Koshlaf. The Panel of Experts established that Mr. Milad himself was directly involved in sinking migrant boats,<sup>1188</sup> which makes him liable as a direct perpetrator for the physical and psychological harm caused in these interceptions, as well as the murder of migrants and refugees. Moreover, Milad and Koshlaf acted in a coordinated manner. The former intercepted migrants and refugees and refugees at sea and delivered them to the al-Nasr centre, where they were then treated as commodities of the al-Nasr Brigade. In exchange, the latter provided protection to the former. Both actors then profit from the exploitation of migrants and refugees. This evidences the existence of a common plan, to which each of them makes an essential contribution. The common plan, that is, the arrangement described, resulted in the commission of crimes in the ordinary course of events: imprisonment, torture, physical and psychological injury, and enslavement, to name a few. This is because both actors were aware of the crimes being committed in the al-Nasr centre. Furthermore, they intended to engage in the commission of crimes insofar as they wilfully made their own essential contributions to the common plan. Therefore, Milad and Koshlaf can be responsible as co-perpetrators for these crimes.

691. Lastly, Milad, Koshlaf and ["Ab"] and Ahmad al-Dabbashi could also be considered as indirect co-perpetrators. Their operations are extremely intertwined, and the commission of crimes by Ibrahim at the al-Nasr centre, for example, may be influenced by his ties to Milad (ties to which the UNSC has alluded) or to the al-Dabbashi family. Further investigation by the OTP can clarify exactly how these close ties between the militias, the coast guard, and those in charge of the centre created diagonal relationships of command and power, characterising indirect co-perpetration.

## **2. Individuals in control in Bani Walid**

692. This subsection aims at establishing the responsibility of the following individuals for events in Bani Walid around 2017-2018: (i) Mousa Adyab, owner of a compound in Bani Walid; (ii) Kidane Zekarias Habtemariam (a.k.a Kidane), a high-level smuggler/trafficker;

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<sup>1188</sup> 2017 UN Panel of Experts Report, para. 105.



(iii) [“WB”], a smuggler/trafficker; (iv) Tewelde Goitom Kiros (a.k.a Welid), a high-level smuggler/trafficker; (v) [“D”]; (vi) [“N”], an Eritrean guard; (vii) [“Ah”], another Eritrean guard; (viii) [“Az”]; and (ix) [“Am”], an Eritrean smuggler/trafficker.

693. As described in Section II, Bani Walid gained prominence as a smuggling hub during the expansion of Islamist armed groups across east Libya, forcing smugglers to reroute through Kufra, Al-Shwarif, and finally, Bani Walid. Although there is an official DCIM centre in Bani Walid, most migrants and refugees that reach Bani Walid are kept in unofficial places, like farms or makeshift detention sites, the ‘campos.’

694. This is the case in the Mousa Adyab compound in Bani Walid, where four main smugglers operate within the compound: Kidane, [“WB”], Welid and [“D”]. The compound has been identified by the UN Panel of Experts, whose report also provides aerial images thereof.<sup>1189</sup> The four alleged perpetrators have sold and bought migrants and refugees, and tortured them.

695. It is reported that Kidane, Welid and [“WB”] are Eritrean, but the nationality of [“D”] remains unconfirmed. Kidane is alleged to be a well-known smuggler/trafficker, who used to run one of the eastern routes, through Adjabiya.<sup>1190</sup> Kidane has accounts in Dubai, to which migrants and refugees and their families pay for their trip and ransom. According to [REDACTED], the person responsible for handling the payments is known as [“AD”]. Welid is also reported to be a high-level smuggler/trafficker. While both were arrested in Addis Ababa, there are reports that Kidane has since escaped.<sup>1191</sup> In October 2021, the Netherlands placed Kidane on its ‘Most Wanted List’ for crimes committed against Eritrean migrants and refugees in Libya, highlighting that Eritreans in the Netherlands have been extorted to pay for relatives’ release from captivity and onward journey in Libya.<sup>1192</sup>

696. The UN Panel of Experts has noted that around 1,200 people are kept in the compound, guarded by 70 armed men.<sup>1193</sup> [REDACTED] recounted smugglers/traffickers in Bani Walid frequently buying migrants and refugees from Al-Shwarif.<sup>1194</sup> [REDACTED], who was in the compound around July-August 2017, saw migrants and refugees being beaten

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<sup>1189</sup> 2018 UN Panel of Experts Report, p. 16.

<sup>1190</sup> [REDACTED].

<sup>1191</sup> Politie, Most Wanted, *Kidane Zekarias Habtemariam*, available at: <https://www.politie.nl/en/wanted-and-missing/most-wanted/2021/kidane-zekarias-habtemariam.html>.

<sup>1192</sup> *Ibid.*

<sup>1193</sup> 2018 UN Panel of Experts Report, p. 16.

<sup>1194</sup> [REDACTED].

by the men guarding the camp to coerce their families to pay ransom.<sup>1195</sup> [REDACTED] was traded between Kidane and Welid.<sup>1196</sup> In addition to crimes committed along with others, Welid also forced women to perform sexual acts with him in exchange for their release from Bani Walid.<sup>1197</sup> According to an AI report, women were commonly forced into prostitution by smugglers in Bani Walid.<sup>1198</sup>

697. In another unknown detention site within Bani Walid, [REDACTED] identified two guards, [“N”] and [“Ah”], who beat migrants and refugees in this place.<sup>1199</sup> Both alleged perpetrators are Eritrean and former military and worked in that location around November 2017 to January 2018. They reportedly worked with two smugglers called [“Am”] and [“Az”], who [REDACTED] has also placed in Al-Shwarif between February and November 2017. [“Az”] is Libyan and allegedly a military officer, and was routinely seen wearing a white/brown military uniform with a star on his shoulder. He was once spotted once driving a military car.<sup>1200</sup> In turn, [“Am”] is a well-known Eritrean smuggler/trafficker, and [REDACTED] has related that after a period in Ethiopia, he returned to Libya in late 2020.<sup>1201</sup> [REDACTED] has also alleged that [“Am”] has ties to Kidane and Welid.

i. *Mousa Adyab, Kidane, [“WB”], Welid and [“D”]’s responsibility for crimes against humanity in the Adyab compound*

698. Concerning the responsibility of the above-mentioned perpetrators, Mousa Adyab, Kidane, [“WB”], Welid and [“D”], there are at least three levels of responsibility and consequent modes of liability that can be identified. First, by forcing women into sexual acts, Welid can be described as a direct perpetrator of rape and other forms of sexual violence. Second, all of them share control over the armed guards, who directly torture and imprison migrants and refugees. In this sense, as the people in control of the compound and guards, Mousa Adyab, Kidane, [“WB”], Welid and [“D”] exercised control over the commission of crimes. Given their command position, it is reasonable to infer that they had knowledge of the crimes in this location and intended to engage in this conduct.

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<sup>1195</sup> [REDACTED].

<sup>1196</sup> [REDACTED].

<sup>1197</sup> [REDACTED].

<sup>1198</sup> AI, *‘Between Life and Death’*, p. 30.

<sup>1199</sup> [REDACTED].

<sup>1200</sup> [REDACTED].

<sup>1201</sup> [REDACTED].

Therefore, Mousa Adyab, Kidane, [“WB”], Welid and [“D”] can be described as indirect perpetrators of imprisonment, torture, and infliction of physical and psychological harm as crimes against humanity.

699. Third, the same men were concomitantly part of a common agreement, insofar as they operated from the same compound, selling and buying migrants and refugees between themselves and with smugglers/traffickers in other locations. Moreover, considering that the enforced prostitution of women to men outside the camp was commonly employed by smugglers/traffickers as a means of revenue, and the men in control of the compound never stopped it, it can be reasonably inferred that the same men were in agreement about this activity. All these conducts were intended to further the system of migrant exploitation. Each of the men also had an essential contribution by ensuring there was always a large group of individuals in the compound to exploit. Finally, they were mutually aware of and accepted the commission of crimes as a result of their agreement. Thus, Mousa Adyab, Kidane, [“WB”], Welid and [“D”] can also be liable as co-perpetrators for the enslavement, including sexual, and the enforced prostitution of migrants and refugees as crimes against humanity.

ii. [“N”], [“Ah”], [“Am”], [“Az”]’s *responsibility for crimes against humanity in an unidentified detention site*

700. In terms of their respective individual criminal responsibility, [“N”] and [“Ah”] can be described as direct perpetrators of torture as a crime against humanity since they engaged directly in the material elements of the offence. The responsibility of [“Az”] and [“Am”] concerning enslavement, especially considering their ties to Kidane and Welid, is best characterised as co-perpetration, following the existence of an agreement for selling and buying migrants and refugees, to which each party to the transaction makes an essential contribution. It is suggested that the OTP should further investigate [“Az”]’s and [“Am”]’s relationship, both to the camp where [“N”] and [“Ah”] operated, and to Kidane and Welid, to support the findings and establish their responsibility as co-perpetrators and indirect perpetrators.

### 3. Individuals in control in Sabratha

701. This subsection analyses the responsibility of the al-Dabbashi militia, specifically of Ahmad al-Dabbashi, for events in Sabratha from 2015 until late October 2017. Sabratha was Ahmad al-Dabbashi (a.k.a. Al-Ammu, Mohammed Sabratha<sup>1202</sup>)’s smuggling/trafficking hub from late 2015 until late October 2017. As explained, the al-Dabbashi family had great power in Sabratha. At that point in time, although Ahmad al-Dabbashi himself was part of the al-Dabbashi militia, his smuggling/trafficking operations were still independent from the militia. He controlled the smuggling operation from the ‘White House,’ an unofficial detention site. Given his family’s control over the city, he was able to give smugglers/traffickers different ‘corners’ in the city, the ‘turkinas,’ where each housed migrants and refugees. This was the case of [REDACTED], who stayed in a turkina under the control of a man called [REDACTED].

702. This separation between the smuggling and trafficking network and the militia changed in 2017, when a new wave of armed conflict hit the region, namely between that militia and the al-Wadi Battalion. During the armed confrontations, smuggling and trafficking activities became intertwined with the militias. For example, [REDACTED], who was kept in a turkina in Sabratha sometime between mid-2016 and mid-2017, described how the building served as ammunition storage. [REDACTED] further described how some migrants and refugees were forced to go to fighting zones, either to support the fighting or directly engaged in it.<sup>1203</sup> [REDACTED] was also taken to the house of al-Dabbashi’s father, where a missile was stored.<sup>1204</sup> As a result of the conflict, al-Dabbashi was driven out of Sabratha.

*i. Ahmad al-Dabbashi’s responsibility for crimes against humanity as the head of a criminal network*

703. Concerning the smuggling, Ahmad al-Dabbashi maintained a network of smugglers and traffickers, with whom he coordinated the selling and buying of migrants and refugees. In addition, they forced the latter to work on construction sites, offering them as a workforce to sponsors. [REDACTED] recounted how women in Sabratha’s unofficial detention settings were also sexually enslaved. These acts evidence the existence of a common plan,

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<sup>1202</sup> AI, *Libya’s Dark Web of Collusion*, p. 16.

<sup>1203</sup> [REDACTED].

<sup>1204</sup> [REDACTED].

through which Ahmad al-Dabbashi and other smugglers/traffickers coordinated the system of migrant exploitation. Each of them made an essential contribution. First, al-Dabbashi provided the smugglers with facilities and the conditions to operate in Sabratha, due to his family's position in the city. Second, the smugglers provided al-Dabbashi with individuals. In an environment characterised by migrants and refugees' commoditisation, he profited from exploiting them as a workforce and/or as sexual slaves. The mutually profitable nature of the commission of the crimes evidences that the co-perpetrators were mutually aware of the commission of crimes in implementing the common plan, and accepted them. Hence, al-Dabbashi is liable as co-perpetrator of the crimes of enslavement, imprisonment and sexual slavery as crimes against humanity.

704. Furthermore, migrants and refugees were killed and tortured in Sabratha's camps,<sup>1205</sup> some due to inhumane detention conditions.<sup>1206</sup> al-Dabbashi, as the person in ultimate control of unofficial detention sites in Sabratha, can be considered an indirect perpetrator of the crimes of murder and torture as crimes against humanity. It is submitted that the OTP should investigate the precise relationship between al-Dabbashi and the smugglers/traffickers operating the turkinas in Sabratha under his command, which will support the conclusion that al-Dabbashi controlled the structure of smuggling and trafficking in Sabratha to the point that he alone exercised control over the commission of crimes, subjugating the will of his subordinates.

#### **4. Individuals in control in Tripoli**

705. This subsection aims at explaining the responsibility of the following individuals for crimes against migrants and refugees committed in Tripoli between 2014 and 2017: (i) ["G"], the son of a local leader, ["AS"]; (ii) Mohammad al-Khoja, commander of the al-Khoja militia; (iii) ["RK"], Mohammad's brother and a smuggler/trafficker; (iv) ["HN"], the person in charge of Tariq al-Sika detention centre in Tripoli; and (v) Tarik Baheej, the person in charge of the Ain Zara detention centre.

706. Between 2014 and 2017, Tripoli became an important centre for migrants and refugees, especially those who sought work in Libya to finance the trip to Europe.<sup>1207</sup> In the capital, migrants and refugees were just as vulnerable to exploitation and detention as in other places. Many individuals, particularly from sub-Saharan Africa, set up residence in a

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<sup>1205</sup> [REDACTED].

<sup>1206</sup> [REDACTED].

<sup>1207</sup> Section II.B.

‘ghetto’ – likely Gragisha, in Gergarish. The area is known as a drug and alcohol hub (which are illegal in Libya), comprising a rundown enclave of houses, where migrants and refugees are also held while in transit through the country. For example, [REDACTED], who was in the ‘ghetto’ in the first semester of 2014, referred to an alleged perpetrator [“G”] who tortured the victim, mercilessly beating him for simply going outside. According to [REDACTED], “[a] lot of people who passed through Libya, if you tell them [“G”], they would know. I went home and they told me, ‘Yeah, this guy is crazy.’”<sup>1208</sup> [“G”] is the son of [“AS”], reportedly the leader of the Arab clan in the Tripoli ‘ghetto.’ The victim reported hearing that [“G”] is since deceased, but no evidence was found to corroborate this. While the role of [“AS”] is unclear, [“G”] is liable as a direct perpetrator of torture as a crime against humanity.

707. In official detention sites, DCIM guards, police officers and soldiers regularly mistreated migrants and refugees. Tripoli has hosted at least 19 DCIM centres since 2011.<sup>1209</sup> The witnesses interviewed mentioned several of these centres, where migrants and refugees were victims of several crimes. One such centre is the Tariq al-Sika detention centre. As with other DCIM centres, it is controlled by a militia, the al-Khoja, which also controlled the Al Sabaa detention centre<sup>1210</sup> and the former Tajoura detention centre.<sup>1211</sup> This militia is run by Mohammad al-Khoja, who occupied the post of DCIM deputy head.<sup>1212</sup> According to [REDACTED], who was detained in Tariq al-Sika from August 2018 until October 2019, Mohammad’s brother, [“RK”], is a smuggler and trafficker and uses the centre for his operations. In turn, the centre’s director is [“HN”], with guards and soldiers reporting to him.

708. According to [REDACTED], [“HN”] refused medical and humanitarian aid organisations access to the centre.<sup>1213</sup> On one occasion, [“HN”] called more than 120 soldiers to come to the centre and torture migrants and refugees.<sup>1214</sup> Centre guards also commonly extorted migrants and refugees<sup>1215</sup> and discriminated against men and women of certain nationalities/religions.<sup>1216</sup> [REDACTED] was also forced to work for ‘sponsors’

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<sup>1208</sup> [REDACTED].

<sup>1209</sup> See table on Annex III.

<sup>1210</sup> *Ibid.*

<sup>1211</sup> Malakooti, *The Political Economy*, p. 87.

<sup>1212</sup> Johnstone and Naish, *Can Libya’s migrant-detention system be reformed?*.

<sup>1213</sup> [REDACTED].

<sup>1214</sup> [REDACTED].

<sup>1215</sup> [REDACTED].

<sup>1216</sup> [REDACTED].

who had arrangements with the centre.<sup>1217</sup> These arrangements included another DCIM centre in Tripoli called Ain Zara. The Ain Zara DCIM centre is controlled by Militia 42, and directed by Tarik Baheej.<sup>1218</sup> There, [REDACTED] were forced to work. While the latter did cleaning and farming, the former was forced to support hostilities in the area.<sup>1219</sup> According to [REDACTED], men would call [“HN”] and ask for a number of migrants and refugees to be moved to Ain Zara, where hostilities were taking place, and they were forced to organise and transport arms and ammunition. The Tariq al-Sika centre also stored weapons and ammunition.<sup>1220</sup>

*i. [“HN”]’s responsibility for crimes at Tariq al-Sika*

709. [“HN”] can be responsible as a direct perpetrator of torture, for instance for having denied medical and humanitarian access to the detention centre, which exacerbated the inhumane conditions of the migrants and refugees detained there and led to them being subjected to physical and psychological harm. Concomitantly, as the person in charge at Tariq al-Sika, [“HN”] exercised control over the power structure, to the extent that guards and soldiers acted under his command. His position and physical presence at the centre mean that he had knowledge of the commission of crimes and intended for these crimes to happen through the direct perpetrators. In this sense, [“HN”] can be responsible as an indirect perpetrator for imprisonment, torture, and persecution as crimes against humanity.

*ii. [“HN”], Tarik Baheej, Mohammad al-Khoja and [“RK”]’s responsibility as co-perpetrators of enslavement*

710. In parallel, the forced labour of migrants and refugees in both Tariq al-Sika and Ain Zara and their exchange between the two evidence the existence of an agreement between the authorities in charge of the two centres, as well as between these authorities and ‘sponsors.’ Considering that ‘sponsors’ would pay the centre’s authorities in order to exploit migrants and refugees’ labour, it is reasonable to conclude that the centre’s authorities made an essential contribution to fulfilling the common agreement, either by providing money, or by providing a workforce. Thus, [“HN”], Tarik Baheej, as well as

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<sup>1217</sup> [REDACTED].

<sup>1218</sup> See table on Annex III.

<sup>1219</sup> [REDACTED].

<sup>1220</sup> [REDACTED].

Mohammad and [“RK”], can be individually responsible as co-perpetrators of enslavement as a crime against humanity.

### **C. Conclusion on individual criminal responsibility of alleged perpetrators for crimes against humanity**

711. After a careful assessment of the standards of the Rome Statute and the jurisprudence of international tribunals in this and the previous Section, it can be concluded that: (i) the ICC has jurisdiction over the situation of migrants and refugees in Libya as part of the UNSC referral in Resolution 1970 (2011); (ii) that there are strong reasons to believe that several crimes against humanity are being committed against migrants and refugees in Libya; (iii) and lastly, that several alleged perpetrators can be identified as individually responsible for these crimes under cumulative modes of liability.
712. The identification of the responsibility of several individual perpetrators and the related analysis of the modes of liability for the commission of crimes in different locations, as in Zawiya, Bani Walid, Sabratha and Tripoli, should serve as an example of the complex dynamics at play between militias, armed groups, smugglers and traffickers, and lone actors. It is evident that these actors become intertwined through the common plans and joint commission of crimes.
713. This overall assessment supports the conclusion that many individual perpetrators are involved in the commission of the crimes outlined in this Communication and can be held responsible pursuant to Article 25(3)(a) of the Rome Statute. The systematic character of the crimes committed is clear in that seemingly high-level perpetrators were directly involved in the crimes at stake, in collusion with a network of other actors, and with criminal networks. Moreover, it is apparent that certain crimes were more often committed in co-perpetration because they involved some sort of transaction, such as enslavement, sexual slavery, or enforced prostitution. The particularly grave nature of these crimes should be taken into account when assessing the modes of liability incurred by perpetrators.
714. Finally, the OTP should further investigate the people cited herein, as well as in Annex II. While the information collected for the purposes of this Communication does not precisely address the role of armed groups in the commission of crimes, their links to the exploitation of migrants and refugees mean that one cannot exclude their participation in the commission of crimes, which the OTP should clarify. At the same time, the preliminary



list of alleged perpetrators in Annex II provides the Prosecutor with important references that can help identify other alleged perpetrators.

## **VI. Admissibility and Interests of Justice**

715. As prescribed by Article 17(1) of the Rome Statute, the Court shall assess the admissibility of a case pursuant to two criteria: a) complementarity and b) gravity. Accordingly, the following paragraphs will elaborate on the issues specifically under Sections A and B. While the admissibility assessment under Article 17 of the Rome Statute is to be conducted with regards to specific cases with identified perpetrators, this Communication lays down elements likely to be relevant for various cases of crimes against migrants and refugees possibly arising in the Libyan situation under the Court's jurisdiction.

### **A. Complementarity**

716. According to the principle of complementarity as adopted in the Rome Statute, Libya has the primary responsibility to investigate the crimes committed on its territory or by its nationals, and to prosecute and punish the perpetrators. Libya is bound to do so with regard to gross human rights violations by customary international law, as well as by the treaties and conventions it has ratified over the years. These include, but are not limited to, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child, the Arab Charter on Human Rights, and the African Charter on Human and Peoples' Rights.

717. As a complementary institution and a court of 'last resort,' the ICC does not have jurisdiction over a case that is being investigated or prosecuted, or investigated and discarded, by a State which has jurisdiction over it, 'unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.'<sup>1221</sup>

718. While the admissibility assessment based on Article 17 needs to be conducted on a case-by-case basis once a case has been identified, a general overview of the Libyan legislation and criminal system, as presented in this section, clearly identifies major flaws

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<sup>1221</sup> Rome Statute, Art. 17(1)(a) and (b).

that are likely to affect case proceedings related to the crimes included in this Communication if they were to be prosecuted domestically.

719. The Court has already made an admissibility assessment in two cases in the situation in Libya, Saif al-Islam Gadhafi and Abdullah Al-Senussi, with two different outcomes. This Communication will highlight some of the points raised in these two cases, as well as other elements particularly relevant to crimes committed against migrants and refugees in Libya. These evidence Libya's inability to genuinely investigate such crimes and to prosecute their perpetrators, also in light of the report published in 2019 by the International Commission of Jurists (ICJ).<sup>1222</sup>

720. The complementarity assessment will respectively look at Libya's relevant legislations and criminal justice system.

## **1. Inadequate national law**

### *i. Absence of inclusion of international crimes under domestic law*

721. While Libya has ratified most key treaties on international humanitarian law and human rights law,<sup>1223</sup> it has not ratified the Rome Statute and has yet to integrate international crimes into domestic law.

722. The latest constitutional draft, the Consolidated Draft Constitution, adopted by the Constitutional Drafting Assembly on 29 July 2017, includes a provision on crimes against humanity. Article 37 of the Consolidated Draft Constitution provides that: 'All forms of behaviour that constitute crimes against humanity, war crimes, genocide, and terrorism shall be prohibited, shall not be subject to the statute of limitations, and shall not be pardoned, in so far as this does not contradict the provisions of the Constitution.'<sup>1224</sup> However, the Consolidated Draft Constitution has yet to be adopted as per the constitutional process and has therefore not entered into force. At the date of this

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<sup>1222</sup> ICJ, *Accountability for Serious Crimes*, p.14.

<sup>1223</sup> Including: the four Geneva Conventions, the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. For further detail, see OHCHR, UN Treaty Body Database, Ratification Status for Libya, available at: [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=99&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=99&Lang=EN).

<sup>1224</sup> *Proposal of a Consolidated Draft Constitution*, 16 April 2017, available at: [https://security-legislation.ly/sites/default/files/lois/229-2017%20Draft%20Constitution\\_ENG.pdf](https://security-legislation.ly/sites/default/files/lois/229-2017%20Draft%20Constitution_ENG.pdf).

Communication's submission, the applicable Constitution in Libya remains the Interim Constitutional Declaration adopted by the National Transitional Council on 3 August 2011, which does not include such a provision.<sup>1225</sup>

723. Furthermore, the Libyan legal framework does not penalise international crimes, as listed in the Rome Statute. While pursuant to Law No. 31 of 2013, the Abu Salim prison massacre, relating to the 1996 massacre of 1,200 people in Abu Salim prison in Tripoli, was qualified as a crime against humanity,<sup>1226</sup> the law itself, or any other legal provision under Libyan domestic law, fails to define the concept of crimes against humanity. In fact, crimes against humanity or war crimes have yet to be formally integrated into Libyan domestic law. As a result, Libyan authorities are unable to initiate prosecutions for international crimes and to hold the perpetrators of such crimes to account.<sup>1227</sup> This is reinforced by the fact that the Libyan legal framework fails to comply with international standards in its criminalisation of serious crimes.

*ii. Limited or inappropriate criminalisation of serious offences*

724. The Libyan legal framework is inadequate when it comes to the criminalisation of serious crimes as defined under international law. Indeed, the definitions of serious offences, such as torture and other ill treatment, slavery, and sexual and gender-based violence—fail to comply with international law and standards. Overall, Libyan laws ill-define the crimes that they sanction.

725. For example, Law No. 10 of 2013 on the Criminalisation of Torture, Forced Disappearances and Discrimination defines torture as follows: 'anyone who inflicts or orders another person to inflict physical or mental pain on a detainee under his control in order to extract a confession for any act that such detainee has or has not committed, or because of discrimination, regardless of its type, or revenge, regardless of its motive.'<sup>1228</sup> As such, the law is inconsistent with the CAT, to which Libya is a party, as it omits some key elements of the CAT definition. The definition as prescribed in Law No. 10 of 2013 is limited to the use of torture for the purpose of extracting a confession and does not

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<sup>1225</sup> Interim Constitutional Draft, 2011, <https://www.ndi.org/sites/default/files/Handout%20%20-%20Libya%20Draft%20Interim%20Constitution.pdf>.

<sup>1226</sup> Law No. 31 of 2013 adopting provisions pertaining to the Abu Salim prison massacre, 18 December 2013, <https://security-legislation.ly/node/33119>.

<sup>1227</sup> ICJ, *Impunity No More*, p. 2.

<sup>1228</sup> Law No. 10 of 2013 on the Criminalisation of Torture, Forced Disappearances and Discrimination, 14 April 2013, Art.2, available at: <https://security-legislation.ly/node/31741>.

include other purposes as indicated in a non-exhaustive manner in CAT. These include obtaining information, punishing the person for an act that is suspected to have been committed, or intimidating or coercing the victim and/or a third person.<sup>1229</sup> Therefore, the definition prescribed in Libyan law excludes a whole range of acts which would amount to torture under the international CAT definition and fails to provide that safety from torture and other ill treatment are non-derogable rights.

726. The Libyan Penal Code also presents significant gaps in the criminalisation of serious offenses. For instance, Articles 425 and 426 of the Penal Code respectively criminalise enslavement and slave trafficking that amount to slavery,<sup>1230</sup> but fail to provide a definition of enslavement or slavery. In addition, while the Penal Code criminalises incitement to prostitution<sup>1231</sup> and forced prostitution of women and children,<sup>1232</sup> international trafficking of women,<sup>1233</sup> and the facilitation of such trafficking,<sup>1234</sup> these provisions only apply to women and fail to include men as victims of trafficking or prostitution. Further, Libyan law only seems to criminalise the trafficking of women for the sole purpose of prostitution, without including any other forms of human trafficking.<sup>1235</sup>

727. Pursuant to Article 407 of the Penal Code, sexual intercourse by force, threat or deceit, is punished with a prison sentence of a maximum of ten years. The offense prescribed by Article 407 seems to correspond to what would be considered as the crime of rape under international criminal law. However, the application of Article 407 is narrow in that it is limited to sexual intercourse ‘by force, threat or deceit’ and fails to cover other circumstances, such as a coercive environment as provided by the Elements of Crimes of the Rome Statute.<sup>1236</sup>

728. Moreover, the effectiveness of the criminalisation of sexual and gender-based violence is reduced by Article 424 of the Penal Code. Under Article 424, the offence and the

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<sup>1229</sup> UN Convention Against Torture, Art. 1; ICJ, *Accountability for Serious Crimes*, p. 33.

<sup>1230</sup> Libyan Penal Code, 1953, Art. 425. Article 425 provides: ‘Anyone who enslaves another or places him under conditions that resemble slavery shall be punished by imprisonment from five to fifteen years.’ Article 426 provides: ‘Anyone who deals in or traffics in slaves or in any manner disposes of a slave or a person in a condition resembling slavery shall be punished by Imprisonment for a period not exceeding ten years. The penalty shall be imprisonment from three to twelve years for anyone who disposes of an enslaved person or a person in a condition resembling slavery, or who delivers him, has him in his possession, acquires him, or retains him in his said condition.’ English translation available at:

[https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=97659&p\\_classification=01.04](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=97659&p_classification=01.04).

<sup>1231</sup> Libyan Penal Code, Art. 415.

<sup>1232</sup> *Id.*, Art. 416.

<sup>1233</sup> *Id.*, Art. 418.

<sup>1234</sup> *Id.*, Art. 419.

<sup>1235</sup> *Id.*, Art. 418.

<sup>1236</sup> See Elements of Crimes, Article 7(1)(g)-1; Article 8(2)(b)(xxii)-1.

attached sentence for a crime committed against a woman, including sexual and gender-based violence such as the crimes described above, are extinguished if the male perpetrator marries the female victim of such crimes.<sup>1237</sup> This provision constitutes a violation of Libya's international obligation to investigate and prosecute the perpetrators of sexual and gender-based violence, and therefore a clear obstacle to accountability. Consequently, it impedes redress avenues for the victims and violates their right to justice.

729. Another key example of deficient legislation in relation to the criminalisation of international crimes is Law No. 29 of 2013 on Transitional Justice. Law No.29 of 2013 addressed severe and systematic violations of human rights perpetrated since the beginning of the Gaddafi regime (1 September 1969) and 'until the end of the transitional period when parliamentary elections will be held based on the permanent Constitution.'<sup>1238</sup> The law aimed to reveal the truth about past human rights violations, to tackle State and individual responsibility, to reform remaining institutions from the Gaddafi regime, and to repair the victims of these violations. For that purpose, the law also established a Fact-finding and Reconciliation Commission (FFRC) to investigate every severe and systematic human rights violation brought to its knowledge, to reveal the truth about circumstances relating to these violations and address issues referring to internally displaced and missing persons, and to propose reparation measures for victims. However, despite commitments from the government to implement Law No. 29 of 2013, the FFRC has yet to be formed and become operational.

730. Law No. 29 of 2013 presents key shortcomings affecting the extent to which accountability for international crimes can be reached in Libya. Indeed, the law defines the 'severe and systematic violations' to which it applies as 'violating human rights through murder, abduction, physical torture or confiscation or damage of funds, if committed by an order of an individual acting out of a political motive. It also means the violation of the fundamental rights in a manner that results in severe physical or moral consequences.' As such, the definition is limited and restrictive as it fails to capture all crimes under international law, such as rape and other forms of sexual violence. The crime of torture is limited to 'physical torture' and does not include the infliction of mental pain or suffering.

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<sup>1237</sup> Libyan Penal Code, Art. 424 provides that: 'If the offender marries the woman against whom the offense is committed, the offense and penalty shall be extinguished and the penal effects thereof shall cease. This shall apply both to the offender and to his accomplices, provided that the personal status law applicable to the offender does not authorise divorce or judicial divorce.'

<sup>1238</sup> Law No. 29 of 2013 on Transitional Justice, 2 December 2013, Art. 3, available at: <https://security-legislation.ly/node/32096>.

The law also appears to be restrictive in that it only applies to crimes committed with ‘a political motive.’ Moreover, the law does not provide a definition of the listed crimes and therefore does not comply with international law and standards.

731. The *ratione temporis* element that determines which crimes fall under the law is unclear. While Article 1 states that the law applies to ‘severe and systematic violations of the basic rights and liberties to which the Libyans were subjected by State affiliated apparatus under the former regime,’<sup>1239</sup> Article 3 provides that the law applies ‘to events that took place as of 1 September 1969 until the end of the transitional period when parliamentary elections will be held based on the permanent Constitution.’<sup>1240</sup> It is therefore unclear whether the law applies to events that took place after the 2011 uprising. Therefore, Law No. 29 of 2013 fails to ensure accountability for all crimes under international law committed in Libya during the Gaddafi era and in the period following the 2011 uprising.

732. In addition, Libyan law is limited when it comes to detailing the modes of criminal liability and superior responsibility. Article 5 of Law No. 10 of 2013 concerning the Criminalisation of Torture, Forced Disappearance and Discrimination provides for superior responsibility of politicians and leaders:

*[a penalty of a one-year imprisonment minimum] shall be incurred by any political, executive or administrative official, and any military leader or acting military leader when any employee or forces under the control and command thereof commit the crimes stipulated in the previous articles, if such official or leader does not take the necessary measures to prevent or uncover such crimes while being capable thereof, or prevents in any way the referral of such crimes to the authorities in charge of discipline, investigation or prosecution.*

733. Article 5 is flawed as it fails to include all the elements of the international definition of superior responsibility. While it includes the superior-subordinate relationship, it fails to reflect the requirement that the superior had the knowledge that a crime was being or about to be committed. Further, it only imposes duties on the superior to ‘uncover’ the crime and refrain from preventing the referral of the crime for investigation and punishment, but does not require them to punish the subordinate. It should also be noted that this provision does not apply to all crimes under international law but only applies to crimes falling under Law No. 10 of 2013. These include crimes of torture and enforced

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<sup>1239</sup> *Id.*, Art. 1.

<sup>1240</sup> *Id.*, Art. 3.

disappearance—which have definitions under Libyan law, as detailed previously, that also fail to comply with international law and standards.

734. Overall, the ill-equipped legal framework decreases the possibility of ensuring accountability for international crimes in Libya. Substantial reforms to the Libyan legal framework are required before accountability for human rights violations and abuses, as well as violations of international humanitarian and criminal law can be achieved domestically in a fair and effective manner.<sup>1241</sup>

*iii. Statute of limitations*

735. The Rome Statute provides, in Article 29, that ‘[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.’<sup>1242</sup> While Libya is not a State Party to the Rome Statute and is therefore not bound by its content, the exclusion of statutes of limitations in cases of international crimes and gross human rights violations has become an internationally accepted principle.<sup>1243</sup> According to the ICRC, a customary rule of international law applies when it comes to war crimes.<sup>1244</sup>

736. Moreover, Libya is a party to the 1970 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, under which statutory limitations cannot apply to war crimes and crimes against humanity, irrespective of the date of their commission and of whether such acts constitute a violation of the domestic law of the country in which they were committed.<sup>1245</sup>

737. At the domestic level, statutory limitations were mostly removed by Article 1 of Law No. 11 of 1997 (for crimes and criminal proceedings) and Article 27 of Law No. 29 of 2013 (for crimes committed before Law No. 11 for political, security or military motives). However, Article 107 of the Penal Code still provides limitations of 10 years for felonies, 3 years for misdemeanours, and 1 year for infractions.<sup>1246</sup> In 2014, the International

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<sup>1241</sup> ICJ, *Impunity No More*, p. 2.

<sup>1242</sup> Rome Statute, Art. 29.

<sup>1243</sup> See e.g. UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 21 March 2006, para. 6.

<sup>1244</sup> J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, 2005, Rule 160. Statutes of limitation may not apply to war crimes, available at: <https://www.refworld.org/docid/5305e3de4.html>.

<sup>1245</sup> UNGA, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Resolution 2391(XXIII) of 26 November 1968, Art. I.

<sup>1246</sup> Libyan Penal Code, Art. 107.

Commission of Inquiry on Libya noted that ‘[u]nless repealed, the existing statute of limitations will prevent the prosecution of serious Gaddafi-era crimes.’<sup>1247</sup> This assertion could also apply to crimes committed against migrants and refugees and refugees. Accordingly, in 2016 the UN High Commissioner for Human Rights called on the relevant Libyan authorities to review national legislation and recalled that ‘[n]o statute of limitations or amnesty should apply to gross human rights violations or serious violations of international humanitarian law, including those amounting to crimes under international law.’<sup>1248</sup>

738. In practice, several examples have shown that despite the removal of the statute of limitations by more recent laws, domestic judges have decided to apply Article 107 of the Penal Code, including for gross human rights violations, thus ignoring international standards, as well as domestic legislation. On 15 December 2019, for instance, the Tripoli Court of Appeal decided to acquit all defendants in the Abu Salim trial case, partly based on the statute of limitations contained in the Penal Code.<sup>1249</sup>

#### *iv. Amnesties*

739. Similar to the prohibition of statutes of limitations for international crimes, the prohibition of amnesties for international crimes and gross human rights violations has become a generally recognised principle. This was confirmed by several international criminal tribunals and regional human rights courts,<sup>1250</sup> as well as ICC Pre-Trial Chamber I, which stated that ‘there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law.’<sup>1251</sup>

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<sup>1247</sup> UNHRC, Report of the International Commission of Inquiry on Libya, A/HRC/19/68, 28 January 2014, para. 113.

<sup>1248</sup> UNHRC, Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: Detailed findings, A/HRC/31/CRP.3, 15 February 2016, p. 93-94.

<sup>1249</sup> UNHRC, Situation of human rights in Libya, and the effectiveness of technical assistance and capacity-building measures received by the Government of Libya, Report of the United Nations High Commissioner for Human Rights, A/HRC/43/75, 23 January 2020, para. 67.

<sup>1250</sup> See e.g. ECCC, *Co-Prosecutors v. Nuon Chea et al.*, Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne bis in idem* and amnesty and pardon) Trial Chamber (3 November 2011), para. 53; SCSL, *Prosecutor v. Morris Kallon et al.*, Decision on Challenge to jurisdiction: Lomé Accord Amnesty, Appeals Chamber (13 March 2004), para. 82; SCSL, *Prosecutor v. Augustine Gbao*, Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, SCSL-04-15-PT, Appeals Chamber (25 May 2004), para. 9.

<sup>1251</sup> ICC, Situation in Libya, *The Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the ‘Admissibility Challenge by Dr. Saif Al-Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’, Pre-Trial Chamber I (5 April 2019), para. 61.



However, the Libyan legal framework continues to include a series of laws providing amnesties for crimes committed during or after the 2011 uprising.

740. Indeed, Law No. 35 of 2012 on the Amnesty of Particular Crimes<sup>1252</sup> provides an amnesty for all crimes committed between 15 February 2011 and 2 May 2012, the date of the law's promulgation.<sup>1253</sup> Article 1 of Law No. 35, however, provides some exceptions for a limited list of crimes that cannot be amnestied. These include (1) crimes committed by the spouse, next of kin and assistants of Gaddafi, (2) 'hudud crimes'<sup>1254</sup> when referred to the judiciary, (3) crimes of kidnapping, torture and forced intercourse, and (4) drug trafficking. While this law does exclude certain crimes from the amnesty it confers, it fails to explicitly rule out other serious crimes that may amount to war crimes or crimes against humanity, such as murder and forced displacement.

741. Further, Law No. 38 of 2012 on Some Procedures Concerning the Transitional Phase<sup>1255</sup> was adopted on the same day of the law above and immediately generated criticism<sup>1256</sup> for effectively offering blanket amnesty to those responsible for crimes aimed at promoting or protecting the uprising against the Gaddafi regime. Being extremely broad both in terms of the type of acts falling under the provision and the temporal scope of this law, the amnesty may therefore include any crime under international law that can be interpreted as having been committed to support the 2011 uprising against the Gaddafi regime.

742. In September 2015, the Libyan House of Representatives adopted a third amnesty law, Law No. 6 of 2015 on General Amnesty, which implements yet another blanket amnesty, even broader than the one provided before. Indeed, Article 1 provides that:

*all Libyans who committed crimes during the period from 15 February 2011 until the promulgation of the Present Law shall be covered by a general amnesty. Criminal proceedings related to such crimes shall be terminated, and sentences handed down shall be revoked. Such crimes shall have no subsequent penal effects and shall be struck from the criminal record of those covered by the amnesty, provided that the conditions stipulated herein are met.*

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<sup>1252</sup> Law No. 35 of 2012 on the Amnesty of Particular Crimes, available at: <https://security-legislation.ly/law/31677>.

<sup>1253</sup> *Id.*, Art. 2.

<sup>1254</sup> Hudud offenses are specific crimes under Islamic law for which the penalty is established by God and is prescribed by the Quran. There are seven hudud crimes, including apostasy, transgression, theft, highway robbery, adultery, slander, and alcohol drinking.

<sup>1255</sup> Law No. 38 of 2012 on Some Procedures Concerning the Transitional Phase, available at: <https://security-legislation.ly/law/31621>.

<sup>1256</sup> See e.g. HRW, *Libya: Letter to the ICC Prosecutor on Libyan Amnesty Laws*, 25 May 2012, available at: <https://www.hrw.org/news/2012/05/25/libya-letter-icc-prosecutor-libyan-amnesty-laws>.

743. Law No. 6 therefore offers an amnesty to any Libyan individual who has committed a crime between 15 February 2011 and 7 September 2015, the date of the law's promulgation.
744. While Law No. 6 of 2015 provides for a number of crimes to which the amnesty cannot be applied—notably drug importing and trafficking, sexual and indecent assault, identity-based murder, abduction, forced disappearance and torture, corruption, hudud offences, and crimes of terrorism stipulated in domestic law,<sup>1257</sup> it does not cover all international crimes and therefore still offers the possibility to escape accountability for such crimes.
745. The problematic existence and scope of such laws were recently highlighted before the ICC in the case against Saif Gaddafi. In an attempt to escape accountability, the Defence argued that Law No. 6 of 2015 grants Saif Gaddafi an amnesty that should result in the dropping of any further criminal proceedings against him and the suspension of any sentence, making the case inadmissible before the ICC.<sup>1258</sup>
746. The pre-trial judges though declared the case admissible before the Court. The decision was based on various grounds, including the lack of a final domestic judgment and the inability of the Libyan authorities to obtain custody over and prosecute Gaddafi.<sup>1259</sup> Recognising that Law No. 6 of 2015 constitutes a general amnesty inconsistent with international law and standards,<sup>1260</sup> the judges noted that Law No. 6 of 2015 was unlawfully applied to Gaddafi, particularly due to the nature of the crimes he was charged with domestically and those contained in the ICC arrest warrant issued against him.<sup>1261</sup>
747. ICC Pre-Trial Chamber I concluded that Law No. 6 of 2015 is 'equally incompatible with international law, including internationally recognised human rights.'<sup>1262</sup> This argument will likely be relevant for future cases similarly concerning crimes within ICC jurisdiction, since those crimes are often the most serious crimes under international law. Thus the prohibition of amnesties of such crimes is customary.
748. The series of amnesty laws adopted consecutively after 2011 shows that the concept of amnesties is still entrenched in the Libyan legal framework. Despite the fact that some international crimes are excluded from these laws, not all international crimes are, and the excluded crimes vary from one law to another.

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<sup>1257</sup> Law No. 6 of 2015 on General Amnesty, Art. 3, available at: <https://www.legal-tools.org/doc/2c966c/pdf/>.

<sup>1258</sup> *Gaddafi*, Decision on Admissibility Challenge, paras 54-55.

<sup>1259</sup> *Id.*, paras 48, 51, 53.

<sup>1260</sup> *Id.*, para. 61.

<sup>1261</sup> *Id.*, paras 56, 58-59.

<sup>1262</sup> *Id.*, para. 78.

749. Moreover, the 2012 laws were adopted shortly after the publication of the report of the UN Commission of Inquiry on Libya which highlighted Libyan armed forces' responsibility for war crimes and crimes against humanity during the 2011 conflict,<sup>1263</sup> thereby denoting Libya's unwillingness to hold such individuals accountable.

## **2. Weakened criminal justice system**

750. While officially the Libyan criminal justice system is still operating, it has been considerably weakened by the current crisis. The prevailing insecurity in the country, as well as the lack of control by the governmental authorities over most parts of the territory since Gaddafi's fall in 2011, has considerably incapacitated judicial actors to deliver justice.<sup>1264</sup> Indeed, 'despite the scale and magnitude of the violations and abuses committed by State and non-State actors, only a handful of investigations and prosecutions of such violations have been undertaken, resulting in a situation of near total impunity.'<sup>1265</sup>

751. The limited attempts to deliver justice to victims of human rights violations, particularly when the crimes are directly or indirectly linked to the previous or actual political authorities, have revealed several obstacles that need to be taken into consideration when assessing Libya's capacity to hold perpetrators of crimes falling under the Court's competence accountable.<sup>1266</sup> It is crucial not to limit the assessment to whether proceedings were held or are ongoing, but also to consider in what conditions, and whether international standards are met.

### *i. Lack of independence and impartiality*

752. A key aspect to determine is whether national courts are able to deliver independent and impartial decisions. According to the ICJ, both State and non-State actors 'pose a serious threat to the independence of Libya's justice system.'<sup>1267</sup>

753. This was a major concern for several organisations following the decision issued by the Tripoli Court of Assize on 28 July 2015 in the case involving 37 officials of the Gaddafi

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<sup>1263</sup> A/HRC/19/68, para. 14.

<sup>1264</sup> ICJ, *Accountability for Serious Crimes*, p.9.

<sup>1265</sup> *Ibid*; see also ICJ, *Impunity No More*, p. 2.

<sup>1266</sup> A/HRC/48/83, paras 69 and 83-86.

<sup>1267</sup> ICJ, *Accountability for Serious Crimes*, p.19.

administration.<sup>1268</sup> Aside from apparent violations of fair trial standards and fundamental rights of the defendants (see below), the deteriorated security situation allowed for increased attempts to obstruct justice. For instance, there was a particularly strong pressure exerted by certain armed groups or individuals on members of the judiciary and the Judicial Police to prevent them from carrying out their mandate and to obstruct and/or influence justice. This included preventing them and the accused from accessing the courts and by attacking or threatening their life and/or physical integrity (assaults, killings, kidnapping, court bombing).<sup>1269</sup>

754. In 2016, the Human Rights Council concluded that ‘[t]he safety of judicial actors including judges, prosecutors, defence counsel, victims, and witnesses, cannot at present be assured.’<sup>1270</sup> In 2019, in view of the 36<sup>th</sup> Session of the Universal Periodic Review Working Group, several organisations submitted updated information on Libya’s justice system, and confirmed that ‘[w]hen justice is sought through the legal process, it is common for armed groups to threaten or attack lawyers, judges, prosecutors, and other law enforcement officials.’<sup>1271</sup>

755. The same armed groups are empowered by ‘[t]he governance and accountability vacuum [...] to arrest, detain, and kidnap individuals without judicial oversight or accountability.’<sup>1272</sup> According to the International Crisis Group, ‘[a]rmed groups that emerged victorious simultaneously took on the roles of police, prosecutors, judges and jailers.’<sup>1273</sup> In an effort to re-establish balance in the country post-2011, they have

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<sup>1268</sup> LFJL, *LFJL is concerned that the absence of fair trial standards during Gaddafi official trials will jeopardise the right of victims to justice*, 29 July 2015, available at: <https://www.libyanjustice.org/news/201-lawyers-for-justice-in-libya-lfjl-is-concerned-that-the-absence-of-fair-trial-standards-during-gaddafi-official-trials-will-jeopardise-the-right-of-victims-to-justice>.

<sup>1269</sup> US Department of State, *2018 Trafficking in Persons Report – Libya*, p. 9; UNSMIL and OHCHR, *Report on the Human Rights Situation in Libya*, 16 November 2015, p. 29, available at: [https://www.ohchr.org/Documents/Countries/LY/UNSMIL\\_OHCHRJointly\\_report\\_Libya\\_16.11.15.pdf](https://www.ohchr.org/Documents/Countries/LY/UNSMIL_OHCHRJointly_report_Libya_16.11.15.pdf); UNHRC, *Situation of human rights in Libya, including the implementation of technical assistance and capacity-building and efforts to prevent and ensure accountability for violations and abuses of human rights*, Report of the United Nations High Commissioner for Human Rights, A/HRC/40/46, 4 February 2019, para. 53; A/HRC/31/CRP.3, paras 209, 312, 325; UNSMIL and OHCHR, *Report on the trial of 37 former members of the Qadhafi regime (Case 630/2012)*, 21 February 2017, p. 9, available at: [https://www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime\\_EN.pdf](https://www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime_EN.pdf).

<sup>1270</sup> A/HRC/31/CRP.3, para. 325.

<sup>1271</sup> Women’s International League for Peace and Freedom (WILPF), *Joint Submission for the UPR of Libya*, 36th session of the UPR Working Group (May 2020), para. 35, 3 October 2019, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fICS%2fLBY%2f42866&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fICS%2fLBY%2f42866&Lang=en).

<sup>1272</sup> ICJ, *Accountability for Serious Crimes*, p.14.

<sup>1273</sup> International Crisis Group, *Trial by Error: Justice in Post-Qadhafi Libya*, Middle East/North Report N°140, 17 April 2013, p. 22, available at: <https://d2071andvip0wj.cloudfront.net/trial-by-error-justice-in-post-qadhafi-libya.pdf>.

integrated some factions of the police forces, including the Judicial Police, and sometimes in leading positions.<sup>1274</sup> While this alliance could have led to a strengthened criminal justice system and enhanced local capacities to enforce the law and prevent impunity, the involvement of the same armed groups that commit gross human rights violations—including the widespread trafficking, enslavement, and torture of migrants and refugees—has in fact shrunk all prospects of impartial and independent justice. The Judicial Police’s key role in ensuring ‘effective and impartial protection for judicial actors and court facilities’ requires that its members be properly equipped, trained and vetted.<sup>1275</sup> In practice, many new ‘brigades’ composed of armed group members who ‘typically act in defiance or ignorance of legal procedures: they arrest people without a warrant from the prosecutor’s office, instead responding to tips provided by friends or acquaintances, and arrest people at checkpoints, in the middle of a street or at their homes.’<sup>1276</sup>

756. Another concern raised regarding the Libyan judicial system is the legacy from the Gaddafi era and its politicised justice. As highlighted by the Human Rights Council in 2016, ‘[d]uring that time, regular courts were often bypassed in favour of special courts and military court systems, in particular for political crimes, such as the Peoples’ Court, which failed to comply with minimum fair trial standards, and lacked adequate legal training.’<sup>1277</sup> These courts were often ingrained with corruption, which unfortunately spread to the rest of the judicial system when, after their closing, judges were re-affected to other jurisdictions.<sup>1278</sup> Instead of using this opportunity to ensure a more sustainable, competent and respectful justice system, arbitrary and corrupted practices were developed in other jurisdictions. The International Crisis Group qualifies this as a ‘vicious cycle’ where ‘the proliferation of armed groups undermined people’s trust in the judicial system; this lack of trust in turn vindicated the armed groups’ claim that it was their duty to take

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<sup>1274</sup> ICJ, *Accountability for Serious Crimes*, p.14.

<sup>1275</sup> A/HRC/31/CRP.3, para. 328.

<sup>1276</sup> International Crisis Group, *Trial by Error: Justice in Post-Qadhafi Libya*, p. 26.

<sup>1277</sup> A/HRC/31/CRP.3, para. 313.

<sup>1278</sup> International Crisis Group, *Trial by Error: Justice in Post-Qadhafi Libya*, p. 15: ‘Moreover, a high percentage of untrained judges continued to man the courts, while those who had worked in the now-abolished People’s Courts simply were reassigned to the ordinary court system, carrying with them a legacy of arbitrary procedural practices.’ ‘In short, despite its face-lift, the judiciary remained plagued by longstanding weaknesses: subservience to political authorities; corruption; and a dearth of knowledge.’ – p. 17 “According to current members of the judiciary, in-ternal screening was carried out to ensure that only judges with clean records were selected to adjudicate such high-profile cases. However, this was never publicly announced, leading many ordinary citizens to distrust the trials.’

matters in their own hands; and the actions of the groups further undermined the state judicial institutions' ability to function.'<sup>1279</sup>

ii. *International standards on fair trial*

757. On 21 February 2017, UNSMIL and OHCHR published a report on the above-mentioned trial held from March 2014 to July 2015 of the 37 former members of the Gaddafi regime, including Saif al-Islam Gaddafi, whose case is still pending before the ICC.<sup>1280</sup> While the report recognised this as a great step toward holding perpetrators of grave human rights violation accountable, they also noted that this case 'fell short of international norms and standards for fair trial and also breached Libyan law in some respects.'<sup>1281</sup> They added that such 'concerns also illustrate major flaws in the criminal justice system that would need to be addressed through legislative and institutional reform.'<sup>1282</sup>

758. The report, seconded by other observers, including civil society organisations,<sup>1283</sup> identified several serious violations of due process requirements under international human rights law and standards. Mainly, on the basis of extensive monitoring and review of available documents and exchanges with key stakeholders (including defendants and defence counsels, members of the Prosecution, police officers and international experts),<sup>1284</sup> the United Nations Support Mission in Libya and the Office of the High Commissioner for Human Rights pointed out the violation of several human rights from the investigation to the delivery of the verdict. These included: the right not to be compelled to confess guilt or incriminate oneself, the right to be informed promptly and in detail of the charges, the right to a public hearing, the right to be presented by counsel, the right to adequate time and facilities for the preparation of defence, the right to call and examine witnesses, and the right to be tried in one's presence.<sup>1285</sup>

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<sup>1279</sup> *Id.*, p. 21.

<sup>1280</sup> UNSMIL and OHCHR, *Report on the trial of 37 former members of the Qadhafi regime (Case 630/2012)*.

<sup>1281</sup> *Id.*, p. 54.

<sup>1282</sup> *Ibid.*

<sup>1283</sup> LFJL, *LFJL is concerned that the absence of fair trial standards during Gaddafi official trials will jeopardise the right of victims to justice*; HRW, *Libya: Flawed Trial of Gaddafi Officials*, 28 July 2015, available at: <https://www.hrw.org/news/2015/07/28/libya-flawed-trial-gaddafi-officials>.

<sup>1284</sup> UNSMIL and OHCHR, *Report on the trial of 37 former members of the Qadhafi regime (Case 630/2012)*, p. 22.

<sup>1285</sup> *Ibid.*

759. LFJL also highlighted the lack of respect for fair trial standards and violation of the defendants' fundamental rights in this specific case, as well as the lack of transparency of and public access to the proceedings.<sup>1286</sup> The organisation emphasised several concerns regarding establishing truth in this case, mainly the failure to determine individual criminal and command responsibility of the accused, the restrictions on submitting new evidence, and the limited opportunity for victim participation. According to Human Rights Watch, '[t]his trial has been plagued by persistent, credible allegations of fair trial breaches that warrant independent and impartial judicial review.'<sup>1287</sup>
760. The presence of armed groups in the Libyan judicial system and their effective control over some defendants or judicial members, as discussed above, is another major concern. Some defendants have complained in Libyan court about having suffered torture and ill treatment while detained by armed groups' members.<sup>1288</sup>
761. Regarding defendants' rights, many issues were raised by various entities, including the lack of proper legal aid and access to counsel, investigations being outsourced to members of armed group, or use of evidence collected through torture.<sup>1289</sup> The UN High Commissioner for Human Rights noted that '[c]riminal proceedings that did take place in 2018 were often marred by breaches of fair trial rights.'<sup>1290</sup> The ICJ concluded that 'any investigation and prosecution of crimes under international law conducted by Libyan authorities are unlikely to meet the standards necessary to ensure fair and effective justice.'<sup>1291</sup>

iii. *Ineffectiveness of the criminal justice system*

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<sup>1286</sup> LFJL, *LFJL is concerned that the absence of fair trial standards during Gaddafi official trials will jeopardise the right of victims to justice*. This was also highlighted by Human Rights Watch, including the fact that international observers had to leave the country and followed the available broadcasted session remotely, the refusal to journalists from relevant authorities to access the trial facility, or the always evolving and confusing process to get granted access. HRW, *Libya: Flawed Trial of Gaddafi Officials*.

<sup>1287</sup> HRW, *Libya: Flawed Trial of Gaddafi Officials*

<sup>1288</sup> UNSMIL and OHCHR, *Report on the trial of 37 former members of the Qadhafi regime (Case 630/2012)*, p. 2.

<sup>1289</sup> ICJ, *Accountability for Serious Crimes*, pp. 11-12; World Coalition Against the Death Penalty and The Advocates for Human Rights, *Submission for the 130<sup>th</sup> Session of the Human Rights Committee (12 October 2020–06 November 2020)*, 17 August 2020, paras 18-22, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fICS%2fLBY%2f42922&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fICS%2fLBY%2f42922&Lang=en); HRW, *World Report 2020: Libya*, 2020, available at: <https://www.hrw.org/world-report/2020/country-chapters/libya#699e6e>; US Department of State, *2019 Country Reports on Human Rights Practices: Libya*, 2019, p.7-9, available at: <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/libya/>.

<sup>1290</sup> A/HRC/40/46, para. 54.

<sup>1291</sup> ICJ, *Accountability for Serious Crimes*, p. 10.

762. Several international bodies have made strong statements underscoring the critical judicial situation in Libya and the resulting impunity for human rights violations and crimes under international law. In 2015, UNSMIL noted that ‘due to the collapse of the criminal justice system in parts of the country, victims have little avenue to seek protection and remedy amidst total impunity. Even in those rare cases where police reports had been filed, little action was taken to open prompt, thorough, effective, impartial, and independent investigations and to bring perpetrators to justice.’<sup>1292</sup> More recently, the UN High Commissioner for Human Rights confirmed that ‘[t]he inability of the justice system to function effectively has led to widespread impunity.’<sup>1293</sup>

763. The UN Human Rights Committee, when assessing the communications received from individuals whose rights have been allegedly violated in Libya, consistently notes that due to the ineffectiveness of the criminal justice system and Libya’s recurrent lack of cooperation with the Committee, the Committee considers the requirement of exhaustion of domestic remedy fulfilled even when other remedies remain theoretically available.<sup>1294</sup>

764. In 2019, the ICJ concluded in its assessment of the criminal justice system in Libya that ‘Libya is unable to investigate, prosecute and remedy gross human rights violations and crimes under international law in full compliance with international law and standards,’<sup>1295</sup> and that ‘[a]ny process of dismantling such impunity, addressing the legacy of past and ongoing crimes under international law, and improving the human rights situation in Libya must be based on the rule of law and, in particular, of restoring a functional criminal justice system.’<sup>1296</sup> However, the restoration of an effective legal and judicial system in Libya cannot take place as long as the situation in the country remains precarious and security is not ensured. Therefore, this reality must be considered when determining Libya's capacity to investigate and prosecute crimes within the ICC's jurisdiction.

765. The case of Al-Werfalli is a good example that demonstrates this lack of capacity or willingness to conduct domestic investigations in Libya. Shortly after the ICC arrest warrant for Mahmoud Mustafa Busayf Al-Werfalli was issued in 2017, the self-

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<sup>1292</sup> UNSMIL and OHCHR, Report on the Human Rights Situation in Libya, p. 30. *See also* A/HRC/31/CRP.3, para. 323.

<sup>1293</sup> A/HRC/40/46, para. 55.

<sup>1294</sup> In several cases, the Committee noted: ‘With regard to the exhaustion of domestic remedies, the Committee reiterates its concern that, in spite of [several] reminders having been addressed to the State party, no observations on the admissibility or merits of the communication have been received from the State party,’ and therefore that the case could be admissible. *See* the various cases in OHCHR, Jurisprudence, available at: <https://juris.ohchr.org/search/results>.

<sup>1295</sup> ICJ, *Accountability for Serious Crimes*, p. 14.

<sup>1296</sup> *Id.*, p. 9.



proclaimed LAAF, of which Al-Werfalli was a commander, issued a statement in which they confirmed the arrest and investigation of ICC indictee Mahmoud Al-Werfalli.<sup>1297</sup> However, despite repeated demands from the OTP to the LAAF to hand Al-Werfalli over to the ICC, the LAAF never did so. In January 2018, the ICC issued a second arrest warrant against him for the additional war crime of murder, noting that ‘for a case to be considered as ‘being investigated’ within the meaning of Article 17(1)(a) of the Statute, tangible, concrete and progressive investigative steps must have been taken,’ and that ‘[b]ased on the limited available information, [it considers] that the investigation has not complied with these requirements.’<sup>1298</sup> Yet, not only was Al-Werfalli not arrested or transferred to the ICC, in July 2019 it was reported that he was promoted only a few days after the arrest warrant was issued.<sup>1299</sup>

766. In late March 2021, reports emerged that Al-Werfalli was killed by armed men in Benghazi on 24 March 2021, and therefore would never be held accountable for the crimes he has committed.<sup>1300</sup> As highlighted by former ICC Prosecutor Fatou Bensouda, ‘[t]he unwillingness of those in power in eastern Libya to transfer Mr Al-Werfalli to the Court, or to genuinely investigate and prosecute him, has contributed to a climate of impunity.’<sup>1301</sup>

767. As for the arrest warrant against Saif Gaddafi, ten years after its issuance by the Court, it remains unexecuted. In that regard, the ICC Prosecutor reiterated Libya’s legal obligation to arrest and surrender him to the ICC in order for him to face trial, further highlighting that ‘[d]efendants benefit from all due process guarantees at the ICC.’<sup>1302</sup>

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<sup>1297</sup> Statement available at: Akhbbar Libya 24, ‘After the issuance of an arrest warrant against him, the General Command confirms that Al-Werfalli is under investigation’, 18 August 2017, available at: <https://akhbbarlibya24.net/2017/08/18/%D8%A8%D8%B9%D8%AF-%D8%B5%D8%AF%D9%88%D8%B1-%D9%85%D8%B0%D9%83%D8%B1%D8%A9-%D8%A7%D8%B9%D8%AA%D9%82%D8%A7%D9%84-%D8%A8%D8%AD%D9%82%D9%87-%D8%A7%D9%84%D9%82%D9%8A%D8%A7%D8%AF%D8%A9-%D8%A7%D9%84%D8%B9/>. See also Al-Jazeera, *Libya: Khalifa Haftar ally Mahmoud al-Werfalli arrested*, 18 August 2017, available at: <https://www.aljazeera.com/news/2017/8/18/libya-khalifa-haftar-ally-mahmoud-al-werfalli-arrested>.

<sup>1298</sup> *Al-Werfalli*, Second Warrant of Arrest, para. 27.

<sup>1299</sup> Middle East Eye, *Libya’s Haftar promotes accused war criminal wanted by international court*, 9 July 2019, available at: <https://www.middleeasteye.net/news/libyas-haftar-promotes-accused-war-criminal-wanted-international-court>.

<sup>1300</sup> AfricaNews, *A top military commander wanted by ICC shot dead*, 25 March 2021, available at: <https://www.africanews.com/2021/03/25/a-top-libyan-military-commander-wanted-by-icc-shot-dead/>; Al-Jazeera, *Libyan commander wanted for war crimes by ICC shot dead*, 24 March 2021, available at: <https://www.aljazeera.com/news/2021/3/24/libyan-commander-wanted-for-war-crimes-by-icc-gunned-down>; Reuters, *Gunmen kill wanted Libyan commander in new sign of instability*, 24 March 2021, available at: <https://www.reuters.com/article/us-libya-security-idUSKBN2BG2TU>; France24, *Libyan militia leader wanted by ICC for war crimes killed by gunmen*, 25 March 2021, available at: <https://www.france24.com/en/middle-east/20210325-libyan-militia-leader-wanted-by-icc-for-war-crimes-killed-by-gunmen>.

<sup>1301</sup> *Statement of the ICC Prosecutor*, 17 May 2021, para. 31.

<sup>1302</sup> *Id.*, para. 34.

*Specificities in prosecutions of crimes against migrants and refugees*

768. With regard to potential cases of crimes against migrants and refugees, there is no doubt that similar barriers would be encountered in Libya. The deep-rooted trafficking networks in Libya, together with the sensitive political context since the fall of Gaddafi, renders the prospect of independent and impartial justice non-existent. This reality has been reflected in some recent cases.

769. In 2018, shortly after the publication of the CNN video, the office of the Libyan Attorney General issued 205 arrest warrants for Libyan and foreign nationals suspected of being involved in the smuggling and trafficking of migrants and refugees in the country and related crimes, including torture, rape and murder.<sup>1303</sup> The Libyan Attorney General's office indicated that the network included members of the security services, migrant detention camp leaders, and officials from African embassies in Libya. The director of the Attorney General's investigations office, Seddik al-Sour, stated that many immigration department officials had been found to be involved.<sup>1304</sup> The arrest warrants resulted from investigations into smuggling networks carried out in conjunction with the Italian prosecutor's office after Italy and Libya agreed in December 2017 to establish a joint unit—formed of intelligence, coast guard and justice resources—to combat smugglers and human traffickers. However, although initially promising, to this date, the arrest warrants have yet to be executed and the suspects brought to justice.

770. The more recent case of Abd al-Rahman Milad, also known as 'Bija,' is another example of the lack of effective proceedings and the obstacles to delivering justice domestically. In June 2017, the Panel of Experts on Libya established pursuant to Security Council Resolution 1973 (2011) described Bija as a facilitator of human trafficking involved in smuggling activities and the mistreatment of migrants and refugees, including the sinking of migrant boats.<sup>1305</sup> On 7 June 2018, the Libya Sanctions Committee added six individuals, including Abd al-Rahman Milad, to its list of individuals and entities subject to sanctions.<sup>1306</sup> Subsequently, on 23 April 2019, the Libyan Attorney General

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<sup>1303</sup> BBC, *Libya migrants and refugees: Smuggling network arrest warrants issued*, 14 March 2018, available at: <https://www.bbc.co.uk/news/world-africa-43409878>.

<sup>1304</sup> *Ibid.*

<sup>1305</sup> 2017 UN Panel of Experts Report, p. 21.

<sup>1306</sup> The updated and consolidated list can be found here: UNSC Consolidated List, 26 August 2021, available at: <https://scsanctions.un.org/consolidated/>.

issued an arrest warrant and an order to suspend Milad.<sup>1307</sup> However, this suspension order was never implemented. Milad continued his activities in his capacity as head of the Libyan Coastguard until 14 October 2020, when authorities in Tripoli announced that he had been arrested in the Hay-al-Andalus district of Tripoli and was being detained by the Radaa militia.<sup>1308</sup> Milad's arrest marked the first time that a senior figure of the Libyan coastguard was arrested for human trafficking.

771. However, on 11 April 2021, Milad was released after the Attorney General dropped all charges against him 'for lack of evidence' and remains free to this day, despite numerous reports documenting the violations committed by Milad, including the report by the Panel of Experts. According to media reports, while in detention, Milad was promoted in March 2021 for his participation in the fighting against the Libyan Arab Armed Forces' attack against the capital in 2019.<sup>1309</sup> Accordingly, the Libyan authorities have failed to demonstrate that they are conducting an effective and transparent investigation with a view to refer him to a fair trial.

### **3. Extraterritorial exercise of jurisdiction by third States**

772. While the States on the territory of which crimes are committed appear to be primarily responsible to exercise jurisdiction over such crimes, the ICC principle of complementarity also places the primacy of State-led proceedings on any State that has the willingness and the capacity to investigate and prosecute authors of crimes included in the Rome Statute. As such, and based on the principle of complementarity, genuine proceedings by third States can preclude the ICC from exercising jurisdiction over these crimes, whether based on active nationality, passive nationality, or even universal jurisdiction.<sup>1310</sup> Challenges to the admissibility of a case can be presented by any 'State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted'<sup>1311</sup> or 'from which acceptance of jurisdiction is required under Article 12.'<sup>1312</sup>

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<sup>1307</sup> Twitter, State of Libya, Statement from the Ministry of Interior, available at: <https://twitter.com/saracreta/status/1188890607709773834/photo/1>.

<sup>1308</sup> L. Tondo, *Senior Libyan Coastguard Commander arrested for alleged human trafficking*, 16 October 2020, available at: <https://www.theguardian.com/global-development/2020/oct/16/senior-libyan-coastguard-commander-arrested-for-alleged-human-trafficking>.

<sup>1309</sup> Associated Press, *Libyan officials say UN-sanctioned human trafficker freed*, 12 April 2021, available at: <https://apnews.com/article/libya-middle-east-tripoli-united-nations-83ad345278cc4d6add49ad01f420c3f5>.

<sup>1310</sup> See Rome Statute, Art. 18(2).

<sup>1311</sup> *Id.*, Art. 19(2)(b).

<sup>1312</sup> *Id.*, Art. 19(2)(c).

Whichever State decides to exercise its jurisdiction, however, the Court's jurisdiction will be excluded only if the State exercising its jurisdiction is genuinely willing and able to investigate and prosecute the suspects.

773. While domestic courts intervening is *per se* a positive step in ascertaining facts and identifying individual perpetrators, national criminal codes may be inadequate to prosecute international crimes, investigations are generally scarce in number and accuracy, and their purpose does not reflect the intention of restoring justice for grave international crimes. With regard to the situation of Libya and crimes committed against migrants and refugees, criminal proceedings have been taking place in some non-territorial States, including and particularly in Italy. Focusing thus on Italy, as the country which until now has probably made the biggest effort to investigate and prosecute crimes committed against migrants and refugees in Libya, the following analysis will highlight some limits of the Italian proceedings, supporting the idea that national proceedings, however commendable, must be complemented by international ones.

#### *Italian proceedings*

774. A first limit of the Italian legal system, which compromises an effective and appropriate prosecution of the crimes that are the object of this Communication, is the absence of appropriate legislation criminalising international crimes as such. While some conducts can still be subsumed under provisions on common crimes, such as torture, others are simply left out of the proceedings. In particular, acts amounting to crimes against humanity under the Rome Statute cannot be charged as such.

775. For instance, the 2018 judgment of the Corte d'Assise of Agrigento acknowledged that the accused was ordinarily beating and threatening migrants and refugees at the detention site, using sexual violence and raping them.<sup>1313</sup> Yet, the perpetrator was charged exclusively with the crimes of criminal association, enslavement, and abetting illegal immigration. In another case, the Corte d'Assise of Milan found that, in order to obtain money for their ransom, the accused was beating the detainees, sometimes with weapons, sticks and electric wires; he intentionally broke their bones, hung them by their feet with hands and legs tied, filled their mouth with sand to stop them from screaming, repeatedly forced their head under water, burnt their testicles with electricity, melted plastic on their bare skin, burnt their body with cigarettes and whipped them with belts or electric wires,

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<sup>1313</sup> Corte d'Assise di Agrigento, Judgment 1/18 (12 June 2018), p. 10.

left them under the sun without water for hours, and forced them to urinate on themselves while watching.<sup>1314</sup> The perpetrator was not charged with the crime of torture, which was introduced in the Italian Penal Code only a few months earlier in 2017, therefore preventing the episodes of torture that took place before the entry into force of the law from being prosecuted as such in the Italian system.

776. Another limit of the lack of international criminal law provisions in the Italian system is the impossibility to capture the overall systemic dimension of the crimes committed. While prosecutors and judges often recognise that the violence committed against migrants and refugees happen as part of a larger criminal system, they often lack the tools and opportunity to get to those perpetrators higher up in the chain of command (political or military) and establish their responsibility. In all the analysed cases, the Italian judges explicitly recognised that the accused were guards tasked with controlling the migrants and refugees at the detention sites and appeared lower in the chain of command. However, while the commanders of such sites, including their names, nationalities, and physical traits, were often identified and are even reported in the judgments, no further investigation or proceeding was conducted.

777. In one case, the Tribunal of Messina acknowledged the involvement of IOM, Libyan police officials, militias, and corrupt authorities as part of a clear ‘wider and more indetermined criminal project, to be reconducted to the existence of a stable organisation directed to identifying and kidnapping [migrants and refugees], through other accomplices, often belonging to local corrupted militias,’<sup>1315</sup> and identified several of the heads of the detention camp in Zawiya. Yet, the only individuals prosecuted were three very young men, from Guinea and Egypt, who eventually left Libya on the same boat together with their victims.

778. The limits just outlined are also strictly connected with the Italian criteria for asserting jurisdiction in these cases. In fact, most proceedings are based on Article 10 of the Italian Penal Code, which extends Italian jurisdiction to crimes committed abroad, by or against a foreign citizen, only under very specific circumstances, including the presence of the perpetrator on Italian territory. This requirement constitutes a significant challenge for the investigation and prosecution of those allegedly responsible for the crimes which are the object of this Communication. In fact, those individuals in control of detention centres are

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<sup>1314</sup> Corte d’Assise di Milano, Judgment 10/17 (10 October 2017), pp. 56-58.

<sup>1315</sup> Tribunale di Messina, Judgment 149/2020 (28 May 2020), p. 31.

commonly part of armed groups or politically affiliated entities in Libya, and are less likely to leave the country. This underlines another limit of the Italian investigations, which lacks effective tools and resources to assess the criminal responsibilities of the broader network and system of exploitation of migrants and refugees in Libya as international crimes.

779. Moreover, the Italian judicial authorities interpret their mandate with regard to the investigation of crimes committed in Libya very differently than the mandate of the ICC, namely to focus essentially on the crimes affecting public order, rather than on those against life and people (and specifically in terms of crimes against humanity). Notably, all the perpetrators were convicted by Italian courts for being part of a criminal association, whose main criminal activity was identified in the abetting of illegal immigration. As reported by the judges, once migrants and refugees land on Italian coasts, the police normally initiate investigations to identify ‘potential boat drivers, responsible of the trafficking at sea.’<sup>1316</sup> While these investigations do sometimes bring the attention of the Italian authorities to graver crimes, they are certainly not their main focus.

780. An important judgment of 2019 by the Corte di Cassazione, Italy’s highest judicial authority, confirms these concerns. The court refused a request for protective custody of a man for possible kidnapping aimed at extortion, torture, and sexual violence against migrants and refugees in Libya, while the custody was applied to the same suspect for investigations on criminal association and abetting of illegal immigration.<sup>1317</sup> The court found that the jurisdictional link was certainly satisfied by the transnational nature of the criminal organisation of smugglers, but found that no such link was present with regard to the other crimes. While the suspect was present on Italian soil, it seems that the missing requisite to establish Italian jurisdiction pursuant to Article 10 of the Penal Code was the *ad hoc* authorisation by the Minister of Justice. Whether such an authorisation was missing due to negligence in requesting it or pursuant to a political decision is not clear. But the case is another example of the inadequacy of the Italian system alone to address the complex net of responsibilities surrounding the commission of international crimes against migrants and refugees in Libya.

781. This brief analysis shows that significant limits and shortcomings can be found in national proceedings that should be taken into account by the ICC when assessing the willingness and ability of the relevant State to genuinely investigate and prosecute the

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<sup>1316</sup> *Id.*, p. 4.

<sup>1317</sup> Corte di Cassazione, Judgment 48250/19 (12 September 2019), p. 2.

perpetrators of grave crimes against migrants and refugees in Libya under the Rome Statute. In conclusion, the exercise of extraterritorial jurisdiction or pure universal jurisdiction by third States, as the Italian proceedings show for instance, should not amount to an obstacle to the Court’s jurisdiction. While there is certainly a need for relevant States to become more active and conduct serious criminal investigations into the heinous crimes against migrants and refugees when they have the opportunity to do so—for instance when a suspect is present on their territory—this should not bar ICC jurisdiction. The ICC is the only one able to effectively tackle the magnitude, systematicity, and gravity of the crimes at stake.<sup>1318</sup>

## **B. Gravity**

782. Article 17(1)(d) of the Rome Statute provides that a case must be ‘of sufficient gravity’ to be admissible before the Court. This gravity threshold constitutes a second major criterion in the admissibility assessment, together with the complementarity with national jurisdictions and proceedings described above. This Communication therefore provides a brief assessment of the gravity of the crimes against migrants and refugees in Libya to conclude that the threshold is met as the potential cases are of sufficient gravity under the Statute’s terms. As set out in the Regulations of the Office of the Prosecutor (Regulation 29), and subsequently detailed in the Office’s Policy Paper on Preliminary Examinations and in Case Selection and Prioritisation, the factors for assessing gravity are: the scale, nature, manner of commission, and impact of the relevant crimes.<sup>1319</sup> This assessment will include both qualitative and quantitative considerations.

### **1. The scale**

783. In its Policy Paper on Preliminary Examinations, the OTP has established that:

*The scale of the crimes may be assessed in light of, inter alia, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their*

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<sup>1318</sup> Domestic legal systems might face challenges in identifying perpetrators. For example, there is a case of mistaken identity where an Italian court found a man was mistakenly identified by prosecutors as one of the world’s most-wanted human traffickers. See D. Boffey, *Italian prosecutor’s claims against Guardian reporter flagged by human rights watchdog*, The Guardian, 5 November 2021, available at: <https://www.theguardian.com/media/2021/nov/05/italian-prosecutors-claims-against-guardian-reporter-flagged-by-human-rights-watchdog>.

<sup>1319</sup> ICC OTP, *Policy Paper on Preliminary Examinations*, November 2013, paras. 59-66, available at: [https://www.icc-cpi.int/iccdocs/otp/otp-policy\\_paper\\_preliminary\\_examinations\\_2013-eng.pdf](https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf); *Policy Paper on Case Selection and Prioritisation*, para. 32.

*geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period).*<sup>1320</sup>

784. In view of OTP criteria to be taken into consideration when assessing the ‘scale’ of the crimes, the present Communication has thoroughly described how the crimes perpetrated against migrants and refugees on Libyan territory, and that can be identified within the situation in Libya currently under investigation, are undoubtedly committed on a very large scale.

785. Victims suffering from the crimes included in this Communication amount to thousands of individuals every year. They are spread across not only Libyan territory but also neighbouring countries and their countries of origin. The crimes included in this Communication show an undeniable pattern of widespread, continuous violence along migrants and refugees’ Libya journey, with repetitive acts of violence over a certain period of time going from a few days to several months. Moreover, the human trafficking of migrants and refugees, underlying the commission of the very serious crimes outlined in this Communication, is based on a large-scale, transborder, and organised system and network, which also entails vast economic and human implications and causes the extreme vulnerability of its victims.

## **2. The nature**

*The nature of the crimes refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction. (Policy Paper on PE, para. 63, see also Policy paper on Case Selection, para. 39)*

786. As this Communication thoroughly documented, the most serious crimes are committed against migrants and refugees in Libya. The nature of these crimes, which include torture, deprivation of liberty, enslavement and sexual slavery, and rape and other forms of sexual violence, is so egregious that it alone meets the required threshold for a case to be admissible before the ICC. This is exacerbated by the fact that the crimes are often committed against individuals placed in situations of extreme vulnerability, including against children. The perpetrators may also take advantage of this situation to commit further violence, which may have a sexual violence component, and is committed concurrently with or subsequent to other crimes, including as reprisals for resistance. The

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<sup>1320</sup> *Id.*, para. 62; para. 38.



crimes constitute an extensive violation of the victims' human rights and of the international order. Their commission is prohibited by most international and regional instruments, including those ratified by Libya. They are, in nature, universally condemned.

### **3. The manner of commission**

*The manner of commission of the crimes may be assessed in light of, inter alia, the means employed to execute the crime, the degree of participation and intent of the perpetrator (if discernible at this stage), the extent to which the crimes were systematic or result from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups. (Policy Paper on PE, para. 64, see also Policy paper on Case Selection, para. 40)*

787. As highlighted above, both the nature of the crimes and the manner in which they are committed show their gravity in the context of the Libyan situation against migrants and refugees. The perpetrators intentionally take advantage of the vulnerability of their victims. The control they exercise over the migrants and refugees, either physical, emotional, or financial, is such that the most horrific and 'creative' forms of violence are perpetrated through direct violence or threats. This violence can be committed in public, with a deterrence purpose, by several perpetrators, and against elderly, children, and pregnant women. Migrants and refugees are subjected as a group to specific forms of discrimination based on race, country of origin, and religion, which amounts to persecution.

788. The testimonies gathered for this Communication show some specific patterns in the commission of the crimes, such as the use of specific tools or torture methods, sexual abuse during extensive and illegal searches, as well as deprivation of food, water and/or hygiene products or facilities. They also show that in various places, their slavery-like condition is well-known to the perpetrators, who remind them of this power imbalance by openly calling them 'slaves.' While the conditions in which migrants and refugees live vary among the official and unofficial detention sites they are placed in, the inhumane character of such conditions appears to be universal.

789. The system that overlooks the crimes committed against migrants and refugees in Libya is a well-organised one. While the crimes are mostly perpetrated in Libya, the whole system often begins well before the victims' arrival on Libyan territory. The victims' vulnerability only increases at every step of the journey, from one holding site to another, from one perpetrator to another. The well-established money transfer system in the region,

the several checkpoints along the way, as well as the agreements among traffickers' networks, or even with State officials, constitute a clear path for criminal activities and abuses. Crimes committed in official detention sites by State officials abusing their power and position further feed into the criminal activities. In these situations, victims are even more vulnerable because those supposed to protect them are, in fact, violating their most basic rights.

#### **4. The impact**

*The impact of crimes may be assessed in light of, inter alia, the sufferings endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities. (Policy Paper on PE, para. 65, see also Policy paper on Case Selection, para. 41)*

790. The impact the crimes have on the direct victims has been highlighted several times in this Communication, including in the gravity assessment. The extreme nature of some forms of violence generates long-lasting physical and psychological harm. Sexual crimes in particular have devastating consequences for their victims, who can suffer from further discrimination, ostracism, rejection, or reprisals, or be forced to bear and raise their aggressors' child who themselves will suffer similar consequences. The impact of the crimes extends to the victims' family, both psychologically and/or financially, who can also be considered as indirect victims.

#### **C. Interest of Justice**

791. According to Article 53(1)(c) and (2)(c) of the ICC Statute, a case will not be admissible when there are substantial reasons to conclude that an investigation or prosecution would not be in the interest of justice. The factors in deciding whether a case would not be in the interest of justice remain at the discretion of the Prosecutor,<sup>1321</sup> who may include considerations such as the age or infirmity of the accused and/or the 'interests of the victims.'<sup>1322</sup> In ascertaining the relevant factors, the Prosecutor may seek to solicit the views of affected communities and other actors involved in the situation.

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<sup>1321</sup> ICC OTP, *Policy Paper on the Interests of Justice*, September 2007, available at: <https://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotppinterestsofjustice.pdf>.

<sup>1322</sup> *Id.*, p. 6.

792. The determination of the interest of justice criterion has come under scrutiny in recent practice. With regard to the Situation in Afghanistan, the Pre-Trial Chamber invoked the interest of justice criterion to reject the authorisation of an investigation.<sup>1323</sup> The reasons put forward by the Chamber included concerns over securing meaningful evidence and witnesses, the likelihood of undermining the credibility of the Court due to lack of cooperation, and the impact an investigation would have on the Court's economic resources. The Appeals Chamber rejected the Pre-Trial Chamber's interpretation of the interest of justice criterion and underlined that Article 53(1) of the Statute is formulated in the negative, so the Prosecutor needs only to consider whether there are reasons to believe an investigation would not serve the interest of justice. Pursuant to the Rome Statute, the assessment of the interest of justice includes the criteria of 'the gravity of the crime' and the 'interests of the victims.'<sup>1324</sup>
793. As for the gravity of the crimes committed in Libya against migrants and refugees and refugees, as analysed in the previous sections, it satisfies the gravity threshold required by the Rome Statute in terms of admissibility. Similarly, there is no reason to believe that the investigation and prosecution of such crimes would not serve the interests of justice. Most of these crimes, including torture and sexual crimes, are recognised as among the most serious crimes under international treaties and customary international law.
794. Furthermore, there is nothing to suggest that opening an investigation and prosecuting those most responsible for the crimes committed against migrants and refugees and refugees in Libya would not serve the interests of the victims. On the contrary, thousands of victims are waiting to see their captors and aggressors brought to justice. During the interviews conducted for the purpose of this Communication, the victims indicated that, despite being in a safer location, they will only be able to move on when justice is done. Some still have friends in Libya, waiting to escape, or have identified their perpetrators in Europe, and hope that proper investigations at the national and international level will help hold those responsible to account.
795. Finally, there is no evidence indicating that ICC proceedings would prolong violence in Libya and any deferral from the Prosecutor on this basis would be an error in light of the policy paper which asserts that the 'interests of peace' are not a consideration.<sup>1325</sup>

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<sup>1323</sup> ICC, *Situation in the Islamic Republic of Afghanistan*, Decision Pursuant to Art. 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Situation in the Islamic Republic of Afghanistan, Pre-Trial Chamber II (12 April 2019).

<sup>1324</sup> Rome Statute, Article 53(1)(c).

<sup>1325</sup> *Policy Paper on the Interests of Justice*, p. 4.

796. Taking into consideration the rights of the victims and the gravity of the crimes, there appears to be no reason why an investigation would not serve the interests of justice.

#### **D. Conclusion**

797. This Communication has shown that grave crimes have been committed against migrants and refugees in Libya since 2011. Most importantly, this Communication has established that the ICC has jurisdiction over these crimes committed in Libya, as part of the UNSC referral in Resolution 1970.

798. Migrants and refugees have been consistently targeted due to their position of vulnerability amidst the ongoing non-international armed conflict. They are exploited and used as commodities by State and non-State actors in order to sustain not only the armed conflict, but also as a source of economic profit for the perpetrators themselves.

799. The background provided in Section II explains how this situation came to be. The instability caused by the hostilities enabled the existence of multiple competing State authorities, militias, and trafficking and smuggling networks. The incorporation of several non-State actors into the State security apparatus further entrenched the Libyan State's connection to the commission of crimes against migrants and refugees and refugees. In addition, Libyan State policy which criminalises migration was kept in place, despite its blatant non-compliance with international law, and underlies the widespread and systematic attack against migrants and refugees in Libya.

800. In this context, Europe's border externalisation and ensuing decisions have further negatively impacted the situation of migrants and refugees in Libya by financially empowering actors who gain a profit from the migrants' smuggling, trafficking, and unlawful interception at sea. Paradoxically, these policies also have the effect of 'legitimising' so-called law enforcement actors in Libya, who in reality actively participate in the criminal system of migrant exploitation. This is evidenced, for example, by the unlawful activities of the Libyan Coast Guard.

801. The crimes committed against migrants and refugees are multiple and have varied throughout the years. Nevertheless, important patterns emerge from an analysis of the testimony collected and open-source information, supporting the findings that there are reasonable grounds to believe that the crimes against humanity of imprisonment, murder, torture, enslavement, rape and other forms of sexual violence, sexual slavery, enforced prostitution, persecution, and other inhumane acts were committed against migrants and

refugees in Libya since 2011. Moreover, this Communication also suggests that several of the conducts underlying crimes against humanity may also constitute war crimes, since they are often linked to the ongoing conflict in Libya and hostilities between the parties to this conflict.

802. This Communication also provided an analysis of modes of liability incurred by alleged individual perpetrators. These perpetrators vary in hierarchy, with one element in common: they all exercised control, to some extent, over the commission of crimes. Many of the names provided in this Communication are well-known to the international community, having been sanctioned by the UN Security Council, for example, or identified by the UN Panel of Experts on Libya.

803. Yet, to date, there has been no serious attempt to hold high-level perpetrators accountable for the serious crimes committed against migrants and refugees in Libya, and the call for justice by victims remain unaddressed. At the domestic level, the lack of an appropriate legal framework, as well as of independence and impartiality of the judiciary in Libya, render the prospect of local prosecutions non-existent. At the international level, despite a few domestic prosecutions of low-level perpetrators in countries other than Libya, perpetrators have gone unpunished. Even those who are well-known to be involved in the commission of crimes have so far escaped justice.

804. Moreover, the predominant narrative focuses on the crimes of smuggling and trafficking, ignoring that the violence against migrants and refugees, in many cases, also amounts to international crimes under the Rome Statute. In turn, accountability efforts that recognise the gravity and seriousness of these violations are lacking. Only recently, in October 2021, did the FFM report on Libya establish for the first time that acts of murder, enslavement, torture, imprisonment, rape, persecution, and other inhumane acts committed against migrants and refugees may amount to crimes against humanity.<sup>1326</sup> These findings are yet to trigger appropriate investigations and judicial consequences.

805. This Communication thus concludes that only an ICC investigation can properly address the complexity of the crimes committed against migrants and refugees in Libya. The fragmentary approach of domestic courts, which have so far only established the role of certain (low-level) individuals, fails to recognise the macro-dimension of the crimes. In addition, while a few third States have made progress with the investigations and carried out some prosecutions with regard to torture and other crimes committed in Libyan

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<sup>1326</sup> A/HRC/48/83, para. 70.

detention centres against migrants, domestic courts inevitably face the immunities obstacle when trying to assess the responsibilities at the higher level. In this regard, the inclusion of militias' members and criminal actors into the Libyan State apparatus presents an additional specific challenge. In conclusion, as domestic investigations and proceedings are not sufficient to bring justice to the victims of these heinous crimes in Libya, the ICC is the only possible avenue for breaking the cycle of impunity and assessing the individual criminal responsibility of high-level perpetrators.

806. In light of the information collected and presented in this Communication, ECCHR, FIDH and LFJL respectfully request the Prosecutor to urgently proceed with the investigation and prosecution of those responsible for the grave crimes under the ICC jurisdiction committed against migrants and refugees in the context of the Situation in Libya, which has been under ICC investigation since 2011.