

SUBMISSION FOR POLICY RECOMMENDATIONS ON SLAVERY CRIMES UNDER THE ROME STATUTE

1. The European Center for Constitutional and Human Rights (**ECCHR**) respectfully submits this policy recommendation to the Office of the Prosecutor (**OTP**) for advancing accountability for slavery crimes under the Rome Statute. We welcome the Prosecutor's initiative to draft a new policy on slavery crimes and its potential to enhance holistic accountability of such crimes from the international criminal law perspective.
2. Our recommendations are influenced by the obstacles we have and continue to face in seeking accountability for survivors we support in the context of the Situation in Libya, owing to the impunity gap created by the Rome Statute in addressing slavery crimes within the framework of crimes against humanity.
3. In 2021, ECCHR, along with Lawyers for Justice in Libya (**LFJL**), and the International Federation for Human Rights (**FIDH**), filed a Communication before the Office of the Prosecutor of the International Criminal Court (**ICC**) under Article 15 of the Rome Statute of the International Criminal Court (**Rome Statute**) (**2021 Communication**).¹ This Communication addressed the alleged commission of crimes against humanity against migrants, refugees, and asylum seekers (hereinafter migrants and refugees) in Libya, requesting the Prosecutor to urgently open an investigation into these crimes. Against the dominant narrative that transnational crimes of trafficking and smuggling were being committed in Libya, this Communication instead analyzed factual conduct against migrants and refugees and the context in which it occurs as amounting to crimes

¹Redacted 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, submitted by the European Center for Constitutional and Human Rights, the International Federation for Human Rights and Lawyers for Justice in Libya on 19 November 2021 (*2021 Communication*), available at https://www.ecchr.eu/fileadmin/user_upload/Redacted_Art_15_Communication_to_the_ICC_on_crimes_against_refugees_and_migrants_in_Libya.pdf.

against humanity.² Among these, the Communication argued that the crimes of enslavement and sexual slavery were being committed in Libya, as indicated, *inter alia* through the deprivation of liberty of migrants and refugees, their sale *en route* to and from various detention sites, their sale through market auctions, and their subjection to forced labor, within the context of an entrenched system of exploitation in Libya reducing migrants and refugees to commodities.³

4. ECCHR subsequently filed another Communication in 2022 before the OTP under Article 15 of the Rome Statute, examining 12 exemplary incidents of interception of migrants and refugees at sea and their return to and detention in Libya between 2018 and 2021. The Communication ultimately concluded that the interception of migrants and refugees while in distress in the Central Mediterranean Sea, and their return to and systematic detention in Libya, amounts to crimes against humanity. More precisely, it argued that these interceptions and returns, rather than “sea rescue” operations, are crimes against humanity in the form of the severe deprivation of physical liberty (Article 7(1)(e) of the Rome Statute).⁴
5. This 2022 Communication sought to clearly draw out the systematic involvement and cooperation between European Union agencies (particularly the European Commission, EUNAVFOR MED, and Frontex) and Member States (including Italy and Malta) with Libyan actors, on both the policy and operational levels, enabling the interception of migrants and refugees at sea for the purpose of their return to and detention in Libya. The Communication identified specific high-ranking officials of EU Member States and EU agencies who acted in concert with each other, resulting in the commission of crimes against humanity, and were thus identified as co-perpetrators under Article 25(3)(a) of the Rome Statute.⁵
6. While preparing both our 2021 and 2022 Communications, we recognized certain gaps vis-a-vis provisions related to slavery crimes in the Rome Statute, which limited our ability to holistically portray the atrocities suffered by migrants and refugees, thereby creating impunity for certain actors and crimes in the context of Libya. Namely, the lack of the crime of “slave trade” or an equivalent within the Rome Statute, as well as the

²See Executive Summary of the 2021 Communication, available at https://www.ecchr.eu/fileadmin/Juristische_Dokumente/20211119_Executive_Summary_Libya_ICC_final.pdf.

³See 2021 Communication, paras 4 and 457 to 480.

⁴See Executive summary of the 2022 Communication, available at https://www.ecchr.eu/fileadmin/user_upload/ECCHR_Executive_Summary_ICC_Libya.pdf.

⁵See Executive summary of the 2022 Communication, para 2.

inclusion of “trafficking” within the definition of “enslavement,” but with no further definition within the Statute or Elements of the Crimes, have proven particularly problematic. In this submission, we detail these challenges and highlight ways in which the OTP’s currently policy process might provide further clarity on these matters.

REPERCUSSIONS OF THE CONFLICT ECONOMY ON MIGRANTS AND REFUGEES IN LIBYA

7. Historically, Libya has been both a prominent destination and transit point for migrants and refugees from Arab and African countries. However, Libya does not have a legal framework to grant asylum, and irregular entry in the country is severely criminalized and harshly punished, e.g. with indefinite detention and induction into hard labor.⁶
8. The fall of the Gaddafi regime in 2011 and the ensuing armed conflict saw the breakdown of rule of law including in the networks involved in the transport of migrants and refugees. The previously state-controlled smuggling and trafficking networks saw the entry of several, conflicting militias and armed groups. Consequently, instead of ensuring safe passage of migrants and refugees caught in these networks, militias and armed groups fought for control over them, effectively inducting them into a system of slavery. Within this system, migrants and refugees are subjected to reprehensible forms of violence and torture, extorted and sold, used as forced labor and as soldiers in the prevailing armed conflict.⁷ Simultaneously, between 2011 and 2014, many of these militias and armed groups got integrated into the internationally recognized State security apparatus, including in the management of detention facilities for migrants and refugees.
9. By 2016, Libya had become the main launching point to Europe along the so-called “Central Mediterranean Route” (CMR). In response to this, European States strengthened their border externalization policies and practices they already had in place, offering little room for legal pathways for migrants and refugees along the CMR, with the aim of curtailing arrivals by sea.⁸ Such actions effectively closed all pathways to Europe and trapped vulnerable migrants and refugees in Libya. Simultaneously, due

⁶See Articles 2 and 6, Law No. 19 of 2010 on combatting illegal immigration (Libya).

⁷See 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>. See also 2021 Communication, paras 28 to 36.

⁸See 2021 Communication, para 37.

to international pressure, both the Libyan State and several militias and armed groups publicly adopted an anti-trafficking and anti-smuggling stance, while continuing to operate within the prevailing system of exploitation of migrants and refugees.⁹

10. Since then, multiple entities and actors from European Union agencies and Member States have worked in concert with internationally recognized Libyan authorities to intercept migrants and refugees at sea and contain them on Libyan territory.¹⁰ Pursuant to their violent interceptions along the CMR, migrants and refugees are then taken to official and unofficial detention centers in Libya, most of which are under the effective control of different militias and armed groups. Here, *“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.”*¹¹
11. In this regime, armed groups and militias are incentivized to increasingly abduct and detain migrants and refugees as a means of generating money either through ransom payments or by selling them to other interested groups, who subsequently use these migrants and refugees for their armed conflict.¹² As our 2021 ICC Communication describes, there are several reports of migrants and refugees being sold by different actors in Libya, either in “markets” or along their journey.¹³ This systematic subjugation and assertion of ownership over migrants and refugees, reinforced by a network of state and non-state actors, qualifies as the crime of “enslavement” under Article 7(1)(c) of the Rome Statute. However, several aspects of the definition of “enslavement” under Article 7(2)(c) of the Rome Statute create impunity gaps, regarding which we would be grateful to receive clarifications in the upcoming policy on slavery crimes.

⁹*Ibid.*

¹⁰See Executive summary of the 2022 Communication, paras 5-9.

¹¹UNSMIL and OHCHR, ‘Desperate and Dangerous’, p. 6. See also 2021 Communication, para 40.

¹²See Amnesty International, ‘Libya’s Dark Web of Collusion: Abuses against Europe-bound Refugees and Migrants’, 11 December 2017, p. 27, available at: <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>. See also 2021 Communication, para 38.

¹³See CNN, ‘People for sale: Where lives are auctioned for \$400’, 15 November 2017, available at <https://edition.cnn.com/2017/11/14/africa/libya-migrant-auctions/index.html>. See also 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>.

ANALYZING THE CRIME OF ENSLAVEMENT

12. It is critical to refer to the context within which the crime of enslavement was established to understand the cause of the impunity gap within today's international criminal law framework.
13. The 1926 Convention for the Suppression of Slavery and the Slave Trade (**'1926 Convention'**), codified the first internationally agreed definition of "slavery"¹⁴ as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."¹⁵
14. More significant to the Libyan context today, "slave trade" has also been defined in this Convention under Article 1(2) to include:

all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slave.
- The 1926 Convention also obligates High Contracting Parties to "prevent and suppress the slave trade" and bring about "progressively and as soon as possible, the complete abolition of slavery in all its forms."¹⁶
15. By identifying slave trade in this manner, the 1926 Convention recognizes the system of trade that works in tandem with slavery, not necessarily exhibiting all elements of slavery, but acting as a precursor that must also be stemmed to truly abolish slavery.
16. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 (**'1956 Convention'**) further criminalizes as "slave trade" any "act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto."¹⁷ Accordingly, attempts to and means of transport for reducing individuals to slavery have been criminalized, denying slave traders and their accomplices safe haven or secure port.¹⁸

¹⁴See Sellers PV & Kestenbaum, JG, 'Missing in Action: The International Crime of the Slave Trade', CARDOZO LEGAL STUDIES RESEARCH PAPER NO. 607(April 23, 2020), p. 1-2, available at <https://ssrn.com/abstract=3583564>.

¹⁵Article 1(1), 1926 Convention.

¹⁶Article 2, 1926 Convention.

¹⁷Article 3, 1956 Convention.

¹⁸See Sellers & Kestenbaum, 'Missing in Action', p. 11.

17. The proscription of both slavery and slave trade has, within this definition, attained the status of being a peremptory norm under customary international law for both international and non-international armed conflicts, and a non-derogable human right.¹⁹ However, while the crime of slavery largely retained its form in its subsequent codification as “enslavement” in the Rome Statute, slave trade was not included in the Rome Statute at all. As a result, despite the continued rampant presence of slave trade, its criminalization has fallen into desuetude within the international criminal law framework.²⁰ Contributing to this disuse was the introduction of the language of “trafficking” in the description of “enslavement” within the Rome Statute. To explicate how the language of trafficking has affected the use of “slave trade” and the ill effect it has had on holistic criminalization under the enslavement provision, a historic understanding of “trafficking” is essential.

TRAFFICKING AND SLAVERY

18. The offense of trafficking initially found its roots in the movement of “white slavery,” which several theorists have also critiqued as a space for patriarchal control over prostitution and a racist subversion of the slavery narrative.²¹ Eventually, “trafficking” brought into its fold the “deviant” transportation of persons for the purpose of exploitation. By the time the international codification of “trafficking” gained momentum, the sex work movement was asserting the removal of all traces of consenting sex work from its conceptualization. The definition of “trafficking” was thus influenced by this debate in the very different setting of gender, the political dynamic of which should not be confused with that of race politics.²²

19. Accordingly, the codification of trafficking in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2000 (**Palermo Protocol**) defines the crime as:

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

¹⁹See International Committee for the Red Cross, ‘Customary IHL: Rule 94’, available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule94>

²⁰See Sellers & Kestenbaum, ‘Missing in Action’, p. 3.

²¹See Doezema, J., *Sex Slaves and Discourse Masters: The Construction of Trafficking* 37 (Zed Books, 2010).

²²See Kennedy, D., ‘The Critique of Rights in Critical Legal Studies’ in Brown & Halley (eds.), *Left Legalism/Left Critique* 178-228 (Duke University Press, 2002).

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.²³

20. Clause ‘b’ of Article 3 adds: “The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.”
21. Clearly these definitions look to the victims, their mental state, their consent and their circumstance of exploitation to decide whether trafficking has occurred or not. In this vital way “slavery” and “slave trade” differ from the terms of reference used for “trafficking.” Notably, slavery and practices similar to slavery are used to explicate forms of exploitation that can indicate trafficking.
22. Interestingly, and without any precedent, “enslavement” as codified as a “crime against humanity” in the Rome Statute includes “trafficking” as one of its potential elements. Accordingly, it is defined as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”²⁴ This results in a tautological bind, with “trafficking” being defined by “enslavement” and vice versa. However, the problem goes beyond that of semantics. The replacement of the crime of “slave trade” by “trafficking” in the definition of “enslavement” has led to a perceptible impunity gap in the Rome Statute.
23. Two things happen in this definition. Firstly, the term “trafficking” is used without independent criminalization, or even further definition, in the Rome Statute. In fact, the OTP’s Policy on Gender Based Crimes, published in December 2023, categorically states that “trafficking is not itself an international crime under the (Rome) Statute.”²⁵ The Elements of Crimes published for the crime against humanity of “enslavement”²⁶

²³Article 3, Palermo Protocol.

²⁴Article 7(2)(c), Rome Statute.

²⁵Office of the Prosecutor: International Criminal Court, ‘Policy on Gender-Based Crimes’ (December 2023), para 57.

²⁶The Elements of Crimes for the crime against humanity of “enslavement” are:

“1. *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.*

2. *The conduct was committed as part of a widespread or systematic attack directed against a civilian population.*

3. *The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.*”

does not further reference “trafficking.”²⁷ Neither is trafficking further defined in the Rome Statute, nor its elements identified in the Elements of Crimes. If one looks beyond the Rome Statute to understand how “trafficking” might be understood, as aforementioned, the Palermo Protocol defines “trafficking” by referring to the concept of “slavery.” This leads to a legal framework where neither term is defined without the other, and trafficking is not defined in the international criminal law framework at all, but only in the transnational. Secondly, despite featuring prominently in previous Conventions, “slave trade” does not find any recognition in the Rome Statute's definition of “enslavement,” nor anywhere else in the Rome Statute. Thus, it is neither specifically defined nor criminalized in the Rome Statute.

IMPUNITY DUE TO THE ROME STATUTE FRAMEWORK IN THE LIBYAN CONTEXT

TRAFFICKING VERSUS SLAVE TRADE

24. Due to the legal framework sketched above, ECCHR has faced problems at several junctures in its attempt to get holistic accountability against all actors who are effectively perpetuating slavery crimes against migrants and refugees in Libya.
25. The examination of witnesses for our Communications clearly indicated that a system of slave trade and slavery, understood in the sense of the 1926 and 1956 Conventions, is being perpetuated by multiple state and non-state Libyan and European actors. This includes the indefinite detention of migrants and refugees, most often following interceptions at sea, in official or unofficial detention sites by the militias and armed groups in control,²⁸ and the sale and transfer of these migrants and refugees either “informally” across detention sites,²⁹ or through more formally established “slave markets.”³⁰ Further, while in detention, the ill-treatment of migrants and refugees is

²⁷The “Elements of Crimes” merely notes in a footnote that, “*It is understood 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. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.*”

²⁸See 2021 Communication, paras 107-117.

²⁹See 2021 Communication, para 106.

³⁰See 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#.WO4aCaIIGUI>. See also 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>. See generally 2021 Communication, para 98.

universally observed. This includes the presence of deplorable dirty and crowded living conditions, conditions of starvation and subjugation to forced labor and sexual slavery.³¹

They are also subjected to torture, for the additional purpose of blackmailing their families and collecting ransom.³²

26. This entire pattern of subjugation fits the legal paradigm of “slave trade” and “slavery” as identified and criminalized in the 1926 and 1956 Conventions. However, at the first instance, problems arise with the legal characterization of the sale and transport of migrants and refugees within the prevailing ICL jurisprudence. In the judgement of *Kunarac* (Trial Chamber, 2001), a categorical pronouncement is found to the effect that while the “mere ability to buy, sell, trade or inherit a person or his or her labours or services” could be a relevant factor to establish enslavement, it is, by itself, insufficient.³³ While there are some judicial precedents that legally characterize the initial abduction and capture of persons undergoing the condition of slavery to indicate assertion of ownership rights, and hence enslavement,³⁴ that position is not consistent. There have been repeated judgements where those responsible for selling and transferring enslaved persons have not been found guilty of the crime of slavery.³⁵
27. The sale and transport of migrants and refugees in Libya could aptly be criminalized as “slave trade,” within the framework of the 1926 and 1956 Conventions. It identifies that people transit through a “supply chain” of slave traders, viewing “slave trade” to be interlinked with other slavery practices.³⁶ The legal framework of “slave trade” only requires the establishment of the *mens rea* that the perpetrator intended for the victims to be reduced to slavery, and the *actus reus* of the acts, or even attempted acts that lead to such reduction.³⁷ Since “slave trade” itself is a crime, there is no need to look at subsequent exploitation for successful criminalization of slave traders.³⁸ Further, the

³¹See 2021 Communication, paras 113-117.

³²See 2021 Communication, paras 118-120.

³³*Kunarac, Kovač and Vuković*, Trial Chamber (22 February 2001), para 543.

³⁴See *Sesay, Kallon and Gbao* (RUF), Trial Chamber (2 March 2009), paras 1465-1466, 1579-1580, 1622.

³⁵Such conflation and criminalisation of abduction, capture and redistribution of slaves has not been done in the cases of *inter alia* *The Prosecutor v. Dominic Ongwen*, Trial Chamber IX (4 February 2021) and *The Prosecutor v. Dominic Ongwen*, Appeals Chamber (17 January 2022). See Sellers, P.V. and Kestenbaum, J.G., ‘The International Crimes of Slavery and the Slave Trade: A Feminist Critique’ in Rosenthal, I., Valerie, O., and SáCouto, S. (eds.), *Gender and International Criminal Law* (Oxford University Press, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741454.

³⁶See Allain, J., *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff, 2008), p. 65.

³⁷See Sellers & Kestenbaum, ‘Missing in Action’, p. 16.

³⁸See Sellers, P.V. ‘Wartime Female Slavery: Enslavement?’ 44 CORNELL INTERNATIONAL LAW JOURNAL (2011), p. 123.

criminal activities being committed during “slave trade,” including torture, rape and other forms of violence, get recognized within the larger system of subjugation and slavery they are being perpetuated in, rather than as stand-alone crimes. However, since the same finds no recognition in the Rome Statute, the effect of relying upon this terminology to establish features of “enslavement” remains unclear.

28. Thus, inevitably, the conduct of transport, sale, and even abduction of migrants and refugees has to be characterized as trafficking, even though that does not fittingly encapsulate the crime being committed. “Trafficking” is codified more as a “means to an end” conduct, with the act of transport itself not being criminalized under the Rome Statute.³⁹ Since “trafficking” is not identified as an independent crime against humanity,⁴⁰ it does not ensure criminalization of acts that qualify as “trafficking” alone, that do not also result in “enslavement.”⁴¹ The pigeon-holing of conduct as “trafficking,” which is seen as an indicator of “enslavement,” but not an independent crime has previously resulted in the non-criminalization of several actors who have participated in what is sometimes perceived as the “precursory conduct” to slavery,⁴² but not slavery itself.⁴³ This is because sometimes some acts are seen as “mere” trafficking, devoid of the context of slavery, in which they are occurring, while in other instances they are judicially accepted to be part of the practice of “enslavement.” Such a legal assessment of “trafficking” as an independent act, and not as a part of the system of “enslavement,” as witnessed in certain cases, renders unclear when the acts of abduction and transport of migrants and refugees, and their sale and transfer, will be criminalized as enslavement (under Article 7(1)(c) of the Rome Statute) and when they will not be criminalized at all.

³⁹See Office of the Prosecutor: International Criminal Court, ‘Policy Paper on Sexual and Gender-Based Crimes’ (2014), pp. 16-17, available at https://www.icc-cpi.int/sites/default/files/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf.

⁴⁰See Office of the Prosecutor: International Criminal Court, ‘Policy on Gender-Based Crimes’ (December 2023), para 57, available at <https://www.icc-cpi.int/sites/default/files/2023-12/2023-policy-gender-en-web.pdf>.

⁴¹See Sellers, P.V., ‘Q & A – The nexus between conflict-related sexual violence and human trafficking for sexual exploitation in times of conflict during court proceedings: An insider’s view’, 13 JOURNAL OF TRAFFICKING AND HUMAN EXPLOITATION (2019), p. 150.

⁴²See Sellers & Kestenbaum, ‘Missing in Action’, p. 4.

⁴³See for e.g. *The Prosecutor v. Bosco Ntaganda*, Judgment, Trial Chamber VI (8 July 2019), paras 956-961. See also *Kunarac, Kovač and Vuković*, Trial Chamber (22 February 2001), paras 543 and 741-742.

NEED FOR CONTEXT-DRIVEN CRIMINALIZATION AT THE NATIONAL AND INTERNATIONAL LEVEL

29. Since “trafficking” is not criminalized under the Rome Statute, it remains a transnational crime. Manifold problems are posed due to this. Firstly, as indicated above, those trading “slaves” are neither criminalized under “slave trade” nor “trafficking” provisions, in international criminal law. In fact, sometimes they are not found guilty of “enslavement” under the Rome Statute at all. Secondly, since the Rome Statute finds “trafficking” to be a potential indicator of “enslavement,” at the national level, both prosecutors and judicial authorities often find “trafficking” to be an “easier” framework for trying the crime. This is especially because the legal framework of “trafficking” allows a context-independent adjudication of facts, which does not acknowledge the system of slavery and slave trade in which the crimes are being committed.
30. However, the language of trafficking is not appropriate for accountability against actors who are, in effect, slave traders. The *mens rea* required for trafficking is the intent to reduce the victim to exploitation. In the present legal discourse, the bar of “exploitation” is often not met by people who are stuck in slave trade. Acts like subsequent market auction,⁴⁴ rape or torture during the act of trafficking/slave trade, or even subsequently, have not been considered to be “exploitation.”⁴⁵
31. Further, since “trafficking” comes from the context of sex work, due to subsequent debates about non-criminalization of consenting sex workers under trafficking provisions, the defense of consent has become available even to those who are effectively slave trading but are being prosecuted under trafficking provisions.⁴⁶ That is, the *actus reus* being impugned is the non-consensual transport of persons involved. Accordingly, the Palermo Protocol identifies “means” of trafficking to include threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving or receiving of payments or benefits to achieve consent of a person having control over another person.⁴⁷ Resultantly, one way to refute that such

⁴⁴See Directorate-General for External Policies Policy Department, European Parliament, ‘Contemporary forms of slavery’, p. 31, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603470/EXPO_STU\(2018\)603470_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603470/EXPO_STU(2018)603470_EN.pdf).

⁴⁵See Sellers, P.V., ‘Q & A’, p. 149.

⁴⁶See Siller, N., *Trafficking in Persons under International Law and its Incorporation within Enslavement as a Crime against Humanity* (Thesis fully internal (DIV), University of Groningen, 2017), p. 99.

⁴⁷ Article 3, Palermo Protocol.

circumstances were present and that “trafficking” indeed occurred is to show that the victims, in fact, consented to the impugned transport and transfer.⁴⁸

32. Thus, not only are actors, who are *de facto* slave traders not being impugned within the ICL framework, due to the differing context of “trafficking,” its elements are not being easily fulfilled for successful criminalization in transnational cases as well. Despite this, due to the ill-suited inclusion of “trafficking” in the “enslavement” provision in the Rome Statute, domestic cases are focusing on “trafficking” provisions instead of “slave trade” ones.
33. An even more troubling result of this legal framework is the easy association of trafficking with smuggling crimes. In the Libyan context it is seen that in the domestic setting, courts proceed with cases of not only trafficking, but also smuggling.⁴⁹ Human smuggling charges in the Libyan context are deeply problematic since they criminalize victims who are effectively captured in the system of slave trade and slavery. Human smuggling is understood as 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 person into a State party of which the person is not a national.”⁵⁰ Those fleeing conflict and persecution in different parts of the world, including in Libya, often resort to paying people smugglers to cross borders irregularly, when they cannot find any legal route to reach safe countries. However, as is clearly seen in the Libyan context, while there may be some instances where migrants and refugees initially paid “smugglers” to cross Libyan borders, due to the well laid network of these “smugglers” integrated with other State and non-State actors, migrants and refugees soon find themselves irreversibly captured in the slave economy.
34. However, since an amenable framework is provided to domestic prosecutors and judges to examine the situation outside the context of slave trade and slavery, heavier reliance on trafficking and smuggling frameworks is found in domestic cases pertaining to

⁴⁸See Siller, N. “Modern Slavery’ Does International Law Distinguish between Slavery, Enslavement and Trafficking?’ 14 JOURNAL OF INT. CRL. JUSTICE (2016), p. 417, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2878231.

⁴⁹See Eritrea Hub, ‘Tewelde Goitom – Eritrea’s notorious people trafficker – in Dutch court today’, 6 October 2022, available at <https://eritreahub.org/tewelde-goitom-eritreas-notorious-people-trafficker-in-dutch-court-today>. See also Al Jazeera, ‘Libya jails 38 over deaths in Mediterranean Sea smuggling case’, 11 July 2023, available at <https://www.aljazeera.com/news/2023/7/11/libya-jails-38-over-deaths-in-mediterranean-sea-smuggling-case>.

⁵⁰Article 3(a), Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2000.

Libya.⁵¹ Such utilization of “smuggling” provisions invisibilize the entrenched system of subjugation that migrants and refugees are subjected to in Libya, instead criminalizing the victims for engaging in the smuggling network. This has led to a situation where survivors do not want to participate in smuggling cases for fear of further retribution. This also opens up anyone that the victims were in contact with to potential criminalization for *inter alia* facilitation of irregular entry, transit and stay, criminalized in many smuggling provisions. Consequently, avenues for justice are further curtailed.

35. Domestic legal systems are further encouraged in their use of smuggling and trafficking frameworks due to statements like that by ICC Prosecutor Fatou Bensouda in her thirteenth report to the UNSC on the situation in Libya on 9 May 2017, when she indicated that “Libya has become a marketplace for the trafficking of human beings... the situation in Libya is exacerbated by the smuggling of migrants and human trafficking into, through and from Libya.”⁵² Even in the subsequent statement of ICC Prosecutor Karim A.A. Khan, while joining the Joint Team on crimes against migrants in Libya, conduct against migrants and refugees in Libya has been characterized as trafficking and exploitation,⁵³ without acknowledging the entrenched system of slavery being perpetuated in the country.
36. This being the case with domestic jurisprudence, reliance upon the principle of complementarity for effective accountability against “enslavement” leaves a broad impunity gap vis-a-vis slave traders. This could potentially be rectified with the reintroduction and emphasis on “slave trade” within the “enslavement” provision of the Rome Statute, or clarity on how “slave trade” might otherwise be adequately captured under other provisions of the Rome Statute, including but not limited to the provision criminalizing “other inhumane acts.” Not only would this enhance accountability options at the national level, it would also minimize impunity gaps in the ICL framework.
37. An added aspect in the Libyan case is that entry into the system of slavery often starts with the violent interception of refugees and migrants in the Mediterranean Sea. As

⁵¹*Supra* note 49.

⁵²ICC, ‘Statement of ICC Prosecutor to the UNSC on the Situation in Libya’, 9 May 2017, paras 27, 29, available at <https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib>.

⁵³*See* International Criminal Court, ‘Statement of ICC Prosecutor, Karim A.A. Khan QC: Office of the Prosecutor joins national authorities in Joint Team on crimes against migrants in Libya’, 7 September 2022, available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-office-prosecutor-joins-national-authorities-joint-0>.

indicated previously, a multiplicity of EU agencies and European Member States are involved in these interceptions. Involvement of these actors is easily encapsulated within the definition of “slave trade” as envisioned under the 1926 and 1956 Conventions, providing fitting context to their conduct which enables the enslavement of migrants and refugees, an aspect which may otherwise go unaddressed within the legal frameworks of “trafficking” and “smuggling.”

AN INTERSECTIONAL APPROACH TO SLAVERY

38. Due to the context of “trafficking” being rooted in sex work, and the introduction of the concept in the “enslavement” definition, sufficient emphasis is not paid in theory, or in practice, to the different aspects of subjugation in slavery-related crimes.⁵⁴ An intersectional analysis, which examines gender, belongingness to specific ethnic or indigenous groups, disability, age, etc., should be rendered mandatory for the structural analysis of slavery.⁵⁵ Such an intersectional analysis would draw recognition to the fact that, for example, in the Libyan context, able bodied-black migrant men are particularly targeted for their use as forced labor.⁵⁶ In such instances, they are often paid nothing, or very little 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 workers are not provided with adequate food and potable water.⁵⁷ Further, strong and able-bodied black men were also especially recruited by militias for participation in armed conflict,⁵⁸ clearly being treated as more “dispensable” commodities to fight a war in which they have no stake.
39. Analyzing conduct from such an intersectional lens enables the identification of instances of “modern slavery,” where individuals might be getting paid for services rendered, yet still exist within the system of oppression, deprived of free will and liberty. Further, such an intersectional approach aptly enables criminalization of other instances

⁵⁴*Supra* note 44.

⁵⁵*Ibid.*

⁵⁶*See* 2021 Communication, paras 473-480.

⁵⁷*See* UNSMIL and OHCHR, ‘Detained and Dehumanised: Report on Human Rights Abuses Against Migrants in Libya’, 13 December 2016, p. 18, available at https://www.ohchr.org/sites/default/files/Documents/Countries/LY/DetainedAndDehumanised_en.pdf.

⁵⁸*See* 2021 Communication, paras 473-480.

observed in the Libyan context where poor migrants and refugees, especially of African descent, are deceived into believing that they have job opportunities, only to be captured by armed actors and subjected to detention, torture and forced labor.⁵⁹ Again, while on the face of it, and especially within the “trafficking” framework, it might appear that such migrants and refugees consented to the work being performed, a contextualized analysis would easily betray the markers of enslavement.

POLICY CLARIFICATIONS SOUGHT

40. In light of the discussion above, ECCHR would welcome further policy clarifications along the lines mentioned below:
- a. Clarification regarding the scope of trafficking within the provision of enslavement under Article 7(1)(c) and 7(2)(c) of the Rome Statute, especially regarding the threshold which needs to be satisfied to criminalize “trafficking” as “enslavement”;
 - b. Clarification regarding the scope of “slave trade” provisions as found in the 1926 and 1956 Conventions and the potential for their criminalization under the Rome Statute either within the “enslavement” provision, or in other provisions, including but not limited to those criminalizing “other inhumane acts”;
 - c. Clarification regarding conduct like abduction, sale, transfer, etc., occurring within the context of a system of slavery and whether and when such conduct can be identified as meeting the elements of enslavement within the meaning of Article 7 of the Rome Statute;
 - d. Clarification with respect to the OTP's approach to complementarity regarding the domestic prosecution of trafficking crimes, but not slave trade or slavery. In this light, an elucidation would be helpful of when the OTP will consider complementarity in this respect to be fulfilled and how it will ensure that domestic prosecutions account for the gravity and systematic nature of enslavement as a crime against humanity, rather than taking the easier, unequal path of prosecuting smuggling and trafficking.
41. Further, it is especially essential that the policy discourage domestic authorities from utilizing legal frameworks designed to criminalize smuggling, for what is effectively

⁵⁹See 2021 Communication, paras 120, 139, 148, 478-479.

the practice of enslavement. As indicated above, such frameworks further criminalize victims and hinder them from approaching judicial authorities.

42. Additionally, the policy should lay emphasis on the system of subjugation within which slavery crimes occur, acknowledging the intersectional dimensions of such subjugation. Only such an intersectional analysis will enable holistic criminalization of conduct, which otherwise can be passed off as a “regular” crime.