

Q&A

ECCHR's 2021 Communication to the International Criminal Court in the context of the Situation in Libya

*

Violence against Migrants and Refugees as Crimes against Humanity and War Crimes

1. What is the Communication about?

This Communication to the International Criminal Court provides detailed information and legal analysis on the commission of grave crimes against migrants and refugees in Libya since 2011 and requests that the Prosecutor urgently investigate these crimes. State and non-State actors alike have perpetrated unspeakable violence and human rights violations against migrants and refugees in Libya, particularly in detention settings, as part of a discernible system of migrant and refugee exploitation that amounts, the Communication argues, to the commission of crimes against humanity and possible war crimes. It analyzes the individual criminal responsibility of several perpetrators, in particular those in command and control of official and unofficial detention sites where migrants and refugees are unlawfully detained, and those profiting from the criminal exploitation and abuse of migrants and refugees in Libya more broadly.

2. What information is the Communication based on?

The Communication is the product of extensive work by three organizations – the European Center for Constitutional Rights (ECCHR), Lawyers for Justice in Libya (LFJL), and the International Federation for Human Rights (FIDH) – which have worked on the human rights situation in Libya for several years. The organizations worked in collaboration and exchange with survivors in strict adherence to the “Do No Harm” principle. The protocols of multi-session, in-depth interviews with 14 witnesses were transmitted to the Office of the Prosecutor along with the ICC Communication which they inform. 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 safe places with access to assistance and psycho-social support if needed. Each witness gave informed consent to being interviewed.

These first-hand witness accounts were also complemented and corroborated by thorough documentation from various reliable sources, including interviews with individual experts; reports of NGOs and humanitarian organizations working on the ground; reports of UN agencies, in particular the Office of the High Commissioner for Refugees (OHCHR), the United Nations Support Mission in Libya (UNSMIL), the Panel of Experts on Libya, and the Fact-Finding Mission on Libya; and judicial findings from proceedings in Libya, Italy and the European Court of Human Rights.

3. Which alleged crimes does the Communication address?

The Communication argues the crimes against humanity of imprisonment, enslavement, murder, torture, rape, sexual slavery, enforced prostitution, sexual violence, persecution, and other inhumane acts have been and are being committed against migrants and refugees in Libya.

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, this 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 migrants and refugees and violence against them are not isolated, but rather part of a course of conduct.

Migrants and refugees are the primary targets of the attack. 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 and policy, implemented by both State and non-State actors. The crimes are committed in pursuance of an apparent policy grounded foremost in Libya's Law No. 19 of 2010, which authorizes the detention and forced labor of migrants. Documents by Libyan authorities explicitly endorsing violence against migrants and refugees serve as proof of this policy. The situation is aggravated by historic discrimination against Black migrants in Libya and governmental instability.

Since most of these crimes took place in the context of an ongoing armed conflict, the Communication also considers the commission of war crimes against migrants and refugees, who are part of the civilian population.

4. Does the Communication identify perpetrators of these crimes?

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 Office of the Prosecutor 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.

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 victimized 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.

5. What is the situation like for migrants and refugees in Libya?

Since the outbreak of armed conflict in 2011, Libya shifted from a destination country for migrants and refugees from Arab and African countries to a transit state towards Europe. In 2014 alone, experts reported approximately 170,000 sea arrivals in Italy from Libya, compared to the yearly

average of 19,500 sea arrivals prior to the conflict. The conflict created the conditions for individuals, as well as armed groups and militias, to generate income by smuggling and trafficking migrants and refugees into Libya and through the Mediterranean Sea to Europe.

Taking advantage of the vulnerability of migrants and refugees, and their impossibility to return to their countries of origin, these actors regularly detain and torture migrants with the purpose of obtaining ransom payments in exchange for their freedom and/or transport towards Europe. The detention often occurs by official authorities, such as the Department for Combating Illegal Immigration (DCIM), which runs official detention centers, often in association with militias. But non-State actors, including smugglers, traffickers, and armed groups, also effectively detain migrants in other makeshift places of detention.

Regardless of who is detaining migrants and refugees, they are put into inhumane living conditions, in overcrowded spaces and with little to no access to food, water, sunlight, medical services, or sanitary facilities. Moreover, migrants and refugees are also physically exploited: while able-bodied men and boys are often targeted for forced labor, including in war-fighting activities, women and girls are frequently forced into prostitution and sexual slavery. Often, migrants and refugees are treated as slaves – bought, sold, auctioned off in the streets – and face persecution for their migrant or refugee status, as well as race, gender, and religion. Torture is also prevalent against migrants and refugees in Libya, as reported by 85% of the over 3,000 migrants and refugees surveyed by the Italian organization Medici per Diritti Umani.

When migrants and refugees manage to reach the Libyan coast, often after great suffering, many embark on a highly risky and often deadly attempt to cross the Mediterranean Sea to Europe. This path has come to be called Central Mediterranean Route, which Médecins Sans Frontières has called “the world’s deadliest migration route.” According to the International Organization for Migration (IOM), at least 489 people have died and 736 gone missing on this route between January and early November 2021. Since 2016, migrants and refugees have also been increasingly at risk of violent interceptions at sea by the Libyan Coast Guard (LCG), a State authority with known ties to militias. Once intercepted, they are returned to Libya, where they face indefinite detention, and the cycle of abuse continues.

6. How are the survivors and where are they now?

Some survivors, such as the 14 witnesses interviewed for the ICC Communication, are now in safe places in third countries. However, not all migrants and refugees who escape the cycle of abuse in Libya are in safe or stable conditions elsewhere. In addition to those migrants and refugees who have managed to reach Europe or been returned to their home countries or relocated to other African countries, many more remain trapped in Libya. According to the IOM, between January and early November 2021, the LCG had intercepted and returned a record number of 28,636 migrants and refugees, including at least 1,092 minors. Once returned to Libya, migrants and refugees often re-enter the brutal system of exploitation in detention sites. According to UNSMIL and OHCHR, there were anywhere between 6,000 to 20,000 migrants detained in Department for Combating Illegal Immigration (DCIM) centers at any given time between 2016 and 2018. The UN Fact-Finding Mission on Libya also calculated that at least 7,000 migrants were detained by October 2021 in government detention centers, including large percentages of children.

7. What is the aim of ECCHR’s work on this case?

The Communication aims to bring the plight of migrants and refugees in Libya to the ICC’s attention, framing it in terms of international crimes, namely crimes against humanity and war

crimes. Through this Communication, ECCHR, FIDH and LFJL seek to further amplify the voices of migrants, refugees, and asylum seekers, and to support them in seeking accountability and justice for the crimes they have endured. By presenting factual details and comprehensive legal analysis to the ICC, ECCHR, FIDH and LFJL also strive towards an ICC that fulfils its promise of accountability to victims and affected communities.

In parallel, ECCHR, FIDH and LFJL's work on Libya also seeks to expose double standards and the role of powerful actors – in this case, from Europe – in the commission of international crimes. This Communication is accompanied by a [public report](#) that details the relationship between European and Libyan actors. Ultimately, ECCHR, FIDH and LFJL also strive to hold European actors accountable for migration policies that effectively enable the system of migrant and refugee exploitation in Libya and elsewhere.

8. Why is this a case for the International Criminal Court (ICC)?

So far, domestic authorities in Libya have failed to investigate these crimes and prosecute those responsible. Moreover, where some prosecutions have taken place in third States, as in Italy, they are often not able to reflect the gravity and the systematicity of the crimes committed against migrants and refugees as crimes against humanity or war crimes.

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 could 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.

9. What is the meaning and purpose of a Communication to the International Criminal Court?

The ICC has jurisdiction over crimes of genocide, crimes against humanity, war crimes, and starting in July 2018, the crime of aggression. A Communication to the Office of the Prosecutor (OTP) brings a potential crime to its attention. It is an opportunity to present an assessment of facts that may amount to one or multiple crimes under the Rome Statute. It is the OTP's task to determine if the allegations have sufficient factual and legal grounds.

The OTP already has an ongoing investigation into the Situation in Libya, which was referred to the Office by the United Nations Security Council in Resolution 1970 of 2011. Thus, the OTP will analyze the Communication within the framework of its broader investigation into the Situation in Libya.

10. What other legal means and avenues are available to address these crimes?

Beyond the ICC, domestic prosecutions and investigations in third States are an important avenue for accountability. Until now, Italy has been the most prominent in bringing criminal cases against direct perpetrators of serious crimes in Libya. In addition, countries like France and the Netherlands have opened investigations against certain individuals, some of which are named in the Communication. Notwithstanding such efforts, it is important to emphasize that investigations and prosecutions to date have focused on the crimes of human smuggling and trafficking. In order to provide justice, investigations must fully address the scope of crimes committed against

migrants and refugees in Libya as crimes against humanity and war crimes, and prosecute individuals who, because of their high positions, are the most responsible for these crimes.

11. What responsibility do European states and the EU have about what Libyan authorities are doing?

Over the past decades, and especially since 2015, European policies have aimed to close migration routes to Europe as much as possible. With this in mind, European states and the EU have entered into agreements with Libyan actors, such as the Libyan Coast Guard, to curb arrivals through the Mediterranean. However, these actors are deeply involved in the commission of crimes against migrants. This means that the financial support and provision of training, equipment, and coordination by European governments and institutions plays a role, at least indirectly, in the commission of crimes by the Libyan actors they enable.