



Crimes against Migrants as Crimes Against Humanity: the role of the ICC

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Migrations and international criminal law: an unexplored chapter



Libya and EU migration policies



Communication to the OTP

- Pursuant to art 15 of the ICC Statute
- June 2019
- Omer Shatz and Juan Branco, Lawyers
- *“The present communication provides the Prosecutor with evidence implicating European Union and Member States’ officials and agents in Crimes Against Humanity, committed as part of a premeditated policy to stem migration flows from Africa via the Central Mediterranean route, from 2014 to date”.*

Timeline

- February 2011: UN Security Council Resolution 1970/2011 referring the situation in Libya to the ICC



Timeline

- UN Security Council Resolution 1973/2011 demanding immediate ceasefire and authorizing all necessary means to protect civilians



Timeline

March 2011: ICC OTP opens an investigation for crimes against humanity, including murder and persecution, committed in Libya



**Cour
Pénale
Internationale**

**International
Criminal
Court**



Timeline: 2011-2018

- Forensic Oceanographic, Amnesty international
- UN Special Rapporteur on Extrajudicial or Arbitrary Executions
- The UN Special Rapporteur on Torture
- OHCHR; UNMSIL; Panel of experts established pursuant to Resolution 1973
- European Parliament, Council of Europe, European Council, individual EU actors



- *“examine whether investigations for crimes against humanity or war crimes are warranted in view of the scale, gravity and increasingly systematic nature of torture, ill-treatment and other serious human rights abuses [...] as a direct or indirect consequence of deliberate State policies and practices of deterrence, criminalization, arrival prevention, and refoulement.”*

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ICC Prosecutor



“**serious and widespread crimes against migrants** attempting to transit through Libya... a marketplace for the trafficking of human beings.”

“thousands of vulnerable migrants, including women and children, are being held in **detention centres** across Libya in often inhumane condition”

“Crimes allegedly committed include **killings, rape** and other forms of **sexual violence, torture and forced labour**, as well as **human trafficking**. There are increasing reports of a **slave trade** underway in Libya, with migrants from Africa being sold in slave markets ... **smuggling of migrants and human trafficking** into, through and from the Libyan territory, which could provide support to **other organised crime and terrorist networks** operating in Libya...”.

June 2019 Communication: Facts

Three main aspects of EU policies:

- the transition from Italian rescue operation *Mare Nostrum* to Frontex Joint Operation *Triton* (“1st Policy”);
- the ousting NGOs conducting search and rescue (SAR) missions (“2nd Policy”);
- the EU’s cooperation with the Libyan Coast Guard (“2nd Policy”).

...Resulting in:

- The deaths by drowning of thousands of migrants;
- The *refoulement* of tens of thousands of migrants attempting to flee Libya;
- Complicity in the subsequent crimes of deportation, murder, imprisonment, enslavement, torture, rape, persecution and other inhuman acts, taking place in Libyan detention camps and torture houses.

Mare Nostrum – October 2013

Objectives:

- “intercepting and rescuing all migrants’ vessels departing from the Libyan coasts”
- “bringing to justice human traffickers and migrant smugglers.”

Area of 70,000 square kilometers of the Mediterranean Sea encompassing the SAR zones of Italy, Libya and Malta.

Budget of 9.5 million Euros per month, funded by the Italian Government.

Rescued 150,810 migrants over a 364-day period.

Criticisms towards Mare Nostrum

- (1) the “pull factor” hypothesis: motivating more migrants to arrive on the Italian coast
- (2) the “death factor” argument: leading smugglers to shift their strategies and organize crossings in more hazardous conditions, thus increasing the risk of death for migrants during the crossing.

TRITON Joint Operation

- Operational scope of Triton much closer to EU shores, leaving around 40 nautical miles of key distress area off the coast of Libya uncovered;
- fewer vessels compared to Mare Nostrum;
- one third less of a budget than Mare Nostrum;
- shifting the burden of rescue onto commercial vessels.

TRITON Joint Operation

- The deterrence goal - Frontex JO Triton 2015 Tactical Focused Assessment, 14 January 2015:
- *“The end of Operation Mare Nostrum on 31 December 2014 will have a direct impact on the JO Triton 2014. The fact that **most interceptions and rescue missions will only take place inside the operational area** could become a **deterrence** for facilitation networks and migrants that can only depart from, the Libyan or Egyptian coast with favourable weather conditions and taking into account that the boat must now navigate for several days before being rescued or intercepted”*

TRITON Joint Operation

- The acceptance of risk:

An internal Frontex report from 28 August 2014 acknowledged that:

“the withdrawal of naval assets from the area, if not properly planned and announced well in advance – would likely result in a higher number of fatalities.”

Triton JO's alleged consequences

- Significant increase on number of deaths – 30 times rate (*Amnesty International; UNHCR; scholars*)
- The shipwrecks of 12 and 18 April 2015
- 25 April 2015 the President of the European Commission itself, Jean-Claude Juncker: *“it was a serious mistake to bring the Mare Nostrum operation to an end. It cost human lives.”*
- The “upgraded Triton”
- NGOs fill the SAR gap

Second Policy – from 2015

“..orchestrated the commission of the alleged atrocious crimes, this time not by omission, but by proxy”.

Two key components:

- “the ousting of the NGOs that filled the SAR gap and failed EU 1st policy;
- the establishment of an armed group to replace the NGOs in order to implement a widespread and systematic campaign of forced collective expulsions of those who somehow managed to flee Libya”.

Ousting of NGOs

- “EU and Italian actors launched a broad political persecution against rescue NGOs, which includes intimidation, defamation, harassment, and formal criminalization”
- Requests not to intervene in SAR operations, in favor of LYCG
- Denying authorization to disembarkation
- Increased administrative obstacles

EUNAVFOR MED – OPERATION SOPHIA

- *“Critical to our exit strategy is a capable and well-resourced Libyan Coastguard who can protect their own borders and therefore prevent irregular migration”.*
- (1) training
- (2) provision of patrolling assets
- (3) declaring Libyan SAR zone
- 4) establishing Maritime Rescue Coordination Centre (MRCC)

EUNAVFOR MED – OPERATION SOPHIA

- ECHR *Hirsi* Decision 2011
- Frontex 2014: “as for all Frontex operation, Triton will be operating in full respect with international and EU obligations, including respect of fundamental rights and of the principle of *non-refoulement* which excludes push backs.”
- UNHCR, 2015: “does not consider that Libya meets the criteria for being designated as a place of safety for the purpose of disembarkation following rescue at sea”

The reality check

- Is the LYCG under the control of the GNA or militias?
- UNSC Panel of Experts on Libya, 2017:
“neither the coastguard nor the navy has been notified to the Committee as part of the security forces under the control of the Government of National Accord”.
- Does the provision of assets violate the UNSC Resolution 2292/2016 on embargo?
- The EUNAVFOR Monitoring powers since August 2017
- Presence of Italian ships in Tripoli - coordination tasks

Alleged facts

- In the period 2016-2018, EU and Italy, via the LYCG, intercepted and pushed-back to Libya more than 40,000 persons
- Evidence for direct involvement of EU and Italian agents in each and every interception, detention and push-back operation LYCG is involved in (13 examples in Annex 2)

Humanitarian situation in Libya

- Libyan law criminalizes undocumented entry, stay and exit, punishable by imprisonment and forced labor and does not specify the maximum period for immigration detention;
- The Department for Combating Illegal Migration (DCIM), under the Libyan Ministry of Interior, is responsible for operating the official detention centers which hold thousands of men, women and children in prolonged arbitrary and unlawful detention;
- According to Human Rights Watch “most centers are under the effective control of whichever armed group controls the neighborhood where a center is located”;
- According to the OHCHR, “Torture and ill-treatment are systematic in detention facilities across Libya, particularly in the initial period of detention and during interrogations”;
- According to Human Rights Watch, in July 2018, there were between 8,000-10,000 people in official detention centers, compared to April 2018, where an estimated 5,200 were being held.

The June 2019 Submission to ICC

- “The migration policy of the European Union and Member States vis-à-vis Libya and the Central Mediterranean should be understood as a **policy of systematic and widespread attack of a pre-targeted population**;
- This policy was **designed and is implemented by the European Union**, comprised of the European Council, the Council of the European Union, the European Commission and its administrative agencies, including in particular its border agency Frontex;
- As the European Union acts on behalf of its State Members, responsibility also extends to the **heads of government, high-civil servants and political leaders involved in the decision-making** of the organization;
- The Italian authorities acted in many circumstances in an autonomous perspective and should be independently held responsible”

The June 2019 Submission to ICC

- The EU had full knowledge:
 - of the *Hirsi* ruling from 2012;
 - of the 2015 UNHCR guidelines regarding Libya;
 - of the current role Libyan agents played in the smuggling business, and of the overall situation in Libya;
 - It nonetheless decided to pursue what it knew was an illegal strategy that would severely attain the right to life of thousands of people.

International Criminal Law tools

Are these conducts actually punishable under the ICC Statute?



Jurisdiction

- *Ratione temporis*
- *Ratione materiae*
- UNSC referral?
- *Ratione personae*
- *Ratione loci* – effective control?

Effective control?

- “The EU exercises *de facto* a complete effective control over the Mediterranean routes used by civilians to escape violence.
- The Central Mediterranean is constantly and completely surveilled and patrolled by the coast guards and other bodies of frontline member states, alongside numerous vessels, aircrafts radars and C&C centers that are part of several maritime operations of EU agencies and in particular its border control agency Frontex”.

Admissibility

- Complementarity
- Gravity
- Interests of Justice

Chapeaux element of CAH

- Crimes listed under Article 7 of the Rome Statute constitute crimes against humanity insofar as they are committed as part of an:
 - (i) attack, that is
 - (ii) widespread or systematic
 - (iii) directed against any civilian population
 - (iv) with knowledge of the attack
 - (v) pursuant to or in furtherance of a State or organizational policy to commit such attack, and with
 - (vi) nexus between the crimes and the attack.

The Attack

- Triton’s “deterrence objectives”;
- “The consequence of this decision was the creation of a lethal SAR gap, in an area in the Mediterranean that is under the effective control of the European Union, in which thousands would drown;
- The objective of this new policy was to sacrifice the lives of many in order to impact the behavior of many others;
- Building on the lethal act of deterrence, this policy was unlawful *per se*, regardless its underlying outcome”.

Widespread and systematic

- Widespread “omission-based attack”:
 - number of victims
 - duration over time
 - geographical scope
 - the extent of means and resources that were mobilized and then removed and left unavailable for the naval operation Triton to conduct rescues, whilst maintaining effective control over the zone
- Systematic:
 - the attack was organized, implemented and effectively conducted by a highly structured apparatus of power, namely the European Union, its agents and officials.

Migrants as a “civilian population”

- Civilian victims can be “of any nationality, ethnicity or other distinguishing features”, so long as the attack in question is directed primarily against them and so long as they are not a “randomly selected group of individuals”;
- The notion does not require a high level of homogenization.

With the knowledge of the attack

- “The European Union actors had full knowledge of the attack, given that it was carried out pursuant to their own policy.
- This policy included legislative and administrative decisions which were made with foreknowledge of this policy’s lethal consequences, but also political and public discourses which were used to justify or disguise them”.

Pursuant to an organizational policy

- One of the most organized apparatus of the modern era - meeting the low requirement in section 7(2)(a) of the Rome Statute;
- Aimed to stem migration flows from Africa;
- Implemented through “a deliberate failure to take action”, “which is consciously aimed at encouraging such attack”;
 - EU’s policy of inaction, or of ‘killing by omission’, is not “inferred solely from the absence of governmental or organization action”;
 - Rather, a series of identifiable acts, concrete decisions and positive statements which, taken together, form the legislative and administrative framework for an attack under which the omission-based crimes occurred.

Murder

- “European Union officials and their agents knowingly caused the death of members of a civilian population, within the meaning of article 7(1)(a) of the Rome Statute”
 - I. Killed, or caused the death of, one or more persons;
 - II. The conduct was committed as part of a widespread or systematic attack directed against a civilian population;
 - III. The 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.

Causing the death

- “failing to fulfill a legal duty to act, *i.e.* the duty to render assistance to civilians in life-risking situation under European Union and Member States’ effective control;
- the duty to act was previously acknowledged and, at least in part, fulfilled by the implementation of the Italian operation Mare Nostrum over the critical SAR zone;
- not only the European Union and its State member actors were aware, but they had the capacity to act, as demonstrated by their previous pattern of conduct. They willingly refused to do so, therefore assuming subsequent criminal responsibility”.

Duty to act

- “The duty to protect the right to life is based, in the exceptional circumstances of the present case, on various normative frameworks:
- international maritime
- human rights
- refugee law”.

Part of a widespread and systematic attack - the effective control

- “The European Union was in a position to assist the persons in question, and thus to prevent their deaths.
- The Central Mediterranean was and still is under the effective control of the EU, manifested by the various means of surveillance and patrols, by the fact the MCCR of the relevant SAR zone is based in an EU’s frontline Member State’s capital (Rome, Italy) and by the various military and other naval operations the EU is operating in the region to combat terrorism, smuggling and irregular migration”.

The effective control

- In fact, the precedent operation Mare Nostrum, which patrolled off the Libyan shores, covered the critical SAR area, and was successful in rendering assistance;
- Likewise, in its 2nd Policy the EU kept on patrolling and monitoring the region by aircrafts, boats, radars, employ command and control facilities, commanding and coordinating operations of other maritime forces (such as the LYCG), and at times specifically engaged in interceptions and SAR operations;

The effective control

- “Choosing not to exercise the control does not render such control ineffective;
- The premeditated plan to a priori located EU’s vessels in a position that would ostensibly avoid maritime and human rights duties did not diminish the effective control over the area nor relieved the EU from the said international obligations;
- It did constitute a failure to act which, when causing the foreseeable death of thousands, constitutes a crime against humanity”.

Weak points

- Omission-based attack: against the “Element of crimes”
- Legally weak identification of the duty to act
- Factually untenable allegation of effective control
- Lack of consideration for the causality link

Mens rea

- “EU agents were well aware, before, during and after of the fact that their actions would lead to a significantly higher death rate of migrants.
- Frontex internal reports and other undisputed evidence demonstrate that **before** Triton was operational, the EU was already fully aware the operation would result in more casualties than when Mare Nostrum was in force, and the acknowledgment of its deterrent purpose.
- **During** the operation and even as the death rate dramatically increased, the EU ignored calls by commercial and private maritime sector that had to engage in rescue without having the competence and know-how to conduct SAR operations, a consequence which per se caused more deaths in the Mediterranean.
- **After** the lethal consequences of ending Mare Nostrum were acknowledged, notably after the Black April incidents, EU officials admitted the termination of Mare Nostrum and its replacement with Triton were “a tragic mistake that cost human lives”

Torture and other inhumana acts

- “In a similar fashion to the intentional nature by which the death of those who drowned was caused, here too EU official and agents intentionally inflicted severe and unnecessary pain and suffering, both physical and mental, upon persons under the control of EU, within the meaning of Article 7(2)(e) of the Rome Statute;
- by failing to comply with the legal duty to render assistance to persons in need of international protection who were in distress at sea in zones under their control, and by doing so with the intent to pursue a political objective, EU agents committed the crime against humanity of torture”

Modes of liability

- “Direct perpetration: e.g. the employees of Frontex, the Italian Maritime Rescue Coordination Centre, or European Union Member State’s SAR operational executives, who deliberately failed to react appropriately to provide assistance to migrants’ vessels in distress on the Mediterranean Sea in the mentioned situations, despite a legal duty to do so, thus directly causing the death of the asylum seekers who were not rescued and ultimately died;
- This responsibility by nature extends to the policy-makers and hierarchical superiors that formulated, instructed and ordered those policies, effecting a political plan;
- The EU had the ability but no political will to instruct Frontex to intervene beyond EU territorial waters, to remain committed to covering the critical SAR area that was previously covered by Italy and remained under EU’s effective control, and therefore put an end to the humanitarian crisis born from the adoption of EU’s 1st policy;
- As the then President of the 150 European Commission, Jean-Claude Juncker admitted in a statement following the Black April’s incidents: “Frontex could intervene in international waters tomorrow, if that were the general will”.

Weak points

- Obligations upon States

do not equal to

- Obligations upon individuals

Second policy as a CAH

- an attack within the meaning of article 7 of the Rome Statute, constituted of
 - (i) conspiring jointly with or through a consortium of militias (LYCG) to commit
 - (ii) multiple acts and omissions against migrants fleeing Libya
 - (iii) pursuant to EU's organizational and Italy's immigrations policies to stem migration flows in the Central Mediterranean route.

Attack against the civilian population

- **Widespread**
 - Conducting interception *in lieu* of rescue and *refoulement* instead of safe disembarkation of at least 40,000 civilian between 2016 and 2018;
 - all the survivors intercepted were immediately detained and exposed to the atrocious crimes taking places in detention centers in Libya;
- **Systematic:** Through legislative, executive and administrative acts, as well as active participation in the commission and facilitation of the prohibited acts themselves:
 - EU continued LYCG's financing, training and support;
 - Providing key information such as the location of migrant boats in distress, giving orders to the LYCG in connection with the interception and *refoulement* of the boats, and providing material support to the capacity-building of the LYCG.
- **Targeting** individuals flying Libya;
- EU agents were complicit in and **had preexisting knowledge** that their actions would lead to the commission of various crimes against the civilian population including persecution, deportation, imprisonment, murder, enslavement, torture, rape, and other inhumane acts.

Underlying crimes

- Committed during the interception and *refoulement*:
 - murder, persecution, deportation, torture, other inhuman acts;
- Committed in the detention camps:
 - unlawful imprisonment, murder, enslavement, torture, rape and other forms of sexual abuse.

Direct perpetration

- “Applicable to EU and Italian agents who found themselves on scene or directly participated in the so-called “rescue” operations that brought individuals to be taken into custody by their accomplices of the LYCG”.

Co-perpetration

- A **common plan or an agreement** with one or more persons
 - not to be expressly spelled out, but may “be inferred from the subsequent concerted action of the co-perpetrators;
 - the co-perpetrators **may initially plan to achieve a non-criminal goal** but are aware (a) of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime and (b) accept such an outcome;
- **Essential contributions** in a coordinated manner which result in the fulfilment of the material elements of the crime
- Co-perpetrators' **mutual awareness** that implementing the common plan will result in the fulfillment of the material elements of the crimes; and yet ... they carry out their actions with the purposeful will (intent) to bring about the material elements of the crimes, or are aware that in the ordinary course of events, the fulfillment of the material elements will be a virtually certain consequence of their actions.”
- The accused’s **awareness of the factual circumstances** enabling him or her to control the crime with the other co-perpetrator.

Essential contribution

- **“Without this policy** and the implementation thereof by European Union officials and their agents, **the crimes could not have taken place.**
- The role of relevant EU agents was therefore **essential**, and contributed in a highly coordinated manner in the fulfillment of the crimes, through numerous legislative, executive, administrative, bureaucratic acts, at both EU and Member States levels, to advance the said policy and its underlying crimes”.

Common plan

- “Overall common plan between Libyan fractions and EU and Italian officials, one that prolonged a decade-long **co-organization of the migratory policies** over the Mediterranean zone between the Libyan State and the European Union’s actors.
- Various formal, official and publicly accessible agreements and declarations, such as the Italian-GNA’s MoU, the EU Malta Declaration and EU decisions internalizing these plans and agreements, for example with respect to the mandate of Operation Sophia to train LYCG personnel.
- The provision of vessels to the LYCG, funding of detention centers through third parties, etc”.

Indirect co-perpetration

- **Perpetration through an agent**, whether the agent him or herself is guilty or not, where the accused “has control over the will of those who carry out the objective elements of the offence;
 - A crime was committed by a person or **persons other than the perpetrator**;
 - The perpetrator **controlled subordinates** through an organized structure of power, such that subordinates are interchangeable;
 - The perpetrator used the **direct perpetrator as a tool** or an instrument to commit the relevant crime;
 - The perpetrator acted with **intent** with respect to the commission of the crime;
 - The perpetrator was **aware of the factual circumstances** enabling them to exercise control over the crimes through another person.

Aiding and abetting

- For a person who, **for the purposes of facilitating the commission of a crime**, aids, abets or otherwise assists in its commission or its attempted commission, **including providing the means** for its commission;
- The accused intentionally carries out an act or acts consisting of **practical assistance, encouragement or moral support** to the principal offender; this includes the allowing of **resources** under one's responsibility to be used for the commission of crimes.
- The assistance must have had a **“substantial effect”** on the commission of the crime; however, proof of a **cause-effect** relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, **is not required**;
- May occur before, during, or after the principal crime has been perpetrated, and ... the **location at which [it] takes place may be removed** from the location of the principal crime.”

Other forms of liability

- Ordering
- Superior Responsibility – failure to prevent or punish the criminal acts of subordinates

Thank you!

