

TOWARDS A PROACTIVE AND VICTIM-CENTRED APPROACH BY THE ICC IN LIBYA



LAWYERS FOR JUSTICE IN LIBYA'S KEY RECOMMENDATIONS FOR THE 21ST ASSEMBLY OF STATE PARTIES OF THE INTERNATIONAL CRIMINAL COURT 5-10 DECEMBER 2022

The 21st Session of the Assembly of State Parties (ASP) of the International Criminal Court (ICC or the Court) will take place from 5 to 10 December 2022 in The Hague, the Netherlands. It will be the 11th ASP session since the opening of the ICC investigation in the Libya situation following referral by the United Nations Security Council (UNSC) pursuant to Resolution 1970 (2011).¹

The session takes place at a crucial time for the ICC in Libya. After more than a decade without any tangible progress in the Libya situation, the Office of the Prosecutor (OTP) has made some promising steps over the course of the last year. In November 2021, the ICC Prosecutor, Karim Khan, presented an “updated roadmap” for accountability in Libya, outlining a strategy to make Libya a priority.² This included aligning more resources within the OTP to the Libya situation, including

¹ S/RES/1970 (2011), 26 February 2011, available at: <https://www.un.org/securitycouncil/s/res/1970-%282011%29>.

² ICC-OTP, ‘Twenty-third report of the Office of the Prosecutor to the United Nations Security Council pursuant to Resolution 1970 (2011)’, 21 April 2022, available at: <https://www.icc-cpi.int/sites/default/files/2022-04/2022-04-28-otp-report-unsclibya-eng.pdf>.

the recruitment of Arabic speakers for the ‘Libya team,’ and the establishment of a more regular presence in the region. In his latest briefing to the UNSC, which took place from within Libya during an official visit, the Prosecutor also announced the submission of new applications for arrest warrants.³

However, these efforts risk to be in vain, as trust in the ICC in Libya is at an all-time low. Prosecutor Khan’s recent visit to Libya included an official meeting and handshake photo op with Khalifa Haftar, which outraged victims and civil society and called into question the Court’s impartiality and legitimacy.⁴ Haftar is the commander of a self-styled armed group allegedly responsible for a plethora of serious international crimes,⁵ and he has previously refused to cooperate with the ICC by failing to handover a wanted suspect.⁶ The meeting was highly offensive to many victims, affected communities and civil society in Libya, and has severely damaged trust in the Court as well as the willingness to collaborate with the OTP.

This has only exasperated pre-existing concerns. A study published in June 2022 by LFJL around the perceptions of justice in Libya, registered low levels of trust in the Court among affected communities in general, and civil society organisations (CSOs) in particular.⁷ The same study found that 90 per cent of respondents said they knew nothing or very little about the ICC.⁸ These findings are the result of years of minimal engagement by the ICC with victims and the civil society actors supporting them. Court officials have explained that resource constraints prevent them from prioritising outreach or victim participation in the Libya situation in the absence of further judicial developments.⁹ This undermines not only investigations into crimes, but also fails to realise the rights of victims as enshrined in the Rome Statute, including their right to participate in ICC proceedings.

In the absence of an effective outreach system in place, including by the OTP, much of the burden of facilitating the Court’s work in Libya rests on Libyan CSOs. The Court’s different organs – OTP, Outreach and Communication, Victim Reparation and Participation Section – have confirmed that they view support from civil society as essential. However, this fails to recognise that civil society in Libya is faced with a continuous crackdown on their work and shrinking civic space.¹⁰ For example, CSOs are expected to seek prior authorisation before engaging with international bodies, such as the ICC.¹¹ CSO members also continue to face surveillance, harassment, arrests, abductions, and killings. This in turn requires the Court, including in particular the OTP, to advocate directly with Libyan authorities for the protection of civil society, and to put in place a system that provides for clear protection measures for civil society when engaging with the Court.

The Prosecutor’s emphasis on complementarity has led the OTP to seek to strengthen cooperation with Libyan national authorities, as highlighted by the Prosecutor’s visit to Libya. While more cooperation is needed, LFJL is concerned about the capacity and will of those the OTP elects as its partners to facilitate accountability processes and deliver meaningful justice to victims. Currently, these very actors have demonstrated no interest in taking steps towards accountability domestically.

In line with this focus on building partnerships, the OTP has also increasingly collaborated with third states to tackle crimes committed against migrants and refugees in Libya, for example by becoming part of a Joint Team together with Italy, the Netherlands, the United Kingdom and Europol. As recalled in the OTP’s 24th report to the UNSC, the work of the Joint Team

3 ICC-OTP, ‘Twenty-fourth report of the Office of the Prosecutor to the United Nations Security Council pursuant to Resolution 1970 (2011)’ 9 November 2022, available at: <https://www.icc-cpi.int/sites/default/files/2022-11/2022-11-09-otp-report-unscl-libya-eng.pdf>.

4 LFJL, ‘Libyan civil society demand apology for ICC meeting with suspect of war crimes and crimes against humanity’ 9 November 2022, available at: <https://www.libyanjustice.org/news/libyan-civil-society-demand-apology-for-icc-meeting-with-suspect-of-war-crimes-and-crimes-against-humanity>.

5 The OTP has itself repeatedly mentioned evidence of crimes linked to the Libyan Arab Armed Forces (LAAF), commanded by Haftar. See for example: op. cit. ICC-OTP 21 April 2022, para 21; op. cit. ICC-OTP 9 November 2022, para 62.

6 ICC-OTP, ‘Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)’ 5 May 2020, available at: <https://www.icc-cpi.int/news/statement-united-nations-security-council-situation-libya-pursuant-unscl-1970-2011-8>.

7 LFJL, ‘Justice is the only way forward’: Perceptions of justice in Libya ten years on, June 2022, p.28, available at: https://uploads-ssl.webflow.com/5a0d8805f2f99e00014b1414/62b0e74c1499e70f14dd82d9_Perceptions%20of%20Justice_EN%20FINAL.pdf.

8 Ibid.

9 LFJL, ‘Victims’ Voices: Participation At The International Criminal Court’ December 2021, p.8-9, available at: https://uploads-ssl.webflow.com/5a0d8805f2f99e00014b1414/61dc329e57d2f3ece63e63e6b4_Victims%20Voices_Participation_ICC_EN.pdf.

10 See for example issues with Libya’s recent cyber-crime law: LFJL, ‘Human rights organisations tell Libyan House of Representatives to immediately repeal anti cyber-crime law’ 10 November 2022, available at: <https://www.libyanjustice.org/news/human-rights-organisations-tell-libyan-house-of-representatives-to-immediately-repeal-anti-cybercrime-law>.

11 See for example: A/HRC/49/4, 23 March 2022, para 61, available at: https://www.ohchr.org/sites/default/files/2022-03/A_HRC_49_4_AUV.pdf

has resulted in the extradition of two Eritrean nationals to the Netherlands and Italy in October 2022.¹² However, the Court's own progress in investigating and prosecuting crimes against migrants and refugees in Libya remains unclear.

At this year's ASP session, State Parties have the opportunity to support the ICC to become a more meaningful instrument for advancing accountability and justice for victims in the Libya situation, and the ICC to reflect on how to do so. The recommendations set out below outline how State Parties and the ICC can harness this opportunity. They build on LFJL's continuous engagements and consultations with civil society, affected communities, and victims in Libya, as well as ICC officials, representatives of a number of State Parties, and international justice experts.

RECOMMENDATIONS

Responsibility to ensure greater efforts to improve the work of the ICC falls on both the Court and all its bodies, as well as State Parties, to ensure not only resource availability but also efficiency within the Court to deliver its mandate to the Libyan people. As such both the Court and its State Parties should ensure the following:

Recommendation 1. Ensure that the Court has adequate resources to fulfil all aspects of its mandate in Libya

The ICC proposed budget for 2023 amounts to €182,241,300, which represents a 20 percent increase on the Court's 2022 approved budget.¹³ This includes an anticipated increase in resources allocated to the Libya situation across the Court, with €3,125,000 proposed for 2023, versus €2,118,200 approved in 2022.¹⁴ Part of the requested budget increase is due to prosecutorial activities in active investigations, including Libya.¹⁵ The proposed budget further notes an increased need for the Registry to provide protection and support to witnesses in a number of situations including Libya.¹⁶ The Public Information and Outreach Section (PIOS) also requested a 17.7 percent increase over the amount approved in 2022, to facilitate missions to conduct outreach activities for the situations currently under investigation, including to "Tunisia and another Arab country" with regard to the situation in Libya.¹⁷

It is of paramount importance for States Parties to approve the 2023 budget including budget increases, in order to enable the Court to continue to prioritise the Libya situation and to make tangible progress for victims and affected communities. Budgetary procedures should be transparent and needs-driven. In addition to investigations, activities that enable the realisation of the Court's mandate towards victims as enshrined in the Rome Statute, such as outreach and victim participation, cannot be compromised by budget constraints.

12 ICC, 'Statement of ICC Prosecutor Karim A.A. Khan KC on arrest and extradition of suspects in relation to crimes against victims of trafficking in Libya' 22 October 2022, available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-arrest-and-extradition-suspects-relation-crimes>

13 ICC, 'Proposed Programme Budget for 2023 of the International Criminal Court' ICC-ASP/21/10, 21 July 2022, available at: <https://asp.icc-cpi.int/sites/asp/files/2022-08/ICC-ASP-21-10-ENG.pdf>.

14 Ibid, Annex XI, p. 224.

15 This includes, for example, the recruitment of country-specific experts within the OTP, including for Libya. Ibid, p.67.

16 Ibid, p. 4.

17 Ibid, pp.145-146.

Recommendation 2. Uphold the fundamental principles of the Rome Statute that guarantee victims' rights and role before the Court, including through adequate outreach and victim participation in the Libya situation

To date, outreach activities have been extremely limited in Libya, with no budget and no outreach strategy dedicated to outreach in Libya in contrast to other situations.¹⁸ Similarly, the victim participation framework enshrined in the Rome Statute to enable victims to be active participants in the process, and to express their views and concerns before the ICC has remained largely unutilised in Libya.¹⁹

Court officials have explained such lack of proactive efforts by pointing at resource constraints: resources cannot be allocated to outreach or victim participation in the Libya situation in the absence of further judicial developments, such as the transfer of suspect to the Court or the issuance of a new public arrest warrants.²⁰ While resource challenges need to be addressed, they cannot be an excuse to ignore victims' rights. Moreover, sequencing the engagement of victims and affected communities to judicial developments fails to recognise their role as a catalyst for the generation of new evidence in ongoing investigations.

While states need to provide the Court with adequate resources (recommendation 1), the Court should take a more proactive efforts to guarantee adequate outreach to affected communities in Libya and meaningful victim participation. This includes adopting a cross-organ outreach strategy tailored to the Libyan situation to ensure that victims and affected communities are properly informed and engaged. Information should be made available in Arabic through accessible platforms and be tailored and responsive to victims and affected communities' needs and concerns.

These efforts are urgently needed also to restore trust in the Court among victims, affected communities, and civil society in Libya. To do so, the Court should also explore ways to redress the insult of the Prosecutor's meeting with Khalifa Haftar, including by providing an apology and investigating the actions of Karim Khan to ensure that he is held accountable through necessary action.²¹

Recommendation 3. Promote and protect Libyan civil society working towards justice and accountability

While the OTP has been strengthening its relationship with some Libyan CSOs through its enhanced field presence, such cooperation is called into question by security concerns as Libyan civil society faces increasing attacks, reprisals, and shrinking civic space. In this context, the Court as well as State Parties should systematically condemn attacks and reprisals against civil society members and call on Libyan authorities to ensure a safe and enabling environment for the work of civil society. The cooperation of Libyan authorities with the Court should be measured also by the degree it facilitates the work of civil society and human rights defenders to support the Court, and the measures it takes to ensure their protection against reprisals.

18 The report on ICC activities and programme performance for 2021 does not mention any activity related to Libya by the Public Information and Outreach Section (PIOS). See: ICC-ASP/21/11 pp.31-31. In previous reports, activities related to the Libya situation were "limited to updating the list of contacts, following the developments on the ground, and using all opportunities to meet and consult with key actors visiting The Hague. See: ICC, ICC-ASP/20/7 *, para 204. The Registry's budget for 2022 was increased by 10.3 percent to support, among others, the recruitment of outreach staff in various listed situations, without mention of any funds being allocated for outreach staff or activities in Libya. See: ICC, ICC-ASP/20/10.

19 On 24 January 2012, Pre-Trial Chamber I issued its "Decision on Victim's Participation in Proceedings Related to the Situation in Libya," which outlines the framework for the collection and assessment of applications for victim participation. However, the Victim Participation and Reparations Section (VPRS) had only received nine applications by 2019, after which it ceased issuing periodic reports "pending new developments in the Situation." See *op. cit.* LFJL, December 2021.

20 *Op. cit.* LFJL, December 2021.

21 *Op. cit.* LFJL, 9 November 2022.

Moreover, Libyan civil society lack clarity on what the Court can and cannot do to protect them beyond precautionary measures. While the Court has protective measures that can be granted to witnesses and victims who appear or testify before the Court²², the same does not seem to exist for CSOs engaged by the OTP in the context of investigations. According to the Guidelines Governing the Relations between the Court and Intermediaries, “in the event that the performance of the functions of an intermediary creates security risks to the intermediary, the Court must take measures to manage those risks.”²³ Regardless of whether Libyan CSOs cooperating with the Court are formally considered intermediaries under the Guidelines²⁴, there is no reason why the Court organs should not extend to them the same duty of care to Libyan CSOs should risks arise as a consequence of their engagement. The Court, and particularly the OTP, should establish tailored measures for the protection of Libyan CSOs and their members when they engage with the Court.

Recommendation 4. Promote positive complementarity with a focus on delivering meaningful justice to all victims of Rome Statute crimes in the Libyan situation

Strengthening cooperation with national authorities within and outside Libya in line with the principle of complementarity is a key element of the Prosecutor’s strategy in Libya as well as other situations. Accordingly, the Prosecutor has sought to strengthen cooperation with Libyan authorities, including through his official visit to Libya in November 2022, as well as a previous visit by the Deputy Prosecutor in June 2022. However, there is little to show that Libyan authorities currently have the capacity or the will to deliver meaningful justice to victims of Rome Statute crimes in Libya, as shown, for example, by the authorities’ continuing crackdown on civil society actors working to advance accountability. To date, the Court has also transmitted a total of 16 communications on non-cooperation to the Council regarding the situations in Darfur and Libya.²⁵

In this context, the Court as well as State Parties should push for genuine cooperation, which should go beyond welcoming official visits, and include tangible efforts to secure the arrest and transfer of suspects to the Court, enabling the Court’s safe and unselective access to all victims and affected communities, and protecting and promoting civil society actors working towards accountability. Moreover, ICC’s partnerships with national authorities should be based on a critical assessment of the authorities’ effective capacity and will to contribute to delivering justice to victims.

States should also continue to actively contribute to positive complementarity in national jurisdictions, for example by exercising universal jurisdiction over relevant serious international crimes committed in Libya, to complement the work of the Court.

Recommendation 5. Investigate and prosecute crimes against humanity and war crimes committed against migrants and refugees in Libya

In November 2021, together with the European Centre for Constitutional and Human Rights (ECCHR) and the International Federation for Human Rights (FIDH), LFJL submitted an Article 15 Communication to the OTP which showed that crimes against migrants and refugees committed in Libya may amount to crimes against humanity and war crimes.²⁶ This assessment was preliminarily confirmed by the OTP in its 23rd report to the UNSC.²⁷

22 See: ICC, ‘Witnesses’ available at: <https://www.icc-cpi.int/about/witnesses>.

23 ICC, ‘Guidelines Governing the Relations between the Court and Intermediaries’ March 2014, pp. 17-18, available at: <https://www.icc-cpi.int/sites/default/files/GRCI-Eng.pdf>.

24 Entering into a contractual relationship with the Court could expose them to further security risks.

25 ICC-ASP/21/24, 20 October 2022, available at: <https://asp.icc-cpi.int/sites/asp/files/2022-11/ICC-ASP-21-24-ENG.pdf>.

26 See the executive summary of the communication: LFJL, FIDH, ECCHR, ‘Situation in Libya – Article 15 Communication on the Commission of Crimes against Migrants and Refugees in Libya’ 19 November 2021, available at: https://uploads-ssl.webflow.com/5a0d8805f2f99e00014b1414/619b93e924661967febf4b73_Executive%20Summary_Libya_ICC_LFJL-migration.pdf.

27 Op. Cit. ICC-OTP, 21 April 2022.

The OTP should confirm an investigation into these crimes with a view to prosecuting those most responsible before the Court. Such investigation should occur irrespective of the work of the Joint Team and other relevant national investigations. LFJL believes that the Court is best placed to capture the nature and gravity of the most serious crimes through the Rome Statute, and to prosecute those most responsible through open-ended and in-depth investigations, which may not be possible for domestic authorities. Domestic investigations and prosecutions by European states should not replace, but rather complement, an ICC investigation.

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