

Assessing the Responsibility of EU Officials for Crimes Against Migrants in Libya

Written by Pat Rubio Bertran

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PAT RUBIO BERTRAN, JUL 2 2021

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The International Criminal Court (ICC) has had an open investigation in Libya since 2011, following a unanimous referral by the United Nations Security Council (UNSC) (ICC, 2011). The investigation has involved charges that include crimes against humanity (murder, imprisonment, torture, persecution, and other inhumane acts) (ICC, 2011). On 8 May 2017, the Prosecutor of the ICC, Fatou Bensouda, told the UNSC that her office was examining the feasibility of opening an investigation into migrant-related crimes in Libya (ICC 2017). Crimes against humanity, as per the Rome Statute of the International Criminal Court, means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, rape and other forms of sexual violence, persecution, enforced disappearance, the crime of apartheid, and other inhumane acts (ICC 1998).

In the context of widespread and systematic crimes committed against migrants in Libya, the European Union (EU) and its member states continue to collaborate with the North African country to stop migration to the EU via the Central Mediterranean. Since 2014, the EU has not had an active search and rescue mission for migrants at sea attempting to flee from Libya (Pillai 2019). Instead, the current policy consists of pushing migrants and refugees back to the North African country by training and funding the Libyan Coast Guard (LCG) to intercept migrants, which end up in detention centers in Libya (Pillai 2019). Scholars Itamar Mann, Violeta Moreno-Lax, and Omer Shatz have gone one step further and asked for the role of the EU to be scrutinized (Mann, Moreno-Lax and Shatz 2018). They state that 'assisting, training, or funding organs of countries that disregard human rights may trigger international responsibility' (Mann, Moreno-Lax and Shatz 2018). Moreover, they argue, no aid or assistance should be offered in a context of gross and systematic human rights violations if it can contribute to maintaining the status quo (Mann, Moreno-Lax and Shatz 2018).

So far, the issue of the EU and its member states' involvement in Libya has been mostly discussed in terms of state responsibility and human rights violations. However, influential observers, and even French President Emmanuel Macron, stated that trafficking in the North African country has become a crime against humanity (Mann, Moreno-Lax and Shatz 2018). Within this environment, claims demanding an investigation of the EU's involvement in crimes against migrants in Libya came to fruition with a Communication to the Office of the Prosecutor of the ICC in 2019 (Shatz and Branco 2019). Invoking Article 15 of the Rome Statute, relating to the initiation of *proprio motu* investigation, Omer Shatz and Juan Branco, lawyers and professors at the Paris Institute of Political Studies, also known as Sciences Po, alleged that thousands of deaths and other 'crimes against humanity' had been committed as a direct result of EU policy. In their communication, Shatz and Branco discuss several modes of liability that could emerge from the EU's policies in Libya and the Mediterranean (Shatz and Branco 2019). All the above calls for a need to assess the implications of the EU's collaboration with Libya, not as an international organization but as an individual agent.

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The aim of this chapter is to assess if individual criminal responsibility can emerge as a result of border externalization policies in Libya, exclusively for aiding and abetting crimes against humanity against migrants. The first section of the chapter will look into the widespread and systematic crimes that migrants face in Libya and its alleged perpetrators. The second section will analyze the relevant legal aspects of aiding, abetting, and otherwise assisting crimes against humanity. The third section will critically analyze the EU's policies and collaboration with Libya, keeping in mind the two main elements of criminal responsibility: the mental and material elements. The last section will assess if those policies could trigger the ICC's jurisdiction and what challenges could arise.

Crimes against Migrants and Border Externalization Policies

As early as in 2011, when the ICC opened its investigation for crimes against humanity in Libya, the International Organization for Migration (IOM) issued an alarm after gathering testimonies of trafficking victims in Libya, which they defined as a 'torture archipelago' (UN News 2017). Also in 2011, the Panel of Experts on Libya, together with the United Nations Support Mission in Libya (UNSMIL), reported that from the moment migrants enter Libya, they become subjected to unlawful killings, torture and other ill-treatment, arbitrary detention and unlawful deprivation of liberty, rape and other forms of sexual and gender-based violence, slavery and forced labor, and extortion and exploitation by armed groups, traffickers, smugglers, private parties, police, the Libyan Coast Guard (LCG), and the Department for Combating Illegal Migration (UNSC 2017).

In August 2017, Agnes Callamard, United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions submitted a report regarding unlawful deaths of migrants and refugees (UNGA 2017). One of the violations Callamard addresses is the threat posed to migrants resulting from border externalization policies, which could amount to aiding and assisting in the deprivation of life and the failure to prevent foreseeable deaths or other violations (UNGA 2017, 2). In the same report, Callamard detailed how border externalization policies, including 'assisting, funding, or training agencies in other countries to arrest, detain, process, rescue, or disembark and return refugees or migrants' raised serious concerns where the recipient states are alleged to be responsible for serious crimes (UNGA 2017, 10–36). She goes on to remark that, by 'funding and training agencies that commit those abuses, funding States are potentially aiding and assisting loss of life' (UNGA 2017, 11–37). One year later, in 2018, Nils Melzer, the United Nations Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment echoed Callamard's findings and stated that 'for the most part, these violations follow a programmatic pattern that can be described as systematic' (UNGA 2017, 16–58).

Violeta Moreno-Lax and Mariagiulia Giuffr  explain how the EU-Libya cooperation, both at sea and on land, and the Italy-Libya memorandum of understanding (MoU) are examples of those migration containment policies (Moreno-Lax and Giuffr  2017). Moreno-Lax and Giuffr  define those policies as forms of 'contactless control' which, far away from continental Europe, present new challenges to determine responsibilities (Moreno-Lax and Giuffr  2017). The strategy launched in 2016 by the EU has transferred all effective management to Libyan agents, aiming to elude all possibilities of international legal responsibility (Moreno-Lax and Giuffr  2017). However, in his 2018 report to the UN Human Rights Council, Melzer affirmed that those policies of 'contactless control' might trigger the ICC's jurisdiction (UNGA 2018).

Aiding, Abetting, and Otherwise Assisting

Aiding, abetting, and otherwise assisting is a mode of liability in international criminal law, based on holding an individual criminally responsible for a crime, even if that individual is not directly responsible for having committed the act (Vij 2013). Whilst the Rome Statute does not strictly define aiding and abetting, *ad hoc* tribunals have unanimously defined an individual liable for aiding and abetting as 'a person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of a crime' (United Nations 1993). 'Aiding' generally refers to physical assistance, and 'abetting' is used to refer to a form of encouragement or persuasion (Vij 2013).

The most challenging part of analyzing this mode of individual criminal responsibility is to determine its minimum requirements (Ambos 2013). There seems to be a universal agreement on two main requirements: *actus reus* and

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mens rea. *Actus reus* is the 'criminal act' (the physical/material element), while *mens rea* refers to the 'criminal intent' (the 'mental element') (Knoops 2014). Regarding the material element, jurisprudence under the International Criminal Court demands that the acts committed by the individual must be specifically directed to assist, encourage, or lend moral support to the commission of the crime (Vij 2013, 159). Most importantly, this support must be 'substantial' for the perpetration of the crime (Vij 2013, 35). In order to find the individual liable, the person must have aided or abetted before, during, or after the crime was being committed (Vij 2013, 35). It is important to highlight that the assistance can either be an act or omission, and there are no geographical or temporal limitations to it (Vij 2013, 35).

Under the jurisdiction of the International Court of Justice (ICJ), Article 16 of the draft articles of the Responsibility of States for Internationally Wrongful Acts of the International Law Commission (ILC) describes aiding and abetting as the following:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if (International Law Commission 2001):

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

Even if the ILC draft articles are not binding, scholars James C. Hathaway and Thomas Gammeltoft-Hansen argue that Article 16 has generated 'wide support as a matter of state practice and *opinio juris*' (Gammeltoft-Hansen and Hathaway 2014). While there is not exact definition of what an action must amount to for it to fit with the definition of 'substantial contribution', case law defines it as a 'contribution that in fact has an effect on the commission of the crime' (United Nations 2000). On the other hand, under ICC jurisprudence, there is no mention of a need for 'substantial' support for the perpetration of the crime. Subparagraph (c) of Article 25 (3) of the Rome Statute deals with the contribution that must exist for a person to be liable for aiding and abetting, and it defines it as a person that 'for the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission' (ICC, 1998). According to scholar Kai Ambos, the fact that 'otherwise assisting' was added as a mode of individual criminal responsibility seems to entail an even lower threshold (Ambos 2013, 14). Still, Ambos concludes, one should consider the substantial effect of the assistance to the crime as an independent constituting element of modes of liability (Ambos 2013, 14).

The second requirement to assign liability is the mental element. In case law produced by the International Criminal Tribunal for the former Yugoslavia (ICTY), the *mens rea* for aiding and abetting cases has remained 'knowledge' (Vij 2013, 158). 'Knowledge' has been defined as being aware or having knowledge that the acts or omissions are indeed assisting in the commission of a crime by the direct perpetrator (Vij 2013, 158). Moreover, since *mens rea* is defined as knowledge, it is not even necessary for the aider and abetter to have the same intent as the main perpetrator (Vij 2013, 158). Generally, the aider-abettor must only be aware of the basic elements of the main perpetrator's crimes in order to satisfy the mental element (Vij 2013, 159). On the other hand, to be liable under the ICC's jurisdiction, the individual must act with the intent to facilitate the crime, know, or desire that his conduct will facilitate the commission of the crime (Vij 2013, 159).

Ambos explains that the wording in the Rome Statute suggests a threshold that goes beyond the ordinary *mens rea* requirement (Ambos 2013, 15). In Article 25(3) it says that the aider-abettor must act 'for the purpose of facilitating the commission of the crime' (ICC 1998). According to Ambos, the term 'purpose' extends beyond the mere definition of knowledge (Ambos 2013, 15). The word 'facilitating' though, confirms that substantial assistance is not an essential condition of the main crime (Ambos 2013, 53).

EU-Libya Cooperation: Externalizing Responsibilities

On 3 and 11 October 2013, two shipwrecks happened near Lampedusa, Italy, causing the death of 636 people (Tazzioli 2016). A few days after the shipwrecks, Italy launched a military-humanitarian operation called Mare Nostrum, with the main objective of rescuing migrants in distress at sea (Tazzioli 2016). Mare Nostrum managed to

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save over 150,000 people in one year and prevented 2,000 to 3,000 migrants from disappearing in the Central Mediterranean (Eisinger 2015). Italy then asked the EU to support their efforts and contribute to their life-saving efforts, but most nations refused because they considered Mare Nostrum a pull-factor for illegal immigration (Eisinger 2015). The Italian-led search and rescue mission officially ended in November 2014, when it was replaced by Triton, a joint EU operation coordinated by Frontex, the European Border and Coast Guard Agency (Tazzioli 2016). However, Triton changed its focus from rescuing refugees and migrants at sea to being solely about border control and preventing illegal crossings (Tazzioli 2016).

2016 marked a record of refugees and migrants attempting to reach Europe via the Central Mediterranean route (European Commission 2017). The year 2016 was also a record year for the number of lives lost at sea: over 4,500 people drowned in the attempt to cross (European Commission 2017). Since then, the EU has intensified efforts to prevent migrants and refugees from reaching Europe from Libya (Human Rights Watch 2019). EU institutions and member states have invested millions of euros to improve the capacity of the Tripoli-based Government of National Accord (GNA), to prevent migrants from fleeing Libya by boat and detain them in detention centres (Human Rights Watch 2019).

Italy has also taken the lead in providing material assistance and training to the LCG and have passed onto them the responsibility of coordinating rescue operations in order to increase the number of interceptions (Human Rights Watch 2019). However, the Panel of Experts on Libya explained in a report to the UNSC that the LCG has not been notified as part of the security forces under the control of the GNA, and the issue of control is further highlighted by multiple reports of criminal activities involving LCG (UNSC 2017, 41). Migrants have recounted dangerous, life-threatening interceptions by armed men believed to be from the LCG (UNSC 2017). After being brought back to Libyan shores, migrants are often beaten, robbed, and taken to detention centers or private houses and farms, where they are subjected to forced labor, rape, and other sexual violence (UNSC 2017).

In January 2017, the European Commission sent a communication to the European Parliament, the European Council and the Council titled 'Migration on the Central Mediterranean route: Managing flows, saving lives' (European Commission 2017). In that communication, the Commission set out the main goals to, firstly, ramp up training for the LCG to autonomously conduct search and rescue (including disembarkation) in Libyan waters and, secondly, to strengthen Libya's southern border (in the Sahara Desert) to hinder irregular movements through Libya and into Europe (Moreno-Lax and Guiffre 2017). The EU had already started a training program for LCG officers, with a focus on the interdiction of migrant boats (Moreno-Lax and Mariagiulia 2017).

In parallel, in February 2017, the Italian Prime Minister and the Head of the National Reconciliation Government of the Libya State signed an MoU to *inter alia* tackle border security and combat the steady rise of smuggling (El Zaidy 2019, 4). Under that framework, Italy's parliament approved the donation of 12 patrol vessels to the LCG to increase interceptions of migrant boats attempting to reach Europe (El Zaidy 2019, 10). Moreover, the EU trained 237 LCG officers to support Italian efforts (El Zaidy 2019). Danilo Toninelli, Italy's Transport Minister, stated in 2018 that the support to Libya given by Italy to prevent boats reaching Europe was worth €2.5 million and included the 12 boats and funds for training and maintaining the LCG officers (El Zaidy 2019). The parties to the MoU also agreed on the need to find rapid solutions to the problem of 'illegal' migration to Europe, while respecting international human rights treaties (Moreno-Lax and Guiffre, 8). Italy agreed to fund the establishment of 'reception' centers in Libya, where migrants and refugees will remain detained until they accept to be voluntarily returned to their home countries (Moreno-Lax and Guiffre, 8). Relying on EU funds, Italy agreed to provide technical and economic support to Libyan agencies in charge of the fight against 'illegal' migration, including LCG (Moreno-Lax and Guiffre, 8).

The training and assistance provided by the EU and Italy are aimed at enabling Libya to intercept boats of migrants and refugees attempting to reach Europe (Moreno-Lax and Guiffre, 8). Since all those measures were put in place, the amount of people reaching Europe via the Central Mediterranean lessened considerably (El Zaidy 2019, 11). Since then, migrants continue to attempt the crossing from Libya, but they are either intercepted by the LCG or pushed back by Italian or European authorities at sea (El Zaidy 2019). All migrants returned to Libya by the LCG encounter indefinite detention and other inhumane or ill treatment in detention centers (El Zaidy 2019, 15), as described in the introduction of this chapter.

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Actus Reus: The Material Contribution

The EU's decision to end Mare Nostrum in 2014 led to a gross increase in drownings (Rettman, 2019). Triton covered an area up to 30 nautical miles from the Italian coastline of Lampedusa, leaving around 40 nautical miles of key distress area off the coast of Libya uncovered (Rettman 2019). The first mass drowning occurred in January 2015 and the overall death rate increased by 30 percent in the following years (Rettman 2019).

The EU also provides support to the LCG to enable it to intercept migrants and refugees at sea, after which they are taken back to Libya where they face arbitrary detention, inhuman, and degrading conditions and the risk of torture, sexual violence, extortion, and forced labor (Rettman 2019). According to Human Rights Watch, the increase in interceptions by the LCG led to an increase in the number of migrants and refugees detained in Libya (Human Rights Watch 2019). In July 2018, there were between 8,000-10,000 people in official detention centers, up from 5,200 in April 2018 (Human Rights Watch 2019). Despite the chaos and dangerous situation in the North African country, the EU's objective of returning migrants and refugees to Libya exposed a further 40,000 people to crimes amounting to crimes against humanity between 2016 and 2018 (Human Rights Watch 2019).

Mens Rea: The Mental Element

It is clear that EU agents have knowledge of the crimes to which migrants are exposed in Libya and are equally aware of the fact that those crimes are direct result of their acts and omissions. Concerning actions at sea, an internal report by Frontex in August 2014 warned that the withdrawal of naval assets from the area previously covered by Mare Nostrum would likely result in a higher number of fatalities (Rettman 2019). And still, Triton's objectives were never adapted to search and rescue. In addition, the humanitarian organization *Médecins Sans Frontières* (MSF), discussed in 2019 the consequences of European containment and pushback policies in the context of Libya. MSF argued that dismantling search and rescue capacities at sea and sponsoring LCG efforts to intercept migrants at sea and forcibly return them to Libya was resulting in an increase of people's chances of dying at sea as well as being subjected to trafficking, abduction, detention, and extortion (MSF, 2019).

The latest UNSC report from April 2020, clearly supports that statement (UNSC 2020). The Secretary-General states, 'Libya cannot be considered a place of safety for the disembarkation of refugees and migrants rescued at sea... However, refugees and migrants continued to be disembarked in Libya, mainly after interception by the Libyan coastguard'. The report reads that 'the continuing systematic and arbitrary detention of refugees and migrants who disembark in Libya is alarming' (UNSC 2020), and that 'conditions inside detention centres remain appalling' (UNSC 2020). UNSMIL has also documented the many ways in which the LCG poses a direct threat to migrants' lives by *inter alia* demonstrating reckless behavior, using firearms against migrants on boats and displaying physical violence (UNSMIL and OHCHR 2018). In the report, there are accounts of incidents, involving aggressive behavior against migrants and refugees, which 'are not isolated' (UNSMIL and OHCHR 2018).

Regarding the awful conditions in detention centers, senior EU officials are aware of the crimes migrants face when detained in Libya. In November 2017, Dimitri Avramopoulos, the EU's Migration Commissioner, said that 'we are all conscious of the appalling and degrading conditions in which some migrants are held in Libya' (Human Rights Watch 2019). According to Human Rights Watch, he and other senior EU officials have repeatedly asserted that the EU wants to improve conditions in Libyan detention centers in recognition of grave and widespread abuses (Human Rights Watch 2019). However, interviews with detainees, detention center staff, Libyan officials, and humanitarian actors revealed that EU efforts to improve conditions and treatment in official detention centers have had a negligible impact (Human Rights Watch 2019).

Besides the above reports from UN special rapporteurs, Frontex, and human rights organizations, the European Court of Human Rights (ECHR) also made clear its position to Italy regarding its policies towards Libya. In the case *Hirsi Jamma and Others v. Italy*, the Grand Chamber of the ECHR unanimously ruled that Italy's push back operations intending to return migrants and refugees at sea to Libya amounted to a violation of the prohibition of torture and other inhuman or degrading treatment under Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) because Italy 'knew or should have known' that migrants and

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refugees would be exposed to treatment in breach of the ECHR in Libya (European Court of Human Rights 2012). On the other hand, that judgement has not deterred EU member states to continue implementing the same practices.

Conclusion

Nils Melzer detailed in his 2018 report that the widespread crimes against humanity committed against migrants in Libya have a causal connection to certain external policies (UNGA 2018, 16). The EU policies in Libya seem to fit that definition. By refusing search and rescue, and funding and training the LCG, EU agents are providing means for the commission of crimes against migrants in Libya. Therefore, criminal responsibility for crimes against humanity can emerge from those actions.

The investigation into the situation in Libya by the Office of the Prosecutor of the ICC focused on the crimes against humanity of murder, imprisonment, torture, persecution, and other inhumane acts, allegedly committed by Libyan agents (Mann, Morena-Lax, and Shatz 2018). However, if the ICC intends to investigate crimes against humanity occurring in Libya, it cannot do so without examining the role of the EU and its officials. As Itamar Mann, Violeta Moreno-Lax, and Omer Shatz explain, the 'decision to also investigate the collusion of European actors would more adequately address the entire situation, its systemic nature and programmed design' (2018). According to them, any investigation that does not take into consideration the involvement of EU agents will just showcase 'the consequence rather than the cause of suffering, in a system that traps migrants in a vicious circle of more control, more danger, and more dependence on facilitators to escape life-threatening perils' (Mann, Morena-Lax, and Shatz 2018). Still today, almost on a weekly basis, we hear of incidents in the Central Mediterranean: European coastguards refusing to respond to distress calls at sea, leaving hundreds of people drifting at sea for several days, or secretly organizing privatized pushback operations to Libya (Migreurop 2020).

According to the case law and definitions of aiding and abetting, there is enough evidence to justify the emergence of individual criminal responsibility from the EU's collaboration with Libya. However, that does not mean that the Prosecutor of the ICC would carry out the investigation. Under the Rome Statute, the ICC would not have jurisdiction to investigate if EU member states decided to investigate domestically. Moreover, the Prosecutor could, under Article 53, decide not to pursue the investigation if there are substantial reasons to believe that it would not serve the interests of justice, even after taking into account the gravity of the crime and interests of victims (ICC 1998). If, on the other hand, the ICC decided to investigate EU officials, a wider scope and evidence would be taken into account, as well as other modes of liability, as described in Shatz and Branco's communication to the Prosecutor of the ICC (Shatz and Branco 2019).

Last but not least, as Itamar Mann, Violeta Moreno-Lax, and Omer Shatz state, a finding that 'European actors were involved in such crimes... would show that militia and trafficking agents are often working at the service (or for the ultimate benefit) of European principals, precisely for the purpose of preventing poor and black populations from access to European sources of wealth' (Mann, Moreno-Lax and Shatz 2018). Including EU officials in the investigation would also set a precedent for other cases of 'contactless control' or border externalization policies, like those of Australia and the United States (Ferlick, Kysel and Podkul 2016), showing that those policies can be deemed active forms of abuse where the end effect is the same (Mann, Moreno-Lax and Shatz 2018).

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