
TWENTY-SECOND SESSION OF THE ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT:



LAWYERS FOR JUSTICE IN LIBYA'S RECOMMENDATIONS FOR THE ICC'S WORK IN LIBYA

The Assembly of States Parties (ASP) to the Rome Statute of the International Criminal Court (ICC or the Court) will meet for its 22nd session from 4-14 December 2023 at the UN headquarters in New York. Taking place almost 13 years after the UN Security Council (the Council) referred the situation in Libya to the ICC, this ASP comes at a critical juncture for the Court and its work in Libya.

In May 2021, the Office of the Prosecutor (OTP) presented a roadmap to the Council for the Libya situation, signalling a change to the previous years of standstill of the Court's work in Libya. A year later in April 2022, the OTP identified Libya as a priority situation¹ and stated in the proposed budget for 2024 that it currently is the "most active investigation, with good results and the largest number of warrants of arrest among all ICC situations."²

Then in 2023 during the Prosecutor's May briefing to the Council, he announced that ICC judges had issued four warrants of arrest (currently under seal) and were considering two further applications for arrest warrants, which is testimony to an increase of investigative activities. This is accompanied by strengthened, albeit limited, engagement with civil society organisations (CSOs) working in and on Libya.

However, despite the roadmap and the arrest warrants, the Prosecutor's latest briefing to the Council on 9 November 2023 has brought back a usual feeling of frustration.

In spite of any notable progress, and the ongoing lack of cooperation from Libyan authorities, the Prosecutor has announced plans to complete investigative activities on Libya by 2025. This does not reflect the fact that there has not yet been any accountability and justice for victims of serious international crimes committed in Libya since 2011, and perpetrators continue committing crimes with impunity.

These concerns are heightened by an increasing crackdown on CSOs working in Libya, further hampering the ICC's work in Libya. Moreover, despite more than a decade of engagement on Libya, the Court has made no efforts to establish an outreach and communication strategy to reach victims, affected communities and broader Libyan society.

Finally, the overall continued impunity of perpetrators of crimes committed in Libya, including crimes committed against migrants, remains unresolved. The Prosecutor's recent announcement to close investigations risks enshrining impunity as the status quo.

¹ ICC, *Twenty-third report of the prosecutor of the International Criminal Court to the United Nations Security Council pursuant to resolution 1970 (2011)*, 21 April 2022, para.53, available at <https://www.icc-cpi.int/sites/default/files/2022-04/2022-04-28-otp-report-unscc-libya-eng.pdf>.

² ICC, *'Proposed Budget for 2024 of the International Criminal Court'* ICC-ASP/22/10, 31 July 2023, para.405, available at https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-22-10-ENG-PPB-2024-31jul23-1500.pdf.

LFJL strongly believes that it is imperative to address these concerns and to build on the progress made with the Prosecutor's roadmap, while advancing accountability and justice for Rome Statute crimes committed in Libya, also beyond the Court. LFJL look forward to engaging with representatives of the Court and States Parties at this year's ASP and set out the following recommendations for the Court's work in Libya in the year ahead.

RECOMMENDATIONS

THE OTP SHOULD REVIEW ITS PLANS TO COMPLETE ALL INVESTIGATIONS BY 2025

In his 26th briefing to the Council on 9 November 2023, the Prosecutor announced that his office had concluded investigations into crimes related to the 2014 – 2020 operations, and that he plans to end all other investigative activities in 2025.³ The Prosecutor did not provide further information in his briefing. This announcement is problematic for several reasons. First, the Court's work in the Libya situation to date did not have any discernible impact on Libya's justice system, and it remains highly unlikely that past and current serious international crimes will be adequately investigated and prosecuted in the nearer future inside Libya. Indeed, there has not yet been any accountability and justice for victims of serious international crimes committed in Libya since 2011. Serious international crimes continue being committed in Libya with impunity, including crimes such as crimes against humanity subject to the Court's jurisdiction.⁴ In these circumstances, announcing an end to investigative activities without stipulating what conditions need to be met for completion, sends the wrong message, and risks emboldening perpetrators and abandoning victims' remaining hope in the Court's work.

Second, it is unclear what makes the OTP set a pre-emptive date by which it believes all investigations can be completed, particularly as continued non-cooperation from Libyan authorities – as highlighted by the Prosecutor in his 26th briefing – will likely continue to impact the OTP's ability to carry out investigations inside Libya. The Prosecutor did not present any information suggesting that Libyan authorities will or are likely to cooperate with his Office's investigations in the future, or how his office intends to carry out investigations despite such non-cooperation. Instead, this unexplained date of completion appears to come as a result of the obstacles the OTP encountered to date, leaving many, including victims, to question what justice the Court can deliver while shying away from addressing challenges.

Third, it does not seem the Prosecutor consulted relevant stakeholders when concluding that investigations should end by 2025. In the 2022 roadmap, the Prosecutor suggested that he is working towards a completion strategy in relation to the Libya situation, "drawing on the views and experience of all actors including survivors, families of victims, competent national authorities and international partners."⁵ While the Prosecutor did not mention to what extent he consulted national authorities and international partners, LFJL and our partners in and outside Libya have not been consulted in relevant discussions around completion, and we are not aware of any effort undertaken by the OTP to engage and consult with other organisations, survivors and families of victims.

3 ICC, 'Statement of ICC Prosecutor Karim A.A. Khan KC to the UN Security Council on the Situation in Libya, pursuant to Resolution 1970 (2011)', 9 November 2023, available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-un-security-council-situation-libya-pursuant-0>.

4 See for an analysis of the Court's jurisdiction over crimes committed against migrants in Libya today, LFJL, European Centre for Constitutional and Human Rights (ECCHR), International Federation for Human Rights (FIDH), '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', November 2021, paras.342 -387, available at https://assets-global.website-files.com/5a0d8805f2f99e00014b1414/629e0058f840063a7dbb3919_Redacted_Art_15__Communication_to_the_ICC_on_crimes_against_refugees_and_migrants_in_Libya.pdf.

5 See, ICC, *Twenty-third report of the prosecutor of the International Criminal Court to the United Nations Security Council pursuant to resolution 1970 (2011)*, 21 April 2022, para.81, available at <https://www.icc-cpi.int/sites/default/files/2022-04/2022-04-28-otp-report-unscl-libya-eng.pdf>.

Recommended steps to achieve this:

- The OTP should review its plans to complete investigations by 2025 and address the above concerns regarding a potential completion of all investigations in the Libya situation.
- The OTP should consult with stakeholders, as set out in the 2022 roadmap, to discuss a potential completion strategy in relation to the Libya situation.
- State Parties should ensure that completion of investigations is not the result of insufficient funding, and provide all funds required to fulfil the Court's mandate given to it by the Council in resolution 1970 (2011).

STATE PARTIES SHOULD ENSURE THAT ALL COURT ORGANS HAVE THE REQUESTED RESOURCES TO FULFIL THEIR TASKS, INCLUDING IN THE LIBYA SITUATION

The Court is proposing a total budget of €196,827,000 for 2024, representing an increase of 16% (or €27,177,800) compared to the 2023 budget.⁶ The proposed budget recognises Libya as a priority situation before the ICC, and notes that additional support is necessary to advance the Libya investigation,⁷ however it remains unclear how much of the Court's 2024 budget will be specifically assigned to this file.

While the Registry has requested additional funds to be able to adequately provide support for witnesses,⁸ the Public Information and Outreach Section (PIOS) is requesting an increase of a total of €353,700 to support outreach activities in situations under investigation, such as Libya.⁹

In addition to investigations, activities that enable the realisation of the Court's mandate through outreach and communication, as well as activities to facilitate victims' rights, such as victim participation, cannot be compromised by budget constraints. It is thus paramount for State Parties to approve the proposed 2024 budget to ensure that the Court can continue to make tangible progress for victims and affected communities.

Recommended steps to achieve this:

- State Parties should approve the 2024 budget with the proposed increase.
- The organs of the ICC should clarify what portion of the budget will be assigned to the Libya situation.
- Budgetary procedures should be transparent and needs-driven.

STATE PARTIES AND THE COURT SHOULD CALL ON LIBYAN AUTHORITIES TO ENSURE THE PROTECTION OF CSOS

The Prosecutor stated that his Office has been strengthening its engagement with some Libyan CSOs through an enhanced field presence and meetings.¹⁰ However, this cooperation is called into question when attacks, reprisals and an increasing crackdown on Libyan civil society is met with silence from the Court and State Parties.

6 ICC, 'Proposed Budget for 2024 of the International Criminal Court' ICC-ASP/22/10, 31 July 2023, available at: https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-22-10-ENG-PPB-2024-31jul23-1500.pdf.

7 Ibid at paras. 196, 206, 268.

8 Ibid at paras. 33, 38.

9 Ibid at para. 851.

10 ICC, 'Statement of ICC Prosecutor Karim A.A. Khan KC to the UN Security Council on the Situation in Libya, pursuant to Resolution 1970 (2011)', 9 November 2023, available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-un-security-council-situation-libya-pursuant-0>.

The Court and all State Parties should systematically condemn attacks and reprisals against CSOs,¹¹ and call on Libyan authorities to ensure a safe environment for civil society to carry out its work. Further to this, the assessment of the cooperation of Libyan authorities with the Court should also include how the authorities facilitate the work of civil society and human rights defenders to support the Court, and the measures the authorities take to ensure their protection against reprisals.

In addition, Libyan civil society do not have clarity about what the Court can and cannot do to protect them, beyond precautionary measures. While the Court may grant protective measures to witnesses and victims who appear or testify before the Court,¹² the same does not seem to exist for CSOs engaged by the OTP in the context of its 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.”¹³ Regardless of whether Libyan CSOs cooperating with the Court are formally considered intermediaries under the Guidelines,¹⁴ there is no reason why the Court organs should not extend the same duty of care to Libyan CSOs it works with, in the context of its investigations. The Court should extend adequate protection measures to Libyan CSOs supporting the Court’s mandate in Libya, and clearly outline to CSOs what it can and cannot do to protect them against reprisals.

Recommended steps to achieve this:

- The Court and State Parties should publicly call out reprisals against CSOs and express support for CSOs in Libya.
- The Court should develop and establish adequate protection measures for CSOs facing increasing risks as a result of their engagement with the Court.

REGISTRY AND OTP TO STRENGTHEN OUTREACH AND COMMUNICATION ACTIVITIES ACROSS LIBYA, INCLUDING WITH VICTIMS AND AFFECTED COMMUNITIES

While the Prosecutor reported that an increased presence in the region has had positive effects on his engagement with victims and affected communities, the Court’s overall outreach and communication efforts in Libya remain inadequate.¹⁵ In 2023, over 400 outreach meetings occurred; however, only five of those were related to the situation in Libya.¹⁶

Similarly, the PIOS has reportedly only recently started to re-engage with victims in January 2023.¹⁷ 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, continues to remain largely unutilised in Libya.¹⁸

11 Switzerland was a notable exception in expressing its concern about “the restrictions on civil society in Libya” during the Prosecutor’s briefing of the Council on 9 November 2023, see Federal Department of Foreign Affairs of Switzerland, *Security Briefing of the Prosecutor of the International Criminal Court on the situation in Libya*, November 2023, available at: <https://www.eda.admin.ch/eda/en/dfa/foreign-policy/international-organizations/un/swiss-speeches-statements.html/content/missions/mission-new-york/en/meta/speeches/2023/november/8/security-council-briefing-of-the-prosecutor-of-the-international>.

12 See ICC, *Witnesses*, available at: <https://www.icc-cpi.int/about/witnesses>.

13 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/CCI-Eng.pdf>.

14 Entering into a contractual relationship with the Court – as stipulated in the Intermediary Guidelines, p.6 – could expose them to further security risks.

15 ICC, *The Twenty-Fifth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)*, May 2023, paras. 14, 56, available at https://www.icc-cpi.int/sites/default/files/2023-05/20230511-otp-report-eng_0.pdf; ICC, *The Twenty-Sixth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)*, November 2023, para. 17, available at <https://www.icc-cpi.int/sites/default/files/2023-11/2023-11-08-report-prosecutor-unsclibya-eng.pdf>.

16 ICC, *Summary of ICC Activities*, October 2023, page 20, available at https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-22-22-ENG.pdf.

17 ICC, *Summary of ICC Activities*, October 2023, para. 60, available at: https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-22-22-ENG.pdf.

18 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), in their Twenty-Fourth Report, noted that they had only received ten applications by February 2023 and had decided to cease issuing reports “pending new developments in the Situation” (see *Twenty-Fourth Periodic Report of the Registry on Applications Received by the Victims Participation and Reparations Section in the Situation in Libya*, ICC-01/11-92, paras 3-5, available at: <https://www.icc-cpi.int/court-record/icc-01/11-92>).

The Court's approach to outreach and communication over the past 12 years in the Libya situation shows the absence of an outreach strategy tailored to Libya. State Parties should request further advancements with regards to outreach to victims and affected communities in Libya. The Court should take a more proactive approach to outreach and communication in Libya, streamlined across all relevant Court organs. At the moment, it is, for instance, not clear to what extent the OTP is collaborating with other Court organs.¹⁹ Collaboration is necessary to ensure that affected communities have a possibility to be adequately informed about the Court's work in Libya, and to ensure that victims are informed about their rights under the Rome Statute. Additionally, to ensure the full participation of victims in the Court's activities, information on relevant procedures should be made readily available in Arabic.

These efforts are necessary to restore trust in the Court among victims, affected communities, and civil society in Libya. Such measures can also help support and strengthen accountability efforts within Libya.

Recommended steps to achieve this:

- The Court should increase outreach activities across Libya, including towards victims and affected communities.
- The Court should make sure to pro-actively provide information about procedures and conditions for victim participation in an accessible manner.
- The Court should develop a comprehensive and coordinated outreach strategy tailored to the Libya situation.

INVESTIGATIONS AND PROSECUTIONS OF CRIMES AGAINST MIGRANTS AND REFUGEES COMMITTED IN LIBYA SHOULD INCLUDE, WHERE THERE IS SUFFICIENT EVIDENCE, CRIMES AGAINST HUMANITY AND WAR CRIMES

Several State Parties are working together with the OTP in a 'Joint Team' to investigate and prosecute crimes committed against migrants in Libya.²⁰ It is unclear to what extent the OTP's support in these investigations is designed to facilitate prosecutions of crimes against humanity and war crimes committed against migrants and refugees in Libya before courts of these States Parties. The Prosecutor has also not provided any information as to whether the OTP plans to prosecute such crimes before the ICC.

These prosecutions should, however, reflect the gravity and systematic nature of the crimes committed against migrants and refugees in Libya, which amount to crimes against humanity and potential war crimes.²¹ The OTP should therefore provide specific support to domestic authorities within the joint team to facilitate such prosecutions at national level, as well as itself prosecute those most responsible for such crimes before the Court. This would be in line with the principle of complementarity, and State Parties' obligations to investigate and prosecute such crimes, including on the basis of universal jurisdiction. It would also help put victims, their rights and experiences, at the centre of relevant investigations and prosecutions, and support their right to reparation.

Recommended steps to achieve this:

- The OTP should continue providing targeted support to State Parties investigating and prosecuting crimes committed against migrants and refugees in Libya, with a view to facilitating prosecutions for relevant Rome Statute crimes. Where a State Party is not able to prosecute Rome Statute crimes, for instance due to the absence of relevant implementing legislation or lack of jurisdiction, these crimes should be prosecuted before the Court.

19 Lawyers for Justice in Libya, 'The ICC's Roadmap for Libya One Year On', May 2023, available at <https://www.libyanjustice.org/news/the-iccs-new-roadmap-for-libya-one-year-on>.

20 ICC, 'The Twenty-Fifth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)', May 2023, para. 45, available at https://www.icc-cpi.int/sites/default/files/2023-05/20230511-otp-report-eng_0.pdf.

21 ICC, 'Twenty-third report of the prosecutor of the International Criminal Court to the United Nations Security Council pursuant to resolution 1970 (2011)', 21 April 2022, para.53, available at <https://www.icc-cpi.int/sites/default/files/2022-04/2022-04-28-otp-report-unsclibya-eng.pdf>; Human Rights Council, Detailed findings of the Independent Fact-Finding Mission on Libya, para.3, 24 March 2023, A/HRC/52/CRP.8, available at https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session50/A_HRC_52_CRP8-EN.docx.

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- The OTP should prosecute those most responsible for Rome Statute crimes committed against migrants in Libya.

STATE PARTIES AND THE COURT SHOULD CALL FOR COOPERATION BY LIBYAN AUTHORITIES, INCLUDING THROUGH FACILITATING THE WORK OF CSOS IN LIBYA WITHOUT FEAR OF REPRISALS

Cooperation with and engagement of the Libyan authorities are central to the Prosecutor's investigative strategy in the Libya situation.²² According to the Prosecutor, "open communication lines with the Libyan authorities" are required, as are "timely responses from them and the issuance of visas to support its work as mandated by Resolution 1970 (2011)."²³ However, as highlighted by the Prosecutor in his 26th report, Libyan authorities have failed on several occasions to grant the OTP visas for "operational -level visits to Libya to meet with technical counterparts and to continue its engagement with Libyan authorities."²⁴

LFJL notes that in his briefings and reports to the Council, the Prosecutor focusses on the issuance of visas by Libyan authorities as a benchmark to assess cooperation. While critical to ensure access to Libya, this focus is insufficient and fails to take into account the fact that CSOs working to support the Court's mandate in Libya are facing serious risks of reprisals as a result of the Libyan authorities' crackdown.

Facilitating the work of CSOs inside Libya, and making sure that they can carry out their work without fear of reprisals, should be a fundamental factor for assessing Libyan authorities' willingness to cooperate with the Court. This is particularly true in light of the OTP's planned opening of a field office in Libya to, amongst other things, "deepen its engagement with Libyan authorities, survivors and families of victims." It is unclear how in the current climate of repression and fear, further fostered by complete impunity, survivors and families of victims will be able to engage with an ICC field office in Libya.

Recommended steps to achieve this:

- The Court and State Parties should call on Libyan authorities to cooperate with the Court, including through:
 - The issuance of visas to Court officials to facilitate the various Court organs to carry out their work inside Libya;
 - Providing an environment designed and capable to protect CSOs and human rights defenders in Libya.
- The OTP should identify the tasks of the planned field office in Libya and provide clarity on arrangements to engage victims and affected communities in a safe and secure manner.

22 ICC, *The Twenty-Sixth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)*, November 2023, para.18, available at <https://www.icc-cpi.int/sites/default/files/2023-11/2023-11-08-report-prosecutor-unsc-libya-eng.pdf>.

23 Ibid, at para.57.

24 Ibid, at para.19.