

Turin, Paris, The Hague, 17 January 2022

To the Office of the Prosecutor of the International Criminal Court (The Hague, The Netherlands)

SUBJECT: Article 15 Communication on War Crimes and Crimes Against Humanity Committed Against Migrants and Asylum Seekers in Libya

EXECUTIVE SUMMARY

1. UpRights, StraLi, and Adala for All (cumulatively “Communication Senders”), file before the Office of the Prosecutor of the International Criminal Court (“ICC”) the present communication pursuant to Article 15 of the Statute (“Communication”) concerning crimes committed in Libya against migrants and asylum seekers (collectively “migrants”).
2. This Communication details alleged crimes committed against thousands of migrants trapped in official detention centres (“DCIM Detention Centres”), in western Libya between 2017 and 2021. These centres, under the nominal control of the Department for Combatting Illegal Migration (“DCIM”), of the Government of National Accord (now the Government of National Unity), are in fact operated by armed groups taking an active part in the hostilities. The Communication outlines that in the DCIM Detention Centres, members of these armed groups systematically subject migrants (men, women and children) to various forms of mistreatments and abuse including murder, torture, rape, forced labour and forced conscription. An analysis of this conduct in six DCIM Detention Centres reveals that such acts amount to war crimes and crimes against humanity pursuant to Articles 7 and 8 of the Statute and fall within the jurisdiction of the ICC.

A. Preliminary Remarks

3. It is not the first time that atrocities of such magnitude have occurred so close to Europe. However, this is the first time that Europe accepts them as a grim reality, or as a necessary evil, that cannot be altered. In 1993, the world was shocked by the reports of atrocities occurring in the Balkans, the international community swiftly created a Tribunal to judge these crimes. In a few years, similar institutions were set up to ensure accountability for international crimes which occurred in Rwanda, Sierra Leone and Cambodia. The establishment of the ICC was part of the process, probably its most ambitious step.
4. Thirty years later, however, the existence of a “pocket of impunity” at the borders of Europe has become openly accepted despite the massive amount of evidence of pervasive international crimes on Europe’s doorstep. Victims and witnesses are located throughout Europe and are capable of testifying to the situation, while readily available evidence clearly points to responsibilities within Europe.
5. These crimes differ from the past atrocities. International criminal law has historically addressed international crimes arising in the context of ethnic conflicts and repressive dictatorships. The genocide in Rwanda and the ethnic cleansing in the former Yugoslavia were triggered by underlying identity tensions reopened by the disaggregation that followed the end of the Cold War. New scenarios and emerging trends of this century, namely the advent of failed States and the massive movement of persons, require similarly robust responses to new challenges.
6. In Libya these two emerging trends coexist in a symbiotic relation. A failed state confronted with mass migration has led to disastrous consequences. The vacuum of power originating from the fall of the Gaddafi regime reshaped the smuggling and trafficking economy of the country, which in turn has fuelled conflict dynamics.
7. When they enter Libya, migrants are external elements in respect to the ongoing hostilities. They are not associated or aligned with any of the parties involved in the conflict. However, this very feature contributes to making them vulnerable, deprived of

any protection against potential abuses. They are not subjected to crimes because of their identity or alignment, as in the former Yugoslavia and Rwanda.

8. To the contrary, the parties to the conflict target migrants because they are perceived as a crucial asset to advance their political and military objectives. Reduced as a form of commodity, migrants are exploited as a means of financing, to acquire political leverage and standing, and, more importantly, as an additional resource for fighting efforts. The neutrality and vulnerability that characterise and affect the status of migrants present in Libya allows for the possibility to repurpose them depending on the goal to be reached.
9. In light of the scale and magnitude of the crimes committed against migrants in Libya and their correlation with the ongoing conflict dynamics, the Communication Senders respectfully ask the Prosecutor to investigate such crimes. It would be the first time that migration as a phenomenon, traditionally under the focus of human rights and refugee law, would be scrutinised through the lens of international criminal law.
10. Admittedly, such an exercise is complex. It requires disentangling legal categories from the factual application to which they were confined in the previous practice of international criminal courts and tribunals and reorient them to a different and new set of facts and dynamics. This, however, is not something of which international criminal law is incapable, but rather a new area in which it must expand. The ability for the international community to adapt to this challenge will test whether international criminal law, as developed in the last thirty years, is suitable to meet the new challenges that the world is facing.

B. Outline of the Communication

11. The present Communication contains five primary sections: (1) Background (Section II); (2) Crimes Allegedly Committed (Section IV); (3) Alleged Perpetrators (Section V); (4) Jurisdiction (Section VI); and (5) Admissibility (Section VII).¹

¹ Section III outlines the subject matter, geographical, temporal, personal parameters of this Communication.

1. Background – Section II

12. The unstable political situation and ongoing conflict in Libya created a foundation for armed groups to perpetrate crimes against migrants in detention centres. The lack of a functioning central government in Libya and the proliferation of armed groups, never fully integrated into national institutions, has fuelled the progression of a continuous armed conflict. Numerous rounds of political negotiations between different stakeholders have not resolved ongoing insecurity and armed clashes. The mass migration of civilians through Libya towards Europe throughout this period allowed for an already vulnerable population to be subjected to international crimes.
13. Indeed, the fragmentation of power affecting Libya shaped the smuggling and trafficking industry in the country. Once under the strict control of Ghaddafi’s regime, armed groups now use their position to penetrate and dominate this industry. The involvement of armed groups in the smuggling business developed over the course of multiple years. Between 2012 and 2014 armed groups confined their engagement into a sort of “predatory economy”, obliging smugglers or traffickers to share with them part of their profits. After 2014 armed groups took direct control over the business themselves, operating migrants detention centres, including those under the nominal control of the Department for Combatting Illegal Migration, which were used principally as a smuggling hub. From 2017 armed groups re-focused their activities on migration control, using DCIM Detention Centres to prevent migrants from crossing the Mediterranean Sea.
14. The “anti-smuggling stance” of armed groups coincided with the growing pressure from European Union (“EU”) and European States to stem the migration flows from Libya. Initially international efforts on the Mediterranean Sea were mostly humanitarian and aimed at rescuing migrants in distress. From 2016/2017 EU and European States, including Italy, shifted their efforts from rescue activities towards activities aimed at reducing the arrivals along the Central Mediterranean Route. In this context, a series of measures were undertaken in order to: (1) increase the ability of the Libyan Coast Guard (“LCG”) to intercept migrants at sea; and (2) co-opt local communities in Libya in anti-

smuggling efforts. These measures reduced significantly the arrivals of migrants in Europe, while increasing the migrant population detained in Libya.

2. Crimes Allegedly Committed - Section IV

15. In the context of ongoing instability, members of armed groups *de facto* in control of DCIM Detention Centres systematically subjected migrants, detained following their interception at sea, to a litany of serious abuses, including: murder, torture and/or cruel treatment, forced labour, hostage-taking, and various forms of sexual violence including rape and sexual slavery. This Communication details the crimes allegedly committed in the centres between 2017 and 2021 and specifically in six detention centres, namely: (1) the Abu Salim Detention Centre; (2) the Tarik al-Matar Detention Centre; (3) the Tarik al-Sikka Detention Centre; (4) the al-Mabani Detention Centre; (5) the Tajoura Detention Centre; and (6) the al-Nasr Detention Centre.
16. These acts as detailed qualify as war crimes under Articles 8(2)(c)(i)-(iii) and 8(2)(e)(vi) of the Statute. The crimes have been committed by members of armed groups taking direct part in the hostilities. Migrants have been forced to perform military-related activities or have been forcibly recruited to join the fighting. The hostilities allowed the respective armed group to establish its military control over the respective detention centres. These factors indicate that these crimes are linked to the hostilities thus satisfying the war crime nexus requirement.
17. In parallel, the abuse and mistreatment inflicted against migrants in the DCIM Detention Centres qualify as crimes against humanity. The crimes committed in the centres analysed amount to murder, imprisonment, torture, enslavement, rape, sexual slavery and/or any other form of sexual violence under Article 7(1)(a), (c), (e)-(f), (g), (k) of the Statute. For each detention centre, such crimes may be viewed as forming part of *separate* systematic or large-scale attacks against a civilian population (namely the migrants detained therein). The conduct at each centre constitutes its own attack carried out pursuant to or in furtherance of an organizational policy to commit such attack.

3. Alleged Perpetrators - Section V

18. Members of armed groups in control of detention centres, staff of the DCIM and the LCG figure among the alleged perpetrators under Article 25(3) of the Statute for the crimes committed in the DCIM Detention Centres. Members of armed groups materially involved in the control of the DCIM Detention Centres may be held accountable under Article 25(3)(a) of the Statute for the crimes committed against migrants detained therein as direct perpetrators, co-perpetrators, and indirect co-perpetrators. At the same time, relevant responsibilities under Article 25(3)(a) or (d) for these crimes can be also detected in the conduct of staff of the DCIM and the LCG. With respect to the members of the LCG, the relevant contribution to the crimes stems from their efforts to intercept migrants at sea and return them to Libya where they are subsequently referred to DCIM Detention Centres.

19. In parallel to the responsibility of Libyan Actors, this Communication also addresses the implications of the conduct of Italian and Maltese authorities and officials aimed at stemming the flow of migrants from Libya to Europe *vis-à-vis* the alleged crimes. Between 2017 and 2021, Italian and Maltese authorities and officials provided crucial support to the LCG to intercept migrants at sea and return them to the DCIM Detention Centres, which included provision of assets, equipment, maintenance and trainings. Importantly, Italian and Maltese officials operated conjointly with the LCG coordinating its rescue operations to ensure that migrants at sea would be intercepted and returned to Libya. The information available indicates a causal connection between such contribution and the crimes migrants suffered in the detention centres. Such connection amounts to a contribution to the crimes pursuant to Article 25(3)(d) of the Statute.

4. Jurisdiction - Section VI

20. The crimes and the alleged conduct described in this communication fall squarely within the jurisdiction of the ICC in light of: (1) Article 13(b) of the Statute under Resolution 1970 (2011) concerning *all* actors involved; and (2) Article 12(2)(b) of the Statute, with respect to the conduct of Maltese and Italian authorities and officials. First,

the alleged crimes analysed under the present communication fall within the parameters of the “situation in the Libyan Arab Jamahiriya” as referred by the UNSC pursuant to Resolution 1970 (2011). They took place on the Libyan territory, after 15 February 2011, they have been perpetrated by Libyan nationals or otherwise States Parties nationals and are associated with the ongoing armed conflict underlying the referral.

21. Indeed, the conflict in Libya is at the base of the manner, the motives, the ability, and the causes underpinning the commission of such crimes. These crimes are perpetrated by members of the armed groups involved in the conflict and in the same facilities as their headquarters (*manner*). Their commission served the purpose of their military campaign (*motives*). The participation in the hostilities of these armed groups has been pivotal to ensure or maintain control over the DCIM Detention Centres (*ability*). The revolution/conflict dynamics empowered and enabled the armed groups to dominate the smuggling sector and exert control over the DCIM Detention Centres (*causes*).

5. Admissibility - Section VII

22. The alleged crimes are admissible under Article 17 of the Statute. In terms of complementarity, as observed by the UN Independent Fact-Finding Mission on Libya, in Libya there has been no attempt to ensure the accountability for the crimes committed against migrants in Libya. In light of the substantial inactivity of domestic authorities to address relevant criminal responsibilities, the relevant crimes are to be considered admissible. In any event, Libya should be considered unable to carry out relevant domestic proceedings.
23. Likewise, there is a substantial inactivity *vis-à-vis* the alleged criminal conduct carried out by Italian authorities and officials. In Malta, only one criminal investigation addressed conduct of Maltese authorities. It was swiftly terminated by the Maltese judiciary.