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To the Office of the Prosecutor

International Criminal Court

The Hague, the Netherlands

**Situation in Libya – Article 15 Communication on the Commission of Crimes against Migrants and Refugees in Libya**

**EXECUTIVE SUMMARY**

**1. Introduction**

1. The European Center for Constitutional and Human Rights (ECCHR), Lawyers for Justice in Libya (LFJL), and the International Federation for Human Rights (FIDH), file this Communication to the Office of the Prosecutor (OTP) of the International Criminal Court (ICC or the Court) under Article 15 of the Rome Statute. This Communication addresses the commission of grave crimes under the jurisdiction of the Court against migrants, refugees, and asylum seekers (hereinafter, migrants and refugees) in the context of the Situation in Libya and requests the Prosecutor to urgently open an investigation into these crimes.

2. The undersigned organisations worked in collaboration and exchange with survivors, conducting particularly extensive and in-depth interviews with 14 witnesses. Their interview protocols are attached in full and provide the basis for the Communication’s submission. The work was conducted according to the ‘Do No Harm’ principle. All witnesses are migrants or refugees who entered and transited through Libya after the 2011 anti-Gaddafi uprising and who are no longer located in the country. They are now in places of safety with access to assistance and psycho-social support if needed. Each witness gave informed consent to being interviewed and their participation was entirely voluntary and without financial or other forms of incentive. The first-hand witness accounts are complemented and corroborated by thorough documentation from various reliable sources. These include specific information gathered from individual experts interviewed for the purpose of this filing.

3. Over the past years, unspeakable violence against migrants and refugees, and violations of their basic human rights—including their right to life—by State and non-State actors in Libya, have been well-documented by international organisations, as well as humanitarian and civil society organisations on the ground. Most recently, the UN Independent Fact-Finding Mission on Libya (the FFM), found that ‘from the moment that migrants and refugees enter Libya, they are systematically subjected to a litany of abuses.’<sup>1</sup> Through this Communication, the undersigned organisations aim to clarify how the system of human trafficking and exploitation of migrants and refugees in Libya, beyond its transnational crime dimension, amounts to the commission of crimes against humanity and possible war crimes by coordinated actors in the country. In particular, for the sake of this submission, the focus of the legal analysis is on the commission of crimes against humanity. However, this does not rule out the possible (alternative or additional) qualification of such acts as war crimes. This Communication also seeks to frame and analyse the individual criminal responsibility of several perpetrators, in particular those in command and control of the detention sites where migrants are unlawfully detained, and more broadly, those profiting from the criminal exploitation and abuse of migrants and refugees.

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<sup>1</sup> UN Human Rights Council, Independent Fact-Finding Mission on Libya, Report of the Independent Fact-Finding Mission on Libya, A/HRC/48/83, 1 October 2021, p. 15.

4. Multiple actors—State and non-State actors alike—are involved in this system of exploitation, which reduces migrants and refugees to commodities. This system subjects them to the worst violence and abuse, which amount to the crimes against humanity of imprisonment, killings, torture, sexual violence, persecution, and ultimately, enslavement. Migrants and refugees are commonly forcibly transported throughout the country, held in official and unofficial detention sites under inhumane conditions and the constant threat of violence. They face forced labour, extortion, rape, beatings, and oftentimes are sold to smugglers or for the purpose of labour.

5. When migrants and refugees manage to reach the Libyan coast, often after unspeakable suffering, many embark on a highly risky and often deadly attempt to cross the Mediterranean sea to Europe fleeing the atrocities in Libya. Despite the well-known situation, migrants and refugees have been more likely in recent years to be intercepted at sea by the Libyan Coast Guard (LCG) and subsequently returned to indefinite detention in Libya, where the cycle of abuse continues.

6. The commission of grave crimes, and in particular of crimes against humanity, is supported by victim accounts, as documented in the witness testimonies attached to this Communication. Their accounts indicate the existence of consistent patterns of criminal conduct and serve as example cases for the analysis of each underlying crime. Along with extensive, reliable, and publicly available documentation on the violence and abuses facing migrants and refugees in Libya, these personal accounts provide the basis for establishing the commission of crimes that must be thoroughly investigated by the Court.

7. Historically, as Libya has been both a prominent destination and transit point for migrants and refugees from Arab and African countries, human smuggling and trafficking networks have long existed in the country. However, since the fall of the Gaddafi regime in 2011 and the ensuing armed conflict, the breakdown of the rule of law and the environment of impunity emboldened human smuggling and trafficking networks in Libya. Indeed, as part of the ongoing conflict since 2011, smuggling and trafficking activities have become a pillar of the conflict economy, serving as a means of revenue for militias and armed groups, and thus also providing them with means to perpetuate their participation in the conflict. At the same time, some non-State actors and competing government authorities have taken advantage of Europe's attempts to curb migration flows, in order to gain legitimacy externally and internally. This has

contributed to the continued existence of a system of migrant and refugee exploitation, particularly through violent interceptions at sea, followed by the detention of migrants in a myriad of official and unofficial detention sites in Libya. These sites are controlled by State authorities as well as a number of militias and armed groups.

8. The undersigned organisations submit that the commission of international crimes against migrants and refugees in Libya since 2011 falls under the ICC jurisdiction pursuant to United Nations Security Council (UNSC) Resolution 1970 (2011). The Communication first provides background context on Libya, before setting out the information collected through survivor testimony and open-source information. The Communication then focuses on the analysis of the Court's jurisdiction *in casu*, the characterisation of the different crimes against humanity, and the individual criminal responsibility of some alleged perpetrators. Finally, the Communication concludes that the investigation of such crimes is admissible and in the interest of justice. Therefore, the undersigned organisations respectfully request the Prosecutor to urgently open an investigation into the commission of crimes against migrants and refugees within the Situation in Libya.

## **2. Jurisdiction (Section IV.A)**

9. UNSC Resolution 1970 (2011) referred the situation in the Libyan Arab Jamahiriya (now State of Libya) on 15 February 2011 to the ICC Prosecutor.<sup>2</sup> Following the referral, the OTP opened an investigation, which currently includes three cases, respectively against Saif Al-Islam Gaddafi, Al-Tuhamy Mohamed Khaled, and Mahmoud Mustafa Busayf Al-Werfalli. None of the cases include charges for crimes committed against migrants and refugees.<sup>3</sup>

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<sup>2</sup> UN Security Council (UNSC), Resolution 1970 (2011), S/RES/1970, 26 February 2011, available at: <https://undocs.org/S/RES/1970%282011%29>.

<sup>3</sup> ICC, Situation in Libya, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Warrant of Arrest, Pre-Trial Chamber I (15 August 2017); *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Second Warrant of Arrest, Pre-Trial Chamber I (4 July 2018); *The Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and

10. As thoroughly analysed in the Communication and based on Resolution 1970, the ICC has jurisdiction over possible crimes against humanity committed against migrants and refugees in the context of the Libyan situation. The territorial jurisdiction of the Court encompasses the whole territory of the State of Libya, including the mainland and territorial waters. Resolution 1970 does not limit the temporal jurisdiction of the Court, and thus covers crimes committed from 15 February 2011 onwards, as long as they are connected with the situation as referred to by the UNSC. In terms of personal jurisdiction, Resolution 1970 covers the conduct of Libyan nationals, as well as nationals of ICC States Parties potentially involved in the commission of international crimes in the Libyan context. The Resolution only exempts nationals, current or former officials, or personnel of non-States Parties in relation to operations established or authorised by the UNSC in Libya, ‘unless such exclusive jurisdiction has been waived by the State.’<sup>4</sup> Finally, Resolution 1970 does not restrict the Court’s subject matter jurisdiction.

11. The ICC jurisprudence has established that in cases where a situation is referred to the Court, there must be a sufficient link between the referred situation and the crimes under investigation.<sup>5</sup> In previous cases stemming from the situation in Libya, Pre-Trial Chamber I (PTC I) has interpreted the UNSC referral broadly, establishing two alternatives for ICC jurisdiction.<sup>6</sup> First, there must be a sufficient link to the armed conflict in Libya since 2011. Second, there must be a sufficient link with the relevant actors already active in the commission of crimes since 2011. Beside the criteria established

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Abdullah Al-Senussi, Pre-Trial Chamber I (27 June 2011); *The Prosecutor v. Al-Tuhamy Mohamed Khaled*, Warrant of Arrest for Al-Tuhamy Mohamed Khaled, Pre-Trial Chamber I (18 April 2013).

<sup>4</sup> S/RES/1970, para. 6.

<sup>5</sup> ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Callixte Mbarushimana*, Decision on the ‘Defence Challenge to the Jurisdiction of the Court’, Pre-Trial Chamber I (26 October 2011), para. 27; Situation in the Democratic Republic of the Congo, *The Prosecutor v. Callixte Mbarushimana*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, Pre-Trial Chamber I (28 September 2010), para. 6; Situation in Darfur, Sudan, *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad al abd-al-Rahman*, Decision on the prosecution application under Article 58(7) of the Statute, Pre-Trial Chamber I (27 April 2007); Situation in Darfur, Sudan, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (“*Omar Al Bashir*”), Pre-Trial Chamber I (4 March 2009).

<sup>6</sup> *Al-Werfalli*, Warrant of Arrest, para. 23; Second Warrant of Arrest, para. 20.

by PTC I, nothing prevents the Prosecutor from establishing additional jurisdictional links to the situation referred by Resolution 1970.

12. With regard to the crimes committed against migrants and refugees in Libya that have been brought to the Prosecutor's attention, the Communication proves the existence of jurisdictional links to the Situation as referred to the Court by the 2011 UNSC referral in three ways.

13. First, a sufficient link exists between the armed conflict and the commission of crimes against migrants and refugees. Although they have been subjected to discrimination and violence since the Gaddafi era, the emergence of an armed conflict in 2011 led to further instability and a security crisis. This laid the conditions for increased discrimination and hostility against migrants and refugees and for their exploitation. This link is direct, as witness accounts show, with migrants and refugees at times being forced to work for armed groups, including by transporting weapons and even directly participating in the hostilities. They have also been the subject of attacks, including airstrikes on migrant detention sites as well as severe deterioration of their living conditions in and outside of detention sites. These have included the deprivation of food or shelter as a result of hostilities.

14. Second, there is a sufficient link between actors prominently involved in the Libyan armed conflict and the commission of crimes against migrants and refugees. The political instability and security crisis which ensued from the 2011 uprising resulted in the strengthening of armed groups and militias, as well as in the division among Libyan governmental authorities. Later in the conflict, militias and armed groups were also incorporated into the State's security apparatus by competing governmental authorities, often blurring the distinction between State and non-State actors. This is evident, for instance, in the Directorate for Combatting Illegal Migration (DCIM). This entity *de jure* controls migrant detention sites across the country as part of the Ministry of Interior. At the same time, some of its officials, such as its former deputy head, have strong ties to militias. It is not only because of the collusion between armed groups and State authorities, however, that some detention sites are under the control of militias and armed groups. Indeed, because of the breakdown of security and the fragmentation of State authority due to the armed conflict, many armed groups and militias exercise territorial control over certain areas. As a consequence, several detention centres are only nominally run by DCIM, and *de facto* fall under the control of

armed groups and militias involved in the armed conflict. In these detention centres, as well as in other unofficial detention sites, migrants and refugees fall victim to abuse on a daily basis.

15. Third, there is a sufficient link between the conflict economy and the crimes included in this Communication in the sense that, the commission of crimes against migrants and refugees serves to perpetuate the conflict. With the breakdown of Libya's economy due to the armed conflict, individuals as well as armed groups and militias have turned to the exploitation of migrants and refugees to secure revenue. The revenue generated by the system of migrant and refugee exploitation also provides the armed groups and militias with additional resources to sustain their military operations. Thus, the exploitation of migrants and refugees by different actors in Libya has been instrumental in the country's conflict economy, to the point that it became a pillar of the Libyan conflict economy.

16. As the Communication thoroughly shows, the crimes committed against migrants and refugees in Libya since 2011 squarely fall under the jurisdiction of the Court, as several links can be established to the armed conflict and its different actors. It thus falls within the scope of the Situation referred to the Court by the UN Security Council back in 2011.

### **3. Crimes against Humanity (Section IV.B)**

17. The myriad of well-documented egregious human rights violations against migrants and refugees in Libya amount to the commission of heinous crimes against humanity. Most recently, the FFM mandated by the UN Human Rights Council reported in October 2021 that evidence of such crimes had been collected to the point that it surpasses the threshold of 'reasonable grounds to believe,'<sup>7</sup> suggesting that crimes against migrants and refugees have taken place during the period of its mandate, 'form[ing] part of a systematic and widespread attack directed at this population, in

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<sup>7</sup> A/HRC/48/83, para. 26.

furtherance of a State policy.’<sup>8</sup> With this in mind, and supported by first-hand witness accounts, this Communication brings to the attention of the ICC Prosecutor a thorough documentation and analysis of how migrants and refugees in Libya have been victims of imprisonment, enslavement, murder, torture, rape, sexual slavery, enforced prostitution, persecution, and other inhumane acts amounting to crimes against humanity.

18. The Communication establishes that such crimes were knowingly committed as part of a widespread or systematic attack against a civilian population, pursuant to Article 7 of the Rome Statute. In Libya, such an attack takes the form of a broad criminal system aimed at the exploitation of migrants and refugees through their subjection to violence and inhumane living, detention, and transport conditions. The Communication highlights how the methods employed in the exploitation of and violence against migrants and refugees are not singular or isolated, but rather part of a course of conduct. Migrants and refugees are categorised as civilians and are the primary targets of the attack, as evidenced in several reports of UN bodies and non-governmental organisations working in and on Libya.<sup>9</sup>

19. The attack is widespread, being directed at thousands of migrants and refugees of different nationalities, religions, genders, racial and ethnic groups, across the entire Libyan territory. The attack is also systematic and follows clear patterns. The crimes are committed in pursuance of an apparent policy, grounded foremost in Law No. 19 of 2010, which authorises the detention and forced labour of migrants. Documents by Libyan authorities, such as a report by the Director of the Al-Kufra Detention Centre sent to the DCIM in July 2017 and explicitly endorsing violence against migrants and

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<sup>8</sup> *Id.*, para. 70.

<sup>9</sup> Amnesty International (AI), *Libya: Rule of Law or Rule of Militias?*, 5 July 2012, available at: <https://www.amnesty.org/en/documents/mde19/012/2012/en/>; *Libya’s Dark Web of Collusion: Abuses against Europe-bound Refugees and Migrants*, 11 December 2017, available at: <https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF>; *‘Between Life and Death’: Refugees and Migrants Trapped in Libya’s Cycle of Abuse*, September 2020, available at: <https://www.amnesty.org/en/documents/mde19/3084/2020/en/>; Human Rights Watch (HRW), *No Escape From Hell: EU policies contribute to Abuse of Migrants in Libya*, 21 January 2019, available at: <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>.



refugees, serve as proof of this policy.<sup>10</sup> Moreover, both State and non-State actors participate in the implementation of this policy. The situation is aggravated by historic discrimination against Black migrants in Libya and governmental instability.

20. These crimes have been committed with the different alleged perpetrators—be they State authorities, militias, armed groups, or private actors—fully aware of the overall context and demonstrating a strikingly similar *modus operandi*, as described in the analysis of each crime. There is no doubt that the overall context of violence and attacks against migrants and refugees is well-known to Libyan authorities. This is not only reflected in several public statements by Libyan officials, but also by international authorities, and third States’ officials.

21. **Severe deprivation of liberty or imprisonment (Article 7(1)(e)).** This crime is one of the most prominent components of the attack against migrants and refugees occurring in Libya. All of the witnesses interviewed for the Communication had been deprived of their liberty at some point during their journey in Libya. Migrants and refugees are frequently detained in transit vehicles, at checkpoints, and in official or unofficial detention sites. Given that exploitation and violence occur in detention places of all kinds, the detention of migrants and refugees in centres nominally under DCIM control, despite being set out by Libyan domestic law, is also always arbitrary due to its conditions, the absence of procedural safeguards or legal oversight, as well as the length of detention. Moreover, the detention of migrants and refugees in other places of captivity is *per se* always unlawful and arbitrary. Migrants and refugees are often at the mercy of traffickers, who promise release upon payment of their ‘debts,’ either through ransom payment, forced labour, or sexual exploitation. The gravity of these acts is indicated by the absolute deprivation of procedural safeguards for migrants and refugees during detention, effectively placing them beyond the protection of law and due process.

22. **Enslavement (Article 7(1)(c)).** As thoroughly analysed throughout the Communication, the commodification of migrants and refugees, which happens most bla-

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<sup>10</sup> UN, Final report of the Panel of Experts established pursuant to resolution 1970 (2011), 5 September 2018, Annex 18, pp. 100-106, available at: <https://digitallibrary.un.org/record/1640692?ln=en>.

tantly through their sale, but also through forced labour or sexual slavery, can be characterised as the crime of enslavement. While this crime bears resemblance and even overlaps substantively with the transnational crime of trafficking in persons, the Communication focuses on how human trafficking serves as the underlying conduct for crimes included under the Rome Statute. The crimes of enslavement and sexual slavery require the exercise of powers attaching to the right of ownership, which can be found when a person is regarded as property and deprived of any form of autonomy.<sup>11</sup>

23. In Libya, smugglers, traffickers, armed groups, or even private citizens have exercised property powers over migrants and refugees. This is evidenced by the sale of migrants and refugees, including through ‘market auctions’ or forced labour. Furthermore, the crime of enslavement is notably gendered and racialised. Black, able-bodied, men are forced into labour under inhumane conditions, usually involving construction work, burying other dead bodies, supporting militias in warfighting and war-sustaining activities, or working on farms and in domestic settings. In turn, women and girls are often forced into sexual slavery. All these crimes are committed with full awareness of the victims’ vulnerability and status, and are connected to the broader attack against migrants and refugees, representing the commodifying attitude which uses human beings as means for militias, armed groups, and private citizens to make economic gains. Witnesses testified to being called slaves or ‘*ibeidad*’ and being confined in inhumane conditions.

24. **Murder (Article 7(1)(a)).** Migrants and refugees have been killed in a variety of situations, either intentionally or collaterally during armed hostilities, or as a result of lethal force deployed by smugglers, traffickers, militias, or even detention guards. Indeed, migrants have been killed in official and other places of captivity as punishment for refusing to surrender to criminal acts of extortion, detention, or sexual exploitation. Many migrants have also died as a result of the inhumane conditions experienced in transit and detention, such as deprivation of food, water, essential sanitation, and medical care. The widespread character of the murder of migrants and refugees can be in-

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<sup>11</sup> ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Germain Katanga*, Judgment pursuant to Article 74 of the Statute, Trial Chamber II (7 March 2014), para. 975.

ferred, *inter alia*, from data collected by Medici per i Diritti Umani ('MEDU'), an Italian organisation working with survivors of torture. MEDU reported that 30% of the over 3,000 migrants and refugees it interviewed between 2014 and 2020 had witnessed the killing of a relative or friend, and 40% had been close to death at least once.<sup>12</sup> These crimes were committed with knowledge that deaths would result from the actions of the perpetrators.

**25. Torture (Article 7(2)(e)).** Torture is committed against migrants and refugees in Libya on a great scale and in a systematic manner. All witnesses interviewed and included in the Communication detailed how they were subjected to torture in one way or another. MEDU reported that over 85% of the over 3,000 migrants and refugees it assisted have been subjected to violence amounting to torture or inhumane treatment in Libya.<sup>13</sup> Different individuals, including members of armed groups, trafficking networks, militias, and State institutions have been reported to have inflicted severe physical and mental pain on migrants and refugees. The cruel methods used by such actors range from beatings with various objects and burnings with heated metals, chemicals or liquids, to suspensions in stress positions, shootings, and floggings. Sexual violence amounting to torture has also been reported through rape, forced nudity, or forced intercourse with animals. Physical and mental pain is also caused through conditions inflicted with the intent of bringing severe suffering, including being forced to sleep outside and the imposition of other inhumane living conditions. Some of the witnesses even reported being locked in freezers or containers. All these acts were committed while migrants and refugees were within the custody and control of the perpetrators at official detention sites as well as in places of captivity. Torture is perpetrated with a variety of motives—primarily to 'discipline' detainees or extort them or their families for ransom, indicating the requisite intent. The severity of the torture inflicted on migrants and refugees is often documented by the perpetrators themselves, who record the infliction of pain and use images and films as a tool in the extortion process to elicit payment from migrants and refugees' families.

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<sup>12</sup> Medici per i Diritti Umani (MEDU), *The Torture Factory: Report on Human Rights Violations Against Migrants and Refugees in Libya (2014-2020)*, March 2020, p. 12, available at: [https://mediciperidirittiumani.org/medu/wp-content/uploads/2020/03/report\\_medu\\_2020\\_ing\\_web.pdf](https://mediciperidirittiumani.org/medu/wp-content/uploads/2020/03/report_medu_2020_ing_web.pdf).

<sup>13</sup> *Id.*, p. 11.

26. **Rape, sexual slavery, enforced prostitution, and other forms of sexual violence of comparable gravity (Article 7(1)(g)).** Migrants and refugees are often subjected to various forms of sexual violence. Several of the witnesses interviewed reported that rape was a daily occurrence at detention sites and that many women became pregnant as a result.

27. These crimes are committed within coercive environments involving physical and psychological oppression, the abuse of official positions, blackmail, reprisals, unlawful detention, and the threat or use of force against victims, their family members, or fellow detainees. Witness testimony also depicts the widespread nature of these crimes. Furthermore, the repeated commission of these crimes, the multiplicity of perpetrators, the severity of the conduct and its consequences, along with the extreme vulnerability of the victims, make clear that perpetrators are aware of the gravity of their conduct.

28. Other forms of sexual violence documented in the Communication include forced nudity, conditions leading to the creation of an environment of constant fear of sexual violence, forced masturbation, and molestation. These forms of sexual violence inflicted on migrants and refugees are acts of a sexual nature, which have been recognised as meeting high gravity thresholds by the UN and international tribunals.<sup>14</sup> Thus, they are of comparable gravity to the crimes enumerated under Article 7(1)(g). While women and girls are often targeted for sexual slavery and enforced prostitution, men and boys are also victims of other forms of sexual violence of comparable gravity.

29. Within the above-mentioned coercive environment, migrants and refugees have further been forced into prostitution and sexual slavery. Perpetrators have established ‘businesses’ of prostitution and slavery, obtaining profit from the exploitation of migrants and refugees—for example, by allowing men to come to detention sites to rape women. Migrant women and girls are often forced into sexual slavery and prostitution

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<sup>14</sup> See Inter-American Court of Human Rights (IACtHR), *Miguel Castro Castro Prison v. Peru*, Judgment (Merits, Reparations and Costs), 25 November 2006, paras 304-308; International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v Zlatko Aleksovski*, Trial Chamber Judgment, Trial Chamber (25 June 1999), paras 184-210, 226, 228; International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Jean-Paul Akayesu*, Judgment, Trial Chamber I (2 September 1998), paras 688, 697.

until they ‘pay off’ perceived debts or ransoms. These factors demonstrate the coercive context of their exploitation.

30. **Persecution (Article 7(1)(h)).** Many of the crimes committed against migrants and refugees in Libya also feature a persecutory component, on grounds of the victims’ status as migrants or refugees. Migrant and refugee status may be the factor underlying a ground of prohibited discrimination under international law. Migrants and refugees are targeted separately or simultaneously for their racial, gender, religious, nationality, and political attributes. The sorts of crimes committed against migrants and refugees in Libya have varied depending on the intersectional attributes of their identities. For instance, Black males appear more likely to be exploited through forced labour, while women face greater sexual exploitation. Non-Muslim migrants and refugees often suffer worse conditions of detention, and migrants and refugees of nationalities considered more ‘valuable’ in terms of ransom payments are treated differently. These crimes have been committed with the special persecutory intent to cause injury on grounds of membership in the aforesaid groups.

31. **Other inhumane acts (Article 7(1)(k)).** Many of the acts characterised as crimes against humanity under Articles 7(1)(a-j) could also be classified as crimes of other inhumane acts. This can be the case when the conduct in question fails to satisfy the threshold specifically provided for other crimes against humanity (torture, for instance), or when the conduct breaches a norm of international human rights law of comparable gravity to other crimes against humanity. In the situation at stake, the crime under Article 7(1)(k) can encompass, *inter alia*, the inhumane conditions of land transit and sea travel of migrants; inhumane conditions of detention falling short of the threshold of torture; forced family separations violating the right to family life under Article 23(1) of the ICCPR; and the slave trade and related conducts precursory to enslavement.

#### 4. War Crimes (Section IV.C)

32. Considering that many of the violations described previously have taken place in the context of an armed conflict, the Communication submits that such conduct can also be characterised as war crimes. This is particularly true with respect to the war

crimes of murder, torture, cruel treatment, outrages upon personal dignity, rape, sexual slavery, enforced prostitution, and sexual violence under Article 8(2)(c) and (e).

## **5. Criminal Responsibility of Individual Perpetrators and Modes of Liability (Section V)**

33. The pervasive commission of crimes against humanity against migrants and refugees in Libya involves State and non-State actors at different levels. However, in accordance with the OTP's strategic approach, the Communication focuses on those 'most responsible.'<sup>15</sup> In particular, it highlights the responsibility of persons in positions of control—be it direct or indirect, official or unofficial.

34. The Libyan context depicts the fluidity between State and non-State actors, making it difficult to clearly distinguish between them. This is so because, as thoroughly analysed in the Communication, the ongoing armed conflict has featured competing government authorities over the past decade, and because militias have been incorporated into State security apparatuses, including the DCIM. Furthermore, allegiances and affiliations have shifted throughout the conflict, warranting further investigation to establish with which groups an alleged perpetrator was affiliated at relevant points in time.

35. The Communication includes documentation relevant for the attribution of individual criminal responsibility to alleged perpetrators, pursuant to Art. 25(3)(a) of the Rome Statute. It analyses in particular the responsibility of 19 individuals as principal perpetrators. The Communication also provides the OTP with a broader list of alleged perpetrators, ranging from guards at detention sites to well-known militia commanders, including specific information on their role and responsibility. Some of the individuals are currently subject to UN Security Council sanctions and/or have been named by the UN Panel of Experts on Libya. This demonstrates that their role in the commission of crimes in Libya is well-known to all relevant actors, including at the international level.

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<sup>15</sup> OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, para. 42, available at: [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf).

36. The responsibility is often multi-layered, as the alleged perpetrators participate in different power structures concomitantly and committed different crimes. Further, it is possible to identify micro and macro ‘cosmoses,’ in which an individual may be a direct or indirect (co-) perpetrator, pursuant to Article 25(3)(a) of the Rome Statute, in relation to several other alleged perpetrators within the same group.

37. The analysis focuses in particular on the individual criminal responsibility of actors in four main locations that have served as hubs for the commission of crimes since 2011—Zawiya, Bani Walid, Sabratha, and Tripoli—where migrants and refugees have been victimised by different actors. It provides background information on the armed groups, militias, and smuggling and trafficking rings active in each location and how they are connected to each other. It also specifically describes the responsibility of individuals who exercise control over the system of exploitation of migrants and refugees.

38. In light of all the information provided in the Communication, the undersigned organisations urge the OTP to investigate the individuals named therein, as well as other suspects that will be identified by the OTP upon thorough investigation. The assessment of the individual responsibility of alleged perpetrators under Art. 25(3)(a) is of course without prejudice to any other finding regarding alleged perpetrators being investigated by the OTP, in relation to whom the Prosecutor may find other modes of liability suitable, including command responsibility.

## **6. Admissibility and Interest of Justice (Section VI)**

39. The Communication elaborates further on the admissibility of the cases as included therein, pursuant to Art. 17(1) of the Rome Statute. Indeed, the Libyan State is unwilling and unable to genuinely carry out investigations into or prosecutions of the commission of international crimes against migrants and refugees on its territory. Alleged perpetrators have not been tried in the past for the conduct attributed to them. The crimes are of sufficient gravity to justify the Court’s intervention.

40. Despite Libya’s primary responsibility to investigate serious crimes and gross human rights violations, its domestic legislation is inadequate for this purpose. Libya

has no legislation that implements crimes against humanity. Even when the underlying acts have been criminalised, domestic provisions fail to provide sufficient definition of these acts, such as torture and enslavement, and are inconsistent with international human rights law to which Libya is a party. Likewise, Libyan law is limited when it comes to detailing the modes of criminal liability and superior responsibility. Finally, the Libyan legal framework contains several amnesty laws for crimes committed during and subsequent to the 2011 uprising. While legislation has been enacted to exclude amnesties for certain crimes, it is not in line with international criminal law standards, as already found in the case against Saif Gaddafi.<sup>16</sup>

41. In addition, Libya's criminal justice system has been considerably weakened since the armed conflict erupted in 2011 and is currently ineffective. According to the International Commission of Jurists, both State and non-State actors 'pose a serious threat to the independence of Libya's justice system,'<sup>17</sup> as certain armed groups, militias, and government authorities exercise control over some defendants and judicial members. The United Nations Support Mission in Libya (UNSMIL) and the Office of the High Commissioner for Human Rights (OHCHR) have also reported the non-compliance of the Libyan justice system with international fair trial standards.<sup>18</sup>

42. Libyan authorities are unwilling to conduct genuine proceedings and alleged perpetrators have so far escaped accountability. For example, following Al-Werfalli's second ICC arrest warrant, the suspect was neither arrested nor transferred to the Court. In fact, it was reported in July 2019 that he had been promoted to lieutenant colonel by Khalifa Haftar, the head of the Libyan Arab Armed Forces (LAAF), only a few days

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<sup>16</sup> ICC, Situation in Libya, *The Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the 'Admissibility Challenge by Dr. Saif Al-Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute', Pre-Trial Chamber I (5 April 2019), para 78.

<sup>17</sup> International Commission of Jurists (ICJ), *Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System*, July 2019, p. 19, available at: <https://www.icj.org/wp-content/uploads/2019/07/Libya-Accountability-serious-crimes-Publications-Reports-Thematic-reports-2019-ENG.pdf>.

<sup>18</sup> United Nations Support Mission in Libya (UNSMIL) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), *Report on the trial of 37 former members of the Qadhafi regime (Case 630/2012)*, 21 February 2017, available at: [https://www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime\\_EN.pdf](https://www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime_EN.pdf).



after the public issuance of the arrest warrant.<sup>19</sup> Thus, it is evident that Libya is unwilling and unable to genuinely investigate and prosecute international crimes, including those committed against migrants and refugees on its territory. Concomitantly, proceedings in other States, in particular Italy, however commendable, are scarce in number and do not necessarily reflect the gravity of the crimes committed against migrants and refugees as crimes against humanity or war crimes. The few domestic proceedings conducted by third States should not bar the Court from exercising its jurisdiction over these crimes.

43. Finally, the Communication assesses the scale, nature, manner of commission, and impact of the relevant crimes,<sup>20</sup> concluding that the gravity criterion under the Rome Statute is fulfilled. Every year, thousands of migrants are reported to be victims of the crimes described in the Communication, with crimes taking place across the whole Libyan territory and involving many different actors. Moreover, the nature of the crimes committed is egregious *per se*: noticeable, several crimes not only integrate gross violations of human rights but also have a sexualised and gendered component. In this respect, the manner of commission takes advantage of migrants and refugees' extreme vulnerability in this insecure environment. These crimes heavily affect their victims, leaving long-lasting physical and psychological scars, while also affecting local Libyan population.

44. As thoroughly analysed in the Communication, there is no reason to believe that the investigation and prosecution of the crimes committed against migrants and refugees in Libya would not serve the interest of justice. On the contrary, the gravity of these crimes makes it precisely in the interest of justice to actively investigate and prosecute these cases. The victims testimonies clearly indicate their wish to see the alleged perpetrators held accountable for the crimes committed against them, their families and

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<sup>19</sup> Middle East Eye, '*Libya's Haftar promotes accused war criminal wanted by international court*,' 9 July 2019, available at: <https://www.middleeasteye.net/news/libyas-haftar-promotes-accused-war-criminal-wanted-international-court>.

<sup>20</sup> Regulation 29 of the Regulations of the OTP; OTP, *Policy Paper on Preliminary Examinations*, November 2013, para. 61, available at: [https://www.icc-cpi.int/iccdocs/otp/otp-policy\\_paper\\_preliminary\\_examinations\\_2013-eng.pdf](https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf); OTP, *Policy Paper on Case Selection and Prioritisation*, para. 42

friends. The fact that no prosecutions have been carried out to date denies the victims' right to justice.

## **7. Request**

45. The ICC Prosecutor must urgently take steps to bring to justice those responsible for the commission of the crimes, as thoroughly documented and analysed throughout the Communication. Indeed, besides the commendable efforts of some domestic prosecutors, an ICC investigation is needed as the Court can properly deal with the structural dimension of the crimes committed beyond the responsibility of low-level perpetrators and hold accountable those at higher echelons, whose immunities bar prosecution in domestic courts. Specifically, the context in Libya with the incorporation of militias and other criminal actors into the State apparatus presents an additional challenge, blurring the division between State authority, armed groups, and criminal networks. It is thus clear that the ICC is the only possible avenue for breaking the cycle of impunity and assessing the individual criminal responsibility of high-level perpetrators.

46. In light of the documentation collected and upon thorough analysis, ECCHR, FIDH, and LFJL respectfully request the Prosecutor to urgently proceed with the investigation and prosecution of those responsible for the grave crimes, under the ICC jurisdiction, committed against migrants and refugees in Libya. This is also in keeping with the Court's essential purpose of ending impunity and contributing to the prevention of international crimes in situations falling under its jurisdiction, including in the context of the Situation in Libya, which has been under ICC investigation since 2011.