



OSSERVATORIO SUI TRIBUNALI INTERNAZIONALI PENALI N. 1/2022

1. *NEVER TOO LATE: A NEW IMPETUS FOR THE PROSECUTION OF CRIMES COMMITTED AGAINST MIGRANTS IN LIBYA BEFORE THE ICC?*

1. *Introduction: the Two Recent Article 15 Communications to the Office of The Prosecutor Regarding Crimes Allegedly Committed Against Migrants in Libya*

On 19 November 2021, a consortium of three NGOs – namely, the [European Center for Constitutional and Human Rights](#) (ECCHR), [Lawyers for Justice in Libya](#) (LFJL), and the [International Federation for Human Rights](#) (FIDH) – filed a communication to the Office of the Prosecutor (OTP) of the International Criminal Court (ICC, the Court) under Article 15 of the Rome Statute (the [Executive Summary](#) of which I will be hereinafter referring to as *ECCHR-LFJL-FIDH Communication*). In such communication, the senders requested the Prosecutor to “urgently proceed with the investigation and prosecution of those responsible for the grave crimes ... committed against migrants and refugees in Libya” (*ECCHR-LFJL-FIDH Communication*, para.46).

On 17 January 2022, another consortium of three NGOs – namely, [UpRights](#), [StraLi](#), and [Adala for All](#) (AfA) – filed a second communication (the [Executive Summary](#) of which I will be hereinafter referring to as *UpRights-StraLi-AfA Communication*) to the same end.

In this short comment I will present the main legal arguments that according to these two communications would warrant the prosecution of the crimes allegedly committed against migrants in Libya before the ICC. But first I will provide an overview of the statements that the Prosecutors of the ICC have made before the United Nations Security Council (UNSC, Security Council) throughout the years in relation to investigations into different set of crimes falling under the jurisdiction of the Court, particularly those allegedly committed against migrants. In light of such statements, the two communications may sound like a *polite nudge* to remind the Prosecution to live up to the promise that it would contribute to “clos[ing] the impunity gap regarding alleged criminality against migrants in Libya” (see the [Eighteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970\(2011\)](#), 6 November 2019, para.33).

2. *Promise Unfulfilled? The Prosecutor’s Statements About Alleged Crimes Against Migrants in Libya*

Through [Resolution 1970/2011](#) adopted on 26 February 2011 (Resolution 1970/2011, the resolution), among other things the UNSC referred “the situation in the Libyan Arab

Jamahiriya since 15 February 2011” to the ICC Prosecutor (paragraph 4), and invited the Prosecutor to address the Security Council every six months on actions taken pursuant to the resolution (paragraph 7).

In his first report to the UNSC, the then Prosecutor, Luis Moreno Ocampo, announced that on 3 March 2011 he had decided to open an investigation into the situation in Libya since 15 February 2011 (see the [First Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970\(2011\)](#), 4 May 2011, paras.22, 31, 37). Between 2011 and 2013, the ICC issued four arrest warrants in relation to crimes against humanity and war crimes allegedly committed between February and August 2011, against the acting Libyan Head of State, Muammar Gaddafi (the case would be terminated after he was killed by rebels in October 2011); his son Saif Al-Islam Gaddafi; the Head of Libyan Military Intelligence, Colonel Abdullah Al-Senussi; and the former head of the Libyan Internal Security Agency, Al-Tuhamy Mohamed Khaled.

A fifth suspect would be selected for prosecution in relation to war crimes allegedly committed in or around Benghazi between June 2016 and July 2017 and in January 2018: the Commander of Al-Saiqa Brigade, Mahmoud Mustafa Busayf Al-Werfalli (see Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli, [Warrant of Arrest](#), Pre-Trial Chamber I, 15 August 2017 (*Al-Werfalli Arrest Warrant*); and Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli, [Second Warrant of Arrest](#), Pre-Trial Chamber I, 4 July 2018 (*Al-Werfalli Arrest Warrant II*)).

Investigations into other sets of conducts have been initiated by the OTP since 2011, including in relation to crimes allegedly committed by groups affiliated with or representing the “Islamic State of Iraq and the Levant” (ISIL) (see the [Tenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970\(2011\)](#), 26 October 2015 (*Tenth Report on Libya*), para.22) and crimes allegedly committed against migrants transiting through Libya (see, among others, [Thirteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970\(2011\)](#), 8 May 2017 (*Thirteenth Report on Libya*), paras.22-26).

Beginning in 2017, ICC Prosecutors have been reporting to the Security Council that the OTP was analyzing allegations concerning serious and widespread crimes allegedly committed against migrants attempting to transit through Libya with the aim of determining whether such crimes may fall within the jurisdiction of the Court (see *Thirteenth Report on Libya*, para.26). In November 2017, Prosecutor Bensouda suggested that “certain crimes allegedly committed against migrants in Libya may fall within the jurisdiction of the Court” (see the [Fourteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970\(2011\)](#), 8 November 2017 (*Fourteenth Report on Libya*), para.34). In November 2019, the Prosecutor informed the UNSC that the OTP was “focusing heavily on its strategy of cooperation and coordination with Libya and other relevant States in order to support national investigations and prosecutions” (see the [Eighteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970\(2011\)](#), 6 November 2019, para.33). According to Bensouda, this “proactive cooperation strategy” would yield “substantial results” (see the [Nineteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970\(2011\)](#), 6 November 2019, para.32), which to date have consisted in the conviction of three individuals by the Court of Messina for crimes committed against migrants in the Zawiyah detention centre (see the [Twentieth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970\(2011\)](#), 10 November 2020

(*Twentieth Report on Libya*), para.28), the imposition of EU sanctions on Mousa Adyab (a.k.a. Moussa Diab) in relation to his involvement in human trafficking, rape, and the killing of refugees in Bani Walid (see *Twentieth Report on Libya*, para.28), and the setting up of a Joint Team formed by Europol, Italy, the United Kingdom, and The Netherlands “culminated in an arrest warrant issued by The Netherlands in October 2021” (see the [Twenty-second Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970\(2011\)](#), 23 November 2021, para.29).

However, as of today the Prosecution has not addressed the question whether the crimes allegedly committed against migrants would fall under the jurisdiction of the Court – let alone whether it would seek any arrest warrants in this respect. Thus the requests made by the two consortia of NGOs in their respective communications.

3. *The Legal Basis for the Exercise of the ICC’s Jurisdiction Over Acts Allegedly Committed Against Migrants in Libya*

Even though in November 2017 Fatou Bensouda hinted that “certain crimes allegedly committed against migrants in Libya may fall within the jurisdiction of the Court” (*Fourteenth Report on Libya*, para.34), the issue of the scope of the ICC’s jurisdiction over such crimes has not been picked up in the following reports. In particular, the OTP has never clarified: 1) whether pursuant to Resolution 1970/2011, the Court could exercise its jurisdiction over such conducts; 2) whether any of those acts would amount to crimes falling under the jurisdiction of the Court. In their respective communications, the two consortia of NGOs provide interesting arguments with respect to both legal issues. For the purpose of this comment I will only focus on the first.

The question revolves around the determination concerning the scope of Resolution 1970. As noted above, the Security Council vested the ICC with broad *ratione materiae* (1), *ratione loci* (2), and *ratione temporis* (3) jurisdiction. Pursuant to paragraph 4 of the resolution, the ICC seems to have been provided with jurisdiction over (any) international crimes (1) committed in Libya (2) since 15 February 2011 (3). Conversely, the Security Council restricted the jurisdiction *ratione personae* by establishing that “nationals, current or former officials or personnel” from a non-State Party to the ICC “shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State” (see paragraph 6 of the resolution).

In assessing whether crimes allegedly committed against migrants fall under the scope of the referral, *ECCHR-LFJL-FIDH Communication* relies on the ICC practice (see paras.11-12). First, the senders recall that in previous instances, the ICC has held that the Prosecution may initiate investigations on certain allegations “as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court”, and that a situation can include crimes committed after the referral “in so far as they are sufficiently linked to the situation of crisis” (see *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 (*Mbarushimana Decision*), para.6). Second, the communication highlights that in other cases stemming from the situation in Libya, Pre-Trial Chamber I has found that the ICC can exercise jurisdiction if the crimes are sufficiently linked to the armed conflict erupted in 2011 or with the relevant actors already active in 2011 (see para.11 of the communication, referring to *Al-Werfalli Arrest Warrant*, para.23; and *Al-Werfalli Arrest Warrant*

II, para.20). In the specific circumstances of the case, there would be three reasons to conclude that one of these two alternative requirements were met: 1) migrants have been forced to work for armed groups, have directly participated in the hostilities, and have been the subject of attacks (*direct* link to the conflict); 2) detention centres where migrants are subjected to the crimes are nominally run by the Directorate for Combatting Illegal Migration (DCIM), but *de facto* under the control of armed groups involved in the conflict (link to actors); 3) as armed groups have turned to the exploitation of migrants to secure revenue and thus sustain their military operations, it is the commission of crimes against migrants that perpetuates the conflict (*indirect* link to the conflict).

The *UpRights-StraLi-AfA Communication* focuses on the other hand on the requirement that the alleged crimes must be *associated with* the ongoing armed conflict underlying the referral. The senders argue that “the conflict in Libya is at the base of the manner, the motives, the ability, and the causes underpinning the commission of such crimes”. In particular, they point out that the alleged crimes are “perpetrated by members of the armed groups involved in the conflict and in the same facilities as their headquarters”, that “[t]heir commission served the purpose of their military campaign”, that the armed groups’ participation in the hostilities “has been pivotal to ensure or maintain control over the DCIM Detention Centres”, and that the conflict “empowered and enabled the armed groups to dominate the smuggling sector and exert control over the DCIM Detention Centres” (see *UpRights-StraLi-AfA Communication*, paras.20-21). In other words, *UpRights-StraLi-AfA Communication* suggests that the legal basis for the exercise of the jurisdiction of the ICC is grounded in the same *nexus* with the conflict that must be proven with respect to war crimes.

The arguments presented in both communications are convincing. Considering that the senders built their arguments around the *Al-Werfalli* arrest warrants, in the next subsection I will focus on such decisions in order to analyze the factors which Pre-Trial Chamber I took into account in determining whether *Al-Werfalli*’s conducts fell under the scope of Resolution 1970/2011. I will subsequently zoom out and turn to the analysis of Resolution 1970/2011, including in order to assess whether it could be argued that the Security Council triggered the ICC’s jurisdiction over conducts (more loosely) associated with the ongoing armed conflict in Libya – including those committed against migrants.

a) The *Al-Werfalli* arrest warrants’ findings concerning the scope of the ICC’s jurisdiction

In the context of the decisions concerning the issuance of two separate arrest warrants against Mahmoud Mustafa Busayf Al-Werfalli, the judges of Pre-Trial Chamber I had to determine whether the ICC could exercise jurisdiction over such conducts on the basis of Resolution 1970/2011. The main legal issue was if, and under which conditions, acts performed by the suspect between 2016 and 2018 may fall within the scope of the referral.

Pre-Trial Chamber I found that incidents in the context of which the suspect had allegedly committed the war crime of murder fell “within the jurisdiction of the Court” because they were “associated with the ongoing armed conflict underlying the referral by the Security Council” (see *Al-Werfalli Arrest Warrant*, para.23; *Al-Werfalli Arrest Warrant II*, para.20). In particular, they would be “sufficiently linked” with the situation that triggered the jurisdiction of the ICC because *Al-Werfalli* was the commander of the Al-Saiqa Brigade, which had been involved in such conflict “ever since the days of the revolution against the Gaddafi regime” (see *Al-Werfalli Arrest Warrant*, para.23; *Al-Werfalli Arrest Warrant II*, para.20). As to the existence, the nature, and most of all the duration of the armed conflict,

judges held that “an armed conflict not of an international character” had been ongoing “on the territory of Libya, from at least early March 2011, between governmental forces and different organized armed groups, or among various such armed groups” (see *Al-Werfalli Arrest Warrant*, para.25; *Al-Werfalli Arrest Warrant II*, para.9).

On the basis of such findings, I believe that in order to fall within the scope of the “situation” over which the UNSC has triggered the jurisdiction of the ICC, it is sufficient that the alleged crimes are “sufficiently linked” with the *non-international armed conflict ongoing on the territory of Libya from at least early March 2011*. According to Pre-Trial Chamber I, the fact that Al-Saiqa Brigade had been involved in such conflict *since the days of the revolution* represented a decisive factor, in itself sufficient to prove that the crimes allegedly committed by its commander – Al-Werfalli – were sufficiently linked with the conflict. However, this does not entail that *only* crimes committed by individuals linked with an actor that has been involved in the conflict since 2011 can fall within the scope of the situation. As the judges held that crimes need be *sufficiently linked with the ongoing conflict*, one may argue that also conducts committed by armed groups that emerged after 2011 may fall under the jurisdiction of the ICC – *insofar as* such conducts are sufficiently linked with the ongoing conflict. In this regard, it is worth recalling that in 2015, Prosecutor Bensouda reported that the OTP had determined that the jurisdiction of the ICC would “*prima facie*” extend to the crimes allegedly committed on the territory of Libya by groups affiliated with ISIL (*Tenth Report on Libya*, para.22). Such assessment was endorsed by the representative of a permanent member of the UNSC – France –, encouraging the Prosecutor “to pursue her investigations ... into such crimes” (see the [transcript](#) of the 7549th meeting of the UNSC, 5 November 2015, S/PV.7549, p.15). No member of the Security Council objected to such determination.

Conversely, the Chamber did not clarify whether *any* crimes allegedly committed by a person linked with an actor active in 2011 may fall under the jurisdiction of the ICC (for instance: crimes hypothetically committed by human traffickers operating under the protection of the Al-Saiqa Brigade).

All considered, the findings of Pre-Trial Chamber I seem to leave room for grey areas, where conducts may or may not fall under the ICC’s jurisdiction, depending on whether the Prosecution can prove that a “sufficient link” exists between the alleged crimes, the ongoing conflict, and/or actors involved in such conflict. An additional question judges would need to address in case they had to assess conducts relating to these grey areas is whether the referral contained in Resolution 1970/2011 can be interpreted as providing the ICC with such an open-ended jurisdiction. This is, I believe, the case of crimes allegedly committed against migrants.

b) The legal effect of paragraph 4 of Resolution 1970/2011 in light of the ICC practice

Pursuant to Article 13(b) ICC Statute, the Security Council, acting under Chapter VII of the UN Charter, can refer to the ICC Prosecutor a “situation” in which one or more crimes falling under the jurisdiction of the Court might have been committed.

The concept of “situation” has been devised with the aim of “identifying a specific set of events in respect of which credible allegations of crimes are made”, and thus circumscribing “the perimeter of the action of the Court” (see, among others, *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), [Decision on the Defence ‘Exception d’incompétence’ \(ICC-02/05-01/20-302\)](#), Pre-Trial Chamber II, 17 May 2021 (*Ali Kushayb Decision*), para.25). Such *situation* is “generally defined in terms of temporal, territorial and in

some cases personal parameters” (see Situation in the Democratic Republic of the Congo, [Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6](#), Pre-Trial Chamber I, 17 January 2006, para.65) and can encompass “not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis which was ongoing at the time of the referral” (see *Ali Kushayb Decision*, para.25). In order not to exceed the parameters of a situation, the Prosecution must therefore prove that the alleged crimes “occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court through the ... referral” (see, among others, *Mbarushimana Decision*, para.7).

With respect to the situation in Libya, Resolution 1970/2011 does provide the ICC with very broad jurisdiction. As already mentioned, pursuant to paragraph 4 of the resolution the UNSC referred to the Prosecutor *the situation in the Libyan Arab Jamahiriya since 15 February 2011*. On the face of it, it seems that the ICC could exercise jurisdiction over *any* crimes committed on the territory of Libya after 15 February 2011 (the only limit being the exception regarding the jurisdiction *ratione personae*, pursuant to paragraph 7 of the resolution). The question is whether this jurisdiction is so broad as to affect the validity of the referral, and/or force judges to restrict it. In particular, the above-mentioned practice on referrals seems to suggest that judges need to assess whether in the specific circumstances of the case, the alleged crimes are linked to the “situation of crisis” in relation to which the UNSC triggered the jurisdiction of the ICC. Where this is not the case, judges may therefore feel compelled to identify a situation of crisis *independently* of the referral. This is precisely what Pre-Trial Chamber I did in *Al-Werfalli Arrest Warrant* and *Al-Werfalli Arrest Warrant II*, where they found that such situation would be the *ongoing non-international armed conflict between governmental forces and different organized armed groups, or among various such armed groups*. The judges did not offer any reason as to how they had got to such conclusion.

In my opinion, Pre-Trial Chamber I had the power – and a *duty*? – to do so. Pursuant to Article 19 ICC Statute, the Court can in fact exercise the so-called *kompetenz-kompetenz* or *compétence de la compétence* (see [Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute”](#), Pre-Trial Chamber I, 6 September 2018, paras.30-33). In particular, the judges should have provided an interpretation of paragraph 4 Resolution 1970/2011. For the purpose of this short comment, I will only make a couple of points in this regard.

First, such interpretation should be grounded on specific rules of interpretation. In the Advisory Opinion on the legality of the declaration of independence of Kosovo, the International Court of Justice (ICJ) held that “[w]hile the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account” – including statements made by representatives of members of the Security Council at the time of the adoption of the resolution, other UNSC resolutions on the same issue, as well as the subsequent practice of UN organs and of States affected by the resolution (see ICJ, [Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo](#), Advisory Opinion [2010] ICJ Rep. 403, p.442, para.94). In addition, Sir Michael Wood, member of the International Law Commission, identified and discussed a number of differences between UNSC resolutions and treaties, and argued, among other things, that “less reliance can be placed upon the preambular language of resolutions as a tool for the

interpretation of the operative part” (see M.C. WOOD, *The Interpretation of Security Council Resolutions, Revisited*, in *Max P. YB. Un. Nat. Law*, 2017, p.34 – referring to M.C. WOOD, *The Interpretation of Security Council Resolutions*, in *Max P. YB. Un. Nat. Law*, 1998, pp.86-87). This approach would have significant effects in the case at hand. In particular, the fact that in the Preamble of Resolution 1970/2011 the UNSC condemned “the violence and use of force against civilians” (first *considerandum*) and hinted that widespread and systematic attacks taking place in Libya against the civilian population “may amount to crimes against humanity” (sixth *considerandum*) might be read as implying that the *situation of crisis* consisted in the attacks launched by State’s authorities against peaceful demonstrators. Conversely, one could argue that the above-mentioned statement made by the representative of France in the context of the November 2015 meeting, encouraging the Prosecutor to pursue an investigation into crimes committed by groups affiliated with or representing ISIL, may *at least* represent one of the “other factors” to be taken into account according to the ICJ. This would allow for more expansive readings of paragraph 4 of Resolution 1970/2011, according to which the *situation of crisis* would consist in the ongoing non-international armed conflict which erupted in 2011 – and thus cover *all* conducts associated with such conflict, including crimes allegedly committed by ISIL and those committed against migrants.

In light of the above, I believe that the conclusion reached by Pre-Trial Chamber I concerning the identification of the “situation of crisis” was reasonable. On the basis of the referral, the ICC can exercise its jurisdiction over crimes sufficiently linked to the situation of crisis which the UNSC decided to address in 2011 – namely, a situation of civil unrest which later morphed into a non-international armed conflict. In terms of *ratione temporis* jurisdiction, this referral can be considered as open-ended. In this spirit, Lentner has argued that a referral “must be interpreted as providing the ICC with prospective jurisdiction unless expressly decided otherwise” in the resolution, and that “the ICC can only exercise its jurisdiction to that extent” insofar as the UNSC “has not terminated the referral expressly” (see G.M. LENTNER, *The UN Security Council and the International Criminal Court. The Referral Mechanism in Theory and Practice*, 2018, pp.122-123). The ICC may exercise jurisdiction over crimes sufficiently linked to the non-international armed conflict *until* the cessation of hostilities. Crimes allegedly committed by Al-Werfalli in 2016-2018 thus fall within the scope of the referral because a non-international armed conflict has been ongoing on the territory of Libya since 2011, either between governmental forces and different organized armed groups or among various such armed groups. With respect to the crimes allegedly committed against migrants, I will limit myself to subscribe to remarks made in *ECCHR-LFJL-FIDH Communication* and *UpRights-StraLi-AfA Communication*. Senders of the former highlight that “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” (see para.7). Senders of the latter argue that the revolution and subsequent conflict dynamics “enabled the armed groups to dominate the smuggling sector and exert control over the DCIM Detention Centres” (see para.21).

4. Conclusions: Crimes Allegedly Committed Against Migrants Fall Within the Ongoing “Situation of Crisis” in Libya

Between November 2021 and January 2022, two consortia of NGOs have filed two separate Article 15 communications requesting the ICC Prosecutor, Karim Khan, to proceed

with the investigation and prosecution of those responsible for the grave crimes allegedly committed against migrants and refugees in Libya. The communication senders argue that those crimes fall within the scope of the referral contained in Resolution 1970/2011 and that the conducts may amount to war crimes and/or crimes against humanity. According to reports submitted by the ICC Prosecutor to the UNSC on the basis of paragraph 7 of the resolution, the OTP has been conducting an analysis of such allegations with the aim of determining whether such crimes may fall within the jurisdiction of the Court for almost five years. In this short comment, I focused on the considerations that should inform the assessment concerning the scope of the ICC's jurisdiction.

First, I recalled that in the *Al Werfalli* case, Pre-Trial Chamber I has identified the “situation of crisis” that the UNSC referred to the ICC. This would consist in the non-international armed conflict which has been ongoing on the territory of Libya from at least early March 2011 between governmental forces and different organized armed groups, or among various such armed groups. Pre-Trial Chamber I noted that it has been the consistent practice of the ICC to require that the Prosecutor focuses on crimes which are “sufficiently linked” to the situation of crisis. Therefore, the judges concluded that with respect to the situation in Libya, the ICC can exercise jurisdiction over any crime sufficiently linked to the ongoing armed conflict. However, they did not clarify how this would follow from the referral contained in paragraph 4 of Resolution 1970.

The interpretation of Resolution 1970/2011 shall accord with the rules on the interpretation of UNSC resolutions. Based on the practice the ICJ and eminent doctrine, I argued that paragraph 4 of such resolution can be interpreted as implying that the Court can exercise its jurisdiction over crimes sufficiently linked to the “situation of crisis” in relation to which the Security Council triggered the ICC's jurisdiction. A situation that has in the meantime morphed into a non-international armed conflict. Therefore, I believe that on the basis of Resolution 1970/2011, the ICC may exercise its jurisdiction over *any* crimes *sufficiently linked* to the *ongoing non-international armed conflict* in Libya – including those allegedly committed against migrants. Interestingly, the OTP seems to have reached a similar conclusion when it determined that the jurisdiction of the ICC would “*prima facie*” extend to the crimes allegedly committed by groups affiliated with ISIL (*Tenth Report on Libya*, para.22).

In light of the above, I believe that the Prosecutor may (should) proceed with the prosecution of people responsible of the grave crimes allegedly committed against migrants transiting through Libya, and particularly against those detained in the centres *de facto* run by armed groups involved in the conflict (on this matter, *see* also L. PROSPERI, *The ICC (Symbolic) Investigation into Crimes Allegedly Committed Against Migrants in Libya*, in N. RONZITTI, E. SCISO (eds.), *I conflitti in Siria e Libia. Possibili equilibri e le sfide al diritto internazionale*, 2018, pp. 243-264). The conducts migrants are subjected to in those detention centres may in fact amount to crimes against humanity and war crimes (*see* ECCHR-LFJL-FIDH *Communication*, paras.17-32; and *UpRights-StraLi-AfA Communication*, paras.15-18).

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* *Disclaimer*: the Author contributed to background research activities and the drafting of sections of *UpRights-StraLi-AfA Communication* which this comment does not discuss.