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Prosecuting Crimes Against Migrants Before Domestic Courts

Challenges of Extraterritorial Justice in Italy

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ABSTRACT

The commission of crimes against migrants and refugees in Libya and along the Central Mediterranean route has long called for accountability of actors at different levels. Yet, despite broad recognition of these crimes, effective prosecutions remain a major challenge. Litigation efforts across national and international fora emphasize the responsibility of states in prosecuting extraterritorial crimes and fostering judicial cooperation. In Italy, the consistent arrival of migrants has prompted investigations into crimes they endure during their journey. Notwithstanding the absence of provisions on universal jurisdiction, Italian criminal law broadly extends to offences committed abroad, particularly those related to illegal immigration. However, as currently interpreted, the extraterritorial application of Italian criminal law limits prosecutions to mid- or lower-level perpetrators. Additionally, the absence of domestic provisions on international crimes compels reliance on ordinary offences, leaving significant gaps in accountability, especially concerning crimes against humanity. This article argues that Italian proceedings are crucial in addressing accountability for crimes committed against migrants in Libya and along the Central Mediterranean route, while critically assessing their limitations. Drawing on existing case law, it examines the potential for these proceedings to effectively target those most responsible for such crimes. The article concludes that a strengthened legal framework would enable Italy to tackle systemic crimes against migrants more comprehensively and to fully cooperate with national and international judicial authorities in fighting impunity.

1. INTRODUCTION

International institutions and human rights organizations have long condemned the commission of serious crimes against migrants, asylum seekers, and refugees[1] in Libya.[2] Amid the

[1] The term 'migrant' is used as including also asylum seekers and refugees.

[2] See Independent Fact-Finding Mission on Libya, *Report of the Independent Fact-Finding Mission on Libya*, UN Doc A/HRC/52/83, 20 March 2023, § I, at 2, stating that 'the Mission has found reasonable grounds to believe that since 2016

violent conflict that has torn the country apart since 2011, thousands of migrants find themselves trapped in a brutal cycle. After enduring systematic violence in Libya due to their illegal status, they risk their lives at sea, only to be intercepted and forcibly returned under European states' policies, and subjected to the very abuses they fled.[3] In this context, criminal organizations and militias controlling Libyan territory play a central role, engaging in activities such as smuggling, human trafficking, and exploitation of migrants during their journey to Libya's coast or attempts to cross into Europe. As widely documented, Libyan authorities arrest and detain migrants in centres officially controlled by the Directorate for Combating Illegal Immigration (DCIM), typically along the coasts, or in warehouses controlled by trafficking militias in the country's southern regions.[4] Conditions in these detention facilities are hazardous and marked by overcrowding, insufficient access to food and water, and inadequate sanitation. Furthermore, detainees endure severe abuses, including murder, enforced disappearance, torture, sexual violence, enslavement, and arbitrary detention.[5] The situation has worsened amid regional crises. As of December 2024, the International Organization for Migration recorded 824,131 migrants in Libya, including 241,065 from Sudan.[6] Despite recognition of the severe crimes committed against migrants in Libya and along the Central Mediterranean route, accountability remains a challenge. Various strategies have targeted litigation across national and international fora, with efforts also focused on fostering international cooperation.[7]

This article analyses the outcomes of Italian proceedings on crimes committed against migrants in Libya and along the Central Mediterranean route, examining whether they align with the broader trend of prosecuting core international crimes in domestic courts under universal jurisdiction and assessing their effectiveness and role within this landscape. It concludes that, within litigation strategies, Italy has the potential to ensure accountability for international crimes committed against migrants, provided it establishes the necessary legal framework to address such violations effectively. Section 2 examines international and supranational accountability efforts for crimes against migrants in Libya within the broader context of ongoing investigations conducted by the Office of the Prosecutor (the OTP) of the International Criminal Court (ICC), together with national authorities. As argued in Section 3, the role of domestic jurisdictions is critical. Empirical studies suggest a direct connection between migration flows and the initiation of criminal proceedings for international crimes

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crimes against humanity have been committed against Libyans and migrants throughout Libya in the context of deprivation of liberty' and documenting 'numerous cases of, *inter alia*, arbitrary detention, murder, torture, rape, enslavement and enforced disappearance'. See also European Center for Constitutional and Human Rights (ECCHR), *No way out: Migrants and refugees trapped in Libya face crimes against humanity*, November 2021, available online at https://www.ecchr.eu/fileadmin/Publikationen/NO_WAY_OUT_Migrants_and_refugees_trapped_in_Libya_face_crimes_against_humanity_EN.pdf (visited 31 May 2025).

[3] Libya is not a state party to the 1951 UN Convention relating to the Status of Refugees, nor to its 1967 Protocol.

[4] The Directorate for Illegal Migration (DCIM) was established in 2014 by the Government of National Accord under the Ministry of Interior to oversee illegal migration in Libya. See Cabinet Decree (386) of 2014, available online at https://security-legislation.ly/sites/default/files/lois/1321-Decree%20No.%20%28386%29%20of%202014_EN.pdf (visited 31 May 2025). In practice, some detention centres are only nominally under DCIM control, while affiliated militias and armed groups, often run them de facto. See further ECCHR, *supra* note 2, at 7, 15, 17, 21, 24–29.

[5] *Ibid.*, at 32. See Independent Fact-Finding Mission on Libya, *supra* note 2, at 11–12. Amnesty International, Libya, *'Between Life and Death': Refugees and Migrants Trapped in Libya's Cycle of Abuse*, 2017, available online at https://www.amnesty.eu/wp-content/uploads/2020/09/Libya-report-Between-life-and-death.pdf (visited 31 May 2025), at 27–32. See also Human Rights Watch, *No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya*, January 2019, available online at https://www.hrw.org/sites/default/files/report_pdf/eu0119_web2.pdf (visited 31 May 2025), at 35–57.

[6] International Organization for Migration—Libya, *Migrant Report Round 55*, November-December 2024, available online at https://dtm.iom.int/sites/g/files/tmzbdl1461/files/reports/DTM_Libya_R55_Migrant_Report_Final.pdf?iframe=true (visited 31 May 2025).

[7] G. Raimondo, 'Invisible Crimes: Accountability for Crimes Against Migrants in Libya', 25 *European Journal of Migration and Law* (*EJML*) (2023) 328–357, at 329; A. Pijnenburg and K. van der Pas, 'Strategic Litigation against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Migration Route', 24 *EJML* (2022) 401–429.

in host countries.[8] Besides universal jurisdiction, the movement of people across borders has prompted judicial responses through other mechanisms, effectively extending territorial jurisdiction beyond national borders and enabling the prosecution of crimes committed abroad against migrants. Italian proceedings represent a remarkable example of this dynamic. The geographical proximity of Libya to Italy and consequent arrival of migrants from the Central Mediterranean route provide a basis for extending Italian criminal law to acts committed outside the national territory. Notwithstanding the absence of provisions on universal jurisdiction, Italian criminal law broadly applies to offences committed abroad. While these proceedings may contribute to advancing accountability, they raise concerns due to their focus on lower-ranking perpetrators. Moreover, the responsibility of Libyan state and non-state actors and the complicity of the European Union (EU) and Member States — such as Italy and Malta — in the commission of crimes against migrants remain largely unaddressed. As acknowledged in Section 4, the lack of specific national provisions addressing international crimes also forces Italian courts to rely on ordinary criminal offences. This entails significant shortcomings in terms of both divergence from the definitions of corresponding international crimes and application of general provisions of domestic criminal law, such as statutes of limitations.

2. JUDICIAL COOPERATION AND INTERNATIONAL INVESTIGATIONS INTO CRIMES AGAINST MIGRANTS IN LIBYA AND THE CENTRAL MEDITERRANEAN

Actors involved in strategic litigation have pursued accountability for crimes committed against migrants in Libya and along the Central Mediterranean route across multiple national, international, and regional fora. However, the effectiveness of these initiatives varies depending on the targeted actors. Proceedings often result in greater accountability for mid- or lower-profile individuals, while attempts to pursue those most responsible for such crimes have largely been unsuccessful.

At the international level, the Situation in Libya has been under investigation by the OTP since March 2011, following a referral by the United Nations Security Council (UNSC) acting under Chapter VII of the Charter of the United Nations (UN).[9] UNSC Resolution 1970 (2011) acknowledged the 'gross and systematic violation of human rights … against the civilian population made from the highest level of the Libyan government', then led by Muammar Mohammed Abu Minyar Gaddafi, and expressed 'concern at the plight of refugees forced to flee the violence'.[10] After the increased migration flows of 2015–2016, the OTP began acknowledging the commission of violence, including sexual violence, and ill-treatment against migrants along the Mediterranean migratory route. In its reports to the UNSC, the OTP highlighted that the 'detention of thousands of migrants continues to be a source of financing for many militant groups in Libya'.[11] Crimes against migrants represent one of the four key lines of inquiry that the OTP is pursuing in the Libyan situation,

[8] Primary reference on the variables influencing how migrants contribute to accountability for crimes committed in their countries of origin is L. Johns, M. Langer and M.E. Peters, 'Migration and the Demand for Transnational Justice', 116 *American Political Science Review* (2022) 1184–1207. See also M. Langer and M. Eason, 'The Quiet Expansion of Universal Jurisdiction', 30 *European Journal of International Law* (*EJIL*) (2019) 779–817; W. Kaleck and P. Kroker, 'Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?' 16 *Journal of International Criminal Justice* (*JICJ*) (2018) 165–191.

[9] SC Res. 1970 (2011), § 4.

[10] *Ibid.*, Preamble.

[11] The Office of the Prosecutor (OTP) first acknowledged violations against migrants and refugees in Libya in its *Eleventh report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to resolution 1970 (2011)*, 20 May 2016, § 21.

together with: (i) 2011 violence against demonstrators and opponents of the former Gaddafi regime; (ii) crimes committed in detention facilities; and (iii) crimes related to the 2014–2020 military operations.[12] It remains, however, unclear to what extent the Prosecutor is addressing crimes against migrants and the responsibility of all actors involved in their commission. Since 2019, several communications submitted by human rights organizations to the OTP under Article 15 ICC Statute have reported the commission of international crimes against migrants in Libya and along the Central Mediterranean route.[13] These crimes would fall under the jurisdiction of the ICC as per UNSC Resolution 1970 (2011), which broadly refers to the 'situation in the Libyan Arab Jamahiriya since 15 February 2011'.[14] According to these communications, the spiral of abuse and violence against thousands of migrants transiting through Libya is far from isolated; these crimes are rather widespread and systematic, meeting the contextual criteria for crimes against humanity as outlined in Article 7 ICC Statute. The high number of migrants subjected to these atrocities, concerning diverse ethnic, national, religious, and gender groups, would demonstrate the widespread nature of the alleged crimes. At the same time, the exploitation of individuals unlawfully detained in Libyan detention centres, frequently driven by economic gain, would evidence their systematic character.[15] According to these communications, the indiscriminate detention and exploitation of migrants, enabled by Law no. 19/2010 and by the absence of a legal framework on asylum, together with the use of public resources to operate detention facilities, amount to a state-level policy.[16] This policy, exacerbated by the ongoing conflict and unstable political context, could meet the criteria established under Article 7(2)(a) ICC Statute for an attack carried out pursuant to or in furtherance of a state or organizational policy. The attack would involve networks of both state and non-state actors, some of whom support competing governments in their quest for authority or legitimacy within Libya's

[12] OTP, *Twenty-eighth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)*, 19 November 2024, at 27. Until 2025, only the first strand led to the opening of cases against specific suspects. However, these cases were discontinued either due to the suspects' death (Muammar Gaddafi; Al-Tuhamy Mohamed Khaled; Mahmoud Mustafa Busayf Al-Werfalli), or because of their inadmissibility under the principle of complementarity ex Art. 17 ICCSt. (Abdullah Al-Senussi, who is still awaiting an appeals trial in Libya). The case against Saif Al-Islam Gaddafi remains pending, as the suspect is still at large.

[13] Legal clinic Capstone on Counter-Terrorism and International Crimes, PSIA—Sciences Po (Paris) with lawyers J. Branco and O. Shatz, *Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Art. 15 ICCSt., EU Migration Policies in the Central Mediterranean and Libya (2014–2019)*, 3 June 2019, available online at https://www.front-lex.eu/icc-case (visited 31 May 2025); ECCHR, Lawyers for Justice in Libya, the International Federation for Human Rights, *Art. 15 Communication to the Office of the Prosecutor of the International Criminal Court Re: Situation in Libya—Crimes against Migrants and Refugees in Libya*, 19 November 2021, available online at https://www.ecchr.eu/fileadmin/user_upload/Redacted_Art_15__Communication_to_the_ICC_on_crimes_against_refugees_and_migrants_in_Libya.pdf (visited 31 May 2025); Adala for All, StraLi, UpRights, *Art. 15 Communication on War Crimes and Crimes Against Humanity Committed Against Migrants and Asylum Seekers in Libya*, 17 January 2022, available online at https://uprights.org/wp-content/uploads/2023/01/Art.-15-Communication-on-War-Crimes-and-Crimes-Against-Humanity-Committed-Against-Migrants-and-Asylum-Seekers-in-Libya.pdf (visited 31 May 2025); ECCHR, *Article 15 Communication to the Office of the Prosecutor of the International Criminal Court Re: Situation in Libya—Commission of Crimes Against Migrants and Refugees: Interceptions at Sea as Crimes Against Humanity*, 29 November 2022, §§ 222–225, available online at https://www.ecchr.eu/fileadmin/Redacted_Article_15_Communication_to_the_ICC__Situation_in_Libya_Interceptions_of_Migrants_and_Refugees_at_Sea_as_Crimes_Against_Humanity.pdf (visited 31 May 2025).

[14] SC Res. 1970 (2011), § 4. On the exclusion of officers and personnel of states other than Libya that were not states parties to the ICCSt. See A. Pizzuti and A. Giannini, 'Crimes against migrants and asylum seekers in Libya: Here's how the ICC Has Jurisdiction', Justice in Conflict, 6 May 2022, available online at https://justiceinconflict.org/2022/05/06/crimes-against-migrants-and-asylum-seekers-in-libya-heres-how-the-icc-has-jurisdiction/ (visited 31 May 2025). See ECCHR 2021, *supra* note 13, at 90–93; 104–118, arguing that a clear jurisdictional link exists between SC Res. 1970 (2011) and crimes committed against migrants and refugees. This connection is based on the targeting of migrants in the context of the ongoing armed conflict in Libya since 2011, the involvement of armed groups and militias whose actions are intertwined with smuggling and trafficking networks, and the economic dimension of these crimes, which contributes to sustaining the conflict.

[15] ECCHR 2022, *supra* note 13, at 16. See also UNODC, *The Migrant Smuggling Market on the Central Mediterranean UNODC Observatory on Smuggling of Migrants Update #2*, October 2024, available online at https://www.unodc.org/documents/data-and-analysis/glosom/Observatory/2024/CMRUpdate_Oct2024.pdf (visited 31 May 2025).

[16] ECCHR 2021, *supra* note 13, at 128–130, referring to the interpretation of 'policy' in: Judgment pursuant to Art. 74 of the Statute, *Katanga* (ICC-01/04-01/07-3436-tENG), Trial Chamber II, 7 March 2014, § 1109; Judgment pursuant to Art. 74 of the Statute, *Bemba* (ICC-01/05-01/08-3343), Trial Chamber III, 21 March 2016, § 160.

unstable power structure.[17] The responsibility of non-state actors has proven contentious, especially when they operate transnationally and move across jurisdictions, particularly in contexts involving states that are not parties to the ICC Statute.[18] In Libya, non-state actors include armed groups, smugglers and traffickers, as well as private individuals, such as drivers and shopkeepers, who often carry out various tasks for state authorities, for instance, assuming control over detention facilities or intercepting migrants at sea.[19] Crimes against migrants would encompass acts of murder, enslavement, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution and any other form of sexual violence of comparable gravity, persecution, and other inhumane acts (Articles 7(1)(a)–(k) ICC Statute). These violations may also constitute war crimes under Article 8 ICC Statute, given the non-international armed conflict that has persisted in Libyan territory from at least March 2011, involving governmental forces and various organized armed groups.[20] Armed groups allegedly perpetrate these crimes to finance military operations, maintain territorial control, and advance strategic objectives, therefore establishing a causal link to the ongoing conflict in Libya.[21] The communications identify Libyan individuals, ranging from detention site guards to militia commanders and members of the Libyan Coast Guard, as principal perpetrators under Article 25(3)(a) ICC Statute, while also invoking the complicity of European actors, including Italian and Maltese authorities, under Article 25(3)(d) ICC Statute.[22] Additionally, they denounced the shared responsibility of these authorities and officials in the European Commission, EU Naval Force — Mediterranean, European External Action Service, EU Political and Security Committee, and Frontex, together with the then High Representative of the Union for Foreign Affairs and Security Policy, for the crime of severe deprivation of personal liberty under Articles 7(1)(k) and 25(3)(a) ICC Statute in the implementation of policies of borders control through pushbacks and forcible returns.[23]

In his latest reports, the ICC Prosecutor emphasized the need to expedite investigations into the Situation in Libya, aiming to continue them beyond May 2026.[24] Although none of the arrest warrants unsealed in October 2024 explicitly concerned crimes against migrants, some sealed warrants may include charges of crimes against humanity and war crimes committed against them.[25] A hint in this regard came with the arrest of Najeem Osema Almasri Habish (Elmasry or Al-Masry) in Turin on 19 January 2025. Italian police executed an arrest warrant issued under seal by Pre-Trial Chamber I (PTCI) of the ICC the previous day

17 ECCHR 2021, *supra* note 13, at 129.

18 International criminal tribunals have increasingly recognized the role of non-state actors in the commission of international crimes. For a critical perspective, see F. Mégret, 'Is the ICC Focusing Too Much on Non-State Actors?' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 173–202.

19 Militias, criminal networks, traffickers, and smugglers contribute to the implementation of this policy. International reports have acknowledged the existence of a state policy aimed at deterring sea crossings, extorting migrants and refugees, and subjecting them to violence and discrimination. See *Report of the Independent Fact-Finding Mission on Libya*, UN Doc A/HRC/48/83, 1 October 2021, § 69.

20 As acknowledged in: Warrant of Arrest against Mahmoud Mustafa Busayf Al-Werfalli, *Situation in Libya* (ICC-01/11-01/17-2), Pre-Trial Chamber I, 5 August 2017, § 25.

21 Adala for All, StraLi, UpRights 2022, *supra* note 13, at 54–148.

22 ECCHR 2021, *supra* note 13, at 204–218 identifies the responsibilities of senior members of armed groups, militias and Libyan agents; Adala for All, StraLi, UpRights 2022, *supra* note 13, at 155–160.

23 ECCHR 2022, *supra* note 13, at 110–153, See also Adala for All, StraLi, UpRights 2022, *supra* note 13, at 160–192; Legal clinic Capstone on Counter-Terrorism and International Crimes 2019, *supra* note 13, at 148–150 and 193–212.

24 *Thirthieth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)*, 25 November 2025, at 7 and 20.

25 See ICC Press Release, 'Libya situation: ICC Pre-Trial Chamber I unseals six arrest warrants', 14 October 2024, available online at https://www.icc-cpi.int/news/libya-situation-icc-pre-trial-chamber-i-unseals-six-arrest-warrants (visited 31 May 2025).

(Elmasry Arrest Warrant).[26] The Elmasry Arrest Warrant includes charges of crimes against humanity and war crimes, including imprisonment, murder, torture, and outrages upon personal dignity, rape, sexual violence, and persecution.[27] These conducts were allegedly committed at the Mitiga detention centre near Tripoli from February 2015 onward, either personally by Elmasry or under his orders, or with his assistance, by members of the Special Deterrence Forces (also known as SDF/RADA). Notably, the Elmasry Arrest Warrant refers to detainees with a migratory background, including sub-Saharan African detainees, among the victims of these crimes.[28] Indeed, UN sources and testimonies collected by civil society organizations have long documented that detainees in Mitiga include migrants from various African countries, systematically targeted for reasons such as religion, ideology, or political motives.[29] The arrest warrant notes that, in addition to the general deprivation of liberty experienced by all detainees at Mitiga Prison,[30] individuals of sub-Saharan African origin endured particularly severe mistreatment. SDF/RADA referred to these detainees as 'slaves' and forced them to perform hard labour, engage in combat, or 'donate' blood.[31] They exploited these individuals for prison tasks such as transporting and searching other detainees, and subjected them to physical abuse, including coercion in stress positions, confinement in standing caskets or 'coffins', and beatings with the 'Falqa' method.[32] SDF/RADA forces imposed ill-treatment and forced indoctrination on detainees who did not adhere to their religious, political, and ideological beliefs.[33] It is therefore notable, particularly concerning the group of detainees of Sub-Saharan origin, that the PTCI found reasonable grounds to believe that the crime of persecution under Article 7(1)(h) ICC Statute had occurred. On this view, the deprivation of these individuals' fundamental rights was indeed attributable to the identity of the targeted group, and it was explicitly motivated by political, racial, national, ethnic, cultural, religious, and gender-based grounds.[34]

The Elmasry Arrest Warrant is also noteworthy as it, together with the dissenting opinion by Judge Socorro Flores Liera, entails significant assessments concerning the Court's jurisdiction over the crimes mentioned above. The majority of PTCI found that Elmasry's alleged conduct was 'sufficiently linked' to the Situation in Libya, which triggered the ICC jurisdiction through UNSC Resolution 1970 (2011).[35] According to the Court, these acts occurred within the broader context of the protracted Libyan crisis that led to the referral, during which the SDF/RADA forces emerged, took control of the Mitiga airbase, and established a detention facility where they held individuals for reasons related to fighting or

[26] Corrected version of the 'Warrant of Arrest for Mr Osama Elmasry/Almasri Njeem' dated 18 January 2025 (ICC01/11-149-US-Exp), including Dissenting Opinion of Judge Socorro Flores Liera, *Situation in Libya* (ICC-01/11-152-Anx), Pre-Trial Chamber I, 18 January 2025.

[27] See M. Crippa and L. Parsi, 'I profili di responsabilità del generale libico Elmasry nel mandato di arresto della Corte penale internazionale', 2 *Sistema Penale* (2025) 125–134.

[28] Elmasry Arrest Warrant, §§ 80, 88.

[29] *Report of the Independent Fact-Finding Mission on Libya*, UN Doc A/HRC/50/63, 27 June 2022, §§ 39, 74; ECCHR 2021, §§ 112, 227, 286, 289, 293, 519.

[30] SDF/RADA held detainees either in solitary confinement units or in overcrowded cells and systematically subjected them to searches followed by brutal interrogations and torture. Detainees were held. Elmasry Arrest Warrant, §§ 36–37.

[31] Nevertheless, PTCI found that the Prosecution had failed to establish the exercise of powers attaching to the right of ownership over one or more identifiable individuals. See Elmasry Arrest Warrant, §§ 78–81.

[32] *Ibid.*, § 88.

[33] *Ibid.*, § 88–89.

[34] *Ibid.*, § 90.

[35] PTCI, in a different composition in the *Al-Werfalli* case, concluded that the ICC's jurisdiction was limited to crimes linked to the armed conflict in Libya, which constituted the crisis underlying the SC Res. 1970 (2011): Public Warrant of Arrest, *Situation in Libya* (ICC-01/11-01/17), Pre-Trial Chamber I, 15 August 2017, § 23; see again Pizzuti and Giannini, *supra* note 14.

tensions among different groups.[36] Furthermore, according to PTCI, the Prosecutor's continued reporting to the UNSC, and the absence of objections thereto, indicate that the ICC retains jurisdiction over the alleged crimes in the context of the ongoing crisis in Libya.[37] In her dissenting opinion, Judge Maria del Socorro Flores Liera challenged the existence of a sufficient link or a direct connection between the alleged crimes and the Situation in Libya as referred to by the UNSC.[38] In her view, although the conflict in Libya may have persisted following the death of Muammar Gaddafi in 2011, the Court cannot determine whether the hostilities at the time of Elmasry's alleged conduct amounted to a non-international armed conflict.[39] The dissenting judge further argued that the majority's approach would, in effect, allow the ICC to exercise its jurisdiction indefinitely over a non-state party.[40] She noted that Libya could either ratify the ICC Statute and become a state party or accept the Court's jurisdiction under Article 12(3) ICC Statute, thereby enabling the Prosecutor to extend the scope of investigations. Interestingly, on 15 May 2025, Libya lodged a declaration under Article 12(3) ICC Statute, accepting the Court's jurisdiction over crimes committed on its territory from 2011 through the end of 2027.[41] Another arrest warrant recently issued by the ICC against a different Libyan suspect confirmed this conclusion. On 16 July 2025, German authorities arrested Khaled Mohamed Ali El Hishri (El Hishri), executing the warrant issued against him by the PTCI on 10 July 2025.[42] El Hishri is suspected of crimes against humanity and war crimes, including murder, torture, rape, and persecution, committed in his capacity as a senior official at Mitiga Prison and, more generally, in Libya between February 2015 and 2020, either personally or through SDF/RADA forces under his control, pursuant to Article 25(3)(a) and (b) ICC Statute. The fact that the arrest warrant against El Hishri does not raise any jurisdictional issues suggests that the question of whether the ICC can cover conduct far from the 2011 conflict is now settled.[43]

Notwithstanding the prompt execution of the arrest warrant under an Interpol Red Notice,[44] on 21 January 2025, Italy released Elmasry and repatriated him to Libya via a state-operated flight, thereby failing to surrender him to the ICC.[45] The *Elmasry* case raises

[36] Elmasry Arrest Warrant, §§ 6–7, 9, 11. PTCI recalled that a situation includes '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 referred to the Court'.

[37] Elmasry Arrest Warrant, § 10.

[38] Dissenting Opinion of Judge Maria del Socorro Flores Liera, § 9. See also A. Skander Galand, 'Making Libya an ICC Priority Situation: Fake Promises to a Difficult Customer?', Opinio Juris, 13 January 2017, available online at https://opiniojuris.org/2017/01/13/making-libya-an-icc-priority-situation-fake-promises-to-a-difficult-customer/ (visited 31 May 2025), noting that a second referral would provide a sounder legal basis for ICC jurisdiction.

[39] *Ibid.*, § 5.

[40] *Ibid.*, § 10. Moreover, the dissenting judge found the approach taken in relation to state vis-à-vis UNSC referrals potentially unequal and inconsistent. See Dissenting Opinion of Judge Socorro Flores Liera, §§ 11–13.

[41] See Press Release: Libya accepts ICC jurisdiction over alleged crimes from 2011 to the end of 2027, 15 May 2025, available online at https://www.icc-cpi.int/news/libya-accepts-icc-jurisdiction-over-alleged-crimes-2011-end-2027 (visited 31 May 2025).

[42] Warrant of Arrest for Mr Khaled Mohamed Ali El Hishri, *Situation in Libya* (ICC-01/11-188), Pre-Trial Chamber I, 10 July 2025. Unlike the case of Elmasry, El Hishri was surrendered by German authorities to the ICC, in accordance with domestic procedural law, and his initial appearance took place on 3 December 2025 before the PTCI. See 'Law on Cooperation with the International Criminal Court', BGBl. I S. 2144, 2002, Sect. 28.

[43] M. Crippa, 'L'estensione della giurisdizione della Corte penale internazionale nella situazione in Libia alla luce dei piú recenti sviluppi', 4 *Ordine internazionale e diritti umani* (2025) 994–1002.

[44] ICC Press Release, 'Situation in Libya: ICC arrest warrant against Osama Elmasry Njeem for alleged crimes against humanity and war crimes', 22 January 2025, available online at https://www.icc-cpi.int/news/situation-libya-icc-arrest-warrant-against-osama-elmasry-njeem-alleged-crimes-against-humanity (visited 31 May 2025).

[45] The Appeals Court of Rome granted the General Prosecutor's request to dismiss proceedings on the confirmation of the arrest warrant, deeming it procedurally irregular given the lack of prior formal communication between the Italian Minister of Justice and the General Prosecutor of Rome (Art. 2 of Law no. 237/2012). See *Corte d'Appello di Roma* (Appeals Court of Rome), Order on surrender to the ICC under Law no. 237/2012, 21 January 2025, 11/2025, at 4. This interpretation of Law no. 237/2012 raises controversial issues. See further L. Poltronieri Rossetti, 'The failure to arrest and surrender Osama Elmasry Njeem: "That Awful Mess" in Rome', *EJIL: Talk! Blog of the European Journal of International Law*, 27 January 2025,

questions about the potential responsibility of Italian authorities for failing to surrender the suspect to the ICC or to prosecute him.[46] It also offers valuable insights into Italy's role within the international criminal justice system, notably for crimes committed in Libya. Elmasry's surrender to the ICC would have complied with the mechanisms of cooperation between the ICC, particularly the OTP, and states parties. As emerges from its reports to the UNSC, the Prosecutor's strategy is to rely on state cooperation, supporting 'domestic accountability efforts equally, including in relation to migrants in Libya'.[47] This 'two-track approach' aligns with the Prosecutor's recent policy on complementarity and cooperation, which positions the OTP as a 'central hub' supporting domestic and regional accountability efforts while maintaining its independent investigative and prosecutorial mandate.[48] The new approach to complementarity could offer long-term benefits by fostering a sustainable system of burden-sharing and coordination between the ICC, national jurisdictions, and judicial cooperation mechanisms.[49] However, it can only function effectively when supported by thorough and genuine domestic investigations and prosecutions of crimes. This does not appear to be the case for crimes against migrants in Libya, where the lack of transparency in national proceedings has resulted in, as noted by the OTP itself, '[i]mpunity [as] a consistent feature … which continues to this day'.[50] The OTP mandate to 'independently and impartially investigate and prosecute crimes under the Rome Statute'[51] is crucial given both the Libyan legal framework, which harshly punishes illegal immigration through detention, forced labour, and fines,[52] and the alleged involvement of European actors in the commission of crimes.[53]

The OTP further pursues its strategy of judicial cooperation through participation in joint teams that support criminal investigations. In 2022, national authorities of Italy, the Netherlands, the UK, and Spain signed a JT Agreement under the framework of Article 19 of the UN Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air (UNTOC), together with the OTP and with the support of the European Migrant Smuggling Centre of the European Union Agency for Law Enforcement Cooperation (Europol).[54] The JT focuses on high-level perpetrators

available online at https://www.ejiltalk.org/the-failure-to-arrest-and-surrender-osama-elmasry-njeem-that-awful-mess-in-rome/; C. Meloni, 'Italy, Libya, and the failure of State Cooperation with the ICC in the Elmasry arrest Case', *Just Security*, 30 January 2025, available online at https://www.justsecurity.org/107175/italy-libya-icc-cooperation-elmasry-arrest; M. Crippa and M. Colorio, 'As Rome mutinies, justice for Libya fades', Opinio Juris, 31 January 2025, available online at https://opiniojuris.org/2025/01/31/as-rome-mutinies-justice-for-libya-fades/ (last access, for all, 31 May 2025).

[46] On the possible violation of Art. 87(7) ICCSt. and Art. 7(1) of the 1984 Convention against Torture, see Rossetti, *supra* note 45; Crippa and Colorio, *supra* note 45. On 17 February, PTCI notified Italy the opening of a procedure on the failure to surrender Elmasry under Art. 92 ICCSt.: *Situation in Libya* (ICC-01/11-162), Pre-Trial Chamber I, 17 February 2025.

[47] ICC Press Release, 'Statement of ICC Prosecutor Karim A.A. Khan KC to the United Nations Security Council on the Situation in Libya, pursuant to Resolution 1970 (2011)', 20 November 2024, available online at https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-united-nations-security-council-situation-libya (visited 31 May 2025).

[48] OTP, *Policy on Complementarity and Cooperation*, April 2024, § I.

[49] E. van Sliedregt, 'A New ICC Policy on Complementarity? Let's Fast Forward to Universal Jurisdiction Allocation', Just Security, 12 August 2024, available online at https://www.justsecurity.org/98221/icc-policy-complementarity-universal-jurisdiction/ (visited 31 May 2025).

[50] *Twenty-Sixth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)*, 8 November 2023, § 44. See T. Quadt, 'Standards of Delivery: On the OTP's Continuing Questionable Complementarity Standards in the Situation in Libya for Crimes Against Migrants', Opinio Juris, 15 October 2024, available online at https://opiniojuris.org/2024/10/15/standards-of-delivery-on-the-otps-continuing-questionable-complementarity-standards-in-the-situation-in-libya-for-crimes-against-migrants/(visited 31 May 2025).

[51] OTP 2024, *supra* note 48, § 3.

[52] Libyan Law no. 19/2010, titled 'Law Combatting Illegal Immigration'.

[53] ECCHR 2022, *supra* note 13, at 110–153, Adala for All, StraLi and UpRights 2022, *supra* note 13, at 160–192; Legal clinic Capstone on Counter-Terrorism and International Crimes 2019, *supra* note 13, at 148–150 and 193–212.

[54] Art. 19, United Nations Convention Against Transnational Organized Crime (UNTOC), 2225 UNTS 209, referring to the possibility for parties to establish 'joint investigative bodies' and employ special investigative techniques. See Office of the Prosecutor Annual Report 2023, *Delivering Better Together*, 2023, at 82–83, available online at https://www.icc-cpi.int/sites/default/files/2023-12/2023-otp-annual-report.pdf (visited 31 May 2025). While it shares with joint investigation teams the aim to enhance cooperation and facilitate the exchange of evidence in cross-border investigations, a joint team is not necessarily

involved in criminal networks active in the smuggling and trafficking of persons from the Horn of Africa through Libya to Europe, including acts of kidnapping, torture, extortion, enslavement, rape and other sexual and gender-based violence.[55] This form of judicial cooperation aims to coordinate investigative efforts, streamline evidence-gathering, and facilitate the execution of arrest warrants.[56] Judicial cooperation proves especially feasible in the early stages of investigations and in situations unlikely to immediately proceed to trial, as in the case of Libya.[57] Nevertheless, although the JT functions within the framework of an international agreement, the qualification of conduct during investigative activities remains subject to national legislation. In this context, the lack of substantive provisions on international crimes in Italian law warrants further consideration of the limited focus of investigations.[58] The JT has been particularly active in sharing investigation results that led to the arrest and transfer of suspects involved in migrant smuggling to Italy and the Netherlands.[59] While decisive in combating criminal organizations exploiting the vulnerability of those undertaking the Central Mediterranean route, these cases have yet to account for crimes against humanity committed against migrants.[60]

3. ITALIAN CRIMINAL LAW AND ITS EXTRATERRITORIAL APPLICATION TO CRIMES AGAINST MIGRANTS

The focus on smuggling and trafficking charges also defines investigations and proceedings at the national level. An overview of publicly available cases in third countries related to the Libyan context supports this assumption.[61] Despite the intense migration flow to Europe through Libya since 2013, and particularly after 2015–2016, very few proceedings have been initiated in European countries, even those pursuing universal jurisdiction cases in other situations, and none of these concern crimes committed against migrants.[62] As previously recalled, empirical studies suggest a close interrelation between the domestic prosecution of international crimes and migration flows from countries where these crimes are committed

case-specific. See also *Twenty-Fourth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970 (2011)*, 9 November 2022, § 38.

55 See Office of the Prosecutor Annual Report 2024, *The law in action for all*, 2024, at 95–96, available online at https://www.icc-cpi.int/sites/default/files/2024-12/2024-12-04-ICC-Annual-Report-OTP-web.pdf (visited 31 May 2025).

56 *Ibid.*, at 82–83.

57 A. Furger, 'Can They Deliver? The Practice of Joint Investigation Teams (JITS) in Core International Crimes Investigations', 22(1) *JICJ* (2024) 43–58, at 56.

58 As further detailed in Section 4.

59 *Twenty-Sixth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to Resolution 1970 (2011)*, *supra* note 50, §§ 69–72. In 2022, two suspects were extradited to JT partners, and in January 2023, authorities in the United Arab Emirates arrested another suspect pending extradition to the Netherlands. See Office of the Prosecutor Annual Report 2023, *supra* note 55, at 83. So far, Dutch authorities have charged seven suspects in a case involving migration-related crimes. See Netherlands Public Prosecution Service Press Release, 'Netherlands Public Prosecution Service charges Eritrean for violence against migrants', 12 April 2024, available online at https://www.prosecutionservice.nl/latest/news/2024/04/12/netherlands-public-prosecution-service-charges-eritrean-for-violence-against-migrants (visited 31 May 2025).

60 C. Meloni and X. Zhang, 'Complementarity Is No Excuse: Why the ICC Investigation in Libya Must Include Crimes Against Migrants and Refugees', Opinio Juris, 1 December 2021, available online at https://opiniojuris.org/2021/12/01/complementarity-is-no-excuse-why-the-icc-investigation-in-libya-must-include-crimes-against-migrants-and-refugees/ (visited 31 May 2025).

61 See *supra* note 59 on the ongoing cases in the Netherlands.

62 Three investigations based on universal jurisdiction in the United Kingdom and France relate to charges of torture, committed between 2002 and 2007 (against an unnamed suspect), between 2016 and 2017 (against Khalifa Haftar as commander of the Libyan National Army under Gaddafi in 2011), and between 2007 and 2011 (against the French company Amesys, for the furniture of surveillance technologies to the Libyan government). Another proceeding, based on active personality principle, is ongoing in Switzerland against unknown suspects for the smuggling of gasoil from Libya in 2014–2015. See TRIAL International, *Universal jurisdiction Annual Review 2024*, available online at https://trialinternational.org/wp-content/uploads/2024/04/UJAR-2024_digital.pdf (visited 31 May 2025). In May 2025, the Libyan American Alliance filed a lawsuit against Khalifa and Saddam Haftar before a U.S. federal court for war crimes committed in 2019. See Libyan American Alliance, *Case against Haftar*, available online at https://libyanamericanalliance.org/case-against-haftar/ (visited 31 May 2025).

to states with universal jurisdiction or sufficient extraterritorial reach.[63] Besides universal jurisdiction, the movement of individuals across borders has triggered judicial responses through other mechanisms, with the concrete effect of extending jurisdiction beyond states' borders and enabling the prosecution of crimes committed abroad. Therefore, Libya's geographical proximity to the Italian territory may (and does) have consequences in the opening of proceedings before domestic courts, particularly due to the broad extraterritorial reach of Italian criminal law. Indeed, the presence of migrants often prompts investigations under universal jurisdiction, as a general pattern, targeting individuals who are recognized by their own victims, whether within the same group or among the local population.[64] Similarly, Italian proceedings on crimes against migrants frequently begin when other migrants identify suspects of such crimes during rescue operations or at hotspots and migration centres. In one of the first cases, victims identified a Somali national at a migrant centre in Milan as the person responsible for abuses and torture in the detention centres of Bani Walid, southeast of Tripoli, and Sabratha, on the coast, which he helped oversee (*Matammud*).[65] In another case, six migrants who arrived in Lampedusa following a shipwreck and rescue operations identified two Egyptians and one Guinean as torturers in the centre of Zawiyah, on the Libyan coast (*Condè, Ahmed and Ashuia*).[66] More recently, four Bangladeshi migrants recognized two fellow nationals after disembarking in Lampedusa as members of a criminal organization that committed grave crimes, such as torture and kidnapping for ransom, against migrants held at a detention facility on the coast near Zuwara (*Sohel and Md*).[67] As discussed further below, in all these cases, prosecutors charged the conduct as trafficking, enslavement, murder, and/or other ordinary offences (such as rape, kidnapping for ransom, and personal or bodily injury).[68] Indictments for torture or enslavement were not framed as war crimes or crimes against humanity, as Italian law does not criminalize such conduct under those categories.[69] Indeed, while the presence of migrants in Italy may facilitate the

[63] According to these studies, migratory flows influence the prosecution of international crimes committed in third countries, together with other factors such as political demands and the costs of prosecutions. See Johns, Langer, and Peters, *supra* note 8, at 1023–1024; Langer and Eason, *supra* note 8, at 796–799.

[64] This was the case of Duško Tadić (in Germany), the Rwandans Butare Four, Etienne Nzabonimana, and Samuel Ndshykirwa (in Belgium), and the Iraqi Nizar al-Khazraji (in Denmark). See M. Langer and M. Eason, 'The Quiet Expansion of Universal Jurisdiction', 30 *EJIL* (2019) 779–817, footnotes 52 and 53. Germany has prosecuted members of the Assad regime by leveraging the presence of victims and perpetrators among Syrian refugees. See, for instance, ECCHR, *Torture in Syria on trial in Koblenz: A documentation of the Al-Khatib proceedings* (2023), available online at https://www.ecchr.eu/en/publication/torture-in-syria-on-trial-in-koblenz-a-documentation-of-the-al-khatib-proceedings-2-edition/ (visited 31 May 2025); see also Kaleck and Kroker, *supra* note 8.

[65] *Corte d'Assise di Milano* (Court of Assizes of Milan), Judgement, 10 October 2017, available online at https://archiviodpc.dirittopenaleuomo.org/upload/1875-sentenza-matammud.pdf (visited 31 May 2025) (*Matammud*). See G. Mentasti, 'Campi di detenzione per migranti in Libia: il caso Matammud: Nota a sentenza Corte Ass. App. Milano, Sez. I, no. 9/2019, ud. 20.3.2019', 1 *Diritto, Immigrazione e Cittadinanza* (2020), 215–227.

[66] *G.i.p. Tribunale di Messina* (Judge for preliminary investigations at Messina Tribunal), Judgement, 28 May 2020, available online at https://www.sistemapenale.it/pdf_contenuti/1601584178_gip-messina-centri-detenzione-libia-tortura-migranti.pdf (visited 31 May 2025) (*Condè, Ahmed and Ashuia*). See G. Mentasti, 'Centri di detenzione in Libia: una condanna per il delitto di tortura (art. 613 bis c.p.). Nuove ombre sulla cooperazione italiana per la gestione dei flussi migratori', *Sist. Pen.*, 2 October 2020, available online at https://www.sistemapenale.it/it/scheda/mentasti-gip-messina-centri-detenzione-libia-condanna-carcerieri (visited 31 May 2025).

[67] *G.i.p. Tribunale di Palermo* (Judge for preliminary investigations at Palermo Tribunal), Judgement, 22 February 2022 (*Sohel and Md*). See also *Corte d'Assise di Agrigento* (Court of Assizes of Agrigento), Judgement, 13 February 2015 (*Muhidin*) and *G.i.p. Tribunale di Palermo* (Judge for preliminary investigations at Palermo Tribunal), Judgement, 2 April 2014 (*Attour*). A copy of the judgments is with the Author.

[68] For further analysis of the consequences of prosecuting crimes against migrants as ordinary crimes, see *infra* part 4.

[69] The ICCSt. does not impose a clear obligation on states parties to incorporate its substantive criminal provisions, allowing them discretion in enacting domestic legislation. It nonetheless aligns with the ICC's broader goal of combating impunity to adapt domestic criminal laws to correspond to the international criminal justice system. See further C. Meloni and F. Jeßberger, 'Obligations, Options and Obstacles: Implementing the Rome Statute Revisited', in F. Jessberger, C. Meloni, and M. Crippa (eds), *Domesticating International Criminal Law* (Routledge, 2023) 3–8; M. Longobardo, 'The Italian Legislature and International and EU Obligations of Domestic Criminalisation', 21 *International Criminal Law Review* (*ICLR*) (2021) 623–640. On constitutional and international obligations to adopt substantive norms on international crimes: A. Annoni, 'Implementation of Substantive Rules of International Criminal Law in Italy: Between International Obligations and

opening of investigations, the absence of adequate domestic provisions on international crimes significantly hinders their prosecution. Although Italy hosted the diplomatic conference that led to the adoption of the ICC Statute, also known as the Rome Statute, in 1998, it never adopted provisions on international crimes.[70] Only in 2012 did the Italian Parliament, in response to the outbreak of the Libyan crisis in 2011, pass the necessary legislation implementing obligations to cooperate with the ICC, as required under Articles 86-102 ICC Statute.[71] In 2022, a commission of experts appointed by the former Minister of Justice, Marta Cartabia, produced a comprehensive draft Code of International Crimes (CIC).[72] The new government then shelved this draft code, leaving Italy the only EU Member State that has not yet criminalized core international crimes at the domestic level.[73]

A. The Almost-universal Reach of Italian Criminal Law and Its Application to Crimes against Migrants

The movement of people across borders fosters accountability for international crimes not only through the exercise of universal jurisdiction. As seen in Italy, the arrival of migrants on Italian shores has spurred investigations and proceedings into crimes they report, particularly those committed during their transit through Libya. Although Italian law lacks explicit provisions on universal jurisdiction, its criminal framework reflects broad acceptance of extraterritorial (*almost-universal*) application of Italian criminal law.[74] As a general principle, Italian criminal law applies universally to crimes, regardless of where, by whom, or against whom they are committed, except for a limited category of less serious offences (Articles 9 and 10 of the Penal Code, PC).[75] Its application is either unconditional or subject to procedural conditions that include the perpetrator's presence in Italy (Articles 9 and 10 PC), a request from the Minister of Justice (Articles 8, 9(2) and (3), and 10 PC), a formal complaint by the victim (Articles 9(2) and 10(1) PC), and non-extradition of the perpetrator (Article 10(2) and (3) PC).[76] Notably, the draft CIC proposed the absolute and unconditional

Constitutional Law Principles', in Jessberger, Meloni, and Crippa (eds), *ibid.*, 31–44. See also L. Prosperi, '"With or Without You": Why Italy Should Incorporate Crimes Against Humanity and Genocide Into Its National Legal System', 21 *ICLR* (2021) 698–714; M. Crippa, 'How to Implement Crimes Against Humanity and Genocide in the Italian System', in Jessberger, Meloni, and Crippa (eds), *ibid.*, 137–146; G. Bartolini and M. Longobardo, 'The Italian Legislation on War Crimes: Obligations to Implement and the Principle of Legality', in Jessberger, Meloni, and Crippa (eds), *ibid.*, 147–160; and G. Bartolini, 'The Criminalization of War Crimes in Italy and the Shortcomings of the Domestic Legal Framework', 21 *ICLR* (2021) 679–697.

70 Italy was among the first states to ratify the ICCSt. through Law no. 232/1999, titled 'Ratification and Execution of the Founding Statute of the International Criminal Court with Final Act and Annexes, adopted by the United Nations Diplomatic Conference in Rome on 17 July 1998'.

71 Law no. 237/2012, titled 'Law Implementing the Provisions of the Founding Statute of the International Criminal Court', does not, however, incorporate international crimes into the Italian legal system.

72 See E. Fronza and C. Meloni, 'The Draft Italian Code of International Crimes', 20 *JICJ* (2022) 1027–1048.

73 On 17 March 2023, the new Minister of Justice announced the imminent adoption of a code on war crimes, aggression, and universal jurisdiction, while assigning crimes against humanity to a later legislative proposal. See Italian Ministry of Justice Press Release, 'Codice dei crimini internazionali, via libera dal Cdm', 17 March 2023, available online at https://www.gnewsonline.it/codice-dei-crimini-internazionali-via-libera-dal-cdm/ (visited 31 May 2025). However, the proposal is still pending. See A. Vallini, 'Il codice a pezzi. Ascesa e caduta della proposta di una legge organica sui crimini internazionali', 2023(1) *Rivista italiana di diritto e procedura penale* (2023) 91–110; M. Mancini, 'Italy and International Criminal Justice: Mapping the Present and Charting the Path Ahead', 24 *ICLR* (2024) 745–758; G. Puma, 'L'adattamento dell'ordinamento italiano al diritto internazionale penale, ovvero dinamica dell'immobilità', in R. Acquaroli and R. Caligiuri, *L'Italia e la repressione dei crimini internazionali* (Editoriale Scientifica s.r.l., 2024) 7–29, at 16.

74 See G. Marinucci, E. Dolcini, and G.L. Gatta, *Manuale di diritto penale. Parte generale* (13th edn., Giuffrè, 2024), at 169. According to some scholars, these general criteria embody the concept of 'tempered territoriality' established under Art. 3 of the Penal Code: F. Antolisei, *Manuale di diritto penale. Parte generale* (16th edn., Giuffrè, 2003), at 125; L. Picotti, 'Sez. III: L'efficacia della legge penale nello spazio', in F. Bricola and V. Zagrebelsky (eds), *Giurisprudenza sistematica di diritto penale. Codice penale. Parte generale* (2nd edn, Utet, 1996), at 170.

75 Marinucci, Dolcini and Gatta (2024), *supra* note 74, at 169.

76 Some doctrine holds that, under dual criminality, acts committed abroad by Italians or foreigners must be crimes under both Italian law and the law of the place of commission: Marinucci, Dolcini and Gatta, *supra* note 74, at 180–182. Italian courts have prosecuted crimes committed in South America against Italian citizens (i.e. victims with dual citizenship), in the

application of Italian criminal law to international crimes, when committed abroad by Italian citizens or by foreigners against the Italian state or an Italian citizen, in line with the principles of personality and protection of national interests (Article 3 draft CIC).[77] For crimes committed abroad by foreigners against foreigners, prosecution in Italy would require the presence of the suspect on Italian soil, even in cases of complicity with an Italian citizen (Articles 9 and 10 PC). Interestingly, the explanatory memorandum accompanying the draft legislation noted that 'a different approach would compel prosecutors to pursue all crimes committed abroad by foreigners and to exercise criminal prosecution against them, leading to complex issues due to jurisdictional overlaps with other states'.[78] In this draft code, the Minister of Justice's request was limited to the crime of aggression, owing to its political significance (Article 3 draft CIC).

In the absence of specific international criminal law provisions, Italian prosecutors and judges rely, albeit to different degrees, on general criteria outlined in the PC, in particular Articles 7(1)(5) and 10(2) PC, alongside provisions on transnational organized crime and smuggling, specifically in the form of aiding and abetting illegal immigration.

B. Reference to International Conventions in Article 7(1)(5) PC

Under Article 7(1)(5) PC, Italian criminal law applies to 'a citizen or foreigner who commits in foreign territory … any … offence for which … international conventions establish the applicability of Italian criminal law'.[79] The provision, therefore, extends the scope of Italian criminal law to offences covered by international conventions that establish the applicability of domestic laws. Originally intended to enable the prosecution of *delicta juris gentium* committed outside the state's borders,[80] Article 7(1)(5) PC is, however, viewed by prevailing jurisprudence as lacking an autonomous prescriptive nature.[81] The constitutional principle of legality, as established under Article 25(2) of the Constitution, prevents the direct application of international provisions that have not been incorporated into the domestic legal system unless they are self-executing. Furthermore, international conventions that merely confer discretionary powers to states are generally deemed non-self-executing and therefore

context of the *Plan Condór: Corte d'Assise d'Appello di Roma* (Appellate Court of Assizes of Rome), Judgement, 8 July 2019 (*Plan Condór* case). See C. Mostardini, 'Nunca más: la Corte d'Assise di Roma condanna I vertici dei regimi dittatoriali dell'America Latina per l'omicidio di alcuni desaparecidos italiani', 11 *Diritto penale contemporaneo* (*Dir. pen. cont.*) (2017) 261–267, at 265, arguing that the 'political nature' of such crimes enabled their prosecution under Art. 8 PC.

77 For a detailed analysis of CIC provisions on jurisdiction see Fronza and Meloni, *supra* note 72, at 1035–1038; C. Cantone, 'La giurisdizione penale universale: quale futuro per l'Italia', SIDIBlog, 29 June 2022, available online at http://www.sidiblog.org/2022/06/29/la-giurisdizione-penale-universale-quale-futuro-per-litalia/ (visited 31 May 2025).

78 Translation by the Author. See Commissione Crimini internazionali, *Relazione* (2022), at 9–10, available online at https://www.sistemapenale.it/it/documenti/codice-dei-crimini-internazionali-pubblicata-la-relazione-della-commissione-palazzo-pocar (visited 31 May 2025).

79 Translation by the Author.

80 *Lavori preparatori del codice penale e del codice di procedura penale, Volume V, Progetto definitive di un nuovo codice penale con la relazione del Guardasigilli On. Alfredo Rocco*, Relazione sul Libro I del Profetto, Ministero della Giustizia e degli Affari di Culto, Tipografia delle Mantellate, Rome, 1929, at 38. In the 1930 PC, the universality of Italian criminal law served to assert the authoritarian aims of state protection, rather than a 'universal humanitarianism': F. Curi, 'La giurisdizione in alto mare: tra universalità tentata e territorialità consumata (Commento a Cassazione, Sez. I, 2 luglio 2021, no. 31652)', 1 *Diritto, Immigrazione e Cittadinanza* (2022) 197–210, at 205, where the author refers to F. Palazzo, 'Codice penale 1930: un passato (ancora) senza futuro', *Dir. pen. cont.*, 15 September 2011, available online at https://archiviodpc.dirittopenaleuomo.org/d/851-codice-penale-1930-un-passato-ancora-senza-futuro (visited 31 May 2025) and A. Di Martino, *La frontiera e il diritto penale. Natura e contesto delle norme di "diritto penale internazionale"* (Giappichelli, 2006), at 79.

81 See Court of Cassation, decision no. 48250/2019, § 2.1, establishing that only a sufficient legal basis, whether domestic or international, can derogate from the principle of territoriality for crimes committed abroad by foreigners against foreigners: see D. Mandrioli, 'Oltre i limiti territoriali: l'esercizio della giurisdizione penale italiana sul traffico di armi nel Mar Mediterraneo', 2 *Il Diritto Marittimo* (2021) 354–368; G. Mentasti, 'La Cassazione interviene sull'applicabilità della legge penale italiana ai reati commessi nei campi di detenzione in Libia', *Sist. Pen.*, 4 February 2020, available online at https://www.sistemapenale.it/it/scheda/cassazione-48250-2019-applicabilita-legge-penale-italiana-campi-detenzione-libia (visited 31 May 2025).

not directly applicable.[82] Accordingly, Article 7(1)(5) PC is generally considered a residual rule for the extraterritorial application of Italian criminal law.[83] In practice, domestic courts appear more likely to rely on other provisions, such as general criteria on common offences committed abroad by foreigners against foreigners (Article 10(2) PC) or charges related to transnational organized crime (Article 416 PC) and violations of migration laws (Article 12 of Legislative Decree no. 286/1998).

In principle, Article 7(1)(5) PC would at least apply to certain international crimes, such as torture, enforced disappearances, and grave breaches of the Geneva Conventions, for which international instruments mandate *aut dedere aut judicare* obligations.[84] Indeed, the Court of Cassation acknowledged the universality of Italian criminal law in respect to *delicta juris gentium*, explicitly mentioning international treaties binding Italy in the prevention and repression of international crimes, such as the 1948 Genocide Convention and the 1956 Convention against Slavery,[85] as well as war crimes.[86] According to the Court, Article 7(1)(5) PC does not require any additional condition for the application of Italian criminal law, other than the mechanism of adaptation to domestic law.[87] Italian criminal law, therefore, applies through the general clause of Article 7(1)(5) PC, provided that international conventions explicitly identify sufficient connecting criteria to extend Italy's jurisdictional authority.[88] Notably, to date, this application of Article 7(1)(5) PC has proven particularly successful in cases related to transnational human trafficking. The Court of Cassation affirmed the applicability of Italian criminal law under Article 7(1)(5) PC to serious crimes defined in Article 2 UNTOC, considering these provisions directly applicable in the domestic framework.[89] This case law included a case of migrants who died from asphyxiation after being forcibly confined in the hold of a vessel by a criminal organization conducting transnational migrant smuggling. An Italian military ship ultimately rescued the vessel in international waters.[90] The Court emphasized the '*almost-universal reach of Italian criminal law*' under Article 3(2) PC.[91] It affirmed the direct application of the UNTOC under Article 7(1)(5) PC, noting that the conduct amounted to a serious crime with substantial effects on Italian territory and that the organized criminal group acted with the purpose of smuggling migrants into the country, as defined in the UNTOC and its Additional Protocol against the Smuggling of Migrants by Land, Sea and Air.[92] According to the Court of Cassation, the UNTOC meets the requirements set forth in Article 7(1)(5) PC, as it specifies the connecting criteria that determine the applicability of Italian criminal law. These provisions, therefore, do

82 Constitutional Court, decision no. 183/1994, § 4, already affirmed this principle.

83 On the irrelevance of Art. 7(1)(5) PC, as necessarily requiring domestic norms implementing international provisions, see S. Aprile, 'Art. 7 c.p.', in E. Dolcini and G.L. Gatta (eds), *Codice penale commentato* (4th edn., Giuffrè, 2015), at 256.

84 1984 Convention Against Torture, Arts 5 and 7; 2006 Convention on Enforced Disappearances, Arts 9 and 11; 1949 Geneva Convention I (Art. 49); Geneva Convention II (Art. 50); Geneva Convention III (Art. 129); Geneva Convention IV (Art. 146).

85 Court of Cassation, decision no. 31652/2021, § 2.6.1.

86 *Ibid.*, § 2.6.2, referring to Court of Cassation, decisions no. 43696/2015 and no. 24975/2018 on conducts committed in the context of an armed conflict which entailed a violation of universal values of human dignity. These cases concerned the killing of Italian soldiers participating in an international mission and of Italian Red Cross volunteers engaged in humanitarian work in Bosnia-Herzegovina by a unit of the Bosnian army.

87 *Ibid.* § 2.6.2. According to the Court, this reflects the 'innovative reach' of Art. 7(1)(5) PC.

88 *Ibid.* § 2.6.2.

89 Numerous decisions by the Italian Court of Cassation established Italian jurisdiction under Arts 7(1)(5) PC and 15 UNTOC, including decisions no. 48250/2019, 20503/2015, 14510/2014, and 36052/2014. Conversely, in decision no. 19762/2020, the Court of Cassation ruled out the applicability of Italian criminal law to the transit of armaments from Libya through international waters to the port of Genoa under Art. 7(1)(5) PC, considering Art. 15(4) UNTOC not directly applicable.

90 Court of Cassation, decision no. 31652/2021.

91 Emphasis added. *Ibid.*, § 2.6.4, where the Court referred to cases under international law allowing authorities to intervene on stateless vessels in the high seas.

92 *Ibid.*, §§ 2.6.3, 2.6.4., 2.7.

not require the adoption of an implementing domestic measure, as they are sufficiently clear and directly applicable.[93] Furthermore, the case concerned (i) a serious offence, which (ii) had substantial effects in Italy, and (iii) was committed by an organized criminal group.

Such an interpretation of Article 7(1)(5) PC has faced criticism regarding its constitutional legitimacy. Both criminal law and international law scholars have noted that the principle of legality in criminal law effectively precludes interpreting Article 7(1)(5) PC as allowing a direct reference to provisions of international conventions.[94] Indeed, constitutional principles of legality and certainty necessarily require the domestic implementation of obligations of criminalization and extension of criminal jurisdiction, as set forth by international treaties.[95] While criminal provisions can refer to international norms, the definition of the scope of Italian criminal jurisdiction remains exclusively within the competence of the national legislator.[96] Consequently, Article 7(1)(5) PC would not imply any direct reference to international conventions, rather limiting its function to recognizing the openness of the Italian criminal system to international agreements.[97] Furthermore, the Court of Cassation refrained from clarifying whether jurisdictional provisions of the UNTOC have a self-executing character.[98] At the same time, an analysis of the Court of Cassation's decisions shows how the 'strict adherence to the principle of legality' and 'the limitations on the direct applicability of treaty provisions' soften in respect to conduct that, while lacking international direct applicability within the Italian legal system and occurring abroad, nonetheless relates to the national territory.[99] Hence, Italian jurisprudence tends to favour Article 10(2) PC over Article 7(1)(5) PC, thereby overcoming the obstacle of the principle of legality.[100] The debate nonetheless remains unsolved. If the principle of legality remains paramount in limiting the scope of Italian criminal law, the international and transnational nature of crimes committed against migrants, however, 'calls for a reconsideration of the concept of criminal jurisdiction and the criteria governing the territorial validity of criminal law', moving away from a 'purely autarkic and nationalist repressive approach' to ensure, 'following the example of international law, the protection of human rights'.[101]

93 *Ibid.*, § 2.6.3. It remains unclear whether the Court intended to extend this interpretation to other serious crimes falling under the UNTOC when committed by a transnational organized criminal group, under Arts 2 and 3(1) UNTOC. Importantly, the Court of Cassation affirmed that the list of offences originally provided for in the UNTOC (Arts 5, 6, 8, and 23) has expanded through the Additional Protocols and Art. 15(4) UNTOC. However, its previous ruling (no. 48250/2019) had excluded the application of Italian criminal law under Art. 15(4) UNTOC, as the conduct had no substantial effects in Italy.

94 Curi, *supra* note 80, at 204; D. Mandrioli, 'La giurisdizione penale extraterritoriale e la Convenzione di Palermo: nuove (o antiche?) riflessioni ispirate dalla Corte di Cassazione', SIDIBlog, 31 January 2022, available online at http://www.sidiblog.org/2022/01/31/la-giurisdizione-penale-extraterritoriale-e-la-convenzione-di-palermo-nuove-o-antiche-riflessioni-ispirate-dalla-corte-di-cassazione/(visited 31 May 2025); F. Bonafè, Constitutional Judicial Review and International Obligations of Criminalization, 21 *ICLR* (2021) 660–678. *Contra*, on the direct application of Art. 7(1)(5) PC to international conventions not implemented into domestic law: N. Levi, *Il diritto penale internazionale* (Giuffrè, 1949), at 99; G. Battaglini, *Diritto penale. Parte generale* (Cedam, 1940), at 63.

95 See, more broadly F. Viganò, 'International Criminal Law Implementation and Constitutional Law', in Jessberger, Meloni, and Crippa (eds), *supra* note 69, 45–52, at 45. On the safeguard of the principle of legality in criminal matters, as opposed to the 'openness to international law', see D. Amoroso, 'The Duties of Criminalization under International Law in the Practice of Italian Judges: An Overview', in 21 *ICLR* (2021) 641–659. On the non-self-executing nature of the ICCSt.: F. Lattanzi, 'Un piccolo passo sulla via dell'adeguamento allo Statuto della Corte Penale Internazionale', 2 *Rivista di diritto internazionale* (2013) 492–512, at 493. *Contra*: G. Acquaviva, *La repressione dei crimini di guerra nel diritto internazionale e nel diritto italiano* (Giuffrè, 2014), at 73–89.

96 Constitutional Court, decision no. 21/2009, § 4. See Bonafè, *supra* note 94, at 669.

97 T. Treves, *La giurisdizione penale nel diritto internazionale* (Cedam, 1973), at 99.

98 As noted by Mandrioli, *supra* note 94.

99 Curi, *supra* note 80, at 205–206. In its decision no. 31652/2021, the Court of Cassation reiterated the requirement that the offence cause grave and direct consequences within Italian territory.

100 *Ibid.*, at 204. Notably, a recent reform of Italian immigration law has partly overcome this debate by explicitly applying domestic criminal law to acts of smuggling that result in the death or injuries of migrants in international waters (Art. 12-bis of Legislative Decree no. 286/1998).

101 Curi, *supra* note 80, at 205–206.

C. Common Offences Committed by Foreigners Abroad under Article 10(2) PC

According to Article 10(2) PC,

> If the crime is committed against … a foreigner, offenders shall be punished according to Italian law,
> at the request of the Minister of Justice, provided that: i) they are in the territory of the state; ii) it is a crime for which the penalty … of life imprisonment, or imprisonment for a minimum of not less than three years is established; iii) their extradition has not been granted, or has not been accepted by the government of the state where they committed the crime, or by that of the state to which they belong.

Therefore, Italian criminal law also extends to common offences punishable by a minimum of three years' imprisonment when committed abroad by foreigners against foreigners.[102] This provision represents the farthest reach of Italian criminal jurisdiction within the domestic legal framework, closely linked to the principle of (conditional) universal jurisdiction. Italian courts most frequently apply Article 10(2) PC in cases involving crimes committed against migrants in Libya or along migration routes, provided that the suspect is present on Italian soil.[103] This provision subjects the exercise of criminal prosecution to specific procedural conditions, including the presence of the suspect, whether voluntary or involuntary, on national soil, and the absence of an extradition agreement, either granted by the Italian judiciary or accepted by the foreign state. There is an ongoing debate as to whether dual criminality represents a requirement for the prosecution of relevant conduct. While Articles 9 and 10 PC do not explicitly impose this requirement, arguments for its application can be found in the *travaux préparatoires* of the PC and under the principle of legality.[104] Article 10 (2) PC also requires a formal request by the Minister of Justice.[105] Although aimed at expediency in cases deemed as politically sensitive, this requirement raises concerns as its absence may effectively bar the exercise of jurisdiction. The Minister of Justice's request serves specific criminal policy objectives, and prevailing legal doctrine considers it to be administrative in nature and therefore subject to judicial review.[106] The requirement for a Ministerial request also applies under Article 604 PC to certain transnational crimes, including those committed against migrants, such as enslavement (Article 600 PC), human trafficking (Article 601 PC), slave trade (Article 602 PC), and various forms of sexual violence under Articles 609-bis *et seq.* PC, when these crimes are committed abroad by a foreigner in complicity with an Italian citizen.[107]

D. Migration-related Conduct Committed (Partly) Abroad

Despite the broad reach of general principles under Articles 7(1)(5) and 10(2) PC, an analysis of cases involving crimes against migrants reveals a prevailing reliance on charges of association or participation in a transnational criminal organization aimed at committing

102 Translation by the Author.

103 Italian jurisdiction was established under Art. 10(2) PC in *Matammud* and *Condè, Ahmed and Ashuia*, *supra* notes 63, 64.

104 *Lavori preparatori del codice penale e del codice di procedura penale*, *supra* note 80, at 36.

105 The Minister of Justice must request prosecution within three months from the *notitia criminis*, or three years from the presence of the suspect on national territory (Art. 128 PC).

106 The request of the Minister of Justice is not inherent to the affairs of the state, nor does it contribute to the highest political direction and program of the government: see Aprile, *supra* note 83.

107 Prosecuting acts of torture committed abroad by foreigners against Italian citizens before the introduction of the offence (in 2017) requires both the suspect's presence on national territory and the Ministerial request. See Art. 3 of Italian Law no. 498/1988, titled 'Ratification and execution of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed in New York on 10 December 1984'.

grave crimes (Article 416 PC and Articles 5 and 15(2)(c) UNTOC), such as human trafficking (Article 601 PC). Crimes committed by transnational criminal organizations are considered part of an overarching criminal plan, and they therefore directly link to the main conduct, even when committed abroad.[108] In addition to organized crime-related charges, Italian prosecutors frequently charge smuggling in the form of aiding and abetting illegal immigration (Article 12(1) and (3) of Legislative Decree no. 286/1998).[109] This provision explicitly encompasses conduct aimed at facilitating the smuggling of irregular migrants into Italy. As a result, Italian criminal jurisdiction extends to acts committed abroad, provided that they aim to bring migrants illegally into the national territory (Article 12(1)-(3) of Legislative Decree no. 286/1998).[110]

The extensive reach of Italian criminal law is also evident in its application by domestic courts. The Court of Cassation has clarified that, for Italian law to apply, it is sufficient that even part of the act — understood in a factual, physical sense — occurs within the state's territory.[111] This includes any part of the criminal conduct, provided that it aims to achieve an outcome within Italian territory, linking the acts carried out abroad to those committed in Italy. With regard to smuggling, this principle is often framed through the concept of 'criminal progression' and allows for the consideration of actions undertaken in international waters as integral to the initial conduct aimed at facilitating illegal immigration.[112] In this regard, it is also possible to identify a teleological nexus (a so-called 'strict connection') between crimes committed against migrants in Libya (e.g. kidnapping, torture, sexual violence, etc.) and those against Italian public order (e.g. participation in a criminal organization or aiding and abetting illegal immigration).[113] Nevertheless, the Court of Cassation has often excluded that a mere teleological connection — for instance, in the case of crimes committed to induce victims' families to pay for the migrants' transport to Italian shores — is sufficient to justify the application of Italian criminal law.[114] This 'strict connection' must instead refer to conduct that is relevant under international law and, in any case, always requires a prior contact with Italian national waters, which establishes a link with the state's territorial jurisdiction.[115] Only such a qualified contact may justify the extension of the state's punitive power to conduct committed beyond territorial waters, provided that these acts show a significant connection to those falling under the state's territorial jurisdiction.[116]

Alternatively, decisions on crimes against migrants consider the disembarkation of migrants on Italian shores as the final segment of an *ab initio* planned activity, which must

108 See *Corte d'Assise di Agrigento* (Court of Assizes of Agrigento), Judgement, 12 June 2018 (*Hassan*), affirming that the criminal organization aimed at human trafficking, therefore linking the two offences and establishing Italian jurisdiction.

109 In *Attour* and *Muhidin* jurisdiction was established under Art. 416 PC and only subordinately under Art. 10(2) PC, *supra* note 67. See also *Corte d'Assise di Agrigento* (Court of Assizes of Agrigento), Judgement, 16 July 2019 (*Deji*); *Corte d'Assise di Agrigento* (Court of Assizes of Agrigento), Judgement, 12 July 2019 (*Taher*).

110 See, *ex multis*, Court of Cassation, decision no. 20503/2015.

111 This part of the conduct connects acts carried out in Italy with those committed abroad. See, *ex multis*, Court of Cassation, decision no. 39993/2021.

112 Court of Cassation, decision no. 325/2001, on the so-called 'right of hot pursuit' under Art. 23 of the 1958 Geneva Convention on the High Sea, which allows national authorities, under certain conditions, to pursuit foreign ships outside territorial waters for the violation of the state's laws. See also Court of Cassation, decision no. 5157/2018.

113 Court of Cassation, decision no. 48250/2019, *supra* note 81, § 2.3. According to the Public Prosecutor, Italian criminal law only requires a 'strict connection' between crimes falling under the domestic jurisdiction and those certainly related to them. The Court of Cassation rejected this interpretation.

114 Court of Cassation, decision no. 48250/2019, *supra* note 81. As already recalled, the Court excluded the existence of a 'strict connection' with the Italian territory in relation to charges of aggravated kidnapping, torture, and sexual violence (Arts 613-bis, 630, and 609-bis PC) committed against migrants in Libya, while confirming it for charges of criminal organization and aiding and abetting illegal immigration, on the basis of the transnational nature of the criminal organization (Arts 5 and 15(2)(c) UNTOC). See Mentasti (2020), *supra* note 81.

115 Court of Cassation, decision no. 325/2001, *supra* note 112, at 5–7.

116 Court of Cassation, decision no. 48250/2019, *supra* note 81, § 2.3.

be interpreted as a unitary ongoing act together with extraterritorial actions.[117] The entry of migrants into Italian territory therefore establishes a causal link to the conduct carried out outside national borders, despite being facilitated through rescue. Traffickers intentionally foresee rescues and, far from being an atypical event that interrupts the causal link, they fall within the criminal enterprise's causal chain.[118] Although intended to affirm smugglers' responsibility and exempt rescuers from liability under Article 48 PC, this principle of so-called '*mediated perpetration*' often also represents a basis to extend national criminal law to conduct preceding the smuggling of migrants to Italian coasts.[119]

E. Implications for Suspects of Crimes Against Migrants in Libya and along the Central Mediterranean Route

A review of existing case law reveals that Italian prosecutors and courts primarily apply Article 10(2) PC or provisions on transnational organized crime and smuggling to extend domestic criminal law to acts (entirely or partly) committed abroad, relying only secondarily, and less consistently, on Article 7(1)(5) PC. This heavy reliance on smuggling laws significantly impacts the effectiveness of proceedings. As previously noted, the broad definition of aiding and abetting illegal immigration also encompasses actions aimed at facilitating migrants' entry into the national territory and leads to the criminalization of lower-level perpetrators within these operations.[120] Indeed, this approach risks prosecuting migrants who are involved only in the final stage of their migration journey, such as steering boats or using GPS out of necessity or to cover transportation costs to Europe.[121] Case analysis further confirms that Italian proceedings fail to hold accountable individuals in command of (official and unofficial) detention sites, as well as those profiting from the broader business of migrants' exploitation. This shortcoming is particularly pronounced due to the blurred distinction between state and non-state actors, as the involvement of Libyan militias and criminal networks in the commission of such crimes demonstrates.[122] These individuals often operate within or alongside the state apparatus; however, their absence from Italian territory precludes their prosecution under Article 10(2) PC. Notably, Italian authorities have hardly ever prosecuted Libyan nationals so far, resulting, to date, in the conviction of mid- or lower-level perpetrators originally from other countries (Somalia, Bangladesh, Egypt, Guinea, etc.).[123] An illustrative example is the decision of the Messina Court of Appeal to grant mitigating circumstances to defendants in the *Condè, Ahmed and Ashuia* case, after the first-instance judge sentenced them to 20 years' imprisonment for participation in a criminal organization aimed at facilitating illegal immigration, as well as for torture and kidnapping for ransom against migrants detained at the Zawiya camp in Libya. The Court of Appeal

[117] Court of Cassation, decision no. 23866/2024.

[118] On this interpretation of Art. 48 PC and its application, see S. Manacorda, 'Tratta e traffico di migranti: il nodo della giurisdizione tra territorialità ed extraterritorialità', 3 *Dir. pen. cont.* (2018) 34–44, at 38. See also S. Orlando, 'Problemi di giurisdizione nel contrasto al traffico di migranti via mare', 3 *Dir. pen. cont.* (2018) 145–158, at 156, alternatively suggesting the application of forms of participation under Arts 110 PC *et seq*.

[119] Emphasis added. See *Deji* and *Taher*, *supra* note 109.

[120] On the limits of extraterritorial jurisdiction based on smuggling charges, and accountability for serious violations against migrants in Libya, see M. Crippa, 'I procedimenti italiani sui crimini contro i migranti in Libia alla luce del sistema di giustizia penale internazionale', AdiMBlog, July 2024, available online at https://www.adimblog.com/wp-content/uploads/2024/07/3_CRIP_1.pdf (visited 31 May 2025).

[121] See F. Patanè et al., 'Asylum-Seekers Prosecuted for Human Smuggling: A Case Study of Scafisti in Italy', 39 *Refugee Survey Quarterly* (2020) 123–152.

[122] As noted by Meloni and Zhang, *supra* note 60.

[123] See, for instance, the conviction of three Libyan nationals by the *Corte di Assise di Appello di Catania* (Appellate Court of Assizes of Catania) to 30 years' imprisonment for human trafficking and murder, although they consistently maintained that they had boarded the vessel as ordinary passengers and had no connection to the smugglers. See further D. Fassini and V.R. Spagnolo, 'Libia. Strage di migranti, quei calciatori ragazzini condannati a 30 anni come scafisti', *Avvenire*, 29 June 2021, available online at https://www.avvenire.it/attualita/pagine/libia-il-caso-dei-calciatori-scafisti (visited 31 May 2025).

noted that 'the defendants were migrants themselves, aiming to reach Italian shores' and 'psychologically subordinate to the system imposed by real traffickers, who unfortunately remain shielded from punitive action'.[124]

Against this backdrop, the Court of Cassation's expansive interpretation in decision no. 31652/2021 could prove particularly significant, as it seems to allow the application of Article 7(1)(5) PC to *delicta juris gentium* under international conventions, provided that they clearly specify the connecting criteria for determining the applicability of Italian criminal law (*supra*, sub-paragraph C). Notably, Article 7(1)(5) PC does not impose procedural requirements, such as the offender's presence on Italian territory, and could prove potentially relevant in prosecuting those responsible for the system of violence and abuse endured by migrants along their journey. At the same time, it could help minimize the risk of political discretion in the Minister of Justice's request under Article 10(2) PC. Its relevance could prove effective also considering the 2023 Ljubljana-The Hague Convention, which Italy has yet to sign and ratify, and which aims to strengthen the domestic prosecution of genocide, crime against humanity, war crimes, and other international crimes (such as aggression, torture or enforced disappearance).[125] The universality of Italian criminal law could also play a crucial role in light of the forthcoming adoption of the International Law Commission Draft Articles on Prevention and Punishment of Crimes Against Humanity (ILC Draft Articles).[126]

However, as previously noted, in its decision no. 31652/2021, the Court of Cassation confined its interpretation to crimes listed under the UNTOC, possibly in recognition of the constraints imposed by the principle of legality. Indeed, in the absence of domestic legislation implementing international crimes, Article 7(1)(5) PC remains subject to the same constitutional principle. The lack of provisions adequately criminalizing most acts committed against migrants therefore significantly undermines efforts to ensure accountability — not only by limiting the extraterritorial application of Italian criminal law, but also by narrowing the range of substantive offences available to prosecutors (*infra* paragraph 4). This gap underscores the need for a strengthened legal framework on international crimes to ensure more effective prosecution and accountability.

4. LIMITS OF PROSECUTING CRIMES AGAINST MIGRANTS AS ORDINARY OFFENCES

The shortcomings of Italian proceedings on crimes against migrants extend beyond the criteria for applying Italian criminal law to extraterritorial acts, also revealing the limited scope of indictments and charges. Even when judgments recognize the systemic nature of violence and abuses against migrants, the absence of specific provisions on international crimes forces reliance on ordinary offences, creating significant gaps in accountability for crimes against humanity and war crimes.[127] Indeed, ordinary offences overlook the contextual element of international crimes and fail to account for the broadness or systemic nature of the abuse endured by migrants, as acknowledged, for instance, in the *Hassan* and *Matammud* cases.

[124] Translation by the Author; see *Corte d'Assise d'Appello di Messina* (Appellate Court of Assizes of Messina), Judgment, 12 March 2021. A copy of the judgment is with the Author.

[125] Arts 8 and 14 of the 2023 Ljubljana-The Hague Convention establish the *aut dedere aut judicare* principle when the alleged perpetrator is present in the state, and neither extradition nor surrender to a competent tribunal occurs.

[126] Arts 7 and 10 of the ILC Draft Articles incorporate the *aut dedere aut judicare* system: see M. Colorio, 'The *Aut Dedere Aut Judicare* System for Crimes Against Humanity: A Critical but Missing Tool in the Fight Against Impunity', 22(1) *JICJ* (2024) 1–17.

[127] On international obligations to adopt domestic provisions on genocide and crimes against humanity, see L. Prosperi, 'Prosecuting genocide and crimes against humanity as ordinary offences. What consequences?', in Jessberger, Meloni, and Crippa (eds), *supra* note 69, 161–173.

As previously noted, domestic proceedings typically charge defendants for their participation in transnational criminal organizations aimed at committing human trafficking (Articles 416 PC and 15 UNTOC) and aiding and abetting illegal immigration (Article 12(1) and (3) of Legislative Decree no. 286/1998). From a substantive standpoint, this approach appears to prioritize the prosecution of crimes against public order and the protection of national borders over those committed against individuals. While consistent with strategies emerging from joint investigations of national and international authorities (*supra*, paragraph 2), these charges, although serious, do not fully capture the extent of the grave and systemic violence inflicted upon migrants. The Italian legal framework also lacks offences specifically criminalizing acts such as forcible transfer of population, persecution, and enforced disappearance of persons, which might be particularly relevant in the Libyan context. In this regard, existing criminal provisions on unlawful arrest or undue restriction of personal freedom (Articles 606 and 607 PC) are relevant only when committed by state agents and therefore inadequately address these acts.[128]

Other offences frequently charged in the Italian cases on crimes against migrants include murder (Articles 575, 577 PC), bodily injury (Article 581 PC), severe personal injury (Articles 582, 583, 585 PC), enslavement (Article 600 PC), human trafficking (Article 601 PC), sexual violence (Articles 609-bis *et seq*. PC), torture (Article 613-bis PC) and kidnapping for ransom (Article 630 PC). Even when domestic provisions are in place, they often fail to align with international standards. For instance, the indictment of torture in the Libyan context represents a significant step toward affirming individual criminal responsibility for such a crime (*Condè, Ahmed and Ashuia*). At the same time, concerns persist regarding the definition of torture under Article 613-bis PC, as critics argue that it falls short of international obligations binding Italy.[129] For instance, Article 613-bis PC mandates that severe or cruel acts of violence or serious threats must result in 'acute physical suffering or verifiable psychological trauma', thereby presenting significant challenges in meeting the evidentiary threshold.[130] Furthermore, the commission of crimes involving sexual violence is structural in the context of migrant detention centres, and several proceedings to date have been prosecuting such offences. However, Articles 609-bis *et seq*. PC are significantly narrower in scope when compared to the conduct listed in Article 7(1)(g) ICC Statute. Italian provisions are primarily limited to acts of coercion through violence, threats, or abuse of authority. In contrast, the ICC Statute includes a broader range of conduct, for instance, forced pregnancy and forced sterilization, reflecting the evolving understanding of sexual violence in international law.[131] Additionally, recent international standards and practices have abandoned the concept of sexual coercion as based on the element of compulsion.[132]

128 For an analysis of the shortcomings of Italian legislation regarding crimes against humanity refer to Crippa, *supra* note 69, at 138.

129 See further C. Meloni, 'L'eterno dibattito sul delitto di tortura in Italia alla luce della normativa internazionale', 24 *Diritto penale e processo* (2024) 263–271; A. Gianelli, 'Has Italy Finally Implemented its International Obligations Concerning the Punishment of Torture?', in 21 *ICLR* (2021) 715–730; P. Lobba, 'Punire la tortura in Italia. Spunti ricostruttivi a cavallo tra diritti umani e diritto penale internazionale', 10 *Dir. pen. cont.* (2017) 181–250.

130 On the interpretation of state-run torture as an autonomous crime, see F. Viganò, 'Sui progetti di introduzione del delitto di tortura in discussione presso la Camera dei Deputati. Parere reso nel corso dell'audizione svoltasi presso la Commissione giustizia della Camera dei Deputati il 24 settembre 2014', *Dir. pen. cont.*, 25 settembre 2014, available online at https://archiviodpc.dirittopenaleuomo.org/d/3302-sui-progetti-di-introduzione-del-delitto-di-tortura—in-discussione-presso-la-camera-dei-deputati (visited 31 May 2025); A. Colella, 'Il nuovo delitto di tortura', in R. Garofoli and T. Treu, Voce per 'Il libro dell'anno del diritto Treccani 2018', *Dir. pen. cont.*, 26 aprile 2018, available online at https://archiviodpc.dirittopenaleuomo.org/upload/7516-colella2018a.pdf (visited 31 May 2025).

131 Judgement, *Ongwen* (ICC-02/04-01/15-1762-Red), Trial Chamber IX, 4 February 2021, §§ 3021–3100. See also OTP, *Policy on gender-based crimes: Crimes involving sexual, reproductive and other gender-based violence*, December 2023, at 19–29.

132 A recent reform of Art. 7(1)(6) of the German Code of Crimes Against International Law (*Völkerstrafgesetzbuch*) emphasized the criteria of the absence of victim's consent, rather than sexual coercion: Bundesgesetzblatt Jahrgang 2024 Teil I Nr. 255, titled 'Act on the further development of international criminal law', 30 July 2024.

Enslavement and human trafficking represent other core activities of criminal organizations operating in Libya, which exploit migrants to pursue economic profit and impose their authority. Domestic courts prosecute such actions as human trafficking (Article 601 PC) when migrants are exploited for profit, or as enslavement (Article 600 PC) when criminal groups receive and trade victims among themselves. The Italian definition of human trafficking includes references to elements of slavery, aligning with international legal instruments and jurisprudence.[133] However, this convergence creates a 'hybrid' offence, where exploitative purposes intersect with aims of coercion, including forced labour, sexual services, begging, illegal activities, or organ harvesting (Article 600 PC). Certain acts against migrants may therefore fall into a 'grey area', particularly the structural sexual violence they endure, regardless of gender, not always for exploitative purposes.[134] Eventually, the absence of provisions on international crimes also determines the application of general principles of criminal law, such as statutes of limitations or standard modes of liability, thereby further hindering accountability.[135]

The inadequacy of ordinary offences to address crimes committed in Libya and along the Central Mediterranean route is among the key arguments supporting the need for adopting domestic provisions on international crimes. However, it is crucial to consider that the complex relationship between Italian and Libyan authorities, alongside concerns about establishing individual accountability for pushbacks and forcible returns, might be among the apparent reasons behind Italy's regressive approach towards international criminal justice.[136]

5. CONCLUSIONS

The movement of people across borders has significantly impacted the prosecution, in destination countries, of international crimes committed against migrants in transit. The presence of migrants has prompted judicial responses in host states, resulting in the broad application of criminal law not only through universal jurisdiction. For instance, the increasing number of migrants arriving on Italian shores, many of whom report violence and abuses endured during their transit through Libya, has led to the application of domestic law to crimes committed extraterritorially. Italian proceedings could significantly contribute to a positive interplay between judicial efforts at different levels to assert criminal responsibility for crimes committed in Libya and along the Central Mediterranean route. Indeed, judicial cooperation at the European and international levels can prove effective in investigating and prosecuting crimes committed against migrants in the Central Mediterranean, particularly by helping harmonize efforts across different legal systems.[137] These initiatives also reflect positively from an accountability perspective as they align with the approach to complementarity pursued by the OTP, which aims to supervise and support investigations and case-building in national jurisdictions. However, a review of case law reveals significant challenges in prosecuting those most responsible for such crimes. Despite the lack of provisions on universal jurisdiction, the broad extraterritorial scope of Italian criminal law enables the domestic prosecution of crimes committed against migrants in Libya and along the Central Mediterranean route. Nonetheless, current reliance on charges related to transnational

133 See L. Prosperi, 'The Continuum between Human Trafficking and Enslavement: Recent Italian Jurisprudence on Abuses Committed against (Female) Migrants in Libya', in A. Di Stasi, R. Cadin, A. Iermano, and V. Zambrano (eds), *Migrant women and gender-based violence in the international and European legal framework* (Editoriale Scientifica, 2023) 279–318, at 296–299.

134 *Ibid.*, at 309.

135 For instance, charges of kidnapping in the *Plan Condór* case were dismissed due to the expiration of statutory limitations: see *supra* note 76.

136 Crippa and Colorio, *supra* note 45.

137 Curi, *supra* note 80, at 201.

organized crime and facilitating illegal immigration limits accountability efforts to mid- or lower-level perpetrators, many of whom are themselves victims of smuggling networks. Additionally, resorting to Article 10(2) PC on crimes committed abroad by foreigners — requiring both the suspect's presence in Italy and the request from the Ministry of Justice — precludes effective action against those who benefit the most from the systematic abuse and exploitation of migrants. A significant advance could result from the Court of Cassation's interpretation of Article 7(1)(5) PC in decision no. 31652/2021, concerning international crimes covered by conventions that clearly establish the connecting criteria for applying Italian criminal law. Nevertheless, the Court confined its judgment to crimes under the UNTOC, and in particular to the smuggling of migrants. At the same time, the constitutional principle of legality strongly limits the extension of Italian criminal law to international or transnational crimes committed against migrants in Libya and along the Central Mediterranean route, in the absence of domestic legislation implementing international provisions. Even when systemic violence and widespread abuse are recognized, the absence of domestic provisions on international crimes and principles applicable thereto continues to hamper effective prosecution. Case law reveals that, while domestic proceedings on extraterritorial crimes align with the OTP's approach to complementarity and cooperation, charges remain limited to ordinary crimes and fail to reflect the gravity of the violations, particularly those amounting to crimes against humanity. Furthermore, accountability efforts do not address the responsibility of high-level perpetrators and agents of the EU and destination states (such as Italy and Malta) for their complicity in these crimes through border externalization policies and the provision of financial and logistical support to Libyan authorities.[138]

The Italian criminal justice system, with its expertise in tackling transnational organized crime, holds significant potential for addressing macro-criminality contexts, which are also typical of international crimes. Italy's strategic position as a primary destination along the Central Mediterranean route also offers unique opportunities for gathering information from migrants, enabling domestic investigations and facilitating cooperation with foreign authorities.[139] Ultimately, a strengthened legal framework is essential to address the systemic abuse and violence that migrants endure along migration routes. A coordinated interaction between domestic and international mechanisms, through judicial cooperation and the enforcement of international criminal law at the national level, is necessary to bridge impunity gaps and establish a more comprehensive system of accountability.

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[138] The UN Special Rapporteur on Torture has called on states and the ICC to examine potential crimes against humanity against 'millions of migrants' that may have occurred 'as a direct or indirect consequence of deliberate state policies and practices of deterrence, criminalization, arrival protection and refoulement': N. Melzer, UN Human Rights Council. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/HRC/37/50, 23 November 2018, at 11, 20.

[139] See Langer and Eason, *supra* note 8, at 798.

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Article