12

Reversing the Perspective

Criminal Responsibility of Italian Authorities for Human Rights Violations in Libya?

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I. A Provocative Viewpoint: The Criminal Liability of Italy's Top Leadership for the Crimes Perpetrated in Libya against Migrants

In this intervention, I would like to 'reverse the perspective', as indicated by the title of my contribution. So far, we have seen how criminal law represents a tool used increasingly more to *punish irregular migrants* or those who facilitate their migration, if not actually to punish whoever endeavours to save the migrants in danger at sea. Now we want to check whether criminal law might also become a tool to *defend migrants* from the serious offences that during the migratory process are inflicted on them, often – as we will see – with the complicity of Italian and European authorities.

My approach is deliberately and explicitly *provocative*, and we will soon discover why. Before doing so, however, I would like to clarify the concrete scenario tackled in this intervention. The international community and the public opinion have known for years that the detention centres where migrants are kept in Libya are infernal places: both the 'regular' centres managed by the Libyan Cost Guard (LCG) and, more generally, by the authorities of the internationally recognised Libyan government, and, more so in fact, the irregular centres managed by the various militias operating in the country. The most atrocious tortures are run-of-the-mill daily occurrences; various commentators, to express the utmost seriousness of the situation, have stated that the conditions prevailing inside them recall those of the most atrocious places in history, the Nazi concentration camps.[1]

[1] Out of various contributions on the tragedies of Libyan concentration camps, see especially M Veglio (ed), *L'attualità del male – La Libia dei lager è verità processuale* (Torino, Seb27, 2018).

We are going to see it better in the first part of this intervention: the centres for migrants in Libya are currently among the worst places in the world where you might happen to be detained. Despite the fact that such reality has been known for years, the Italian government, beginning in particular with 2017, has identified in the collaboration with Libyan authorities (especially with the LCG) a decisive element of its own migratory policy. Supporting the LCG by technical and financial means, besides logistical and operational ones, is a constant of Italian policy in recent years. This strategy had a massive launch in 2016–17 under the Gentiloni government, particularly during Minniti's term as Minister of Internal Affairs, as he was responsible for the code of conduct applicable to NGOs, which explicitly laid down that NGOs were under a duty to support the LCG in migrant refoulement activities;[2] and it continued on an even more explicit note under the first Conte government and Salvini's ministry.

Here is, then, my provocation. Our authorities know that the Libyan detention centres, where the LCG sends back the migrants rescued at sea, are hellish places, where the worst atrocities are committed. Nevertheless, they fund and support the rescue operations at sea whereby the migrants who have finally managed to escape from those centres are restored by the LCG to the hell they came from. Can we posit an issue of criminal liability against our top leaders for *complicity* in the crimes of which the migrants are victims in Libya?

The question is seemingly provocative, since the policy of collaboration with Libyan authorities in controlling migrations is far from a circumstance denied or passed over in silence by our governments, and its implementation has in fact been greeted with extreme favour by the EU institutions as well.

The political reasoning is clear and explicit, at both Italian and European level. The result to be obtained at all costs is the reduction in the number of migrants setting out from Libya for the Italian shores. Until 2012, ships of the Italian military navy were conducting refoulement operations directly, intercepting migrants' vessels on the high seas and taking them back to Libya: after the 2012 *Hirsi* judgment by the ECHR,[3] this practice is no longer possible. The only possibility left after 2012 is for the Libyan authorities themselves to run the rescue operations and take the migrants back to Libya. Surely, the Italian and European authorities are pretty well aware of the situation of detention centres in Libya, and there are always official occasions on which they undertake to improve living conditions in such centres. However, according to our authorities, there are at present no other places where the migrants repelled at sea might be brought back, and it is not the

[2] On code of conduct for NGOs approved on summer 2017 summer, see F Ferri, 'Il Codice di condotta per le ONG e i diritti dei migranti: fra diritto internazionale e politiche europee' (2018) (1) *Diritti umani e diritto internazionale* 189.

[3] The reference is obviously to the very well-known judgment by the Grand Chamber of the European Court of Human Rights, 23 February 2012, *Hirsi Jamaa v Italy*, where the ECHR held that the Italian praxis of intercepting with military ships the vessels heading from Libya, sending migrants back, was illegitimate as being in conflict with the *non refoulement* principle (article 3 of the ECHR) and with the prohibition of collective expulsions (article 4 Prot 4 ECHR).

responsibility of Italy and Europe if the Libyan authorities are unable to ensure to detained migrants fulfilment of even the most basic rights.

This discourse boasts a very wide support at the level of public opinion, and is more or less the common opinion of European governments on the issue of how to govern the Libyan flows of migrants. The support for the LCG's ability to carry out rescue operations at sea is necessary for precluding the intervention of NGOs, so that migrants can be sent back to Libya and the migrant flows to Europe reduced. No politician in Italy who aspires to some kind of electoral following could nowadays assert that, although helping Libyans manage rescue operations at sea has drastically reduced the number of new arrivals, that should be stopped, as the Libyan detention centres migrants are sent back to are atrocious places. The argument of the need to block the flows has such a powerful resonance in the political debate that the issue of human rights protection is doomed to certain defeat. First arrivals must be contained, and only then, if at all, should the issue of human rights in Libya be tackled: currently, these priorities are not in discussion, in Italy or in Europe.

Is it thus possible that the activities in support of Libyan authorities, while boasting so much consent, nevertheless configure a case of criminal liability on the part of our institutional leaders? Let us indeed de-contextualise the issue, and let us shelve aside, for a moment, politics and current affairs. There are torture centres managed by authority of government X, and another government Y, which is well acquainted with the situation of these centres, provides X with aids and means for it to run them: is it so far-fetched to ask ourselves whether the members of government Y could be held liable for what happens in those centres?

My intention is to try to articulate some thoughts on this point. We will begin with a short analysis of the state of detention centres in Libya, analysing the crimes we can identify there, and the proceedings currently underway against those who directly manage the centres. We will then look at the possible scenarios for liability on the part of the Italian authorities: first vis-à-vis the jurisdiction of the International Criminal Court, and second vis-à-vis the internal criminal jurisdiction. We will not deal instead with the profiles relating to any international liability of the Italian State for what happens in Libya, before the ECHR or other international venues: a profile we do not have enough room to analyse here, even though it obviously has many points where it intersects with the problems we are about to tackle.

II. The Situation in Libya: The Criminal Liability of Libyan Agents or Agents Acting Directly in the Libyan Centres

The conditions of detention centres in Libya have been for years at the centre of attention among NGOs and international human rights organisations: there are

countless reports, and it would be pointless to list them here.[4] So exceptional is the situation that, since the end of 2017, the UNHCR has embarked on a temporary programme of evacuation from such centres of the most highly vulnerable subjects, transferring them to Niger and subsequently installing them in European countries. A programme that in any event involves but a few hundreds of migrants, compared to the thousands and thousands blocked inside the Libyan centres.

I would like to focus now on the investigations and on the criminal proceedings that involve the liability of the authors of crimes perpetrated against migrants in Libya. As for the international jurisdictions, starting from the end of 2016 the Prosecutor's office at the ICC has launched a preliminary investigation into the violent acts perpetrated against migrants in Libya. As we know, Libya has not signed the Rome Statute and is accordingly not subject to the jurisdiction of the ICC. Nevertheless, the Security Council referred the situation in Libya to the ICC Prosecutor on 26 February 2011 through Resolution 1970 (2011): this referral confers jurisdiction in the Libya situation on the ICC. Concerning the ICC's jurisdiction over the crimes committed in the Libyan camps against migrants, it is therefore necessary to find a link between such crimes and the situation that in 2011 led the Security Council to refer the case to the ICC. A link that can be proved by highlighting the fact that the crimes of which migrants are victims are still the consequence of the lawlessness that has arisen in Libya since 2011, and that the authors of such crimes are the same armed groups that gave birth to the 2011 conflict.[5] In any event, at the time we are writing these notes (May 2020), there is still no news of any proceedings officially opened by the ICC Prosecutor's office with regard to the events of interest here.

More developments took place at the level of internal jurisdictions. As regards Italy, in particular, there have been two important judgments that inflicted extremely heavy punishments on the persons held to be liable for the atrocities committed in separate Libyan camps. It is worth remembering that the jurisdiction of our courts for offences (like those examined here) perpetrated abroad by a foreign citizen against foreign citizens is founded on the dual requirement, laid down by Article 10 of the Italian Criminal Code, of the presence in Italy of the wrongdoer and the request to prosecute by the Minister of Justice.

In December 2017, the Criminal Court (Corte d'assise) of Milan sentenced to life imprisonment – for the crimes of multiple and aggravated murder, kidnapping

[4] See, lastly, the very harsh December 2018 report by the High Commissioner for Human Rights of the United Nations, significantly titled *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*.

[5] For a more in-depth discussion on such issues, see in particular A Whitford, 'Challenges to Bringing a Case before the International Criminal Court in Relation to Alleged Crimes Committed against migrants in Libya' and C Meloni, 'Legal Responsibility before the International Criminal Court in Libya', both of them available in the volume that gathers the texts of the reports delivered at the international Conference held in Tunis on 15 and 16 March 2019, titled *Violations of Human Rights after the Libyan Route Shutdown: Legal Liability of the Italian and Libyan Governments and Possible Legal Solutions*, available on www.asgi.it.

and sexual violence – a Somali citizen identified by several of his fellow countrymen in his role as co-manager of a Libyan detention camp (the facts dealt with in the judgment relate to a period covering the second half of 2015 and the first months of 2016).[6] The description that emerges from the tale of the 17 wronged persons leaves us breathless. In a shed near the Libyan city of Bani Walid, more than 500 persons were detained in horrific hygienic and health conditions, exposed daily to physical violence and sexual abuses. The accused was tasked with inducing the detainees, through the most atrocious tortures, to obtain from their families the money needed to release them and continue their journey to Italy (around 7000 dollars); inside a 'torture chamber', the accused daily raped and tortured his victims, many of whom eventually died of the violence they were made to suffer. The life sentence was later confirmed by the Criminal Court of Appeal (Corte d'assise d'appello) of Milan, which reiterated the reasons for ruling that the testimonies of the victims were reliable, and the accused's liability for the atrocities he was charged with can be established beyond any reasonable doubt.[7]

In June 2015, moreover, the Criminal Court (Corte d'assise) of Agrigento had sentenced to 10 years in jail, for the crime of conspiracy (*associazione a delinquere*) and reduction into slavery, a person held liable for terrible acts of violence against a group of migrants waiting to leave for Italy.[8] The picture that emerged at this trial is consistent with the tragic tales of victims at the proceedings held in Milan, thereby confirming the systematic character of the atrocities the migrants detained in the several concentrations camps of Libya are subjected to.

To sum up, therefore, the responsibilities of Libya's governmental authorities are the target of a preliminary investigation by the ICC; whereas at an internal level, already on two occasions the seriousness of what is taking place at the detention centres in Libya has been established, resulting in heavy sentences against the persons identified as culprits.

Let us check now whether and to what extent we can postulate a liability of the Italian authorities, in the form of complicity, for the offences that are committed in Libya's detention camps for foreigners.

III. Liability before the ICC and its Complementarity with National Jurisdictions

The issue of the possible liability of Italian authorities before the ICC for complicity in the crimes against humanity committed by the Libyan authorities has been

[6] For an analysis of that decision see Veglio, above n 1: the contributions available in the volume take the cue precisely from such decision, providing a more comprehensive interpretation of the state of Libya's detention camps.

[7] The text of the decision by Milan's Criminal Court of Appeal (Corte d'Assise d'Appello di Milano), filed on 12 June 2019, is available on www.asgi.it.

[8] Corte d'Assise Agrigento, 9 May 2015, www.asgi.it.

the specific focus of an interesting work published in April 2018 by Flavia Pacella,[9] a young jurist who worked for a short period at the ICC offices.

According to the author, the scenario we could possibly envisage as regards the Italian authorities before the ICC is a form of responsibility for *complicity for aiding or abetting* (Article 25 § 3 letter c of the Rome Statute). The Italian leaders would be liable for complicity in the crimes against humanity perpetrated by the LCG and by the other Libyan authorities in charge of the detention centres.

Let us leave aside the issues relating to *proof* of actual cooperation by Italian authorities with the Libyan ones, and let us assume as proven the actual collaboration of our authorities with the Libyans; let us also assume as proven the awareness on the part of our authorities of the crimes committed in the detention centres. Based on this, and given the patent relevance of the Italian contribution to the activities of the LCG, it is not so difficult to establish the *actus reus* of the complicity towards the Italian authority that facilitated the execution of the crime committed by Libyans.

Far more complex, instead, is in our view the discourse about the subjective element of the offence, the element of *mens rea*, which presupposes under the Statute that the accomplice has acted 'for the purpose of facilitating the commission of such crime' (article 25 § 3 letter C) or 'in the knowledge of the intention of the group to commit the crime' (article 25 § 3 letter D, ii). Pacella puts forward an interpretation of this subjective requirement that makes is subsumable under the Italian category of *dolus eventualis*, essentially requiring a) the conscious will to facilitate the Libyan authorities; and b) the awareness that in the normal course of events serious crimes would be committed against migrants.

The issue seems indeed to be more complex. In the interpretation of *mens rea* put forward by Pacella, no account is taken of the possible defensive argument that the Italian authorities do not consent at all (at least according to official statements) to the use of their own resources for the perpetration of any crime. On the contrary, according to the Italian government the activities aimed at improving the conditions of migrants in Libya would testify to the will of hindering, rather than facilitating, the criminal activities against them. No doubt that, in hypothetical proceedings against Italian leaders for complicity in the crimes committed in Libya, the problem of the *mens rea* would be a topic for far-reaching discussion. This subject deserves, however, an in-depth analysis not in abstract terms, but rather in the light of the probative evidence that would concretely emerge during any such proceedings, so we do not deem it useful now to dwell on it further.

The thesis of the liability on the part of Italian (and European) authorities for *complicity in crimes against humanity* that take place in Libya was also dealt with in depth in an important document drawn up as part of a project of legal clinics

[9] F Pacella, 'Cooperazione Italia-Libia: profili di responsabilità per crimini di diritto internazionale' (2018) *Diritto penale contemporaneo*, 6 April.

from the Paris University of Sciences Politiques, presented in June 2019 at the ICC Prosecutor's Office.[10]

It is quite a detailed communication (the document runs into nearly 250 pages), which reconstructs the policies deployed in recent years at European level as regards management of rescue operations at sea on behalf of migrants' vessels heading from Libya, and as regards the collaboration by European and Italian authorities with Libyan ones. The document identifies in particular two scenarios in which we might conceive an Italian and European liability. The first such scenario relates to management of rescue operations and to the progressive European disengagement following the brief parenthesis of the (Italian) *Mare Nostrum* operation, a disengagement that prevented the implementation of an effective system capable of avoiding the thousands of deaths that occurred over these years along the Libya-Italy route. The second scenario relates to the European policies of 'Border Externalisation', which, starting in particular from 2015, have aimed to strengthen the operational ability of Libyan authorities to prevent migrants' departures to Europe, resulting in a drastic increase in the number of foreigners held in the Libyan detention camps.

In respect of both scenarios, the document deems it possible to envision a criminal liability for crimes against humanity on the part of European and Italian authorities that consciously decided not to set up an effective system of rescue operations at sea, thereby contributing with their omissions to the occurrence of shipwrecks and deaths at sea (first scenario); and that collaborated and keep on collaborating with Libyan authorities to prevent departures for Italy, by so doing contributing to the atrocities to which migrants are subjected in the detention camps (second scenario).

We cannot here reconstruct the multiple arguments that in the opinion of the drafters of the communication allow to consider as proven all the definitional elements of the crime against humanity, as described in Article 7 of the ICC Statute (in particular the element of 'a widespread or systematic attack directed against any civilian population', and the element of the 'knowledge of the attack'). The document reconstructs quite thoroughly any legal or political act by which the European and Italian authorities have implemented the policies in aid and support of Libyan authorities preventing migrants' journeys to Europe.

As for the identification of the individual persons who might be held liable for such crimes before the ICC, the text does not actually spell out 'names and surnames' of any possible accused. The tone of the arguments makes it however clear that in hypothetical proceedings, all the heads of state and government that at European Council level have contributed to the formulation of the Union's

[10] The document (signed, besides the students of the Paris legal clinic, by advocates Omer Shatz and Juan Branco) is freely accessible on the Internet (see e.g., www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf).

migratory policies would stand trial, together with a further and independent liability attaching to the Italian Prime Minister and the Minister of Internal Affairs, who through separate initiatives from the European context have concluded a series of bilateral agreements with Libyan authorities responsible for running the detention and torture centres.

We can only refer to the perusal of the aforementioned contributions for a more extensive exposition of the issues regarding the possibility of holding European and Italian authorities liable for crimes against humanity committed in Libya. We would like now to focus our attention – particularly as regards the liability of Italian authorities, which is the specific matter of this work – on a *preliminary issue*, which is only briefly hinted at both in the 2018 work and in the 2019 communication, although, in my view, it is of the utmost importance: the issue of the relationships between the Italian criminal courts and the ICC.

As we know, such relationships draw inspiration from the *principle of complementarity*, which under Article 17 of the ICC Statute enjoins on the Court, before proceeding to examine a case, the verification of a series of requirements. The requirement of specific interest here is the one set out under the letter (a) ('the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution'). For the ICC not to decline jurisdiction over the matter, therefore, it is necessary to direct attention to the internal legal system, in order to check whether or not the national criminal justice system is capable of ensuring a reliable ascertainment of facts and responsibilities.

The abovementioned works essentially argue that the current lack of any pending proceedings in our criminal courts means that the Italian State has expressed its intention not to consider the conduct of Italian authorities in support of the LCG as triable in a criminal case, and any such case must therefore be deemed to fall under the jurisdiction of the ICC.

I do not find this conclusion entirely convincing. It is indeed true that the Italian criminal prosecutors have not ostensibly launched any investigation against the Italian authorities for complicity in the crimes committed by the LCG at sea and in the detention camps in Libya. It is however similarly true that, as far as I am aware, such problem has never been explicitly brought to the attention of the State prosecutors with a formal request (complaint for complicity in the crimes of the LCG), hence Italian prosecutors, quite simply, never had a chance to take a position on this point. It is furthermore obvious that this kind of crimes can be prosecuted *ex officio*, and that, therefore, no formal complaint is necessary for the Prosecutor's Office to launch investigations. Nonetheless, it seems to be precisely because of that complementarity which ought to inspire the relationships between the ICC jurisdiction and the national ones, that it would be preferable to formally involve the Italian prosecutors in the case, before bringing it to the attention of the ICC prosecution. Although the likelihood of opening a criminal proceeding is limited, the Italian prosecutors would at least be enabled to spell out

the reasons why the collaboration of Italian authorities with Libyan ones could not be punished, in spite of the terrible acts of violence ascribable to the latter.

There is moreover no shortage of cases, including very recent ones, in which the Italian prosecutors have hypothesised criminal responsibilities of the Italian authorities for facts associated with migratory flows from Libya.

Let's think about the trial (currently pending before the Criminal Court of Rome) for manslaughter and failure to provide assistance concerning a military ship that arrived too late to rescue the shipwreck survivors of a boat heading from Libya, at a time when tens of castaways had already drowned (the trial relates to the shipwreck which, on 10 October 2013, had caused the death of more than 200 persons, at least 60 of whom children). The persons accused of such crimes are the captain of the ship and other subjects (military and civilians) occupying top positions, who, by delaying with their conduct the rescue operations, contributed to the occurrence of the disaster.

The most famous case is the one known as the '*Diciotti* case', concerning the former Minister of Internal Affairs, M Salvini (the facts of the case date back to August 2018). The media, including the foreign ones, closely followed the case, and the space is too narrow here to account for it in detail. Put in a nutshell, the Court of Ministers (Tribunale dei ministri) of Catania (the competent body to investigate crimes allegedly committed by a Minister in the discharge of his functions) took the view that the decision by Minister Salvini to prevent for five days the disembarkation of the migrants on board the military ship *Diciotti*, at anchor in the port of Lampedusa, realised the crime of aggravated kidnapping: an extremely serious offence, punished with imprisonment up to 15 years. The Italian Constitution (Article 96) stipulates, as regards ministerial crimes, that the Court must request the authorisation to prosecute from Parliament (the Senate for Salvini, as the Minister is a Senator as well), which may deny the authorisation when the offence has been committed 'for the sake of pursuing an overriding public interest in the exercise of a governmental function' (Article 9, § 3, law no 1/1989, a constitutional law that governs the procedure applicable in the event of ministerial crime). The Senate, by a vote dated March 2019, denied the authorisation to prosecute, holding that the blockage of migrants had occurred as part of the Government's strategy to forcefully raise at European level the problem of the redistribution of migrants who land from Libya on Italy's shores. So the Minister, by his conduct, had pursued the overriding public interest in a reduction of the migratory pressure on Italy.[11]

In August 2019, a very similar case to that of the *Diciotti* occurred, the case of the *Open Arms* ship, which had assisted a number of migrants adrift in international waters. A decree issued by the Minister of Internal Affairs applying the

[11] For an analysis of the opinion of the Senate Immunity Council, which was then approved by the Senate assembly, see L Masera, 'Il parere della Giunta del Senato per le immunità nel caso Diciotti. Alcune riflessioni in attesa della decisione dell'assemblea del Senato' (2019) (1) *Diritto, immigrazione e cittadinanza*.

new rules introduced in June 2019 through the so-called security decree-*bis* (*Decreto sicurezza bis*, Decree law no 53/2019, converted into Law no 77/2019) had prevented the *Open Arms* from entering Italian territorial waters. The decree had been appealed against before the Administrative Court (TAR Lazio), which had provisionally suspended its legal effect, holding that it was in conflict with the rules of international law that govern rescue operations at sea. Despite that, the Minister of Internal Affairs had refused to authorise the disembarkation of the migrants, who had been forced to remain on the ship anchored in the port of Lampedusa, in utterly distressful health and psychological conditions due to the overcrowding on the ship and the length of the stay (altogether, from the rescue to the disembarkation the migrants remained for more than three weeks on board the *Open Arms*). Faced with the aggravation of the health and hygiene conditions, the Prosecutor of Agrigento had ordered the immediate disembarkation of the shipwreck victims, in the belief that the Minister's prohibition against them disembarking was in conflict with both domestic and international law, and amounted therefore to the offence of refusal to perform official duties (Article 328 of the Italian Criminal Code). The judge for the preliminary investigations subsequently confirmed the Prosecutor's decision, stressing the fact that the matter had many points in common with the *Diciotti* case, and adumbrating therefore the possibility of charging the Minister with the offence of kidnapping as well.

In the coming weeks, we will able to see how this case is going to develop, as well as whether the criminal judiciary will also take steps with regard to the many similar incidents of orders prohibiting disembarkations issued by the Ministry of Internal Affairs in breach of international law.[12] For the purposes of our argument, these events show in any case that the Italian judiciary enjoys sufficient independence to prosecute even the highest governmental authorities whenever it is of the view that they have committed serious crimes. Sure, the constitutional mechanism which, in the event of ministerial crimes, requires the authorisation to prosecute on the part of Parliament, makes it harder to open a criminal trial against a Minister, exposing the proceeding to the vagaries of political decisions. Despite that, the control of legality carried out by the criminal judiciary over the executive power, on the issue of managing the migratory flows as well, is a serious and independent control, complying with the standards of a State subject to the rule of law.

For this reason, in conclusion, it seems to me that – concerning the issue of interest here, the complicity of Italian authorities in the atrocities perpetrated in Libya – it would be appropriate to submit the case to the national criminal authority, before approaching the ICC. Such a solution seems to me the one most in line with the spirit of the complementarity clause that regulates the relationships between the ICC jurisdiction and the national criminal jurisdictions. So, let us

[12] On 12 February 2020, in relation to the case of the Gregoretti ship blocked for days in the port of Lampedusa in July 2019, the Senate granted the authorisation to prosecute the former Minister Salvini for the crime of kidnapping: see P Gentilucci, 'Il rebus politico-giuridico della nave Gregoretti – Una bussola per i futuri governi' (2020) (2) *Giur. pen. web*.

now try to imagine the scenario an investigating judge would have to face if he wanted to argue the criminal liability of our institutional leaders for the atrocities in Libya.

IV. The Liability before the National Criminal Justice System and the Problem of the Legal Qualification of the Fact

Let us assume as a well-established fact that the Italian authorities (especially the Prime Minister and the Minister of Internal Affairs who in recent years have concluded the agreements with the Libyans, M Gentiloni and M Minniti until June 2018, then M Conte and M Salvini) had funded the LCG while knowing the atrocities whose perpetration the LCG was contributing to and still contributes to in the Libyan detention camps. Without having the pretence here to analyse all the intricate issues a public prosecutor who decided to open an investigation on these facts would have to face, I would limit myself here to focus attention on a profile I regard as particularly important, being preliminary to any further discussion.

The first, major difficulty that would arise at internal level is to identify the *qualification* of the facts *under criminal law*. As we know, Italy has ratified and implemented the ICC Statute, but had not introduced in the internal legal system the offences corresponding to the crimes described in the Statute. For the Italian criminal law, the species of 'crimes against humanity' does not exist; the crimes that can be charged against the Libyans (and thus ascribable to the Italians for complicity) are those provided in our criminal code: kidnapping, sexual violence, murder, torture, reduction into slavery, conspiracy. Therefore, in the event of a criminal trial against the Italian authorities, complicity in crimes against humanity could not be held against them, and what they could be charged with is the participation in the common offences the Libyan authorities have been responsible for.

The lack of the species of crimes against humanity makes it much harder to formulate the charge. Crimes against humanity are by their nature 'macro-crimes', wherein what is charged is not the single episode, but rather the overall situation framing the individual facts: it is thus a crime that, precisely because of its macro-nature, can be more easily held against the leaders of a State or an organisation, as it does not require proof of a personal contribution by them to a specific criminal episode. At the internal level, a corresponding species of offence is lacking, which means that any conviction would have to be for specific offences: complicity in those specific acts of sexual violence, committed on date X in place X and by the material authors Y and Z; complicity in the murders perpetrated by X against Y and Z; kidnapping of X, Y and Z; and so on.

It is clear that put in these terms it is truly hard to conceive the liability of the leaders of the Italian government. What could be ascribed to our leaders (perhaps, and in any event with difficulty) is the conscious collaboration with the LCG,

knowing the crimes committed by the latter. However, it seems to me practically impossible to think of proving, on the standard of proof beyond any reasonable doubt applied in a criminal trial, their conscious contribution to a specific criminal episode perpetrated by the Libyans.

I see two possible ways out of this problem. The first would be to imagine a liability for complicity in sexual violence, kidnapping, etc, without indicating any specific episodes for which complicity has been proven. The reasoning would be as follows: the Italian leaders helped the LCG, though aware of the very serious crimes being committed in the centres managed by the latter; the Italian leaders could thus stand trial for complicity in these crimes, even without proof of any contribution to a specific episode. Would this reconstruction be compatible with the principle of the personal nature of criminal liability, and with the principle of the strict determination of the charge? Perhaps yes, but we are dealing with a far from straightforward issue. We would have to argue that, once the operational and financial support of the LCG has been proved, as well as the awareness of the crimes it is responsible for in the detention camps for migrants, we might then allege the liability of Italian authorities even without proof of their direct involvement in a specific criminal episode. Still, it would be a novel legal principle for Italian jurisprudence, which would undoubtedly arouse many negative reactions within the community of criminal law academics and defence lawyers.

A second solution, which I think is simpler, would be to assume the complicity of Italian authorities not in the individual offences perpetrated by the Libyans, but purely in the offence of conspiracy (*associazione a delinquere*), by article 416 of the Italian Criminal Code. An offence which, as we know, does not require proof of complicity in the specific criminal facts committed by the agents. We could then postulate a criminal association run by the LCG and by the other subjects that manage the centres; and a complicity of Italian authorities in such an association, which the Italians certainly do not take part in, but whose activity they support through their collaboration.

It would essentially be a case of applying in the specific instance the category of *external support in a criminal association* (*concorso esterno in associazione a delinquere*), developed by Italian judges particularly in relation to the scenario of external support in Mafia-style association. It is to this legal category that our judges referred when they condemn politicians whose collaboration with Mafia exponents had been established. In the absence of proof linking the politician to specific criminal episodes carried out by the Mafia group, the charge would be that of criminal association: article 416-bis of the Italian Criminal Code, which describes the special offence of participation in a Mafia-style criminal association (*associazione di tipo mafioso*). The politicians proved to have colluded with the Mafia were not convicted of actual participation in the Mafia-style association (a requirement for which our judges require proof of the subject's stable inclusion in the group's criminal activities), but of having provided from the outside, by virtue of their own political-institutional role, a significant contribution to the activity of the criminal group.

In the case of Libya, which is what interests us here, we could attempt to develop a similar argument. The Italian authorities that collaborated and collaborate with subjects responsible for atrocious crimes are neither accountable for the individual offences committed by the Libyans nor definable as participants in the criminal association set up for the purpose of managing the detention and torture camps. They could however be convicted of external support in the criminal association ascribable to the Libyans, just as the politicians colluding with the Mafia have been convicted of external support in Mafia-style association.

However somewhat bizarre it might prima facie appear, this solution nevertheless seems to be more capable of expressing the disvalue of the conduct reproached to the Italian authorities. The charge against them is not so much their voluntary participation in specific criminal episodes the Libyans engaged in, but the fact that they entertained a collaboration relationship with authorities suspected of having perpetrated and continuing to perpetrate terrible crimes against migrants. As the species of crimes against humanity is absent from the Italian criminal law system, external support in a criminal association seems to me the juridical characterisation best fitting the need to express the sense of criminal charge against Italian authorities.

V. Conclusions

In the Libyan detention camps, a tragedy of horrific proportions is taking place. For years, thousands of migrants have been the victims of inhuman suffering, the women systematically raped, the men and children tortured and killed. The testimonies of what is happening in those camps are by now countless, and yet the Italian (and European) authorities keep on collaborating with the authors of such atrocities. All that matters are to block or in any event reduce the migratory flows to Italy, and the manner in which such result is pursued is seemingly quite indifferent.

Faced with such a flagrant breach of the most basic rights of thousands of people, the question of who is responsible for such infringements cannot be eluded. No doubt, the direct authors of the acts of violence in the Libyan camps must respond for the crimes therein committed. However, we cannot ignore the fact that the authorities running those camps (at least the governmental ones) only have means and money to perform their criminal activities because Italy and Europe continue to fund them, in the name of combating illegal immigration.

Asking ourselves whether criminal liability might be imputed to the Italian (and European) authorities as well for what is happening in the Libyan camps is thus a question we criminal law theorists cannot shy away from. So far, as we have seen, the issue has been tackled from the viewpoint of international criminal law, by envisioning a liability on the part of Italian and European authorities for complicity in the crimes against humanity perpetrated at sea and in the Libyan detention camps. The recent communication from the Paris legal clinic to the ICC Prosecution seems to us to be an excellent contribution, on top of that well

documented, from which we can draw an initial, interesting analysis of the many complex issues that rise to the fore from that perspective.

In my intervention I have likewise sought to envision the possible internal law scenarios, reflecting on which qualification might be the most apt to penalise the conduct of the Italian authorities in the absence, in the Italian criminal law system, of species of offences corresponding to the crimes against humanity featuring in the ICC Statute.

Realistically, there is an extremely low likelihood of criminal proceedings being instituted against the Italian (and European) authorities for the atrocities of the Libyan camps. As far as the ICC is concerned, we have seen earlier that the ICC Prosecution has not formally opened an investigation even against the Libyan militias that materially run the torture camps. To imagine that, for the same facts, the Prosecutor's Office wants instead to prosecute the top Italian and European institutional leaders frankly seems utterly unlikely, not so much for legal reasons, but first and foremost on political grounds. We are in fact quite familiar with the difficulties that, since its foundation, the ICC had to cope with when discharging its mission. Investigating precisely the leaders of those European countries, which are among the few to support the ICC politically and financially, would be a very risky operation for the legitimisation of the Court.

As for the internal criminal jurisdiction, we have remarked that the lack of the species of crimes against humanity complicates the legal qualification of the facts, without overlooking the obstacle represented, in the event of ministerial crimes, by the need for the judiciary to request Parliament's authorisation to prosecute. If it is possible that the judiciary will take steps, as in the *Diciotti* case, in relation to offences perpetrated through specific episodes of breach of migrants' fundamental rights, it is far more difficult to imagine an investigation being opened against our highest governmental authorities for complicity in the tortures committed in Libya. Faced with such a broad and general charge, an outcry would surely be raised by people accusing it of being a political trial due to the judiciary's determination to encroach on exclusive prerogatives of Government and Parliament: it is unlikely that the judiciary would want to adopt such a radical choice in opposition to political power.

Taking note of the fact that criminal proceedings are unlikely to be opened against Italian and European authorities does not however void of meaning the reflections herein put forward. A document like the communication sent by the Parisian legal clinic to the ICC Prosecutor will quite likely result in no formal investigation being opened, yet it has the very great merit of explicitly asserting on solid juridical grounds the terrible responsibilities of European authorities for what is happening in Libya. This is precisely our task as jurists, leaving behind a testimony that what Europe is doing in Libya is against national and international law and should result in an ascertainment of the liability, criminal as well, on the part of those who took such decisions. Politics will almost certainly prevent the opening of criminal proceedings, but as jurists, we can say that we have not failed in our professional and ethical responsibilities.