

**INTERNATIONAL CRIMINAL COURT**

**OFFICE OF THE PROSECUTOR**

**OTP-CR-330/19**

**AMICI CURIAE OBSERVATIONS PURSUANT TO**

**RULE 103 OF THE RULES OF PROCEDURE AND EVIDENCE**

On behalf of:

the association CIVITAS, in person of the council member and legal representative, Mr Paolo Montali, domiciled in via Ceradini 16, 20129, MILAN, Italy, legally represented by Mr Giuseppe Pellegrino (T.I.N.: PLL GPP 64R26 F205F; tel. +39.02.86.43.20; fax: +39.02.87.83.15; e-mail: info@studiopellegrinoferrari.it; p.e.c. [certified e-mail]: giuseppe.pellegrino@milano.pecavvocati.it), registered with the ICC List of Counsel, and by Mr Alberto Ferrari (T.I.N.: FRR LRT 76R11 D969D; tel. +39.02.86.43.20; fax: +39.02.87.83.15; e-mail: info@studiopellegrinoferrari.it; p.e.c. [certified e-mail]: alberto.ferrari.milano.pecavvocati.it), registered with the ICC List of Assistants to Counsel, both domiciled in via Ceradini 16, 20129, MILAN, Italy, pursuant to power of attorney on 13<sup>th</sup> February 2020;

- amicus curiae

for the commencement of an investigation *proprio motu* by the Prosecutor with regard to the commission of crimes against humanity related to the trafficking in human beings and enslavement organised and perpetrated on the territories of the Republic of Mali, Burkina Faso, the Republic of the Niger, the State of Libya, the Republic of Italy and any and all the flag States of the vessels committed in the search and rescue operations in the Mediterranean

international waters

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**PRELIMINARY ISSUE, CIVITAS' STANDING: THE ASSOCIATION'S COMMITMENT**

The association Civitas was founded when seven victims, still anonymous pending the adoption of protective measures concerning them and their families, were filing information concerning the traffic of human beings between western sub-Saharan countries and the Republic of Italy.

On 4<sup>th</sup> July 2019 indeed an activity to spread information about trafficking in human beings as well as about the seven victims' courageous denunciation took place and since the first meeting a collective interest to support their complaint and promote a proper punishment and prevention of trafficking in human beings has arisen.

In order to be more effective, providing information both on the phenomenon of human trafficking as a whole and on the seven victims' denunciation has been deemed necessary. Already from the first meeting several Italian citizens decided to join with the victims and set up an association – Civitas – to support them in their commitment before the International Criminal Court (doc. 1).

Civitas' intent is protecting victims from traffickers by using legal tools, more than targeting traffickers' responsibilities.

The issue is both political and legal. The association operates on both levels but with an essential clarification: the political theme is of interest only for those choices which are bound by rules and principles of higher order but

do not fall within the free political discretion.

In the present case, the association is of Italian nationality, that is to say, of a State which once was an enemy of the signatory States according to art. 107 of the Charter of the United Nations. In the Italian post-war order, specific attention was therefore given to the prevention of further abuse of the political discretion by Parliament and Government for the future by adopting a rigid constitution as a sure and stable yardstick for assessing the legitimacy not only of individual conducts, but also of political acts carried out by sovereign powers.

Therefore, the Association's political interest will be limited to the boundaries of legitimacy primarily dictated by the Italian Constitution, the supreme source of law in the national legal system, and subsequently by international customary and conventional laws and principles capable of limiting the political discretion of national governments, as well as of international organizations within the frame of binding duties.

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#### **NEXT: THE INFORMATION AVAILABLE TO CIVITAS**

The application of the law to a specific concrete case is in the inherent nature of the jurisdictional activity. The denunciation proposed by the seven anonymous migrants called for an assessment of the criminal responsibility and the punishment of those who were actually responsible for the events that occurred to each of them during their journey to Italy.

The starting point for Civitas' submission as *amicus curiae* in the present proceedings is then grounded on the statements released both by the

seven claimants (*rectius*: victims, arisen to eleven in the meanwhile) and by the other asylum seekers, indicated as potential witnesses.

On the other hand, the aim pursued by the present intervention is both the fight against trafficking in human beings in general terms (especially on Italian soil, given Civitas' nationality) and the support of the eleven claimants' (that is to say the eleven victims') views and concerns in particular.

Fighting against trafficking – such as against any form of exploitation of human beings – after all does not simply mean prosecuting persons responsible thereof, but protecting their victims too. Therefore, preventing even more than punishing is the real commitment of the Association.

Today's defensive support activity is based on the information given in the minutes of individual (both of victims and witnesses) and collective interviews attached to the information deed filed on victims' behalf; and it is based as well on the legal arguments concerning the structure of the material conduct, the subjective element, the context elements and all the other matters dealt with therein, including jurisdiction and admissibility of the case.

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**ON THE MERITS: THE POLITICAL RESPONSIBILITIES RELATED TO TRAFFICKING IN HUMAN BEINGS**

Trafficking in human beings is not a common crime which can be committed under the sovereignty of a legitimate government which duly exercises the responsibility to protect conferred on it by the United Nations Charter.

Trafficking, as well as enslavement, requires the control of the territory and waters over which it is practised. Here are three institutional scenarios

where the crime can be perpetrated:

- institutional collapse;
- institutional corruption;
- institutional inability to react.

The information released by the victims outlined three different scenarios for the five States of transit and destination of human trafficking, namely:

- the three sub-Saharan transit countries crossed by the western routes;
- the State of Libya;
- the Republic of Italy.

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### **NEXT: SUB-SAHARAN GOVERNMENTS' RESPONSIBILITIES**

All asylum seekers heard by the undersigned defendants passed alternatively through the towns of Gao or Agadez.

When crossing Gao the transit countries turned out to be Mali and Algeria; whereas Mali, Burkina Faso and Niger were those to go through Agadez.

With the only exception of Algeria, the governments of three other countries have been supporting human trafficking in at least two respects:

- failure to carry out the necessary border checks;
- collection of illegal tolls by police and military personnel on transit routes.

Civitas does not have adequate information on the reciprocal transit agreements between the three aforementioned States. it is not to be excluded

that there can be between them a regime similar to that of the European countries, either they belong to European Union or they do not (i.e. the Schengen Area).

Anyway two data have unquestionably emerged:

- the borders between one State and another are guarded by control posts;

- a real mass exodus passes through these control posts.

A *de facto* border control has therefore been carried out; such control has also been replicated along the main communication routes used by transport companies; however, it has been regarding not the possession of regular documents and the requirements for transit on national soil, but more simply the payment of a toll. A toll – it must be recalled – required not according to regular administrative instruments prescribed by law, but through the most brutal physical force and deprivation of personal freedom.

Such course of action has not been occasional, but systematically adopted by military and police personnel of the three transit countries: Mali, Burkina Faso and Niger.

In these three countries, transport has been performed, in the majority of cases, by private transport companies, whose drivers still cooperate peacefully with the soldiers deployed along the routes. Such cooperation operates by collecting the required money in advance from passengers, in order to prevent beatings and whippings during checks at roadblocks.

In Niger only, the scenario is further aggravated in at least three respects:

- the permanent establishment of concentration camps – called either ghettos or *foyers* by francophones – in the town of Agadez prior to the crossing of the desert to Libya;

- free movement in a large area of national territory (from the town of Agadez to the Libyan border) of unlabelled off-road vehicles openly overloaded with passengers (25-30 persons in average for a Toyota Hilux or similar models);

- the organisation of a real escort service by military personnel out of the town of Agadez.

The above-mentioned circumstances, more widely described in the information report of the seven anonymous victims, demonstrate a serious institutional degradation of the local government apparatus in terms of corruption.

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### **NEXT: THE CONDITIONS ON LIBYAN SOIL**

The Libyan territory is the place where human trafficking is best rooted. Despite of the Security Council's resolutions, the territory along the route is controlled, rather than by one of the two warring factions, by a plurality of tribes and local organizations taking part to the fight, not so much because of national political purposes, but because of local economic interests that are mostly illegal.

Illicit economic interests also include the preservation of trafficking even in the event of armed clashes between neighbouring tribes or organisations; it occurs through an organised handover – by abandonment and subsequent collection of passengers in desert areas – so as to avoid crossing hostile

territories or contacts between crews belonging to opposing factions.

The power fragmentation leads to the exercise of sovereignty through local predatory conduct generating confusion and overlapping between public interests and private ownership.

From this point of view, the whole detention system – now systematically used not to restrict detainees on the ground of criminal responsibility, but to intern migrants for the sole purpose of extortion against families or slavery – proves to be of a highly dubious nature.

The control of territorial waters is also completely corrupted and arbitrary: military crews responding to an indeterminate chain of command and control haggle with mere civilians the opening of navigation to the dinghies used for the clandestine transport of migrants.

Totally ambiguous and promiscuous the role of these crews also according the narrative of non-governmental organisations that systematically patrol the border of Libyan territorial waters to carry out their search and rescue operations: on their websites the overall Libyan institutional system is publicly condemned (without indicating individual governmental responsibilities pursuant to art. 28 of the Statute, however...) so far to deny Libyan territory the character of a safe place as to disembark the shipwrecked persons rescued at sea.

The embarrassments, the half-truths, the diplomatic hypocrisies are allowing not only immunity for previous conduct, but even the continuation of the consummation of crimes against humanity at the time when the present act of intervention is being drafted: hence the specific responsibility of the OTP in



the respective prerogatives not only of prosecution and punishment, but also of prevention of the consummation of international crimes, according to the intentions set out in the preamble of the Rome Statute.

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### **NEXT: THE RESPONSIBILITIES OF THE ITALIAN GOVERNMENT AND THE EUROPEAN INSTITUTIONS**

However, the most serious point of the whole system is related to the conditions not of the transit countries but of the country of arrival: the Italian Republic.

As anticipated in the foreword, Italy is a country with precise historical responsibilities in the conduct of the Second World War, from which it emerged not only through an military occupation, but also through a civil war that has torn its consciences and definitively changed its institutional regime from monarchy to republic and – more important – from totalitarianism to democracy.

The process of elaborating the Republican Constitution among politically opposed forces (Catholics, Liberals and Socialists) has led to an in-depth rethinking of the fundamental values of the human being and of the relationship between the individual and the State exercising its sovereignty over him or her.

The Italian legal system, therefore, at constitutional and legislative level does not manifest any uncertainties about the tolerability or not of human trafficking and enslavement.

Useless spending further words about European Union and Nice

Charter's guarantees on fundamental freedoms.

Beyond legal sources and principles, however, slave market manages to reach Italian and European shores because of the aforementioned institutional incapability to react to the phenomenon. Two are the fronts where both Republic of Italy and European Union are engaged by trafficking in human beings: Mediterranean Sea and Italian soil.

In the Mediterranean Sea the transport activity related to traffic is carried out by two orders of subjects:

- independent smugglers, who use little boats, such as fishing and sailing boats;
- non-governmental organisations, which use larger “search and rescue” boats.

The former category is here of no interest, because it does not interfere with traffic in human beings; the latter, unfortunately, yes! And much more than public opinion can even expect.

Traffic in human beings implies transport, as slaves in the traffickers' perspective are chattel. Their market, then, needs a transport connection from a place of departure to a place of arrival. The traffickers' means may work exclusively in those countries hit by an institutional collapse or by an endemic corruption, such as Libya and Sub-Saharan countries.

Their capacity of projection on open waters is very limited and, until 3<sup>rd</sup> October 2013, only old fishing boats overloaded with hundreds of desperate people could reach the Italian shores.

The death of so many people just in a shipwreck caused the European

Navies' intervention, first, and later their substitution by NGOs' vessels. The constant and systematic patrol by NGOs' units let the traffickers even change their means of transport over the sea, turned from old shipping boats to rafts.

This means that, thanks to NGOs' intervention, for the criminal groups it has got much easier and cheaper to push migrants to the sea and, consequently, the slaves market has even grown.

Civitas has denounced before domestic judicial Authorities the NGOs responsible of the disembarkations occurred since September 2019 onward and is now bringing to the attention of the International Criminal Court all kind of responsibilities thereto related, even those which are removed from domestic jurisdiction: the responsibilities arising from the use of political discretion of the institutions of the individual States involved (docc. 2-16).

On Italian territory, moreover, slaves exploitation does not come to an end: the extensive control of organised crime on the southern regions' soil and on the economic activities carried out there, together with the distortive effects of free market principles in the agricultural sector, result in a substantial lack of sustainability of agricultural production that does not involve the exploitation of illegal labour.

Moreover, attention must be paid to the fact that the whole world of solidarity includes, along with virtuous examples, areas totally prey to parasitic interests, such as the extraordinary reception of migrants seeking international protection, that very little deals with an effective growth and integration of a workforce able to reside permanently in Italy.

Hence arises the **uncertainty of the institutions**, in the context also of

an **exasperated search of the electoral consensus**, in facing on one hand the open pressures of the charity world in favour of search and rescue operations at sea and of extraordinary reception system, and on the other hand the covered interests of organised crime which exploits debarked “human capital” in terms of: servile work in the countryside, prostitution, recruitment to organized crime, with specific reference to drug dealing.

Even in an institutionally mature country (due to a very troubled recent historical past) the need, therefore, arises that the International Criminal Court establish well defined boundaries between the areas open to political discretion and those which are not, whatever the principles of higher order demagogically invoked in the political struggle to gather electoral consensus.

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#### **THE PROCEDURAL EVENTS FOLLOWING THE LODGING OF THE INFORMATION BY SEVEN PERSONS**

By note of 20 September 2019, the OTP informed the represents of the seven victims that it had recorded the information they had provided under the situation on Libya opened in 2011.

No response was given to the request to initiate an overall investigation on the other four transit and destination countries passed through by the route.

Indeed the Republic of Italy is not the only European country involved: several Flag States are responsible for the conduct of the “search and rescue” vessels which operate in the Mediterranean Sea, aiding the human traffickers in performing their criminal intent: responsibility arising from the failure to exercise an appropriate control over the proper use of their merchant vessels.

The widening of the scope of the investigation – on the assumption of new facts following the fall of the dictator Muḥammad Gaddafi and therefore unrelated to those considered in Resolution SC Res 1970 (2011) – is mandatory whether there be a genuine desire to combat, to punish and to bring to an end the crime of trafficking along the routes between Africa and Europe and the shores of the Mediterranean Sea.

The above-mentioned Resolution indeed can not legitimate an investigation on crimes organised and perpetrated after its adoption by Security Council.

The request for the extension of the investigation to the four other countries referred to in the information deed and to the flag States of the vessels used in search and rescue operations is therefore respectfully reiterated, consistently with the denounces filed before the Italian authorities too for the most recent landings between September 2019 and March 2020 (docc. 2-16).

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On the basis of:

- the facts reported in the Statement of the Facts and the subsequent reasoning in law rendered in the seven anonymous persons' information (proceedings reference: OTP-CR-330/19);

- the above-mentioned reasonings in fact and in law;

association Civitas, legally represented by Mr Giuseppe Pellegrino as legal representative and by Mr Alberto Ferrari as associated Counsel,

### **RESPECTFULLY REQUEST**

- that the Office of the Prosecutor initiate an investigation into the situ-

ation of Mali, Burkina Faso, Niger, Italy and the Flag States of the vessels engaged in humanitarian operation in the Mediterranean Sea for the purpose of charging the persons responsible of the commission of the following crimes against humanity: enslavement, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of the international law, murder, torture and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health;

- that the Office of the Prosecutor inform the United Nations Security Council of the conducts reported herein and in the information filed by the seven victims still anonyms, so that the United Nation Security Council refer to the Office of the Prosecutor pursuant to Chapter VII of the UN Charter the situation of Libya for the purpose of charging the persons responsible of the commission of the following crimes against humanity: enslavement, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, murder, torture and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health;

- that following the referral by the United Nations Security Council, the Office of the Prosecutor initiate an investigation into the situation of Libya, for the purpose of charging the persons responsible of the commission of the same crimes against humanity;

- with the express reserve to submit further observations to the relevant Chamber pursuant to rule 103.

Attachments:

1.- Association's statute;

2-16.- Civitas' denounces against NGOs operating on Italian shores.

Milan, 7<sup>th</sup> September 2020

Alberto Ferrari

Giuseppe Pellegrino

(associate counsel)

(lead counsel)

