



## **FIRST REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UN SECURITY COUNCIL PURSUANT TO UNSCR 1970 (2011)**

### **INTRODUCTION**

1. On 26 February 2011 the United Nations Security Council unanimously adopted Resolution 1970 (2011), referring the situation in Libya since 15 February 2011 to the Prosecutor of the International Criminal Court.
2. Paragraph 7 of the Resolution invites the Prosecutor to address the Security Council within two months of the adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution. This report provides a summary of the activities of the Office of the Prosecutor undertaken to implement Resolution 1970 (2011), including:
  - a. The process of preliminary examination conducted by the Office of the Prosecutor in order to assess the jurisdiction of the International Criminal Court;
  - b. The ongoing investigation; and
  - c. The anticipated next judicial activities.

### **1. PRELIMINARY EXAMINATION.**

3. In accordance with the Rome Statute the Office of the Prosecutor of the International Criminal Court is responsible for determining whether to proceed with an investigation into a situation subject to judicial review as appropriate.
4. For this purpose, the Office conducts a preliminary examination to evaluate all relevant information and to analyze its seriousness in order to determine whether an investigation should be opened. If the Office is satisfied that all the criteria established by the Statute are fulfilled, it has a duty to open an investigation into the situation.
5. Article 53(1)(a)-(c) of the Statute establishes the legal framework for this assessment. It provides that the Prosecutor shall consider: jurisdiction (temporal, material, and either territorial or personal jurisdiction); admissibility (complementarity and gravity); and the interests of justice. The standard of proof for proceeding with an investigation into a situation under the Statute is 'reasonable basis'.

6. Jurisdiction relates to whether a crime within the jurisdiction of the Court has been or is being committed. It requires an assessment of (i) temporal jurisdiction (date of entry into force of the Statute, namely 1 July 2002 onwards, date of entry into force for an acceding State, date specified in a Security Council referral, or in a declaration lodged pursuant to article 12(3); (ii) material jurisdiction as defined in article 5 of the Statute (genocide; crimes against humanity; war crimes; and aggression); and (iii) either territorial or personal jurisdiction, which requires that the crime occur on the territory or by a national of a State Party or a State not Party that has lodged a declaration accepting the jurisdiction of the Court, or otherwise arises from a situation referred by the Security Council.

7. Admissibility comprises complementarity and gravity.

Complementarity involves an examination of the existence of relevant national proceedings in relation to the potential cases considered for investigation by the Office. This is done bearing in mind its policy of focusing investigative efforts on those who appear to bear the greatest responsibility for the most serious crimes. Where relevant domestic investigations or prosecutions exist, the Office will assess their genuineness.

Gravity includes an assessment of the scale, nature, manner of commission of the crimes, and their impact.

8. The 'interests of justice' is a countervailing consideration. The Office must assess whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. Article 53(1)(c) assumes that in principle an investigation or prosecution is in the interests of justice. The Prosecutor's action will be guided by the object and purpose of the Statute, namely: the prevention of serious crimes of concern to the international community through the ending of impunity. The Office will seek to work constructively with and respect the mandates of those engaged in other areas, but will pursue its own judicial mandate independently.

9. On 28 February 2011 the Office of the Prosecutor initiated a preliminary examination on alleged crimes committed in Libya by different actors since 15 February 2011.

10. The Office gathered information on the alleged crimes from different sources. A crime database has been created to store, collate and analyze information. The Office has indexed, and critically analyzed the data from multiple sources.

## **1.1 Jurisdiction**

11. The available information provides reasonable grounds to believe that crimes against humanity have been committed and continue being committed in Libya, including murder under Article 7(1)(a) of the Statute; imprisonment or other severe deprivation of physical liberty under Article 7(1)(e) of the Statute; other inhumane acts under Article 7(1)(k) of the Statute; torture under Article 7(1)(f), and persecution under Article 7(1)(h) of the Statute.

12. There is also relevant information concerning the alleged commission of rape under Article 7(1)(g) of the Statute; deportation or forcible transfer under Article 7(1)(d) of the Statute and war crimes once the situation developed into an armed conflict, including violence to life and person, under Article 8(2)(c)(i); intentionally directing attacks against civilians not taking a direct part in hostilities under Article 8(2)(e)(i); intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives, under Article 8(2)(e)(iv).

## **1.2 Admissibility**

13. In accordance with the Rome Statute, the ICC is complementary to national criminal jurisdictions. On 22 February, Sayf al Islam Qadhafi, son of Muammar al Qadhafi, suggested that a national commission would investigate the protests and unrest. Muammar al Qadhafi stated on 2 and 6 March that the UN should send a commission to investigate.

14. However, in accordance with the information collected, the Office of the Prosecutor has not found any genuine national investigation or prosecution of the persons or conduct that would form the subject matter of the cases it will investigate.

## **1.3 Gravity**

15. The Rome Statute limits the Court's jurisdiction to the most serious crimes of concern to the international community as a whole and requires the Office to take into account the gravity of the crimes when deciding on the initiation of investigations.

16. In referring the situation in Libya to the ICC, the UN Security Council has highlighted the gravity of the situation. It clearly meets the threshold of gravity required by the ICC Statute, taking into account all relevant criteria.

17. Concerning the manner and nature of the crimes, the shooting at peaceful protesters was systematic, following the same modus operandi in multiple locations and executed through Security Forces. The persecution appears to be also systematic and implemented in different cities. War crimes are apparently committed as a matter of policy.

18. Concerning the scale, the efforts to cover up the crimes have made it difficult to ascertain the precise number of victims. Dead bodies were removed from streets and hospitals. Doctors were not allowed to document the number of dead and injured admitted to hospitals after the violent clashes began. Security forces were allegedly stationed in the hospitals and arrested injured protestors who sought medical treatment. There is information that some protestors sought medical attention in private homes and did not bring injured or dead persons to the hospitals. Victims of rape have reportedly been arrested and subject to harassment.

19. Taking into consideration that it is not possible yet to provide precise numbers, there is some credible information that estimates that as the result of the shootings 500 to 700 persons died, only in February. On 15 March, Muammar al Qadhafi estimated the number of people killed at *"only 150 or 200... and half of them were from the security forces"*. The total number of persons that have died since the beginning of the conflict is in the thousands, up to 10,000 according to the Libyan Interim National Council (INC). Thousands of persons have been wounded, more than 50,000 according to the INC.
20. The number of those displaced, according to the UN, includes approximately 535,000 migrant workers, refugees and asylum seekers, and 327,342 Libyans internally displaced. Other organizations place the total of those displaced at 475,000.

#### **1.4 Interests of justice**

21. As required by the Statute, the Prosecutor has determined that, at the time of initiating the investigation, there were no substantial reasons to believe that the investigation would not serve the interests of justice.

#### **1.5 The decision to open an investigation**

22. After thorough consideration of factors listed in items 1.1 to 1.4 above, and on the basis of the information evaluated and analyzed, on 3 March 2011, the Prosecutor determined that the statutory criteria for the opening of an investigation into the situation in Libya since 15 February 2011 has been met.
23. On the same day, the Prosecutor informed the President of the Court, the United Nations Secretary-General, and through the Secretary-General, the members of the UN Security Council and issued a public statement informing the opening of the investigation and noting that the Office will act with impartiality.
24. On 4 March 2011, the Presidency of the ICC issued a decision assigning the situation in Libya to Pre-Trial Chamber I.

## **2. THE INVESTIGATION**

### **2.1 Focus on those who bear the greatest responsibility**

25. In accordance with the Statute the Office consolidated an investigation policy focused on those who bear the greatest responsibility for the most serious crimes, based on the evidence that emerges in the course of an investigation. Thus, the Office will select for prosecution those who bear the highest responsibility, including those who ordered, incited, financed, or otherwise planned the commission of the alleged crimes. If the Office does not deal with a particular individual, it does not mean that impunity is granted. Consistent with positive complementarity, the Office supports national investigations of alleged crimes that do not meet the criteria for ICC prosecution.

26. A policy of focused investigations also means that cases inside a situation will be selected according to gravity, taking into account factors such as the scale, nature, manner of commission, and impact of the alleged crimes. A limited number of incidents are selected. This will allow the Office to carry out investigations expeditiously; to limit the number of persons put at risk by reason of their interaction with the Office; and to propose expeditious trials while aiming to represent the entire range of victimization. While the Office's mandate does not include production of comprehensive historical records for a given conflict, incidents are selected to provide a sample that is reflective of the gravest incidents and the main types of victimization.

## **2.2 Cooperation**

27. Paragraph 5 of UNSCR 1970 (2011) "*urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor.*" Insofar as States Parties to the Rome Statute are concerned, the Statute provides an existing framework of obligations in accordance with Part IX of the Statute.

28. The Office of the Prosecutor has thus far received outstanding support from States Parties and non-States Parties alike. The Office has issued seven requests for assistance to three States and four organizations, all of which have been fulfilled. In addition, two requests were sent by INTERPOL on the Office's behalf to all of its member countries.

29. The OTP is liaising with the UN International Commission of Inquiry on Libya, established by the Human Rights Council.

## **2.3 Evidence collected.**

30. Since the initiation of the investigation on 3 March, the Office has conducted 15 missions to 10 States and has collected as of 26 of April:

- a. Almost 45 interviews were taken or individuals have been screened to be interviewed
- b. More than 569 documents, including reports and their underlying material; and including visual material obtained by the Prosecution independently or through a variety of sources, such as videos and pictures.
- c. Open source information.

## **2.4 Alleged criminal incidents**

31. The evidence collected shows two main types of incidents:

1. Security forces allegedly attacking unarmed civilians constituting crimes against humanity.

2. The existence of an armed conflict with alleged war crimes as well as other crimes against humanity that appear to have been committed by different parties.
32. On 15-16 February, security forces dispersed civilian demonstrators in Benghazi and arrested Fatih Terbil and Farag Sharany, who were requesting justice for the victims of the 1996 Abu Salim prison massacre. On 17 February 2011, thousands of demonstrators congregated in the square around the High Court of Benghazi, protesting such arrests and calling for political and economic freedom.
33. Security forces entered the square and reportedly fired live ammunition into the crowd, killing numerous demonstrators. This was the beginning of a series of similar incidents in different cities across Libya which appears to demonstrate a consistent pattern of Security Forces firing live ammunition at civilians.
34. Additionally, civilians in Tripoli and other areas are reportedly subject to different forms of persecution because of their suspected association with the uprising. Systematic arrests, torture, killings, deportations, enforced disappearances and destruction of mosques have been reported in Tripoli, Al Zawiyah, Zintan and the area of the Nafousa Mountains. The victims are allegedly civilians who participated in demonstrations or talked to international media, activists, journalists, as well as citizens of Egypt and Tunisia that were arrested and expelled en masse because of their perceived association with the popular uprising.
35. According to different sources during such persecution a number of women were raped. In one high-profile case a woman gave a report to international media of how she had been raped by security forces because of her suspected association with the rebels. The Office is investigating these allegations and assessing whether specific charges should be pursued in this regard.
36. Several sources have also reported the unlawful arrest, mistreatment and killings of sub-Saharan Africans perceived to be mercenaries. Reportedly angry mobs of protesters assaulted Sub-Saharan Africans in Benghazi and other cities and killed dozens of them. Allegedly, they were considered to be members of the groups of mercenaries which had been recruited to quash the protest. A number of Sub-Saharan Africans were allegedly arrested by the new authorities in Benghazi and it is unclear whether they were innocent immigrant workers or prisoners of war.
37. Since the end of February there has been an armed conflict in Libya. In such context there are allegations of war crimes committed, including the use of imprecise weaponry such as cluster munitions, multiple rocket launchers and mortars, and other forms of heavy weaponry, in crowded urban areas. There are also reports of forces blocking humanitarian supplies.
38. Some sources have also reported the use of civilians as human shields and the torture of prisoners of war or civilians in the context of the armed conflict.

39. On 20 April 2011, UN High Commissioner for Human Rights, Navi Pillay, condemned the reported repeated use of cluster munitions and heavy weaponry by Libyan government forces in their attempt to regain control of Misurata, noting that the deliberate targeting of medical facilities is a war crime, and the deliberate targeting or reckless endangerment of civilians may also amount to serious violations of international humanitarian law. Pillay also expressed serious concern about the treatment of journalists by Libyan authorities. At least two journalists have been killed and some 16 others are missing. Dozens of others have reportedly been detained, assaulted, physically abused or expelled.
40. On 9 March, the UNSG's Special Representative for Children and Armed Conflict, Radhika Coomaraswamy, noted having received unconfirmed reports from numerous sources of the killing and maiming and use of children as combatants and the denial of humanitarian access. She reminded all parties to the conflict of their obligation under international law to protect children during armed clashes.
41. On 14 April, the UNSG's Special Representative on Sexual Violence in Conflict, Margot Wallström, informed the UN Security Council that measures against sexual violence should be automatically and systematically included in provisions to protect civilians like those in the UN Security Council's Libya resolutions, or otherwise, interventions on the frontlines may relegate women's security to the sidelines.

## **2.5 Victims and Witnesses protection.**

42. The responsibility for general security of the civilian population rests with the territorial authorities concerned and where appropriate, the Security Council.
43. The Office's mandate of protection is established by Article 68(1) of the Statute and extends to those persons who are at risk on account of their interaction with the Office. This includes witnesses, screened individuals and their immediate family members, intermediaries, sources, and staff members of the Office.
44. Protection is not an isolated activity. It is a concept that extends across all the activities of the Office. The Office seeks to rely on the smallest number of witnesses necessary to prove its case by conducting focused investigations and by prioritizing the use of documentary and physical evidence. To the extent that the Office relies on evidence from witnesses, it prioritizes witnesses who reside in safe areas.
45. Additionally, the Office does not seek evidence from humanitarian organizations or call their personnel as witnesses. This is based on the recognition that providing evidence or testimony to the Court may raise issues of security for such organizations and their staff in the field and could also affect confidentiality owed to victims.
46. In the Libya situation the Office has not taken any testimony from persons that could be put at risk in Libya and referred no individuals to the Victims and Witnesses Unit of the International Criminal Court.

### **3. NEXT JUDICIAL PROCEEDINGS**

47. The Office of the Prosecutor will submit its first application for an arrest warrant to Pre-Trial Chamber I in the next weeks. It will focus on those most responsible for crimes against humanity committed in the territory of Libya since 15 February 2011.
48. The Pre-Trial Chamber may decide to accept the request, to reject it or to ask the Office of the Prosecutor for additional information.
49. Further cases will be opened as necessary taking into account the full scope of criminality allegedly committed by different individuals in the context of the Libya situation.
50. The Office will act impartially, respecting the right of all the parties involved and, before proceeding, will inform the UN Security Council in advance.

### **4. CONCLUSION**

51. Should the judges decide to issue arrest warrants, the primary responsibility to execute them will lie with the territorial authorities.
52. Libyan authorities were requested by the Office of the Prosecutor to be ready to implement any arrest warrant that the International Criminal Court might decide to issue.
53. The Office of the Prosecutor is awaiting an answer from the representatives of the Muammar al Qadhafi's regime.
54. In a 14 April 2011 letter, the Interim National Council answered to the Office of the Prosecutor that "*We are fully committed to supporting the fast implementation of such arrest warrants and expect the international community to cooperate fully as is required by the Rome Statute of the ICC and in accordance with Security Council Resolution 1970 adopted under Chapter VII of the UN Charter.*"
55. In case of failure or inability of the national authorities to perform an arrest, or should the local authorities request international assistance to perform such arrests, the UN Security Council should evaluate how to ensure the implementation of any arrest warrants issued by the International Criminal Court in accordance with UN Security Council Resolution 1970 (2011).
56. Security Council Resolution 1970 (2011) stressed the need to hold to account those responsible for attacks, including by forces under their control, on civilians. It is indeed a characteristic of the situation in Libya that massive crimes are reportedly committed upon instruction of a few persons who control the organizations that execute the orders. Arresting those who ordered the commission of crimes, should the Judges decide to issue warrants, will contribute to the protection of civilians in Libya.