

TENTH REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UNITED NATIONS SECURITY COUNCIL PURSUANT TO UNSCR 1970 (2011)

1. INTRODUCTION

1. On 26 February 2011, the United Nations Security Council (“Council”) unanimously adopted Resolution 1970 (2011), referring the situation in Libya since 15 February 2011 to the Prosecutor of the International Criminal Court (“ICC” or the “Court”), and inviting the Prosecutor to address the Council every six months on actions taken pursuant to this resolution.
2. Since 2011, the Office of the Prosecutor (“OTP” or “Office”) has provided nine biannual reports and updates to the Council. This is the OTP’s tenth report and update on its activities regarding the Libyan cases.

2. THE CASES AGAINST SAIF AL-ISLAM GADDAFI AND ABDULLAH AL-SENSUSSI

3. The Council will recall that since the death of Muammar Gaddafi, one of the three individuals against whom arrests warrants were issued by the ICC on 27 June 2011, the remaining suspects are Saif Al-Islam Gaddafi (“Saif Gaddafi”) and Abdullah Al-Senussi (“Al-Senussi”). It is also recalled that on 11 October 2013, Pre-Trial Chamber I of the Court declared the case against Al-Senussi inadmissible before the ICC, while on 31 May 2013, it found the case against Saif Gaddafi admissible and requested Libya to surrender him to the ICC. The Appeals Chamber affirmed the inadmissibility of the case against Al-Senussi on 24 July 2014, and affirmed the admissibility of the case against Saif Gaddafi on 21 May 2014. On 10 December 2014, Pre-Trial Chamber I found that Libya had failed to comply with the Court in relation to two requests for cooperation in relation to Saif Gaddafi – including its failure to arrest and surrender the suspect to the Court - and decided to refer the matter to the Council pursuant to article 87(7) of the Rome Statute for appropriate follow-up action. To date, Saif Gaddafi has not been surrendered to the ICC, and the Council is yet to react to the Pre-Trial Chamber I’s decision.

4. The Office has continued to monitor judicial proceedings relating to both cases in Libya and has called upon the Libyan authorities to surrender Saif Gaddafi to the ICC. It remains crucial for the Council to remind Libya of its obligations to comply with ICC requests and to take any necessary measure to ensure compliance.
5. On 28 July 2015, the Tripoli Court of Assize sentenced both Saif Gaddafi and Abdullah Al-Senussi, among other co-defendants, to death for the crimes they are alleged to have committed during Libya's 2011 uprising.
6. Various organisations have criticised the trial in Libya. During its press briefing on Libya on 28 July 2015, the Office of the United Nations High Commissioner for Human Rights ("OHCHR") expressed its discomfort with the verdicts and sentences handed down in Tripoli in the trial of former Gaddafi officials, particularly the imposition of the death penalty against a number of them. The OHCHR expressed its concern that international fair trial standards were not met in those trials.
7. With regard to the case against Saif Gaddafi, on 30 July 2015, the OTP filed a request with Pre-Trial Chamber I seeking an order directing Libya to refrain from executing Saif Gaddafi, to immediately surrender him to the Court, and to report his death Sentence to the Council. On 20 August 2015, Libya filed its response, stating that the death sentence against Saif Gaddafi was non-enforceable in the country because his trial was held *in absentia*, and hence not final, and that he will enjoy an absolute right to a new trial when he is transferred from Zintan into the custody of the Libyan Government. Libya acknowledged that Saif Gaddafi was not in the custody of the Libyan state authorities. The Council should redouble its efforts to ensure that Saif Gaddafi is surrendered to the Court without further delay.
8. In relation to Al-Senussi's case, the Office continues to monitor and collect information to enable it to assess whether there are new facts that may support an application for a review of Pre-Trial Chamber I's 2013 decision on the admissibility of the Al-Senussi case before the ICC. In this respect, under article 19(10) of the Rome Statute, the Prosecutor can only submit such a request, if "fully satisfied" that there are new facts which negate the basis of that decision.
9. The Office further emphasises that any new facts sustaining any such application must conform to the Appeals Chamber's finding that, for due process violations in a domestic trial to lead to a case being deemed admissible before the ICC, the violations must be "so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the accused."
10. The Office has sought information on the progress of the proceedings against Mr Al-Senussi in order to determine whether the Libyan authorities remained genuinely willing and able to investigate and prosecute the case. To this end, the OTP held meetings with the Human Rights, Transitional Justice and Rule of Law Division of the UN Support Mission in Libya ("UNSMIL"). The OTP also sought information from Human Rights Watch ("HRW") and the Libyan authorities.

11. The OTP is also aware of and is extremely concerned by the recently released videos of apparent interrogation sessions involving Saif Gaddafi's brother, Saadi Gaddafi, at Al-Hadba prison. In one video, Saadi Gaddafi is seen being subjected to acts which can constitute torture. In another, he is threatened with sexual assault. In this second video, the voice of a person off-camera is heard alleging that Al-Senussi's ribs were broken at the same prison. Reports of acts of torture or similar inhumane acts committed against Al-Senussi in Al-Hadba prison are clearly relevant to Al-Senussi's case in the context of articles 17 and 19(10) of the Rome Statute.
12. The OTP takes allegations of torture and similar inhumane acts most seriously, and is seeking information from the Libyan authorities and other sources regarding the events depicted in the videos allegedly recorded from Al-Hadba prison. The OTP is also seeking information from the Libyan authorities regarding the measures taken by the authorities to stop such acts, and to investigate and punish those alleged to be responsible for such inhumane acts.
13. The failure to prevent or repress the commission of these reprehensible acts, or to submit the matter to the competent authorities for investigation and prosecution, may give rise to criminal responsibility. These videos are of even greater concern given that Al-Senussi is detained in the Al-Hadba prison, and his trial was conducted within its compound.
14. The Office currently awaits the UNSMIL report on the trial of Saif Gaddafi and Al-Senussi conducted in Libya and the full judgment of the Libyan court. These will be carefully studied and evaluated, along with all other relevant information regarding the conduct of the trial and the treatment of Al-Senussi and other prisoners at Al-Hadba prison. In this regard, on 23 October 2015, the Office received a communication from the Libyan authorities, which is currently being carefully examined by the OTP.
15. Having thoroughly considered the information at its disposal, at the present time, the OTP is not fully satisfied that the basis on which the case against Al-Senussi had previously been found inadmissible, has been negated. As the Prosecutor has acknowledged in her previous report to the Council, this position is subject to change should reliable information emerge that warrants a reassessment of the admissibility of the case before the ICC.
16. The Office will continue to follow the situation, to collect and analyse information with a view to determine whether seeking the Chamber's review in accordance with article 19(10) of the Rome Statute is warranted. The Council and its Members are encouraged to provide OTP with information that may be in their possession and which may assist the Office with its on-going assessment.

3. THE ONGOING INVESTIGATION

17. The Office underscores that its ongoing investigations is conducted in line with the Memorandum of Understanding concluded in November 2013 on burden-sharing regarding investigations and prosecutions in Libya.
18. The ongoing investigation has been, and continues to be, hindered due to internal instability in Libya, the current security situation and limited OTP resources.
19. In spite of these limitations, relative progress has been made in respect of the ongoing investigation. Avenues of enquiry are still being pursued, potential evidence identified and obtained, and where possible, interviews are being conducted.
20. A significant body of material provided by the Libyan authorities in late December 2014 continues to be reviewed, analysed and investigated, resulting in significant investigative progress.
21. The OTP also continues to establish and develop relationships and to work with national law enforcement agencies to advance its ongoing investigation. Furthermore, where there is an overlap in activities or objectives, the OTP has assisted national investigations in line with its strategic objectives.

4. CRIMES ALLEGEDLY COMMITTED BY DIFFERENT PARTIES IN THE REPORTING PERIOD

22. As the Office previously indicated, it has assessed that ICC jurisdiction granted by virtue of UNSCR 1970 (2011) *prima facie* extends to contemporary crimes committed on the territory of Libya, including those committed by groups purportedly affiliated with or representing the self-proclaimed “Islamic State of Iraq and the Levant” (“ISIL”, also known as Da’esh). This *prima facie* determination finds further backing in the Council’s own resolutions – UNSCR 2213 (2015) and 2238 (2015) – which expressed the Council’s grave concern over the “growing trend of terrorist groups in Libya to proclaim allegiance to ISIL and the continued presence of other Al-Qaida-linked terrorist groups and individuals operating there.” After “[r]ecalling its decision in resolution 1970 (2011) to refer the situation in Libya to the Prosecutor of the International Criminal Court”, UNSCR 2213 “calls for those responsible for violations of international humanitarian law and violations and abuses of human rights to be held accountable” and “[c]alls upon the Libyan Government to cooperate fully with and provide any necessary assistance to the International Criminal Court and the Prosecutor as required by resolution 1970 (2011).” The same inter-linkages to the ICC referral are made in UNSCR 2238 (2015).
23. Given that many foreign fighters are alleged to have joined the ranks of ISIL, including a number of State Party nationals, the Office recalls that under the Rome Statute, the primary responsibility for the investigation and prosecution of perpetrators of atrocity crimes rests first and foremost, with the

national authorities. The Office reiterates its commitment to consult with relevant States to coordinate and possibly exchange information on crimes allegedly committed by their nationals and to support domestic investigations and prosecutions as appropriate.

24. The Office remains equally concerned that all sides including the Libyan National Army (“LNA”), Libya Dawn, Islamists, ISIL; and their respective allies, and international actors continue to commit attacks resulting in civilian casualties, some of which appear to be indiscriminate in nature. Common methods of attack include air strikes, sniper fire and shelling. That civilians have been killed by sniper fire suggests that deliberate killings have also taken place. The Office emphasises that civilian casualties can be particularly hard to determine in some cases where the local populations have taken up arms, such as in the case of Sirte.
25. Civilian deaths have increased in the period April-August 2015 compared to January-March 2015. During the reporting period, in 634 separate incidents, a total of at least 1539 violent deaths were recorded. 426 of these incidents resulted in civilian deaths. This number may be even greater as the fate of some abducted individuals is unknown, and not all instances of violent death is reported. Military activities including air assault by LNA, Libya Dawn and foreign forces and ground assault from all sides, account for 34 per cent of civilian deaths. Specific executions or assassinations account for a further 29 per cent, while suicide or car bombings account for 12 per cent. General unattributed violence or criminality accounts for 19 per cent, though this may be incorrectly attributed due to limited reporting on incidents.
26. The number of violent deaths has, on average, increased on a monthly basis in 2015. Civilian deaths have fluctuated though no less than 60 per month have been recorded this year. Peaks in February 2015 are explained by large numbers allegedly executed in groups by ISIL and the retaliatory airstrikes by Egypt.
27. Civilian deaths attributed to ISIL are consistently higher in number than those of other perpetrators. Peaks in April and August 2015 relate to mass executions, including of the group of 30 Ethiopian Christians and the takeover of Sirte respectively. The rise of ISIL within Libya has united previously opposing factions, particularly in Derna, Ajdabiya and Sirte. ISIL has reinforced alliances with Islamist groups, including Ansar al Sharia, which currently has a large presence in Libya. At least 5000 foreign fighters, the majority of whom are Tunisian, were reported as aligned with ISIL in Libya, and, in historically conservative cities such as Derna, ISIL continues to rely on local command.
28. ISIL-led attacks have focused on the cities of Derna and Sirte. Significant clashes between Islamist groups and ISIL in Derna in June saw ISIL driven from the city. There have been at least 37 recorded incidents of car or suicide bombings, 26 of which have been attributed to ISIL. Several of these incidents targeted civilian victims only, or have been aimed at high-profile individuals such as

lawyers or family members of politicians. In most cases of suicide bombings, civilian deaths have occurred near checkpoints or other military targets.

29. Larger scale abductions, which in the past have been precursors to executions, have also allegedly continued and are attributed mainly to ISIL. General lawlessness has provided opportunity for abductions for ransom, or prisoner exchange with rival political groups. Foreign workers or high profile civilians are frequently targeted for these purposes. ISIL has reportedly abducted a large number of Christian migrants; some have allegedly been executed, while the whereabouts of many remain unknown.
30. Reported executions have been frequent with at least 51 incidents recorded; 20 attributed to ISIL, and six to other Islamist groups. Persons are executed by ISIL for perceived activities such as spying, homosexuality and social activism. In August 2015, ISIL reportedly carried out numerous executions in Sirte, in the course of their takeover of the city. Victim numbers remain unclear, but initial reports suggest between 30 and 150 persons were killed.
31. Report of resistance to Libya Dawn from LNA aligned groups continues in the Tripoli area with incidents causing civilian deaths clustered in the West of the country. Benghazi also continues to form the frontline between LNA and Islamist groups. The majority of reported attacks resulting in civilian deaths are launched from the ground through a battery of weapons including shelling, rockets and gunfire. Civilian homes, places of worship and medical facilities have been repeatedly affected by attacks from all sides. Airstrikes from LNA, Libya Dawn and international actors have also reportedly resulted in civilian deaths.
32. Similar to the previous reporting period, heavy military clashes between LNA and Islamist groups in the Benghazi area have continued with at least 99 civilians reportedly killed between April and August 2015. Clashes take place on the ground using heavy artillery or gunfire within residential neighbourhoods.
33. Recent escalation of tribal fighting between Tebu and other communities and Libya Dawn-aligned militias in the south of the country around Sabha and Kufra has reportedly displaced an estimated 12000 civilians since July, according to OHCHR.
34. OHCHR reported that detention facilities are operated by all sides to the conflict with various factions taking responsibility for different sections of each facility. Around 4500 individuals, including foreign nationals and persons under the age of 18, remain in detention. Detained persons, both Libyan nationals and foreigners, continue to report poor treatment in detention facilities including torture, sexual and gender-based crimes, and in the case of foreign detainees, extortion of payments in exchange for their freedom. The number of those held by the Department for Combatting Illegal Migration has also significantly increased.

35. According to HRW, detainees have reported incidents of torture at a number of facilities under LNA control, including the police Criminal Investigation Department and the Security Directorate in Benghazi; the al-Abyar and al-Rajma military camps; the al-Fuweihat facility of the Army Special Forces 21; the Counter Terrorism Unit in Bourzeina; the former Military Police Headquarters in Benghazi controlled by army special forces under the command of Salem Afarit; the Internal Security facility in Tocra, East of Benghazi; the Military Police headquarters in Tobruk; and police stations in al-Bayda and al-Marj. Forced confessions have been broadcast on television, suggesting collaboration with local TV stations.
36. Approximately 50 per cent of prisoners interviewed by HRW and other NGOs reported ill-treatment while in custody. Reports of abuse typically featured not only beatings on the soles of the feet with plastic pipes, but also being tied up for long periods of time, having food or water withheld, electrocution, and having cold water poured over their bodies. This has resulted in at least two reported deaths in detention centres including at Bersis prison and the Criminal Investigation Unit, respectively.
37. Abductions are frequent and appear to be committed by all sides. Many combatants as well as civilians disappear, while unidentified bodies are regularly discovered. Abductions are difficult to attribute to specific perpetrators, particularly when individuals are habitually taken without any third party witnesses.
38. Many acts of violence against the civilian population are committed by unknown perpetrators, yet peaks in civilian deaths appear to coincide with ISIL and other Islamist-attributed deaths.
39. Continued instability and conflict in Libya has facilitated migration flows and forced the population to flee as fighting reaches their areas. OHCHR reports that in the span of a year, the number of displaced has reached almost 450,000, that is close to double the figure in September 2014.
40. There have been encouraging developments with regard to the issue of internally displaced Tawerghans. From 9 to 11 September 2015, the Misrata/Tawergha Joint Committee met in Tunis, Tunisia under the auspices of UNSMIL. Amongst others, participants agreed to develop strategies for the return of the Tawergha as well as to set out clear plans for reparations. More importantly, the Joint Committee affirmed its full support to the political dialogue and the formation of a Government of National Accord to meet the aspirations of the Libyan people to establish the rule of law, end the conflict and safeguard Libyan unity.
41. Reports suggest that in some areas the civilian population has been prevented from leaving conflict zones due to breakdowns in communications between parties to the conflict. For example, attempts to allow remaining residents in downtown Benghazi safe passage to leave have failed, leaving

civilians caught in the crossfire without food or medical supplies. The Benghazi area itself has over 100,000 displaced individuals and remains the most affected area in Libya. The shelling of protestors in Benghazi on 23 October 2015, which has reportedly resulted in a number of deaths and at least 30 wounded is deplorable and can constitute a serious crime.

42. The Office reiterates its concern that extremely grave crimes within the jurisdiction of the Court are still being committed by all parties to the conflict and their respective allies. The Office recalls that those responsible for these crimes can be prosecuted either at the national level or by the ICC.
43. The Office stresses the importance of investigating the ongoing crimes in Libya and reiterates its every desire to do so. To this end, the Office has requested resources for additional investigations as part of its 2016 proposed budget for consideration by the States Parties of the Court. However, at the time of writing, there are indications that those resources will likely not be forthcoming. As such, resource constraints in 2016 will hinder the Office's ability to conduct these additional investigative activities. It is of paramount importance that the ongoing crimes are investigated and that the Office is provided the requisite resources to undertake the necessary investigations in accordance with its mandate vis-à-vis the Situation in Libya. The Office, therefore, relies on the critical financial support of States Parties in this regard, and equally invites the Council to seriously consider assisting the Office, in accordance with article 115(b) of the Rome Statute, to obtain the resources required for the effective investigations of alleged crimes committed in a situation that has been referred to the Court by this august body.

5. COOPERATION

44. Paragraph 5 of UNSCR 1970 "urges all States and concerned regional and other international organisations to cooperate fully with the Court and the Prosecutor."
45. Pursuant to UNSCR 1970 the Council decided that "the Libyan authorities shall cooperate fully with, and provide any necessary assistance to, the Court and the Prosecutor pursuant to this resolution," a decision reiterated by UNSCRs 2174 (2014) and 2213 (2015), and more recently by UNSCR 2238 (2015). Pre-Trial Chamber I has held that "Libya, while not being a State Party to the Statute, is under a duty to cooperate with the Court in accordance with resolution 1970 (2011)", and noted that "Libya itself has consistently acknowledged its duty to cooperate with the Court and has fully participated, through its appointed counsel, in the proceedings before the Court, exercising procedural rights accorded to States Parties by the Statute." The Libyan authorities must heed the Council's calls for cooperation and comply with the Pre-Trial Chamber's request to immediately surrender Saif Gaddafi to the Court. The Libyan authorities are under a clear legal obligation to do so, and remain non-compliant by failing to surrender Saif Gaddafi into ICC custody.

46. Additionally, continued cooperation, consultation and coordination between the Office and Libyan authorities remains crucial for the implementation of the Memorandum of Understanding concluded in November 2013 on burden-sharing regarding investigations and prosecutions in Libya. The commendable efforts by the Libyan Prosecutor General and the Libyan Representative to the Court to engage with the Office are encouraging and must be supported.
47. The Office appreciates the cooperation it continues to receive from both, States Parties and non-States Parties, as well as international organisations in the Libya situation, and looks forward to strengthening efforts and synergies to assist Libyan authorities in their efforts to build the rule of law in Libya. The Office appeals to all other States that have not yet done so, to engage and cooperate with the Office. Some of the evidence and persons of interest to the Office are located outside of Libya and can only be accessed through the cooperation of States.

6. CONCLUSION

48. As armed conflicts escalate, the wide scale breakdown in law and order has left Libya divided. Extremist groups have exploited the situation to consolidate their power and to commit crimes with impunity. The Council and the international community must appreciate that justice for abuses committed in Libya is essential for sustainable and durable peace. The role of the Council and the international community to support OTP's efforts to bring justice to victims of atrocity crimes in Libya, including through the provision of adequate resources, cannot be overemphasised.
49. The ongoing dialogue, facilitated by the UN, towards the establishment of the Libyan Government of National Accord represents hope for transition to national unity and durable peace, carrying important promise for Libya's efforts towards the promotion of the rule of law, the protection of civilians, and the ending of impunity for atrocity crimes.
50. The Office continues to call for Saif Gaddafi's immediate transfer to the Court and emphasises the Libyan judiciary's continued obligation to ensure that domestic proceedings against Al-Senussi and other individuals are conducted genuinely.
51. The Office remains conscious of the challenges facing the Government of Libya, including its ongoing effort to stabilise the country and strengthen state-building projects and institutions and expresses its willingness to work with the Government to bring the perpetrators of atrocity crimes to justice. The Office calls on key partners of Libya including this Council, to provide any necessary support requested by the Libyan authorities so that they can restore security in the country to protect civilians and strengthen Libyan society on the pillars of justice and the rule of law.
52. The Office will continue to lend its support to the efforts of the Government of Libya and UNSMIL to address impunity in Libya. | OTP