



THIRTEENTH 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 twelve biannual reports and updates to the Council. This is the OTP’s thirteenth report and update on its activities regarding the situation in Libya.

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

Saif Al-Islam Gaddafi

3. The Office’s efforts to secure the surrender of Saif Al-Islam Gaddafi (“Mr Gaddafi”) to the Court continue. This Council will recall that the Office filed a request (“Prosecution Request”) on 26 April 2016 with Pre-Trial Chamber I (“PTC I”) seeking an order directing the Registry to transmit the request for Mr Gaddafi’s arrest and surrender to Mr al-’Ajami al-’Atiri (“Mr al-’Atiri”), Commander of the Abu-Bakr al-Siddiq Battalion in Zintan, Libya.
4. On 21 November 2016, approximately two weeks after the Prosecutor last briefed the Council on the Libya situation, PTC I denied the Prosecution Request. PTC I noted that the official channel of communication between Libya and the Court is the Government of National Accord (“GNA”), which is the competent national authority as recognised by the international community. The Chamber concluded that, in accordance with the Rome Statute, the ICC is required to communicate with the *de jure* government and cannot direct its cooperation requests directly to any non-State entity claiming to represent the State. The Chamber added that information provided by the Registry did not enable it to

determine with certainty that the recognised government of Libya had designated any alternative channel of communication.

5. The Office has recently received information from reliable sources that Mr Gaddafi is still in Zintan but is no longer in the custody of Mr al-'Atiri. Reports indicate that Mr Gaddafi is now under the direct control of the Zintan Revolutionaries' Military Council.
6. The Office is monitoring the situation and will continue its efforts to secure the surrender of Mr Gaddafi to the Court. The Office will further pursue this pending matter directly with the Libyan authorities, and benefits from this report to renew its calls on the GNA to ensure the surrender of Mr Gaddafi to the custody of the Court without further delay. The Office would appreciate the support of the Council in appealing to the GNA to facilitate the surrender and transfer of Mr Gaddafi to the Court.

Abdullah Al-Senussi

7. As this Council is aware, on 28 July 2015, the Tripoli Court of Assize issued its judgment in the trial of Mr Gaddafi, Abdullah Al-Senussi ("Mr Al-Senussi"), and 35 other former members allied with Mr Muammar Mohammed Abu Minyar Gaddafi ("Mr Muammar Gaddafi") in relation to alleged crimes committed during the February 2011 revolution and ensuing armed conflict (Case 630/2012). Mr Gaddafi (tried *in absentia*) and Mr Al-Senussi were amongst those convicted for these crimes. Mr Al-Senussi has appealed his conviction and the matter is currently pending before the Libyan Supreme Court.
8. On 21 February 2017, the United Nations Support Mission in Libya ("UNSMIL"), in cooperation with the Office of the United Nations High Commissioner for Human Rights ("OHCHR"), released its full report on the conduct of the Libyan trial ("Report"). The Report commends the efforts of the Libyan Prosecutor-General and the Libyan judiciary to prosecute a complex case against former high-ranking officials allied with Mr Muammar Gaddafi in the context of the on-going armed conflict and political polarisation. The Report, however, also expresses serious due process concerns and points to flaws in the Libyan criminal justice system.
9. The Office is thoroughly considering the Report and the full Libyan trial judgment within the framework of articles 19(10) and 17(2)(c) of the Rome Statute, and ICC jurisprudence, to determine whether new facts have arisen which negate the basis on which PTC I found Mr Al-Senussi's case inadmissible before the ICC. It is important to note that the ICC Appeals Chamber has held that due process violations in a domestic trial 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” in order for a case to be deemed admissible before the ICC.

10. The Office has sought additional information from UNSMIL in relation to certain aspects of the Report.

Allegations of Torture and Ill-Treatment in the Al-Hadba prison

11. In relation to the allegations of torture or similar inhumane acts committed against Saadi Gaddafi in Al-Hadba prison, the Office understands that the related warrants of arrest issued by the Libyan authorities against three individuals remain outstanding. The Office previously informed this Council of reports that one such individual had returned to a position of authority in Al-Hadba prison. The Office understands that this individual has now been removed from his position and no longer works in Al-Hadba prison.

3. THE CASE AGAINST AL-TUHAMY MOHAMED KHALED

12. On 18 April 2013, following an application filed by the OTP on 27 March 2013, PTC I issued a warrant of arrest under seal for Al-Tuhamy Mohamed Khaled (“Mr Al-Tuhamy”), the head of the Libyan Internal Security Agency from at least 2005 until at least 24 August 2011. In issuing the warrant, PTC I found reasonable grounds to believe that between 15 February 2011 and 24 August 2011, Mr Al-Tuhamy committed the crimes against humanity of imprisonment, torture, other inhumane acts and persecution, and between at least early March 2011 and 24 August 2011, the war crimes of torture, cruel treatment and outrages upon personal dignity. Mr Al-Tuhamy is alleged to have committed these crimes in various locations throughout Libya including in Zawiya, Tripoli, Tajoura, Misratah, Sirte, Benghazi and Tawergha.
13. Despite significant efforts by the OTP and the Registry, the warrant has not been executed and Mr Al-Tuhamy remains at large. Therefore, on 21 April 2017, the Office filed an application to unseal the warrant of arrest and reclassify it as public. Reclassifying the warrant of arrest as public may facilitate Mr Al-Tuhamy’s arrest and surrender to the ICC as all States will be made aware of the existence of the warrant. At this juncture, the OTP has not been able to independently confirm the whereabouts of Mr Al-Tuhamy, but has become aware of recent media reports indicating that he is presently residing in Libya.
14. On 24 April 2017, Pre-Trial Chamber I granted the Prosecution’s application and ordered the Registrar to reclassify as public the warrant of arrest. The Office calls upon the

members of this Council, Libya and all States to provide any information as to Mr Al-Tuhamy's whereabouts and to support the arrest and surrender of Mr Al-Tuhamy to the Court without delay.

4. ONGOING MONITORING AND INVESTIGATIONS OF CRIMES ALLEGEDLY COMMITTED IN LIBYA SINCE 15 FEBRUARY 2011

15. The security situation in Libya remains highly volatile as a result of fighting between, among others, forces aligned with the Presidency Council of the GNA and the so-called Islamic State in Iraq and the Levant in Sirte, and between forces and militias within the Libyan National Army ("LNA") led by General Khalifa Haftar ("General Haftar") and the Benghazi Revolutionaries Shura Council ("BRSC") in and around Benghazi. Conflict among militias operating with impunity throughout Libya exacerbates the climate of insecurity.
16. This ongoing instability precludes the Office from conducting investigations within Libyan territory in relation to both existing and new cases, and hampers the Office's ability to gather evidence through *in situ* investigations. Nevertheless, the Office continues to investigate and prepare new warrants of arrest against potential suspects in relation to crimes committed in Libya since 15 February 2011. The Office continues to benefit from substantial support and cooperation from the Libyan Prosecutor-General's office and will continue to work in partnership with the Prosecutor-General's office to find a suitable solution that will permit the safe conduct of investigative missions in Libya.
17. The Office continues to monitor the ongoing situation throughout Libya on the basis of information received from non-governmental organisations, private individuals and other sources. The Office analyses this information independently to determine whether any incidents *prima facie* amount to crimes within the jurisdiction of the Court. In the course of this monitoring, the Office has received allegations of crimes committed in different parts of Libya. The Office notes with great regret the continuing reports of civilian deaths, executions, abductions, detentions, torture, mass graves, displacement and crimes committed against migrants transiting through Libya.

Ganfouda, Benghazi

18. The Office has taken note of reports that LNA forces took over the Ganfouda neighbourhood of Benghazi on or around 18 March 2017 following an extended period of conflict with the BRSC. Crimes reportedly committed during this recent conflict include unlawful executions, killings, unlawful detentions and desecration of corpses.

Following the LNA's victory, video footage has emerged which appears to depict serious crimes, including executions of detained persons, committed by LNA forces.

19. The Prosecutor calls on all parties to the conflict to refrain from carrying out serious violations of human rights and international humanitarian law. The Prosecutor reminds all parties to the conflict of the provisions of the Rome Statute relating to the responsibility of commanders and superiors to prevent or repress the commission of crimes by their forces, and to submit any such crimes for investigation and prosecution.
20. The Office notes that the LNA has issued statements condemning or denouncing violations of human rights and laws of war, reminding commanders of the "principles and ethics of the LNA" and requesting them to take action against troops who are responsible. The Office will continue to monitor the situation.
21. Incidents involving the use of car bombs, suicide bombs and improvised explosive devices during the period under review were reported as primarily targeting LNA-aligned forces or civilians suspected of supporting General Haftar. The Office is concerned that the Benghazi Medical Centre has reportedly been a target throughout the conflict between LNA forces and the BRSC, with three recently reported bombing incidents at or near the hospital.

Alleged crimes against migrants in Libya

22. The deterioration of the security situation in Libya, coupled with its geographical proximity to Europe, has led to increasing numbers of migrants smuggled or trafficked through Libya to Europe. The International Organization for Migration ("IOM") estimates that between 1 January and 22 November 2016, 181,436 migrants reached Italy from North Africa, mostly from Libya. Over the course of last year, over 3,700 migrants have reportedly drowned in the Mediterranean crossing from Libya to Italy.
23. The IOM also reported that there are over 380,000 migrants in Libya, both resident and transiting through the country. The number of migrants reportedly held in official detention centres is between 4,000 and 7,000, but the actual number is likely to be far higher due to the large number of unofficial detention centres. Allegations persist of inhumane conditions and poor treatment of migrants in unregulated detention centres. Crimes allegedly committed include killings, rape and other forms of sexual violence, torture and forced labour, as well as human trafficking. There are increasing reports of a slave trade underway in Libya, with migrants from Africa being sold in slave markets.

24. The dire circumstances facing migrants held in detention centres and trapped in Libya until their dangerous onward travel to Europe have increasingly caught the attention of this Council and the international community. Reports indicate that migrants in Libya are subject to exploitation, extortion and abuse by State and non-State actors, including militias and other armed groups. The Council has expressed concern that the current situation in Libya is exacerbated by the smuggling of migrants and human trafficking into, through and from the Libyan territory, which could provide support to other organised crime and terrorist networks operating in Libya. The Council has also urged States and regional organisations to cooperate and share information with the GNA and with each other regarding acts of migrant smuggling and human trafficking, and called on States to investigate and prosecute persons responsible.
25. The Office is alarmed by the nature and scale of crimes allegedly committed against migrants, including women and children, as they transit through Libya. The Office is engaging with national law enforcement agencies from a variety of countries, along with the European Union as a whole and several international agencies, including the European Union Naval Force, in order to share information relating to crimes against migrants in Libya and individuals involved in facilitating and financing illegal migration through Libya.
26. At the same time, the Office is analysing open-source reports by experts as well as information provided by States, regional entities and UNSMIL, so as to determine whether alleged crimes against migrants fall within the jurisdiction of the Court. The Prosecutor is considering initiating an investigation and welcomes any reliable information on State and non-State actors and militias involved in human trafficking and smuggling networks operating in Libya.

5. COOPERATION

27. Paragraph 5 of Council Resolution 1970 “urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor.” The Office appreciates the cooperation it continues to receive from various States including Tunisia, the Netherlands and the United Kingdom. It is regrettable, however, that a number of States, including States Parties to the Rome Statute, do not promptly act upon the Office’s requests for assistance. Such delays hamper ongoing investigations and stall effective follow-up actions. The Office urges States to respond as quickly as possible to these requests.

28. The Office notes Council Resolution 2323 of 13 December 2016 extending the mandate of UNSMIL until 15 September 2017. Resolution 2323 recalls Resolution 1970 and subsequent resolutions of the Council on the situation in Libya, and reiterates the Council's expression of "concern at the deteriorating humanitarian situation in Libya." Resolution 2323 also repeats the Council's determination that "the situation in Libya continues to constitute a threat to international peace and security", and requests States to take "steps to ensure the security and unhindered movement for the United Nations and associated personnel." The Office understands such associated personnel to include personnel of the Court, such as the Office's investigators.
29. The Office appreciates the excellent working relationship and the support and assistance it continues to enjoy from UNSMIL.
30. The United Nations Panel of Experts on Libya established pursuant to Security Council Resolution 1973 (2011) recognised in its Final Report dated 9 March 2016 the ICC's readiness to open new investigations but noted that "its efforts appear to be hampered by security and budgetary constraints." Recommendation 21 of the Final Report calls upon United Nations Member States "[t]o contribute to ending the current climate of impunity in Libya by ensuring adequate funding to support ICC in investigating serious post-revolution violations of human rights and international humanitarian law."
31. The Chair of the Security Council Committee established pursuant to Resolution 1970 concerning Libya issued a *note verbale* dated 15 November 2016 to all States, following up the Panel of Experts' Recommendation 21. The Chair brought "to the attention of States Parties to the Rome Statute of the International Criminal Court and those States that wish to contribute voluntarily, the need to ensure adequate funding to support the International Criminal Court in its investigations of serious violations of human rights and international humanitarian law in Libya since 15 February 2011."
32. The Office reiterates that it is only with the cooperation of States, including through the provision of adequate resources, that it will be able to conduct effective investigations and prosecutions in the Libya situation.

6. CONCLUSION

33. The Office wishes to express its continued appreciation for the cooperation it receives from, *inter alia*, regional actors and States, in relation to the situation in Libya. In particular, the Office appreciates the ongoing support and cooperation provided by the Libyan Prosecutor-General's office despite the difficult and challenging circumstances it faces.

34. The Office reiterates Libya's obligation to surrender forthwith Mr Gaddafi to the ICC. In Resolutions 2213 and 2238 of 2015, this Council noted PTC I's decision of 10 December 2014 finding Libya in non-compliance with the Court and referring such finding to this Council. The Office would welcome in this regard the assistance of this Council to appeal to the Libyan authorities to support the surrender of Mr Gaddafi to the Court.
35. The Office continues to urge the Council to support its ongoing efforts in Libya, and in particular, to support and facilitate financial assistance by the United Nations for its ongoing investigations.
36. Regrettably, to date, any meaningful support for the Office's work in Libya has not been forthcoming from the Council. The Office welcomes the *note verbale* dated 15 November 2016 to all States from the Chair of the Security Council Committee established pursuant to Resolution 1970, which highlighted the need to ensure adequate funding to support the ICC in its investigations of serious violations of human rights and international humanitarian law in Libya since 15 February 2011.
37. The Office looks forward to continuing to work with this Council, the Presidency Council of Libya, the GNA, the Libyan Prosecutor-General, UNSMIL, individual States, EU-affiliated organisations and all committed to fighting impunity and bringing to justice perpetrators of serious crimes and grave violations of human rights in Libya. | OTP