



## ELEVENTH 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 ten biannual reports and updates to the Council. This is the OTP’s eleventh 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. On 10 December 2014, Pre-Trial Chamber I made a finding of non-compliance by Libya for its failure to surrender Saif Al-Islam Gaddafi to the custody of the Court and notified the ICC Presidency in order for the finding of non-compliance to be transmitted to the Council. On 17 December 2014, the Registry conveyed to the designated focal point at the United Nations the letter of the ICC President to the United Nations Secretary-General regarding the finding of non-compliance. The Council noted this decision in its Resolution 2238 (2015), along with the Prosecution’s request of 30 July 2015 to Pre-Trial Chamber I that Libya immediately surrender Mr Gaddafi to the Court. In its 20 August 2015 response to this Prosecution request, Libya submitted to the Court that “Mr Gaddafi continues to be in custody in Zintan and is presently ‘unavailable’ to the Libyan State.” It is the responsibility of this Council to ensure that Libya complies with its obligations and that Mr Gaddafi is surrendered to the Court without further delay.
4. In view of the fact that Libya remains unable to surrender Mr Gaddafi to the Court due to his unavailability to the Libyan State authorities, the OTP has been exploring other avenues through which Mr Gaddafi could be surrendered to the Court. The Office has confirmed that Mr Gaddafi continues to be detained in Zintan where he is in the custody of the Abu-Bakr al-Siddiq Battalion commanded by Mr al-’Ajami al-’Atiri. As part of its efforts to secure Mr Gaddafi’s surrender, on 26 April 2016, the Office filed a request with Pre-Trial Chamber I for an order directing the Registry to transmit the request for arrest and surrender of Mr Gaddafi directly to Mr al-’Atiri. The Pre-Trial Chamber has not issued a decision on the request at the time of writing. The Office hopes that Mr al-’Atiri

and the Battalion he commands will cooperate and surrender Mr Gaddafi to the custody of the Court to be tried. However, should Mr al-'Atiri refuse to do so, this Council must, at the appropriate time, give serious consideration to imposing sanctions on him and the Abu-Bakr al-Siddiq Battalion for that obstruction.

*Abdullah Al-Senussi*

5. The Council will recall that on 28 July 2015, the Tripoli Court of Assize convicted and sentenced Mr Al-Senussi to death. The Office has received information that on 15 September 2015, Mr Al-Senussi filed an appeal against his conviction and sentence with the Tripoli Appeals Court. Based on information received from the Libyan Prosecutor-General's office, no date has been set for the appeals proceedings.
6. The Office recently received a copy of the written judgment of the Libyan court in relation to the case against Mr Al-Senussi and conducted a preliminary review of the judgment. The Office is still awaiting the full report of the UN Support Mission in Libya on the conduct of the trial. At this time, the Office is not fully satisfied that new facts have arisen which negate the basis on which Pre-Trial Chamber I found Mr Al-Senussi's case inadmissible. The Office recalls 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." The Appeals Chamber further held that "in the context of admissibility proceedings, the Court is not primarily called upon to decide whether in domestic proceedings certain requirements of human rights law or domestic law are being violated" and instead, "what is at issue is whether the State is willing genuinely to investigate or prosecute."
7. The Office continues to collect and analyse relevant information in relation to Mr Al-Senussi's case within the framework of article 19(10) of the Rome Statute. The Office's current assessment is based on the available information in its possession. The Office will continue to review its assessment as and when new relevant information becomes available.

*Torture Allegations*

8. In its tenth report to the Council, the Office expressed its concerns regarding allegations of torture or similar inhumane acts committed against Mr Al-Senussi and, in particular, videos which surfaced in August 2015 showing Saadi Gaddafi, the brother of Mr Gaddafi, being subjected to acts which may constitute torture. In its letter to the Libyan authorities, dated 1 September 2015, the Office expressed its concerns over the allegations, stressing that it takes any such allegations very seriously and that the practice of torture and similar inhumane acts are crimes that may fall within the jurisdiction of the ICC. The Office also requested information relating to any investigative and judicial actions conducted by Libyan authorities to address these allegations. On 23 October 2015, the Office received a communication from the Libyan authorities stating that the "allegations have been seriously pursued at the highest levels of the Government"; that "individuals suspected of involvement have been

referred to the Public Prosecution Office for interrogation” and that investigations had commenced. The Libya authorities further committed to investigating in good faith the allegations of abuse against Mr Al-Senussi “consistent with Libyan law, and in light of the previous findings by the Court, based on Mr Al-Senussi’s own admission [...], that he was in fact not subjected to physical abuse.”

9. On 26 January 2016, the Libyan Prosecutor-General informed the Office that three arrest warrants had been issued against those suspected of allegedly torturing Mr Saadi Gaddafi and that his office took the matter very seriously.
10. The Office continues to liaise with the Libyan authorities, and seeks the necessary updates regarding the torture allegations and the apprehension and prosecution of the suspects. Such crimes must be fully investigated and Libya must take all the necessary steps to ensure that those found to be responsible are held accountable. The Office will continue to closely follow-up on this matter.

### **3. THE ONGOING INVESTIGATION**

11. The Office underscores that due to the prevailing instability and current security situation, it is impossible for investigators to undertake investigative activities in Libya. While the Office continues to successfully collect some of the available evidence from outside Libya, a substantial body of the evidence required to augment the investigations and prosecutions can only be accessed in Libya.
12. Despite these obstacles compounded by limited resources, the Office’s collaborative efforts with the Libyan Prosecutor-General’s office are yielding significant positive results. The large body of witness and document-based evidence provided by the Libyan Prosecutor-General’s office, coupled with limited but targeted investigative work conducted by the Office has expanded the evidence base significantly.
13. As the investigation progresses, the Office is evaluating the newly acquired evidence and determining whether to seek additional arrest warrants. Based on the evidence in the possession of the Office at this time, it is likely that the Office will apply to the Court for additional warrant(s).
14. At the end of this month, the Office’s investigators plan to once again meet with staff from the Libyan Prosecutor-General’s office to review material and discuss financial aspects of the investigation.
15. Additional resources are urgently required to build on these positive results. The cooperation of States, including through the provision of adequate resources, is key to the success of all investigative activities in the Libya situation.
16. The ICC is however not a panacea for the difficulties facing Libya. The situation in Libya requires collaboration and coordination between all the relevant actors at the national, regional and international levels. ICC efforts in Libya should not only be supported through the provision of adequate resources, but also through national

investigations and prosecutions of Libyan suspects who may be in territories of States. The Office's efforts to bring together national law enforcement agencies that are working on Libya are encouraging and will continue. Initial discussions have confirmed the Office's view that there is much that can be done if all involved in the Libya crisis work together and in particular, where appropriate, share information and learn from each other's experiences. The Office encourages all national and international law enforcement agencies that are working on Libya to contact the Office as it continues to strengthen the network of law enforcement agencies that aim to contribute to bringing an end to the carnage and destruction in Libya. The plan of the Office is to increase cooperation with other stakeholders so that a coordinated investigative and prosecutorial strategy to tackle national, transnational and international crimes related to Libya takes form. The Office intends within this strategy to identify, investigate and prosecute individuals who have committed crimes within its jurisdiction and to act in line with the Memorandum of Understanding with the Libyan authorities. This strategy will prioritise those that pose a threat to the stability of Libya.

17. For its part, the Office continues to carefully evaluate how to best utilise its limited resources to maximise impact on the present situation in Libya. The Office is not oblivious to other relevant instances of criminality in Libya including on-going crimes. On the contrary, it is assessing the potential to expand its investigations into these new crimes, such as those alleged to have been committed by the self-proclaimed Islamic State in Iraq and the Levant ("ISIL") and Ansar Al-Sharia. In order to effectively undertake this work, the Office will require the necessary resources. However, the Office recalls and stresses that States have the primary responsibility to investigate and prosecute their nationals who have joined the ranks of ISIL, Ansar Al-Sharia and other militias operating in Libya.

#### **4. THE CRIMES ALLEGEDLY COMMITTED BY THE DIFFERENT PARTIES IN LIBYA SINCE 15 FEBRUARY 2011**

18. The Office notes the progress made in the on-going Libyan United Nations-backed negotiations and in particular, the formation of a Government of National Accord, following the 17 December 2015 Agreement. The Office holds itself available and looks forward to constructive engagement with the Government of National Accord in the near future.
19. The Office recalls Resolution 2259, adopted on 23 December 2015, which welcomed the 17 December 2015 Agreement and called upon Member States, particularly those in the region, "to continue to urge all parties in Libya to engage constructively with the Government of National Accord and all other institutions included in the Libyan Political Agreement" and "to cease support to and official contact with parallel institutions that claim to be the legitimate authority but are outside of the Agreement as specified by it." The Council condemned the terrorist acts being committed in Libya by groups proclaiming allegiance to ISIL or Al-Qaida. The Council reiterated grave concern about the negative impact of their presence, violent extremist ideology and deadly actions in Libya, neighbouring States and the region. The Council recalled in this regard

Resolution 1970 (2011) referring the situation in Libya to the ICC Prosecutor and affirmed the importance of the Government of National Accord's full cooperation with the ICC and the Prosecutor. Resolution 2259 called upon the Government of National Accord "to hold to account those responsible for violations of international humanitarian law and violations and abuses of human rights, including those involving sexual violence, and to co-operate fully with and provide any necessary assistance to the International Criminal Court and the Prosecutor as required by Resolution 1970 (2011) and recalled by Resolution 2238 (2015)."

20. Within this framework, the Office remains concerned about ongoing civilian deaths, with reported executions by ISIL accounting for the majority of these, although civilian deaths continue to also result from the Libya Dawn-Libya National Army conflict. Moreover, abductions, detentions, and ill treatment in detention centres continue to be reported on all sides of the conflict.
21. The Mediterranean-Libya migratory route to Europe remains a popular option among refugees and migrants who are particularly vulnerable to violence, sexual violence and ill-treatment in Libya. Detention of thousands of migrants continues to be a source of financing for many militant groups in Libya.
22. UNSCR 2278 (2016) calls for all detainees to be transferred to State authority, including both conflict-related Libyan detainees as well as migrants detained for financial and political motivations.

## 5. COOPERATION

23. Paragraph 5 of 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 has received, in particular from the Tunisian and Jordanian authorities in connection with its operations in Libya and calls upon all others that have not responded to Requests for Assistance, to do so without further delay. States' cooperation with the Office is indispensable for the success of its work in Libya and all other situations under investigations.
24. In addition, Resolution 1970 "[d]ecides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution." While Part IX of the Rome Statute lays down the obligation of States Parties to cooperate with the Court, Pre-Trial Chamber I has held that Libya is equally bound by Part IX by virtue of the Council's Resolution 1970.
25. The Office appreciates the cooperation and assistance it continues to receive from the Libyan Prosecutor-General's office, including through working meetings conducted regularly since 2014. These meetings, coupled with the provision of information and the significant body of evidence provided by the Libyan Prosecutor-General's office have proved essential for continued implementation of the Memorandum of Understanding concluded in November 2013 on burden-sharing regarding the investigation and

prosecution of former officials under the reign of Mr Muammar Mohammad Abu Minyar Gaddafi. Further meetings are planned in the coming months.

26. The valuable exchanges between the Office and Libyan authorities have laid the groundwork for continued judicial cooperation. The Office wishes to underscore its appreciation for the commitment and professionalism displayed by the Libyan national investigators and prosecutors who continue to investigate under difficult circumstances.

## 6. CONCLUSION

27. The Office appreciates the continuing positive engagement the Libyan Prosecutor-General's office has undertaken with the Office and with the Court. The Office encourages Libyan authorities to undertake immediate consultations with the Chamber on issues relating to the surrender of Saif Al-Islam Gaddafi, and to seek assistance from the international community as deemed appropriate so as to meet their outstanding legal obligations.
28. The Office remains appreciative of the challenges facing the Government of National Accord and expresses its willingness to work with the Government in its efforts to bring perpetrators to justice. The Office encourages the Libyan authorities, in concert with other relevant national investigative and prosecutorial authorities to seek opportunities to work jointly, along the lines of previous Office recommendations for creation of an international contact group on justice issues, to ensure that fugitives from justice outside of Libya, and in some cases within the borders of ICC States Parties, do not enjoy impunity. The Office will continue to engage the Libyan authorities, as well as national and international judicial and law enforcement partners to see how efforts can be mutually reinforced to investigate crimes occurring in or related to the situation of Libya.
29. The Libyan authorities have repeatedly expressed their commitment to bringing justice to victims and have sought assistance in order to do so. That assistance should be forthcoming as soon as possible.
30. The Office continues to encourage the Government of National Accord to share with the Council and with the international community their comprehensive strategy to address atrocity crimes, regardless of who is the perpetrator and who is the victim. This will demonstrate that justice remains a key priority, underpinning efforts to ensure peace and stability in Libya, and that the victims will have the opportunity to seek redress through the courts.
31. The Office looks forward to continuing to work with the Government of National Accord, the UN Support Mission in Libya and the Council to address impunity for Rome Statute crimes in Libya. | OTP