



THIRD 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 and invited the Prosecutor to address the Security Council on actions taken pursuant to this resolution.
2. In its first report, presented to the Council on 4 May 2011, the Office announced that it would “*submit its first application for an arrest warrant to Pre-Trial Chamber I in the next weeks*” and that it would “*focus on those most responsible for crimes against humanity in the territory of Libya since 15 February 2011.*”
3. In its second report, on 2 November 2011, the Office reported that on 16 May 2011, the Office had requested arrest warrants against three individuals who, according to the evidence, were most responsible for the attacks against unarmed civilians on the streets and in their houses in Benghazi, Tripoli and elsewhere during the month of February 2011. On 27 June 2011, the Judges of Pre-Trial Chamber I issued warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi for murders as a crime against humanity under article 7(1)(a) and persecution as a crime against humanity under article 7(1)(h). The Chamber found that the crimes of murder and persecution on political grounds were committed in the context of an attack against a civilian population and in furtherance of a State policy that sought to quell and deter the demonstrations by all means, including through the use of lethal force. Further, the Chamber found that “*the evidence submitted by the Prosecutor provides reasonable grounds to believe that the scale of the concerted actions by Muammar Gaddafi and his son Saif Al-Islam Gaddafi leads to the inference that Muammar Gaddafi in coordination with his inner circle including Saif Al-Islam, conceived and orchestrated a plan to deter and quell, by all means, the civilian demonstrations against the regime.*”
4. This third report will address:
 - a. Cooperation;
 - b. The case of Muammar Mohammed Abu Minyar Gaddafi (Muammar Gaddafi), Saif Al-Islam Gaddafi, and Abdullah Al-Senussi, including its admissibility;
 - c. The ongoing second investigation;
 - d. A comprehensive report on the crimes allegedly committed by the different parties in Libya since 15 February 2011.

1. COOPERATION

5. 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.
6. The Office continues to receive cooperation from both States Parties and non-States Parties alike, as well as from the UN, Interpol, NGOs and other organizations. The Office has submitted more than 86 requests for assistance during the investigation thus far, many of which have been fulfilled or are in the process of being fulfilled, representing approximately 85% of all requests made.

1.1 The UN Commission of Inquiry

7. The Office has a specific mandate in accordance with article 54 of the Statute *“to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.”* It has the duty to carry out its own investigation independently and to evaluate independently all information it receives from non-governmental, state or international bodies; in this context, it is appreciative of the information received from the UN Commission of Inquiry.
8. The Office has taken cognizance of the latest report of the Commission of Inquiry, dated 2 March 2012 and of its findings in assessing possible next steps in the Office’s own investigations.
9. The Office looks forward to continued cooperation and coordination with the Office of the UN High Commissioner for Human Rights, following on the work of the Commission.

1.2 The Government of Libya

10. Security Council Resolution 1970 *“Decides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution.”*
11. The Office appreciates its ongoing cooperation with the Government of Libya in this regard. Since 2 November 2011, the Office has sent several investigative missions to Libya, and the intensity of cooperation with the OTP’s investigations is only increasing.
12. From 18 to 20 April, the Prosecutor led a mission to Libya and held meetings with National Transitional Council (NTC) Chairman Mustafa Abdul Jalil, with Prime Minister Abdulrahim Al Keib, with Justice Minister Ali Hemda Ashour, with Attorney-General Abdulaziz Al Hasadi, with Foreign Minister Ashoura Bin Khayalle and Deputy Foreign Minister Mohamed Abdulaziz, with Interior Minister Faouzi Abdel Aal, and with a number of other government officials and members of the National Transitional Council.

13. In these meetings, all concerned expressed gratitude for the Court's intervention in Libya at the height of the violence and how the issuance of arrest warrants strengthened the Libyan people's resolve to stop Gaddafi's crimes; they reiterated their support for the ICC and their interest to work cooperatively together to ensure justice for victims. While the Court's intervention was seen as necessary and timely given that there were no prospects for justice under Gaddafi's regime, the national authorities stressed their intent to conduct fair and impartial national investigations and prosecutions of Saif Al-Islam Gaddafi and Abdullah Al-Senussi that meet international standards and that, in their analysis, would satisfy the admissibility requirements of the Rome Statute.

2. THE CASE OF MUAMMAR MOHAMMED ABU MINYAR GADDAFI (MUAMMAR GADDAFI), SAIF AL-ISLAM GADDAFI, AND ABDULLAH AL-SENUSSI

14. Since the last report, Pre-Trial Chamber I terminated the case against Muammar Gaddafi on 22 November 2011. Saif Al-Islam Gaddafi was arrested on 19 November 2011 in Zintan, in Libya, and has remained in custody in Zintan. Abdullah Al-Senussi was arrested on 17 March 2012 in Mauritania and remains in custody in Mauritania, pending national extradition requests from Libya and France and the request of the International Criminal Court to surrender him.

15. On 6 December 2011, the Chamber issued the "Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi". In this decision, the Chamber, *inter alia*, sought submissions from Libya on whether and when the Libyan authorities intended to surrender Mr Gaddafi to the Court. The Libyan authorities confidentially filed their response on 23 January 2012, in which they, *inter alia*, sought to postpone Saif Al-Islam Gaddafi's surrender in order for the Government of Libya to complete its investigation and prosecution. On 3 February 2012, the Chamber issued the "Decision on the Registry-OPCD Visit to Libya", ordering the Registry to make arrangements with the NTC for a joint Registry-OPCD visit to Mr. Gaddafi in Libya. The Registry-OPCD delegation visited Libya from 29 February 2012 to 4 March 2012, and a visit to Mr. Gaddafi by part of this delegation occurred on 3 March 2012. The OPCD filed confidential reports on 4 and 5 March regarding this visit, which have since been released in public redacted versions.

16. On 7 March, the Pre-Trial Chamber refused the Libyan request to postpone the surrender of Saif Al-Islam Gaddafi, considering that article 94(1), invoked by the Libyans, did not provide a basis for postponement of the surrender, and requested that Libya arrange with the Registry for Saif Al-Islam Gaddafi's surrender to the Court. On 22 March 2012, the Government of Libya notified the Pre-Trial Chamber of its intention to challenge the admissibility of Saif Al-Islam Gaddafi's case pursuant to articles 19(2)(b), (5) and (6) of the Rome Statute by 30 April 2012 and asked for the suspension of the surrender request pending a decision on this challenge. On 4 April 2012, the Pre-Trial Chamber issued a second decision, recalling that postponement of the surrender request under article 95 could only be invoked when there was an actual admissibility challenge under consideration, and for this reason, rejected the second

postponement request and reiterated its request that Libya surrender Saif Al-Islam Gaddafi immediately to the Court.

2.1 Admissibility of the Case Against Saif Al-Islam Gaddafi

17. On 1 May, the Government of Libya publicly filed an admissibility challenge in the case of Saif Al-Islam Gaddafi, arguing that it is investigating him for the same and additional crimes and the same underlying conduct as the Office of the Prosecutor. The Government of Libya submitted in its application under article 19(2)(b) of the Rome Statute that *“this case is inadmissible on the grounds that its national judicial system is actively investigating Mr Gaddafi and Mr Al-Senussi for their alleged criminal responsibility for multiple acts of murder and persecution, committed pursuant to or in furtherance of State policy, amounting to crimes against humanity. These acts, allegedly committed as part of a widespread or systematic attack against Libyan civilians, include but are not limited to crimes committed in Tripoli, Benghazi, and Misrata, during the period commencing from 15 February 2011 until the liberation of Libya.”*
18. The application submits that *“The Libyan Government has expended considerable efforts to ensure an effective and genuine investigation of both of these individuals in the expectation of being able to conduct fair trials for them in Libya.”* The application adds that *“the Libyan Government has no intention of shielding such individuals so as to allow impunity, or to hold a rushed trial of these two persons that would not meet international minimum standards of due process. It is committed to attaining the highest international standards both for the conduct of its investigations and any eventual trials.”*
19. The application notes that *“On 8 January 2012, the Libyan Prosecutor-General commenced an investigation of serious crimes (including murder and rape) allegedly committed by Mr Gaddafi during the 2011 revolution (including in the period between 15 February to 28 February 2011). A similar investigation in respect of Mr Al-Senussi by the Libyan Military Prosecutor was commenced on 3 April 2012. These investigations have continued and are now at an advanced stage. They are expected to be completed in the near future.”*
20. According to the application, the Libyan Code of Criminal Procedure, based on the Italian model, provides four phases of criminal proceedings: investigation, accusation (similar to the ICC’s confirmation of charges), trial and appeal. Article 59 of Libya’s Criminal Procedure Code requires confidentiality, allowing only the disclosure of summary reports to persons not involved in the Libyan investigative or prosecutorial team. For this reason, the Government of Libya confidentially provides the Pre-Trial Chamber summary reports of its evidence against Saif Al-Islam Gaddafi, but indicates that with the completion of the investigative phase of proceedings in the next few weeks, it would be in a position to provide on a confidential basis examples of the evidence that will be relied upon in the accusation, trial and appeals phases of the case.
21. The application notes that the Libyan authorities have analyzed intercept evidence of the speeches and telephone calls of Saif Al-Islam Gaddafi from February 2011 forward, and have conducted interviews with potential witnesses with first-hand knowledge of the crimes alleged, including friends and associates of Saif Al-Islam Gaddafi, members of the Libyan military, “volunteers” who were not members of the military but were

armed directly by Saif Al-Islam Gaddafi, and civilians who did not take part in the fighting, such as family members of victims. The application notes that the Prosecutor-General and his team will conduct further interviews, and will continue with the collation and analysis of photographs and other evidence, and will prepare full transcripts of the intercept evidence in their possession. Documentary evidence includes passenger manifests and payments records for the transport of mercenaries in Afriqiyah Airways.

22. Libyan authorities expect to proceed to the accusation stage of proceedings (similar to the ICC's confirmation of charges) in the next few weeks, and if that stage succeeds, to proceed to trial.
23. As regards Saif Al-Islam Gaddafi's detention, the application asserts that the original detention period was extended on the authority of the Prosecutor General, after being issued with permission to do so by a summary judge who travelled to Zintan for this purpose, and that Saif Al-Islam Gaddafi has been kept in adequate conditions of detention, provided with sufficient and good quality food, given access to ICC lawyers and the option of retaining a domestic lawyer of his choosing, received visits from NGOs and family members, been provided with proper medical and dental care and not subject to physical abuse, and investigated under Libyan law with respect to the same crimes for which the ICC Office of the Prosecutor has investigated him.
24. The Office is studying this filing and will soon submit its observations to the Pre-Trial Chamber. As mentioned on numerous occasions in relation to the Darfur and other situations, under the Statute, admissibility analysis is not an assessment of the judicial system as a whole, but an assessment as to whether or not the national authorities have investigated or prosecuted, or are investigating or prosecuting genuinely, the cases selected by the Office.
25. In its 4 May "Decision on the Conduct of the Proceedings Following the 'Application on behalf of the Government of Libya pursuant to Article 19 of the Statute'," the Pre-Trial Chamber ruled as a preliminary matter that, on the basis of Libya's submissions, it understood the challenge to concern only the case against Saif Al-Islam Gaddafi, and not Abdullah Al-Senussi.
26. In addition to requesting observations from the OTP, as well as from the Offices of Public Counsel for the Defence and for the Victims, the Pre-Trial Chamber furthermore followed the procedure outlined, in its 4 May "Decision on the Conduct of the Proceedings Following the 'Application on behalf of the Government of Libya pursuant to Article 19 of the Statute'," Rule 59 of the Rules of Procedure and Evidence, which provides:

For the purpose of article 19, paragraph 3, the Registrar shall inform the following of any question or challenge of jurisdiction or admissibility which has arisen pursuant to article 19, paragraphs 1, 2 and 3:

- (a) *Those who have referred a situation pursuant to article 13;*

(b) The victims who have already communicated with the Court in relation to that case or their legal representatives.¹

27. In relation to Libya, the body that referred the situation is the Security Council and accordingly must be notified. The Rule further provides that those so informed “*may make representation in writing to the competent Chamber within such time limit as it considers appropriate.*” As such, the Court directed the Registrar to inform the Security Council of the challenge and invited the Security Council to submit observations on the challenge, if any, by 4 June 2012.
28. It is therefore for the Security Council to decide whether it wishes to submit any observations to the Court on the specific challenge brought. The Prosecutor, as a party to the proceedings, cannot provide any further comments in this regard.
29. It will be for the Judges of the Pre-Trial Chamber to decide whether the case remains admissible before the ICC.
30. The admissibility challenge in relation to Saif Al-Islam Gaddafi has suspended the Office’s investigations into Saif Al-Islam Gaddafi’s activities, pursuant to the requirements of article 19(7).
31. Al-Senussi remains in detention in Mauritania, pending consideration of extradition requests from Libya and France and of the request for surrender from the International Criminal Court. As the 1 May Libyan application has noted, Al-Senussi “*is not currently subject to any control by or contact on behalf of the Libyan authorities. Nevertheless, the investigation of his involvement in alleged crimes is proceeding with due commitment. As noted above, Mr Al-Senussi was a member of the Libyan armed forces at the relevant time. Accordingly, as is required by the applicable regulations of Libyan law, his investigation is being conducted by the Military Prosecutor and not by the Prosecutor-General. The Military Prosecutor commenced his investigation of Mr Al-Senussi in relation to allegations of both financial crimes and crimes against the person on 3 April 2012, following a Libyan delegation visit to Mauritania on 20 March 2012.*”

2.2 The Ongoing Investigation

Gender crimes

32. The Office has proceeded with the investigation of a second case in relation to gender crimes that includes collection of evidence against other possible suspects outside Libya.
33. The Commission of Inquiry interviewed a number of victims and perpetrators and determined that sexual violence took place in Libya during the period of 15 February until the end of the conflict. It found that there were two primary patterns of rapes that targeted both men and women. One pattern identified involved the rape of victims by numerous armed men either in their homes or elsewhere. A second pattern identified involved the rapes of victims in detention as punishment or to extract information.

¹ Rule 59(1), Rules of Procedure and Evidence (emphasis added).

34. As noted in its 2 November 2011 briefing, the Office is mindful that in Libya, rape is considered to be one of the most serious crimes, affecting the victim in many ways including in their relation to family and society. Accordingly, the Office has adopted a strategy which seeks to limit the exposure of victims by focusing on obtaining alternate evidence and identifying avenues of investigation which support charges without the need for multiple victim statements. In this respect, the Office has been in contact with sources reporting multiple victims of sexual violence, allegedly committed by Gaddafi security forces, including doctors and nurses who treated the victims. Additionally, the Office is collecting evidence from members of Gaddafi forces.

35. The Office continues to collect evidence.

3. COMPREHENSIVE REPORT ON THE CRIMES ALLEGEDLY COMMITTED BY THE DIFFERENT PARTIES IN LIBYA SINCE 15 FEBRUARY 2011

36. The High Commissioner for Human Rights, Navi Pillay, commented in her 25 January 2012 briefing to the UN Security Council that *"In addition to addressing ongoing human rights concerns, Libyans are faced with the enormous challenge of addressing past abuses. Those include violations committed during the former regime, as well as violations of international human rights and international humanitarian law committed during the conflict."*

37. The UN Commission of Inquiry documented thousands of alleged crimes committed by Gaddafi forces, as well as allegations of crimes committed by rebel or revolutionary forces.

38. Government of Libya officials also discussed with the Office their preparations of a comprehensive strategy to address all crimes and end impunity in Libya.

39. Among the critical tasks facing the Government of Libya is arranging the transfer of control of thousands of detainees from militias and local authorities to the national authorities, and the screening of these detainees to determine as quickly as possible who must be released, and who will be the subject of criminal investigations and possible prosecutions. This has also been identified as a major concern by the High Commissioner for Human Rights.

40. The Office understands that the Libyan comprehensive strategy to deal with the massive number of crimes committed in the Libya territory includes criminal investigations and prosecutions of those who bear the greatest responsibility for the most serious crimes. In particular, in accordance with article 8 of the Rome Statute, this includes war crimes committed as part of a plan or policy or as part of a large-scale commission of such crimes.

41. The Government of Libya has recently adopted a Transitional Justice Law, which, among other things, establishes a Fact-Finding and Reconciliation Commission. The Office understands that the Government is in the process of establishing the Commission, and that its work has not yet begun, but that the Government is working

with the UN on its establishment. The Office encourages these and other complementary efforts to address justice.

42. *The office is focused in particular on:*

Arbitrary arrests and detention and enforced disappearances

43. The Commission of Inquiry found that rebel or revolutionary forces were involved in arbitrary arrests and enforced disappearance of perceived Gaddafi loyalists, security officers and members of the former government. The Commission expressed concern that rebel or revolutionary forces had applied the presumption of guilt to those who fought against them or who were believed to have supported the Gaddafi Government, and that detainees were being held outside the legal framework, rendering their detention arbitrary.
44. The Commission acknowledged that recent statements by the Government of Libya indicated that the new authorities recognized the concern and were taking steps to address it, following the attention the UN and both national and international NGOs brought to this issue. Nevertheless, the Commission noted that torture was still taking place in centers under the control of local military councils and security committees, that access to family members remained limited, and that access to lawyers was non-existent.
45. According to information received in February 2012, the Commission reported that approximately eight of sixty detention facilities across Libya were now under the control of the National Transitional Council. The Government of Libya appeared to be making some headway in extending its control over the known detention centers, with an additional 1523 detainees in three detention centers in Misrata reportedly handed over to Government of Libya control during the Prosecutor's visit to Tripoli in April 2012. The Government of Libya stated to the Commission its commitment to close all unofficial and unacknowledged detention centers as quickly as possible and to take steps to curb maltreatment.
46. During the 18 to 20 April visit of the Prosecutor, the Government of Libya indicated that thousands of detainees were turned over that week to national control, but acknowledged that many more remain to be processed, and that this was an essential first task in re-establishing the rule of law in Libya. The Office has reminded the Libyan authorities of the importance of ensuring due process for those detained and it has been informed that the NTC is working to ensure that all formal and informal detention facilities created during the past year are brought under formal Government of Libya control, to undertake the screening of all detainees and to ensure that those against whom there is no basis for investigation are released.

Tawergha civilians

47. Human Rights organizations have raised concerns about the situation in Tawergha, a town near Misrata. In its 8 April 2012 letter to the Misrata Local Council and the Misrata Military Council, Human Rights Watch alleges that civilians were subject to killings,

looting, property destruction and forced displacement by the Misrata militias, and that Misrata militias are preventing Tawergha civilians from returning to their homes.

48. In its 2 March 2012 report, the UN Commission of Inquiry noted that Misratans believed Tawerghans to be Gaddafi loyalists and responsible for crimes, including rape. The Commission reported that once the rebel or revolutionary forces took control of Misrata and ended the siege, they shelled Tawergha from 10 to 12 August 2011, using indiscriminate munitions, killing and injuring civilians, and shot at Tawerghans as they left the town, killing and injuring civilians.
49. The Commission found that following the capture of Tripoli, there were arbitrary arrests of Tawerghans by Misratan militias and that, according to reports, those detained were subject to torture or mistreatment. In the months following the displacement of the population of Tawergha, houses and buildings continued to be looted and destroyed, Misratan rebel or revolutionary forces used racist or derogatory language to describe Tawerghans, and expressed the intent that the Tawerghans never return.
50. The Commission concluded that murder, torture and cruel treatment, and pillaging could constitute war crimes, or in peacetime, could violate international human rights law, and that torture, given the widespread and systematic manner, could constitute crimes against humanity. The Commission noted that other communities were similarly targeted, including Mashashiya towns perceived as loyalist.

NATO

51. The UN Commission of Inquiry found in its 2 March 2012 report that NATO did not deliberately target civilians in Libya, and that for the few targets struck within population centers, NATO took extensive precautions to ensure civilians were not killed.
52. Of a total of 25,944 air sorties and 7,642 air-to-surface weapons employed as reported by NATO, with respect to five air strikes the Commission cited evidence suggesting that a total of 60 civilians were killed and 55 injured. The Commission also examined two NATO air strikes which damaged civilian infrastructure and where it could not confirm NATO's assertion that the strikes had been directed at legitimate military targets. The Commission concluded that it was unable to determine whether these air strikes were based on incorrect or outdated intelligence, for lack of sufficient information from NATO. The Commission called on NATO as well as the Libyan authorities to conduct investigations in Libya to determine the level of civilian casualties, and review how their procedures operated during Operation Unified Protector.
53. The Office does not have jurisdiction to assess the legality of the use of force and evaluate the proper scope of NATO's mandate in relation to UNSC Resolution 1973.
54. The Office does have a mandate, however, to investigate allegations of crimes by all actors. This includes allegations of crimes against humanity (article 7 of the Statute) and of war crimes, in particular when committed as part of a plan or policy or as part of large scale commission of such crimes (article 8 of the Statute).

55. The Office has found no information to conclude that the NATO air strikes which may have resulted in civilian death and injury or damaged civilian objects were the result of the intentionally directing of attacks against the civilian population as such or against civilian objects. The Office has therefore focused its attention on incidental loss of life or injury to civilians under article 8(2)(b)(iv).
56. In relation to the overall direction of Operation Unified Protector (OUP) exercised by NATO's supreme decision-making authority, the North Atlantic Council, the Office has no information to suggest that the North Atlantic Council authorized the launching of strikes in the knowledge that such attacks would cause incidental loss of life or injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
57. The Office is also unaware of information suggesting that such strikes were directed at the level of the overall direction of the operation, in particular the Combined Joint Task Force Command OUP which operationally commanded OUP and its tactical air operations.
58. In examining such allegations, the Office is also assessing the existence of genuine national proceedings as well as considerations of gravity. The Office understands that the Government of Libya has committed to further investigate the five incidents identified by the UN Commission of Inquiry, and that the individual States involved in these operations further have the responsibility to investigate whether their own forces were potentially involved through negligence or otherwise in criminal activities. The Office will monitor these proceedings to assess whether the Office should conduct its own investigations.

4. CONCLUSION

59. Two arrest warrants against Saif Al-Islam Gaddafi and Abdallah Al-Senussi are outstanding.
60. Mauritania received a surrender request from the Court against Al-Senussi.
61. Libya has made a challenge to admissibility. Under the Rome Statute, admissibility analysis is not an assessment of the judicial system as a whole, but an assessment as to whether or not the national authorities have investigated or prosecuted, or are investigating or prosecuting genuinely the cases selected by the Office.
62. The Office of the Prosecutor plans to continue its ongoing investigation and to continue its evaluation of Libya's efforts in order to ensure that justice is done in Libya.