



## FOURTEENTH 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. This is the fourteenth report and update on the activities of the Office of the Prosecutor (“the Office” or “OTP”) regarding the situation in Libya.

### 2. THE CASE AGAINST MAHMOUD MUSTAFA BUSAYF AL-WERFALLI

2. In its thirteenth report to the Council, the Office noted reports of serious crimes allegedly committed following the takeover of the Ganfouda neighbourhood of Benghazi by forces of the Libyan National Army (“LNA”). These reported crimes included the summary execution of detained persons.

3. In this context, the Prosecutor called on all parties to the conflict to refrain from carrying out serious violations of human rights and international humanitarian law. Specifically, the Prosecutor reminded 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, or to submit the matter to the competent authorities for investigation and prosecution.

4. The Office continued to monitor the situation carefully. On 23 July 2017, video footage emerged on social media depicting the killing of 20 detained persons. This was the seventh in a series of executions allegedly either ordered or carried out by a commander in the Al-Saiqa Brigade, Major Mahmoud Mustafa Busayf al-Werfalli (“Mr al-Werfalli”). Each of these seven executions was filmed and posted to social media. The Al-Saiqa Brigade, a Special Forces unit, had been active in military operations as part of the LNA’s Operation Dignity since its launch in May 2014.

5. Taking into account, in particular, the escalating nature of the alleged crimes, the Office made an urgent under seal application on 1 August 2017 for a warrant of arrest against Mr al-Werfalli for his direct participation in the seven executions. In total, 33 people were allegedly murdered in the course of these executions, which are believed to have taken place between about 3 June 2016 and about 17 July 2017. Of these 33 alleged murders, 32 took place between about 18 March 2017 and about 17 July 2017.
6. On 15 August 2017, Pre-Trial Chamber I (“PTC I”) issued a public warrant of arrest for Mr al-Werfalli. In doing so, PTC I found reasonable grounds to believe that Mr al-Werfalli had committed the war crime of murder, pursuant to article 8(2)(c)(i) of the Rome Statute, in relation to the seven execution incidents.
7. In addition, PTC I found reasonable grounds to believe that the persons killed in these incidents appeared to have been detained and to have been either civilians or persons *hors de combat*. PTC I found no information in the evidence to show that they had been afforded a trial by a legitimate court, whether military or otherwise, that would comport with any recognised standard of due process. PTC I also concluded that the alleged crimes were sufficiently linked with the situation that triggered the jurisdiction of the Court through the Council’s referral.
8. Following the issuance of the warrant of arrest, the General Command of the LNA released an official statement asserting that since 2 August 2017, Mr al-Werfalli had been arrested and was being investigated by a military prosecutor. In a further statement, the LNA reiterated that Mr al-Werfalli was under investigation and made it clear that it would not surrender him to the ICC.
9. The Office has received information that, contrary to the LNA’s official statement, Mr al-Werfalli is at large, has continued to act as a commander in the Al-Saiqa Brigade, and may have been involved in further killings since the warrant of arrest was issued. The Office is currently investigating the veracity of this information.
10. Nevertheless, and irrespective of any reported domestic investigation that may be underway, Libya remains under a legal obligation to immediately arrest and surrender Mr al-Werfalli to the Court.
11. On 15 August and 13 September 2017, respectively, the Prosecutor publicly called on Libya to take all measures within its power to bring about the immediate arrest and surrender of Mr al-Werfalli to the Court. The Office takes this opportunity to renew that call. It also appeals to all States, including members of the Council, to assist Libya in complying with its obligation by whatever means may be necessary and appropriate.

12. The Office acknowledges the public statements of support that have been made welcoming the issuance of the warrant of arrest. Such support has also been expressed directly to the Office in its interactions with, among others, the Libyan authorities. The Office is also grateful for the intervention of the Office of the United Nations High Commissioner for Human Rights (“OHCHR”), which has called on all parties in Libya to fully cooperate with the ICC in relation to this case.
13. On that note, the Prosecutor urges the LNA, which has publicly expressed its gratitude for the work of the Court in relation to this case, to demonstrate its respect for international justice by facilitating Mr al-Werfalli’s immediate transfer into the custody of the Libyan authorities. The Office appeals to the members of the Council to call on the LNA to facilitate Mr al-Werfalli’s immediate transfer, so that Libya may surrender him to the ICC in compliance with its outstanding obligation.

### **3. THE CASE AGAINST AL-TUHAMY MOHAMED KHALED**

14. The warrant of arrest against Al-Tuhamy Mohamed Khaled (“Mr Al-Tuhamy”), which was made public on 24 April 2017, remains outstanding despite continued efforts by the Office to verify his whereabouts and, through the cooperation of States, to effect his immediate arrest and surrender.
15. The Office continues to collect information relating to Mr Al-Tuhamy’s current whereabouts and to act promptly on the credible information it receives. However, as ever, the Court relies on the cooperation of States to turn these efforts into tangible results.
16. Libya and all States Parties are under an obligation to cooperate with the ICC. The Office also urges non-States Parties, especially those that are members of the Council, to take concrete action when necessary to support the efforts of the Court. Such support is critical if the Court is to fulfil its mandate under the Rome Statute following the Council’s referral through Resolution 1970 (2011). In passing this resolution, the Council itself urged “all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor.”
17. Furthermore, the Office renews its appeal to all States, as well as any organisations or individuals in a position to assist, to provide all reliable information to the Court that could facilitate the arrest of Mr Al-Tuhamy and his surrender to the ICC.

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

##### *Saif Al-Islam Gaddafi*

18. The Office has continued its efforts to secure the surrender of Saif Al-Islam Gaddafi (“Mr Gaddafi”) to the Court, including through further dialogue with the Government of National Accord (“GNA”).
19. The Office appreciates the support expressed by members of the Council following the submission of its thirteenth report through their appeals to Libya to comply with its outstanding obligation to surrender Mr Gaddafi immediately to the ICC. Once again, the Office calls on the GNA to take all necessary steps within its power to bring about the surrender of Mr Gaddafi to the Court without further delay, and also urges those with effective control over Mr Gaddafi to cooperate with the GNA in this respect.
20. The Office appeals to all States and any other relevant entities with information relating to Mr Gaddafi’s whereabouts to provide this information to the Office as and when it becomes available.

##### *Abdullah Al-Senussi*

21. As the Council will recall, on 21 February 2017, the United Nations Support Mission in Libya (“UNSMIL”), in cooperation with OHCHR, issued its full report on the trial of Mr Gaddafi, Abdullah Al-Senussi (“Mr Al-Senussi”), and 35 other former members of the regime of Mr Muammar Mohammed Abu Minyar Gaddafi, in relation to alleged crimes committed during the 2011 revolution and ensuing armed conflict (Case: 630/2012) (“Report”).
22. The Office has received additional information from UNSMIL in relation to certain aspects of the Report. Having considered the Report, the additional information received, and the full Libyan trial judgment, the Office remains of the view that, within the framework of articles 19(10) and 17(2)(c) of the Rome Statute, no new facts have arisen which negate the basis on which PTC I found Mr Al-Senussi’s case inadmissible before the Court.
23. The Office will continue to monitor and evaluate the proceedings relating to Mr Al-Senussi’s pending appeal before the Libyan Supreme Court.

## 5. ONGOING MONITORING AND INVESTIGATION OF CRIMES ALLEGEDLY COMMITTED IN LIBYA SINCE FEBRUARY 2011

24. The Libya situation continues to be a priority for the OTP. Its investigations are progressing well in relation to both existing and potential cases. These investigations are focussed on both crimes alleged to have occurred during the 2011 events, as well as more recent crimes, including those alleged against Mr al-Werfalli. Progress is being made.
25. Ongoing insecurity in Libya continues to prevent the Office from carrying out its investigations on Libyan territory. However, the Office remains determined to resume investigative activities on the ground in Libya as soon as possible, and will continue to monitor the situation and work with relevant actors, including the Libyan Prosecutor General's office, with a view to achieving this goal.
26. Over the reporting period, the Office continued to monitor events in Libya through a variety of sources. The security situation continued to be volatile with clashes occurring between various factions across Libya, including in Tripoli and its surrounds, Sabratah, Benghazi, Ajdabiya, Derna, and in the regions of Sabha and Al Jufra.
27. In particular, reports indicated that the Third Force, along with elements of the Benghazi Defence Brigades, carried out an attack on the LNA-held Brak Al Shati airbase on 18 May 2017, resulting in a high number of casualties, including civilians. Recent clashes in the Sabratah region between the 48<sup>th</sup> Infantry Brigade (also known as the Martyr Anas al-Dabashi armed group) and the Operations Room to Combat the Islamic State reportedly led to heavy civilian casualties.
28. As noted by UNSMIL in its 22 August 2017 report to the Council, while no longer controlling any Libyan territory, Islamic State of Iraq and the Levant ("ISIL") continues to be active, especially in the desert region to the south and south-west of Sirte, with sleeper cells located in other parts of the country. The Office notes, in particular, reports that ISIL claimed responsibility for a suicide attack on the courthouse in Misrata on 4 October 2017 that killed at least three people and wounded over fifteen.
29. Information received by the Office indicates that the LNA has allegedly sharply intensified restrictions on access to the city of Derna over recent months, in connection with fighting during the reporting period between the LNA and the Derna Mujahideen Shura Council. The Office has also received reports indicating that hundreds of Derna's inhabitants have been arrested attempting to leave the city. The Office is concerned about the potential impact that this reported blockade, as well as any further escalation

in hostilities between the parties, may have, in particular, on the civilian population in Derna.

30. Within this overall context of continuing insecurity in Libya, the Office has noted reports of unlawful killings, including the execution of detained persons; kidnappings and forced disappearances; torture; prolonged detentions without trial or other legal process; arbitrary detention, torture, rape, and other ill-treatment of migrants in official and unofficial detention centres; and the continued internal displacement of persons.
31. The Office will continue to monitor closely the ongoing situation throughout Libya with a view to determining whether any party may have committed crimes within the jurisdiction of the Court.

*Alleged crimes against migrants in Libya*

32. The Office shares the concern of the Special Representative of the Secretary-General (“SRSG”) and Head of UNSMIL, expressed in his 28 August 2017 address to the Council, that irregular migration, and the revenue it generates for smuggler networks, has proven to be a direct threat to stability in parts of Libya. The SRSG noted that the hundreds of thousands of migrants and refugees in Libya often suffer abuses and detention in inhuman conditions.
33. Activities continued during the reporting period with respect to the collection and analysis of information and evidence relating to alleged crimes against migrants in Libya. The Office continued to work collaboratively with, among others, a range of States, and international and regional organisations. Working meetings with representatives of these States and organisations were held to discuss cooperation in relation to these alleged crimes. These important efforts allow for the exchange of information, as well as, where this fits within the respective mandates of these organisations, the coordination of investigative and prosecutorial strategies aimed at closing the impunity gap.
34. Based on its continuing analysis of information currently in its possession, the Office is of the view that, depending on the precise facts and circumstances that might be established by a full investigation, certain crimes allegedly committed against migrants in Libya may fall within the jurisdiction of the Court.
35. The Prosecutor continues to welcome the submission of reliable information concerning the alleged commission of crimes by State or non-State actors in connection with human trafficking and smuggling networks operating in Libya.

## 6. COOPERATION

36. The Office expresses its gratitude once again for the collaborative relationship it continues to enjoy with the Libyan Prosecutor-General's office. In addition, the Prosecutor recently received a delegation including several distinguished members of the Libyan judiciary, as part of the Office's continuing engagement with Libya.
37. In June and September 2017, the Prosecutor met with Prime Minister Fayez al-Sarraj, who reaffirmed Libya's commitment to the rule of law and accountability, and to cooperating with the ICC.
38. The Office also continues to benefit from cooperation with various States, including Tunisia, the United Kingdom, the Netherlands and Italy. It has also received important support from international organisations, such as INTERPOL, which has provided prompt and useful assistance with respect to suspects currently at large. In addition, the Office continues to regularly receive valuable submissions of information and evidence from a variety of concerned groups and individuals.
39. The Office welcomes the appointment of Mr Ghassan Salamé as the new SRSG and Head of UNSMIL, and expresses its sincere appreciation to Mr Martin Kobler for his notable assistance to the Office in his prior service in that role. The Office notes the adoption by the Council of Resolution 2376 (2017) extending the mandate of UNSMIL until 15 September 2018, and looks forward to further collaboration on issues of mutual interest in relation to the situation in Libya.
40. Following its thirteenth report, several members of the Council highlighted the need to ensure that the Office receives adequate funding to achieve its mission. While the Office welcomes these expressions of support, unfortunately, its work continues to be impeded by resource constraints. Once again, the Prosecutor urges the Council to take concrete steps to facilitate financial assistance through the United Nations for the Office's work in Libya in accordance with article 115(b) of the Rome Statute.

## 7. CONCLUSION

41. The Office continues to examine closely the acts of all parties to the ongoing conflict in Libya. It will continue to assess whether these acts may constitute crimes falling within the jurisdiction of the ICC and, if so, whether to bring new applications for warrants of arrest. As ever, the Office will carry out this important function independently and impartially.

42. All parties in Libya must refrain from committing crimes under the Rome Statute. The Office will continue to scrutinise, in particular, the responsibility of commanders and superiors for crimes allegedly committed by their forces in Libya. The Prosecutor will not hesitate to bring new applications for warrants of arrest in the Libya situation should the evidence and all of the other relevant considerations support such a course of action.
43. The Office remains committed to the Libya situation. However, for the Court to make sustained progress in its prosecutions, Libya's promises of cooperation must be turned into concrete action. Those in Libya with actual authority or control over the suspects wanted by the Court must immediately facilitate the transfer of these suspects to the GNA, so that they can be surrendered to the ICC without further delay.
44. Specifically, in relation to the case against Mr al-Werfalli, the Office reiterates that Libya is under a legal obligation to arrest and surrender him to the Court. The Prosecutor calls on the LNA to immediately facilitate the transfer of Mr al-Werfalli to the GNA, so that Libya can comply with its outstanding obligation.
45. As demonstrated by the issuance of the most recent warrant of arrest, the Office remains dedicated to pursuing justice for crimes under the Rome Statute committed in Libya since 2011 to the present day. The Council has regularly recalled its determination that the situation in Libya continues to constitute a threat to international peace and security. The Council has also repeatedly emphasised that those responsible for violations of international humanitarian law and violations and abuses of human rights in Libya must be held accountable. In this context, the Office will continue to work with the Council, all States and all other relevant entities to discharge its mandate under the Rome Statute in the situation in Libya. | OTP