



SEVENTEENTH 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”). The Council invited the Prosecutor to address it every six months on actions taken pursuant to this resolution. This is the seventeenth report and update on the activities of the Office of the Prosecutor (“OTP” or “Office”) regarding the situation in Libya.

2. STATUS OF THE CURRENT CASES

Mahmoud Mustafa Busayf Al-Werfalli

2. Two warrants are outstanding for the arrest of Mahmoud Mustafa Busayf Al-Werfalli (“Mr Al-Werfalli”). The first of these warrants, issued on 15 August 2017, relates to the alleged war crime of murder of 33 people in the course of seven execution incidents in Benghazi or surrounding areas in 2016 and 2017. Shortly after the issuance of this warrant, Mr Al-Werfalli’s superiors, the General Command of the Libyan National Army (“LNA”), issued an official statement asserting that Mr Al-Werfalli had been arrested and was under investigation.
3. Nevertheless, approximately five months later, on 24 January 2018, Mr Al-Werfalli allegedly murdered another 10 people in Benghazi. The ICC issued a second warrant of arrest in relation to this incident on 4 July 2018. As with the seven previous executions, this eighth execution was filmed and a graphic video of the killings was posted on social media.
4. In issuing this second warrant of arrest, Pre-Trial Chamber I (“PTC I”) found that, on the basis of the information provided by the OTP, it could not be concluded that the case against Mr Al-Werfalli was being or had been investigated in Libya within the meaning of article 17(1)(a)-(b) of the Rome Statute. It thus exercised its discretion to find the case against Mr Al-Werfalli admissible before the ICC.
5. Today, approximately eighteen months since the first warrant of arrest was issued, Mr Al-Werfalli remains at liberty. There is no evidence that the LNA has genuinely prosecuted him. Nor is there any evidence indicating that any person has been held

accountable in Libya for the murders alleged in the ICC arrest warrants against Mr Al-Werfalli, despite many of the suspects being clearly identifiable in the videos depicting the alleged crimes.

6. Libya remains under an obligation to immediately arrest and surrender Mr Al-Werfalli to the ICC. The Office calls on General Khalifa Haftar, commander of the LNA, to facilitate Mr Al-Werfalli's immediate surrender to the ICC. It also urges the Council and its member States to take all reasonable actions within their power to ensure that the situation of impunity in relation to Mr Al-Werfalli's case does not persist.
7. In this regard, the Office notes the call made by France, in response to the Prosecutor's fifteenth report to the Council, to the LNA to transfer Mr Al-Werfalli to the Libyan authorities as soon as possible so that they can hand him over to the ICC in accordance with their obligations to cooperate with the Court. Similarly, in the same Council meeting, the United Kingdom also called on all parties to cooperate with the ICC in relation to the arrest warrant for Mr Al-Werfalli. The Office welcomes these and the many other expressions of support voiced by members of the Council in relation to this issue.

Al-Tuhamy Mohamed Khaled

8. The warrant of arrest against Al-Tuhamy Mohamed Khaled ("Mr Al-Tuhamy") remains outstanding. Since the issuance of this warrant on 18 April 2013, the Office has made concerted efforts, in partnership with the ICC Registry, to obtain the necessary cooperation to effect Mr Al-Tuhamy's arrest and surrender to the ICC. In the hope that it could foster support and cooperation for an arrest operation from the international community, the warrant of arrest was made public on 24 April 2017. More than two years later, the warrant of arrest is still unexecuted.
9. When the Council passed Resolution 1970 (2011) referring the situation in Libya to the ICC Prosecutor, it urged "all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor". Such cooperation is critical if the ICC is to fulfil the mandate conferred on it by the Council through its referral. The execution of arrest warrants against suspects is a critical step in achieving justice for their alleged crimes.
10. The Office calls on all relevant States, including States Parties and non-States Parties, to cooperate with the ICC in the arrest and surrender of Mr Al-Tuhamy. It further urges the Council to give its full support to this call and to take all reasonable steps to facilitate Mr Al-Tuhamy's immediate arrest and surrender.

Saif Al-Islam Gaddafi

11. As the Council is aware, on 5 June 2018, Saif Al-Islam Gaddafi ("Mr Gaddafi") filed a challenge, pursuant to articles 17(1)(c), 19 and 20(3) of the Rome Statute, to the admissibility of his case before the ICC. Mr Gaddafi submitted that his ICC case is inadmissible because he has already been tried in Libya for the same conduct as alleged

by the ICC Prosecutor, and that a trial is not permitted by the Court under article 20(3) of the Statute.

12. As previously reported to the Council, on 28 September 2018, the OTP filed its response to Mr Gaddafi's admissibility challenge. The OTP submitted that PTC I should find the case against Mr Gaddafi admissible before the ICC. On the same date, the Office of Public Counsel for Victims ("OPCV"), which had been appointed by PTC I to represent the victims in these proceedings, submitted its observations on the admissibility challenge. The OPCV also requested that PTC I find the case against Mr Gaddafi admissible before the ICC. Also on 28 September 2018, Lawyers for Justice in Libya and Redress Trust filed joint *amicus curiae* observations on the admissibility challenge, pursuant to leave granted by PTC I on 5 September 2018.
13. On 4 October 2018, Mr Gaddafi applied, *inter alia*, for leave from PTC I to reply to the issues raised in the OTP's response to the admissibility challenge and the OPCV's observations. On 24 October 2018, the PTC granted Mr Gaddafi leave to reply to new issues of fact or law arising from certain relevant documents. On 9 November 2018, Mr Gaddafi filed a consolidated reply to the OTP's response to the admissibility challenge and to the *amicus curiae* observations.
14. On 5 April 2019, PTC I, by majority, rejected Mr Gaddafi's admissibility challenge. As a result of this decision, Mr Gaddafi's case remains admissible before the ICC. PTC I indicated that Judge Marc Perrin de Brichambaut would file a minority opinion in due course. At the time of submitting this report, this minority opinion is still pending.
15. PTC I decided that Mr Gaddafi had procedural standing to lodge the admissibility challenge. However, it found that Mr Gaddafi had not been tried in Libya within the meaning of articles 17(1)(c) and 20(3) of the Statute because no final judgement on the merits had been issued in his domestic proceedings. In coming to its decision, the Court found that Mr Gaddafi had not received an amnesty in Libya. It further observed that "granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights." Having made these findings, the Chamber did not consider it necessary to decide whether the proceedings against Mr Gaddafi in Libya did relate to substantially the same conduct as his case before the ICC.
16. On 11 April 2019, Mr Gaddafi filed an appeal against the decision of PTC I. Mr Gaddafi also applied for an extension of the time limit to file the Defence appeal brief. The Appeals Chamber granted this application, extending the time limit for the filing of the Defence appeal brief until 9 May 2019 or, if the minority opinion of Judge Marc Perrin de Brichambaut is notified after 30 April 2019, then on the tenth day after its notification.
17. Further details with respect to the admissibility challenge can be found in the public versions of the major filings and decisions in this litigation, all of which are accessible on the ICC website.

18. As was noted in the Office's sixteenth report to the Council, Mr Gaddafi stated in his admissibility challenge that he was released from custody in Zintan on or about 12 April 2016. The United Nations Panel of Experts reported on 5 September 2018 that a lawyer for Mr Gaddafi had confirmed that Mr Gaddafi was in Zintan where he had freedom of movement. The OTP is unable to confirm Mr Gaddafi's current whereabouts.
19. Libya remains under an obligation to arrest and surrender Mr Gaddafi to the ICC. The current admissibility proceedings do not suspend that obligation. As recently as September 2018, the Government of Libya indicated that it is continuing efforts to transfer Mr Gaddafi into the custody of the competent authorities and that, should this be achieved, Mr Gaddafi's *in absentia* conviction would be annulled and his case re-tried. In the present circumstances, given that Mr Gaddafi is still at large, the pursuit of justice for his alleged crimes remains at an impasse, both in Libya and before the ICC.

Abdullah Al-Senussi

20. The case against Abdullah Al-Senussi ("Mr Al-Senussi") is inadmissible before the ICC following the determination of PTC I on 11 October 2013, upheld by the Appeals Chamber on 24 July 2014. However, the Office continues to monitor for any developments in Mr Al-Senussi's domestic case, which is still pending before the Supreme Court of Libya. There have been no significant developments during the reporting period.

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

21. The Office continues to dedicate resources to its Libya investigations, and is making progress in relation to both existing and potential cases. Over the reporting period, the Office also continued to monitor and assess ongoing developments in Libya through a variety of sources. It regularly receives valuable submissions of evidence and information from various groups and individuals in relation to a range of crimes allegedly committed in Libya since 2011. Such submissions are welcomed by the OTP.
22. The Office noted a general deterioration in the security situation across Libya during the reporting period. In Tripoli, renewed armed clashes broke out between 16 and 18 January 2019, reportedly leading to the deaths of six civilians.
23. Armed clashes occurred in Derna, as LNA forces took control of the old city from the Derna Protection Force. Many human rights and humanitarian law violations, as well as civilian casualties, were reported during these military operations, which have now come to an end. During the fighting, access to the old city was reportedly severely restricted, including for the delivery of food, water and medical care. Reports indicate that large numbers of persons have been arrested and are being detained without charge in LNA-controlled detention facilities.
24. LNA forces also advanced in southern Libya, entering Sabha and Ubari in January and February 2019. The LNA was met with resistance by the Tebu community and affiliated

armed groups as it attempted to take Murzuq. This fighting, as well as subsequent revenge attacks, reportedly led to the deaths of at least 18 residents of Murzuq, a further 29 people injured, and ninety homes reportedly burned by LNA-affiliated groups.

25. The Office is also closely following the clashes in the Tripoli area that have been ongoing since early April 2019. The Office notes the recent conflict has reportedly resulted in 272 deaths, including 21 civilians, and over 30,000 persons internally displaced by the ongoing hostilities. The situation for persons, including migrants and refugees, held in detention facilities in the Tripoli area is increasingly worrisome.
26. On 16 April 2019, the Prosecutor issued a preventive statement, calling on all parties and armed groups involved in the fighting to fully respect the rules of international humanitarian law. This includes taking all necessary measures to protect civilians, and civilian infrastructures, including schools, hospitals and detention centres. She urged all parties to the conflict not to commit any crimes within the Court's jurisdiction, and in particular, for commanders to ensure that their subordinates do not do so. In that statement, the Prosecutor emphasised that she will not hesitate to expand the Office's investigations and potential prosecutions to cover any new instances of crimes falling within the Court's jurisdiction, with full respect for the principle of complementarity.
27. The Office warns that attacks against the civilian population, as well as attacks directed at hospitals and medical personnel or vehicles, may constitute war crimes under the Rome Statute. The Office is gathering information and will assess whether any party to the armed conflict has committed crimes within the jurisdiction of the ICC.
28. The Islamic State in Iraq and the Levant ("ISIL") was also active during the reporting period. On 23 November 2018, ISIL reportedly carried out an attack on Tazirbu in southeast Libya, allegedly shooting dead eight civilians and abducting a further thirteen. On 9 December 2018, ISIL allegedly murdered six hostages who had been abducted during an ISIL attack on the town of Al-Foqha on 28 October 2018. In addition, ISIL claimed responsibility for an attack on the Ministry of Foreign Affairs in Tripoli on 25 December 2018, which reportedly killed two and injured four civilians. The Council condemned this attack on 27 December 2018.
29. According to the International Organization for Migration ("IOM"), as at December 2018, an estimated 170,040 persons remain internally displaced in Libya. The IOM reports that the top three locations from which persons have been displaced are Benghazi, Sabha and Misrata, with a reported ninety-four percent of civilian displacement caused by the deterioration of the security situation. In the context of internal displacement, the Office again notes that, regrettably, the Misrata-Tawergha agreement of August 2016 has yet to achieve full implementation.

Crimes against migrants

30. Reports by national and international organisations published over the past year trace the journey of migrants and refugees through Libya and document continuing patterns of serious human rights violations and abuses. For example, the December 2018 report

on the human rights situation of migrants and refugees in Libya prepared by the United Nations Support Mission in Libya (“UNSMIL”) and the Office of the High Commissioner for Human Rights (“OHCHR”) describes evidence of human rights violations at each stage of their journey.

31. Based on 1,300 first-hand accounts, information gathered by human rights officers in UNSMIL, as well as observations during regular monitoring visits to 11 immigration detention centres in Libya, the UNSMIL/OHCHR report documents serious human rights violations and abuses suffered by migrants and refugees in Libya. Violations include deprivation of liberty, arbitrary detention in official and unofficial detention facilities, torture and sexual violence, abduction for ransom, extortion, forced labour and unlawful killings. According to the report, alleged crimes are being committed by all sides, including State officials, members of militia and armed groups, as well as smugglers and traffickers.
32. A March 2019 report by the Women’s Refugee Commission also paints a horrific picture of widespread and systematic sexual violence against migrant men, women, boys and girls, and catalogues extreme examples of torture of a sexual nature, including in official and unofficial detention centres in Libya. The Office is analysing this appalling victimisation allegedly inflicted on women, men and children in the context of its 2014 Policy Paper on Sexual and Gender-Based Crimes and its 2016 Policy on Children.
33. These reports and the Office’s own investigations confirm that abuses against migrants start as soon as they cross the border into Libya and continue throughout the journey to the north coast. The Libyan Coast Guard is increasingly intercepting or rescuing boats at sea, and transferring migrants back to detention centres where many continue to face arbitrary detention, torture and ill-treatment.
34. Allegations of cruel, inhuman and degrading treatment implicate many parties. Allegations relate to abuse in detention centres at least nominally run by State authorities such as the Department for Combatting Illegal Migration, but also in holding warehouses used by smugglers and traffickers to house migrants at different stages of the journey. Allegations have been made concerning human rights violations in Misrata, Al-Zawiyah, Tripoli and Bani Walid, among others cities and towns.
35. Years of armed conflict and the continuing volatile situation in Libya provide fertile ground for smugglers, traffickers, members of armed groups and State officials to act with impunity. The Office is cognisant of the fact that the human smuggling business and the associated allegations of crimes committed against vulnerable men, women and children has an impact on peace and security not just in Libya but also beyond.
36. For its part, the Office has adopted a two-pronged approach. First, the Office continues to monitor, investigate and analyse allegations of crimes committed against migrants and refugees in Libya in both official and unofficial detention centres, in order to determine whether crimes committed fall within the jurisdiction of the Court.

37. Second, the Office continues to cooperate with Libya and other States, as well as national and international organisations, to enhance the coordination of investigative and prosecutorial strategies aimed at closing the impunity gap for Rome Statute and transnational crimes, as well as organised criminal activity.
38. Achievements to date with this cooperation strategy include the sharing of information obtained by the Office with national law enforcement authorities concerned with human smuggling and trafficking. In a number of cases, the Office has provided critical information that has supported national investigations and prosecutions in a number of States for crimes committed against migrants transiting through Libya to Europe.

4. COOPERATION

39. As illustrated by the status of the current cases in the Libya situation, the execution of arrest warrants remains one of the ICC's greatest challenges. The ICC is wholly reliant on the cooperation of States to execute its arrest warrants. Thus, the prospects for the arrest and surrender of suspects are dependent on the willingness and capacity of States to cooperate, and on the commitment of the Council, and the international community in general, to urge States Parties and non-States Parties to execute the arrest and surrender of suspects on their territory.
40. In relation to the outstanding cases in the Libya situation, the Office has gathered sufficient evidence to obtain warrants of arrest against Mr Al-Werfalli, Mr Al-Tuhamy and Mr Gaddafi. It is now in the hands of the States where the suspects are believed to be present to ensure that these warrants of arrest are executed.
41. Notwithstanding this challenge, the OTP does receive excellent cooperation from a large number of States and organisations in support of its investigations in the Libya situation. In addition to Libya, the OTP is grateful for the assistance provided by States such as Italy, The Netherlands, Tunisia and the United Kingdom, among others, and a range of international and regional organisations and civil society groups. The Office again extends its appreciation to INTERPOL for its ongoing assistance in efforts to locate and arrest ICC fugitives. The Office is also grateful to UNSMIL for its continued collaboration on matters of mutual concern.
42. Finally, the Office notes Resolution 2441 (2018), extending the mandate of the Panel of Experts and deciding that perpetrators of sexual and gender-based violence may also be subject to sanctions.

5. CONCLUSION

43. The Office remains dedicated to the pursuit of justice for Rome Statute crimes committed in Libya since the ICC's jurisdiction commenced on 15 February 2011. It is cognisant that the current cases in the Libya situation do not fully represent the number, scale and distribution of grave crimes committed across Libya during this period. However, the OTP continues to investigate a range of allegations of international crimes, and intends to apply for new warrants of arrest in the Libya situation in the near future.

44. The path to justice is often long, and the investigations undertaken by the OTP are complex and challenging. Nonetheless, the warrants of arrest issued by the ICC to date demonstrate that the investigations in the Libya situation have borne fruit. The OTP cannot hope to bring every case against every perpetrator of grave crimes in Libya. It must select and prioritise cases. However, in doing so, the OTP will act, as it has always done, according to the principles of independence, objectivity and impartiality.
45. Establishing the rule of law is essential to securing ongoing peace and stability in Libya. The Council must demonstrate through concrete action its commitment to holding accountable those responsible for violations of international humanitarian law and the crimes listed in the Rome Statute. The first, and indispensable, step is to ensure that the outstanding warrants of arrest for Messrs Al-Werfalli, Al-Tuhamy and Gaddafi are executed, and the suspects are transferred to the ICC to stand trial. Such a development would send a strong and necessary message to the victims of grave crimes in Libya that the Council and the international community at large are serious about pursuing justice for these grave crimes and committed to taking concrete action towards that end. | OTP