



## EIGHTEENTH 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 eighteenth 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

#### *Saif Al-Islam Gaddafi*

2. As previously reported to the Council, on 5 April 2019, the Majority of Pre-Trial Chamber I (“PTC I”) rejected the challenge brought by Saif Al-Islam Gaddafi (“Mr Gaddafi”) to the admissibility of his case before the ICC. On 8 May 2019, Judge Marc Perrin de Brichambaut issued his separate concurring opinion.
3. On 11 April 2019, Mr Gaddafi filed an appeal against the decision of PTC I. On 20 May 2019, Mr Gaddafi filed his Defence appeal brief in support of his appeal, having been granted an extension of time until after the separate concurring opinion was issued.
4. Mr Gaddafi raises two grounds of appeal: (1) that the Majority of PTC I erred in law in holding that articles 17(1)(c) and 20(3) of the Rome Statute may only be satisfied where a judgment on the merits of a case has acquired *res judicata* effect; and (2) that the Majority of PTC I erred in law and fact, and procedurally, by failing to determine that Law No. 6 of 2015 was applied to Mr Gaddafi and that such application rendered his conviction final.
5. On 11 June 2019, the OTP and the Office of Public Counsel for Victims (“OPCV”), respectively, responded to the Defence appeal brief. Each submitted that Mr Gaddafi’s appeal should be rejected.
6. On 24 September 2019, the Appeals Chamber ordered that a hearing be scheduled before it from 11 to 12 November 2019 to hear submissions and observations in the appeal of Mr Gaddafi. The Appeals Chamber invited the Security Council and the State of Libya to

submit observations on issues arising from the appeal by 24 October 2019. The Appeals Chamber also invited the Security Council and the State of Libya to attend the scheduled hearing. It further ordered that any request for leave to submit observations under rule 103 of the Rules of Procedure and Evidence should be filed by 8 October 2019. Additionally, the Appeals Chamber indicated that further directions on the conduct of the proceedings, including as to the participation in the hearing of the parties, the OPCV and any others, would be issued in due course.

7. On 8 October 2019, the Libyan Cities and Tribes Supreme Council requested leave to submit observations under rule 103 of the Rules of Procedure and Evidence. A request to submit joint observations was also made on 8 October 2019 by Lawyers for Justice in Libya and REDRESS.
8. The current admissibility proceedings do not suspend Libya's obligation to arrest and surrender Mr Gaddafi to the Court. The OTP has received reliable information indicating that Mr Gaddafi remains in Zintan, Libya. However, it has been unable to independently verify this information. The OTP understands that the Government of Libya remains unable to secure the custody of Mr Gaddafi in order for his domestic case to be re-tried or to transfer him to the ICC.

*Mahmoud Mustafa Busayf Al-Werfalli*

9. Following the Prosecutor's applications, two warrants of arrest for Mahmoud Mustafa Busayf Al-Werfalli ("Mr Al-Werfalli") were issued by the Court on 15 August 2017 and 4 July 2018, respectively. These remain unexecuted.
10. Mr Al-Werfalli is allegedly responsible for the murder of a total of 43 people during eight execution incidents in Benghazi or surrounding areas between 2016 and 2018. In issuing the warrants of arrest, PTC I found that the persons killed appear to have been detained, and that there was 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. The eight executions were filmed and the graphic videos posted online, causing severe humiliation and degradation to the victims, and inflicting great suffering on their families.
11. In issuing the second arrest warrant, 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. Accordingly, PTC I exercised its discretion to find the case against Mr Al-Werfalli admissible before the ICC.
12. Recent developments reinforce the conclusion reached by PTC I. Credible reports investigated by the OTP indicate that, on 8 July 2019, the General Command of the Libyan National Army ("LNA") promoted Mr Al-Werfalli from the rank of Major to Lieutenant Colonel. This promotion strongly suggests that the LNA has no intention to prosecute Mr Al-Werfalli for his responsibility for the crimes alleged in the ICC warrants of arrest.

13. The current situation is thus one of impunity. More than two years since the first arrest warrant was issued, Mr Al-Werfalli enjoys his liberty in the Benghazi area, having faced no genuine accountability for his alleged crimes. It is imperative that the ICC arrest warrants for Mr Al-Werfalli be executed. Similarly, the LNA has not prosecuted any of the other alleged perpetrators clearly identifiable in the execution videos.
14. The Office has repeatedly called on General Khalifa Haftar, commander of the LNA, to facilitate Mr Al-Werfalli's immediate surrender to the ICC. It reiterates that call. Furthermore, it again urges the Council and all States, including States Parties and non-States Parties, to take all reasonable steps within their power, including by applying pressure on the LNA, to ensure that Mr Al-Werfalli is surrendered to the ICC without further delay.

*Al-Tuhamy Mohamed Khaled*

15. The warrant of arrest against Al-Tuhamy Mohamed Khaled ("Mr Al-Tuhamy") has been outstanding for more than six years, since its issuance on 18 April 2013. An INTERPOL Red Notice based on the ICC warrant was issued on 24 May 2017 and remains valid.
16. In the ICC warrant of arrest, which was made public on 24 April 2017, PTC I ordered that a request for cooperation in the arrest and surrender of Mr Al-Tuhamy be transmitted to the competent authorities of the Arab Republic of Egypt ("Egypt"), where Mr Al-Tuhamy was believed to be residing. The information in the possession of the OTP indicates that Mr Al-Tuhamy is still residing in Cairo, Egypt.
17. Grave crimes are alleged against Mr Al-Tuhamy. In issuing the warrant of arrest, PTC I found reasonable grounds to believe that, between 15 February and 24 August 2011, members of the Internal Security Agency ("ISA") and other Libyan security forces arrested and detained persons perceived to be opponents of the Muammar Gaddafi regime, who were subjected to various forms of mistreatment, including severe beatings, electrocution, acts of sexual violence and rape, solitary confinement, deprivation of food and water, inhumane conditions of detention, mock executions, and threats of killing and rape, in various locations throughout Libya. PTC I found reasonable grounds to believe that Mr Al-Tuhamy, in his capacity as head of the ISA, bore criminal responsibility for crimes against humanity and war crimes in relation to these acts.
18. The Office once again 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.

*Abdullah Al-Senussi*

19. There have been no significant developments during the reporting period in relation to the case against Abdullah Al-Senussi ("Mr Al-Senussi"). As the Council is aware, Mr Al-Senussi's ICC case was found inadmissible by PTC I on 11 October 2013. This decision was upheld by the Appeals Chamber on 24 July 2014. As previously reported to the Council, the Office is monitoring Mr Al-Senussi's domestic case, which is pending before the Supreme Court of Libya.

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

20. The Office is making further progress in its existing investigations and is continuing to work on applications for new warrants of arrest. It has also been closely monitoring developments in Libya over the reporting period, particularly following the renewal of clashes in and around Tripoli on 4 April 2019 and their escalation since June 2019.
21. 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, including by 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. The Prosecutor emphasised that she would 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.
22. Regrettably, multiple serious violations of international human rights and humanitarian law by all parties have reportedly been committed since the offensive on Tripoli began.
23. Reports indicate that, since early April 2019, more than 100 civilians have been killed, 300 injured and 120,000 displaced as a result of the armed conflict. UNSMIL reports that more than 37 attacks have been registered against health workers and facilities, including hospitals, field hospitals and civilian and military ambulances, resulting in at least 11 deaths and more than 33 injured.
24. Mitiga airport in Tripoli has reportedly been hit by indiscriminate shelling seven times since the end of July 2019, including on 1 September 2019, when projectiles hit civilian parts of the airport causing damage to an airplane carrying dozens of passengers. Zuwara airport has also reportedly been the target of airstrikes.
25. There has reportedly been a sharp increase in abductions, disappearances and arbitrary arrests since early April 2019. The Office notes in particular the disappearance of House of Representatives member, Siham Sergewa, from her home in Benghazi on 17 July 2019.
26. The Office has received reports of the alleged summary execution of 41 injured LNA-affiliated fighters and some civilians at Gharyan hospital on 26 June 2019 by forces operating under the Government of National Accord.
27. On 10 August 2019, a car bomb attack in Benghazi killed five people, including three United Nations staff members, and injured multiple other civilians, including two further United Nations staff members. The Council condemned this attack on 10 and 11 August 2019. The Office joins the Council in this condemnation, and reiterates its deepest condolences to UNSMIL and the bereaved families of the victims, and wishes those injured a full recovery.

28. Violence also continued in the south of Libya during the reporting period. Clashes in Murzuq have reportedly claimed more than 100 lives. On 4 August 2019, airstrikes targeting a gathering of Tebu representatives in Murzuq killed more than 40 people. The Office notes reports that the Islamic State in Iraq and the Levant (“ISIL”) has gained momentum in the south of Libya since the offensive on Tripoli began in early April 2019. In addition, ISIL claimed responsibility for a car bomb attack against LNA forces in Derna, eastern Libya, on 2 June 2019, which resulted in 11 wounded.
29. The Office condemns all unlawful violence resulting in the loss of life and injury.

*Crimes against migrants*

30. In its seventeenth report, the Office noted that the situation for persons, including migrants and refugees, held in detention facilities in the Tripoli area was increasingly worrisome. This situation has only worsened during the reporting period. As of August 2019, more than 4,800 refugees and migrants were reportedly arbitrarily detained in Libya. Many are vulnerable due to their proximity to the fighting in and around Tripoli. Migrants and refugees continue to be at risk of torture, sexual violence, abduction for ransom, extortion, forced labour, unlawful killings and detention in inhumane conditions.
31. On 2 July 2019, airstrikes on Tajoura migrant detention centre, east of Tripoli, reportedly killed 53 people and injured 130, including women and children. The Office notes that prior to this incident, the United Nations had provided the exact coordinates of this detention centre to the parties to the armed conflict. The Council condemned this attack on 5 July 2019.
32. As previously reported to the Council, the Office has adopted a two-pronged approach with respect to the serious and widespread allegations of crimes being perpetrated against migrants in Libya. First, it continues to monitor, investigate and analyse evidence relating to such crimes in both official and unofficial detention centres, with a view to bringing a case before the ICC should the required legal and evidentiary elements be satisfied.
33. Second, the Office is focusing heavily on its strategy of cooperation and coordination with Libya and other relevant States in order to support national investigations and prosecutions. This positive approach to complementarity is in accordance with Strategic Goal 6 of the OTP’s Strategic Plan for 2019-2021, issued on 17 July 2019. Its aim is to strengthen the ability of the Office and its partners to close the impunity gap regarding alleged criminality against migrants in Libya. This approach has the benefit of bringing together the knowledge and network of the OTP, relevant States, and regional and international organisations, to address Rome Statute crimes, transnational crimes, and other organised criminal activity. This strategy has already seen positive, concrete results. In several instances, valuable evidence and information shared by the Office with national law enforcement authorities has progressed national investigations and prosecutions relating to crimes committed against migrants transiting through Libya.

#### **4. COOPERATION**

34. Progress in the Libya situation continues to be stymied by the failure of States to execute the outstanding warrants of arrest. The cases against Messrs Gaddafi, Al-Tuhamy and Al-Werfalli will remain at an impasse until this essential step is achieved. The Office notes that, following the Prosecutor's seventeenth report to the Council, several States called on all relevant parties to cooperate with the ICC in the execution of arrest warrants.
35. Such cooperation is indispensable given that the ICC depends solely on States for the arrest and surrender of suspects. The Office continues to call on the Council, and the wider international community, to urge the relevant States Parties and non-States Parties to take all necessary and reasonable measures to ensure the outstanding arrest warrants are executed. Specifically, it calls on General Haftar, and those who are working with the LNA, to facilitate the arrest and surrender of Mr Al-Werfalli to the ICC.
36. The effective cooperation of States is also imperative for the Office to progress its ongoing investigations. In this regard, the Office acknowledges the assistance provided by Libya, as well as other States such as Italy, The Netherlands, Tunisia, the United Kingdom, Lithuania, Ireland, Spain and France, among others. As always, it is also grateful for the assistance provided by a range of international and regional organisations, civil society groups, and private individuals.
37. The Office notes the work being done by UNSMIL in inspecting sites and documenting incidents in connection with the ongoing armed conflict in and around Tripoli. It welcomes UNSMIL's continued cooperation and indication that it will submit certain information to the ICC regarding potential crimes falling within its jurisdiction. The Office also notes Resolution 2486 (2019) extending the mandate of UNSMIL until 15 September 2020.

#### **5. CONCLUSION**

38. Perpetrators of grave international crimes must be held to account. Accountability not only delivers justice to the victims, but also sends a strong message that such crimes will not be tolerated in the future. Accountability is indispensable in establishing respect for the rule of law. When ICC arrest warrants go unexecuted, it signals that the alleged perpetrators of grave international crimes can enjoy impunity.
39. The ICC is designed to complement national jurisdictions. The Office operates with full respect for this principle. It is Libya's obligation, first and foremost, to ensure accountability for crimes committed on its territory. However, where a domestic jurisdiction is not delivering, or cannot deliver, genuine justice, the ICC must be able to perform its essential function as a court of last resort. States Parties, the Council and the international community as a whole must give full support to the ICC to perform this function. Only then can the ICC have the greatest possible impact.

40. Notwithstanding the challenges, the Office will continue to strive towards delivering justice for Rome Statute crimes committed in Libya. | oTP