



SIXTEENTH 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 sixteenth report and update on the activities of the Office of the Prosecutor (“OTP” or “Office”) regarding the situation in Libya.

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

Saif Al-Islam Gaddafi

2. 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.
3. This is the first challenge brought by Mr Gaddafi to the admissibility of his ICC case. As the Council will be aware, Libya previously challenged the admissibility of the case on the basis that its national judicial system was actively investigating Mr Gaddafi in relation to the same conduct. In those proceedings, Mr Gaddafi’s interests were represented by the Office of Public Counsel for the Defence (“OPCD”), which argued, consistent with the views provided by Mr Gaddafi to the OPCD, that his case was admissible before the Court.
4. Libya’s challenge to the admissibility of Mr Gaddafi’s case was rejected by Pre-Trial Chamber I (“PTC I”) on 31 May 2013. PTC I’s determination that the case was admissible before the ICC was confirmed by the Appeals Chamber on 21 May 2014. Nevertheless, the current admissibility challenge filed by Mr Gaddafi will be decided on the basis of the facts as they exist at the present time.
5. On 14 June 2018, PTC I issued a decision on the conduct of the proceedings relating to Mr Gaddafi’s admissibility challenge. PTC I invited the Prosecutor, the Security Council and victims who had already communicated with the Court in relation to Mr Gaddafi’s

case, should they wish to do so, to submit written observations on the admissibility challenge no later than 28 September 2018. PTC I appointed the Office of Public Counsel for Victims (“OPCV”) to represent the victims in these proceedings.

6. On 26 July 2018, the OTP requested the assistance of the Government of Libya to provide information and documentation in relation to the factual and legal issues raised by Mr Gaddafi’s admissibility challenge. The OTP received a response to its request on 18 September 2018.
7. On 30 August 2018, two non-governmental organisations, Lawyers for Justice in Libya and Redress Trust, applied to PTC I for leave to submit joint observations on three main points raised by Mr Gaddafi’s admissibility challenge. This request was made pursuant to rule 103(1) of the Rules of Procedure and Evidence of the Court relating to the making of submissions by *amicus curiae*. PTC I granted this application on 5 September 2018.
8. 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 Court. Additionally, the OTP argued that, as a fugitive from justice both in Libya and before the ICC, Mr Gaddafi does not have procedural standing to challenge admissibility. Further, the OTP submitted that Mr Gaddafi has not been tried in Libya for the purposes of articles 17(1)(c) and 20(3) of the Statute. However, the OTP agreed with Mr Gaddafi that, based on the information contained in the *in absentia* judgment issued against him by the Tripoli Court of Assize, those proceedings did relate to substantially the same conduct as his case before the ICC.
9. Also on 28 September 2018, the OPCV submitted its observations on the admissibility challenge, and Lawyers for Justice in Libya and Redress Trust filed their joint *amicus curiae* observations. In its observations, the OPCV requested that PTC I find the case against Mr Gaddafi admissible before the ICC.
10. One of the significant issues being litigated in the admissibility proceedings is whether Mr Gaddafi has received an amnesty in Libya, the effect of this purported amnesty on his domestic proceedings, and the potential implications of the application of any such amnesty for the admissibility of Mr Gaddafi’s case before the ICC.
11. Mr Gaddafi stated in his admissibility challenge that he was released from custody in Zintan on about 12 April 2016. His current whereabouts are not known to the OTP. The United Nations Panel of Experts on Libya, in its report of 5 September 2018, noted that it had met with a lawyer for Mr Gaddafi who had confirmed that Mr Gaddafi was in Zintan where he has freedom of movement.
12. Libya, in its response to the OTP’s request for assistance, stated that it had been unable to substantiate reports that Mr Gaddafi had been released from custody. It stated that Mr Gaddafi was wanted for arrest and that efforts were continuing in order to transfer him into the custody of the competent authorities of Libya. It confirmed that, as previously submitted to PTC I by the Government of Libya, in accordance with Libyan law, if Mr Gaddafi appears or is arrested, his *in absentia* conviction shall be annulled and

the case re-tried. It further confirmed that the application of the death penalty imposed on Mr Gaddafi by the Tripoli Court of Assize on 28 July 2015 is absolutely prohibited under Libyan law because the judgment against Mr Gaddafi was issued *in absentia*.

13. Notwithstanding the current admissibility proceedings, Libya remains under an obligation to arrest and surrender Mr Gaddafi to the ICC. The ICC warrant for Mr Gaddafi's arrest has been outstanding for seven years, since its issuance on 27 June 2011. Despite, on Mr Gaddafi's account, having been released from custody more than two years ago, he has given no indication that he will surrender himself to the ICC or to the competent authorities of Libya. To the contrary, one of his lawyers reportedly stated to the media in June 2017 that Mr Gaddafi would not be turning himself in to the custody of the ICC. While Mr Gaddafi remains at large, there can be no justice for his alleged crimes, whether in Libya or before the ICC.

Abdullah Al-Senussi

14. As the Council is aware, 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. The Office has not received any reports regarding developments in the domestic case against Mr Al-Senussi, which is currently before the Supreme Court of Libya. The Office will continue to monitor for any such developments.

3. THE CASE AGAINST MAHMOUD MUSTAFA BUSAYF AL-WERFALLI

15. On 15 August 2017, a public warrant of arrest was issued for Mahmoud Mustafa Busayf Al-Werfalli ("Mr Al-Werfalli") in relation to seven execution incidents in which 33 people were allegedly murdered. In its previous report to the Council, the Office noted that despite the issuance of this arrest warrant, there was credible evidence that Mr Al-Werfalli had committed further murders in Benghazi in January 2018.
16. On 1 May 2018, the OTP requested that PTC I amend the warrant of arrest for Mr Al-Werfalli to add an eighth execution incident in which 10 people were allegedly murdered. The OTP alleged that on 24 January 2018 in front of Bi'at al-Radwan Mosque in the Salmani District of Benghazi, Mr Al-Werfalli shot in the head, at close range, ten people who were blindfolded, dressed in light blue jumpsuits, and kneeling in a row with their hands tied behind their backs. Mr Al-Werfalli is alleged to have then fired indiscriminately at their bodies where they had collapsed on the ground.
17. This eighth execution incident was allegedly carried out by Mr Al-Werfalli in retaliation for the detonation of two car bombs in front of Bi'at al-Radwan Mosque on 23 January 2018. These bombings, which were condemned by the ICC Prosecutor in a public statement on 26 January 2018, reportedly killed at least 34 civilians, including at least two children.
18. As with the seven executions that are the subject of the first warrant of arrest against Mr Al-Werfalli, this incident was filmed and the video posted to social media.

19. On 4 July 2018, PTC I decided on the OTP's request and issued a second public warrant of arrest for Mr Al-Werfalli. 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 eighth execution incident, described above.
20. As with the first warrant of arrest, PTC I found reasonable grounds to believe that the persons killed in this incident had either been placed *hors de combat* or were civilians taking no active part in hostilities. 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 crime was sufficiently linked with the situation that triggered the jurisdiction of the Court through the Council's referral.
21. Further, on this occasion, PTC I exercised its discretion to determine the admissibility of Mr Al-Werfalli's case before the ICC. PTC I held 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 Statute.
22. Two warrants of arrest are now outstanding for Mr Al-Werfalli in relation to a total of eight execution incidents in which 43 people were allegedly murdered. The information available to the OTP indicates that Mr Al-Werfalli is currently at large in Libya. The primary responsibility to arrest and surrender Mr Al-Werfalli to the ICC rests on Libya. The Office calls on Libya to take all necessary steps to effect the arrest and surrender of Mr Al-Werfalli to the ICC, where he will receive a fair, impartial and public hearing of the allegations against him.

4. THE CASE AGAINST AL-TUHAMY MOHAMED KHALED

23. The warrant of arrest against Al-Tuhamy Mohamed Khaled ("Mr Al-Tuhamy"), issued on 18 April 2013 and made public on 24 April 2017, remains unexecuted. The OTP, in cooperation with the ICC Registry, continues its efforts to secure his arrest and surrender to the Court. However, the prospects for achieving Mr Al-Tuhamy's arrest remain dependant on the willingness and capacity of both States Parties and non-States Parties to cooperate with the ICC.
24. At the request of the OTP, INTERPOL has issued a Red Notice in relation to Mr Al-Tuhamy, which is published on its Wanted Persons public website.
25. The Office again appeals to all States to cooperate with the Court to effect the arrest and surrender of Mr Al-Tuhamy without further delay. The Council must unreservedly support the Office in this call for assistance. If ICC fugitives are allowed to remain at large, the mandate of the Court to hold those responsible for the most serious crimes of concern to the international community will continue to be frustrated, and the Council's referral of the situation in Libya to the ICC will be rendered ineffective.

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

26. The Office continues to broaden and strengthen the evidence in relation to its existing cases through focussed investigations. Additionally, the OTP is investigating other allegations of serious criminal activity with a view to the potential opening of new cases. The Office continually monitors ongoing events in Libya, and collects and analyses information from a variety of sources.
27. The Office has taken particular note of the sharp escalation of violence in and around Tripoli since 26 August 2018. Armed clashes in residential neighbourhoods, including the use of indiscriminate fire and heavy weapons, reportedly led to heavy loss of life. Many of the reported casualties were civilians, including children. The fighting reportedly caused the displacement of thousands of families. Despite the UN-brokered ceasefire signed on 4 September 2018, outbreaks of violence in the capital continued through September.
28. In its previous report, the Office noted in particular the continuing armed conflict in Derna, where a Libyan National Army (“LNA”) imposed siege was still in place in some areas of the city. Fighting in Derna intensified in May 2018 as LNA forces launched an offensive to take control of the city. The ensuing clashes reportedly led to many civilian deaths, including women and children, and the displacement of many hundreds of local families. Humanitarian access was reportedly severely restricted. On 12 June 2018, a video emerged on social media appearing to show the summary execution of two captured men by fighters allegedly affiliated with the LNA. The LNA reportedly took control of Derna at the end of June 2018, although fighting on a smaller scale has continued thereafter.
29. Armed conflict also continued during the reporting period in other areas of Libya, including in the oil crescent region and in southern Libya, in particular, in and around Sabha. Islamic State of Iraq and the Levant claimed responsibility for an attack on the High National Election Committee headquarters in Tripoli on 2 May 2018, which caused the deaths of at least 13 people. An apparent car bomb attack in Benghazi on 24 May 2018 reportedly claimed at least seven lives.
30. The abduction of military, civil society, political or foreign targets, or their relatives, remains a serious problem in Libya, as does the prolonged detention of persons without trial or other legal process.
31. The Office has previously noted that the Misrata-Tawergha agreement of August 2016 has yet to achieve full implementation to allow the safe return of the Tawergha community. In this context, it notes with concern reports of the forced eviction of the entire population of the Tariq al-Matar settlement, Tripoli in August 2018. This settlement had housed approximately 370 families displaced from Tawergha in 2011, now displaced for a second time.

Crimes against migrants

32. The Office continues to investigate and monitor allegations of continued crimes committed by militias and armed groups in Libya, and in this context, puts a particular focus on crimes allegedly committed against international migrants transiting through Libya.
33. The International Organization for Migration reported in August 2018 that the number of migrants held in detention centres had soared due to a surge in the numbers of persons intercepted at sea and returned to Libya. The OTP continues to receive reports of allegations of crimes committed against migrants held in detention centres, including killings, sexual violence and torture. Furthermore, the Office is cognisant of the differences in victimisation experienced by women and men in the migrant context, and integrates this gender perspective and analysis in its work, in line with its June 2014 Policy Paper on Sexual and Gender-Based Crimes.
34. The complex and volatile situation in Libya comprising allegations of a wide range of international, transnational and domestic crimes requires a multi-layered and multi-party strategic approach by the international community in cooperation with the Libyan state. The Office therefore continues to work collaboratively with a range of States and organisations in the spirit of the principle of complementarity enshrined in the Rome Statute, and in line with Strategic Goal 9 of the Office's Strategic Plan for 2016-2018, which aims at closing a prevailing impunity gap through enhanced coordination.
35. This work includes active engagement with States and organisations to gather, exchange and analyse information in relation to alleged crimes committed against migrants in Libya. Efforts are made to identify which entity is in the best position to investigate or prosecute these crimes. As much as possible, assistance is also provided to relevant national authorities to effectively conduct their own investigations and prosecutions, with the support of the OTP in accordance with article 93(10) of the Rome Statute.

6. COOPERATION

36. The cooperation of States Parties, as well as non-States Parties, is of utmost importance for the Office, and the Court as a whole, in order to succeed in its mission. In paragraph 5 of Resolution 1970 (2011) referring the situation in Libya to the International Criminal Court, the Security Council "urge[d] all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor." In 2014, the Council reaffirmed the importance of the Government of Libya's cooperation with the Court and the Prosecutor in its Resolution 2174 (2014).
37. The nature of the cooperation that the Office seeks covers a wide range of activities, including but not limited to the seizure of evidence, the interviewing of witnesses, the freezing of assets, and assistance in the arrest and surrender of fugitives.

38. Since its last report to the Council, the Office has continued to rely on the excellent cooperation of a wide variety of States and organisations for its investigative efforts. In this regard, the Office is grateful for the assistance it receives from the Libyan Prosecutor-General's office, and appreciates the cooperation from various States, in particular, The Netherlands, Tunisia, Italy, and the United Kingdom, among others, as well as international and regional organisations and civil society groups. The Office extends its appreciation, in particular, to INTERPOL for its continued assistance in efforts to arrest and surrender ICC fugitives.
39. The Office notes Resolution 2434 (2018) of 13 September 2018 extending the mandate of the United Nations Support Mission in Libya ("UNSMIL") until 15 September 2019, and highlights its appreciation for the cooperation it receives from UNSMIL. The Office welcomes the final report of the Panel of Experts on Libya, established pursuant to Resolution 1973 (2011), which was submitted to the Security Council on 5 September 2018. It also takes note of the listing, on 7 June 2018 and 11 September 2018 respectively, of seven additional individuals onto the sanctions list established by the Security Council Committee concerning Libya (established pursuant to Resolution 1970 (2011)), in relation to their suspected activity with transnational trafficking networks.

7. CONCLUSION

40. Accountability for crimes under the Rome Statute and full respect for the rule of law are integral to sustainable peace, stability and development in Libya. The Office remains steadfast in its commitment to bring justice to victims of atrocity crimes in Libya.
41. The appalling cycle of violence, criminality and impunity cannot be allowed to continue for the sake of the Libyan people and the security and stability of the country and the region. A crucial step in combatting impunity for serious crimes is the arrest of Mr Gaddafi, Mr Al-Tuhamy and Mr Al-Werfalli and their surrender to the Court. The Office urges States Parties and non-States Parties to take all possible steps to this end.
42. The Office also calls on the Council to take appropriate and effective measures to enable the Court to carry out its mandate in Libya, including by encouraging all States to cooperate with the OTP's investigations and the Court's efforts to arrest fugitives.
43. The Office continues to stand with all States and organisations committed to the fight against impunity for atrocity crimes and calls on others to similarly demonstrate their support for the Court and the cause of international criminal justice. | otp