



## Twelfth 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.
2. Since 2011, the Office of the Prosecutor (“OTP” or “Office”) has provided eleven biannual reports and updates to the Council. This is the OTP’s twelfth report and update on its activities regarding the situation in Libya.

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

#### *Saif Al-Islam Gaddafi*

3. As indicated in its eleventh report to the Council, the Office filed a request with Pre-Trial Chamber I on 26 April 2016, seeking an order directing the Registry to transmit a request to Mr al-’Ajami al-’Atiri (“Mr al-’Atiri”) for the arrest and surrender of Saif Al-Islam Gaddafi (“Mr Gaddafi”) to the Court. Mr al-’Atiri commands the Abu-Bakr al-Siddiq Battalion in Zintan, Libya and has control of Mr Gaddafi. This request was part of the Office’s efforts to explore other avenues through which Mr Gaddafi could be surrendered to the Court.
4. On 2 June 2016, Pre-Trial Chamber I ordered the Registrar to communicate with the Libyan authorities to inquire:
  - i. whether there has been any recent coordination or liaison between the Libyan authorities and the militia in Zintan;

- ii. whether the Libyan authorities would agree that a request for arrest and surrender of Mr Gaddafi to the Court be addressed to the militia in Zintan; and, if so
  - iii. whether the Libyan authorities would either facilitate, in accordance with their obligation to fully cooperate with the Court, the transmission to the relevant local authorities in Zintan of such a request or, alternatively, agree for direct transmission by the Court of that request to those local authorities.
- 5. On 28 October 2016, the Registry filed an update on the implementation of the Pre-Trial Chamber's order. This update contained, in a confidential annex, a reply from the Libyan Attorney General's Office, dated 29 September 2016. The Registry sought guidance on what further course of action to take to communicate with the relevant Libyan authorities. The Office is awaiting Pre-Trial Chamber I's decision on next steps in relation to this matter.
- 6. Various reports circulated in the press beginning in early July 2016 claiming that Mr Gaddafi had been released from detention. These included a report of a statement by a lawyer acting on behalf of Mr Gaddafi, that Mr Gaddafi was released on 12 April 2016 pursuant to an amnesty previously declared by the Tobruk Parliament. The Office has since received information from the Libyan Prosecutor-General's office, and other reliable sources, that these reports were not correct and that Mr Gaddafi remains under the control of Mr al-'Atiri's militia in Zintan.
- 7. Regardless of the veracity of these reports, it is clear that Mr Gaddafi remains outside the custody and control of the Presidency Council of the Government of National Accord.
- 8. The Office recalls that the Presidency Council of the Government of National Accord issued a public statement on 10 July 2016, affirming that the charges against Mr Gaddafi are not subject to a statute of limitations and that a general or specific amnesty does not apply, in accordance with international conventions and international human rights law. At any rate, the Office considers that any such supposed amnesty would not have any legal effect before the ICC and would not preclude proceeding with the case against Mr Gaddafi before the Court.

9. The Office is still awaiting the full report of the UN Support Mission in Libya (“UNSMIL”) on the conduct of the domestic trial of Abdullah Al-Senussi (“Mr Al-Senussi”). At this stage, the Office remains of the view that no new facts have arisen which negate the basis on which Pre-Trial Chamber I found Mr Al-Senussi’s case inadmissible before the ICC. This assessment is based on the information currently available to the Office. In accordance with article 19(10) of the Rome Statute, the Office continues to collect information and review its assessment as and when new information becomes known. In this regard, the Office recalls the ICC Appeals Chamber’s finding that due process violations in a domestic trial must reach a high threshold in order for a case to be deemed admissible before the ICC.

*Allegations of Torture and Ill-Treatment in the Al-Hadba prison*

10. As previously reported to the Council, warrants of arrest have been issued by the Libyan authorities against three individuals in relation to the allegations of torture or similar inhumane acts committed in Al-Hadba prison against Saadi Gaddafi, the brother of Mr Gaddafi. The Office understands that these warrants are still outstanding. In addition, the Office has received reports that one of these three individuals has returned to a position of authority in Al-Hadba prison. The Office has not yet been able to confirm this information.
11. The Office has not received any information to suggest that any mistreatment allegedly suffered by Mr Al-Senussi in Al-Hadba prison prior to his trial either affected the conduct of his trial or would otherwise negate the basis of Pre-Trial Chamber I’s decision on admissibility.
12. Mindful of Libya’s obligations to hold accountable those responsible for torture or similar inhumane acts in Al-Hadba prison, the Office will continue to monitor the situation regarding these allegations.

### **3. THE ONGOING INVESTIGATION**

13. The unstable security situation persists in Libya. This instability currently precludes the Office from conducting investigations within Libyan territory in relation to both existing and possible new cases. The Office continues to assess the security situation in Libya through a variety of sources, with the aim of returning to the country to conduct *in situ* investigations as soon as possible. The Office is also constantly looking to mitigate the corresponding security risks and will continue to work in partnership with the Libyan

Prosecutor-General's office to find a suitable solution that will permit the safe conduct of investigative missions. Working outside of Libya, the Office has been successful in continuing to conduct investigations and collect important evidence. Despite the continuing resource challenges, in 2017 the Office intends to expand significantly its investigations into crimes committed from 2011, including current instances of alleged grave criminal behaviour falling under the Court's jurisdiction.

14. The Office continues its investigations of crimes based on its November 2013 Memorandum of Understanding on Burden Sharing with the Libyan authorities, and continues to receive support and material from the Libyan Prosecutor-General's office. This material is being analysed, avenues of enquiry exploited, and interviews conducted to further the Office's investigations.
15. In its various resolutions, the Council has repeatedly condemned crimes allegedly committed by the so-called Islamic State in Iraq and the Levant ("ISIL"), Ansar Al-Sharia, and other parties to the conflict in Libya. The Office is fully aware that parties to the conflict in Libya continue to commit atrocities, some of which may amount to crimes within the Court's jurisdiction, with civilians suffering the consequences of protracted fighting and abuses resulting from the breakdown of law and order. The Office is aware, as UNSMIL recently reported to the Council, that Tripoli remains controlled by more than 40 rival armed groups originating from the capital and nearby areas.
16. Due to the seriousness of the present situation of widespread violence and impunity in Libya, as discussed below in Section 6, and the identified possibilities to progress investigations, the Office is determined to ensure that investigations into the Libya situation will be one of its priorities in 2017.
17. Increased investigation into crimes that are alleged to have occurred post-2011 will require substantial resources in order to enable the Office to continue to conduct its work effectively. The Office will therefore significantly increase the resources it dedicates to the Libya investigation. The allocation of such resources will inevitably come at the expense of other investigations required in other situations. In addition, within the Libya situation itself, the Office will be forced to prioritise between investigating competing, equally serious alleged crimes. The Office once again invites this Council to support and facilitate financial assistance by the United Nations for the Libya investigations, to ease the overall financial burden placed on the Office by the Council's referral.

18. Given its resource constraints, the Office is also actively pursuing its Strategic Goal 9, pursuant to which it seeks to develop coordinated investigative and prosecutorial strategies with partners to further close the impunity gap for ICC crimes. To that end, the Office has taken concrete steps by identifying, contacting, liaising and working with national law enforcement agencies who are actively working on Libya related investigations. In particular, the Office is engaging with those agencies investigating individuals involved in facilitating and financing illegal migration through Libya. A two-day operational meeting was held in The Hague in October 2016, bringing together judicial and investigative agencies from multiple States. It was clear from the meeting that both national and transnational investigations that are being conducted by various agencies are interlinked with the Office's investigations. An agreement was reached in principle for the Office to work collectively with these States in a coordinated manner, and with respect for each other's independent mandates, with a view to enhancing efforts to fully investigate crimes that fall within their respective remit.

#### **4. ADDITIONAL WARRANTS OF ARREST**

19. The Office's efforts in regards to the arrest of additional suspects have advanced significantly since the last report. The Office intends to apply for new warrants of arrest under seal as soon as practicable and hopes to have new arrest warrants served in the near future. Timely execution of these new arrest warrants will be crucial, and will require coordinated efforts, likely including support from the Council.

#### **5. COOPERATION**

20. Paragraph 5 of Council Resolution 1970 "urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor." The Office appreciates the cooperation it continues to receive from regional States, in particular from the Tunisian and Jordanian authorities, both of whom have continued to facilitate the Office's investigations regarding the Libya situation.

21. In paragraph 5 of Resolution 1970, the Council also "[d]ecides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution." The Office emphasises once again that it is highly appreciative of the operational investigative support, advice and evidence it continues to receive from the Libyan Prosecutor-General's office. Despite the difficult circumstances in which the Libyan Prosecutor-General's office finds itself, the most recent meeting held in October 2016 with that office's Head of Investigations was again

highly productive. Avenues for further cooperation were discussed in an open and frank manner.

22. Investigations of this complex nature cannot produce positive results without meaningful and timely cooperation. To that end, the Office appreciates the cooperation provided by both States Parties and non-States Parties, particularly in respect of Requests for Assistance. Almost all States are responding to the Office's requests within reasonable periods, save for a few exceptions where there have been inordinate delays. The Office urges all States that have not responded to its requests to do so without further delay.
23. The Office also notes with appreciation the Council's Resolution 2291 (2016) dated 13 June 2016, extending UNSMIL's mandate until 15 December 2016. In particular, the Office notes the Resolution's pronouncement "further reiterating [the Council's] call upon all parties to cooperate fully with the activities of UNSMIL, including taking necessary steps to ensure the security and unhindered movement for the UN and associated personnel." The security and safety of ICC staff is equally important and essential for the Office's investigative activities. The Office thus calls upon the Council to ensure that such a request to all parties to cooperate and ensure the security of UN and associated personnel is expressly extended to ICC personnel who conduct investigations in Libya. Doing so will facilitate the Office's efforts to conduct investigations within the territory of Libya.
24. The Office emphasises that the cooperation of States, including through the provision of adequate resources, is key to the success of the Office's investigative activities in the Libya situation.

## **6. THE CRIMES ALLEGEDLY COMMITTED BY THE DIFFERENT PARTIES IN LIBYA SINCE 15 FEBRUARY 2011**

25. The Office continues to receive from non-governmental organisations, private citizens and other sources, information and potential evidence of acts that *prima facie* appear to constitute crimes within the jurisdiction of the Court. In particular, these include attacks that impact upon the civilian population, preventing them from fleeing violence and from obtaining access to food, medicine, and other basic needs. The Office strongly condemns any such attacks, and will continue, to the extent it can, taking into account its resource limitations, to review this information and evidence and to assess the potential to expand its investigations accordingly.

26. During this reporting period, executions, including by ISIL and other Islamist aligned groups, were again reported as the cause of the largest number of killings in Libya. Although reports suggest a decrease in the number of executions by ISIL or other Islamist aligned groups, this may be a result of increased combat operations against these groups by government aligned armed groups. There have been increased reports of the identification of mass graves and the mass dumping of bodies. The Office is also concerned that civilian deaths have allegedly been caused by indiscriminate airstrikes, shelling, gunfire or other crossfire during clashes. Although the number of victims has reportedly decreased, abductions, mainly in Tripoli, continue. Unlawful detentions, both conflict and migrant related, continue to be reported. In addition, the Office has received reports of significant civilian displacements due to increased combat operations. The Office notes reports that over 300,000 internally displaced persons have returned to their homes. Nevertheless, the total number of internally displaced persons in Libya is reportedly around 350,000.

## **7. CONCLUSION**

27. The Office appreciates the cooperation it continues to receive from different stakeholders including regional actors and other states in relation to the situation in Libya.
28. The Office again underscores its particular appreciation to the staff of the Libyan Prosecutor-General's office for the ongoing support and cooperation they provide in difficult and challenging circumstances.
29. The Office reiterates Libya's obligation to surrender Mr Gaddafi to the ICC. The Office recalls that Libya's continuing failure to do so led Pre-Trial Chamber I, on 10 December 2014, to make a finding of non-compliance by Libya. The Pre-Trial Chamber referred this finding to the Council in accordance with regulation 109(4) of the Regulations of the Court. In its Resolution 2238 (2015), the Council noted both this non-compliance decision and the request of the Prosecutor to the Pre-Trial Chamber, dated 30 July 2015, that Libya immediately surrender Mr Gaddafi to the Court. The Office invites the Libyan authorities to ensure that Mr Gaddafi is transferred to the ICC in line with their obligation and urges the Council to take appropriate steps to ensure Libya's timely compliance with the Pre-Trial Chamber's order.
30. The Office reiterates its commitment to allocating additional resources to the investigations of current crimes, in an effort to alleviate the suffering of civilians who continue to bear the brunt of the fighting and grave crimes allegedly being perpetrated

in Libya. The Office underscores that increasing its investigations in Libya will necessarily be at the expense of investigations in other situations. The Council referred the Libya situation to the Court. The Office continues to urge the Council to support its on-going efforts in Libya, and in particular, to support and facilitate financial assistance by the United Nations for investigations in 2017. Regrettably, the Council has so far failed to provide any meaningful support, financial or otherwise, to the Office's work in Libya.

31. The Office welcomes the 31 August 2016 Misrata-Tawergha Agreement on the Return of the Displaced and Compensation for those Affected. In particular, the desire stated in this agreement, to achieve social peace, justice and reparation, establish the rule of law and contribute to preventing recurrence of past mistakes or propagating them to future generations, is commendable. The Office encourages other such initiatives aimed at improving the lives of the people of Libya.
32. The Office looks forward to continuing to work with the Presidential Council and the Government of National Accord, UNSMIL, the Council and individual States to combat the current climate of impunity for Rome Statute and other crimes in Libya. | OTP