

FIFTH REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UN SECURITY COUNCIL PURSUANT TO UNSCR 1970 (2011)

INTRODUCTION

1. On 26 February 2011 the United Nations Security Council unanimously adopted Resolution 1970 (2011), referring the situation in Libya since 15 February 2011 to the Prosecutor of the International Criminal Court, and inviting the Prosecutor to address the Security Council every six months on actions taken pursuant to this resolution.
2. In its first report, presented to the Council on 4 May 2011, the Office announced that it would “*submit its first application for an arrest warrant to Pre-Trial Chamber I in the next weeks*” and that it would “*focus on those most responsible for crimes against humanity in the territory of Libya since 15 February 2011.*”
3. In its second report, on 2 November 2011, the Office reported that on 16 May 2011, the Office had requested arrest warrants against three individuals. According to the evidence, these individuals were most responsible for the attacks against unarmed civilians on the streets and in their houses in Benghazi, Tripoli and elsewhere, during the month of February 2011. On 27 June 2011, the Judges of Pre-Trial Chamber I issued warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi for murders as a crime against humanity under article 7(1)(a) and persecution as a crime against humanity under article 7(1)(h).
4. In its third report, on 16 May 2012, the Office noted Pre-Trial Chamber I’s termination of the case against Muammar Gaddafi on 22 November 2011 and the arrests of Saif Al-Islam Gaddafi in Libya on 19 November 2011 and of Abdullah Al-Senussi in Mauritania on 17 March 2012. The Office noted, as well, the 1 May 2012 admissibility challenge, brought by the Libyan government, in the Saif Al-Islam Gaddafi case.
5. In its fourth report, the Office provided updates on the admissibility process for Saif Al-Islam Gaddafi, on the arrest of Abdullah Al-Senussi in Mauritania and his subsequent extradition to Libya, as well as on the ongoing investigations.
6. This fifth report will address:

- a. Cooperation;
- b. The case of Saif Al-Islam Gaddafi, and Abdullah Al-Senussi, including admissibility;
- c. The ongoing investigation; and
- d. The crimes allegedly committed by the different parties in Libya since 15 February 2011.

1. COOPERATION

- 7. Paragraph 5 of UNSCR 1970 (2011) *“urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor.”* Insofar as States Parties to the Rome Statute are concerned, the Statute provides an existing framework of obligations in accordance with Part IX of the Statute.
- 8. The Office continues to seek cooperation from States Parties and non-States Parties alike, as well as from the UN, Interpol, NGOs and other organizations. The Office has submitted more than 160 requests for assistance during the investigation thus far, some of which have yet to be fully executed. The Office encourages partners to cooperate as fully as possible without unnecessary preconditions or restrictions to ensure the effectiveness of the investigation.

1.1 The Government of Libya

- 9. Security Council Resolution 1970 *“Decides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”*, since reaffirmed in Resolution 2095, adopted on 14 March 2013.
- 10. The period leading up to the elections in Libya presented a number of challenges including security challenges thus limiting contact with the Government of Libya. Following elections held on 7 July 2012, and the formation of the new Libyan government under Prime Minister Ali Zeidan on 14 November 2012, as well as the subsequent appointment of a new Prosecutor General, Mr. Abdul Qader Radwan, on 17 March 2013, the Office has renewed contacts with the new administration. On 19 April 2013 Mr. Radwan and the designated ICC focal point, Dr. Ahmed El Gehani, visited the The Hague at the invitation of the Prosecutor. The ensuing constructive and fruitful discussions between the Office and the Libyan delegation focused on cooperation and coordination of efforts to advance the Office’s investigative activities

both within and outside Libya. Areas of future possible cooperation and coordination of investigations were explored. These preliminary positive discussions illustrated the willingness of the Office and of the Government of Libya to cooperatively work together in furthering investigations that could lead to arrest and surrender of alleged perpetrators, both inside and outside Libya.

11. Unfortunately, a scheduled mission to Tripoli from 30 April-1 May to discuss these issues at the highest political level had to be postponed due to security concerns. The Office will reschedule the visit to Tripoli as soon as circumstances permit. The Office is of the firm view that the strength of the Rome system lies in the possibility for shared responsibility and complementary actions between the Court and Libyan national judicial institutions and hopes to explore possibilities for mutually reinforcing activities between the Government of Libya and the Court in fostering complementarity.

1.2 The UN (Commission of Inquiry)

12. The Office continues to maintain contact with the Office of the High Commissioner for Human Rights, which remains the depositary of the work of the Commission of Inquiry. The Office appreciates the cooperation of the Office of the High Commissioner in its ongoing investigations.

1.3 NATO

13. The Office continues to communicate with NATO authorities to address concerns raised in the UN Commission of Inquiry's report regarding the possible incidental loss of life. The Office is in contact with NATO authorities, as well as Libyan authorities about their own investigations into these limited number of incidents. The Office reiterates its finding that there is no information to conclude that the NATO air strikes which may have resulted in civilian death and injury or damaged civilian objects were the result of the intentionally directing of attacks against the civilian population as such or against civilian objects which would be clearly excessive to the anticipated military advantage. The Office encourages NATO to cooperate fully in Libya's national efforts to investigate civilian casualties. The Office appreciates NATO's cooperation in this regard and will continue to monitor the situation.

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

14. It is worth recalling that the Government of Libya is acting fully in compliance with the Statute in challenging the admissibility of the Saif al-Islam Gaddafi and Abdullah Al-Senussi cases. Admissibility entails an assessment of the existence of relevant national

proceedings and their genuineness, pursuant to Articles 17(1)(a)-(c). This is a judicial issue, and is ultimately subject to determination by the Chambers of the Court. It includes an assessment of whether a State is conducting genuine proceedings in relation to those bearing the greatest responsibility for the most serious crimes. As required by Article 17 of the Statute, the assessment relates to whether a State has investigated or prosecuted, or is investigating or prosecuting, in a genuine manner, cases selected or considered for selection by the Prosecution. It is an examination of relevant national proceedings in relation to the person and the conduct which forms the subject of the Prosecution's case hypothesis.

15. As the Office noted in its May 2012 report, the admissibility challenge in relation to the case against Saif Al-Islam Gaddafi has, pursuant to the requirements of Article 19(7), resulted in the suspension of the Office's investigations into Saif Al-Islam Gaddafi's case. As of 2 April 2013, the investigations into Abdullah Al-Senussi's case have likewise been suspended following the submission of an admissibility challenge in respect of this case as well. Since his transfer from Mauritania to Libya on 5 September 2012, Abdullah Al-Senussi has remained in detention in Tripoli. Saif Al-Islam Gaddafi has remained in detention in Zintan.

3. ADMISSIBILITY OF THE CASE AGAINST SAIF AL-ISLAM GADDAFI AND ABDULLAH AL-SENUSSI

16. On 11 February 2013, the Office of the Prosecutor responded to the Government of Libya's further submissions on issues related to admissibility of the case against Saif Al-Islam Gaddafi, arguing that while Libya has taken some concrete investigative measures, the material thus far provided is insufficient to establish that Libya is investigating the same case. The Office of the Prosecutor argues further that, given the challenges that Libya is facing in this transitional post-conflict stage and the fact that it has secured relevant international assistance, Libya should be afforded reasonable time to provide additional materials to demonstrate that it is investigating the same case.
17. On 4 March 2013, the Office of Public Counsel for Defense requested the Pre-Trial Chamber to withdraw its representation of Saif Al-Islam Gaddafi and to appoint instead John R.W.D. Jones as defense counsel; the Pre-Trial Chamber agreed to do so in a decision of 17 April 2013.
18. On 2 April 2013, the Government of Libya filed an admissibility challenge under Article 19(2)(b) of the Rome Statute, asserting that the government is investigating and prosecuting Abdullah Al-Senussi for the same case as the Office of the Prosecutor. In its

response of 24 April, the Office of the Prosecutor asserted that it believes on the basis of the Libyan submission that the case against Abdullah Al-Senussi is inadmissible and should therefore be prosecuted at the national level, but adds that the Court, including the Prosecution, should take steps to monitor the ongoing progress of Libya's investigation and prosecution to ensure that it continues to be able to investigate and prosecute the same case as is before the ICC.

19. In accordance with a decision of the Pre-Trial Chamber of 26 April 2013, the Security Council has already been notified of the public redacted version of the Government of Libya's admissibility challenge in the Abdullah Al-Senussi case, for purposes of submitting observations, should the Council choose to do so, as is its right pursuant to Article 19(3) of the Rome Statute, read in conjunction with rule 59 of the Rules of Procedure and Evidence. The Pre-Trial Chamber has invited comments from the defense, from the Office of Public Counsel for Victims, and from the Office of the Prosecutor, if the Office seeks and receives leave to submit additional comments, by 14 June 2013.
20. The Pre-Trial Chamber has asked the Registrar to provide a report on the status of the arrangements of the visit to Mr. Al-Senussi by his defense counsel by 3 May 2013. The Judges of the Pre-Trial Chamber will decide whether the cases remain admissible before the ICC.

4. THE ONGOING INVESTIGATION

21. In its fourth report to the UN Security Council, on 16 May 2012, the Office noted that it was proceeding with a second case in relation to gender crimes and was also collecting evidence against other possible suspects outside of Libya. The Office continues with its investigations in this regard, with a focus in particular on pro-Gaddafi officials outside of Libya, who continue to pose a security threat to the newly established Government of Libya. The Office hopes to work closely with the Government of Libya to address this threat. The investigation of members of the Gaddafi regime outside Libya is in pursuance of the Office's policy to bring to justice those who bear the greatest responsibility for the most serious crimes.
22. As regards the allegations of crimes committed by rebel forces, the Office remains concerned about the situation in Tawergha, a town near Misrata. The Office has reviewed allegations that civilians there were subject to killings, looting, property destruction, and forced displacement by Misrata militias, and also that Misrata militias are preventing Tawergha civilians from returning to their homes. The Office noted that

murder, torture and cruel treatment, and pillaging could constitute war crimes, and that acts of torture, if committed in the context of a widespread or systematic attack against a civilian population, could constitute crimes against humanity. The Office continues to collect information to determine whether a new case should address these allegations. The Office efforts in this regard are being hindered by security concerns which have prevented missions to Libya since mid-2012. The Office looks forward to working closely with the Government of Libya in this process.

23. The Office also remains concerned about the alleged use of arbitrary detention and of torture against persons in custody but outside of government control, and the alleged persecution of specific ethnic groups on the basis of perceived affiliations with Gaddafi including sub-Saharan Africans and members of the Tuareg, Tobu and Tawareg minorities. Further, the Office also notes with concern the alleged execution of over fifty persons on the grounds of the Mahari Hotel in Sirte in October 2011 and Libyan government and militia forces operations in Bani Walid commencing in September 2012 which allegedly led to arbitrary detention, torture, killings and destruction of property.

5. CONCLUSION

24. The Office appreciates the challenges facing the newly elected government and expresses its willingness to support the government in trying to address as many cases as possible.
25. The Office commends the engagement of the Libyan Government in the judicial process at the ICC, and encourages the government to do everything in its power to provide the information needed by the ICC's judges to properly assess its admissibility challenge under the Rome Statute.
26. The Office also encourages the Libyan Government to formulate, make public, and implement, as much as possible, a comprehensive strategy to address the crimes. This will demonstrate that justice remains a key priority, underpinning efforts to ensure peace and stability in Libya, and that victims of all crimes will have the opportunity to seek resolution through the courts.
27. Given the extensive crimes committed in Libya and the challenges facing the new Libyan Government, the ICC's mandate is still essential to ending impunity in Libya. The Office plans to take a decision regarding a second case in the near future, and will consider additional cases after that, depending on the Government of Libya's progress in implementing its comprehensive strategy.