



## NINETEENTH 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 nineteenth 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. On 9 March 2020, the Appeals Chamber unanimously confirmed the admissibility of the case against Saif Al-Islam Gaddafi (“Mr Gaddafi”) before the Court. The Appeals Chamber rejected Mr Gaddafi’s appeal, and upheld the 5 April 2019 decision of Pre-Trial Chamber I (“PTC I”) dismissing Mr Gaddafi’s admissibility challenge.
3. The Appeals Chamber issued its judgment following a two-day hearing held on 11 and 12 November 2019. In the course of this hearing, the Appeals Chamber heard submissions and observations on the appeal from Mr Gaddafi’s legal representatives, the Office of the Prosecutor, the Office of Public Counsel for Victims, representatives of the State of Libya, and a number of *amici curiae*.
4. In its judgment, the Appeals Chamber found that PTC I had correctly interpreted articles 17(1)(c) and 20(3) of the Rome Statute to require that the decision issued by a national jurisdiction must be final before a case can be declared inadmissible on the basis of these provisions. It emphasised that this interpretation is in line with the Court’s complementarity framework, which recognises the primary role of States to investigate and prosecute cases within their own jurisdictions.
5. More specifically, the Appeals Chamber held that PTC I did not err in finding that the 28 July 2015 judgment of the Tripoli Court convicting Mr Gaddafi and sentencing him to death had been rendered *in absentia*. The Appeals Chamber noted that, due to its *in absentia* nature, this judgment cannot be considered final given that, under Libyan law, a retrial must take place if Mr Gaddafi appears or is apprehended. It further noted that, as correctly found by PTC I, even assuming Mr Gaddafi had been tried in his presence,

other procedural avenues would not have been completed, notably, a mandatory review by the Libyan Court of Cassation, which is required in cases of death penalty convictions.

6. Finally, the Appeals Chamber confirmed that PTC I did not err when it found that the Libyan amnesty law, Law No. 6 of 2015, did not render Mr Gaddafi's case inadmissible before the Court. In this respect, it noted, *inter alia*, that there was no evidence that certain formal requirements for the application of Law No. 6 of 2015 to Mr Gaddafi's case had been satisfied.
7. Libya, therefore, remains under an obligation to arrest Mr Gaddafi and surrender him to the Court. Mr Gaddafi and his legal representatives have stated, including during the recent hearing before the Appeals Chamber, that he was released from custody on or about 12 April 2016. As such, Mr Gaddafi is a wilful fugitive from justice, and should immediately surrender himself to the competent Libyan authorities so that he can be transferred to the Court.

*Mahmoud Mustafa Busayf Al-Werfalli*

8. The two warrants of arrest for Mahmoud Mustafa Busayf Al-Werfalli ("Mr Al-Werfalli), issued by the Court on 15 August 2017 and 4 July 2018, remain unexecuted.
9. As the Council is aware, Mr Al-Werfalli, a commander in the Al-Saiqa Brigade, is alleged to have directly committed, and to have ordered the commission of, war crimes of murder in relation to the killing of 43 people in the course of eight executions in Benghazi or surrounding areas, between 2016 and 2018. These executions are alleged to have occurred in connection with the Al-Saiqa Brigade's participation in military operations as part of Operation Dignity, led by General Khalifa Haftar ("General Haftar"), commander of the Libyan National Army ("LNA").
10. Regrettably, the LNA, led by General Haftar, has not facilitated the arrest and surrender of Mr Al-Werfalli to the Court, nor has it taken genuine action to ensure that he is held accountable in Libya for his alleged crimes. Mr Al-Werfalli continues to be at liberty in the Benghazi area, which sits in territory under LNA control. The purported investigation initiated in Libya by the LNA into Mr Al-Werfalli's alleged crimes lacked tangible, concrete and progressive steps, and was thus found by PTC I to be inactive.
11. Furthermore, in a clear sign that the LNA has no intention of genuinely prosecuting Mr Al-Werfalli for the crimes alleged in the ICC arrest warrants, it promoted Mr Al-Werfalli, for the second time, on 8 July 2019.
12. The Office recalls that, under article 28 of the Rome Statute, military commanders can be held responsible for crimes within the jurisdiction of the Court committed by forces under their effective command and control. Military commanders have an obligation both to prevent or repress the commission of crimes by their forces, and to submit any such crimes for investigation and prosecution.

13. In issuing the arrest warrants against Mr Al-Werfalli, PTC I found that his arrest was necessary to prevent him from committing further such crimes. The Office has obtained information from credible sources indicating that Mr Al-Werfalli has continued to commit multiple, serious crimes in Libya since the issuance of the arrest warrants. It is unacceptable that, nearly three years since the first arrest warrant was issued, Mr Al-Werfalli continues to evade justice and remains a danger.
14. The Office therefore, once again, reiterates its call on General Haftar, commander of the LNA, to facilitate Mr Al-Werfalli's immediate surrender to the ICC. The Office urges the Council, and all relevant States, to demonstrate their commitment to ending impunity by taking concrete steps, including by impressing on the LNA the need to ensure that Mr Al-Werfalli is surrendered immediately to the ICC.

*Al-Tuhamy Mohamed Khaled*

15. The warrant of arrest against Al-Tuhamy Mohamed Khaled ("Mr Al-Tuhamy") remains in force, and he continues to be a fugitive from the Court. As former head of the Libyan Internal Security Agency, Mr Al-Tuhamy faces serious charges relating to the arrest, detention and torture of perceived opponents of the Muammar Gaddafi regime between 15 February and 24 August 2011.
16. Credible information obtained by the Office indicates that Mr Al-Tuhamy continues to reside in Cairo, the Arab Republic of Egypt ("Egypt"). As was previously reported to the Council, Mr Al-Tuhamy was believed to be residing in Egypt when the warrant for his arrest was issued on 18 April 2013. Regrettably, to date, Egypt has not arrested and surrendered Mr Al-Tuhamy to the Court.
17. The Council, in Resolution 1970 (2011), referring the situation in Libya to the ICC Prosecutor, urged "all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor". The case against Mr Al-Tuhamy cannot progress further without such cooperation. The Office, once again, urges the members of the Council to support its call on all relevant States, including Egypt, to cooperate with the ICC in the arrest and surrender of Mr Al-Tuhamy.

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

18. During the reporting period, significant progress was achieved by the Libya team in its diverse investigations. These investigations are neither limited to crimes allegedly committed during 2011, nor to crimes allegedly perpetrated by Mr Al-Werfalli in and around Benghazi between 2016 and 2018. While the Office continues to strengthen its cases against existing suspects in the Libya situation, preparations are also moving ahead for possible new applications for warrants of arrest. As is always the case, the making of any such applications will depend on an assessment of the evidence, jurisdiction and all other relevant considerations.

19. The Office has taken note of the escalation of violence, mainly in and around Tripoli and in the Abu Grain area, south of Misrata, during the reporting period. An estimated 749,000 people are reported to be present in areas affected by fighting in and around Tripoli, including almost 345,000 people in frontline areas. More than 149,000 people have reportedly been displaced from southern Tripoli since the LNA offensive began in April 2019, and some 4,650 people from the area of Abu Grain.
20. Reports indicate that, between January and November 2019, 284 civilians were killed and 363 injured, the majority in Tripoli. Since then, tens of incidents have led to at least 75 additional civilian deaths, with more than 100 injured.
21. During the reporting period, at least 72 incidents of shelling or airstrikes, including drone attacks, reportedly caused civilian deaths, injuries and/or material damage to civilian properties and infrastructure, some vital. According to reports, such shelling and airstrikes killed at least 18 children and wounded at least 23. There are strong indications that several of these attacks were indiscriminate. The Office warns that attacks against the civilian population, as well as attacks directed at civilian infrastructure, may constitute war crimes under the Rome Statute.
22. There is credible evidence that the majority of the shelling and airstrikes resulting in civilian casualties and damage to civilian infrastructure have been carried out by forces associated with the LNA, as it presses its offensive on Tripoli and seeks to retain control over areas in the south of Libya. Reports of such attacks are very numerous. They include, but are not limited to: airstrikes on 18 November 2019 hitting a biscuit factory in Wadi al-Rabi'a, killing seven workers; an airstrike on 1 December 2019 hitting civilian homes in Al-Sawani, killing three children; one or more airstrikes on 28 or 29 November 2019 in Um Al-Aranib in Murzuq, killing between six and eleven civilians; shelling on 28 January 2020 of the Al-Hadhba Al-Badri neighbourhood in Tripoli, killing four school children; shelling on 19 March 2020 in Ain Zara neighbourhood, killing four young women and girls; shelling on 24 March 2020 in Ain Zara striking Al-Rouaymi prison, injuring prison inmates and staff; and heavy shelling between 6 and 10 April 2020 hitting the Al-Khadra hospital in Abu Salim, injuring at least one health worker and damaging the facility.
23. Also notably, on 4 January 2020, an LNA-affiliated airstrike on a military training institution in Tripoli reportedly killed 30 young cadets. Several instances of shelling and airstrikes in and around Mitiga airport in Tripoli were also recorded during the reporting period.
24. Additionally, the Office remains concerned by reports of a continued escalation in abductions and enforced disappearances of civilians, including journalists, civil society activists, lawyers, migrants, and State officials, by armed groups, including the LNA, the Special Deterrence Force, and the Nawasi Brigade, among others. In particular, reports indicate that the 9<sup>th</sup> Brigade, also known as Al-Kaniyat, is allegedly responsible for multiple incidences of enforced disappearance, torture and extrajudicial killing in Tarhuna.

25. Reports have also emerged of enforced disappearances and arbitrary detentions in the city of Sirte, since it was taken by the LNA on 6 January 2020. In addition, on 5 February 2020, the Zawit Bin Issa Sufi shrine in Sirte was reportedly destroyed. It must be recalled that the intentional directing of attacks against buildings dedicated to religion, or historical monuments, when they are not military objectives, is a war crime under the Rome Statute.
26. The Office notes with grave concern that Siham Sergewa, an elected member of the House of Representatives, remains missing since being abducted by armed men from her home in Benghazi on 17 July 2019.
27. Finally, the Office is paying particularly close attention to evidence of certain individuals propagating hate speech in Libya. The Office recalls that anyone who instigates the commission of crimes within the jurisdiction of the ICC, including through public incitement, is liable to prosecution before the Court. No one should doubt the determination of the Office to investigate such crimes and to prosecute them when the necessary conditions, as defined by the Rome Statute, are met.

#### *Crimes against migrants*

28. The Office remains concerned by reports indicating that migrants and refugees in Libya continue to be routinely subjected to arbitrary detention, unlawful killing, enforced disappearance, torture, sexual and gender-based violence, abduction for ransom, extortion, and forced labour.
29. An estimated 2000 migrants and refugees, including children, detained in and around Tripoli continue to be particularly vulnerable given their proximity to the intensifying armed conflict. Migrant detention centres were nearly hit by shelling and airstrikes on at least two occasions during the reporting period.
30. The Office continues to tackle the persistent allegations of grave crimes being committed against migrants in Libya, including in both official and unofficial detention centres, using a two-pronged approach, as previously reported to the Council.
31. First, the Office continues to collect and analyse evidence of such crimes, and to assess whether the necessary evidentiary and legal requirements are satisfied with a view to potentially bringing a case before the ICC.
32. Second, in line with Strategic Goal 6 of the OTP's Strategic Plan for 2019-2021, the Office continues to actively engage with States and relevant organisations to exchange evidence and information, with a view to supporting national authorities to investigate and prosecute migrant-related crimes in their respective jurisdictions. To date, this proactive cooperation strategy has yielded substantial results.

#### **4. COOPERATION**

33. The non-execution of arrest warrants for ICC fugitives remains the greatest obstacle faced by the Office in relation to matters of cooperation. Nevertheless, the Office does

receive valuable and effective cooperation from many States, enabling it to significantly advance its ongoing investigations. The Office welcomes, in particular, the continued engagement of the competent authorities of Libya, the Government of National Accord, and its commitment at the highest level to cooperating with the Office, including by executing its requests for assistance.

34. The Office also benefits from assistance provided by a range of international and regional organisations, civil society groups, and private individuals. As always, the Office invites submissions from any group or individual in possession of credible and reliable information pertaining to the alleged commission of Rome Statute crimes in Libya since 15 February 2011. The Office regularly receives such submissions of information from a variety of sources.
35. The Office notes the appointment of Ms Stephanie Williams as Acting Special Representative of the Secretary-General and head of UNSMIL, and expresses its sincere appreciation to Mr Ghassan Salamé for his valuable assistance during his prior service in that role. The Office looks forward to future cooperation with UNSMIL in the accomplishment of the organisations' respective mandates.
36. The situation in Libya remains a priority for the Office in 2020. In line with this priority, the Office is extending and enhancing its existing networks of cooperation to achieve further progress in its diverse investigations. It is also working to promote the investigation and prosecution, in domestic jurisdictions, of international crimes committed in Libya, where viable and appropriate.

## 5. CONCLUSION

37. To conclude, the Office recalls the apt words of a member of the Council in response to the Office's eighteenth report: "It is regrettable that the arrest warrants issued by the Court have still not been executed. The resulting impunity is an affront to the victims and their loved ones, as it undermines any hope of achieving a lasting peaceful solution to the crisis in Libya, of which justice is an essential element."
38. The Office remains committed to its mandate to secure justice for the victims in the Libya situation, despite the lack of adequate cooperation in executing the ICC arrest warrants. The support of the Council for this mandate, triggered by its own Resolution, remains essential. | o r r