



Background paper

Libya and the ICC

19 June 2012

On 26 February 2011, the UN Security Council adopted Resolution 1970 by consensus, referring the Libya situation to the ICC. The Security Council's consensus greatly enhanced the cooperation received and allowed the Office to present a first case in a few months.

The Office presented its request for arrest warrants for Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi on 16 May 2011. On 27 June 2011, the Pre-Trial Chamber issued warrants for the three individuals, unveiling the crimes committed against civilians in Tripoli and other areas under the control of Gaddafi. The Judges concluded that in order to stop the crimes and protect civilians it was necessary to arrest the three individuals identified as the most responsible. Office reported publicly that if the Libyan authorities decided to prosecute the same individuals for the same crimes under investigation by the International Criminal Court, they should submit an admissibility challenge and it would be for the ICC Judges to decide.

On 1 May, the Government of Libya filed its challenge, which noted that *"On 8 January 2012, the Libyan Prosecutor-General commenced an investigation of serious crimes (including murder and rape) allegedly committed by Saif Al Islam Gaddafi during the 2011 revolution (including in the period between 15 February to 28 February 2011) and that "The Libyan Government is committed to attaining the highest international standards both for the conduct of its investigations and any eventual trials."* Libyan authorities also said that Saif Al-Islam has been kept in adequate conditions of detention, provided with sufficient and good quality food, given access to ICC lawyers and the option of retaining a domestic lawyer of his choosing. Saif also received visits from the ICRC, NGOs and family members. He has been provided with proper medical and dental care, and not been subject to physical abuse.

Following the submission of the Libyan admissibility challenge, the Pre-Trial Chamber requested observations from different parties to the proceedings, as well as from the UN Security Council. Rule 59 of the ICC Rules of Procedure and Evidence provides that those who have referred a situation, in this case the Security Council, must be notified of the

challenge, and may in response make representation on the jurisdictional challenges. The Registry transmitted the notification through a Note Verbale to the UN Secretary General.

This is the first time in the short history of the International Criminal Court that a State is requesting jurisdiction to conduct a national investigation against the same individual and for the same incidents under investigation by the International Criminal Court. The Prosecution presented its observations, as requested by the Pre-Trial Chamber, on 4 June.

As mentioned on numerous occasions in relation to Darfur and other situations, the Office will not evaluate the Libyan judicial system as a whole. The Office is checking the factual situation in accordance with the Statute's requirements that include the intervention of an independent and impartial judiciary. This is a judicial issue that will be decided by the Judges of the Pre-Trial Chamber.

Abdullah Al-Senussi was also arrested on 17 March 2012 by Mauritanian authorities. He is subject of extradition requests from France and Libya, as well as a request for surrender from the ICC. Mauritania shall decide.

The Office of the Prosecutor continues to collect evidence in relation to a second case in Libya on gender crimes committed against both men and women. The UN Commission of Inquiry's findings confirmed the commission of these crimes. The Office is mindful of the sensitivity surrounding rape in Libya, and has adopted a strategy to limit exposure of victims by focusing on obtaining evidence from doctors and soldiers. The investigation is progressing.

The Office's mandate is to investigate those who bear the greatest responsibility for the most serious crimes under the jurisdiction of the International Criminal Court while respecting genuine national proceedings. So, the Office will monitor Libya's national proceedings closely. The Office is also gathering information about the activities outside Libya of high-level Gaddafi officials who were allegedly involved in Rome Statute crimes and who reportedly continue to seek to destabilize the situation of Libya.

The report of the UN Commission of Inquiry issued on 2 March 2012 presents a comprehensive view of the crimes committed in Libya. There are thousands of allegations of crimes committed by Gaddafi forces and thousands of individuals allegedly involved in such crimes who are in detention, many of them still not under the jurisdiction of the national authorities and allegedly subjected to mistreatment or torture by rebel forces. There are allegations as well of crimes committed against civilians in Tawergha, and

questions remain to be answered about the circumstances of the death of Muammar Gaddafi.

Additionally the UN Commission of Inquiry found that NATO did not deliberately target civilians in Libya. Of a total of 25,944 air sorties and 7,642 air-to-surface weapons employed, the Commission cited evidence with respect to five air strikes that reportedly produced civilian casualties.

The Office of the Prosecutor took due note of the UN Commission of Inquiry findings. The Office has no jurisdiction to evaluate the proper scope of the NATO mandate in relation with UN Security Council Resolution 1973, but the Office has requested further information about these five incidents identified by the Commission of Inquiry.

The Government of Libya has committed to a comprehensive strategy to address all crimes and end impunity in Libya. While the Government faces challenges on many fronts, this comprehensive strategy must remain a priority if the Government is to show that impunity will no longer be tolerated. This strategy must address as a priority the transfer to the central authorities and the screening of thousands of detainees, the investigation of allegations of crimes by these detainees where warranted, to ensure justice for the victims, and the release of those against whom there is no basis for investigation. At the same time, all unofficial and unacknowledged detention centers should be dismantled and all possible steps should be taken to curb mistreatment or torture. The Government of Libya expressed its commitment to conduct targeted investigations and prosecutions to address the most serious crimes committed by all sides. The Government of Libya has adopted a Transitional Justice Law that created a Fact-Finding and a Reconciliation Commission that could contribute to strengthening the rule of law in the country.

In his address to the Security Council in May 2012, Libya's Deputy Permanent Representative to the United Nations, Ambassador Ibrahim Dabbashi, noted that justice was among the new government's top priorities, and that the government had therefore undertaken the necessary judicial reforms to reestablish the independence of the judiciary. He noted as well that the government had decided to follow the provisions of the Office of the Prosecutor's policy paper, which stipulates that the Office address those with the greatest responsibility for the most serious crimes. As for other cases, he indicated *"they will be dealt with through an integrated plan for transitional justice in a manner that will ensure that justice is served, impunity ended and national reconciliation, stability and social peace established."*

Ambassador Dabbashi further *“commend[ed] the intervention of the ICC in Libya at the height of the acts of suppression and murder that the Libyan people were subjected to, including its issuance of arrest warrants. Those efforts have strengthened the Libyan people’s resolve to put an end to the crimes committed by the tyrant Al-Qadhafi and have served as an important step towards upholding the right to protection by combating impunity.”*