

# THE DAY AFTER: PROSECUTING INTERNATIONAL CRIMES COMMITTED IN LIBYA

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## Abstract

*In 2011, Libya was a theatre of atrocious crimes. Ensuring that those involved do not go unpunished is now a major challenge for the new Libyan Government and the international community. The first part of this article surveys the crimes against humanity and war crimes that were reportedly committed by both the Gaddafi forces and the insurgents. It also considers the NATO air strikes which resulted in civilian casualties or damage to civilian objects and might amount to war crimes. The second part of the article discusses the available mechanisms for prosecuting the aforementioned crimes. Firstly, the Security Council referral of the Libyan situation to the International Criminal Court and its limitations are examined, and subsequent developments are explored, including the warrants against Muammar Gaddafi, his son Saif Al-Islam and Al-Senussi, their capture and Libya's admissibility challenge of 1 May 2012. Secondly, the article considers the prospects for national proceedings against the alleged criminals. The author argues that proceedings before Libyan courts are the only practically available option to ensure the punishment of the bulk of perpetrators. She also emphasises the importance of investigations and prosecutions being given equal weighting, whether they are of Gaddafi loyalists or revolutionaries.*

Keywords: crimes against humanity; war crimes; Libya; Security Council; International Criminal Court; national criminal jurisdictions; complementarity; amnesty.

## 1. INTRODUCTION

In 2011 the overthrow of Muammar Gaddafi's four decade regime was marked by heinous crimes. As was documented by the International Commission of Inquiry on Libya (ICOIL), which was established by the Human Rights Council on 25 February 2011,<sup>1</sup> both Gaddafi forces and insurgents committed a multitude of acts

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<sup>1</sup> UN Doc. A/HRC/RES/S-15/1, Human Rights Council, Situation of Human Rights in the Libyan Arab Jamahiriya, 25 February 2011, para. 11.

potentially constituting crimes against humanity and/or war crimes.<sup>2</sup> Additionally, a number of NATO air strikes were of doubtful legality and might amount to war crimes.

Ensuring that those responsible for these crimes do not escape unpunished is now a major challenge for the new Libyan Government and the international community. This article considers the international crimes that were reportedly committed in Libya between the early days of the protests in mid-February and the cessation of hostilities at the end of October, and discusses the available mechanisms for prosecuting the alleged perpetrators.

## 2. INTERNATIONAL CRIMES COMMITTED IN THE PROTEST PHASE

The events which led to the overthrow of Colonel Gaddafi's rule fall into two distinct phases: the phase of peaceful anti-government demonstrations, which lasted less than two weeks; and the phase of armed conflict, which went on for the following eight months.

The former started on 15 February 2011, when a spontaneous mass protest against the arrest of two prominent human rights activists in Benghazi was met by the Libyan Government with armed force. In the following days, peaceful anti-government demonstrations broke out in several cities across Libya. In an attempt to quell them, Gaddafi security forces attacked demonstrators with heavy lethal weapons, killing or injuring hundreds.<sup>3</sup> They also abducted, arrested, detained and tortured many people associated with the protests.<sup>4</sup>

As regards the Government forces' conduct during the protest phase, one has to mention the decision on the arrest warrants against Muammar Gaddafi, his son Saif Al-Islam and Abdullah Al-Senussi, which was issued by Pre-Trial Chamber I of the International Criminal Court (ICC) on 27 June 2011.<sup>5</sup> According to the Chamber, there were reasonable grounds to believe that a State policy existed which aimed at "detering and quelling the February 2011 demonstrations by any means" and that, in furtherance of this, a widespread and systematic attack was carried out against the civilian population participating in protests or perceived to be dissidents

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<sup>2</sup> UN Doc. A/HRC/19/68, Report of the International Commission of Inquiry on Libya, 2 March 2012, Annex 1, paras. 808-810.

<sup>3</sup> See UN Doc. A/HRC/17/44, Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, 1 June 2011, para. 99; UN Doc. A/HRC/19/68, *ibid.*, Annex 1, paras. 130, 131.

<sup>4</sup> See UN Doc. A/HRC/17/44, *ibid.*, paras. 106, 108, 112, 129; UN Doc. A/HRC/RES/S-15/1, *cit. supra* note 1, para. 1.

<sup>5</sup> ICC-01/11-01/11-1, Pre-Trial Chamber I, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi", 27 June 2011.

throughout Libya, from 15 February until at least 28 February 2011.<sup>6</sup> Moreover, there were reasonable grounds to believe that murders and acts of persecution based on political grounds were committed by Government security forces as part of the above-mentioned attack, thus constituting crimes against humanity under Article 7(1)(a) and (h) of the ICC Statute.<sup>7</sup> Since the Government engaged in a pattern of arbitrary detentions, tortures and enforced disappearances of protesters and perceived dissidents, it is submitted that the crimes against humanity of imprisonment, torture and enforced disappearance (Article 7(1)(e), (f) and (i) of the Rome Statute) were also presumably perpetrated.

### 3. INTERNATIONAL CRIMES COMMITTED IN THE ARMED CONFLICT PHASE

The starting date of the armed conflict phase is not easy to determine. As the protests spread across Libya, many demonstrators began to organise themselves, took up arms and clashed with the security forces. In a few days, the rebels – also called *thumar* – gained control of several cities, including Benghazi and Misrata. According to the ICOIL, around 24 February 2011 the situation escalated to the level of a non-international armed conflict, triggering the application of Article 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II, to which Libya is a party.<sup>8</sup> By contrast, in the opinion of the Independent Civil Society Fact-Finding Mission to Libya, which was conducted by the Arab Organization for Human Rights and other two non-governmental organisations, that level was reached only around 10 March, when the National Transitional Council (NTC) had already been established and the Gaddafi Government had launched major offensives to retake the cities under the rebels' control.<sup>9</sup>

A parallel international armed conflict broke out on 19 March, as a coalition of States led by the United States began air operations pursuant to Security Council Resolution 1973 (2011), which, *inter alia*, authorised Member States “to take all necessary measures [...] to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya” (para. 4). On 31 March, NATO assumed command of operations, launching Operation Unified Protector, in which a number of non-NATO countries also participated. As stated by the ICOIL, the international armed conflict between the States intervening under the Security Council authorisation and the Libyan State led by Colonel Gaddafi was legally

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<sup>6</sup> *Ibid.*, paras. 31-35.

<sup>7</sup> *Ibid.*, paras. 41, 65.

<sup>8</sup> UN Doc. A/HRC/17/44, *cit. supra* note 3, para. 65. See also UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, para. 28.

<sup>9</sup> Arab Organization for Human Rights, International Legal Assistance Consortium, Palestinian Centre for Human Rights, Report of the Independent Civil Society Fact-Finding Mission to Libya, January 2012, para. 62, available at: <<http://www.ilac.se/publications>>.

separate to and coexisted with the non-international armed conflict between the Libyan Government and the insurgents.<sup>10</sup>

The armed conflict phase terminated only in late October 2011. On 23 October, three days after the capture and death of Muammar Gaddafi and the fall of his last stronghold Sirte, the NTC officially declared the liberation of Libya. Thereafter, on 31 October, NATO ended air operations pursuant to Security Council Resolution 2016 (2011).

What follows is a brief overview of the international crimes that were reportedly committed during the period of armed conflict.<sup>11</sup>

### 3.1. *Gaddafi Forces*

During the armed conflict, Gaddafi forces were allegedly responsible for a wide range of international crimes. To begin with, they launched heavy bombardments on many cities and towns throughout Libya, causing high numbers of civilian casualties and extensive destruction of civilian buildings. Unguided rockets and mortars were widely used against residential areas.<sup>12</sup> As noted by the ICOIL, “while the *thumar* were using individual houses for shelter, rendering them lawful targets, the scale of the shelling and the damage caused to residential buildings by the use of these unguided weapons was disproportionate to the military gain and breached the principle of distinction”.<sup>13</sup> In particular, Misrata was under siege and sustained massive bombardments for over three months (March-May 2011). The ICOIL documented that “at all times when it was under attack, Misrata’s population remained predominantly civilian and suffered heavy civilian casualties”.<sup>14</sup>

Attacks on civilian populated areas with unguided weapons certainly contravened the customary prohibition on indiscriminate attacks, which applies both in international and non-international armed conflicts.<sup>15</sup> What is more, they probably amounted to intentional attacks against civilians in a non-international armed con-

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<sup>10</sup> UN Doc. A/HRC/17/44, *cit. supra* note 3, para. 66. See also UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, para. 28.

<sup>11</sup> It is mainly based on the ICOIL’s findings. In this respect it is to be stressed that those findings are in no way equivalent to judicial findings. The ICOIL itself made it clear that “its evidentiary standard is less than required for criminal proceedings”. UN Doc. A/HRC/19/68, *cit. supra* note 2, para. 116.

<sup>12</sup> See Arab Organization for Human Rights et al., *cit. supra* note 9, paras. 96-98; UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, paras. 552, 557, 562, 573.

<sup>13</sup> UN Doc. A/HRC/19/68, *ibid.*, Annex 1, para. 600.

<sup>14</sup> *Ibid.*, Annex 1, para. 546.

<sup>15</sup> *Ibid.*, para. 81. As to the customary nature of the prohibition on indiscriminate attacks, see HENCKAERTS and DOSWALD-BECK (eds.), *Customary International Humanitarian Law*, Cambridge, 2005, Vol. I, p. 37.

flict, constituting war crimes under Article 8(2)(e)(i) of the ICC Statute.<sup>16</sup> Indeed, as stated by Trial Chamber I of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Galić*, “indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians”.<sup>17</sup> Moreover, the above-mentioned attacks might constitute underlying acts of the war crime of terror, as delineated by the ICTY Appeals Chamber in *Galić*.<sup>18</sup>

With regard to indiscriminate attacks, it is also worth noting that, on various occasions, Gaddafi forces employed anti-personnel and anti-vehicle landmines, as well as cluster munitions, including within or close to civilian concentrations. In particular, the ICOIL found considerable evidence of the use of such weapons in Misrata and in the Nafusa Mountains.<sup>19</sup> Libya is not a party to the 1997 Ottawa Convention on anti-personnel mines or to the 2008 Oslo Convention on Cluster Munitions. Nevertheless, it is submitted that the use of those weapons in civilian areas infringed the customary prohibition on indiscriminate attacks.<sup>20</sup>

In addition, Gaddafi forces widely disregarded the basic international humanitarian rules protecting hospitals, medical transport and personnel.<sup>21</sup> For example, they occupied the Yafran hospital for a long period and used it as a base from which to fire on *thuwar* positions.<sup>22</sup> Other hospitals were shelled.<sup>23</sup> Ambulances were shot at many times and also misused to transport military personnel or equipment.<sup>24</sup> Medical staff treating rebels were arbitrarily arrested and detained. During detention, they were subjected to torture and in a number of cases they were killed.<sup>25</sup> Attacks on hospitals, ambulances and medical personnel in a non-international armed conflict constitute war crimes under Article 8(2)(e)(ii) and attacks on hospitals in particular also fall under Article 8(2)(e)(iv) of the ICC Statute. Torturing and killing medical personnel in an internal conflict are serious violations of Article 3 common to the 1949 Geneva Conventions and amount to the war crimes of torture and murder under Article 8(2)(c)(i) of the Rome Statute.

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<sup>16</sup> This was the view of the Independent Civil Society Fact-Finding Mission to Libya. See the report, *cit. supra* note 9, para. 102.

<sup>17</sup> ICTY Trial Chamber I, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment of 5 December 2003, para. 57.

<sup>18</sup> ICTY Appeals Chamber, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment of 30 November 2006, para. 102.

<sup>19</sup> UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, paras. 664-667.

<sup>20</sup> See *ibid.*, para. 600.

<sup>21</sup> See HENCKAERTS and DOSWALD-BECK (eds.), *cit. supra* note 15, p. 79 ff.

<sup>22</sup> UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, paras. 583-585.

<sup>23</sup> *Ibid.*, Annex 1, paras. 586, 602. See also UN Doc. A/HRC/17/44, *cit. supra* note 3, paras. 177, 180.

<sup>24</sup> UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, paras. 586, 597, 602. See also UN Doc. A/HRC/17/44, *cit. supra* note 3, paras. 176, 179, 180.

<sup>25</sup> UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, paras. 587, 590, 602.

During the hostilities, Gaddafi forces also continued their practice of arbitrary detention, enforced disappearance and torture. A large number of persons suspected of being *thumar* or of supporting them were imprisoned, often in unofficial or unacknowledged sites.<sup>26</sup> While in detention, they were subjected to torture and other forms of ill-treatment.<sup>27</sup> The ICOIL confirmed that Gaddafi forces “committed torture and ill-treatment in a widespread and systematic manner”.<sup>28</sup> Since the practices of arbitrary detention, enforced disappearance and torture largely targeted civilians for their perceived support to the insurgents and occurred on a wide scale, they presumably amounted to the crimes against humanity of imprisonment, torture and enforced disappearance (Article 7(1)(e),(f) and (i) of the ICC Statute). They also appeared to constitute underlying acts of the crime of persecution (Article 7(1)(h) of the Rome Statute). Moreover, tortures as well as other forms of cruel, inhuman or degrading treatment of detainees, whether civilians or *thumar*, constituted serious violations of Article 3 common to the 1949 Geneva Conventions and amounted to the war crimes of torture, cruel treatment and outrages upon personal dignity under Article 8(2)(c)(i) and (ii) of the Rome Statute.

Gaddafi forces were also responsible for the killing of many detainees. The ICOIL established that they “executed, otherwise unlawfully killed and tortured to death large numbers of prisoners in detention centres prior to retreating from the *thumar* forces”.<sup>29</sup> These acts qualified as war crimes, more precisely as murders in a non-international armed conflict under Article 8(2)(c)(i) of the ICC Statute. However, since many of the victims were civilians, the systematic and widespread executions of detainees also presumably amounted to the crime against humanity of murder under Article 7(1)(a) of the Rome Statute.<sup>30</sup>

Finally, there were several instances of sexual violence by Gaddafi forces. The ICOIL ascertained two main patterns of sexual violence. Women were raped in their homes or abducted and raped elsewhere, generally because of their perceived support to the rebels. On the other hand, in detention, both men and women supporting the *thumar* were subjected to acts of sexual violence. Overall, Gaddafi forces used sexual violence as a means to punish, to terrorise, to send a message to those supporting the revolution or to extract information during interrogations.<sup>31</sup> Their acts certainly amounted to the war crimes of rape and sexual violence in a non-international armed conflict under Article 8(2)(e)(vi) of the ICC Statute. Indeed, rape and other forms of sexual violence, “when committed as part of a widespread

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<sup>26</sup> *Ibid.*, paras. 285, 315. See also UN Doc. A/HRC/17/44, *cit. supra* note 3, para. 120; Arab Organization for Human Rights et al., *cit. supra* note 9, paras. 91-94.

<sup>27</sup> UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, para. 378. See also Arab Organization for Human Rights et al., *cit. supra* note 9, paras. 93, 116, 117.

<sup>28</sup> UN Doc. A/HRC/19/68, *ibid.*, para. 52.

<sup>29</sup> *Ibid.*, Annex 1, para. 251.

<sup>30</sup> See *ibid.*

<sup>31</sup> *Ibid.*, Annex 1, paras. 503, 504.

or systematic attack directed against any civilian population, with knowledge of the attack”, also constitute crimes against humanity under Article 7(1)(g) of the Rome Statute. The ICOIL, however, did not find evidence corroborating allegations of “a widespread or a systematic attack, or any overall policy of sexual violence against a civilian population” and recommended further investigation.<sup>32</sup>

### 3.2. *Insurgents*

Like the Gaddafi forces, *thumar* reportedly committed a large variety of international crimes. First of all, they relied heavily on Grad rockets and other unguided weapons in their assaults on Sirte and Tawergha. The former was the scene of the final battles in the first three weeks of October 2011. The ICOIL stated that “the scale of the destruction there and the nature of the weaponry employed demonstrated that the attacks in Sirte were indiscriminate”.<sup>33</sup> As mentioned above, indiscriminate attacks may qualify as intentional attacks against civilians, which are war crimes under Article 8(2)(e)(i) of the ICC Statute.<sup>34</sup>

Tawergha, a town of 30,000 dark-skinned inhabitants which was used by Gaddafi forces as a base for their attacks on Misrata, was also subjected to indiscriminate fire. Once control of Misrata was taken, rebels advanced towards Tawergha, shelling it from 10 to 12 August 2011.<sup>35</sup> The ICOIL found that “Grad rockets were fired indiscriminately into the town”.<sup>36</sup>

Indeed, Tawergha and its inhabitants met a tragic fate. The Misrata *thumar* targeted the Tawerghan civilians for their alleged loyalty to Gaddafi and presumed responsibility for the rape of Misratan women and other crimes<sup>37</sup>. During the shelling, most Tawerghans fled the town. Those who remained were either arrested and transported to Misrata or beaten and forced to leave.<sup>38</sup> After being emptied of its population, Tawergha was pillaged and burned.<sup>39</sup> Moreover, many Tawerghans who were displaced to various locations were arbitrarily arrested, in most cases transported to and detained in Misrata and subjected to torture and other forms of ill-treatment. There were also several instances of unlawful killings.<sup>40</sup> The ICOIL found that “the Misrata *thumar* targeted the Tawerghan community in a widespread

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<sup>32</sup> *Ibid.*, Annex 1, paras. 535-536. See also Arab Organization for Human Rights et al., *cit. supra* note 9, paras. 110-115.

<sup>33</sup> UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, para. 601.

<sup>34</sup> See *supra* section 3.1.

<sup>35</sup> UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, paras. 393, 394.

<sup>36</sup> *Ibid.*, Annex 1, para. 582.

<sup>37</sup> *Ibid.*, para. 56.

<sup>38</sup> *Ibid.*, Annex 1, paras. 395, 396.

<sup>39</sup> *Ibid.*, Annex 1, paras. 400, 487.

<sup>40</sup> *Ibid.*, Annex 1, paras. 442, 443, 486.

and systematic manner”<sup>41</sup> and classified the tortures and killings of Tawerghans as acts potentially constituting crimes against humanity.<sup>42</sup> In fact, the crimes against humanity perpetrated by the Misratan *thuwar* against the Tawerghans presumably included murder, forcible transfer of population, imprisonment, torture and persecution (Article 7(1)(a), (d), (e), (f) and (h) of the Rome Statute). Moreover, the above-mentioned acts committed by the Misratan *thuwar* certainly amounted to the war crimes of murder, torture, cruel treatment, outrages upon personal dignity and pillaging in a non-international armed conflict under Article 8(2)(c)(i) and (ii) and (e)(v) of the ICC Statute.<sup>43</sup>

Interestingly, the ICOIL established that insurgents also perpetrated war crimes against members of other communities.<sup>44</sup> In particular, throughout the conflict, *thuwar* arbitrarily arrested, beat and, in a number of cases, killed Sub-Saharan African nationals, largely on the erroneous assumption that they were mercenaries contracted by Gaddafi.<sup>45</sup>

The pillaging of Tawergha was by no means an isolated incident. The ICOIL ascertained that *thuwar* were “responsible for widespread pillaging and destruction of public and private property across the country”.<sup>46</sup> Pillaging a town or place in non-international armed conflict is a war crime under Article 8(2)(e)(v) of the Rome Statute.

Furthermore, as soon as they took control of cities and towns, rebels arrested former Gaddafi soldiers, members of the security forces, suspected mercenaries and other persons perceived as loyalists *en masse* and subjected them to torture and other forms of ill-treatment.<sup>47</sup> The ICOIL held that “the *thuwar* systematically tortured those they arrested, with severe beatings, particularly upon arrest or arrival

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<sup>41</sup> *Ibid.*, Annex 1, para. 485.

<sup>42</sup> *Ibid.*, Annex 1, para. 488.

<sup>43</sup> See *ibid.*, para. 488.

<sup>44</sup> *Ibid.*, Annex 1, paras. 489-494.

<sup>45</sup> *Ibid.*, Annex 1, para. 493. See also UN Doc. A/HRC/17/44, *cit. supra* note 3, para. 211. The Gaddafi Government reportedly recruited foreign nationals in order to fight the insurgents. The ICOIL found that at least an organised group of Sudanese fighters were deployed in support of the Government forces (UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, paras. 683-685). In Resolution 1973 (2011), the Security Council deplored “the continuing use of mercenaries by the Libyan authorities” (preambular para. 16). Notably, Libya is a party to the 1977 Organisation of African Unity Convention for the Elimination of Mercenarism in Africa and the 1989 UN Convention against the Recruitment, Use, Financing and Training of Mercenaries. While the former does not prohibit States Parties from hiring mercenaries in order to resist rebel groups within their territory, the latter forbids the hire of mercenaries for whatever purpose. It is uncertain however whether the foreign fighters recruited by the Gaddafi regime met all the requirements that the UN Convention lists for a person to be considered a mercenary. See UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, para. 689.

<sup>46</sup> UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, para. 755.

<sup>47</sup> *Ibid.*, Annex 1, paras. 287, 288, 316, 379.

at the facilities”.<sup>48</sup> Those acts certainly constituted serious violations of Article 3 common to the 1949 Geneva Conventions, amounting to the war crimes of torture, cruel treatment or outrages upon personal dignity under Article 8(2)(c)(i) and (ii) of the ICC Statute.

The ICOIL also documented several killings of captured Gaddafi fighters and civilians perceived as mercenaries or loyalists by insurgents.<sup>49</sup> Those killings constituted serious violations of Article 3 common to the 1949 Geneva Conventions and amounted to war crimes under Article 8(2)(c)(i) of the Rome Statute. With regard to the death of Muammar Gaddafi, he was captured, wounded but alive, by the Misratan *thumar* near Sirte on 20 October 2011. Gaddafi was beaten and placed in an ambulance heading to Misrata. However, he died before arriving there. The official autopsy reportedly ascertained that a gunshot to the head killed him. The ICOIL, however, was not given access to the autopsy report, nor was it able to obtain first-hand accounts of the circumstances of the death. Therefore, it was not able to confirm that the Colonel’s death was an unlawful killing and thus a war crime, and recommended further investigation.<sup>50</sup>

### 3.3. NATO

As recognised by the ICOIL, NATO conducted a highly precise aerial campaign, using precision-guided munitions only and making significant efforts to avoid any harm to the civilian population.<sup>51</sup> However, a number of air strikes led to civilian casualties or damage to civilian objects. In particular, the ICOIL documented five air strikes which resulted in a total of 60 civilians killed and 55 injured, and two further air strikes which caused damage to civilian infrastructure.<sup>52</sup> As to the latter, a medical school and a tile factory were bombed in Bani Walid. According to NATO, they were used at the time as command and control facilities. The ICOIL, however, found no evidence confirming NATO’s assertion.<sup>53</sup> With regard to NATO air strikes leading to civilian casualties, the ICOIL declared itself “unable to understand NATO’s characterization of four of five targets where the Commission found civilian casualties as ‘command and control nodes’ or ‘troop staging areas’

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<sup>48</sup> *Ibid.*, Annex 1, para. 379.

<sup>49</sup> *Ibid.*, para. 36 and Annex 1, para. 252.

<sup>50</sup> *Ibid.*, Annex 1, paras. 236-248.

<sup>51</sup> *Ibid.*, Annex 1, para. 649. See also *ibid.*, Annex 2, Letter of the NATO Legal Adviser P. Olson to the Chair of the ICOIL P. Kirsch of 23 January 2012, OLA(2012)006, pp. 3-4.

<sup>52</sup> *Ibid.*, Annex 1, para. 611. See also Human Rights Watch, “Unacknowledged Deaths. Civilian Casualties in NATO’s Air Campaign in Libya”, May 2012, available at: <<http://www.hrw.org/reports/2012/05/13/unacknowledged-deaths>>. Human Rights Watch documented a total of 72 civilians killed resulting from eight NATO air strikes (*ibid.*, pp. 27-55).

<sup>53</sup> UN Doc. A/HRC/19/68, *cit. supra* note 2, paras. 640-646.

without further explanation”.<sup>54</sup> In fact, the ICOIL visited all the relevant sites and no evidence of such activity was found.<sup>55</sup>

The question arises as to whether NATO took the precautionary measures listed in Article 57 of Additional Protocol I to the 1949 Geneva Conventions in the above-mentioned cases. This article, which the ICTY Trial Chamber in *Kupreškić* found to be “part of customary international law”,<sup>56</sup> dictates certain precautions regarding attacks. In particular, Article 57 requires those who plan or decide upon an attack to do everything feasible to verify that the targets are neither civilians nor civilian objects (para. 2(a)(i)) and to desist from launching any attack which might be expected to cause incidental loss of life or injury to civilians or damage to civilian objects, or a combination of them, which would be disproportionate to the concrete and direct military advantage anticipated (para. 2(a)(3)). Moreover, it prescribes that an attack must be cancelled or suspended if it becomes apparent that the targets are civilians or civilian objects or that the attack may be expected to lead to the incidental death or injury of civilians or damage to civilian objects, or a combination of these, which would be excessive in comparison with the concrete and direct military advantage anticipated (para. 2(b)).<sup>57</sup> If it were found that NATO did not take the aforementioned precautionary measures, the air strikes in question might qualify as war crimes.

In this regard, it is worth considering the third report of the ICC Prosecutor to the Security Council.<sup>58</sup> According to this report, the ICC Office of the Prosecutor found no information to affirm that the NATO air strikes which resulted in civilian casualties or damage to civilian objects were “the result of the intentionally directing of attacks against the civilian population as such or against civilian objects”,<sup>59</sup>

<sup>54</sup> *Ibid.*, Annex 1, para. 654. See also *ibid.*, Annex 1, paras. 619-639.

<sup>55</sup> *Ibid.*, Annex 1, para. 654. The ICOIL recommended that NATO extended the application of the “Non-Binding Guidelines for Payments in Combat-Related Cases of Civilian Casualties or Damage to Civilian Property”, which were adopted in 2010 with respect to NATO/ISAF operations in Afghanistan, to civilian losses resulting from Operation Unified Protector (UN Doc. A/HRC/19/68, *cit. supra* note 2, para. 130). These guidelines stipulate that NATO shall proactively offer assistance, including *ex gratia* payments or in-kind assistance, for civilian casualties or damages to civilian property. They specify, however, that such assistance shall be provided “without reference to the question of legal liability”. See “NATO Nations Approve Civilian Casualty Guidelines”, 6 August 2010, available at: <[http://www.nato.int/cps/en/natolive/official\\_texts\\_65114.htm](http://www.nato.int/cps/en/natolive/official_texts_65114.htm)>.

<sup>56</sup> ICTY Trial Chamber, *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgment of 14 January 2000, para. 524.

<sup>57</sup> As to the customary nature of the above-mentioned provisions, see HENCKAERTS and DOSWALD-BECK (eds.), *cit. supra* note 15, p. 55 ff. It is worth recalling that, as clarified in the 2009 HPCR Manual on International Law Applicable to Air and Missile Warfare, the obligation to take feasible precautions in attack also applies to drone operations (Rule 39).

<sup>58</sup> Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UN SC Resolution 1970 (2011), 16 May 2012.

<sup>59</sup> *Ibid.*, para. 55.

which is a war crime under Article 8(2)(b)(i) or (ii) of the Rome Statute. The ICC Office of the Prosecutor therefore concentrated its attention on “incidental loss of life or injury to civilians under Article 8(2)(b)(iv)”.<sup>60</sup> In other words, it considered the possibility that NATO personnel might have committed the war crime of intentionally launching an attack while knowing it would cause incidental loss of life or injury to civilians “which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”, as provided in Article 8(2)(b)(iv) of the ICC Statute.

#### 4. THE SECURITY COUNCIL REFERRAL OF THE LIBYAN SITUATION TO THE ICC

By Resolution 1970 of 26 February 2011, the Security Council, acting under Chapter VII of the UN Charter, referred the situation in Libya since the previous 15 February to the ICC Prosecutor (para. 4). After the referral of the situation in Darfur by Resolution 1593 (2005), this was the Security Council’s second referral to the ICC. It had the effect of extending the jurisdiction of the Court to international crimes committed in Libya by Libyan nationals and, despite the exceptions indicated below, by nationals of other non-party States.

Libya is not a party to the Rome Statute, nor has ever made an *ad hoc* declaration accepting the ICC jurisdiction under Article 12(3) of the Statute. As emerges from Article 13 read in conjunction with Article 12(2) of the Rome Statute, the Court may exercise its jurisdiction only in the case of referral by the Security Council, where neither the State on whose territory the crimes are committed nor the State whose nationals are potentially guilty are parties to the Statute or have made an *ad hoc* declaration of acceptance. Therefore, had the Security Council not made the aforementioned referral, the crimes committed by Gaddafi forces and *thuwar* would have fallen outside the ICC jurisdiction.

In Resolution 1970 the Security Council also imposed the obligation to “cooperate fully with [...] the Court and the Prosecutor” on the Libyan Government, which at the time was still led by Gaddafi, and, while recognising that non-party States have no obligation under the Rome Statute, it urged all States and international organisations to do the same (para. 5).

The Security Council, however, granted exclusive jurisdiction to non-party States – other than Libya – with respect to their nationals involved in UN-established or authorised missions on Libyan soil. To be exact, it decided that

“nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the

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<sup>60</sup> *Ibid.*

exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State” (para. 6).

As a result, Resolution 1970 shields nationals of non-party States participating in the NATO aerial campaign from prosecution before the ICC, the Libyan courts or the domestic courts of any other State for international crimes which may have been committed in relation to that campaign. In fact, of the 16 countries which took part in Operation Unified Protector, the United States, the United Arab Emirates, Turkey and Qatar are not parties to the Rome Statute.<sup>61</sup>

It is worth noting that the above-mentioned provision mirrors paragraph 6 of Resolution 1593 (2005), which attributes exclusive jurisdiction to non-party States – other than Sudan – over their nationals involved in operations established or authorised by the Security Council or the African Union.<sup>62</sup> Moreover, like the preamble of Resolution 1593, the preamble of Resolution 1970 makes reference to Article 16 of the Rome Statute. Under this Article, the Security Council has the power to defer an ICC investigation or prosecution for a renewable period of 12 months by means of a resolution adopted according to Chapter VII of the UN Charter.<sup>63</sup>

The aforementioned provision, however, clearly goes beyond Article 16 as it contains no temporal limitation. It aims to permanently exclude any possibility of ICC prosecution for crimes which may have been committed in Libya by personnel from non-party States.<sup>64</sup> Furthermore, since it exempts such personnel from the

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<sup>61</sup> See the list of States participating in the Operation Unified Protector in NATO, “Operation Unified Protector, Protection of Civilians and Civilian-Populated Areas & Enforcement of the No-Fly Zone”, October 2011, available in the NATO website.

<sup>62</sup> Resolution 1593 (2005) stipulates that “nationals, current or former officials or personnel from a State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State” (para. 6). See also the Security Council Resolution 1497 (2003), which grants exclusive jurisdiction to non-party States in relation to their nationals “for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia”, except for an express waiver (para. 7).

<sup>63</sup> On Article 16 of the ICC Statute, see BERGSMO and PEJIĆ, “Article 16”, in TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., München/Oxford/Baden-Baden, 2008, p. 595 ff.; SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, 2010, p. 325 ff.

<sup>64</sup> For a similar remark on the corresponding provision of Resolution 1593 (2011), see CRYER, “Sudan, Resolution 1593, and International Criminal Justice”, Leiden JIL, 2006, p. 195 ff., p. 211. See also AKANDE, “The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC”, JICJ, 2012, p. 299 ff., p. 308.

jurisdiction of any State other than their own national State, the provision in question precludes their prosecution before Libyan courts or, under the principle of universal jurisdiction, before the courts of third States.<sup>65</sup> The exclusion of jurisdiction of Libyan courts is particularly disturbing, as it runs against the territoriality principle, whereby States are entitled to exercise jurisdiction over events occurring in their territory. This well-established principle is regarded as “the primary basis for jurisdiction in criminal law matters”.<sup>66</sup>

Finally, one may question whether practically granting jurisdictional immunity to nationals of non-party States involved in UN-established or authorised missions in Libya constitutes a legitimate exercise of the Security Council’s powers under Chapter VII of the UN Charter. Indeed, it is disputable that this is truly a measure directed at maintaining or restoring international peace and security under Chapter VII of the UN Charter. In fact, it appears to serve only the interests of the non-party States contributing to such missions.

##### 5. THE ICC PROSECUTOR’S INVESTIGATION AND THE ARREST WARRANTS OF 27 JUNE 2011

On the basis of the Security Council referral, on 3 March 2011, the ICC Prosecutor opened an investigation into the crimes against humanity allegedly committed by the Libyan security forces since 15 February 2011 in the context of the suppression of the peaceful anti-government demonstrations against the regime.<sup>67</sup> Thereafter, on 16 May, the Prosecutor applied to Pre-Trial Chamber I, to which the Court’s Presidency had assigned the situation in Libya,<sup>68</sup> for the issuance of arrest warrants against Muammar Gaddafi, his son Saif Al-Islam and Abdullah Al-Senussi for the crimes against humanity of murder and persecution based on political grounds.<sup>69</sup>

By the decision of 27 June 2011, as mentioned previously, the Chamber granted

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<sup>65</sup> See Human Rights Watch, *cit. supra* note 52, p. 60 ff.

<sup>66</sup> UN Doc. A/61/10, Report of the International Law Commission, Fifty-Eight Session (1 May-9 June and 3 July-11 August 2006), Annex E, para. 18. As to the territoriality principle see, *inter alia*, AKEHURST, “Jurisdiction in International Law”, BYIL, 1972-1973, p. 145 ff., p. 152 ff.; AKANDE, “Territoriality Principle”, in CASSESE (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, 2009, p. 531 f.; CRYER, FRIMAN, ROBINSON and WILMSHURST, *An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge, 2010, p. 46 f.

<sup>67</sup> See Statement of the Prosecutor on the Opening of the Investigation into the Situation in Libya, The Hague, 3 March 2011.

<sup>68</sup> ICC-01/11-1, Presidency, Decision Assigning the Situation in the Libyan Arab Jamahiriya to Pre-Trial Chamber I, 4 March 2011.

<sup>69</sup> ICC-01/11-01/11-4-Red, Pre-Trial Chamber I, Prosecutor’s Application pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi.

the Prosecutor's application.<sup>70</sup> It held that there were reasonable grounds to believe that, pursuant to Article 25(3)(a) of the Rome Statute, Colonel Gaddafi and his son were responsible as indirect co-perpetrators for the crimes against humanity of murder and persecution on political grounds that were committed in different locations in Libya from 15 February until at least 28 February, and that Al-Senussi was responsible as an indirect perpetrator for those which were committed in Benghazi from 15 February until at least 20 February.<sup>71</sup>

In particular, the Chamber found reasonable grounds to believe that Muammar and Saif Al-Islam Gaddafi, acting as *de facto* head of the Libyan State and *de facto* Prime Minister respectively, designed and orchestrated a plan to prevent and suppress by any means the civilian demonstrations against the regime and contributed to its implementation by performing essential tasks, such as issuing orders to that effect and providing the necessary resources.<sup>72</sup> Moreover, according to the Chamber, reasonable grounds existed to believe that they "were both mutually aware and accepted that implementing the plan would result in the realisation of the objective elements" of the aforementioned crimes.<sup>73</sup>

With regard to Al-Senussi, who was at the time the head of Libyan military intelligence, the Chamber found reasonable grounds to believe that, once instructed by Colonel Gaddafi to implement the plan in Benghazi, he directed the armed forces under his command to attack civilians protesting in that city.<sup>74</sup> The Chamber pointed out that "not only did Abdullah Al-Senussi play an essential role in the commission of the crimes by giving orders to the armed forces under his control, but at the same time, and as a result of his position, he had the power to determine whether and how the crimes were committed".<sup>75</sup>

As requested by the Prosecutor, on 27 June, Pre-Trial Chamber I issued warrants of arrest for Muammar Gaddafi, his son Saif Al-Islam and Abdullah Al-Senussi for murders and persecution as crimes against humanity.<sup>76</sup> A few days later, the Registrar, on instructions from the Chamber, transmitted a request for their arrest and surrender to the Libyan authorities, the States Parties to the ICC Statute, the Security Council members not parties to it and to Libya's neighbouring States, to cover the eventuality that the three enter one of these territories.<sup>77</sup>

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<sup>70</sup> See *supra* section 2.

<sup>71</sup> ICC-01/11-01/11-1, *cit. supra* note 5, para. 71.

<sup>72</sup> *Ibid.*, paras. 76 and 78-80.

<sup>73</sup> *Ibid.*, para. 82.

<sup>74</sup> *Ibid.*, para. 87.

<sup>75</sup> *Ibid.*, para. 89.

<sup>76</sup> See: ICC-01/11-01/11-2, Pre-Trial Chamber I, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, 27 June 2011; ICC-01/11-01/11-3, Pre-Trial Chamber I, Warrant of Arrest for Saif Al-Islam Gaddafi, 27 June 2011; ICC-01/11-01/11-4, Pre-Trial Chamber I, Warrant of Arrest for Abdullah Al-Senussi, 27 June 2011.

<sup>77</sup> See: ICC-01/11-01/11-5, Registry, Request to the Libyan Arab Jamahiriya for the Arrest and Surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah

At the end of September, on application by the Prosecutor, Pre-Trial Chamber I issued a request for cooperation addressed to the Libyan authorities, the States Parties to the Rome Statute and the Security Council members not parties to it to identify, trace, seize and freeze the personal property and assets of the suspects located in their territory for the purpose of eventual forfeiture, in particular for the benefit of the victims.<sup>78</sup> Following this request, pursuant to Article 93(1)(k) of the Rome Statute, Italy seized property and assets worth more than one billion euros in the spring of 2012.<sup>79</sup>

As mentioned above, on 20 October 2011, Colonel Gaddafi was captured wounded by the Misratan *thuwar* near Sirte and put in an ambulance heading to Misrata, but died before arriving there, reportedly due to a gunshot wound.<sup>80</sup> At the beginning of November, the Registrar received a copy of the death certificate, sent from the Embassy of Libya to the Netherlands, and transmitted it to Pre-Trial Chamber I.<sup>81</sup> As a result, on 22 November 2011, the Chamber terminated the case against the former Libyan leader.<sup>82</sup>

Saif Al-Islam Gaddafi was captured by the Zintan *thuwar* near Ubari in south-eastern Libya on 19 November 2011 and taken by plane to Zintan where, at the

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Al-Senussi, 4 July 2011; ICC-01/11-01/11-6, Registry, Request to States Neighbouring the Libyan Arab Jamahiriya for the Arrest and Surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, 4 July 2011; ICC-01/11-01/11-7, Registry, Request to all States Parties to the Rome Statute for the Arrest and Surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, 4 July 2011; ICC-01/11-01/11-8, Registry, Request to the United Nations Security Council Members that are not States Parties to the Rome Statute for the Arrest and Surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, 4 July 2011.

<sup>78</sup> See Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, to the United Nations Security Council on the Situation in Libya, pursuant to UN SC Resolution 1970 (2011), 2 November 2011, para. 13.

<sup>79</sup> See: “Sequestrati beni di Gheddafi per oltre 1,1 miliardi di euro”, 28 March 2012, available at: <[http://www.repubblica.it/economia/2012/03/28/news/sequestro\\_gheddafi-32358828/](http://www.repubblica.it/economia/2012/03/28/news/sequestro_gheddafi-32358828/)>; “A Pantelleria sequestrati beni alla famiglia Gheddafi per 20 milioni di euro”, 16 May 2012, available at: <<http://www.ilsole24ore.com/art/notizie/2012-05-16/pantelleria-sequestrati-beni-famiglia-115817.shtml?uuid=AbklUOdF>>. Assets seized included stakes of the Libyan Investment Authority (LIA) in Italian companies UniCredit, Eni and Finmeccanica. The LIA, which is a government agency, challenged their seizure before the Court of Appeals of Rome on the grounds that those assets were controlled no longer by the Gaddafi family, but by the new Libyan Government on behalf of the Libyan people. See “Shearman & Sterling Advises LIA in Challenge to € 1 Billion Asset Freeze”, 27 April 2012, available at: <<http://www.shearman.com/Shearman--Sterling-Advises-LIA-in-Challenge-to-1-Billion-Italian-Asset-Freeze-04-27-2012>>.

<sup>80</sup> See *supra* section 3.2.

<sup>81</sup> ICC-01/11-01/11-22, Registry, Transmission of Muammar Mohammed Abu Minyar Gaddafi’s Death Certificate, 9 November 2011.

<sup>82</sup> ICC-01/11-01/11-28, Pre-Trial Chamber I, Decision to Terminate the Case against Muammar Mohammed Abu Minyar Gaddafi, 22 November 2011.

time of writing, he is still in custody.<sup>83</sup> Soon after his capture, Pre-Trial Chamber I issued a decision requesting the new Libyan Government, that is to say the NTC, to file submissions, *inter alia*, on whether and when it intended to surrender the Colonel's son to the Court.<sup>84</sup> The NTC responded that Gaddafi was not arrested on account of the ICC arrest warrant and that he was currently being investigated for various offences under domestic law. Consequently, it submitted a request to postpone his surrender to the ICC, pursuant to Article 94(1) of the Rome Statute, so as to complete its investigation and prosecution.<sup>85</sup> By decision of 7 March 2012, the Chamber rejected the Libyan request, on the basis that Article 94 only applies to ICC cooperation requests other than surrender, and demanded that Libya arrange with the Registry for Gaddafi's surrender to the Court.<sup>86</sup>

Two weeks later, the Libyan Government notified Pre-Trial Chamber I of its intention to challenge the admissibility of the case regarding the Colonel's son and asked for the suspension of the surrender request pending the Chamber's decision on the challenge, pursuant to Article 95 of the Statute.<sup>87</sup> On 4 April 2012, the Chamber refused the new Libyan request, recalling that Article 95 only applies when an admissibility challenge is already under consideration and reiterated its request that Saif Al-Islam Gaddafi be immediately surrendered to the Court.<sup>88</sup>

The Libyan Government did not comply with the Chamber's request and, on 1 May 2012, it filed an application challenging the admissibility of the case against Gaddafi on the grounds that he was being investigated by the domestic judicial authorities for substantially the same acts alleged by the ICC Prosecutor, and requesting postponement of his surrender pending a decision on the challenge.<sup>89</sup> The Chamber granted this request by decision of 1 June 2012.<sup>90</sup>

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<sup>83</sup> See "Saif Al-Islam Gaddafi Arrested in Libya", 19 November 2011, available at: <<http://www.aljazeera.com/news/middleeast/2011/11/20111119111936535209.html>>.

<sup>84</sup> ICC-01/11-01/11-39-Red, Pre-Trial Chamber I, Public Redacted Version of Decision Requesting Libya to File Observations Regarding the Arrest of Saif Al-Islam Gaddafi, 6 December 2011.

<sup>85</sup> ICC-01/11-01/11-44-Anx1-Red, Registry, Report of the Registrar on Libya's Observations Regarding the Arrest of Saif Al-Islam Gaddafi, 23 January 2012, Annex 1.

<sup>86</sup> ICC-01/11-01/11-72, Pre-Trial Chamber I, Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, 7 March 2012.

<sup>87</sup> ICC-01/11-01/11-82, Government of Libya, Notification and Request by the Government of Libya in Response to "Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi", 22 March 2012.

<sup>88</sup> ICC-01/11-01/11-100, Pre-Trial Chamber I, Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, 4 April 2012.

<sup>89</sup> ICC-01/11-01/11-130-Red, Government of Libya, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, 1 May 2012. See also ICC-01/11-01/11-134, Decision on the Conduct of the Proceedings Following the "Application on behalf of the Government of Libya pursuant to Article 19 of the Statute", 4 May 2012, para. 8.

<sup>90</sup> ICC-01/11-01/11-163, Pre-Trial Chamber I, Decision on the Postponement of the Execution of the Request for Surrender of Saif Al-Islam Gaddafi pursuant to Article 95 of the Rome Statute, 1 June 2012.

Regarding Abdullah Al-Senussi, he was arrested by the Mauritanian authorities on 17 March 2012 as he arrived at Nouakchott airport on a flight from Morocco with a forged Malian passport, and at the time of writing he is still in detention in Mauritania.<sup>91</sup> Soon after his arrest, the Mauritanian authorities received a surrender request from the ICC, and extradition requests from Libya, where he was being investigated by the Libyan judicial authorities,<sup>92</sup> and from France, where he had been convicted *in absentia* in 1999 of involvement in the 1989 bombing of a French passenger plane and sentenced to life imprisonment.<sup>93</sup>

Mauritania is not a party to the Rome Statute and, as such, it is not subject to the obligations of cooperation with the ICC stated therein, including the obligation to comply with the Court's surrender requests. Nevertheless, as stated previously, in Resolution 1970 the Security Council urged all States to cooperate fully with the Court.<sup>94</sup> At the time of writing, the Mauritanian authorities have taken no decision regarding the competing requests from the ICC, Libya and France. What is more, Al-Senussi has reportedly been indicted for illegally entering the country.<sup>95</sup>

It should be noted that, following the arrest warrants of 27 June 2011, the ICC Prosecutor continued his investigation into the crimes committed by Saif Al-Islam Gaddafi and Al-Senussi and, until his death, into those perpetrated by Muammar Gaddafi, progressing in the collection of evidence against them.<sup>96</sup> However, after Libya's admissibility challenge of 1 May 2012, he suspended the investigation into the activities of the Colonel's son pursuant to Article 19(7) of the Rome Statute.<sup>97</sup> Separately, the Prosecutor started investigating the gender crimes committed during the conflict. At the time of writing, however, no application has been made to Pre-Trial Chamber I for the issuance of new arrest warrants.

Interestingly, the Prosecutor has no time limit for investigating and prosecuting individuals responsible for crimes within the Court's jurisdiction in the Libyan

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<sup>91</sup> See "Former Gaddafi Spy Chief Held in Mauritania", 17 March 2012, available at: <<http://www.aljazeera.com/news/africa/2012/03/2012317101649311253.html>>.

<sup>92</sup> See ICC-01/11-01/11-130-Red, *cit. supra* note 89, paras. 50-52.

<sup>93</sup> See "Paris veut que Senoussi exécute sa peine en France", 19 March 2012, available at: <<http://www.lanouvellerepublique.fr/France-Monde/Actualite/Faits-divers-justice/n/Contenus/Articles/2012/03/19/Paris-veut-que-Senoussi-execute-sa-peine-en-France>>.

<sup>94</sup> See *supra* section 4.

<sup>95</sup> See PRIEUR, "Gaddafi Ex-Spy Charged in Mauritania: Source", 21 May 2012, available at: <<http://www.reuters.com/article/2012/05/21/us-mauritania-senussi-idUSBRE84K0QX20120521>>.

<sup>96</sup> See Second Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UN SC Resolution 1970 (2011), 2 November 2011, para. 42; Statement by Luis Moreno-Ocampo, *cit. supra* note 78, para. 12.

<sup>97</sup> See Third Report of the Prosecutor of the International Criminal Court, *cit. supra* note 58, para. 30.

territory since 15 February 2011.<sup>98</sup> Nevertheless, over the years the Office of the Prosecutor has developed an investigation and prosecution policy focused on “those who bear the greatest responsibility for the most serious crimes”<sup>99</sup> consistently with the Rome Statute, under which the ICC has jurisdiction with respect to “the most serious crimes of international concern” (Article 1) and must declare a case inadmissible where it “is not of sufficient gravity to justify further action by the Court” (Article 17(1)(d)). It is expected that, according to that policy, the Prosecutor will concentrate his efforts only on a small number of individuals considered as the most responsible, in particular those who ordered, financed or organised the commission of crimes, and on a limited number of incidents regarded as among the gravest and representative of the main categories of victims.<sup>100</sup>

#### 6. THE COMPLEMENTARITY PRINCIPLE AND LIBYA’S ADMISSIBILITY CHALLENGE OF 1 MAY 2012

The Libyan admissibility challenge of 1 May 2012 brings into question the interpretation and the application of the very principle on which the functioning of the ICC is based, that is to say the principle of complementarity. Under Article 1 of the Rome Statute, the Court is “complementary to national criminal jurisdictions”. States have primary responsibility for investigating and prosecuting international crimes. The ICC will step in only if States are unwilling or unable to do so. According to Article 17(1)(a) of the Rome Statute, the Court is bound to declare a case inadmissible, if that case “is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”. In its application, Libya submitted that the case against Saif Al-Islam Gaddafi was inadmissible since it was investigating him for the same acts as those forming the basis of the ICC arrest warrant, although characterised as ordinary crimes,<sup>101</sup> and claimed its willingness and ability to carry out the investigation genuinely.<sup>102</sup> Accordingly, the Libyan Government requested Pre-Trial Chamber I to declare the case against Gaddafi inadmissible and quash the surrender request.<sup>103</sup>

Indeed, while it can hardly be doubted that the new Libyan Government is willing to investigate and prosecute the Colonel’s son, the question arises of whether

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<sup>98</sup> See STAHN, “Libya, the International Criminal Court and Complementarity”, JICJ, 2012, p. 325 ff., p. 348 ff.

<sup>99</sup> Office of the Prosecutor of the International Criminal Court, Prosecutorial Strategy 2009-2012, The Hague, 1 February 2010, para. 19.

<sup>100</sup> See *ibid.*, paras. 19, 20; First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UN SC Resolution 1970 (2011), paras. 25-26.

<sup>101</sup> ICC-01/11-01/11-130-Red, *cit. supra* note 89, paras. 83-84.

<sup>102</sup> *Ibid.*, paras. 93-97.

<sup>103</sup> *Ibid.*, para. 108.

it is able to grant him a fair trial in accordance with international standards. Article 17(3) of the Rome Statute stipulates that “in order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings”.

The ICOIL found that “Libya had a judicial system that lacked independence and fairness”, which “collapsed in the aftermath of the conflict”.<sup>104</sup> It added that “considerable efforts will be required by the interim Government to rebuild the judicial system”.<sup>105</sup> However, as the Prosecutor recalled in its third report to the Security Council, “admissibility analysis is not an assessment of the judicial system as a whole, but an assessment as to whether or not the national authorities have investigated or prosecuted, or are investigating or prosecuting genuinely, the cases selected by the Office”.<sup>106</sup>

As for the case to which the admissibility challenge of 1 May 2012 refers, Libya was able to obtain the accused: as mentioned above, Saif Al-Islam Gaddafi was captured in November 2011 and has since been detained in that country.<sup>107</sup> Moreover, it is reasonable to assume that the Libyan judicial authorities are capable of collecting the necessary evidence and testimony, perhaps even more easily than the ICC Prosecutor.<sup>108</sup>

Whether Libya is able to carry out its proceedings against Gaddafi in accordance with due process standards is a moot point. Notably, Article 17(3) of the Rome Statute makes no reference to such standards. However, pursuant to Article 21(3), the application and interpretation of the Statute must be “consistent with internationally recognized human rights”. Therefore, it is submitted that Pre-Trial Chamber I should take due process concerns into consideration when determining whether Libya is “otherwise unable to carry out its proceedings” under Article 17(3).<sup>109</sup> In its application, the new Libyan Government claimed to be “able to carry out proceedings in accordance with international standards” with the support of the international community, including the ICC in the context of positive complementarity.<sup>110</sup> It was stressed, however, that “it is not the function of the ICC to hold

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<sup>104</sup> UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, paras. 779-780.

<sup>105</sup> *Ibid.*, para. 780.

<sup>106</sup> Third Report of the Prosecutor of the International Criminal Court, *cit. supra* note 58, para. 24.

<sup>107</sup> See *supra* section 5.

<sup>108</sup> See ICC-01/11-01/11-130-Red, *cit. supra* note 89, para. 96.

<sup>109</sup> See STAHN, *cit. supra* note 98, p. 344 ff.

<sup>110</sup> ICC-01/11-01/11-130-Red, *cit. supra* note 89, para. 97. On “positive complementarity”, see MORENO-OCAMPO, “A Positive Approach to Complementarity: The Impact of the Office of the Prosecutor”, in STAHN and EL ZEIDY (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge, 2011, Vol. I, p. 21 ff., p. 23 f.

Libya's national legal system against an exacting and elaborate standard beyond that basically required for a fair trial".<sup>111</sup>

Clearly, the ICC's decision on the admissibility challenge in the case of Gaddafi will indirectly affect the course of action in the case of Al-Senussi. Were its application granted, the Libyan Government would certainly challenge the admissibility of the case against the former head of their national military intelligence, if and when he is extradited to Libya. In fact, like the Colonel's son, Al-Senussi is allegedly being investigated by the Libyan judicial authorities for substantially the same acts as those on which the ICC arrest warrant is based.<sup>112</sup>

## 7. THE PROSPECTS FOR NATIONAL PROCEEDINGS AGAINST ALLEGED CRIMINALS

Whatever decision the ICC takes on the Libyan admissibility challenge of 1 May 2012, national proceedings appear to be the only practically available option for ensuring the punishment of the bulk of those who committed international crimes during the protest phase and the ensuing armed conflict. As mentioned above, the Gaddafi-era judicial system collapsed in the aftermath of the war.<sup>113</sup> The NTC is now facing the huge challenge of building a new judicial system consistent with international standards. Ensuring accountability for international crimes perpetrated by both Gaddafi forces and *thumar* is an additional critical task confronting the new Libyan Government.

The April 2012 draft decree incorporating international crimes into Libyan criminal code can be considered a first step in that direction.<sup>114</sup> It substantially reproduces Articles 6, 7, 8, 25, 28 and 77 of the ICC Statute. Interestingly, if the aforementioned draft decree were adopted, the Libyan courts could not impose the death penalty on those convicted of genocide, crimes against humanity or war crimes. The Libyan criminal code prescribes the death penalty for serious offences such as premeditated murder (Article 368).<sup>115</sup> By contrast, under the said draft decree only the same penalties as those provided for in Article 77 of the Rome Statute could be imposed on persons found responsible for international crimes.

At the time of writing, a number of criminal proceedings against Gaddafi loyalists have begun or are about to start under the existing legislation before Libyan tribunals.<sup>116</sup> The first of such trials commenced in February 2012 before a military

<sup>111</sup> ICC-01/11-01/11-130-Red, *cit. supra* note 89, para. 99.

<sup>112</sup> *Ibid.*, paras. 50, 83.

<sup>113</sup> See *supra* section 6.

<sup>114</sup> ICC-01/11-01/11-144, Libyan Government's Re-filing of Public Annexes to its Article 19 Admissibility Challenge, 15 May 2012, Annex J. See also *ibid.*, Annex K.

<sup>115</sup> ICC-01/11-01/11-158, Libyan Government's Filing of Compilation of Libyan Law Referred to in its Admissibility Challenge, 28 May 2012, Annex A.

<sup>116</sup> See AL TOMMY, "Libya Court Postpones Trial of Gaddafi Loyalists", 6 February 2012, available at: <<http://af.reuters.com/article/topNews/idAFJ0E8150112012020206>>; "Libya Holds

court in Benghazi against 41 former regime supporters accused of various offences during the conflict. However, upon defence lawyers' request, the case was transferred to a civilian court.<sup>117</sup>

Indeed, the Libyan conflict-related detainees currently consist entirely of former Gaddafi supporters.<sup>118</sup> In this regard, the ICOIL voiced concern about the failure to hold *thumar* accountable for criminal acts during the conflict and afterwards, and emphasised the need for the Libyan authorities to “address similar criminal acts committed by different perpetrators on an equal footing, in order to restore confidence in the legal system and judiciary”.<sup>119</sup>

In this context, Law No. 38 “On Some Procedures for the Transitional Period”, which was adopted by the NTC on 2 May 2012, is highly regrettable. It stipulates that no penalty shall be imposed for “military, security, or civil actions dictated by the February 17 Revolution that were performed by revolutionaries with the goal of promoting or protecting revolution”.<sup>120</sup> It thus apparently grants *thumar* a blanket amnesty.<sup>121</sup> Notably, Law No. 35 “On Granting Amnesty of Some Crimes”, which was passed by the NTC on the very same day, also gives cause for concern, as it explicitly excludes only certain acts constituting international crimes from the amnesty it confers. In particular, it reportedly fails to rule out murder and forced displacement which, depending on the circumstances, may amount to war crimes or crimes against humanity.<sup>122</sup>

Analysing the complex issue of the legality of amnesties in international law exceeds the scope of this article. Nonetheless, a few remarks should be made.<sup>123</sup> First of all, Article 6(5) of the 1977 Additional Protocol II, to which Libya is a party, stipulates that “at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”. This provision, however, cannot be

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First Civilian Trial of Alleged Gaddafi Supporters”, 9 May 2012, available at: <<http://www.reuters.com/article/2012/05/08/us-libya-trial-idUSBRE84714S20120508>>; “Libya Says It Is Ready to Try Gaddafi Loyalists”, 31 May 2012, available at: <<http://www.reuters.com/article/2012/05/31/us-libya-trial-loyalists-idUSBRE84U11R20120531>>.

<sup>117</sup> See UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, paras. 785, 786.

<sup>118</sup> *Ibid.*, Annex 1, paras. 776, 778.

<sup>119</sup> *Ibid.*, Annex 1, para. 778.

<sup>120</sup> Human Rights Watch, “Libya: Letter to the ICC Prosecutor on Libyan Amnesty Laws”, 25 May 2012, available at: <<http://www.hrw.org/news/2012/05/25/libya-letter-icc-prosecutor-libyan-amnesty-laws>>.

<sup>121</sup> See Human Rights Watch, “Libya: Amend New Special Procedures Law”, 11 May 2012, available at: <<http://www.hrw.org/news/2012/05/11/libya-amend-new-special-procedures-law>>.

<sup>122</sup> Human Rights Watch, *cit. supra* note 120.

<sup>123</sup> On the issue of the legality of amnesties in international law, see O'SHEA, *Amnesty for Crime in International Law and Practice*, The Hague, 2002; NTOUBANDI, *Amnesty for Crimes against Humanity under International Law*, Leiden, 2007; DELLA MORTE, *Le amnistie nel diritto internazionale*, Padova, 2011.

interpreted as encouraging amnesty for international crimes. When it was adopted at the Geneva Diplomatic Conference, the Soviet Union, in explanation of the vote, stated that it “could not be construed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever”.<sup>124</sup> That Article 6(5) cannot be invoked in favour of an amnesty for war crimes has always been the position of the International Committee of the Red Cross (ICRC).<sup>125</sup> Indeed, according to the ICRC Study on Customary International Humanitarian Law, a customary rule nowadays exists under which

“at the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, *with the exception of persons suspected of, accused of or sentenced for war crimes*”.<sup>126</sup>

Moreover, as regards torture, it should be noted that the 1984 Convention against torture, to which Libya is a party, mandates States Parties to either extradite or prosecute persons allegedly responsible for torture who are found in their territory, when torture was committed there or if the perpetrator or victim are their nationals (Articles 5 and 7(1)). In addition, as stated by the ICTY Trial Chamber in *Furundžija*, as a consequence of the peremptory nature of the prohibition against torture, States cannot take “national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law”.<sup>127</sup> Therefore, Libya cannot condone acts of torture committed by *thuwar* on the grounds that they were “dictated by the February 17 Revolution [...] with the goal of promoting or protecting revolution”.

More generally, as the Appeals Chamber of the Special Court for Sierra Leone found in *Kallon and Kamara*, there is nowadays an emerging principle of customary law to the effect that States cannot grant amnesty for international crimes.<sup>128</sup> This principle is supported, *inter alia*, by the United Nations. In fact, according to UN policy on amnesties, any amnesties that foreclose war crimes, genocide, crimes against humanity or gross violations of human rights are impermissible.<sup>129</sup> Laws No. 35 and 38 of 2012 are clearly inconsistent with the aforementioned principle,

<sup>124</sup> HENCKAERTS and DOSWALD-BECK (eds.), *cit. supra* note 15, Vol. II, Part 2, p. 4032 f.

<sup>125</sup> *Ibid.*, p. 4043.

<sup>126</sup> *Ibid.*, Vol. I, p. 611 (emphasis added).

<sup>127</sup> ICTY Trial Chamber, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, para. 155.

<sup>128</sup> SCSL Appeals Chamber, *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para. 82. On this point, see also CRYER, FRIMAN, ROBINSON and WILMSHURST, *cit. supra* note 66, p. 565 f.

<sup>129</sup> Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, New York and Geneva, 2009, p. 11.

to the extent that they prevent the prosecution of individuals who allegedly perpetrated international crimes in the context of the revolution.

Finally, it is worth mentioning Law No. 4 of 2011 on national reconciliation and transitional justice, which established a Fact-Finding and Reconciliation Commission. At the time of writing such commission has not yet started functioning. Apparently, it does not constitute an alternative to prosecutions of international crimes. In fact, it has, *inter alia*, the power to refer alleged perpetrators to the competent domestic courts.<sup>130</sup>

## 8. CONCLUSION

As illustrated above, in 2011 Libya was a theatre of atrocious crimes. Gaddafi forces and insurgents both reportedly committed a wide range of war crimes and crimes against humanity.<sup>131</sup> The prompt referral of the Libyan situation to the ICC Prosecutor by the Security Council was certainly a positive step, as it had the effect of extending the ICC jurisdiction to international crimes perpetrated by both parties. However, it did not have a deterrent effect and nor did the subsequent arrest warrants issued against Muammar Gaddafi, his son Saif Al-Islam and Abdullah Al-Senussi.

To date, these are the only arrest warrants that have been issued by the ICC with respect to the situation in Libya. As mentioned previously, the case against the former Libyan leader was terminated following his death, which might in itself constitute a war crime.<sup>132</sup> Regarding the case against Saif Al-Islam Gaddafi, who is detained in Libya, the ICC has not yet decided on the admissibility challenge filed by the new Libyan Government. The challenge brings into question the interpretation and application of the principle of complementarity, which governs the functioning of the Court. In this author's view, when deciding, the Court should consider, *inter alia*, whether Libya is able to carry out its proceedings against the Colonel's son in accordance with due process standards.<sup>133</sup> The ICC's decision on the admissibility challenge in the case of the Saif Al-Islam Gaddafi is likely to indirectly influence the course of action in the case of Al-Senussi. In fact, if the former were declared inadmissible, Libya would certainly challenge the admissibility of the latter, should the extradition of Al-Senussi from Mauritania be obtained.

The ICC Prosecutor has no time limit for investigating and prosecuting those responsible for crimes within the Court's jurisdiction in Libya since 15 February

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<sup>130</sup> The English translation of Law No. 4 of 2011 is available at: <<http://www.scribd.com/doc/83976561/Transitional-Justice-Law-of-Libya>>. On this law see UN Doc. A/HRC/19/68, *cit. supra* note 2, Annex 1, paras. 790-792.

<sup>131</sup> See *supra* sections 2 and 3.

<sup>132</sup> See *supra* section 3.2.

<sup>133</sup> See *supra* section 6.

2011. However, for the reasons illustrated above, it is expected that only a small number of individuals considered to be the most responsible will be investigated and, where appropriate, prosecuted.<sup>134</sup> In fact, national proceedings appear to be the only practically available option for ensuring punishment of the bulk of those who perpetrated international crimes during the protest phase and the ensuing armed conflict.

The Libyan Government is now facing the big challenge of building a new judicial system in line with international standards, and ensuring accountability for international crimes is certainly an additional major task to confront. However, it can benefit from the support of the UN Support Mission in Libya (UNSMIL), which was mandated by Security Council Resolution 2040 (2012), *inter alia*, to assist Libyan authorities in building “transparent and accountable justice and correctional systems” and developing and implementing a “comprehensive transitional justice strategy” (para. 6(b)). Moreover, the Libyan Government can benefit from the assistance of the ICC in the context of positive complementarity. In particular, pursuant to Article 93(10) of the Rome Statute, the Court may provide assistance to Libya, upon its request, with respect to the investigation or prosecution of the atrocities perpetrated in its territory.

As stressed by the ICOIL, it is important that the Libyan authorities apply the law equally and ensure that those allegedly responsible are investigated and prosecuted, whether Gaddafi loyalists or *thumar*.<sup>135</sup> In this respect Law No. 38 of 2012 is highly regrettable, as it practically prevents the prosecution of *thumar* who committed war crimes or crimes against humanity. Law No. 35 of 2012 is another cause for concern, as it fails to rule out all acts potentially constituting international crimes from the amnesty it confers. While amnesty may be used as a legitimate tool to avoid overburdening the new Libyan judicial system, it is submitted that it should not bar the prosecution of international crimes before Libyan courts.<sup>136</sup> In any case, the aforementioned laws do not prevent the prosecution of international crimes committed in Libya before the ICC or, in accordance with the principle of universal jurisdiction, before foreign courts.

Finally, as regards NATO air strikes which resulted in civilian casualties or damage to civilian objects and might amount to war crimes, both Libya and those States whose forces participated in these air strikes have primary responsibility to investigate and, where appropriate, prosecute the individuals responsible for them. As stated in its third report, the ICC Prosecutor will monitor national judicial activities to assess whether it should conduct its own investigations.<sup>137</sup> However, the exclusive jurisdiction granted by the Security Council to States not parties

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<sup>134</sup> See *supra* section 5.

<sup>135</sup> See *supra* section 7.

<sup>136</sup> See *ibid.*

<sup>137</sup> Third Report of the Prosecutor of the International Criminal Court, *cit. supra* note 58, para. 58.

to the Rome Statute other than Libya with respect to their nationals involved in UN-established or authorised missions on Libyan soil practically precludes the prosecution of United States' and other non-party States' nationals before Libyan courts, third States' courts under the principle of universal jurisdiction, or the ICC.<sup>138</sup>

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<sup>138</sup> See *supra* section 4.