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November 05, 2014

Fatou Bensouda
Prosecutor
International Criminal Court

RE: Accountability for Serious Crimes in Libya

Dear Prosecutor,

We write ahead of your upcoming United Nations Security Council briefing on Libya to draw your attention to a number of issues that we believe implicate your mandate as authorized by Resolution 1970. Indeed, we believe the Office of the Prosecutor should now take several steps to further the quest for accountability for serious crimes in Libya. In the face of ongoing serious crimes that may amount to war crimes and crimes against humanity, particularly with the escalation of armed conflicts in many places in 2014, investigations your office is pursuing in Libya remain limited to cases from 2011 involving officials of the former Gaddafi government.

We believe that your office needs to do more to meaningfully address Libya's current culture of impunity and that further engagement in the face of serious ongoing crimes is needed. We also urge your office to rigorously follow up on the cases involving International Criminal Court (ICC) suspect Saif al-Islam Gaddafi as well as Abdullah Sanussi.

Impunity for Serious Ongoing Crimes

Since the uprising in Libya in 2011, Human Rights Watch has closely monitored the situation in the country. We have had a regular presence there and have issued several reports and numerous press releases, statements, and op-eds. Our research has shown rampant ongoing violations of international law amid a climate of impunity, including arbitrary detentions, torture, forced displacement, and unlawful killings. Many of these violations are sufficiently organized and widespread to amount to crimes against humanity.

Thousands of people across Libya remain in **arbitrary detention**. Only around 10 percent of some 6,000 detainees held in prisons that the Justice Ministry nominally administers, according to the ministry in April, are serving sentences imposed by the courts. The others are held in pre-charge detention, including some who have been



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detained since 2011. An unknown number of detainees are being held in facilities controlled by militias and there is little information about those detained and their conditions of detention as a result of the current conflicts. Despite repeated promises since 2011, and even passing of laws, to address the issue of militia detainees, little has changed. Human Rights Watch has documented serious violations of the rights of detainees held under state custody as well as under the control of militias, including **torture** and other ill-treatment, and denial of due process.

Some 40,000 people from the town of Tawergha **forcibly displaced** since August 2011 continue to be prevented from returning to their former homes, mostly by armed forces from Misrata. The displaced currently reside in makeshift camps and private housing and are dispersed around Libya, subject to arbitrary arrest and detention, attack and harassment. The forced displacement and militia violence amount to a crime against humanity.

We welcome the concern your office has expressed about many of these abuses in previous reports to the Security Council, as well as your commitment to monitor the situation on the ground. Regrettably, since your last briefing to the Council, Libya has fallen into deeper crisis, and escalating violence coupled with lack of accountability has led to further violations.

Since May 2014, violent clashes between rival armed groups have intensified and developed into armed conflicts across Libya. Armed groups have engaged in **attacks on civilians and civilian property** that have included seizing and detaining people as well as looting, burning, and destroying property, in some cases violations that amount to war crimes. Politically motivated **assassinations** also continue unabated and may amount to crimes against humanity. Human Rights Watch has tracked at least 250 such killings in Benghazi and in nearby Derna since the beginning of 2014. The victims of the barrage of assassinations that have gone unclaimed and unpunished include journalists, activists, judges, prosecutors, and members of the security forces.

For these and other serious violations committed in Libya, accountability is required. However, Libyan authorities have failed to conduct investigations, or to prosecute those responsible for any of these violations. In this regard, we note that in July the former Libyan Minister of Justice sought the assistance of your office in pursuing perpetrators of crimes under the ICC's jurisdiction. Indeed, 2014 has seen the near total breakdown of the justice sector in Benghazi, Derna, Sirte, and Sebha. Inaction domestically in the face of mounting crimes has contributed to a culture of impunity that fuels further abuses and has helped set the stage for the militia lawlessness in Libya today.

Given the serious crimes committed in Libya and the challenges facing the authorities, the ICC's mandate therefore remains essential to ending impunity in Libya. We understand that your office is continuing its investigations into a second case (following the first case, which involved Saif al-Islam Gaddafi, Abdullah Sanussi, and Muammar Gaddafi) and is also collecting evidence against other possible suspects, with a focus in particular on pro-Gaddafi officials outside of Libya. At the same time, we encourage you to also consider additional cases addressing the violations outlined in this letter, and to examine the abuses with a view to determining whether further investigations are warranted.

In this respect, we welcomed your July 25 statement, in which you warned that your office "will not hesitate to investigate and prosecute those who commit crimes under the Court's jurisdiction in Libya irrespective of their official status or affiliation." We urge you to continue to convey in public statements your office's judicial mandate and your commitment to the independent and impartial implementation of that mandate. Unfortunately, as the Libyan government has not been able to rein in abuses, let alone hold those responsible to account as it has pledged, we believe the Office of the Prosecutor has an important role to play on behalf of victims in Libya.

We recognize that the effective discharge of your mandate depends to a large degree on the level of support afforded to you by the Security Council and ICC states parties, including in the form of resources. In this regard, we take note of your October 23 statement at the Security Council open debate on working methods in which you expressed concern about the degree of follow-up on referrals, citing in particular that lack of state or UN financing impacts the ability of your office to conduct "full and effective investigations." We urge you to continue to make clear, including at your upcoming Security Council briefing on Libya, the need for the Council and states parties alike to extend their full support to facilitate your important work.

Saif al-Islam Gaddafi

On May 21, an ICC appeals chamber confirmed an earlier decision rejecting Libya's bid to prosecute Saif al-Islam Gaddafi in Tripoli. However, Libya has failed to turn Gaddafi over to the ICC, despite an outstanding obligation to surrender him to the court. This obligation has been outstanding for over a year, and an ICC pretrial chamber indicated in July that the court may take further action to ensure Libya's cooperation, including making a formal finding of non-cooperation and transmitting it to the Security Council to take appropriate measures.

Despite this, Libya has carried on with domestic proceedings against Gaddafi in contravention of its duty to turn him over to The Hague. We therefore welcome your calls on the Libyan authorities to immediately surrender Gaddafi to the ICC. We urge you to reiterate Libya's obligations to cooperate fully with the court pursuant to

Resolution 1970, including at your upcoming briefing to the Security Council. In our advocacy, we have underscored the point that Security Council members in particular, who unanimously gave the ICC authority to investigate in Libya, have a special responsibility to make clear that Libya should comply with the ICC's rulings without delay.

Abdullah Sanussi

On July 24, 2014, an ICC appeals chamber upheld an earlier pretrial chamber decision from October 2013 that concluded that Abdullah Sanussi's case was "inadmissible" and that Libya could therefore prosecute him domestically for the crimes outlined in the ICC's arrest warrant. This decision approving Libya's bid to prosecute the country's former intelligence chief came amid a near breakdown of Libya's judicial system.

Sanussi, together with Saif al-Islam Gaddafi and others, is currently on trial in Libya for, among other charges, serious crimes related to his alleged role in trying to suppress the country's 2011 uprising. The trial of Sanussi and 36 other people, mostly Gaddafi-era officials, began on March 24 in a specially designated courtroom in Al-Hadba Corrections Facility in Tripoli. The facility is currently under the control of the former deputy Minister of Defense, whose forces are allied with the Misrata-led Libya Dawn militia coalition. While subsequent trial sessions have taken place in the months following, the proceeding has been marred with postponements due to the absence of lawyers representing some of the defendants, lack of lawyers for others, and most recently due to the upsurge in violence in Tripoli and environs since July. Proceedings are reportedly due to resume on November 16.

While the July ICC appeals chamber decision is final, as you know, article 19(10) of the ICC treaty allows your office to ask the ICC judges to review a finding of inadmissibility if fully satisfied that new facts have surfaced that negate the basis of the court's original ruling on the matter. Indeed, this procedure was cited by both the ICC pretrial and appeals chambers designated to the Sanussi case as an avenue available to your office.

In this regard, the issue of Sanussi's access to legal counsel is particularly pertinent. On October 11, 2013, the ICC pretrial chamber decided that while Sanussi's lack of legal representation at the time of the ICC decision was not an impediment to the progress of the domestic case against him, it had "the potential to become a fatal obstacle." The ICC appeals chamber similarly stressed that "should it later become clear that the issue of legal representation cannot be resolved, this may be a basis for the Prosecutor to seek, pursuant to article 19(10) of the Statute, a review of the decision that the case against Mr [Sanussi] is inadmissible."

As you may be aware, a Human Rights Watch investigation conducted three months after the pretrial chamber decision revealed that Libya had failed to grant Sanussi and co-defendants basic due process rights.¹ At the time, Sanussi told Human Rights Watch that he had not had access to a lawyer of his choosing and described multiple interrogation sessions without legal counsel. Sanussi also said he had not had the chance to review the evidence against him. In April 2014, it was reported that Sanussi had briefly obtained a lawyer but that he resigned shortly thereafter, citing health reasons. Human Rights Watch was able to monitor some of the proceedings in Tripoli, including a session in April, and is not aware that Sanussi had any access to lawyers.

There are strong indications that Sanussi has little to no prospect of legal representation. Since the start of the trial, we are not aware that Sanussi has had access to a lawyer or legal representation during court sessions. Moreover, the repeated postponement of his trial suggests that the increasing deterioration of the security situation in Libya has directly affected the authorities' ability to carry out the proceedings. As such, we look to your office to gather relevant current information related to Sanussi's case, particularly on the issue of his access to legal counsel, and to consider on this basis requesting the court to revisit its inadmissibility ruling.

Madame Prosecutor, we thank you in advance for your attention to these pressing matters, and are available to discuss these concerns further with you.

Sincerely,

Richard Dicker
Director
International Justice Program
Human Rights Watch

¹ Human Rights Watch, "Libya: Gaddafi Son, Ex-Officials, Held Without Due Process," February 13, 2014, <http://www.hrw.org/news/2014/02/13/libya-gaddafi-son-ex-officials-held-without-due-process>.