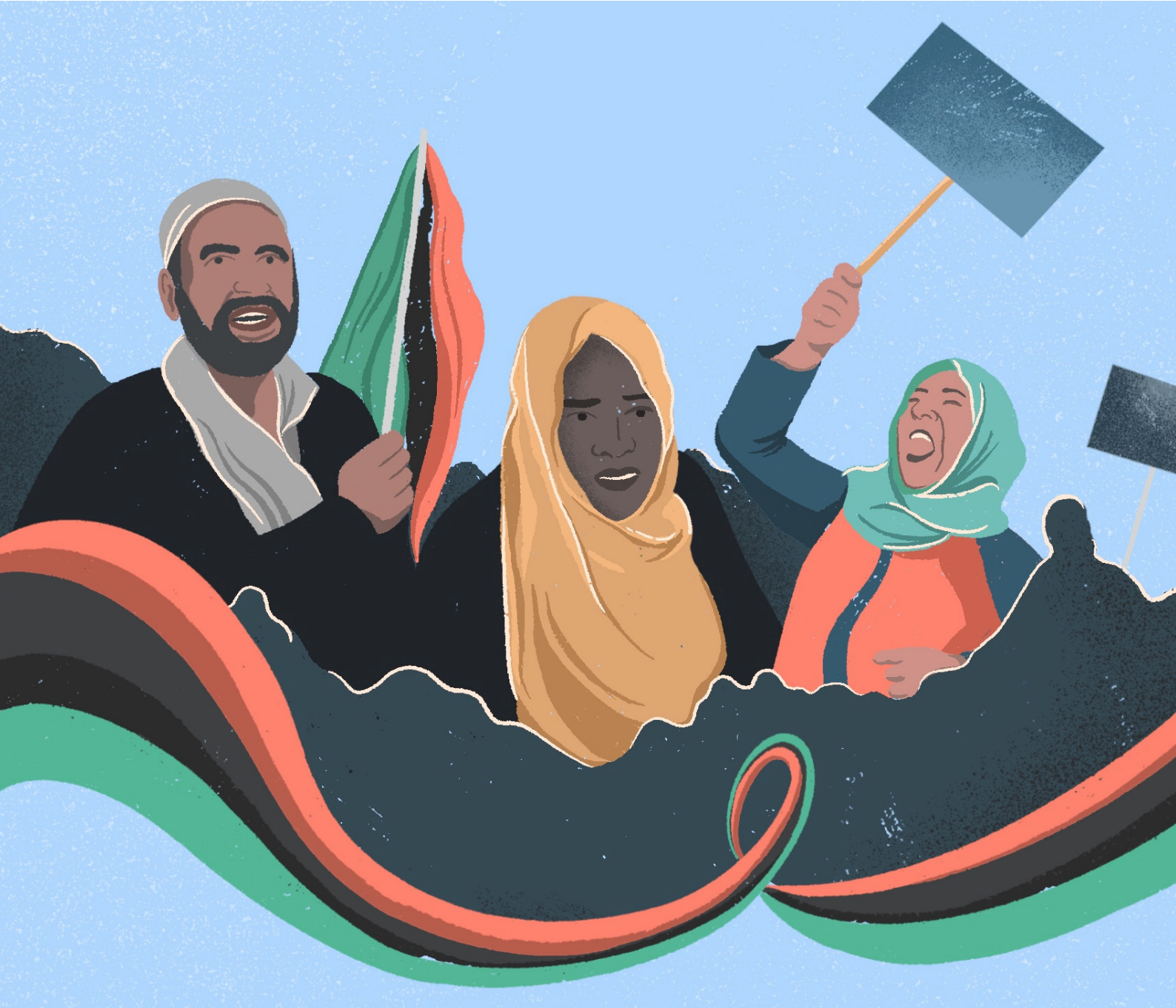
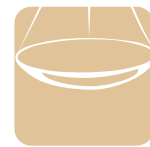


# Victims' Voices: Participation At The International Criminal Court



محامون من أجل العدالة في ليبيا



**LFJL**  
LAWYERS FOR JUSTICE IN LIBYA

# ACKNOWLEDGEMENTS

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LFJL expresses its deepest thanks to the individuals who participated in the surveys.

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This paper was made possible through a partnership with the German Federal Foreign Office. Additional support was provided by the International Center for Transitional Justice (ICTJ), made possible with support from the Ministry of Foreign Affairs of the Kingdom of The Netherlands.

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## THE VICTIMS' VOICES SERIES

LFJL's work is rooted in a rights-based and victim-centred approach: we believe that all engagement and policies must be founded on a framework of human rights and ensure that individuals and communities can participate fully as a fundamental part of leading dignified lives. Libyans must be central to efforts to strengthen respect for human rights, accountability, and the rule of law in the country. Victims are crucial as key stakeholders in Libya and they will have unique perspectives. In that spirit, we are publishing the Victims' Voices series to highlight perceptions of victims and their families on key transitional justice and accountability mechanisms.

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# 1. INTRODUCTION

More than ten years after the situation in Libya was referred to the Prosecutor of the International Criminal Court (ICC), justice for Libyans before the ICC remains illusory. The situation in Libya was referred to the Prosecutor of the ICC by UN Security Council resolution 1970 in February 2011<sup>1</sup>, in the wake of the violence and use of lethal force against civilians and gross and systematic violations of human rights, which followed the popular demonstrations that led to the overthrow of the former Gaddafi regime. An ICC investigation into alleged crimes against humanity and war crimes committed in the context of the situation in Libya since 15 February 2011 opened in March 2011.<sup>2</sup> To date, five arrest warrants have been issued. These have been issued against Muammar Gaddafi (which was withdrawn following his death), his son Saif Al-Islam Gaddafi (issued on 27 June 2011), Abdullah Al-Senussi, ex-director of military intelligence (issued on 27 June 2011, the case was declared inadmissible by the Pre-Trial Chamber on 11 October 2013, confirmed on appeal on 24 July 2014), Al-Tuhamy Mohamed Khaled (issued on 18 April 2013) and Mahmoud Mustafa Busayf Al-Werfalli (issued on 15 August 2017, with a second arrest warrant issued on 4 July 2018). To date, no arrest warrants have been enforced and no suspects have been transferred to the Court. Though Saif Al-Islam Gaddafi was tried, convicted and sentenced to death by a Tripoli Court in a judgment dated 28 July 2015, the case remains admissible before the ICC,<sup>3</sup> and Libya remains under the legal obligation to arrest and surrender him to the ICC. At the time of writing, the arrest warrants against Al-Tuhamy Mohamed Khaled and Mahmoud Mustafa Busayf Al-Werfalli remained open despite reports of their respective deaths.<sup>4</sup>

Despite their thirst for justice and accountability, the near total impunity prevailing in Libya, and the clear mandate of the ICC Prosecutor to investigate international crimes in Libya, victims and the civil society groups supporting them have had only minimal engagement with ICC organs and, the ICC's innovative framework to enable victims to participate

in proceedings before the Court remains virtually dormant in respect of the Libya situation and cases. On first glance, this might seem surprising – surely victims desirous of accountability would engage with any system which could notionally bring them a measure of justice? From those consulted by LFJL in the course of the research for this report, it is clear that Libyan victims of international crimes want justice, whether it occurs domestically or internationally.<sup>5</sup> What is consistent for them in the current time is the total absence of any form of justice in either sphere.<sup>6</sup> There is an ambivalence about the ICC, however. While victims have limited trust in the ICC, because of the absence of real domestic justice alternatives, there is continued hope that the ICC will eventually make progress on the Libyan situation and cases. As one respondent indicates, “the ICC has let us down, and despite this, we are always ready to submit any information it might need.”<sup>7</sup>

A part of the challenge with victim participation has to do with victims' and Libyan civil society's frustration at the lack of tangible progress of ICC cases and the failure to issue new arrest warrants against most known perpetrators. After ten years of nothing much, why should they engage with the ICC? Is there really a point to such engagement? But equally, for those victims who might wish to engage with the ICC, their ability to do so has been marred by limited access to information about what has been happening at the ICC and few opportunities for constructive engagement. These latter challenges relate both to the structural impediments to participation inherent in ICC procedures and how they have been interpreted by different chambers as well as to the limited resources within the Registry devoted to foster victims' engagement, owing in large part to the perception that the Libyan situation and cases are not presently active. Thus, the lack of tangible progress before the ICC of the Libyan situation and cases has become the principal rationale for the Court's limited outreach and engagement with Libyans (ultimately resulting in low levels of victim participation). In a cyclical sense, this serves as a self-fulfilling prophecy for the continued lack of progress with the situation and cases; without victim and civil society engagement, the prospects for meaningfully progressing the Libyan situation and cases remain poor.

This report critically examines the various causes for the low Libyan victim engagement with the ICC. It focuses on the perspectives of Libyan victims and civil society actors

1 See S/RES/1970 (2011)

2 See Office of the Prosecutor, “ICC Prosecutor to open an investigation in Libya”, 2 March 2011, <https://www.icc-cpi.int/pages/item.aspx?name=statement+020311>.

3 See, *Prosecutor v Saif al-Islam Gaddafi*, “Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I of 5 April 2019”, Appeals Chamber, ICC-01/11-01/11-695 09-03-2020, 9 March 2020.

4 See, Office of the Prosecutor, “Twenty-First Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to Resolution 1970 (2011)”, 17 May 2021; “Libya militia leader wanted by ICC shot dead: officials” DW, 25 March 2021; “Libyan militia leader wanted by ICC for war crimes killed by gunmen”, France 24, 25 March 2021; “Libyan interim government announces death of General Intelligence chief”, Egypt Today, 10 May 2020.

5 Interview number (1)

6 Interview number (2)

7 Interview number (1)

and also provides an analysis of ICC procedures relevant to victim engagement (including outreach and information-sharing, victim engagement with the Office of the Prosecutor and victim participation in the Libyan situation and cases), and explains how these have been applied in relation to Libya and have impacted victim participation. The report considers what steps may be taken and by whom, to improve victims' ability to engage with the ICC where they so choose, and explains why such steps are merited to advance the prospects of justice and to ensure the integrity of the ICC system of justice as a whole.

Lawyers for Justice in Libya (LFJL) decided to produce this report because, despite the lack of tangible progress to date, it still sees the ICC as having the potential to be a critically important instrument for Libya. The ICC can contribute to ending impunity for some of the worst crimes committed in Libya for which impunity continues to reign, while at the same time it can serve as a catalyst for local justice efforts in the country, a necessary precondition for long-term peace and stability. Our focus on victims and victim participation reflects our view that victims are crucial stakeholders in any justice effort and our understanding of the central importance for the ICC to engage closely with victims, most affected communities, and civil society throughout its work. Victims' views, concerns and experiences of harm and impunity are crucial for the ICC's understanding of how crimes within its jurisdiction have been perpetrated, and how they continue to affect the lives of ordinary Libyans in all parts of the country. Furthermore, LFJL is of the firm view that greater engagement of Libyan victims by the ICC would improve perceptions of the ICC's relevance for Libya, also increasing the prospects for arrest warrants to be complied with.

This report benefits from the results of a population survey carried out by LFJL between 1 October and 31 January 2021 on Libyans' perceptions of justice and accountability, in which 385 Libyans of different genders, ages, backgrounds, locations and tribal affiliations were interviewed. Additionally, five in-depth interviews were conducted with Libyan civil society actors who are working directly with Libyan victims of crimes coming within the jurisdiction of the ICC. The identity of some interviewees, as well as the places and dates of interviews, have been withheld to protect the personal safety of those concerned in a context where some of the respondents may be targeted and attacked by state and non-state actors within the country. LFJL also interviewed key officials at the ICC engaging in different ways with victims and civil society actors. In particular, it met with representatives from the Victim Participation and Reparations Section and the Public Information and Outreach Section of the Registry as well as the Principal Counsel of the Office of Public Counsel for Victims. LFJL expresses its gratitude to all those who contributed information for this report.

This report is the third in an LFJL report series which reflects on how best to integrate the views and concerns of victims of human rights and international humanitarian law abuses into key processes and mechanisms relevant to Libya: The *Victims' Voices* series. The first report focused on integrating victims' voices in the Libyan Political Dialogue Forum. The second report focused on victims' voices in the Independent Fact-Finding Mission on Libya.<sup>8</sup>

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<sup>8</sup> See "*Victims' Voices: The UN Independent Fact-Finding Mission on Libya*", Lawyers for Justice in Libya, 19 October 2021, and "*Victims' Voices: The Libyan Political Dialogue Forum*", Lawyers for Justice in Libya, 28 July 2021.



## 2. VICTIM PARTICIPATION BEFORE THE ICC

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In accordance with Article 68(3) of the ICC Statute,<sup>9</sup> victims may present their views and concerns “at stages of the proceedings determined to be appropriate” when their “personal interests [...] are affected” in “a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” Additionally, Article 15(3) of the Statute enables victims to make representations to the Pre-Trial Chamber when the Prosecutor seeks authorisation from the Pre-Trial Chamber to investigate, and Article 19(3) of the Statute gives victims the right to participate in proceedings concerning the jurisdiction of the Court or the admissibility of a case. In practice, victims of crimes relevant to most of the situations and cases that have come before the Court have presented views and concerns through appointed legal representatives at hearings at all stages of proceedings.

Victim participation is an important recognition that victims are stakeholders of the justice process with views and concerns that are relevant to the justice process. Such participation can empower victims and it fosters their right to the truth.<sup>10</sup> It can also strengthen the work of the ICC by contributing to the establishment of the truth and creating a strong connection between the Court and those most directly affected by the crimes.

But victim participation will only happen if victims have access to information and are properly supported to engage with the ICC. Access to information is a crucial condition precedent for victims to participate in proceedings. Outreach and awareness-raising activities informing victims about the mandate of the ICC, victims’ rights within the ICC system and the progress of the situation and cases helps victims and affected communities to understand the role of the ICC and its various organs in the delivery of justice and assists victims to form views about the justice process and to consider whether and in what forms and at what stages they may wish to engage

with the ICC. Effective procedures that treat victims with humanity and respect for their dignity and security and accommodate cultural and language factors must be in place to support victims to access the participation process and to present their views and concerns to the ICC. Making the victim participation process known and accessible to Arabic speakers is also key to the majority of Libyan victims and civil society actors consulted. Victims who wish to participate in the proceedings must make an application to the Registrar of the ICC. The application process has been progressively streamlined over time though it requires the relevant Chambers to assure itself that the persons wishing to participate in proceedings fulfil the definition of victims set out in Rule 85 of the Rules of Procedure and Evidence and are eligible to participate in the given situation or case.<sup>11</sup>

In addition to the formal participation of victims in proceedings, victims may also play a part in ICC proceedings in other ways. The conduct of investigations by the Office of the Prosecutor may bring certain victims into contact with the Office; victims may also supply information to the Office on their own initiative. While victims lack the ability to compel the prosecution to either pursue particular charges or amend existing charges against the accused, information supplied by victims to the Office of the Prosecutor may serve as part of the impetus for the Prosecutor to initiate preliminary examinations. Such information can also influence the direction of investigations and ultimately what charges are brought by the Prosecutor. Here too, victims’ access to the Office of the Prosecutor will depend on the quality of information they receive about the ICC and the accessibility of channels of communication that can be established. Victims may also be called as witnesses for the prosecution, defence or victims’ legal representatives. If an accused person is convicted, victims may also request reparations.

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<sup>9</sup> See Rome Statute of the International Criminal Court.

<sup>10</sup> *Prosecutor v Al Bashir*, Decision on Applications a/0011/06 to a/0013/06, a/0015/06 and a/0443/09 to a/0450/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case, ICC-02/05-01/09-62, 15 December 2009, paras 4-5.

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<sup>11</sup> *Prosecutor v Bosco Ntaganda*, Decision Establishing Principles on the Victims’ Application Process, ICC-01/04-02/06-67, 28 May 2013; *Prosecutor v. Bosco Ntaganda*, Decision on victims’ participation in trial Proceedings, ICC-01/04-02/06-449, 6 February 2015.

# 3. CHALLENGES WITH RESPECT TO VICTIM PARTICIPATION IN THE LIBYAN SITUATION AND CASES

In this section we outline the key challenges related to victim participation in the Libyan situation and cases. These are not an exhaustive list of challenges – they focus on the principle challenges as observed by LFJL and as described by those it spoke with in the course of its research for this report. In some instances, given the impact of one listed factor on others, the listed challenges have some inevitable overlap.

## 3.1 APPROACH OF THE ICC TO ITS MANDATE HAS NOT INSPIRED CONFIDENCE IN VICTIMS

There are three main aspects of the ICC's approach to its mandate which have not inspired confidence.

**First**, the failure to take all possible steps to secure the timely enforcement of arrest warrants. While the ICC prosecutor has issued repeated requests that Libya transfer Saif Al-Islam Gaddafi into ICC custody, it has not been consistently proactive in seeking enforcement in the face of Libyan reluctance to comply. Arguably, the ICC could do more to require greater support from UN political organs include requests for targeted sanctions and more consistently report incidents of non-cooperation to the UN Security Council. Pre-Trial Chamber I made a finding of noncompliance by the Government of Libya on 10 December 2014, after numerous reminders to Libya of its obligation to surrender Saif Al-Islam Gaddafi, and referred the matter to the UN Security Council.<sup>12</sup> While at the time Libya affirmed that it was not able to comply with the arrest warrant because Saif Al-Islam Gaddafi remained in the custody of the authorities in Zintan and was not accessible to the state of Libya,<sup>13</sup> Mr Gaddafi was subsequently released from custody on or around 9 June

2017.<sup>14</sup> Saif Al-Islam Gaddafi was released after he was granted amnesty under the General Amnesty Law no 6 of 2015. He announced in November 2021 that he will run for office in the 2021 presidential elections.<sup>15</sup> Following the rejection of an admissibility challenge lodged by Mr Gaddafi, the Court confirmed that the case against him remained admissible,<sup>16</sup> which was confirmed on appeal.<sup>17</sup> Despite this, no further findings of non-compliance with the arrest warrant have been sought or issued.

Similarly, the warrant of arrest for Al-Tuhamy Mohamed Khaled was issued in 2013 and made public in 2017.<sup>18</sup> A first warrant of arrest for Mahmoud Mustafa Busayf Al-Werfalli was issued on 15 August 2017,<sup>19</sup> and a second arrest warrant was issued on 4 July 2018.<sup>20</sup> Despite the failure of Libya and/or other states to enforce these arrest warrants, no findings of non-compliance were sought or issued.

**Second**, the approach of the ICC to complementarity as taken in the *al-Senussi* and *Saif Al-Islam Gaddafi* cases has been poorly communicated and understood locally. In both the *Gaddafi* and *al-Senussi* cases, Libya challenged the ICC's jurisdiction on the ground that, as it was willing and able to prosecute nationally, the cases were inadmissible before the ICC. On 31 May 2013, the Pre-Trial Chamber rejected Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi and concluded that Libya had not succeeded in demonstrating that Libya's domestic investigation covered

12 *Prosecutor v Saif Al-Islam Gaddafi*, "Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council", ICC-01/11-01/11-577, 10 December 2014

13 *Prosecutor v Saif Al-Islam Gaddafi*, "Response to Prosecution's Request for an Order to Libya to Refrain from Executing Saif Al-Islam Gaddafi, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council", ICC-01/11-01/11-612, 21 August 2015

14 "Libya: Surrender Saif Al-Islam Gaddafi to ICC", Human Rights Watch, 15 June 2017, please also see online statement from Abu Bakr Al-Seddiq brigade in Zintan that was holding Saif Al-Islam Gaddafi confirming his release, <https://www.facebook.com/almaajdllwatn/photos/a.1481614628810969/1695806494058447/>.

15 *Libya: Saif Al-Islam Gaddafi to run for president*, Middle East Eye, 14 November 2021.

16 *Prosecutor v Saif Al-Islam Gaddafi*, "Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'", ICC-01/11-01/11-662, 5 April 2019

17 *Prosecutor v Saif Al-Islam Gaddafi*, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' of 5 April 2019, ICC-01/11-01/11-695, 9 March 2020

18 *Prosecutor v Al-Tuhamy Mohamed Khaled*, Warrant of Arrest with under seal and ex parte Annex, ICC-01/11-01-13-1, 18 April 2013, reclassified as public 24 April 2017

19 *Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli*, First Warrant of Arrest, ICC-01/11-01/17-2, 15 August 2017

20 *Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli*, Second Warrant of Arrest, ICC-01/11-01/17-13, 5 July 2018

the same case that is before the ICC. It also determined that Libya was genuinely unable to carry out the investigation and prosecution of Saif Al-Islam Gaddafi because of its inability to secure the transfer of Gaddafi into state custody from his place of detention in Zintan.<sup>21</sup> This ruling was confirmed on appeal,<sup>22</sup> and further confirmed in the later admissibility challenge brought by Saif Al-Islam Gaddafi.<sup>23</sup> In contrast, on 11 October 2013, the Pre-Trial Chamber decided that the case against Al-Senussi was inadmissible before the ICC as he was subject to ongoing domestic proceedings by the competent Libyan authorities covering the same case as that before the ICC.<sup>24</sup> This was confirmed on appeal.<sup>25</sup> He was sentenced to death in Libya in 2015.

**Third**, the failure to show progress with both existing and other potential cases of crimes within the jurisdiction of the Court. The state of impunity in Libya has generated a general feeling of frustration and despair among the victims along with a growing feeling of doubt and uncertainty with regards to what the Court can accomplish.<sup>26</sup> Victims are reluctant to be in contact with the ICC because they lack trust in the institution, lack clarity about protection measures in addition to the fact that cases take too much time and still remain unsolved;<sup>27</sup> “Some victims are really frustrated with the fact that the Court would leave all these years of violations and only mentions *Al Werfali*. The Court is selective, some names are hidden and the victims do not really know what is happening.”<sup>28</sup> In 2017, then Prosecutor Bensouda affirmed that her office was carefully examining the feasibility of opening an investigation into migrant-related crimes in Libya,<sup>29</sup> though no notable progress has been made since then. One Libyan respondent, who works with victims in Libya, indicated that correspondence with the Office of the Prosecutor on crimes

referred to in the Prosecutor’s reports to the Security Council had gone cold; “We had also shared with them a few cases, and communications were going well, however none of these cases were investigated and that was mainly due to lack of finances as mentioned by [one of the ICC investigators]. Basically, all materials received are left untouched and no investigation has been started to date.”<sup>30</sup> Another respondent shared similar concerns with LFJL: “I would love to know about the ICC’s role in Libya especially since it has responsibility over these cases as per the Security Council’s resolution on Libya. So why wouldn’t it give that priority?”<sup>31</sup>

### 3.2 THE POLICY DECISION TO TREAT THE LIBYAN SITUATION AND CASES AS “INACTIVE” AND IN CONSEQUENCE, ADOPTING A DE MINIMIS APPROACH TO OUTREACH AND ENGAGEMENT WITH VICTIMS

As indicated, the investigation into the situation has been open for a decade and despite the issuance of arrest warrants against five persons, none have resulted in the transfer of an accused person to the ICC. The ICC website is available in English and French with limited Arabic documents. This language barrier alone has made the ICC inaccessible not only to victims but to lawyers and civil society in Libya. The Registry’s outreach activities regarding Libya have been minimal. All Libyan respondents who spoke with LFJL raised serious concerns about the lack of information. One respondent noted: “I have no clear understanding regarding what is currently happening with the investigations in Libya.”<sup>32</sup> This was echoed by another respondent who indicated: “I have no understanding whatsoever of what is happening at the ICC.”<sup>33</sup> The respondent continued, expressing frustration that “we are in dire need to communicate with the ICC. However, the biggest challenge we face is that we do not know with whom we should communicate. There should be an office or a contact person to represent the Court and with whom we can communicate. I mean it should be someone from within the Court. The problem is that there is no entity to explain to us what are the proceedings and the adequate mechanisms for communication.”<sup>34</sup> Another respondent went further to say that “victims are not aware the ICC exists.”<sup>35</sup> It was explained that

*“already in 2019, ... we raised the question of establishing a clear mechanism for victims’ communication with the Court, especially since some of the victims are unaware of the existence*

21 *Prosecutor v Saif Al-Islam Gaddafi*, “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, ICC-01/11-01/11-344-Red, 31 May 2013

22 *Prosecutor v Saif Al-Islam Gaddafi*, “Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, ICC-01/11-01/11-547-Red, 21 May 2014

23 *Prosecutor v Saif Al-Islam Gaddafi*, “Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’”, ICC-01/11-01/11-662, 5 April 2019; *Prosecutor v Saif Al-Islam Gaddafi*, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled ‘Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’ of 5 April 2019, ICC-01/11-01/11-695, 9 March 2020

24 *Prosecutor v Abdullah Al-Senussi*, “Decision on the admissibility of the case against Abdullah Al-Senussi”, ICC-01/11-01/11-466-Red, 11 October 2013

25 *Prosecutor v Abdullah Al-Senussi*, “Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’”, ICC-01/11-01/11-565, 24 July 2014

26 Interview number (2)

27 Interviews number (1; 3; 4)

28 Interview number (3)

29 Statement of ICC Prosecutor to the UNSC on the Situation in Libya, International Criminal Court, 9 May 2017.

30 Interview number (1)

31 Interview number (5)

32 Interview number (2)

33 Interview number (4)

34 Ibid.

35 Interview number (1)



*of the ICC as there is a lack of awareness about the ICC in Libya. And by this we mean that people are not introduced or educated about the Court's proceedings and the complaints process. The public in general and the victims in particular are not being informed about it, for example no one knows what has become of the Libyan situation".<sup>36</sup>*

Another respondent characterized the problems as follows:

*"The challenges can be summarized in the lack of a clear mechanism of communication between the ICC and the victims, and so we are unable to make the victims' voices heard or give them access to the Court in order to make their own voices heard. ... So, the biggest challenge remains: is there a possibility to have a body that could facilitate the communications between us and the Court?"<sup>37</sup>*

#### a) Outreach and Communications

In response to queries to officials within the Registry about the limited outreach and communications, and the absence of proactive work to enable the participation of Libyan victims, LFJL received a single, standard response: our hands are tied when there is no judicial development or the situation has been ongoing for a certain period without such a development. There will be more capacity when an accused person is transferred to the seat of the Court and proceedings become active. This is confirmed in the most recent report to the Assembly of States Parties "In Libya, due to the lack of judicial developments in the cases (and attendant resource reductions), PIOS [Public Information and Outreach Section]'s activities are limited to updating the list of contacts, following the developments on the ground, and using all opportunities to meet and consult with key actors visiting The Hague."<sup>38</sup> A part of this "policy" choice stems from the limited financial and personnel resources at the disposal of the ICC and the large number of open preliminary examinations, investigations of situations and live cases. There is a need to prioritise. Yet, it is the firm view of LFJL that a lack of adequate financial resources and staffing should not override the core responsibilities to conduct outreach and engage with victims. When the Court treats the Libyan situation and cases as "inactive" this ensures that they remain so; there is a failure to consider the role of victim participation as a catalyst for state cooperation and as a way to foster victim engagement in the

generation of new evidence of crimes within the jurisdiction of the Court. Second, it should be noted that there was no outreach or communication plan when the Libya situation was first opened or when any of the arrest warrants were made public, the last being in 2018. This is not only a missed opportunity; it is a dereliction of the Court's responsibility to ensure victims are adequately informed and supported to participate in proceedings so that their views and concerns can be appropriately considered.

This "policy" choice is also one which has not been uniformly applied across all situations and cases, with Libyan victims seemingly losing out. Other situations and cases without accused persons present at the seat of the Court have fared better. For instance, on 3 March 2021, the Prosecutor announced the opening of the investigation into the Situation in the State of Palestine. Well before this decision, on 13 July 2018, the Pre-Trial Chamber issued its "Decision on Information and Outreach for the Victims of the Situation",<sup>39</sup> in which it noted that

*"for the Court to be able to properly fulfil its mandate, it is imperative that its role and activities are properly understood and accessible, particularly to the victims of situations and cases before the Court. Outreach and public information activities in situation countries are quintessential to foster support, public understanding and confidence in the work of the Court. At the same time, they enable the Court to better understand the concerns and expectations of victims, so that it can respond more effectively and clarify, where necessary, any misconceptions."<sup>40</sup>*

Furthermore, the Pre-Trial Chamber ordered the Registry to establish, "as soon as practicable, a system of public information and outreach activities among the affected communities and particularly the victims of the situation in Palestine" and "a continuous system of interaction between the Court and victims, residing within or outside of Palestine, for as long as the situation in Palestine is assigned to a Pre-Trial Chamber".<sup>41</sup> Similarly, in respect of the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Pre-Trial Chamber ordered the Registry to establish, as soon as practical, and in consultation and collaboration with the Prosecutor, a system of public information and outreach activities with the affected communities and particularly with the victims of the Situation. In doing so, it recalled,

<sup>36</sup> Interview number (2)

<sup>37</sup> Interview number (5)

<sup>38</sup> ICC, "Report on activities and programme performance of the International Criminal Court for the year 2020", ICC-ASP/20/7 \*, 12 August 2021, para 204. There is an identical statement in the report for the year 2019, ICC-ASP/19/7, 24 November 2020, para 186.

<sup>39</sup> *Situation in the State of Palestine*, "Decision on Information and Outreach for the Victims of the Situation", ICC-01/18-2, 13 July 2018

<sup>40</sup> Ibid, para. 7.

<sup>41</sup> Ibid, para. 14.

*“that pursuant to Article 68(3) of the Statute, the Court has an obligation to permit victims’ views and concerns to be presented and considered at stages of the proceedings determined to be appropriate. The Chamber considers that a meaningful exercise of this obligation is premised on the victims having access to complete and accurate information about their role at the Court during the various stages of the proceedings. Outreach facilitates and enables victims to enjoy and exercise their rights and the Court to fulfil its duties.”<sup>42</sup>*

## b) Work of the Victim Participation and Reparations Section

The challenges of the Victim Participation and Reparations Section (VPRS) to engage with victims in the Libya situation and cases is closely related to the aforementioned challenges related to outreach and communications. According to officials of that Section, their work to engage with victims has been hampered by the lack of judicial activity at the Court. Interest from victims was highest when the investigation was announced, and immediately following the issuance of arrest warrants. The failure to act then to engage with victims and explain the process to apply to participate in proceedings is an important factor in the negligible number of applications to participate in proceedings coming from Libyan victims. The independent expert review of the ICC has noted in this respect that the ability to reach victims “is not the result of the application procedure, but depends on other factors, including the steps taken to reach out to victim communities to alert them to the interest of the Court and ensure that they are fully informed of their rights as victims, and the extent to which these steps are successful in the face of various obstacles and communication difficulties...”<sup>43</sup>

While Article 68(3) of the ICC Statute clearly affords victims the opportunity to present views and concerns and to have them considered at any stages of the proceedings determined to be appropriate, the Registry has failed to ensure that Libyan victims can avail themselves of this opportunity at the situation and pre-trial stages. The Registry appears to have relied on the absence of clear instruction from the chambers to initiate activity. Such instruction would necessarily have come had the Prosecutor’s investigation in Libya stemmed from use of its *proprio motu* powers (as opposed to a UN Security Council referral). In accordance with Article 15(3) of the ICC Statute and Rule 50 of the Rules of Procedure and

Evidence, the Prosecutor must notify victims that there is an intention to seek authorisation of the Pre-Trial Chamber to open an investigation. In practice in other situations and cases, this requirement (only present when the Prosecutor is seeking to use *proprio motu* powers) has led the Pre-Trial Chamber to order the Registry to conduct an initial mapping of victims communities in the affected areas in order to so inform victims about the proceedings so that they can make representations to the Pre-Trial Chamber.<sup>44</sup> It has constituted an important trigger to action the VPRS at an early stage. However, even though that procedure does not apply to investigations initiated following a UN Security Council referral (as with the situation for Libya), there is nothing preventing a particular Pre-Trial Chamber from making a like order relying on Rule 92 (8) of the Rules of Procedure and Evidence or Article 68(3) of the ICC Statute, to establish a continuous system of interaction between the Court and victims, as it has done in relation to the situation in Palestine.<sup>45</sup> Of course, in the absence of such orders, the Registry need not and should not await specific judicial instruction to undertake tasks such as mapping victim communities and informing victims about the process to participate in proceedings, which fall squarely within its mandate. Here again, absent specific judicial instruction, it is the issue of prioritisation and the absence of recent judicial activity in the Libyan situation and cases which have been used to justify the Registry’s inaction. In the most recent report to the Assembly of States Parties regarding the work of the Court in 2020, the VPRS notes no activity in relation to the Libya situation or cases.<sup>46</sup>

On 24 January 2012, Pre-Trial Chamber I issued its “Decision on Victim’s Participation in Proceedings Related to the Situation in Libya.”<sup>47</sup> This is a framework decision which outlines how victim participation and applications for participation should be organised in the context of the Libya situation, irrespective and outside the context of any case which may arise from that situation. It follows the approach taken by the Chamber in respect of the situation in the

44 See for example, *Situation in the Republic of Kenya*, “Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute”, ICC-01/09-4, 10 December 2009, where the VPRS was ordered to VPRS to “(1) identify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations (collective representation); (2) receive victims’ representations (collective and/or individual); (3) conduct an assessment, in accordance with paragraph 8 of this order, whether the conditions set out in rule 85 of the Rules have been met; and (4) summarize victims’ representations into one consolidated report with the original representations annexed thereto.”

45 *Situation in the State of Palestine*, “Decision on Information and Outreach for the Victims of the Situation”, ICC-01/18-2, 13 July 2018, para. 14.

46 ICC, “Report on activities and programme performance of the International Criminal Court for the year 2020”, ICC-ASP/20/7 \*, 12 August 2021, paras 170 – 180. See similarly, for the year 2019, ICC-ASP/19/7, 24 November 2020, paras 153-163.

47 *Situation in Libya*, “Decision on Victim’s Participation in Proceedings Related to the Situation in Libya”, ICC-01/11-18, 24 January 2012.

42 *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, “Order on Information and Outreach for the Victims of the Situation”, ICC-01/19-28, 20 January 2020, para. 7.

43 Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report - 30 September 2020, ICC-ASP/19/16, 9 November 2020, para 849.

Democratic Republic of the Congo,<sup>48</sup> and underscores that in line with previous decisions, there is no general right to participate at the stage of the investigation in a situation. The victims are entitled, however, to participate in any judicial proceeding conducted at this stage, including proceedings affecting investigations. It directs the Registry to keep hold of any applications that have been filed at a time when no judicial proceedings are conducted by the Chamber. Only when judicial proceedings have been initiated, or upon an order from the Chamber, will those applications which relate to the subject-matter of these specific proceedings be transmitted by the VPRS to the Chamber for examination under rule 85 of the Rules and article 68(3) of the Statute.<sup>49</sup> Further, the Chamber ordered the VPRS to report to the Chamber every three months on the applications it has received.

In accordance with the 24 January 2012 decision, the VPRS has submitted reports filed as confidential with *ex parte* annexes only available to the Registry, to Pre-Trial Chamber I at three month intervals.<sup>50</sup> On 4 May 2012, following the application made by the Government of Libya to challenge the admissibility of the cases against Mr Gaddafi and Mr Al-Senussi, the Pre-Trial Chamber appointed the Office of the Public Counsel for Victims (OPCV) to represent the victims who had communicated with the Court in relation to the case, and instructed the Registrar to provide the OPCV with information about victims who had already communicated with the Court, as well as with any necessary assistance to contact the victim applicants as soon as possible.<sup>51</sup> In its 22<sup>nd</sup> periodic report to the Pre-Trial Chamber, the Registry notes “that the warrant of arrest for Al-Tuhamy Mohamed Khaled, issued under seal *ex parte* on 18 April 2013, was unsealed on 24 April 2017. The Registry remains very attentive to any developments in the region which may lead to an arrest of any of the fugitives, which, in turn, would trigger relevant victims’ participation activities.” Thus, it appears from the Registry’s submission, that it does not envision any role for itself unless any of the fugitives are arrested. Further it “informs the Chamber

that, unless instructed otherwise, it will suspend the transmission of periodic reports pending new developments in the Situation.”<sup>52</sup> In its 23<sup>rd</sup> and final periodic report, the Registry informs the Pre-Trial Chamber that the total number of victim applications received in respect of the Libyan situation is nine.<sup>53</sup> This contrasts significantly with the numbers of applications received in other situations and cases, which range in the hundreds and thousands.

### 3.3 FACTORS EXTRANEEOUS TO THE ICC

There is a general sense of insecurity and lawlessness in Libya fuelled by ongoing conflict, the large presence of highly weaponised militia groups and poor rule of law. Given the sensitivity of the ICC’s work and its impact on militia leaders, civil society groups and victims are rightly concerned about the impact of any communications they have with the Office of the Prosecutor or other organs of the Court. As one respondent explained to LFJL, “even if the ICC was represented in Libya, I could not communicate with it directly because I’d be afraid to do that.”<sup>54</sup> The difficult security context should not be under-estimated, however LFJL is concerned that it is being used (similar to the Covid-19 pandemic) as a further excuse by the Registry to limit information and outreach and engagement with victims impacted by the Libyan situation and cases. Early on, on the basis of ICC security assessments, ICC staff were prevented from travelling to Libya, though in recent years ICC investigators attached to the Office of the Prosecutor have conducted investigations in Libya. Whilst it may still be insecure for Registry staff conducting public outreach and victim engagement to carry out those activities in Libya, it does not appear that alternative options have been actively explored, such as working more seamlessly with partners on the ground, making more use of electronic means of communication, or carrying out site visits in neighboring countries such as Tunisia where large numbers of Libyans and Libyan civil society are based.

48 *Situation in the Democratic Republic of the Congo*, “Decision on victims’ participation in proceedings relating to the situation in the Democratic Republic of the Congo”, ICC-01/04-593, 11 April 2011

49 *Situation in Libya*, “Decision on Victim’s Participation in Proceedings Related to the Situation in Libya”, ICC-01/11-18, 24 January 2012, (quoting from para 11 of the DRC decision, *ibid*).

50 The first report - ICC-01/11-23, was filed on 24 April 2012 and a total of 23 reports were filed, the last - ICC-01/11-70, filed on 21 October 2019.

51 *Prosecutor v Saif al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on the Conduct of the Proceedings Following the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute””, ICC-01/11- 01/11-134, 4 May 2012, para. 13

52 *Situation in Libya*, “Twenty-Second Periodic Report of the Registry on Applications Received by the Victims Participation and Reparations Section in the Situation in Libya”, ICC-01/11-57, 24 July 2017

53 *Situation in Libya*, “Twenty-Third Periodic Report of the Registry on Applications Received by the Victims Participation and Reparations Section in the Situation in Libya”, ICC-01/11-70, 21 October 2019

54 Interview number (2)

## 4. RECOMMENDATIONS

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Despite the limited progress to date, there is a desire to see the Libyan situation and cases before the ICC succeed. Victims of crimes coming within the jurisdiction of the ICC, like most Libyans, have had no experience of justice but maintain a strong thirst for it, whether it can be achieved at the domestic or international level. However, victims and affected communities have a legitimate interest to engage in ICC proceedings that affect them, and their engagement will strengthen the legitimacy and effectiveness of the process. Thus, they should be informed about the progress of the situation and cases and the procedure for registering their interest to participate, consulted on the many issues that affect them and provided with effective opportunities to have their views and concerns presented and considered, in line with the ICC Statute and Rules.

Chambers should use their powers to order the Registrar, pursuant to Rule 92(8) of the Rules of Procedure and Evidence and Article 68(3) of the ICC Statute, to take the necessary steps to ensure that victims are fully informed about the proceedings and how to engage with the Court. But, even in the absence of such orders, the Registry should act in accordance with its mandate to ensure that victims are properly and effectively informed about what is happening and how to participate should they choose to do so. This is not an optional task for the Registry; to the contrary it fulfils one of the basic requirements of its mandate.

With respect to the limited financial and personnel resources available to the Registry in light of the significant number of

situations and cases, LFJL's view is that this cannot be an excuse to refrain from performing key functions of the Registry. It is for the Court and States Parties to ensure that there are sufficient resources available to fulfil the mandate of the Court and for the organs of the Court to determine how to create efficiencies to work effectively within the constraints of its budget.

The Registry should be more creative in meeting the demands of its mandate. This should include partnering more effectively with civil society groups that have links to victims and affected communities, using the visiting professionals and internship programmes of the ICC (which LFJL hopes will be renewed) to bring on board more Libyans to engage on outreach and related work subject to security-related constraints, making greater use of the translation service to increase the availability of relevant documentation in Arabic, making much greater use of video briefings and electronic communications to engage more effectively with Libyan civil society groups who are already in contact with victims, and conducting regular field visits to countries neighbouring Libya in order to intensify relationships.

Whilst it may not be possible at this time for the ICC to put in place a Libya field office, this should be in constant review, and other temporary options such as placing ICC liaisons in Tunis, having a dedicated ICC Liaison based in the Hague but focussed on the Libya situation and cases should be implemented.

# ABOUT US

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Lawyers for Justice in Libya is a Libyan and international independent non-governmental organisation and UK-registered charity. We work on and in Libya with a growing network of lawyers, activists and grassroots communities across and outside the country. Our vision is of a Libya which embodies the values and principles of human rights and the rule of law and is a society committed to justice. We seek justice in Libya through advocacy and outreach, accountability, transitional justice initiatives and capacity building, underpinned by our own independent research. Our work is rooted in a rights-based and victim-centred approach: we believe that all engagement and policies must be founded on a framework of human rights and ensure that individuals and communities can participate fully as a fundamental part of leading dignified lives.



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محامون من أجل العدالة في ليبيا



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