

# LIBYA: Q&A on the Arrest and Surrender of the Three International Criminal Court Suspects

## Questions and Answers

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### **1. What is the source of the International Criminal Court's jurisdiction in Libya?**

On February 26, 2011, the United Nations Security Council adopted resolution 1970 by a vote of 15-0 referring the situation in Libya to the International Criminal Court (ICC). Under the Rome Statute, the ICC's founding treaty, the Security Council may refer a situation in any country to the ICC prosecutor if it determines the situation to warrant such action under Chapter VII of the UN Charter. Resolution 1970 gave the court authority over events in Libya beginning on February 15, 2011. On March 3, the ICC prosecutor announced he would open an investigation into the situation in Libya.

The court's authority does not include alleged crimes committed earlier in Muammar Gaddafi's rule.

## **2. Has the court issued any arrest warrants related to the ICC prosecutor's current investigation?**

Yes. The ICC judges granted warrants on June 27 for Muammar Gaddafi, his son Saif al-Islam, Gaddafi, and Libya's intelligence chief, Abdullah al-Sanussi. They are wanted on charges of crimes against humanity for their roles in attacks on civilians, including peaceful demonstrators, in Tripoli, Benghazi, Misrata, and other Libyan cities and towns after the start of anti-government protests in eastern Libya on February 15.

Some representatives of the Interim National Transitional Council (NTC) have indicated their interest in prosecuting those ICC suspects domestically. See # 7 below for a fuller discussion of this issue.

## **3. How did the judges make the determination to issue arrest warrants?**

By issuing the arrest warrants, the ICC judges indicated that they were satisfied that there were “reasonable grounds to believe” that the people named in the prosecutor's May 16 request had committed a crime within the jurisdiction of the court.

A suspect who is arrested or surrenders to the court has an opportunity to object to the charges and to challenge the evidence in a “confirmation of charges” hearing. At that point, if the ICC judges decide that there is enough evidence to establish “substantial grounds to believe”—a higher threshold than required for issuing an arrest warrant—that the person committed each of the crimes charged, the case can move forward to trial.

## **4. Now that arrest warrants have been issued, how are they to be carried out?**

Because the ICC has no police force of its own, it depends on national authorities to make arrests on its behalf. United Nations Security Council resolution 1970, which referred Libya to the ICC, requires the “Libyan authorities” to cooperate fully with the court. Libya, though not a party to the Rome Statute of the ICC, is obligated because of the resolution to make arrests at the court's request. States parties to the ICC also have a legal obligation to cooperate with the court, and resolution 1970 urges states that are not parties to the Rome Statute to cooperate.

**5. What responsibilities do the Libyan authorities have in terms of the three ICC accused?**

First, if any of the three suspects are taken into custody, they should be treated humanely in accordance with international human rights and humanitarian law standards. The International Committee for the Red Cross, an independent humanitarian organization that monitors compliance with the Geneva Conventions, should be given access to them.

The suspects should also be promptly handed over to the ICC for fair trial. This is consistent with the terms of Security Council resolution 1970 and with the obligation to cooperate fully with the court. In April, the Interim National Transitional Council sent a letter to the ICC prosecutor promising to cooperate. In that letter, the NTC stated: *“We are fully committed to supporting the fast implementation of such arrest warrants and expect the international community to cooperate fully as is required by the Rome Statute of the ICC and in accordance with Security Council Resolution 1970 adopted under Chapter VII of the UN Charter.”*

**6. In addition to the legal obligations stemming from the UN Security Council resolution that bind the Libyan authorities, are there practical advantages to surrendering the three suspects to the ICC?**

In addition to the legal obligation to cooperate, pursuant to Security Council resolution 1970, surrendering the three suspects to the court in The Hague will eliminate what is likely to be a huge security burden on the Libyan authorities to keep the suspects safe as the Libyan authorities confront a multitude of other pressing tasks following months of conflict. In addition, the physical presence in Libya of the three suspects is likely to have a destabilizing effect.

**7. What if the Libyan authorities decide they want to try the three ICC suspects? Shouldn't the ICC step aside?**

The ICC is “a court of last resort” and places the primary obligation on national authorities to carry out prosecutions. Should the Libyan authorities decide to pursue national trials involving the three ICC suspects, they have the opportunity to challenge—through a legal submission—the court's jurisdiction over these specific cases under the ICC treaty. The Libyan authorities will have to show that they are genuinely able as well as willing to prosecute the cases domestically in fair and credible proceedings.

An admissibility challenge is permitted at any time before the trial starts at the ICC; in exceptional circumstances the court may grant permission for a challenge to be brought later. For the ICC to find that the case is inadmissible, and that it thus must be returned for prosecution by national officials, national proceedings must encompass both the person(s) and the conduct that are the subject of the case before the ICC.

Ultimately, it is up to the ICC judges to determine whether any national proceedings exist that would trump the court's ability to hear these cases. Because the court is a judicial institution, its work is distinct from other diplomatic and military initiatives under way in Libya and must run its independent course.

If an admissibility challenge is filed, the ICC prosecutor must suspend his investigation until the court makes its determination on the challenge. While such a challenge does not affect the validity of the three arrest warrants as they were issued by the court *prior* to the challenge, it could affect the timing of the Libyan authorities' implementation of the ICC's request for arrest and surrender of the three suspects.

### **8. Are national investigations and prosecutions necessary now that the ICC has jurisdiction?**

Additional proceedings in Libya against other alleged perpetrators who will not be subject to investigation by the ICC prosecutor will be needed to complement the ICC process and bring full accountability for crimes committed following the start of anti-government protests. Criminal investigations will also be needed for alleged crimes committed over the past four decades of Gaddafi's rule as the ICC only has jurisdiction for serious crimes committed after February 15, 2011.

In this regard, reforms are required to equip the Libyan judicial system to carry out credible and independent national trials.

### **9. Will the ICC prosecutor conduct further investigations?**

The ICC prosecutor has indicated that the focus of his current investigation in Libya relates only to the 15-day period following February 15. The prosecutor has suggested that he may open a second investigation later, relating to the subsequent armed conflict. In his first report to the UN Security Council, in May, the prosecutor indicated that: "Further cases will be opened as necessary, taking into account the full scope of criminality allegedly committed by different individuals in the context of the Libya situation."

On June 1, an International Commission of Inquiry for Libya set up by the UN Human Rights Council released its report, concluding that both government and rebel forces committed acts amounting to war crimes. The commission investigated reports that NATO forces were involved in indiscriminate attacks against civilians, but concluded that it had not seen evidence to suggest that NATO forces had intentionally targeted civilian areas or engaged in indiscriminate attacks on civilians.

In addition to the current case against the three Libyan suspects, Human Rights Watch has urged the ICC prosecutor to continue to investigate serious crimes that may have been committed by all parties in Libya, including rebel forces and NATO. Security Council resolution 1970 gives the ICC ongoing jurisdiction over war crimes and crimes against humanity committed on the territory of Libya since February 15.