



Libya: The ICC and Saif al-Islam Gaddafi

Questions and Answers

January 2012

The International Criminal Court (ICC) judges granted arrest warrants on June 27, 2011, for Muammar Gaddafi, his son Saif al-Islam, and former intelligence chief Abdullah Sanussi in an investigation authorized by United Nations Security Council Resolution 1970. The three were wanted on charges of crimes against humanity for their roles in attacks on civilians, including peaceful demonstrators, in Tripoli, Benghazi, Misrata, and other locations in Libya. Consistent with Resolution 1970, the ICC warrants apply only to events in Libya beginning on February 15, 2011.

While the ICC's proceeding against Muammar Gaddafi was terminated following his death on October 20, anti-Gaddafi forces apprehended Saif al-Islam Gaddafi on November 19 in southern Libya and are holding him in the town of Zintan. While initial reports suggested that a militia also had captured Sanussi, his whereabouts remain unknown. Libya's general prosecutor told Human Rights Watch on December 10: "Officially we don't have him."

Following Saif al-Islam Gaddafi's apprehension in November, some representatives of Libya's transitional government and National Transitional Council (NTC) declared that he would be tried in Libya. The chairman of the NTC, the justice minister, and the general prosecutor subsequently reiterated this stance to Human Rights Watch.

In December the ICC judges requested further information from the Libyan authorities regarding Saif al-Islam Gaddafi's status, including whether and when Libya intends to surrender him to the court. Libya was supposed to provide that information by January 10, 2012, but it requested a three-week extension due to the security situation in Libya. The court granted an extension of about two weeks, requiring Libya to file these submissions by January 23.

The following questions and answers concern the relationship between the ICC's case against Saif al-Islam Gaddafi and potential domestic proceedings against him in Libya. For additional

information about Libya and the ICC, please see “Libya: Surrender Saif al-Islam Gaddafi to ICC” (November 2011); “Libya: Q&A on the Arrest and Surrender of the Three International Criminal Court Suspects” (August 2011), and “Libya: Q&A on the Arrest Warrants for Gaddafi, Cohorts” (June 2011).

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

On February 26, 2011, the UN Security Council adopted resolution 1970 by a vote of 15-0 referring the situation in Libya to the ICC. Under the Rome Statute, the ICC's founding treaty, the Security Council may refer a situation in any country to the ICC prosecutor under its Chapter VII mandate if it determines that a situation constitutes a threat to the maintenance of international peace and security.

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 prior to February 15, 2011. It does potentially include any crimes within its jurisdiction committed by anyone in Libya since that date. The possible exception is citizens of countries that are not states parties to the ICC—apart from Libya—concerning acts relating to the international military intervention in Libya under Security Council Resolution 1973.

2. Has the ICC sought the arrest and surrender of Saif al-Islam Gaddafi?

Yes. On June 27 the ICC judges authorized three arrest warrants related to the Libya investigation, including one for Saif al-Islam Gaddafi. The same day, the court directed the ICC Registrar to prepare a request for the arrest and surrender of the three suspects, which was subsequently transmitted, with the arrest warrants, to the Libyan authorities on July 4. In December, and following the apprehension of Saif al-Islam Gaddafi, the court requested information about him from the Libyan authorities, including whether he had been arrested on account of the ICC arrest warrant, and whether and when the Libyan authorities intended to surrender him to the court. They gave Libya until January 23 to respond.

3. Is Libya obligated to cooperate with the court's request for the arrest and surrender of Saif al-Islam Gaddafi?

Yes. UN Security Council Resolution 1970, which referred Libya to the ICC, requires the Libyan authorities to cooperate fully with the court, including in the arrest and surrender of suspects at the court's request.

In April 2011, before Muammar Gaddafi's fall, Libya's 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.*"

4. What if the Libyan authorities encounter difficulties that prevent them from fulfilling the court's request for Saif al-Islam Gaddafi's surrender?

When problems arise in executing a request for cooperation, states have a duty to consult with the court "without delay" to resolve the matter.

The Rome Statute provides some examples of difficulties states may have, including insufficient information to execute a request, or situations in which executing an ICC request would require a state to breach a pre-existing treaty obligation.

5. Can Libya try Saif al-Islam Gaddafi, instead of the ICC?

The ICC is a court of last resort. It only steps in where national jurisdictions are unable or unwilling to prosecute Rome Statute crimes. If Libya wishes to try Saif al-Islam Gaddafi domestically for crimes outlined in the ICC's arrest warrant, Libyan authorities have the ability to challenge the court's jurisdiction over the case through a legal submission, called an "admissibility challenge". 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. The Rome Statute stipulates that such a challenge must be brought "at the earliest opportunity."

Under existing ICC case law, for the ICC to find a case inadmissible, there must be national proceedings encompassing both the person and the conduct that are the subject of the ICC case. Furthermore, the state must demonstrate its genuine willingness and ability to conduct those proceedings. The Rome Statute provides guidance about the meaning of "unwillingness" and "inability" in article 17, which sets out admissibility criteria.

When considering a state's ability to conduct genuine national proceedings, the Rome Statute instructs the judges to 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."

A state may be considered "unwilling" if:

- its proceedings are for the purpose of shielding the person concerned from criminal responsibility;
- there has been an unjustified delay that, under the circumstances, is inconsistent with an intent to bring the person concerned to justice; or
- the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner that, under the circumstances, is inconsistent with an intent to bring the person to justice.

Ultimately, it is up to the ICC judges to determine whether national proceedings exist that meet the criteria for a successful admissibility challenge.

6. Did the ICC prosecutor accept that Saif al-Islam Gaddafi would be tried by Libya instead of in The Hague?

The ICC judges have exclusive competence to decide on the continuation of ICC judicial procedures, including any decision on the admissibility of a case. The ICC judges have underlined that Resolution 1970 requires Libya to cooperate with the ICC, and that the obligation remains in force.

7. What if Libya *intends* to investigate Saif al-Islam Gaddafi for the same crimes as those in the ICC's arrest warrant? Is that enough to successfully challenge the admissibility of the case before the ICC?

An ICC pre-trial chamber recently held in the Kenya situation that a promise to investigate is not enough to stop existing ICC cases.

On March 31, 2011, the Kenyan government challenged the admissibility of the two Kenyan cases before the ICC, citing its plans to begin or continue investigations of those responsible for its post-election violence in 2007-2008 in the context of reforms mandated by the new constitution promulgated in Kenya in August 2010. But the pre-trial chamber, in a May decision, rejected the government's admissibility challenge. The judges found no evidence that the government was actually investigating any of the six people named in the two cases. The judges held that, under the court's case law, a promise to investigate is not enough to stop existing ICC cases.

On August 30, the appeals chamber—in a majority decision—confirmed the pre-trial chamber decision. The appeals chamber agreed that the Kenyan government would have had to demonstrate that it was investigating the same six people for the same conduct for which they were summoned by the ICC for the cases to be inadmissible.

8. If Libya files an admissibility challenge, how will that affect the ICC prosecutor's investigation?

If Libya files an admissibility challenge, 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 arrest warrant for Saif al-Islam Gaddafi, as it was issued *prior* to the challenge, it could affect the timing of the Libyan authorities' execution of the ICC's request for his surrender.

9. Is the prosecutor still investigating crimes in Libya?

During his trip to Libya in November the ICC prosecutor noted that his investigation was on-going. He said there were “people now in Libya working on investigations...collecting evidence against [Saif al-Islam].” A news release issued by the prosecutor's office at that time noted that “[t]he Office continues its impartial investigation in Libya.”

10. What if Libya wants to try Saif al-Islam Gaddafi for crimes different than those in the ICC's warrant?

In a situation in which there are domestic proceedings against a person sought by the ICC for crimes different than those in the ICC's arrest warrant, the Rome Statute requires consultations between national authorities and the court regarding the potential sequencing of cases.

11. Can the ICC hold its proceedings in Libya?

Although the ICC is headquartered in The Hague, the court's treaty leaves open the possibility for proceedings to be held in other locations.

12. What happens if Libya doesn't cooperate with the ICC?

Article 87 of the Rome Statute permits the court to issue a finding of non-cooperation. Because Libya is before the ICC as a result of a Security Council referral, such a finding is sent to the Security Council for follow-up. The Security Council then has a range of options, including resolutions, sanctions, and presidential statements.

The court issued its first formal finding of non-cooperation regarding its Darfur investigation. In that case, the ICC authorized arrest warrants for three people for serious crimes. Following three years of inaction by Sudan to hand over any of the suspects, the ICC prosecutor on April 19, 2010, asked the court to issue a finding of non-cooperation in the execution of warrants for two of the suspects under article 87. On May 25 a pre-trial chamber of the ICC decided to send the finding of non-cooperation on the warrants to the Security Council. It has yet to take any action in response to the ICC's finding.

13. Does Saif al-Islam Gaddafi have a defense lawyer and has he been brought before a judge?

No. Gaddafi is being held in Zintan, Libya without access to a lawyer. Because the ICC judges were unable to determine whether Gaddafi wished to appoint specific counsel, they authorized the ICC Office of Public Counsel for the Defence to represent Gaddafi's interests at the court.

Human Rights Watch visited Gaddafi in Zintan on December 18 and was allowed 30 minutes with the detainee in private. Libya's general prosecutor told Human Rights Watch that he would allow Gaddafi access to a lawyer as soon as the government prepared a secure detention facility in Tripoli where Gaddafi could be held without risk of attack, either by those wishing to free him or by those wishing him harm. The general prosecutor said his office is working to prepare such a location.

To Human Rights Watch's knowledge, Saif al-Islam Gaddafi has not been brought before a judge in Libya since his detention began.

14. Does denying Saif al-Islam Gaddafi access to a lawyer and a judge violate Libyan or international law?

Yes. Under Libya's code of criminal procedure, the state must allow a detainee access to a lawyer during investigation if he or she asks for one. Special laws enacted during Muammar Gaddafi's rule allow restrictions on access to a lawyer, but these restrictions are inconsistent with Libya's transitional Constitutional Declaration, which entered into force on August 3. The declaration also provides for a "fair trial at which [the accused] has the guarantees necessary for exercising his right of defense."

One of the basic rules in the prohibition of arbitrary detention, as set out in article 9 of the International Covenant on Civil and Political Rights, states that anyone who is detained must be

brought promptly before a judge. Failure by the authorities to ensure this leads to arbitrary detention.

15. What happens next?

Now that Libya has responded to the ICC judges' request for information regarding Saif al-Islam Gaddafi, the ICC prosecutor and counsel representing the interests of the defense are entitled to file a response to those submissions.