



## **ICC: Prosecutor to Open an Investigation in Libya Libya and the International Criminal Court**

### **Questions and Answers**

**March 2011**

On March 3, 2011, the prosecutor of the International Criminal Court (ICC) announced he would open an investigation into the situation in Libya. This follows the referral on February 26, 2011 by the United Nations (UN) Security Council—by a vote of 15-0—of the situation in Libya since February 15, 2011 to the ICC prosecutor.

The ICC is a permanent international court with jurisdiction over crimes of genocide, war crimes, and crimes against humanity. Currently, 114 states are parties to the ICC.

Anti-government protests began in Libya on February 17, 2011, following widespread protests in Tunisia and Egypt. Security forces that day attacked peaceful demonstrators in cities across the country.

The UN Security Council resolution followed the establishment by the UN Human Rights Council of an international commission of inquiry to investigate alleged human rights violations in the face of reports of escalating violence in Libya. The Arab League, African Union, and the Secretary General of the Organization of the Islamic Conference condemned the violence. The UN General Assembly suspended Libya's membership in the UN Human Rights Council as of March 1.

#### **1. What does it mean that the situation in Libya was referred by the Security Council to the ICC prosecutor?**

Under the Rome Statute, the ICC's founding treaty, the UN Security Council can 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.

Security Council referrals are one of three so-called “triggers” for the ICC’s jurisdiction and are an important avenue through which serious crimes occurring in states, such as Libya, that are not party to the Rome Statute can be prosecuted by the court.

The other two triggers are ICC state party referrals and the ICC prosecutor’s initiation of an investigation on his own initiative (known as “proprio motu” investigations). These triggers are however limited to situations occurring within the jurisdiction of ICC states parties or for alleged crimes committed by nationals of ICC states parties. In addition, under article 12(3) of the Rome Statute, a non-state party may accept the court’s jurisdiction in relation to a particular situation.

The Security Council passed a resolution on February 26 under its Chapter VII powers to refer the situation in Libya to the ICC prosecutor. Security Council Resolution 1970 referred the situation as of February 15, 2011. The resolution also requires the Libyan authorities to cooperate with the ICC and its prosecutor and imposed travel bans on key Libyan leaders and froze their assets.

## **2. Is this the first time the Security Council has referred a situation to the ICC prosecutor?**

This is the second time. In March 2005, the Security Council passed Resolution 1593 to refer the situation in the Darfur region of Sudan. The ICC prosecutor opened an investigation in June 2005. To date, as a result of investigations in Darfur, the ICC has issued four arrest warrants, including two for President Omar al-Bashir of Sudan on charges of genocide, crimes against humanity, and war crimes. The ICC has also issued summonses to appear for three rebel leaders on charges related to attacks on an African Union peacekeeping mission in Darfur. All three rebel leaders have voluntarily appeared in The Hague, although one case was subsequently dropped for lack of evidence. The targets of the warrants, Al-Bashir, Ahmed Haroun, then the country's minister for humanitarian affairs and now governor of Southern Kordofan state, and Ali Kosheib, a “Janjaweed” militia leader, remain fugitives.

The Libya referral is notable, however, for the speed with which the Security Council acted. It was only after months of discussions and years after the massive human rights violations in Darfur were brought to the attention of the international community that the Security Council referred the situation to the ICC. In the Libya case, the referral came within weeks after the first reports of unlawful attacks by state security forces on anti-government protesters. The

situation was also unique in that Libya's representatives to the UN had sought Security Council action. The unanimous resolution reflects a growing recognition that there will be accountability for those associated with widespread atrocities and the important potential role of the ICC in delivering justice. It is the first time the United States or China, neither of which are states parties to the ICC, have voted affirmatively to send a case to the ICC.

**3. Why did the prosecutor have to make a decision whether to open an investigation? Wasn't it enough that the Security Council referred the situation?**

A referral does not automatically lead to an investigation. While the Security Council referral gives the ICC jurisdiction over the situation in Libya, the ICC prosecutor must still decide whether to open an investigation. The Rome Statute provides that the ICC prosecutor "shall" go ahead with an investigation unless, on the basis of available information, he determines that there is "no reasonable basis to proceed."

The Security Council resolution invited the prosecutor to address it in two months' time and every six months thereafter. Shortly after the referral was made, the Office of the Prosecutor indicated that it would move forward "without delay." The Office indicated that it was seeking information from a number of intergovernmental organizations, including the Arab League, the African Union, the UN, and Interpol, as well as states and Libyan authorities, to help it make a determination about whether to investigate.

The prosecutor does not need the authorization of ICC judges to open an investigation following a Security Council referral. The authorization of ICC judges is only required where the ICC prosecutor seeks to open an investigation on his own initiative -- that is, in the absence of either a state party referral or a Security Council referral.

**4. What should the prosecutor consider in deciding whether to open an investigation?**

The ICC prosecutor's decision to initiate an investigation following a Security Council referral is guided by requirements set out in the Rome Statute.

First, there must be a reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed. ICC crimes include genocide, crimes against humanity, and war crimes.

Currently, crimes against humanity may be relevant to the situation in Libya. Under article 7 of the Rome Statute, a crime against humanity encompasses any of a number of acts, including murder, torture, or rape when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Second, even where an ICC crime or crimes have been committed, the ICC prosecutor must determine whether possible cases arising out of an investigation would be admissible. For a case to be admissible, it must be of a certain gravity—assessed according to the scale, nature, and manner of commission of the crimes, as well as their impact. In addition, since the ICC is a court of last resort, which steps in only where national authorities are unwilling or unable to act, there must be no credible investigations or prosecutions of the case at the national level. This latter requirement is known as “complementarity” and makes the ICC’s international jurisdiction secondary to that of national authorities.

### **5. What happens now? How long will it take for cases to come to trial?**

There are many steps between the opening of an investigation and the eventual trial of a case.

It is important to understand that investigations by the ICC prosecutor may not necessarily lead to prosecutions. While the initial decision to open an investigation is based on information available to the prosecutor at that time, the prosecutor must then conduct an independent investigation. On the basis of this investigation, the prosecutor may determine that there is insufficient evidence that crimes committed within the court’s jurisdiction have taken place. Or the prosecutor may determine that there are proceedings at the national level that would make any case before the ICC inadmissible or that a prosecution is not in the interests of justice. If the prosecutor decides not to proceed with prosecutions following investigations, this decision can be reviewed by ICC judges sitting in a pre-trial chamber.

If, based on the investigation, the prosecutor wishes to pursue prosecutions, he will need to ask ICC judges to issue arrest warrants for individuals on the basis of specific charges. The prosecutor must establish to the satisfaction of the pre-trial chamber that there are reasonable grounds to believe that the individual named in the request has committed a crime within the jurisdiction of the court and that an arrest is necessary to ensure that the person will appear at trial or that the person will not obstruct or endanger the investigation or the court proceedings, or that a warrant is needed to prevent ongoing crimes. The

prosecutor can also request a voluntary summons to appear if he considers that a summons is sufficient to ensure the individual's appearance before the court.

It is difficult to predict how long it might be between the beginning of an investigation and the issuance of arrest warrants or summonses. To date, the court's investigations have lasted between 10 and 20 months before the first arrest warrants have been issued. Most recently, the ICC prosecutor conducted an investigation in the situation in Kenya for eight months before asking the pre-trial chamber to issue summonses for six people on charges of crimes against humanity. A decision on those requests is pending.

In addition, because the ICC does not have its own police force and must rely on governments and the United Nations to enforce the warrants and effect arrests, some of its warrants have been outstanding for more than five years.

When an individual appears before the Court, following either an arrest or a summons, pre-trial proceedings known as the "confirmation of charges" take place to determine whether the available evidence establishes substantial grounds to believe that the person committed each of the crimes charged in the indictment. When and if a charge or charges are confirmed, a trial date is set.

The ICC's first trial— of Thomas Lubanga -- began in January 2009, nearly five years after the situation in the Democratic Republic of Congo was referred by its government to the ICC prosecutor and three years after Lubanga was transferred to ICC custody. The trial has yet to reach completion. While the start of Lubanga's trial was delayed for reasons that are unlikely to recur and the two other trials ongoing at the ICC have moved more quickly, the ICC's unique pre-trial proceedings and the complicated nature of cases tried by the court mean that proceedings are likely to last two to three years from arrest to verdict.

## **6. Who is likely to be the target of ICC investigations? How many people could be charged?**

Criminal liability before the ICC can apply not only to those who commit crimes, but also as those who give the orders and those in a position of command who should have been aware of the abuses and failed to prevent them or to report or prosecute those responsible. Article 27 of the Rome Statute rules out immunity for heads of state and government officials.

It is the policy of the ICC prosecutor to target only those bearing the greatest responsibility for the gravest crimes. While Human Rights Watch has advocated that the ICC prosecutor apply this policy flexibly, it is unlikely that more than a handful of people will be charged if the ICC opens an investigation and proceeds with prosecutions in Libya. The prosecutor's case in Uganda yielded five arrest warrants, while the three cases in the DRC have yielded five arrest warrants. The prosecutor has sought seven arrest warrants or summonses for six individuals in the Darfur situation, and just one in the Central African Republic. In Kenya, the prosecutor is seeking charges against six people.

### **7. Will the ICC have jurisdiction over forces participating in the current UN-authorized military operations in Libya?**

Security Council Resolution 1970, adopted on February 15, 2011, says that nationals from a state outside Libya that is not a party to the ICC Statute shall not be subject to ICC jurisdiction for all alleged acts arising out of operations in Libya established or authorized by the Security Council. On March 17, the Security Council adopted Resolution 1973, which authorizes member states “to take all necessary measures to protect civilians and civilian populated areas under threat of attack” in Libya. Of the 12 countries that have provided notice to the UN secretary-general as of March 24 about their participation in military operations under Resolution 1973, all are parties to the ICC Statute except the United States, the United Arab Emirates, Qatar and the Ukraine. All states, including these four, remain obligated under international law, however, to investigate and prosecute any members of their armed forces implicated in war crimes.

The ICC prosecutor has indicated that the focus of his current investigation in Libya relates only to the 15-day period following the adoption of Resolution 1970. The prosecutor has suggested that he may open a second investigation later, relating to the subsequent armed conflict. ICC jurisdiction for alleged acts arising out of Security Council-authorized operations in Libya could therefore be the subject of this potential second investigation, though it appears not to be an issue for the prosecutor’s current investigation.

Human Rights Watch opposes the exemption from ICC jurisdiction under Resolution 1970 as running counter to core international legal principles of jurisdiction, including territoriality. In addition, the exemption – by limiting jurisdiction over nationals of non-ICC states accused of war crimes in Libya to the “exclusive jurisdiction” of their own country – undercuts the ability of domestic courts in third countries to prosecute such nationals under the principle of universal jurisdiction. Similar language had been included in the Security Council’s

referral of the situation in Darfur in 2005 to the ICC and risks obstructing justice for the most serious crimes.

**8. Will the ICC have jurisdiction over non-Libyan nationals recruited by the Libyan leader, Col. Muammar Gaddafi, into his armed forces?**

The ICC will have jurisdiction over foreign nationals in the Libyan armed forces. Resolution 1970 excludes from ICC jurisdiction only foreign nationals participating in operations in Libya established or authorized by the Security Council. Those fighting in the Libyan armed forces are not participating in UN-authorized operations.

**9. Even if the prosecutor seeks to bring charges against individuals, will there ever be arrests?**

Securing arrests is one of the most difficult challenges faced by the ICC. Without its own police force, the court must rely on states and the international community to assist in arrests. To date, only five of the 14 individuals sought by ICC arrest warrants have been apprehended.

But while arrests may take time—particularly where those sought are high-ranking government officials—with sufficient international support they are possible. Charles Taylor, the former Liberian president, was apprehended in Nigeria following a three-year request to arrest him. He is on trial before the Special Court of Sierra Leone.

**10. Where else is the ICC investigating? Is it true that the ICC is targeting only African leaders for prosecution?**

The ICC is currently investigating in five countries—Democratic Republic of Congo, Uganda, Central African Republic, the Darfur region of Sudan, and Kenya. While this means that the ICC's investigations are all in Africa, three out of these investigations (DRC, Uganda, and CAR) were referred voluntarily by the governments where the crimes were committed, and Darfur was referred by the UN Security Council.

In addition, the ICC prosecutor is analyzing a number of situations in countries or territories around the world, including Afghanistan, Colombia, Cote d'Ivoire, Gaza, Georgia, Guinea,

Honduras, the Republic of Korea, and Nigeria.

The ICC makes decisions about its investigations based on a variety of factors, including whether it has jurisdiction over the crimes. Some of the worst crimes in violation of international law since the court's authority began in 2002 have been committed in states that are not parties to the ICC and are thus outside the court's jurisdiction. In such instances, the court can only obtain jurisdiction if the Security Council refers the matter to the ICC or a non-state party voluntarily gives the court the authority to address crimes committed on its territory.

African states played an active role at the negotiations on the ICC statute in Rome, and African countries were among the founding states to ratify the Rome Treaty. Of the ICC's 114 states parties, 31 are in Africa. Africans are among the highest-level officials and staff at the ICC, including judges who have been nominated by African governments. African states—Tanzania and Benin—were among the Security Council members that referred Darfur to the ICC, while South Africa, Nigeria, and Gabon voted along with all other Security Council members to refer Libya to the ICC.

At the same time, the landscape in which international justice is applied has been uneven, with leaders from or supported by powerful states less likely to be prosecuted by international courts if they are associated with war crimes, crimes against humanity and genocide. Nevertheless, justice should not be denied because there are political obstacles to ensuring justice for all. Rather, governments should work to extend the reach of accountability to wherever serious international crimes occur. This can be achieved by working to increase the number of states that are parties to the ICC and insisting on justice for such crimes committed in states that are not parties to the court, such as Sri Lanka and Israel.