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International Federation
for Human Rights

Federación Internacional
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اللَّفْدَرَابَلْيَةُ الدُّولِيَّةُ لِحقوقِ الْإِنْسَانِ

Libya and the ICC **Questions & Answers**

First request for arrest warrants - May 2011

1) Who are the persons targeted by the the ICC Prosecutor's application for arrest warrants? What does he intent to charge them with?

The ICC Prosecutor has applied for arrest warrants against Libyan leader Colonel Muammar Gaddafi, his second eldest son Saif Al Islam Gaddafi and the Head of intelligence, Abdulah Al Sanousi. The three suspects could be charged with murder and persecution as crimes against humanity.

According to the evidence gathered by the ICC Prosecutor, Muammar Gaddafi, Saif Al Islam and Abdulah Al-Sanousi planned and directed operations aimed at killing civilians and persecution of alleged dissidents through illegal detention, torture and enforced disappearances.

2) What are the next procedural steps?

A Pre-Trial Chamber, composed of three judges, will review the Prosecutor's application in order to decide whether to issue arrests warrants. The Chamber will determine whether the evidence provided by the Prosecutor is sufficient to establish that there are reasonable grounds to believe that the suspects have committed a crime within the jurisdiction of the Court and if their arrest appears necessary in accordance with article 58 of the Rome Statute. The arrest of a person may appear necessary to ensure the person's appearance at trial, to ensure that the person does not obstruct or endanger the investigation or the court proceedings, or, where applicable, to prevent the person from continuing with the commission of that crime or a related crime.

If the request is granted, arrests warrants will be issued against Col Muammar Gaddafi, Saif El Islam Gaddafi and Abdulah Al-Sanousi. Should the Chamber find the evidence in the Prosecutor's application insufficient, it will requests the Prosecutor to provide further evidence.

The Prosecutor's application must be decided upon as soon as possible. However there is no time fix

deadline for the Chamber to take a decision. In previous cases the Chamber has taken between two weeks and eight months. The case presented by the Prosecutor is a simple case in comparison to more complex cases presented by the Office, so a decision could be taken within a few months.

The Prosecutor must report regularly to the Security Council on the progress of his investigation. The next report is due in November 2011.

3) Why are so few people charged? Will investigations continue?

ICC investigations and prosecutions only target those most responsible for crimes under its jurisdiction, who are not tried at the national level. “Mid-level and low-level” perpetrators of genocide, crimes against humanity or war crimes should be tried before domestic tribunals.

The filing of a first request of arrest warrants does not imply that ICC investigations of the ICC are closed. On the contrary, the Prosecutor has indicated that investigations are ongoing. The Office is likely to focus now on allegations of war crimes committed during the armed conflict which started in Libya towards the end of February, as well as crimes of sexual violence and attacks against migrants.

4) What should the ICC judges take into account when deciding whether Colonel Gaddafi and the other suspects should be charged with crimes against humanity?

When deciding upon the request for an arrest warrant, the ICC judges will look into the suspects' responsibility for the commission of crimes in Libya. According to article 25(3) of the Statute, liability for perpetration of crimes can take different forms: a person is responsible for crimes if s/he intentionally commits, orders, assists to, contributes to or attempt to commit such a crime.

Colonel Gaddafi and the two other suspects are alleged to be responsible for the commission of murder and persecution constituting crimes against humanity in Libya. According to Article 7 of the Rome Statute, crimes against humanity are criminal acts committed as part of a widespread or systematic attack directed against the civilian population.

5) If the warrants of arrest are issued by the ICC Pre-Trial Chamber, who will be responsible to arrest the suspects? Is Libya, who has not ratified the ICC Statute, bound to cooperate with the Court under international law?

The ICC does not have a police force. According to Part IX of the Rome Statute, arrests are the primary responsibility of States Parties to the ICC Statute.

Libya is not a member of the ICC. However, Libya is bound to cooperate with the ICC in accordance with UN Security Council Resolution 1970, including through the arrest and surrender of persons sought by the Court. It must be recalled that, as a UN Member State, Libya must abide by Security council Resolutions taken under Chapter VII.

Should the suspects travel abroad, other States will be under the obligation to arrest them.

6) The President of Sudan, Omar Al-Bashir, has also been indicted by the ICC and has not been arrested. What makes the ICC think that it will succeed in having Gaddafi arrested and handed over to the Court?

The ICC issued an arrest warrant for Omar Al-Bashir, President of Sudan on 4 March 2009. Al-Bashir has not been arrested to date. This does not mean, however, that he cannot be arrested anytime. So far, arrest warrant for Al-Bashir has affected his freedom of movement since he could be arrested at any given moment when on the territory of another State. Should the regime in Sudan change, Al-Bashir could also be arrested in Sudan.

As far as Gaddafi is concerned, the ICC prosecutor called on Libyan authorities to implement arrest warrants should they be issued. It may be unlikely that Libyan authorities will execute the arrest warrants immediately, especially considering the authority with which Gaddafi himself is invested. However, the situation in Libya is very volatile and things could change quickly. A new regime could cooperate with the ICC. The Interim National Council actually indicated formally to the ICC Prosecutor its willingness and interest in cooperating with his office. The issuance of an arrest warrant could also have a significant impact on the suspects' personal travel. They could be arrested as soon as they cross the border.

7) What effect could the issuance of arrest warrants and arrest of the suspects have on the current conflict in Libya ?

The crimes for which the suspects have been investigated are ongoing.

Arresting the suspects would have a direct impact on the current conflict in Libya. By removing them from the context and surrendering them to the ICC, they would practically be barred from carrying criminal enterprise.

8) How has the Office of the Prosecutor conducted investigations? Has it conducted investigations on the Libyan territory?

Between 3 March and 4 May 2011, members of the Office of the Prosecutor went on 30 missions to 11 States. They conducted over 50 interviews with witnesses or individuals screened for the purpose of the investigation. In addition, the Office reviewed over 2,000 documents, including video and pictures.

The Prosecutor made a conscious decision not to conduct investigation on Libyan territory. He would have needed authorisation from the Libyan authorities, which would have been unlikely to obtain. Additionally, the Prosecutor did not want to put witnesses at risk and, therefore, has not interviewed anyone who is currently in Libya.

Nevertheless, the investigation has been remarkably quick. It is the quickest investigation (less than three months) that the OTP has ever conducted.

9) Why is the Court investigating crimes committed in Libya?

The ICC is investigating crimes committed in Libya because the United Nations (UN) Security Council referred the situation to the Court. The situation was referred on 26 February 2011 by Resolution 1970, which was adopted unanimously. Only five days later, ICC Prosecutor, Mr. Luis Moreno-Ocampo, announced the opening of an investigation into the situation in Libya regarding the crimes committed since 15 February 2011.

The ICC is an independent body and is not part of the UN system. However, the Rome Statute recognises certain prerogatives for the UN Security Council, including the possibility to refer a situation to the Court.

10) Can the Court investigate crimes in Libya even if Libya is not a State party to the ICC Statute?

It must be recalled that there are three possible ways for a situation to come before the ICC:

1. A State Party, that is to say a State that has ratified the Rome Statute, can request the Court to investigate a situation.
2. The Prosecutor can initiate an investigation on his own initiative as well, with the approval of the judges.
3. The UN Security Council has also this power to request an opening of investigations by a resolution, adopted as part of its attributes contained in Chapter VII of the Charter.

A State referral and Prosecutor's own initiative investigations are only possible when the relevant State is a party to the ICC Statute (or has accepted the jurisdiction of the Court through an ad hoc declaration). UN Security Council referrals, on the other hand, do not have this limitation. The UN Security Council can refer a situation when it considers that the crimes being committed in the country concerned constitute a threat to international peace and security (in accordance with Chapter VII of the UN Charter).

11) How is the referral by the Security Council different from other actions taken by the Security Council?

Chapter VII of the UN Charter establishes the Council's powers in relation to the maintenance of international peace and security, and provides the framework for the Council to take measures whose implementation is mandatory. The Security Council can decide to take military or non-military action to "maintain or restore international peace and security". Article 41 allows for measures not involving the use of armed force. Article 42 allows for other measures involving the use of force if non-military measures have proven to be inadequate.

Referral of the situation in Libya to the ICC, which was taken under Chapter VII of the UN Charter, was a non-military measure taken with the aim to maintain or restore international peace and security. It is possible to affirm that action by the ICC was seen at the time not only as a tool to punish those responsible for the crimes, but also to prevent perpetration of further atrocities, and thus protect civilians. It is remarkable that the adoption of UN Security Council Resolution 1970 was unanimous.

Only later, the Council adopted Resolution 1973 (17 March 2011) which ordered a military intervention into the situation in Libya and the establishment of a no-fly zone for the purpose of putting an end to the on-going violence. The two resolutions are of very different nature and are not linked to one another.

Through investigations, arrests and prosecutions, the ICC could contribute substantially to put an end to violence and protect civilians in Libya, without resorting to military action.

12) Does the ICC have jurisdiction over crimes that could be perpetrated by forces participating in the current UN-backed or NATO military operations in Libya? Could nationals from countries involved in this conflict be prosecuted?

In principle, since the situation was referred to the ICC by a UN Security Council resolution, the Court has jurisdiction over all crimes committed by all parties on the territory of Libya since 15 February 2011. In this case, nationality of the alleged perpetrators is irrelevant. NATO forces are thus subject to the jurisdiction of the Court.

However, an exception has been introduced in Resolution 1970: nationals of States that are not party to the ICC Statute, who participate in the UN Security Council military operations cannot be prosecuted before the ICC. Paragraph 6 of the Resolution reads: “[individual] from a State outside [Libya] which is not a party to the Rome Statute of the ICC shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations [in Libya] established or authorized by the Security Council.”

13) How is it possible that both the ICC and the African Court on Human and Peoples' Rights are handling a case about the grave human rights violations committed in Libya? Is there any conflict of jurisdiction?

No, there is no conflict of jurisdiction. The ICC only tries individuals, whereas proceedings before the African Court on Human and Peoples' Rights are introduced against States only. In other words, in one case individual criminal responsibility is at stake, whereas in the other case it is a matter of State responsibility.

In this situation, the African Court has been seized of a case on the responsibility of Libya in massive human rights violations committed on its own territory. It is a completely different and separate process from the one pending before the ICC.

14) Could Gaddafi be tried in Libya instead of at the ICC?

Cases before the ICC are admissible when the State concerned is unable or unwilling to investigate and prosecute (this is the so-called principle of complementarity, enshrined in Article 17 of the Rome Statute). Since Libya is not taking any action to investigate the crimes that have been perpetrated on its territory since last 15 February, the case is admissible before the ICC.

However, should there be a change of regime once the conflict has come to an end and Gaddafi has been removed from office, national proceedings could be organised. If so, the ICC would defer to national prosecutions, as long as the local cases target the same individuals and for the same conducts, and the investigations and prosecutions are genuine.

15) Why is the ICC investigating crimes committed in Libya and not those committed in Syria or Bahrain?

The ICC has jurisdiction to investigate into the situation in Libya given that the UN Security Council referred the situation to the Court (see question 9).

Syria, Bahrain, Egypt and Yemen are not State Parties to the Rome Statute and the UN Security Council did not adopt any resolution to refer these situations to the Court. As a result, the ICC has no jurisdiction to conduct investigations into the events which have unfolded in those countries. The Court cannot intervene, it is not legally entitled to do so, unless the UN Security Council referred the situations to the ICC. FIDH called for such a referral in the case of Syria.

16) The ICC is also investigating crimes in five other African countries? Is this a court against Africa?

The ICC is currently investigating crimes committed in six African countries: Democratic Republic of Congo, Uganda, Central African Republic, Sudan, Kenya and Libya. But it is not a Court “against Africa” for the following reasons:

- 1) Africa is the continent most represented at the Assembly of States Parties to the ICC Statute. 31 African countries have recognised and accepted the ICC jurisdiction over their territory and their nationals.
- 2) Three out of these six States currently under investigation have referred the situation to the ICC themselves and requested the Prosecutor to open an investigation into the crimes perpetrated on their territory.
- 3) Opening an investigation means trying to bring justice to the victims of these situations. Not only the perpetrators are African; victims are so as well and they have no access to remedy in their countries.
- 4) The seriousness of the crimes is a crucial criteria for opening investigations at the ICC. It cannot be denied that crimes of a very serious nature have been perpetrated in Africa since 2002, date of the entry into force of the Rome Statute.
- 5) States from other continents are under preliminary analysis by the ICC Office of the Prosecutor (including countries such as Colombia, Georgia and Afghanistan, as well as the Palestinian Territories). This is the stage before the opening of an investigation, where the ICC Prosecutor determines whether he should proceed with an investigation.

17) What is the International Criminal Court (ICC)? What is the scope of its jurisdiction?

The International Criminal Court (ICC) is a permanent international judicial institution, whose mandate is to try individuals responsible for the most serious international crimes. The ICC was created by a treaty, also known as the Rome Statute, which was adopted at an international conference on 17 July 1998 and entered into force on 1 July 2002.

To date, 115 States are parties to the ICC Statute.

The Court has jurisdiction to prosecute individuals for the crime of genocide, crimes against humanity and war crimes (see articles 6, 7 and 8 of the Statute).