



## ***THE UN SECURITY COUNCIL REFERRAL OF THE SITUATION IN LIBYA TO THE INTERNATIONAL CRIMINAL COURT***

On February 26, 2011, the UN Security Council unanimously adopted Resolution 1970 referring the situation in Libya to the ICC Prosecutor. Since Libya is not a State Party to the Rome Statute, the referral provides the basis for ICC jurisdiction over alleged crimes committed in Libya since February 15. The resolution, like Resolution 1593 on Darfur, purports to grant exclusive jurisdiction over non-Libyan nationals of countries that are not ICC States Parties to the courts of their nationalities, subject to waiver, and bars the UN from bearing any costs associated with the referral. On March 3, 2011, the Prosecutor announced that his office decided to officially open an investigation into alleged crimes against humanity committed in Libya.

### Background of Conflict

In February of 2011, protests broke out in various parts of Libya to oppose the 41-year totalitarian rule of President Muammar el-Qaddafi. Qaddafi blamed these protests on foreign colonialist influence and attempted to quell the protesters with a violent crackdown. On February 25, he allegedly ordered his security forces to begin air raids on the unarmed civilians congregating in the streets. Soon after, he reportedly conscripted mercenaries from neighboring countries such as Chad, Sudan and Niger, to attack the unarmed civilians on the ground.<sup>1</sup> His alleged actions and the resulting death toll led to a wave of public outcry around the world. The international community quickly responded with several actions in the United Nations, including in the Security Council.

### International Response

The February 25 air raids prompted the UN Human Rights Council to suspend Libya's membership and to pass a resolution calling for an independent commission of inquiry to investigate the alleged human rights violations.<sup>2</sup> The following day, the UN Security Council passed a unanimous resolution "deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators." More importantly, it invoked its Chapter VII powers, responding to threats to international peace and security, to refer the situation in Libya from February 15 to the Prosecutor of the International Criminal Court.<sup>3</sup> This is the first time that the Security Council has unanimously referred a situation to the Court under Article 13(b) of the Court's Rome Statute.<sup>4</sup>

The United States strongly supported this referral. US Ambassador Susan Rice stated in a press conference that the US was "very pleased with the outcome, and also with the unity of purpose that the Council has showed in

---

<sup>1</sup> Libya—The Protests (2011), The New York Times, March 18, 2011, <http://topics.nytimes.com/top/news/international/countriesandterritories/libya/index.html>.

<sup>2</sup> Human Rights Council passes resolution on Libya in Special Session, United Nations Human Rights, February 25, 2011, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10768&LangID=E>.

<sup>3</sup> United Nations Security Council Resolution 1970, S/RES/1970 (2011), February 26, 2011, <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>.

<sup>4</sup> Article 13(b) of the Rome Statute grants the Court jurisdiction over a situation that is referred to it by the Security Council under Chapter VII where the state (here Libya) is not a party to the Statute.





acting quickly and decisively in accordance with its responsibility to protect.”<sup>5</sup> Then, on March 1, the US Senate passed its own resolution explicitly supporting Security Council Resolution 1970.<sup>6</sup>

These actions demonstrate that the United States is willing to support the ICC where this support also bolsters its national interests.<sup>7</sup> Despite the condemnation of the ICC referral by some conservative critics in the US, it could be a starting point for accelerating the growing relationship between the US and the ICC.

## Acceptance by the ICC

An Article 13(b) referral invites, but does not require, the Prosecutor to open an investigation into the country situation in question. However, on March 3, 2011 the ICC Prosecutor, Luis Moreno-Ocampo, announced the Court’s acceptance of the Security Council’s referral of the situation in Libya. Under the Rome Statute, the Prosecutor shall proceed with an investigation referred to it unless there is no reasonable basis to believe that crimes falling within ICC jurisdiction have been committed. He may conduct a formal investigation without the Pre-Trial Chamber authorization required in other circumstances. Here, a preliminary examination of the violence committed against civilians in Libya provided sufficient evidence that crimes against humanity were committed. Thus, the Prosecutor’s decided to open an investigation.

Once the Prosecutor feels he has accumulated enough evidence, he will ask the judges of the Pre-Trial Chamber to issue an arrest warrant for Qaddafi and possibly others alleged to have committed atrocity crimes. Under Article 58 of the Rome Statute, an arrest warrant is proper where the Pretrial Chamber is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court, and the arrest of the person seems necessary to ensure the person’s appearance at trial, to prevent obstruction of the proceedings, or to prevent continued commission of the crime.

## Next Steps

Given their recent commission and the wide breadth of international coverage on the alleged crimes, the Prosecutor should have little difficulty meeting his burden of proof. Yet there are number of questions that still surround the case.

For one, the Prosecutor must determine whether to limit his investigations to crimes against humanity as opposed to expanding them to prepare for the inclusion of war crimes charges. When the Security Council referred the situation in Libya to the Court, the fighting between Qaddafi’s army and the rebel forces amounted only to an internal revolt. Article 8(2)(f) states that the war crimes provisions within the Rome Statute are not intended to apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence,” such as the case is here. However, the severity of the fighting has greatly increased since that time.

<sup>5</sup> Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at the Security Council Stakeout, on Resolution 1970, Libya Sanctions, New York, New York, February 26, 2011, <http://usun.state.gov/briefing/statements/2011/157195.htm>.

<sup>6</sup> Senate Passes Libya resolution, Washington Post, March 1, 2011, [http://voices.washingtonpost.com/2chambers/2011/03/senate\\_passes\\_libya\\_resolution.html](http://voices.washingtonpost.com/2chambers/2011/03/senate_passes_libya_resolution.html).

<sup>7</sup> The United States absented from Security Council 1593 referring the Darfur situation to the Court.



In fact, on March 18, the Security Council authorized military action led by Britain, France and the United States, against Qaddafi's forces to quell their barrages against civilians. Should the conflict escalate into an internal armed conflict (known within the Rome Statute as a "conflict not of an international character") the Prosecutor may consider additional charges such as war crimes.<sup>8</sup>

Second, many doubt the Court's ability to capture Qaddafi even after the issuance of an arrest warrant. The ICC has experienced great difficulty in arresting Omar Al-Bashir of Sudan and the fact that he is still at large years after his warrant's issuance seriously undermines the Court's goal to end impunity. Many are wondering, "Does Qaddafi really have anything to fear?" While it is hard to assure arrest, the Security Council's unanimous referral of the case binds all members of the United Nations to arrest Qaddafi in the case that he is present on the state's territory. The Prosecutor should work quickly in getting a warrant to prevent his assassination or flight into hiding, and thus increase the Court's chances for arrest.

A final concern stems from the cost of this unforeseen investigation. The ICC has already decided on its budget for the fiscal year and there is little room for the case in Libya. The President of the Court, Judge Sang-Hyun Song, publicly confirmed that there are no budgeted funds available for the case.<sup>9</sup> Worse still, is the fact that Security Council Resolution 1970 contains a reservation that prevents the United Nations from contributing funds to the case.<sup>10</sup> As a result, the Court may ultimately need to dip into its contingency funds in order to move forward with the trial.

## Conclusion

Despite the aforementioned hurdles, the referral of the situation in Libya to the Court is a positive reflection of the Court's growing legitimacy as an international tribunal. It is important that the ICC and its supporters use this case to prove the Court's ability to aid in fighting impunity and to bolster its global reputation.

*Researched and drafted by Lauren Maccarone  
Updated March 22, 2011*

---

<sup>8</sup> Qaddafi and His Forces Warned on War Crimes, The New York Times, March 19, 2011, <http://www.nytimes.com/2011/03/17/world/europe/19hague.html>

<sup>9</sup> International Criminal Court in need of funds to prosecute Gaddafi, Gma News, March 7, 2011, <http://www.gmanews.tv/story/214658/intl-criminal-court-in-need-of-funds-to-prosecute-gaddafi>.

<sup>10</sup> United Nations Security Council Resolution 1970, S/RES/1970 (2011), February 26 2011, <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>.

