



International Justice and the Prevention of Atrocities

Case Study: Libya: The ICC Enters During War by Priscilla Hayner

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In the context of the Arab Spring, Libyans took to the streets in February 2011 to challenge the government of Muammar Gaddafi after forty years of dictatorship. The protests were met with violence, and the confrontation quickly developed into full-scale armed conflict.

The UN Security Council responded with two important resolutions. In late February, ten days after the government's violent crackdown began, the Security Council referred the situation to the International Criminal Court, with a unanimous vote. This resolution also imposed an arms embargo, and a travel ban and freezing of assets of senior members of the Gaddafi regime.² Three weeks later, the Security Council passed another resolution that authorized "all necessary measures" to protect civilians in Libya.³ A sustained NATO air campaign began almost immediately.

This paper looks at the decisions around the referral of Libya to the ICC, and provides a preliminary assessment of the impact of the intervention of an international court in the midst of an ongoing conflict.

¹ This paper was prepared as part of a project of the European Council on Foreign Relations to compare the experience of different situations where international responses to crises involving mass atrocities have faced the dilemma of seeking accountability while trying to bring the crisis to an end. Please cite fully in the event of reference or quotation.

² UN Security Council Resolution 1970, 26 February 2011.

³ UN Security Council Resolution 1973, 17 March 2011.

The decision by the Security Council to make the ICC referral was influenced by several factors. First, a letter from the Libyan Ambassador to the UN expressed support for the referral of his own country to the ICC.⁴ Second, support from the Arab League, the African Union, and the Secretary General of the Organization of the Islamic Conference also weighed heavily in the Council's deliberations. In addition, there may have been a misreading of the dynamics on the ground in Libya, with some believing that the Gaddafi forces were pulling back and the armed conflict would not be long-lived.

Once referred, the next surprise was how quickly the ICC prosecutor moved from investigation to arrest warrants. What took several years in other contexts, such as Sudan, was accomplished in three months in the case of Libya. The result was that the announcement of warrants (for President Gaddafi, his son Saif al-Islam, and intelligence chief Abdullah al-Sanussi) was made at the height of the war, in mid-June 2011.

To understanding how the ICC intervention might have affected the conflict and any prospects for peace, it may be useful to ask four questions. First, was there an impact on the possibility of a negotiated solution? Second, how did the indictments affect the perceived legitimacy of Gaddafi? Third, did the arrest warrants have an impact on the choices available to the government, and on its decisions and actions? Finally, did the engagement and oversight of the ICC have an effect on the opposition fighters, perhaps deterring potential abuse? The below very briefly addresses these questions.

After the Security Council referral to the ICC, commentators warned that such an early hail for justice would make a negotiated resolution more difficult. By April 2011, analysts were suggesting that leaders throughout the Arab world, who were confronting their own popular protests, were concluding that it was better to fight than quit. When the ICC arrest warrants were confirmed for Libya in June, the Guardian wrote: "The ICC has added its weight to attempts to corner Gaddafi. But cornered, he is rendered all the more dangerous."⁵ However, it should be noted that the fear of justice was not only a reaction to the ICC: in Egypt it was the national courts that put former president Mubarak on trial. This also received widespread attention throughout the region; it is said that the Gaddafi family took note and that this affected their calculations.

Regardless, the escape route had been significantly narrowed: it was assumed that any departure for Gaddafi would have to rely on an offer of exile by one of the few dozen states

⁴ Letter to the President of the UNSC, 26 February 2011, from Abdurrahman M. Shalgham, Permanent Representative of Libya to the United Nations.

⁵ [Simon Tisdall](http://www.guardian.co.uk/commentisfree/2011/jun/27/gaddafi-international-criminal-court-arrest-warrant), "This arrest warrant could make Gaddafi more dangerous," The Guardian, 27 June 2011 (<http://www.guardian.co.uk/commentisfree/2011/jun/27/gaddafi-international-criminal-court-arrest-warrant>).

that were not party to the ICC. But Gaddafi would know that even in those countries (and it was not at all clear who might offer such asylum), his security from arrest would still not be sure.

While the possibility of successful negotiations to end the war was never high, there were a number of attempts to do so; the African Union may have led the most serious effort.⁶ One member of the National Transitional Council (NTC) – the political leadership of the opposition at this time – described the changed dynamics as soon as the ICC warrants were on the table. It seemed that there was no longer a serious effort by the international community to try to end the war by means other than through military means, he noted. The ICC was “definitely seen as an impediment” to getting Gaddafi to leave power, at least in the views of some who were central to NTC decision-making. Meanwhile the AU’s access to Libya, and thus its negotiation efforts, were stymied by NATO military actions.

The AU also saw the arrest warrants as hindering peace options. Shortly after the warrants were confirmed by the ICC Pre-Trial Chamber, the AU declared that its members would not implement the warrants, and that Gaddafi could freely travel in Africa.⁷ This statement was apparently a product of considerable debate at the AU summit in late June, but it was not clear how such an AU political decision could overrule the legal obligations of the then thirty-one African state parties to the ICC, who were required to cooperate with the Court.

In July 2011, at a moment when the Libyan conflict appeared unlikely to yield a quick victory for the rebels, France and the United Kingdom signaled their openness to a settlement whereby Gaddafi left power but remained in Libya. French foreign minister Alain Juppé said that “one of the scenarios effectively envisaged is that [Gaddafi] stays in Libya on one condition...that he very clearly steps aside from Libyan political life.”⁸ British foreign minister William Hague said a few days later that “what happens to Gaddafi is ultimately a question for the Libyans... Whatever happens, Gaddafi must leave power.”⁹ Neither official discussed how a decision to allow Gaddafi to stay in Libya would be compatible with the country’s obligation to cooperate

⁶ See in particular Alex de Waal, “African Roles in the Libyan Conflict of 2011,” *International Affairs* 89:2 (2013), pp. 365-379.

⁷ African Union, “Decision on the Implementation of the Assembly Decisions on the International Criminal Court: Doc. EX.CL/670(XIX)”, Assembly/AU/Doc.366(XVII), 1 July 2011, para. 6.

⁸ William Booth, “France: Gaddafi could possibly stay in Libya,” *Washington Post*, 20 July 2011 (http://www.washingtonpost.com/world/middle-east/france-gaddafi-could-possibly-stay-in-libya/2011/07/20/gIQAaMISQI_story.html).

⁹ Theo Usherwood, “Gaddafi must relinquish power says William Hague,” *The Independent*, 26 July 2011 (<http://www.independent.co.uk/news/world/africa/gaddafi-must-relinquish-power-says-william-hague-2326152.html>).

with the ICC's arrest warrants. Asked about this, Hague replied that the possibility of Gaddafi remaining in Libya was simply a "hypothetical route."¹⁰

At one point, when the NTC leadership thought there was movement on possible negotiations, they asked ICC prosecutor Moreno-Ocampo to delay his announcement of the request for warrants, to allow them to push for a negotiated solution. The prosecutor complied with this request. But once the warrants were released, as they had feared, the opposition sensed that Gaddafi dug in his heels and decided to fight to the end.

Some suggest that an opportunity was lost to use the ICC, backed up by NATO military strikes, as a political tool to reach a compromise solution. While the NTC starting position was that Gaddafi must leave power, they also stated, early on, that if Gaddafi left the country they would not pursue him. They were also prepared if necessary to ask for an Article 16 deferral from the Security Council, which would have halted the ICC prosecutions for at least one year.¹¹

Meanwhile, Gaddafi tried to use the ICC's engagement in Libya to rally more support to his side, decrying this form of international intervention. Former Gaddafi loyalists felt that this increased the popular support for his regime and, in retrospect, that this may have effectively prolonged the conflict.

A former close confidant of Gaddafi, who was with him until the end, described Gaddafi's frame of mind in the last weeks and months.¹² Gaddafi was extremely aware of, and clearly felt trapped by, the ICC warrants, and did not seem to understand what his options might be other than to continue to fight. He complained bitterly and repeatedly that his friends in the international community should be reaching out to help him, to guide him and to suggest what might be done. But those he expected to help presumably felt constrained by their legal obligations to the ICC. For at least the last weeks when he was in hiding and on the run, the ICC warrants may have played a critical role in preventing a non-military end to the conflict. Considerable damage was done in this last period of fighting, in particular with the sacking of the town of Sirte, where Gaddafi was hiding.

However, there is no evidence that the ICC engagement in Libya affected the fighting tactics of the regime's forces. They committed serious abuses throughout the conflict.

For those in the opposition not engaged in the possibility, however slight, of a negotiated end to the conflict, the ICC engagement was seen much more positively. The NTC's legal committee helped feed information to the ICC, and considered it a success when the warrants were finally announced. They saw the arrest warrants as representing the international community's clear

¹⁰ Ibid.

¹¹ According to an NTC Executive Committee member.

¹² Interview by author of former security chief Mansour Dhao Ibrahim, Misrata detention center, Jan. 26 2012.

recognition that Gaddafi was an international war criminal. This was taken as a strong vote of moral support for the opposition: in the rebel-held parts of Libya, the streets erupted in celebrations when the arrest warrants were confirmed. Looking back, many see this as a turning point in the conflict, as the beginning of the collapse of the regime, and the moment when supporters of the government began to step back.

Many in the opposition did not however perceive the ICC as also concerned with any potential abuses on their own side, and there is little evidence it had much impact on their actions. There were some NTC officials or force commanders who were aware that the ICC had jurisdiction over both sides, but this message did not seem to reach others. Some, and perhaps many, opposition commanders urged respect for the laws of war, based primarily on religious and cultural foundations. However there were increasing and well-founded reports of torture and abuse within detention centers controlled by opposition forces, with seemingly no response from those in command of these forces – and no response by the ICC, either. The former chairman of the NTC, Mahmoud Jibril, remembers receiving two or three emails from NATO, urging respect for human rights, but no messages from the ICC, nor any indication from the ICC that the opposition might also be a target of investigation. The official position from the Office of the Prosecutor in The Hague was certainly that they had jurisdiction over both sides, and this was said for example in the Chief Prosecutor's reports to the UN Security Council, but this did not seem to be generally understood in Libya.¹³

When the opposition gained control of government and held two of the ICC indictees in detention, their position changed. Since the end of the war in late 2011, the firm position of the new government – and clearly backed by public opinion – has been to insist that these two individuals be tried at home, in Libya. Even those former NTC officials most involved in the campaign to persuade the ICC to bring charges against officials of the former regime were adamant that these persons should not now be turned over.¹⁴ When the outcome of the war was uncertain, the international warrants had been welcome. But once the regime was defeated and former officials were in custody, it was unthinkable to extradite them to an international court for trial.

The ICC Pre-Trial Chamber decided against Libya in its complementarity challenge in relation to Saif al-Islam Gaddafi, saying that there was no evidence that proceedings had begun at the national level. He was in fact still held by a militia group in Zintan, and not under the control of central authorities. In October 2013, the ICC Pre-Trial Chamber took the contrary decision in relation to former intelligence chief al-Sanussi, granting Libya the right to try him at home. Both of these decisions are now on appeal.

¹³ Interviews by author of former NTC commanders and political leaders, Tripoli and Misrata, February 2013.

¹⁴ Interviews by author, Tripoli, February 2013.

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