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The Motivation for the Referral of Libya to the ICC: Political Pressure or Justice?

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The killings and other atrocities committed in Libya, if confirmed, likely rise to the level of crimes against humanity, which are under International Criminal Court (ICC) jurisdiction in the Rome Statute. But the ICC is supposed to be a court of last resort, becoming involved only if national authorities prove unwilling or unable to pursue the alleged crimes. It has yet to be determined whether Libya will be able to hold President Muammar Qadhafi to account for his recent actions or his past crimes.

By acting preemptively to refer the situation to the ICC, the U.N. Security Council has fallen victim to political pressure to respond to the situation rapidly rather than letting developments in Libya determine whether the ICC has a role to play.

Qadhafi's Crimes. There is little question that the Libyan government is willfully killing civilian protestors and likely committing other serious crimes in its effort to maintain power. However, the details of the situation remain vague. News sources estimate that at least 1,000 people have been killed in various confrontations between forces loyal to the government and the opposition protestors. U.N. Secretary-General Ban Ki-moon has cited that number as well, based on various reports. While it is certain that lives have been lost, definitive confirmations of deaths and indisputable video or evidence of specific incidents are sporadic.

In response to these crimes, the United Nations has taken several appropriate steps:

- The Human Rights Council convened a special session on February 25 to look into the "Situation

of human rights in the Libyan Arab Jamahiriya" and adopted a resolution that "strongly condemns the recent gross and systematic human rights violations committed in Libya, including indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, detention and torture of peaceful demonstrators, some of which may also amount to crimes against humanity."

- The General Assembly, which had overwhelmingly elected Libya to a seat on the Human Rights Council in 2010, adopted a resolution to suspend Libya's rights of membership in the council.
- The Security Council also passed a resolution deploring the "the gross and systematic violation of human rights" committed by the Libyan government and imposing (1) an arms embargo on Libya; (2) a travel ban on Qadhafi, his family, and high-level members of his regime; and (3) an asset freeze on Qadhafi and his family. The Security Council also referred the situation in Libya to the ICC for its consideration of an investigation of potential crimes against humanity.

Why Refer Libya to the ICC Now? While nearly all of the U.N.'s actions are appropriate responses

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to the situation, the referral of the situation to the ICC by the Security Council is not. The authority of the Security Council to refer the situation to the ICC is not at issue. The Rome Statute of the International Criminal Court clearly envisions such referrals, and the previous referral of Sudan to the ICC stands as precedent. During the preparatory meetings for the Rome Statute, the U.S. argued that the *only* way the ICC should be permitted to launch an investigation is by a Security Council referral. If this position had been adopted, it is possible that the U.S. would be a member of the ICC today.

What is at issue is the timing of the referral and the possible ramifications of that decision. The ICC was not created to be the first option for investigating or prosecuting possible crimes against humanity. Rather, it was created to be a court of last resort if “the State [is] unwilling or unable genuinely to carry out the investigation or prosecution.” Delay and observation are inherent in this restriction.

The determination of whether Libya is unwilling or unable to carry out a serious investigation or prosecution of those responsible for the alleged crimes is dependent on what arises from the current unrest. For instance, if Qadhafi is able to remain in power, there would be little expectation that Libya would be willing to pursue an investigation or prosecution into the actions undertaken at his behest. If this occurs, a Security Council referral would be a reasonable course of action. A delay in the Security Council referring the Libyan situation to the ICC until this situation is resolved would not hurt the prospects for justice. The authority of the council to refer a case to the ICC has no expiration date, and if Qadhafi remains in power, such a referral could be made with full justification based on the fact that Libya is hardly likely to investigate the crimes committed by him and his associates. Moreover, the ICC would probably not be able to bring Qadhafi into

custody until he is ousted—and perhaps not even then.

If Qadhafi is forced from power, however, the successor government in Libya may have a strong interest in investigating and prosecuting those responsible for the crimes committed over the past few weeks. Moreover, such an investigation could lead to the prosecution of individuals for past crimes against the Libyan people or internationally—such as the bombing of Pan Am 103—that are beyond the scope of the ICC. The ICC should not be charged with this investigation before the Libyan people or the other victims of Qadhafi’s crimes have an opportunity to pursue justice as they determine best fits their interests.

Another possibility is that Qadhafi is killed. This would remove much of the luster from a potential ICC prosecution. Considering the jaundiced view of the ICC that many African governments have, it is likely that a Libyan trial would be received more warmly than an ICC trial and, consequently, benefit from more cooperation in terms of warrants and extradition of Qadhafi’s collaborators if they flee to other countries.

Moreover, the decision places the ICC in a difficult position. As admitted by the ICC prosecutor, the court has no investigators on the ground in Libya, and the effort to collect evidence while the conflict is raging is challenging, to say the least.¹ Despite this serious problem, “Following a preliminary examination of available information, the Prosecutor has reached the conclusion that an investigation is warranted.”²

The speed of this decision should raise flags. Considering the many problems that have beset ICC trials³ and the admitted lack of concrete evidence, the prosecutor appears to be letting political expediency drive his decision rather than an objective consider-

1. Associated Press, “ICC: Killing of Libyan Civilians Could Be Criminal,” March 1, 2010, at <http://www.google.com/hostednews/ap/article/ALeqM5jxTvaQ-ah5YLKe5cFkP2oFc-rGrA?docId=19131135cd41482fba956a38908d4d2d> (March 4, 2011).
2. Press release, “ICC Prosecutor to Open an Investigation in Libya,” International Criminal Court, March 2, 2011, at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/statement%20020311> (March 3, 2011).
3. For some examples, see Brett D. Schaefer and Steven Groves, “The U.S. Should Not Join the International Criminal Court,” Heritage Foundation *Backgrounder* No. 2307, August 18, 2009, at <http://www.heritage.org/Research/Reports/2009/08/The-US-Should-Not-Join-the-International-Criminal-Court>.

ation of the situation or of whether the ICC may be in a position to successfully prosecute the case.

Creating Disincentives to Act. Finally, the referral may actually create disincentives for outside intervention to aid the opposition in Libya. Libya is not an ICC state party, and the court would have had extremely restricted jurisdiction in Libya without the Security Council referral.⁴ The Security Council resolution protects the “nationals, current or former officials or personnel” of non-ICC parties (except for Libya) from ICC jurisdiction—but only for “alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council.” In other words, now that the council referred the case to the ICC, actions in Libya taken by non-ICC parties (such as the U.S.) would have to be expressly authorized by the Security Council to avoid becoming subject to ICC jurisdiction.

Based on their long-held position of opposing external interference in sovereign territory, China and Russia (which can veto Security Council resolutions) are unlikely to approve any *ad hoc* interventions in Libya. Thus, by referring the situation to the ICC, the Security Council may have unintentionally complicated the situation by deterring even non-ICC parties like the U.S. from intervening in Libya. Any actions not authorized by the Security Council, however well intentioned, might result in an ICC investigation or prosecution of the actor’s citizens, officials, or personnel.

The Security Council is unlikely to reverse course on its decision to refer the situation in Libya to the

ICC. However, the U.S. should make clear its position that, ideally, a post-Qadhafi Libyan government should investigate and prosecute those responsible for the crimes committed in Libya over the past few weeks (and, hopefully, other crimes committed by or at the behest of Qadhafi in the past) and that the ICC should take no precipitous action that would preclude or infringe on that preferred outcome.

Complicating Matters. The Libyan people deserve justice for the terrible actions taken by their government against them. However, it is unclear whether the ICC is integral to that process or necessary to accomplish that goal. The precipitous action of referring Libya to the ICC indicates that the Security Council yielded to pressure to be as aggressive in dealing with the Libyan government as possible—even if that action results in undermining the sovereign privileges of any successor government in Libya, placing unrealistic expectations on the ICC to quickly investigate a very fluid and unstable situation, and, perhaps, actually impeding international support of efforts to oust Qadhafi.

The referral to the ICC by the Security Council further illustrates that international justice cannot be severed from political motivations and demonstrates the wisdom in America’s wary relationship toward the ICC.

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4. The ICC’s jurisdiction is limited to alleged crimes committed on the territory of an ICC member state or by the nationals of an ICC party. Thus, absent a Security Council referral, the ICC at best has jurisdiction only over the actions of individuals from ICC state parties acting in Libya. This obviously provides no protection to ICC party states like the United Kingdom, whose nationals and officials are already subject to the court’s jurisdiction. The U.K. is reportedly considering imposing a no-fly zone in Libya. Prime Minister David Cameron was doubtlessly hearing from his legal advisers about the possible legal ramifications resulting from the actions of British forces sent to Libya even before the Security Council referral.