

# WebMemo



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## International Criminal Court Complicates Conflict Resolution in Libya

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Despite NATO intervention and advances by opposition forces, the Libyan conflict appears far from resolution. The White House support for rushing referral of Muammar Qadhafi to the International Criminal Court (ICC) has significantly complicated efforts to get Qadhafi to leave the country.

The lesson of the ICC referral of Libya is that the pursuit of international justice is not without consequences and must be balanced with the need to resolve threats to international peace and security. The Administration should be more cautious when considering future proposals to refer situations to the ICC.

**Troubled Precedents.** Qadhafi cannot hold out indefinitely. He is running out of vital supplies and equipment. A number of Libyan diplomats abandoned Qadhafi in the early days of the conflict, and there have been additional defections recently as his supporters conclude that Qadhafi cannot win. Yet Qadhafi's resolution despite near-certain defeat is clear in his declaration that he "will stay in our land dead or alive."<sup>1</sup>

Qadhafi's interests in persevering are clear and he is likely gambling that he can hold out until the NATO coalition splinters or support for the operation weakens. This is certainly possible given the constraints placed on the NATO intervention under U.N. Security Council resolutions 1970 and 1973<sup>2</sup> and the questionable level of support for an extended NATO mission as demonstrated by Germany's reluctant support of the NATO operation and the

dissatisfaction of many Republican and Democratic lawmakers expressed in a recent resolution passed by the House of Representatives.

Qadhafi may also believe he has no other option than to hold out. Early in the conflict it was believed that Qadhafi was considering options for exile. If true, Qadhafi's consideration of this option was undoubtedly influenced by the Security Council referral of Libya to the ICC, which significantly complicates options for exile.

As Qadhafi himself has observed, when Charles Taylor was turned over to the Special Court for Sierra Leone, it virtually ended the chances that future dictators will accept exile.<sup>3</sup> There are 114 ICC member states obligated to enforce ICC warrants, and international pressure can lead even non-ICC member countries to renege on sanctuary deals. Reportedly, the threat of prosecution concerns Qadhafi enough that he engaged a South African law firm to prepare a defense against possible ICC charges.<sup>4</sup> Based on the unprecedented speed with which the ICC is pursuing the situation in Libya, he is right to be concerned.

**Libya on the ICC Fast Track.** Once a situation is referred to the ICC, the prosecutor's office con-

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ducts a preliminary investigation to determine if the court has jurisdiction, investigate the claims, and examine the evidence to verify if an investigation is warranted. Historically, the preliminary examination takes months, even years, to complete before a formal investigation is opened. For instance, of the current cases before the ICC, preliminary examination of the situation in the Central African Republic took just under two years, the situation in Uganda took six months, and the situation in the Democratic Republic of the Congo took two months. In the case of Darfur—which, like Libya, was referred to the ICC by the Security Council—the preliminary examination took two months, despite voluminous documentation and evidence of crimes from impeccable sources.

The prosecutor's office has been also conducting preliminary examinations of situations in Afghanistan, Georgia, Guinea, Côte d'Ivoire, Colombia, Palestine, Honduras, Korea, and Nigeria for extended periods without reaching a decision to conduct an investigation.

Based on past practice, the ICC is moving at an unprecedented pace on Libya. Following the Libyan referral, the ICC prosecutor opened a preliminary examination and made a decision to open an investigation after *five days*. In a little over two months, the prosecutor requested that the ICC judges approve arrest warrants for Qadhafi, his son Saif al-Islam, and Libyan intelligence chief Abdullah al-Sanousi. Other cases generally experienced a gap of a year or more between the opening of an investigation and the issuing of warrants. It took the ICC years to issue an arrest warrant for Sudanese President Omar al-Bashir.

Qadhafi has no doubt committed serious crimes, but the speed of this process should raise flags and questions about the motivation of the court. Bashir

has remained free despite an ICC warrant outstanding since 2009. The ICC could be seeking to use a weakened Qadhafi to prove that heads of state are not beyond its reach. ICC prosecutor Moreno Ocampo, whose term in office expires in mid-2012, could see this case as the culmination of his career in The Hague. Regardless of motivation, letting political expediency drive the actions of the court will only serve to damage the court in the long term.

**An Unnecessary Complicating Factor.** The Libyan people deserve justice for the terrible actions taken by their government against them. However, the Security Council acted prematurely in referring Libya to the ICC. 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 is still far from clear whether a successor government in Libya would be unable or unwilling to hold Qadhafi to account for his current crimes or those long past, such as the Lockerbie bombing.

Moreover, justice is not the only consideration. The ICC referral is likely impeding international efforts to oust Qadhafi by removing the option of offering him exile in return for leaving Libya. If securing an exit safe from prosecution for Qadhafi can shorten the conflict and save lives, it becomes a legitimate option. This solution may or may not be acceptable to the Libyan opposition, but it is a choice that they should be able to consider without having to worry about the ICC scuttling a potential agreement.

Even the Obama Administration appears, belatedly, to be recognizing that the ICC presents an impediment to resolving the situation in Libya. Reportedly, President Obama asked Russian President Dmitry Medvedev “to pass on a message that the Libyan leader's safety would be guaranteed if he fled to another country.... Washington is hop-

1. *The Guardian* (U.K.), “Gaddafi Speech: ‘We Will Stay in Our Land Dead or Alive,’” June 8, 2011, at <http://www.guardian.co.uk/world/video/2011/jun/08/libya-muammar-gaddafi-speech-nato-bombing-video> (June 9, 2011).
2. Brett Schaefer, “Bombing by International Consensus,” *National Review Online*, April 4, 2011, at <http://www.nationalreview.com/articles/263700/bombing-international-consensus-brett-schaefer?page=1> (June 9, 2011).
3. Daniel Freedman, “Double Crossing Dictators,” *The Wall Street Journal*, March 16, 2011, at <http://online.wsj.com/article/SB10001424052748704893604576200694057915526.html> (June 9, 2011).
4. Nkululeko Ncana and Anna Majavu, “SA Lawyers in Secret Gaddafi Exit Plan,” *Times Live*, May 31, 2011, at <http://www.timeslive.co.za/africa/article1093567.ece/SA-lawyers-in-secret-Gaddafi-exit-plan> (June 9, 2011).

ing that assurances that Col Gaddafi would not be pursued if he left Libya would finally persuade him to make an exit.”<sup>5</sup> The story went on to report that White House sources confirmed that the Obama Administration was prepared to negotiate terms for his departure.

That Qadhafi has not leaped at this offer illustrates the complications of referring a case to the ICC. Once the Security Council referred the Libyan situation to the ICC, it lost a vital bargaining chip. The Security Council cannot reverse its decision to refer a case to the ICC. Once referred, it is entirely up to the court to decide whether to issue arrest warrants and pursue the case.

Under Article 16 of the Rome Statute, the council can defer ICC consideration of the case for a year and can renew that deferral indefinitely by passing an annual resolution. But once Qadhafi leaves power, the incentive for the council to annually adopt resolutions to protect a brutal dictator known to support terrorists is reduced. Qadhafi knows that it would only be a matter of time until honoring the deal becomes more trouble than it is worth.

**Justice Can't Be Severed from Political Reality.** The ICC was created to investigate and pros-

ecute individuals for committing heinous crimes. This is an admirable, but singular, mission that is not always congruent with addressing vital issues of international peace and security. An ICC referral reduces options for resolving a conflict by activating an independent judicial authority that has no obligation to weigh the political and security ramifications of its decisions.

The authority of the Security Council to refer a case to the ICC has no expiration date, and, considering the limited ability of the court to execute its warrants, the consequences of delaying a referral are unlikely to outweigh the advantages of keeping options for negotiation open. The U.S. should oppose future referrals to the ICC unless it is clear that the referral would not prematurely exclude future options to resolve a conflict, negatively influence an ongoing crisis, or serve to intensify a concerning situation into a crisis.

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5. Alex Spillius, “G8 Summit: Russia Agrees to Mediate Gaddafi Exit Strategy,” *The Telegraph* (London), May 27, 2011, at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8542616/G8-summit-Russia-agrees-to-mediate-Gaddafi-exit-strategy.html> (June 9, 2011).