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# JUSTICE FOR TYRANTS: INTERNATIONAL CRIMINAL COURT WARRANTS FOR GADDAFI REGIME CRIMES

JOHN J. LIOLOS\*

**Abstract:** The Arab Spring was a period of great transition in the Middle East and North Africa, when people in many nations united in protest against their oppressive and tyrannical governments. In February 2011, the Libyan people filled their city streets in peaceful demonstrations against Muammar Gaddafi's regime. Attempting to quell the dissent, the Gaddafi regime allegedly engaged in a systematic campaign of violence against the dissidents. These attacks escalated into a full-fledged civil war, triggering United Nations intervention to protect civilians. In response to the Gaddafi regime's attacks on civilians, the UN Security Council passed a resolution referring the alleged human rights abuses to the International Criminal Court (ICC) for prosecution. This Comment explores the effect of the warrant, the ICC's complementary jurisdiction over the matter, and argues that both Libyan and ICC officials should be instrumental in trying the accused members of the Gaddafi regime.

## INTRODUCTION

On May 16, 2011, the prosecutor at the International Criminal Court (ICC), Luis Moreno-Ocampo, filed warrants for the arrest of Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Senussi for alleged human rights abuses in connection with the 2011 Libyan uprising.<sup>1</sup> The prosecution accused these three men of planning and implementing "widespread and systematic attacks against a civilian population, in particular demonstrators and alleged dissidents."<sup>2</sup> Using the Libyan armed forces as agents, the men allegedly

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<sup>1</sup> Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minya Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, para. 2 (May 16, 2011) [hereinafter *Prosecutor's Warrant Application*], available at <http://www.icc-cpi.int/iccdocs/doc/doc1073503.pdf>. The names of the accused often vary in spelling among the sources. Throughout this piece the names remain consistent with their spelling in the Prosecutor's Warrant Application.

<sup>2</sup> *Id.*

detained, tortured, and killed hundreds of civilians in an attempt to suppress the growing popular challenge to Gaddafi's authoritarian rule.<sup>3</sup> Judge Sanji Monageng of the ICC issued warrants for their arrest and ordered the men to stand trial at the Hague for human rights abuses pursuant to its prosecutorial power.<sup>4</sup>

Part I of this Comment provides a brief background on the Gaddafi government, the 2011 civilian uprising and its connection to the Arab Spring, and the alleged human rights abuses of the Gaddafi regime. Part II focuses on the ICC's jurisdictional powers and its ability to legitimately and effectively prosecute crimes against humanity, while also respecting domestic criminal jurisdiction. Part III analyzes the appropriateness of the ICC as the proper tribunal for prosecuting the accused. This section explores the available alternative options for prosecution, such as the post-revolution Libyan courts or a hybrid prosecution in Libya involving both ICC and Libyan officials. It will also demonstrate that the ICC is the proper organization to undertake the prosecution, although the Hague may not be the ideal location. Lastly, this section also explores the prudence of the ICC issuing the warrant during Gaddafi's reign and the deepening civil war.

## I. BACKGROUND

### A. *A Pattern of Abuse: Gaddafi and His Government*

Muammar Gaddafi seized power in Libya in a bloodless military coup on September 1, 1969, replacing the ruling Sanusi Monarchy.<sup>5</sup> Gaddafi assumed a key position in the Revolutionary Command Council, and his powers gradually coalesced from revolutionary leader to authoritarian autocrat.<sup>6</sup> Gaddafi consolidated his power by capitalizing

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<sup>3</sup> *Id.* paras. 12, 14, 17, 20, 27; Kareem Fahim & David D. Kirkpatrick, *Qaddafi's Grip on the Capital Tightens as Revolt Grows*, N.Y. TIMES, Feb. 23, 2011, at A1; David D. Kirkpatrick & Mona El-Naggar, *Qaddafi's Grip Falls as His Forces Take on Protesters*, N.Y. TIMES, Feb. 22, 2011, at A1.

<sup>4</sup> Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minya Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi, para. 41 (June 27, 2011) [hereinafter Decision on Prosecutor's Warrant Application], available at [http://www.icc-cpi.int/icc\\_docs/doc/doc1099314.pdf](http://www.icc-cpi.int/icc_docs/doc/doc1099314.pdf). The Rome Statute of July 17, 1998, established the ICC's power to prosecute crimes against humanity. Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2178 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute].

<sup>5</sup> DIRK VANDEWALLE, A HISTORY OF MODERN LIBYA 73, 79 (2006).

<sup>6</sup> GEOFF SIMONS, LIBYA: THE STRUGGLE FOR SURVIVAL 161, 194 (1993).

on the nation's oil reserves, and propagandized his revolutionary and social philosophy through the dissemination of his *Green Book*.<sup>7</sup> With his control solidified, Gaddafi ruled Libya continuously from 1969 until his overthrow and death in 2011.<sup>8</sup>

Under Gaddafi, the Libyan government allegedly committed numerous human rights abuses and state-sponsored acts of terrorism, including the infamous 1988 Lockerbie bombing.<sup>9</sup> In response to these abuses and criminal acts, Gaddafi's regime faced international reprisals throughout his reign, including both military intervention and economic sanctions.<sup>10</sup> Though Gaddafi appeared to relax his belligerent attitude when he abandoned the Libyan nuclear program under international pressure in 2003<sup>11</sup>, his response to the recent popular uprising demonstrated his continued disregard for human rights.<sup>12</sup>

Saif al-Islam Gaddafi, one of Muammar Gaddafi's sons, was a key figure in the inner circle of the regime.<sup>13</sup> After studying at the London School of Economics, he became an unofficial but instrumental presence within the government.<sup>14</sup> Saif al-Islam was also thought to entertain progressive, western-friendly ideals, and to be attempting to transform Libya into a thriving democratic state.<sup>15</sup>

<sup>7</sup> JOHN WRIGHT, *LIBYA: A MODERN HISTORY* 243 (1982); see GEORGE TREMLETT, *GADDAFI: THE DESERT MYSTIC* 233–36 (1993). The *Green Book* is Gaddafi's revolutionary manifesto containing his philosophies on social and political order. VANDEWALLE, *supra* note 5, at 6–7.

<sup>8</sup> See Neil MacFarquhar, *An Erratic Leader, Brutal and Defiant to the End*, N.Y. TIMES, Oct. 21, 2011, at A16.

<sup>9</sup> YEHUDIT RONEN, *QADDAFI'S LIBYA IN WORLD POLITICS* 43–45 (2008).

<sup>10</sup> *Id.* at 32, 45–46.

<sup>11</sup> See *id.* at 63–64.

<sup>12</sup> Vivienne Walt, *The Capture of Gaddafi's Son: The Reformer Who Refused to Reform*, TIME, Nov. 19, 2011, available at <http://www.time.com/time/world/article/0,8599,2099890,00.html>; *Defiant Gaddafi Orders Revolt Crushed*, SYDNEY MORNING HERALD, Feb. 23, 2011, available at <http://www.smh.com.au/world/defiant-gaddafi-orders-revolt-crushed-20110223-1b4bo.html>.

<sup>13</sup> *Inside Gaddafi's Inner Circle*, ALJAZEERA (Feb. 27, 2011), <http://english.aljazeera.net/news/africa/2011/02/2011227192852808945.html>.

<sup>14</sup> See Timothy Garton Ash, *Dr. Saif Gaddafi's LSE Thesis Makes a Case for the Action That Crushed Him*, GUARDIAN (U.K.), Nov. 30, 2011, at 41 (discussing Saif al-Islam's relationship with the London School of Economics); *Libya to Sign Free Trade Accord with EU Soon: Saif*, REUTERS (Aug. 20, 2008), <http://www.reuters.com/article/2008/08/20/us-libya-europe-idUSLK6924420080820> (providing an example Saif al-Islam's influence in the government).

<sup>15</sup> See LUIS MARTINEZ, *THE LIBYAN PARADOX* 7 (2007); *Countdown to Reforms in Libya Begins: Saif*, REUTERS (Aug. 20, 2008), <http://www.reuters.com/article/2008/08/21/us-libya-saif-reform-idUSLK22324520080821>; *Gaddafi Son Calls for Democracy*, BBC NEWS (Sept. 26, 2009), <http://news.bbc.co.uk/2/hi/8258617.stm>.

Saif al-Islam's reformist attitude changed abruptly in response to the growing protests against his father's regime.<sup>16</sup> As tensions escalated, Saif al-Islam adamantly supported his father's right to power, dismissed the protestors as rabble, and warned of bloody civil war if the demonstrations continued.<sup>17</sup> Gaddafi's brother-in-law and the head of Libyan intelligence, Abdulla al-Senussi, was also allegedly instrumental in the forceful response against demonstrators.<sup>18</sup> Thus, the ICC charged both Saif al-Islam and al-Senussi with human rights violations in connection with the government's response to the uprising.<sup>19</sup>

### B. Arab Spring Rising: The Libyan Chapter

The recent Arab Spring effectively began on December 17, 2010, when an unemployed Tunisian, desperately frustrated with economic and social conditions in his nation, set fire to himself in the street in an act of protest.<sup>20</sup> The flames embodied a frustration felt by millions of similar citizens, galvanizing political actors and sparking widespread demonstrations throughout Tunisia and the wider Arab world.<sup>21</sup> After civilian protests in Tunisia and Egypt evolved into successful popular revolutions, many Libyans also began to voice their frustrations and stand in resistance to the Gaddafi regime.<sup>22</sup> Unlike the Tunisian and Egyptian governments, who responded to the peoples' calls for reform by stepping down, the Gaddafi regime reacted violently to the protests in an attempt to maintain power.<sup>23</sup>

By late February 2011, the popular protests in Libya became widespread and prominent; in response, the Gaddafi regime escalated its

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<sup>16</sup> See Walt, *supra* note 12; *Gaddafi's Son in Civil War Warning*, ABC NEWS (Feb. 21, 2011), <http://www.abc.net.au/news/2011-02-21/gaddafis-son-in-civil-war-warning/1951396>.

<sup>17</sup> *Gaddafi's Son in Civil War Warning*, ALJAZEERA (Feb. 21 2011.) <http://www.aljazeera.com/news/africa/2011/02/2011220232725966251.html>.

<sup>18</sup> Ian Black, *Gaddafi's Confidant Is Abdullah Senussi, a Brutal Right-Hand Man*, GUARDIAN (U.K.), Feb. 22, 2011, at 5.

<sup>19</sup> Prosecutor's Warrant Application, *supra* note 1, para. 2.

<sup>20</sup> See Robert F. Worth, *How a Single Match Can Ignite a Revolution*, N.Y. TIMES, Jan. 23, 2011, at WK4. The "Arab Spring" refers to the widespread social and political awakening across the Middle East that inspired protests and revolutions, including civil war in Libya. See Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT'L & COMP. L. REV. 145, 157-58, 162-63 (2012).

<sup>21</sup> See Worth, *supra* note 20; Joseph, *supra* note 20, at 157-58, 162-63.

<sup>22</sup> See Joseph, *supra* note 20, at 157-58, 162-63; *Egypt-Inspired Protests Spread to Libya*, CBS NEWS (Feb. 16, 2011.) <http://www.cbsnews.com/stories/2011/02/16/501364/main20032155.shtml>.

<sup>23</sup> See Joseph, *supra* note 20, at 157-58, 162-63; Kirkpatrick & El-Naggar, *supra* note 3.

brutal crackdown on protestors.<sup>24</sup> One group of independent human rights activists, concerned by the increasing death toll, confirmed more 220 deaths by February 21.<sup>25</sup> There were further incidents of violence, including allegations that Gaddafi forces used rape as a weapon of fear and intimidation.<sup>26</sup> In response, the ICC began an investigation into these alleged crimes against humanity.<sup>27</sup>

## II. DISCUSSION

### A. *Jurisdiction of the International Criminal Court*

The ICC was established at the Hague in 1998, after the United Nations ratified the Rome Statute.<sup>28</sup> Article 5 of the Rome Statute enumerates the court's jurisdiction over crimes against humanity, war crimes, genocide, and the crime of aggression.<sup>29</sup> The ICC theoretically has jurisdiction to prosecute these crimes when they are committed.<sup>30</sup> To limit the court's interference in domestic prosecutions, however, the drafters of the Rome Statute erected jurisdictional hurdles that must be cleared before the ICC can hear a case.<sup>31</sup>

To admit a case, the court must find that it meets the jurisdictional requirements under Article 19.<sup>32</sup> Ordinarily, only the states that are signatories to the Rome Statute are subject to the jurisdiction of the ICC.<sup>33</sup> Libya is one of the United Nations member states that has not ratified the Rome Statute, and therefore is generally outside the jurisdiction of the court.<sup>34</sup>

The Rome Statute provides other means for the court to obtain jurisdiction, however, including a referral from the United Nations Se-

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<sup>24</sup> Kirkpatrick & El-Naggar, *supra* note 3.

<sup>25</sup> *Id.*

<sup>26</sup> Ed Pilkington et al., *Gaddafi Faces New ICC Charges for Using Rape as a Weapon in Conflict*, *GUARDIAN* (U.K.), June 8, 2011, at 23.

<sup>27</sup> Marlise Simons, *International Criminal Court Begins Libya Inquiry*, *N.Y. TIMES* (Mar. 3, 2011), <http://www.nytimes.com/2011/03/04/world/africa/04hague.html>.

<sup>28</sup> Rome Statute, *supra* note 4, art. 1.

<sup>29</sup> *Id.* art. 5.

<sup>30</sup> Remigius Oraeki Chibueze, *The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute*, 12 *ANN. SURV. INT'L & COMP. L.* 185, 202-03 (2006).

<sup>31</sup> *Id.*

<sup>32</sup> Rome Statute, *supra* note 4, art. 19.

<sup>33</sup> WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 59-60 (3d ed. 2007).

<sup>34</sup> See Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, *ASIL INSIGHTS* (Aug. 1998), <http://www.asil.org/insigh23.cfm>.

curity Council.<sup>35</sup> Article 13(b) authorizes the court to exercise jurisdiction if the Security Council determines a listed crime has been committed and refers the issue to the court.<sup>36</sup> Because non-parties are not bound to the terms of the treaty, there is no true enforcement mechanism to the Security Council's recommendation.<sup>37</sup> Nevertheless, Article 12(3) allows non-member states to accept the court's jurisdiction and cooperate in the matter, if they so choose.<sup>38</sup> Accordingly, on February 26, 2011, the United Nations Security Council passed Resolution 1970 that unanimously referred the Gaddafi matter to the ICC.<sup>39</sup> The resolution conceded that it is not binding on Libya, but it did strongly encourage Libya to cooperate with the court.<sup>40</sup> Thus, the resolution effectively granted the ICC jurisdiction over the matter if Libya decided to consent and cooperate, which is a point of some contention.<sup>41</sup>

Even if Libya opts to cooperate with the investigation, though, ICC prosecution of the Gaddafi regime faces a second jurisdictional hurdle if Libya decides to prosecute the regime in domestic courts.<sup>42</sup> The drafters of the Rome Statute sought to limit the ICC's power in matters where the individual state's internal judicial system has the capacity to handle the matter adequately.<sup>43</sup> The ICC's jurisdiction is expressly intended to be "complementary to national criminal jurisdictions."<sup>44</sup> As such, Article 17 states that the court shall determine a case is admissible only where the state with original jurisdiction is "unwilling or unable genuinely to carry out the investigation or prosecution."<sup>45</sup> To determine such inability, the court is bound to consider whether the state's judicial system is unable to "obtain the accused or the necessary evidence and testimony" resulting from a "total or substantial collapse or unavailability of its na-

<sup>35</sup> Rome Statute, *supra* note 4, art. 13.

<sup>36</sup> *Id.* art. 13(b).

<sup>37</sup> See Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331.

<sup>38</sup> Rome Statute, *supra* note 4, art. 12(3).

<sup>39</sup> S.C. Res. 1970, ¶ 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011); see also Press Release, Security Council, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters, U.N. Press Release SC/10187 (Feb. 26, 2011) [hereinafter UN Press Release on Resolution 1970] (stating the referral was unanimous).

<sup>40</sup> S.C. Res. 1970, *supra* note 39, ¶ 3.

<sup>41</sup> Vivienne Walt, *Why Gaddafi's Legal Fate Remains Contentious*, TIME, Sept. 1, 2011, available at <http://www.time.com/time/world/article/0,8599,2091277,00.html>.

<sup>42</sup> See Rome Statute, *supra* note 4, art. 17.

<sup>43</sup> SCHABAS, *supra* note 33, at 59–60.

<sup>44</sup> Rome Statute, *supra* note 4, pmbl.

<sup>45</sup> *Id.* art. 17(1)(a).

tional judicial system.”<sup>46</sup> After years of authoritarian dominance and corruption, the Libyan judiciary is generally considered to be weak.<sup>47</sup> However, the newly established ruling National Transitional Council (NTC)<sup>48</sup> is working to develop a legitimate justice system and may desire the responsibility of prosecuting its former leader.<sup>49</sup> Thus, this aspect of the issue of the ICC’s jurisdiction hinges on the present capacity of the Libyan courts to administer justice effectively.<sup>50</sup>

### B. *The Prosecutor’s Burden: Obtaining the Warrant*

Once a viable argument for the court’s jurisdiction has been established, the ICC prosecutor may initiate an investigation into the alleged crimes if “the information available to the [p]rosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed.”<sup>51</sup> In this case, jurisdiction was arguably established through the passage of UN Resolution 1970 on February 15, 2011.<sup>52</sup> Prosecutor Moreno-Ocampo<sup>53</sup> subsequently began the official investigation into the alleged crimes on March 3.<sup>54</sup>

During an ICC investigation, the prosecutor must meet certain procedural thresholds to comport with the fundamental due process rights mandated by the drafters of the Rome Statute.<sup>55</sup> One such protection is the “reasonable basis” threshold.<sup>56</sup> Here, the offenses are “crimes against humanity,”<sup>57</sup> defined by the Rome Statute as any number of enumerated acts, such as murder, torture, and rape “committed

<sup>46</sup> *Id.* art. 17(3).

<sup>47</sup> VANDEWALLE, *supra* note 5, at 191; WRIGHT, *supra* note 7, at 80.

<sup>48</sup> See Ian Black, *Libyan Rebels Win International Recognition as Country’s Leaders*, GUARDIAN (U.K.), July 15, 2011, available at <http://www.guardian.co.uk/world/2011/jul/15/libyan-rebels-international-recognition-leaders> (recognizing the NTC as the acting government of Libya).

<sup>49</sup> David Kaye, *What to Do with Qaddafi*, N.Y. TIMES, Sept. 1, 2011, at A29.

<sup>50</sup> See Rome Statute, *supra* note 4, art. 17.

<sup>51</sup> *Id.* art. 53(1)(a).

<sup>52</sup> S.C. Res. 1970, *supra* note 39, ¶ 5.

<sup>53</sup> Louis Moreno-Ocampo is a former Argentine prosecutor who was unanimously elected as the first prosecutor of the International Criminal Court in 2003. Press Release, Int’l Criminal Court, Election of the Prosecutor (Apr. 24, 2003), available at [http://www.icc-cpi.int/menus/icc/press and media/press releases/2003/election of the prosecutor](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2003/election%20of%20the%20prosecutor).

<sup>54</sup> Press Release, Int’l Criminal Court, ICC Prosecutor to Open an Investigation in Libya (Mar. 3, 2011), available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/statement%20020311>.

<sup>55</sup> T. MARKUS FUNK, VICTIMS’ RIGHTS AND ADVOCACY AT THE INTERNATIONAL CRIMINAL COURT 53 (2010).

<sup>56</sup> Rome Statute, *supra* note 4, art. 53(1)(a).

<sup>57</sup> See *id.* art. 7; Kirkpatrick & El-Naggar, *supra* note 3.



as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>58</sup> The accused must have performed a criminal act within the court’s jurisdiction in order for the prosecutor to have a “reasonable basis.”<sup>59</sup>

To this end, Prosecutor Moreno-Ocampo collected evidence indicating Gaddafi and his associates perpetrated crimes against humanity.<sup>60</sup> The evidence collected included a plan to suppress demonstrations through “the use of lethal force against demonstrators and alleged dissidents,” accounts of snipers strategically placed to fire on crowds of civilians leaving mosques, and incidents of torture and abuse.<sup>61</sup> Direct evidence of these abuses was also corroborated through the “scale, scope and duration of the attacks.”<sup>62</sup> On the basis of this evidence, the ICC concluded that the prosecutor had met his “reasonable basis” burden, and granted the warrant on June 27, 2011.<sup>63</sup>

### III. ANALYSIS

#### A. *Potential Challenge to ICC Jurisdiction*

With Libya’s cooperation, the ICC appears to meet the jurisdictional requirements to prosecute Saif al-Islam and al-Senussi, but some Libyans have expressed a desire to try the accused in domestic courts.<sup>64</sup> Libya is not bound to cooperate with the ICC, and the NTC may contest jurisdiction if it establishes a viable justice system before the prosecutions begin.<sup>65</sup> Because of the ICC’s commitment to the principle of complementarity, national prosecutions take precedence over ICC prosecutions, provided the domestic institutions are willing and able to undertake the complex proceedings.<sup>66</sup> Neither the principle of complementarity, nor the threshold of the domestic court’s prosecutorial

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<sup>58</sup> Rome Statute, *supra* note 4, art. 7.

<sup>59</sup> *Id.* arts. 5, 53(1)(a).

<sup>60</sup> See Prosecutor’s Warrant Application, *supra* note 1, paras. 12, 14, 15, 27.

<sup>61</sup> *Id.* paras. 12, 20, 27.

<sup>62</sup> *Id.* para. 12.

<sup>63</sup> Decision on Prosecutor’s Warrant Application, *supra* note 4, para. 41.

<sup>64</sup> See Kaye, *supra* note 49; Walt, *supra* note 41.

<sup>65</sup> See SCHABAS, *supra* note 33, at 59–60.

<sup>66</sup> Rome Statute, *supra* note 4, pmbl.; MOHAMED M. EL ZEIDY, THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW: ORIGIN, DEVELOPMENT AND PRACTICE 158–59 (2008).

ability is explicitly defined in the Rome Statute.<sup>67</sup> This sets the stage for a flashpoint of jurisdictional contention.<sup>68</sup>

The NTC may contest ICC jurisdiction on the grounds that it is not bound by the Rome Statute and is willing and able to try Saif al-Islam and al-Senussi on Libyan soil.<sup>69</sup> Some have advanced the view that this scenario is the only one that will allow Libyans to feel vindicated, and to legitimize the new popular government.<sup>70</sup> Furthermore, trying Saif al-Islam and al-Senussi in Libya would allow the prosecution of other alleged criminal acts against the people during Gaddafi's reign that were not included in the warrant and that the ICC has not pursued.<sup>71</sup>

Should Libya choose to prosecute Saif al-Islam and al-Senussi domestically rather than to accept the jurisdiction of the ICC, the ICC may nevertheless attempt to retain jurisdiction by arguing that Libya is "unable genuinely to carry out the investigation or prosecution."<sup>72</sup> To support this position, the ICC may conclude that the Libyan courts are not yet sufficiently established as an independent judiciary after decades of authoritarian control.<sup>73</sup> Under Gaddafi, the Libyan courts lacked independence and were subject to his supremacy and influence.<sup>74</sup> And before Gaddafi was in power, his predecessors exercised similar control over the judiciary.<sup>75</sup> Therefore, the Libyan legal system has long been subject to authoritarian dominance without the freedom to develop as a just and independent force.<sup>76</sup> With such a history of corruption, there is reason to believe the new Libyan government may struggle to establish an effective court system capable of guaranteeing a fair trial for former regime officials so soon after the revolution.<sup>77</sup>

Yet, these arguments address neither the problem of trying the accused in courts previously dominated by the Gaddafi government, nor the due process concerns inherent in post-revolutionary regime

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<sup>67</sup> BENJAMIN N. SCHIFF, *BUILDING THE INTERNATIONAL CRIMINAL COURT* 77 (2008).

<sup>68</sup> See Kaye, *supra* note 49.

<sup>69</sup> See SCHABAS, *supra* note 33, at 59–60; Kaye, *supra* note 49.

<sup>70</sup> Charles Adeogun-Phillips, *Prosecuting Gaddafi: Ensuring Justice in Libya*, JURIST (Sept. 20, 2011), <http://jurist.org/forum/2011/09/charles-adeogun-phillips-libya.php>.

<sup>71</sup> See Rome Statute, *supra* note 4, art. 5; RONEN, *supra* note 9, at 43–45 (referencing Libya's Lockerbie Bombing involvement); Evan Hill, *Libya Survivor Describes 1996 Prison Massacre*, ALJAZEERA (Oct. 21, 2011), <http://english.aljazeera.net/indepth/features/2011/09/20119223521462487.html> (discussing alleged al-Senussi massacre).

<sup>72</sup> See Rome Statute, *supra* note 4, art. 17(1) (a).

<sup>73</sup> See *id.*; VANDEWALLE, *supra* note 5, at 191; WRIGHT, *supra* note 7, at 80.

<sup>74</sup> VANDEWALLE, *supra* note 5, at 191; WRIGHT, *supra* note 7, at 80.

<sup>75</sup> WRIGHT, *supra* note 7, at 80.

<sup>76</sup> VANDEWALLE, *supra* note 5, at 191; WRIGHT, *supra* note 7, at 80.

<sup>77</sup> See VANDEWALLE, *supra* note 5, at 191; WRIGHT, *supra* note 7, at 80.

prosecutions.<sup>78</sup> With reports surfacing that allege NTC mistreatment of common prisoners of war, there is reason to fear that similar disregard for due process would befall Saif al-Islam and al-Senussi.<sup>79</sup> Additionally, questions over the manner of Gaddafi's death, and accusations that it was an extra-judicial execution, exacerbate skepticism of Libya's ability to guarantee a legitimate prosecution and the due process rights of the accused.<sup>80</sup> If Saif al-Islam or al-Senussi are captured alive, there is a valid concern that they will neither be safe in the custody of Libyan military authorities, nor receive the due process to which they are entitled.<sup>81</sup> Without a reliable and independent Libyan judicial system, it is unclear that a wholly domestic prosecution would achieve real justice.<sup>82</sup>

In order to address both the Libyan people's demands for justice and to palliate the concerns of critics, some suggest the trial should be held in Libya but supervised by the ICC.<sup>83</sup> Such a cooperative prosecution is not unprecedented in international criminal cases.<sup>84</sup> Holding an ICC trial in Libya would ensure due process for the accused and provide Libyans just and well-orchestrated criminal proceedings on their home soil.<sup>85</sup> This experience would offer Libyan citizens a sense of vindication, and establish a paradigm of legitimate criminal justice for the courts.<sup>86</sup> One concern with this model is the capacity of the NTC to ensure security and safety during the trial.<sup>87</sup> This is especially disconcerting in light of Gaddafi's controversial death and the treatment of NTC prisoners of war.<sup>88</sup> Despite these concerns, since the NTC acquired control

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<sup>78</sup> See VANDEWALLE, *supra* note 5, at 191; WRIGHT, *supra* note 7, at 80; Ian Black, *Libyan Revolutionaries Accused of Widespread Torture*, SYDNEY MORNING HERALD, Jan. 28, 2012, at 16 (demonstrating due process violations, torture, and similar concerns for prisoners).

<sup>79</sup> See Chris Stephen & Luke Harding, *Amnesty Finds Widespread Use of Torture by Libyan Militias*, GUARDIAN (U.K.), Feb. 16, 2012, available at <http://www.guardian.co.uk/world/2012/feb/16/amnesty-widespread-torture-libyan-militias> (discussing the torture of common prisoners).

<sup>80</sup> See George Grant, *Saif Gaddafi Should Be Put on Trial in Libya*, TELEGRAPH (U.K.), Nov. 22, 2011, available at <http://www.telegraph.co.uk/news/worldnews/africaandindian-ocean/libya/8906893/Saif-Gaddafi-should-be-put-on-trial-in-Libya.html> (noting Gaddafi's extra-judicial execution).

<sup>81</sup> See Adam Nossiter & Rick Gladstone, *In Libya, Massacre Site Is Cleaned Up, Not Investigated*, N.Y. TIMES, Oct. 25, 2011, at A4.

<sup>82</sup> See Kaye, *supra* note 49.

<sup>83</sup> *Id.*

<sup>84</sup> See, e.g., Daryl A. Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AM. J. INT'L L. 934, 937-48 (2001).

<sup>85</sup> See Kaye, *supra* note 49.

<sup>86</sup> *Id.*

<sup>87</sup> See *id.*

<sup>88</sup> See Adam Nossiter & Kareem Fahim, *Revolution Won, Top Libyan Official Vows a New and More Pious State*, N.Y. TIMES, Oct. 24, 2011, at A10; Stephen & Harding, *supra* note 79.

of the country, conditions have come to appear suitable for a prosecution.<sup>89</sup>

In all, it seems that a Libyan domestic prosecution poses risks to due process, but it is unclear that the ICC would have jurisdiction if Libya chooses not to cooperate.<sup>90</sup> A trial at the Hague would probably be the most efficient, safe, and effective means of prosecution. Nevertheless, an ICC trial in Libya could satisfy all due process concerns of the accord, while also vindicating the Libyan people's demands for justice and setting a benchmark for judicial independence and integrity in the Libyan transition to democracy.<sup>91</sup>

### B. Prudential Aspects of the ICC Warrant

Even if legal jurisdiction is established, the ICC still faces certain political concerns regarding the prudence of issuing its arrest warrant for Muammar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Senussi.<sup>92</sup> For one, because the vast majority of the ICC's cases to date involve African nations and their leaders, some criticize the ICC as merely a tool of Western imperial powers specifically for use against African nations.<sup>93</sup> Scholars point out that because the ICC primarily prosecutes African leaders, it risks being labeled as a "selective prosecutor," providing justice "only for those countries too weak to resist it."<sup>94</sup>

To the contrary, most African nations have themselves voluntarily referred cases to the ICC, a fact that supports the court's legitimacy as a forum of international justice.<sup>95</sup> In the present matter, the UN Security Council unanimously referred this issue to the court in Resolution 1970, displaying international consensus extending beyond western

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<sup>89</sup> *Libya's New Rulers Declare Country Liberated*, BBC NEWS (Oct. 23, 2011), <http://www.bbc.co.uk/news/world-africa-15422262>; *US Envoy in Tripoli Praises NTC over Security*, AL-JAZEERA (Sept. 14, 2011), <http://english.aljazeera.net/news/africa/2011/09/2011914132633648113.html>.

<sup>90</sup> See Rome Statute, *supra* note 4, pmbll.; EL ZEIDY, *supra* note 66, at 158–59; Nossiter & Gladstone, *supra* note 80.

<sup>91</sup> See Kaye, *supra* note 49.

<sup>92</sup> See, e.g., Christa Tzu-Hsiu Lin, *The International Criminal Court: Taiwan's Last Hope?*, 6 PAC. RIM L. & POL'Y J. 755, 760–61 (1997); *African Union Opposes Warrant for Qaddafi*, N.Y. TIMES, July 3, 2011, at A10.

<sup>93</sup> See Lin, *supra* note 92, at 760–61.

<sup>94</sup> RICHARD J. GOLDSTONE & ADAM M. SMITH, INTERNATIONAL JUDICIAL INSTITUTIONS: THE ARCHITECTURE OF INTERNATIONAL JUSTICE AT HOME AND ABROAD 113 (2009).

<sup>95</sup> See David J. Bederman, *International Criminal Court Pretrial Chamber Decision on the Standard for the Prosecutor to Initiate Investigations Under the Rome Statute*, 105 AM. J. INT'L L. 540, 541 (2011).

nations.<sup>96</sup> Additionally, members of the new Libyan government have applauded the efforts of the international community to back their revolution.<sup>97</sup> Despite concerns about the limited application of ICC jurisdiction to African nations, it is clear that the action taken against Gaddafi has widespread international support and legitimacy.<sup>98</sup>

A second prudential criticism levied against the ICC is the timeliness of the warrant.<sup>99</sup> Critics contend that the ICC should not have granted the warrant for Gaddafi and his associates while he still held significant power.<sup>100</sup> This arguably incentivized Gaddafi to entrench himself and perpetuate the violence, rather than to investigate exit options involving political compromise.<sup>101</sup> To this effect, the African Union released a declaration imploring its member states not to cooperate with the ICC warrant because it “seriously complicates the efforts at finding a negotiated political solution to the crisis.”<sup>102</sup> Nevertheless, UN Security Council Resolution 1970 urged the cooperation of all UN member states, making a political solution involving exile and asylum quite difficult.<sup>103</sup> Even if Gaddafi had sought amnesty in another nation the harboring country would have faced heavy international pressure to extradite the former dictator.<sup>104</sup>

Although the issuance of the warrant may have been a theoretical disincentive to negotiate, it is clear Gaddafi intended to crush the rebellion and was not willing to talk either before or immediately after the warrant was granted.<sup>105</sup> Both Gaddafi’s rhetoric and actions reinforced the fact that he was determined to maintain power at any cost and would not be deterred.<sup>106</sup> Even under the force of NATO air-

<sup>96</sup> See UN Press Release on Resolution 1970, *supra* note 39.

<sup>97</sup> See Black, *supra* note 48; *India Backs UN Sanctions Against Libya*, TIMES OF INDIA, Feb. 27, 2011, available at <http://timesofindia.indiatimes.com/india/India-backs-UN-sanctions-against-Libya/articleshow/7585933.cms>.

<sup>98</sup> See GOLDSTONE & SMITH, *supra* note 94, at 113; UN Press Release on Resolution 1970, *supra* note 39.

<sup>99</sup> Robert Booth, *Muammar Gaddafi’s Exit Hindered by UN Resolution, Law Experts Warn*, GUARDIAN (U.K.), Mar. 29, 2011, at 5.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> African Union, Decision on the Situation in Libya, para. 6, Assembly/AU/Dec. 385(XVII) (July 1, 2011); Booth, *supra* note 99.

<sup>103</sup> See UN Press Release on Resolution 1970, *supra* note 39; Booth, *supra* note 98.

<sup>104</sup> See S.C. Res. 1970, *supra* note 39, ¶ 5.

<sup>105</sup> See Prosecutor’s Warrant Application, *supra* note 1, ¶¶ 12, 14, 17, 20, 27; Kirkpatrick & El Nagggar, *supra* note 3; *Muammar Gaddafi in His Own Words*, GUARDIAN (U.K.), Oct. 20, 2011, at 4.

<sup>106</sup> See Prosecutor’s Warrant Application, *supra* note 1, ¶¶ 12, 14, 17, 20, 27; Fahim & Kirkpatrick, *supra* note 3; *Muammar Gaddafi in His Own Words*, *supra* note 105.

strikes, a retreating front line, high-level government ministers defecting, and the capture of Tripoli by NTC forces, Gaddafi continued to use his military forces against his own people.<sup>107</sup> It was only after his defeat appeared inevitable that reports emerged of his potential willingness to negotiate.<sup>108</sup> Gaddafi defiantly held out to the last, reduced to a small area of a few square blocks, until his violent demise.<sup>109</sup> Furthermore, the ICC warrant demonstrated growing international support for the cause of the NTC's fighters, which is an important consideration in evaluating the prudence of the warrant.<sup>110</sup> Thus, the warrant's benefits outweighed any adverse effects, given Gaddafi's clear intention to violently crush the rebellion both before and after it was issued.<sup>111</sup>

### CONCLUSION

For over forty years, Muammar Gaddafi oppressed the people of Libya as dictator, until he was deposed in a popular uprising during the Arab Spring in 2011. During peaceful political demonstrations, Gaddafi's government allegedly repressed the protests through the systematic use of lethal force against civilians. In response to these acts, the United Nations Security Council adopted a resolution condemning the violence and referring the Gaddafi government's alleged crimes against humanity to the International Criminal Court. Based on this authority and the existing evidence, the prosecutor of the ICC applied for a warrant which the court subsequently granted. If the new Libyan government chooses to cooperate, the ICC would certainly have jurisdiction. However, Libya is not a party to the Rome Statute, so it would not be subject to the Court's jurisdiction if it chose not to cooperate. The ICC may contend that Libya is unable to try the matter effectively because it lacks the institutions and a functional judiciary capable of ensuring due process. There may be some credence to this argument, but it may not be sufficient to outweigh an uncooperative Libya because it is not

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<sup>107</sup> MacFarquhar, *supra* note 8.

<sup>108</sup> See David Smith, *Gaddafi Offers to Negotiate with Libya Rebels over Transfer of Power*, GUARDIAN (U.K.), Aug. 28, 2011, available at <http://www.guardian.co.uk/world/2011/aug/28/gaddafi-offers-negotiate-libya-rebels>.

<sup>109</sup> See Tim Gaynor & Rania el Gamal, *Gaddafi Diehards in Sirte Hold Up Libyan Troops*, REUTERS (Oct. 16, 2011), <http://www.reuters.com/article/2011/10/16/us-libya-idUSTRE79F1FK20111016>.

<sup>110</sup> See UN Press Release on Resolution 1970, *supra* note 39; *ICC Issue Gaddafi Arrest Warrant*, ALJAZEERA (June 28 2011), <http://english.aljazeera.net/news/africa/2011/06/20116278148166670.html>.

<sup>111</sup> See MacFarquhar, *supra* note 8; *Muammar Gaddafi in His Own Words*, *supra* note 105.

bound by the Statute. An ICC trial in Libya is certainly a viable solution to serve both parties' interests of achieving a just trial, doling out punishment for crimes if the defendants are found guilty, and allowing the Libyans to observe with these patriotic and democratic experiences on their home soil. In all, the ICC warrant for Gaddafi, Saif al-Islam, and al-Senussi was warranted by the circumstances surrounding the Gaddafi regime's brutal oppression of the popular uprising, and was a service to international justice and the Libyan people.