

## PROSECUTING THE GADDAFIS: SWIFT OR POLITICAL JUSTICE?

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### Abstract

In this article the author assesses the legality and legitimacy of the Gaddafi arrest warrant; was the issuance thereof a matter of swift justice or was it merely meant to serve as political pressure in overthrowing a detrimental regime? To this end the available evidence at the time the arrest warrants were issued, political motives behind the arrest warrants and differences – or actually similarities – between the Syrian and the Libyan situation, are discussed. Moreover, the trial prospects of Saif Al Islam Gaddafi, who is facing a trial before either a Libyan court or the International Criminal Court, are analysed. The case review in this article illustrates the dynamics of politics within International Criminal Law.

### Introduction: the involvement of the ICC

Colonel Muammar Gaddafi, despite frequent changes to his official title, was the effective supreme leader of Libya from the revolution of September 1969 until he was shot and killed in October 2011 by members of the Libyan National Liberation Army. Gaddafi came to power in 1969 through a bloodless *coup d'état* against the reigning monarch, King Idriss, which resulted in the establishment of the Arab Republic of Libya. Though purportedly governed on the utopian mixture of pseudo-Marxist and democratic principles enshrined in Colonel Gaddafi's Green Book, in practice Libya turned into a full-fledged dictatorial state, ruled over by Gaddafi and his most trusted supporters. In early 2011 peaceful protests broke out in Libya against the Libyan government and Gaddafi in particular, inspired by recent revolts in neighbouring Arab countries such as Tunisia and Egypt. Gaddafi, referring to the protestors as "Stray dogs", vowed that his troops would go from house to house and show no mercy. After violent repression of the rebel movement in the Eastern coastal city of Benghazi the country erupted into a full-blown civil war. NATO forces joined the conflict on the side of the rebels on 23 March 2011. When they reached Tripoli it appeared that the tipping point had been reached and

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that the Gaddafi era was coming to an end. Gaddafi maintained control in the city of Sirte until 20 October 2011, when members of the Libyan National Liberation Army captured him alive after a NATO-attack on his convoy and subsequently killed the former dictator under controversial circumstances.

On June 27 2011, Pre-Trial Chamber I of the International Criminal Court (ICC) had granted a request of the Chief Prosecutor of the ICC to issue arrest warrants against Muammar Gaddafi, his son Saif al-Islam Gaddafi, the *de facto* Prime Minister of Libya, and Abdullah Senussi, chief of the Libyan Military Intelligence.<sup>1</sup>

The Pre-Trial Chamber held that there were reasonable grounds to believe that these three individuals were criminally liable, as indirect co-perpetrators, for the counts of crimes against humanity, murder and persecution. In particular, the three judges of the ICC Pre-Trial Chamber ruled that there were reasonable grounds to believe that, based upon a state policy, the Libyan Security Forces carried out “an attack against the civilian population taking part in demonstrations against Gaddafi’s regime or those perceived to be dissidents, killing and injuring as well as arresting and imprisoning hundreds of civilians” throughout Libya between 15 February and 28 February 2011.<sup>2</sup>

The Gaddafi arrest warrant was the result of United Nations Security Council (SC) resolution 1970 of 26 February 2011, which referred the situation in Libya – since Libya is a non-ratifying State party – to the ICC.<sup>3</sup> Was the arrest warrant a matter of swift justice or merely meant to serve as political pressure to overthrow colonel Gaddafi’s reign? The answer to this question, which is the main subject of this article, is relevant since the ICC pretends to endorse international justice, abstracted from political agendas.

## I. The availability of evidence

Under the ICC Statute, the prosecution can seek an arrest warrant from the ICC Pre-Trial Chamber (Article 58, ICC Statute). To this end, the prosecutor must adduce evidence to the extent that there must be “reasonable grounds to believe” that certain crimes have been committed.<sup>4</sup> The standard of “reasonable grounds.” does not imply proof beyond a reasonable doubt. The misconception that these two standards of proof are equal was dispelled by the Pre-Trial Chamber’s decision on the issuance of an arrest warrant for Omar

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<sup>1</sup> Press Release 27 June 2011, ‘Pre-Trial Chamber I issues three warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi’, ICC-CPI-20110627-PR689.

<sup>2</sup> See Situation in the Libyan Arab Jamahiria, *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi*, Case No. ICC-01/11, PT.Ch. I, 27 June 2011.

<sup>3</sup> S.C. Res. 1970 (2011), paras. 5-8, U.N. Doc. S/RES/1970 (26 February 2011).

<sup>4</sup> Article 58(1)(a) ICC Statute.

Hassan Ahmad Al Bashir.<sup>5</sup> This decision was rendered following the Appeals Chamber's finding of 3 February 2010, setting aside the prior decision by the Pre-Trial Chamber not to include the crime of Genocide.<sup>6</sup> In this decision the Appeals Chamber accepted the arguments put forward by Chief Prosecutor Luis Moreno-Ocampo based on the dissenting opinion of judge Usacka which was part of the first decision on this matter, holding that such a high burden conflicts with the nature of an arrest warrant.<sup>7</sup> In particular the Appeals Chamber ruled that:

Imposition of such a standard would be tantamount to the creation of an obligation on the part of the Prosecution to prove genocidal intent beyond reasonable doubt, a higher and more demanding standard than the one required under Article 58(1)(a) of the Statute.<sup>8</sup>

A first arrest warrant against Al Bashir was issued on 4 March 2009. As the ICC Chief-Prosecutor noted, it seems awkward that the Pre-Trial Chamber should have held that the standard of proof required for the preliminary matter of issuing an arrest warrant should be the same as that required for an *actual conviction*. If it has been effectively proven that the accused committed the specified crimes beyond reasonable doubt before his arrest, then any subsequent trial would be a mere formality. It may be suggested that political considerations regarding the potential ramifications of arresting Al Bashir influenced the interpretation of Article 58. The judges may have anticipated the non-cooperation of the African Union, which did in fact occur when neighbouring Kenya refused to arrest Al Bashir.<sup>9</sup>

In the case of Libya, the decision to launch an ICC investigation was made on 26 February 2011 on the basis of SC resolution 1970<sup>10</sup> which was unanimously adopted. The Prosecution request to issue arrest warrants was filed on 16 May 2011. Hence, the timeframe for any serious investigation 'on the ground' was merely three months. The question arises whether any serious investigation

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<sup>5</sup> *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest on the situation in Darfur, Sudan, Case No. ICC-02/05-01/09, Para 1., PT.C. I, 12 July 2010.

<sup>6</sup> *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", Case No. ICC-02/05-01/09-73, A.C, 3 February 2010.

<sup>7</sup> Separate and Partly Dissenting Opinion of Judge Anita Ušacka, 4 March 2009.

<sup>8</sup> *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest on the situation in Darfur, Sudan, Case No. ICC-02/05-01/09, Para 1., PT.C. I, 12 July 2010, referring to *Prosecutor v. Omar al Bashir*, Judgment on the appeal, para 39.

<sup>9</sup> On 28 November 2011 Kenyan judges ordered the government to arrest and extradite Omar Al-Bashir to the ICC, if he would ever visit the country again. Malalo et al. 28 November 2011, 'Kenyan court issues arrest order for Sudan's Bashir'.

<sup>10</sup> UNSC Res. 1970 (2011).

into an allegation that 'crimes against humanity' have been committed can be concluded within three months. Again, the course of the investigation into the case against Omar Al Bashir provides an interesting comparison on this point. The ICC Prosecutor announced the opening of an investigation into the crimes in Darfur in June 2005; he did not announce until December 2006, *over a year and a half later*, that he had nearly completed an investigation into some of the worst crimes committed in Darfur.

Furthermore, as is also true of the Libyan situation, the investigation into the evidence against Omar Al Bashir was launched whilst the conflict in Darfur was ongoing. As this was the case it was deemed necessary by the Prosecutor to take certain precautions with the witnesses; this was why the Prosecutor carried out his investigations from outside the region of Darfur. The need to take precautions was announced in June 2006, a full year after the initial announcement of the start of the investigation. Two elements may therefore reasonably be inferred from this delay:

- 1) That it took a year for the office of the Prosecutor to decide on an appropriate approach to the investigation.
- 2) That it was deemed necessary to have access to certain witnesses to ensure that the investigation yielded enough material to sustain an arrest warrant, and that these witnesses could not adequately be protected within Darfur.

In the Libyan situation, the actual timeframe which took the ICC Prosecutor to say that crimes were committed was fifteen days. On 3 March 2011, the ICC Prosecutor announced his view that such crimes were committed.<sup>11</sup>

Although no detailed information is available on the preliminary investigation by the Prosecutor, compared to the timescale of the Al Bashir case in terms of investigation, fifteen days does not seem a sufficient period of time to decide on an approach and secure witness statements. It is unrealistic that a prosecutor can complete an investigation into potential crimes against humanity within this short period of time, unless very compelling evidence was available to the ICC prosecutor within these fifteen days. No reference is made to any concrete and compelling evidence in either the case sheet or in the documentation adduced to the Pre-Trial Chamber under the Article 58 proceedings.<sup>12</sup> Furthermore there is scant reference in either document to the sources used by the Prosecutor.

Another cause for concern, highlighted by the Office of Public Council for the Defence (OPCD), is the speed with which the names of alleged perpetrators were published by the prosecutor in the initial press-release. The Principal Council for the Defence expressed its concerns regarding the potentially

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<sup>11</sup> Press Release Office of the Prosecutor 2 March 2011, 'ICC Prosecutor to open an investigation in Libya'.

<sup>12</sup> Both available via the official website of the ICC.

prejudicial effects of said press release in a letter to the Prosecutor, dated 2 March.

It is the view of the OPCD that the publication of the names of potential suspects at this early stage will contravene the presumption of innocence inherent in Article 66(1) of the Statute. The presumption of innocence, a cornerstone of fair trial rights, is particularly important in early stages of the proceedings before the ICC, when the Prosecution is charged with investigating both incriminating and exonerating circumstances. Given the very recent referral of the matter to the ICC as well as the tumultuous and shifting nature of events on the ground in Libya, it is questionable as to whether the prosecution could have properly investigated incriminating and exonerating circumstances to the extent that public disclosure of names of potential suspects would be either warranted or acceptable.<sup>13</sup>

The office declined to explain the disparity in the timescale of the Gaddafi and Al Bashir cases. The issue was also avoided in the press conference given by the Prosecutor on 16 May 2011.<sup>14</sup>

An assessment of the nature and scope of this preliminary investigation learns that the ICC Prosecutor was only informed through indirect sources about what was going on in Libya. Any detailed and reliable evidence, scrutinised by thorough, reliable fact-finding commissions was not at his disposal on 3 March 2011. The same goes for the matter of potential individual criminal liability, which led to the three arrest warrants on 27 June 2011. Other than relying on several public and indirect sources, it is not clear which (independent) facts – within the Appeal Chamber’s standard in the Al Bashir case – did sustain the allegation that the late Colonel Gaddafi and the other two suspects were personally criminally responsible for acts that amounted to crimes against humanity.

## **II. Political motives behind the Gaddafi arrest warrant**

The preceding observations invoke the question as to whether there were other motives underpinning the arrest warrants than the purported motives of international criminal justice. To this end, one should look into the UN-Security Council resolution 1970. Scrutinising this resolution learns that the referral of the Libyan situation to the seat of the ICC was part and parcel of a ‘package’ of different economic and political measures imposed by the United Nations. In addition to referring the case to the International Criminal Court, the Resolution initiated three other political and economic measures:

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<sup>13</sup> Letter to Moreno-Ocampo, Annex A, ICC/01/11-1-5-AnxA, 25-05-2011, page 1.

<sup>14</sup> Office of the Prosecutor 16 May 2011, ‘Statement ICC Prosecutor Press Conference on Libya May 2011’.

- 1) Imposition of an arms embargo and other arms restrictions on Libya.<sup>15</sup>
- 2) Imposition of sanctions on figures important to the regime, including travel bans and the freezing of assets.<sup>16</sup>
- 3) Provision for humanitarian assistance.<sup>17</sup>

On its face, this ICC referral was just one of the mechanisms which aimed at overthrowing the regime of Gaddafi. This interpretation is strengthened by the fact that the Prosecutor is required by the resolution to report regularly to the Security Council.<sup>18</sup> This may explain why within fifteen days from the adoption of Resolution 1970 the ICC prosecution promulgated its decision that the aforementioned 'reasonable basis' existed that crimes had been committed within Libya for which the regime may be accountable. The comparison between the approaches taken in the Al Bashir and Gaddafi cases, considering the material similarities of the situations in the respective states, indicates that some force other than abstract justice was at work. It is suggested that political considerations affect not only the fairness of the process leading up to the trial itself, but even whether there will be an arrest warrant or trial at all. To test this proposition it will be useful to compare the situations in Libya and Syria, and to contemplate the following question: are there any sound reasons of justice why an arrest warrant was issued for Colonel Gaddafi but not for Bashar al-Assad of Syria?

### III. Why Gaddafi and not Assad?

The above analysis of Resolution 1970 reveals that the arrest warrant issued for Gaddafi was contemplated within the context of a package of different measures. This, in itself, indicates that international criminal justice was considered just one of several *means* by which desirable political ends could be achieved. It was probably not an *end in its own right*. A further consideration that casts doubt on the good faith of the urgent pursuit of the Gaddafi prosecution is the question as to why a similar warrant has not yet been issued for Syria's Assad, and why it does not appear to be a priority for any of the leaders who participated in the offensive in Libya. It is not suggested that there should be no arrest warrant against these leaders; rather, this comparison is called upon to determine the fairness of the ICC system.

Throughout Syria, official forces have crushed dissent in the form of peaceful protests with an intensity – if reports are found to be credible – equal to, if not worse than, that of the late Colonel Gaddafi. Protestors have been executed in the streets, their family members have been murdered or arrested and detained without trial. Crimes have allegedly been perpetrated both by the official armed forces and the 'Shabeeh' Militia, which Assad claims is

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<sup>15</sup> Paras. 9, 14 UN SC Resolution 1970, 26 February 2011.

<sup>16</sup> Paras. 15, 17-21 UNSC Resolution 1970, 26 February 2011.

<sup>17</sup> See exceptions to arms embargo and travel bans.

<sup>18</sup> Para. 7 UN SC Resolution 1970, 26 February 2011.

controlled by (and possibly in the pay of) his regime.<sup>19</sup> Sandwiched between Egypt and Tunisia, two of the early blooms and great hopes of the 'Arab Spring', it appears that Assad – having had the opportunity to observe close-hand the failings of the mixture of defiance and compromise attempted by Ben Ali and Mubarak – has determined instead to repress all opposition to his regime. His view is that this opposition is an armed rebellion and Syria is justified to combat it. When confronted with the parallels between the situations in Libya and Syria, the U.S. Foreign Secretary, Hillary Clinton, explained the difference in approach by suggesting that Syria still had an opportunity "to bring about a reform agenda". Clinton continued:

Nobody believed that Gaddafi would do that. People do believe that there is a possible path forward with Syria. So, we're going to continue joining with all our allies to press hard on that.<sup>20</sup>

According to the United States, Assad is eligible to be considered a potential reformer, despite his regime being identified by the United States as a state-sponsor of terrorism. He is to be given another chance to cooperate, irrespective of his important support for Hezbollah and Hamas, two of the main obstacles to the United States' declared goal of enduring peace in the Middle East. In truth, it would seem that if Assad is not even less open to reform than Gaddafi, he is at least more consistent in his total opposition to anything the US hopes to accomplish in the region and – if allegations of his assisting terrorists in entering Iraq are to be believed – a greater threat to America's national interest. From the perspective of the ICC system, there seems to be no clear, material difference as to the intensity of the alleged crimes attributable to Gaddafi and Assad and the different legal approaches seem arbitrary and artificial. It appears that pragmatism may supersede objective reasons of International Criminal Law, or as the Executive Director of the Middle East Policy Council put it:

U.S. officials have had to think about our ideological national interests, which support more popular political participation in government, but also about our strategic national interests, which include access to oil and gas and dealing with challenges posed by Iran and Al Qaeda. So it may not be very surprising that the administration, which already had a

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<sup>19</sup> See Amnesty International's full report on the situation in Syria at: [http://www.amnesty.nl/sites/default/files/public/1108\\_syrie.pdf](http://www.amnesty.nl/sites/default/files/public/1108_syrie.pdf), (accessed on 18 January 2012); see also a dedicated page about the situation in Syria on the Human Rights Watch website at: <http://www.hrw.org/middle-eastn-africa/syria>, (accessed on 18 January 2012).

<sup>20</sup> A. Quinn, 'Clinton says reform still possible in Syria', Reuters 6 May 2011.

reputation for pragmatism in foreign policy, has not responded in identical ways to each situation.<sup>21</sup>

The above citation alludes to two distinct types of policy consideration, both of which appear to have influenced the United States and much of Western Europe in its divergent approaches to the conflicts in Syria and Libya:

- 1) **Economic Considerations:** Basically these concern access to natural resources: oil, natural gas, water.<sup>22</sup>
- 2) **Geopolitical Considerations:** Problems regarding both the political ramifications for the state against which sanctions/military action/judicial proceedings are considered, and possible political and military consequences within the wider region.

It is suggested that strong arguments can be made (and almost certainly have been made) on both of these grounds as to why Libya, rather than Syria, had to be the target of western nations' combined efforts; and why it would make more sense in this context to arrest and prosecute the late Colonel Gaddafi than Bashar al-Assad. Libya, which exports 1.5 million barrels of oil per day, is an important oil source because although it accounts for just less than 2% of global production, few other states produce the equivalent grades of 'sweet crude oil' on which many of the world's refineries depend. European oil companies stand to gain a great deal from the revolution if a pro-Western administration succeeds in forming in the wake of the conflict. BP (United Kingdom) and Total (France) may have a particular advantage considering remarks made by the chief executive of the rebel Libyan oil company, Abdeljalil Mayouf: "We don't have a problem with Western countries like the Italians, French, and UK companies. But we may have some political issues with Russia, China and Brazil."<sup>23</sup>

Syria, by contrast, exports only 0.15 million barrels of oil per day – ten times less than Libya.<sup>24</sup> However, there are some doubts as to the significance of this comparison. Commentators have suggested that a preoccupation with statistics can distract from the on-the-ground difficulties faced by oil companies in the aftermath of conflicts on this scale. It is probable that if chaos ensues following the deposition of Gaddafi it will take a long time for Libya to return to pre-war levels of output. The example of Iraq, where it took five

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<sup>21</sup> T. Mattair, 'The Arab Uprisings and U.S. Policy: What is the American National Interest?', *Middle East Policy* 2011-18, pp. 1-28.

<sup>22</sup> For a thorough examination of the significance of crude oil dependency and its influence on developed nations' policy in the Middle East, see M. Klare, *Blood and Oil: The Dangers and Consequences of America's Growing Dependency on Imported Petroleum*, New York: Metropolitan Books 2004; Owl Books 2005.

<sup>23</sup> S. Kovalyova and E. Farge, 'ENI leads Libya oil race, rebels warn Russia, China', Reuters 22 August 2011.

<sup>24</sup> 'How Syria and Libya compare', The Guardian 28 April 2011.

years before oil production levels recovered, casts a long shadow. Moreover, the scarcity of supply caused by the conflict has resulted in a sharp increase in global oil prices. Though there may be economic advantages for western industrialised states in the long term, it is suggested that the combined uncertainty of the situation and the short-term unpopularity of rises in oil prices render the pursuit of oil *alone* an insufficient reason for the differences in approach to Libya and Syria. Still, it is notable that France and the UK were the first states to claim a considerable share in future Libyan oil production, which they were allocated in return for their military and political support for the rebels.

It is sufficient to compare the political allegiances of the two nations to reveal that geopolitical considerations were the main factor in the decision to intervene directly in Libya and merely to impose economic sanctions on Syria. Libya is so isolated that NATO's proposed intervention was actually approved by the Arab League, and the only other states prepared to offer support or assistance of any kind to Gaddafi were other 'rogue' states, Chavez's Venezuela and Mugabe's Zimbabwe. Syria, on the other hand, has strong ties with Mahmoud Ahmedinejad's unpredictable, uranium-enriching Iran, and a good relationship with Turkey, a member of NATO. Its aforementioned links with Hamas and Hezbollah add another dimension to the threat of possible reprisals. The dictatorship of Syria presents a different problem because it is not based, as Gaddafi's regime was, solely on loyalty and patronage, but – as an Islamic Ba'ath Party – has a stronger ideological dimension to it. Added to this is Syria's much greater military capability. Gaddafi's forces number approximately 50,000<sup>25</sup>, Assad has a force comprised of official military and paramilitaries more than eight times as powerful at his disposal. Collectively, these matters may have convinced western leaders that intervention in Libya would entail few risks whereas intervention in Syria might lead to a serious, large-scale regional war.

#### **IV. Trial prospects before the ICC and before a Libyan Court**

##### **IV.1 The ICC**

The ICC issued an arrest warrant against Saif Al-Islam on 27 June 2011. At the end of October 2011 several news media reported that the ICC was negotiating with Saif Al-Islam about his surrender to the Court.<sup>26</sup> The Chief Prosecutor of

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<sup>25</sup> Although Gaddafi's official military forces were indeed much smaller than those of Assad, mercenary groups (the amount of which remains unclear) fought on the side of Gaddafi during the Libyan conflict. See D. Rosenblum, 'Guns for hire: Examining the use of mercenaries in Libya', Consultancy Africa Intelligence 4 April 2011; Human Rights Council, 'Oral Statement by HRW on Libya', Human Rights Watch 19 September 2011.

<sup>26</sup> B. Farmer, 'Saif al-Islam Gaddafi negotiating with ICC', The Telegraph 28 October 2011; 'Gaddafi's son protests his innocence in ICC talks', Euronews 29 October 2011;

the ICC, Moreno-Ocampo, confirmed that there were indirect, informal conversations between the ICC and Saif Al-Islam, but he stated that a deal with the Court was out of question since there was nothing to negotiate. According to Moreno-Ocampo the conversations were about how he ought to appear before the judges and how the evidence will be presented.<sup>27</sup> On 19 November 2011 Saif Al-Islam was captured by fighters from Zintan – one of Libya’s most powerful militia factions – near the town of Obari in South Libya.<sup>28</sup> The Libyan National Transitional Council (NTC) announced to try Saif Al-Islam in Libya. The ICC, on the other hand, intends to ensure the realisation of a fair, impartial trial. A concern of the ICC is whether all the parties, both victims and witnesses, will be safe.<sup>29</sup> On 22 November 2011 Moreno-Ocampo flew to Libya with a delegation to meet ‘with Libyan authorities as part of the coordination efforts following the arrest of Saif Al-Islam.’<sup>30</sup> The Prosecutor said that “the issue where the trials will be held has to be resolved through consultations with the Court. In the end, the ICC judges will decide, there are legal standards which will have to be adhered to.”<sup>31</sup> After Moreno-Ocampo’s visit, the news media reported that Saif Al-Islam would be tried in his own country, possibly with support of the ICC. In a press release from the ICC on 23 November 23, the ICC stated that – contrary to what has been reported in the media – it is up to the judges of the Pre-Trial Chamber I to decide where Saif Al-Islam will be tried. Therefore the Libyan obligation to fully cooperate with the Court continues.<sup>32</sup> What if Saif Al-Islam is tried before the ICC, what would his defence be like?

The most likely defence for Saif Al-Islam is to argue that the investigative prosecutorial authorities are abusing the process. The aforementioned political and economic reasons for the military intervention in Libya could constitute such a defence. The doctrine of abuse of process is an accepted defence under international criminal law. It relates to misuse of international criminal procedures by the prosecution.<sup>33</sup> By prosecuting solely, or to a decisive extent, on political or discriminatory grounds, basic defence rights of the accused are seriously circumvented. The doctrine of abuse of process has – at the

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Usman, ‘Mediators Between Saif Al-Islam And ICC Are Negotiating Over Terms and Conditions’, CNN News 3 November 2011.

<sup>27</sup> B. Farmer, ‘Saif al-Islam Gaddafi negotiating with ICC’, The Telegraph 28 October 2011.

<sup>28</sup> S. Fayed, E. Solomon and M. Gumuchian, ‘Gaddafi’s son will get fair trial: Libyan PM’, Reuters 19 November 2011.

<sup>29</sup> R. Hamilton, ‘Q+A: Will Gaddafi’s son be tried in Libya or The Hague?’, Reuters 22 November 2011.

<sup>30</sup> Press Release 22 November 2011, ‘ICC Prosecutor arrives in Libya’, ICC-OTP-20111122-PR745.

<sup>31</sup> Ibid.

<sup>32</sup> Press Release 23 November 2011, ‘Course of action before the ICC following the arrest of the suspect Saif Al-Islam Gaddafi in Libya’, ICC-CPI-20111123-PR746.

<sup>33</sup> G.J. Knoop, *Miscarriages of Justice. Practice and Procedure in National and International Criminal Law Cases*, Ardsley, NY: Transnational Publishers, Inc. 2006, p. 176-182.

international level – been adopted as a remedy to sanction serious misbehaviour on the part of prosecutorial investigative authorities that prejudice fundamental defence rights.<sup>34</sup> It is for the courts to decide on the specific remedy, considering the individual circumstances of each case and the severity of the authorities' misconduct. General parameters as to the application of discretionary power can be derived from international law:

- 1) the seriousness of the human rights violations by law enforcement agencies;
- 2) the extent to which these violations undermine the integrity of process by restricting or jeopardising the right of the individual concerned to a fair administration of justice; and
- 3) the need for the remedy to be proportional to the seriousness of misconduct.<sup>35</sup>

More severe human rights violations will have a negative impact on the integrity of the process, which requires the court to take more radical remedial action. The question remains, will Saif Al-Islam succeed in invoking an abuse of process defence?

In the first place Saif Al-Islam could argue that he is being prosecuted for of political reasons. The Western countries would rather see the Gaddafi regime leave than stay in power. The Arab League also viewed Libya as a sole actor, which resulted in approval from the Arab League for the NATO's proposed intervention. An intervention in Libya would entail few risks compared to the possible political and economic gains. Saif Al-Islam could argue that referral to the ICC was part and parcel of a 'package' of different economic and political measures by the UN. As mentioned above, the UN SC resolution initiated other political and economic measures, in addition to referring the case to the ICC. France and the UK, for example, claimed a considerable share in future Libyan oil production, which they were allocated in return for their military and political support for the rebels.

The Court would probably respond by stating that they intervened to protect innocent civilians from the human rights violations committed by the Gaddafi regime. The question arises whether an allegation that 'crimes against humanity' have been committed is justified, since the decision to launch an ICC investigation was made on 26 February 2011 and the arrest warrants were filed on 16 May 2011 – a timeframe of merely three months. Is such a short timeframe indicative for abuse of process? In the Darfur case, it took the Court one and a half years of research before issuing an arrest warrant against Al-

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<sup>34</sup> G.J. Knoop, *Redressing Miscarriages of Justice. Practice and Procedure in National and International Criminal Law Cases*, Ardsley, NY: Transnational Publishers, Inc. 2006, p. 176.

<sup>35</sup> *Idem*, p. 181.

Bashir. This is six times the time it took them in the Gaddafi-case. The observation that the ICC proceedings were apparently misused to facilitate a regime change, instead of protection of human rights while the ICC prosecutor was involved in this respect, could substantiate such defence.

A second defence – which also subsumes under the abuse of process doctrine – would be that Saif Al-Islam is being prosecuted on discriminatory grounds. Saif Al-Islam could argue that the NATO and the NTC are not being prosecuted, while they also reportedly committed war crimes. The NATO, for example, caused civilian deaths by air bombings on populated areas and civil installations.<sup>36</sup> Moreno-Ocampo declared in a statement to the Security Council on 2 November 2011 that his office would initiate an investigation into possible war crimes committed by the NATO and the NTC. Moreno-Ocampo announced that the investigation of alleged crimes by NATO forces and the NTC will be executed impartially and independently.<sup>37</sup> The impartiality and independence can be questioned, since some of the NATO-members are the main financial supporters of the ICC. Furthermore, the United States have not ratified the ICC, and it would have far-reaching political consequences if the ICC were to decide to prosecute the American military involved in the Libyan regime change.

Empty words of the Chief-Prosecutor? The ICC Prosecutor has an interest in showing the rest of the world that his office is not selectively prosecuting African countries, that it is not biased and does not hesitate to launch investigations into Western states. However, the past learns that the ICC is reluctant to prosecute when NATO-led military interventions – like in Libya – take place. The ICC prosecution abstained from prosecuting NATO military in the case of Iraq and Afghanistan as well.

A third defence might be that of a possible deal between Saif Al-Islam and the ICC. Diverse news articles reported negotiations between Saif Al-Islam and the ICC.<sup>38</sup> This could point to a deal where Saif Al-Islam could get immunity or a reduced sentence in exchange for his surrender to the Court. Although the Chief Prosecutor stated that a deal was out of the question and the conversations were about Saif Al-Islam's surrender to the ICC, it is interesting to analyse what the legal status of such a deal would be. Is remission or immunity possible in exchange for valuable information? When Radovan Karadzic was arrested and surrendered to the International Criminal Tribunal

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<sup>36</sup> 'NATO acknowledges civilian casualties in Tripoli strike', NATO 19 June 2011.

<sup>37</sup> L. Moreno-Ocampo, 'Statement to the United Nations Security Council in the situation in Libya, pursuant to UNSCR 1970 (2011)', The Office of the Prosecutor 2 November 2011.

<sup>38</sup> B. Farmer, 'Saif al-Islam Gaddafi negotiating with ICC', The Telegraph 28 October 2011; A. Gray-Block, 'Gaddafi son eyes safety, talks to Hague', Reuters 28 October 2011; 'Gaddafi's son protests his innocence in ICC talks', Euronews 29 October 2011; Usman, 'Mediators Between Saif Al-Islam And ICC Are Negotiating Over Terms and Conditions', CNN News 3 November 2011.

for the former Yugoslavia (ICTY) on 28 July 2008, he relied on a 'deal' concluded with the late American envoy Richard Holbrooke in 1995. In exchange for Karadzic stepping out of politics— he was the president of the Serbian Republic at that time – Holbrooke reportedly promised him immunity from prosecution on behalf of the United States. However, on 8 July 2009 the Trial Chamber of the ICTY rejected this defence.<sup>39</sup> The Court reasoned that, even *if* Holbrooke promised Karadzic immunity of prosecution on behalf of the United States, this did not take away the Tribunal's right to prosecute Karadzic for war crimes. In other words: deals with governments or government officials have no binding status in the face of international criminal law; the prosecution of war crimes is of a higher order.

So, what would be the benefit of a voluntary surrender to the Court for Saif Al-Islam? Should the international community ultimately opt to not always prosecute individuals in order to achieve a higher goal, namely safety and security in a region? It is like choosing between Scylla and Charybdis. The prosecution of those people allegedly responsible for war crimes on the one hand and the closing of deals with these people in the interest of safety and security on the other do not always go hand in hand; as is shown in the Gaddafi case.

#### **IV.2 Trial in Libya**

As mentioned above, the NTC has stipulated that Saif Al-Islam has to stand trial in Libya. In principle, the ICC is only empowered with jurisdiction when the state parties cannot or do not want to investigate or prosecute the case themselves. However, it is still unclear whether this principle automatically applies when it concerns Security Council referrals. What if Saif al-Islam is tried in Libya? What would the process be like and would he face a fair trial?

If Saif Al-Islam were to be tried by a Libyan Court, he would – according to Libyan law – face the death penalty,<sup>40</sup> while the solidity of the Libyan institutions can be seriously questioned after Gaddafi's 42-year dictatorship and a bloody civil war. The Arab Spring rebels are in charge now and they have to decide on Saif Al-Islam's fate. The rebels were his opponents during the war, they lost friends and family and therefore probably cherish feelings of revenge. Furthermore, the way the rebels treated Muammar Gaddafi after they captured him may hint at the likelihood of future criminal proceedings in Libya against his son being at all fair. Obviously the Libyan death penalty will give them more satisfaction than possible imprisonment by the ICC in The Hague. Thus, the independence of the Libyan judges can be doubted. Altogether these factors lead to the conclusion that Saif Al-Islam's chances of facing a fair trial in a Libyan Court are minimal.

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<sup>39</sup> Prosecutor v. Radovan Karadžić, 8 July 2009.

<sup>40</sup> F. Murphy, 'Libya will try Gaddafi's son fairly: ICC prosecutor', Reuters 24 November 2011.

One solution could be that the ICC as a court will sit in Libya and that Saif Al-Islam will be tried on the basis of the ICC rules and procedures. Such a scenario implies *inter alia* that the imposition of the death penalty is impossible and that Saif Al-Islam has the right to an effective defence. The last point is an essential part of the acceptance of a verdict. The question remains whether the ICC can ensure the safety of victims and witnesses if the process takes place in Libya.<sup>41</sup>

Another option – which is suggested by the ICC Prosecutor – is that the ICC supports Libya in a trial against Saif Al-Islam.<sup>42</sup> However, this option is doomed to fail, as can be gathered from the Iraqi-process against former dictator Saddam Hussein. A devastating Human Rights Watch report learned that the verdict barely could rely on international support, as it contravened fair trial rights, even though the whole world was ready to condemn Saddam Hussein before the process took place.<sup>43</sup>

Yet, in accordance with Resolution 1970, which was unanimously adopted by the UN SC, the ICC is authorised to decide where the process takes place.<sup>44</sup> However, one should learn from the past.

## Conclusions

It has been shown that political considerations influence international criminal justice in two principal ways. The comparison between the Gaddafi and Al Bashir proceedings, and the flaws of the Gaddafi process thereby revealed, demonstrates that the threat of a trial is considered and applied by the UN as a valuable political tool – a sort of quasi-judicial sanction – and that the immediate political context may determine the speed and rigor with which preliminary investigations are conducted. The second comparison, between Gaddafi and Assad, shows that economic and/or geo-political considerations will often dictate whether or not arrest warrants and international criminal prosecution are initiated at all.

It is not argued that the political reasons for the different approaches taken are improper as political reasons. Regrettably, on strictly utilitarian terms, it may well be argued that it is politically wise to avoid attempting to arrest Bashar al-Assad, as such provocation could spark a region-wide conflict, jeopardising the opportunity that Tunisia and Egypt now have to democratise, with dire consequences for civilians caught in the cross-fire. The point of contention is that such a course of action detracts from the legitimacy of the ICC, as a court

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<sup>41</sup> R. Hamilton, 'Q+A: Will Gaddafi's son be tried in Libya or The Hague?', Reuters 22 November 2011.

<sup>42</sup> Ibid.

<sup>43</sup> Human Rights Watch, 'Judging Dujail. The First Trial before the Iraqi High Tribunal', November 2006.

<sup>44</sup> Press Release 23 November 2011, 'Course of action before the ICC following the arrest of the suspect Saif Al-Islam Gaddafi in Libya', ICC-CPI-20111123-PR746.

of justice, when its processes are exploited to achieve political ends. Its function is not to expedite the removal of alleged dictators and war criminals; it is to bring them to account – by means of fair trials and always under the presumption of innocence – for their alleged misdeeds.

Undeniably, the ICC system is predicated upon political views on impunity and human rights. This might be inherent to any system of ICL. However, at the moment investigative decisions are influenced by political motives, this may undermine the framework of ICL.

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*- The Amsterdam Law Forum is an initiative supported by the VU University  
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