



# Situation Report

Date issued: 22 July 2011

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Distribution: General

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## Perspectives on Africa's response to the ICC's arrest warrants in the Libya situation

On 27 June, the three judges of the International Criminal Court's Pre-trial Chamber I issued arrest warrants for Libyan leader Muammar Gaddafi, his son Saif al-Islam, and Abdullah al-Senussi for alleged crimes against humanity committed in Libya since mid-February this year. The decision is a significant but not unexpected development in a process begun by the United Nations Security Council when it passed Resolution 1970, which, among other things, referred the situation in Libya to the ICC for investigation and possible prosecution.

The judges' ruling has been widely welcomed, not least in the rebel stronghold of Benghazi in eastern Libya. However, for some African leaders and the African Union (AU), as confirmed at its 17<sup>th</sup> annual Heads of State Summit on 1 July 2011, the arrest warrants are of major concern. The AU has repeatedly stated that only political solutions can bring peace to Libya. South Africa's President Jacob Zuma, who hosted a meeting of the AU's High Level Ad Hoc Committee on Libya the day before the warrants were announced, expressed 'extreme disappointment' with the ICC's decision.<sup>1</sup>

The already frosty relations between the AU and the ICC are the backdrop to this position. The current motivator is African leaders' unease with the NATO-led military operation in Libya authorised by UN Security Council Resolution 1973, along with concerns that the Gaddafi warrant will undermine the AU's efforts to negotiate a political settlement. The implications of these positions for international justice and the ICC are important and need to be approached by considering several questions: How did the Libyan situation come before the ICC? On what basis did the ICC judges issue the arrest warrants? To what extent are peace prospects now under threat? What are the prospects for Africa-ICC relations?

### Resolution 1970: the starting point

On 26 February 2011 the UN Security Council unanimously passed Resolution 1970, which referred the situation in Libya to the ICC. The resolution also imposed a travel ban and assets freeze on Gaddafi and key figures in his government, as well as an arms embargo. The vote – supported by the three African countries on the UN Security Council, namely Gabon, Nigeria and South Africa – followed

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increasing reports of systematic attacks on civilians by government forces, including extrajudicial killings and torture of peaceful demonstrators.

The UN Security Council was also mindful of widespread expressions of concern about the violence, and condemnation of the Gaddafi regime from regional and global bodies, including the Organisation of the Islamic Conference, the Council of the League of Arab States, the AU and the UN's Human Rights Council. At this early stage, Libyan diplomats who had distanced themselves from their government also called for the ICC's intervention.

Resolution 1970, which gives the ICC its mandate in Libya, was (and remains) widely supported by the international community. The same cannot, however, be said for UN Security Council Resolution 1973 adopted a few weeks later on 17 March. The latter – which demands a ceasefire and authorises the international community to establish a no-fly zone and use all means necessary short of foreign occupation to protect civilians – was supported by 10 of the 15 UN Security Council members, including the three African countries. Even so, the AU had already made clear its opposition to the kind of action authorised by the resolution. On 10 March the AU's Peace and Security Council rejected any foreign military intervention in Libya, and established a High Level Ad Hoc Committee on Libya to facilitate dialogue among all parties to the conflict.

In the wake of continuous NATO-led air strikes across Libya, criticisms of Resolution 1973 have mounted from the AU and individual African leaders, as well as countries like Russia, Turkey and Venezuela, and the Arab League. Disapproval centres on allegations that NATO and its allies are conducting 'a campaign for regime change or political assassination' rather than the protection of civilians, and that NATO has overstepped its mandate.<sup>2</sup> Underpinned by calls for African (rather than Western) action to solve the Libyan crisis, opposition to Resolution 1973 is reminiscent of accusations that the ICC is a 'Western attempt to target African leaders'. In the build-up to the July AU summit, statements by African leaders and the decision of the special AU assembly meeting on 25 May showed that criticisms of Resolutions 1973 and 1970 were being conflated. The May AU decision questioned the implementation of *both* Resolutions 1970 and 1973 and called on international actors to 'fully comply with the letter and spirit' of *both* resolutions.<sup>3</sup> When the indictments were announced, Libya's justice minister rejected the ICC warrants for Gaddafi and his co-accused, calling the ruling a 'cover for NATO, which is still trying to assassinate Gaddafi'.<sup>4</sup>

This is a damaging development that not only obscures the facts in the matter but also, more generally, undermines the importance of accountability as an essential element for achieving sustainable peace. The ICC, as an independent judicial body, acted at the instruction of the UN Security Council under Resolution 1970 to investigate mass crimes in Libya. The pursuit of justice for these crimes is an entirely separate matter from the NATO-led air strikes stemming from Resolution 1973. The conflation of the two resolutions is likely to undermine the ICC's ability to function effectively in Libya and in so doing, reduces the chances of Libyan victims seeing those most responsible for the atrocities being brought to justice.

The ICC does not have its own police force and must rely on the cooperation of states to conduct investigations and to arrest and surrender suspects. Already the tenuous relations between the ICC and the AU have helped high-profile suspects evade justice. Sudanese president Omar al-Bashir, wanted since 2009 by the ICC for crimes allegedly committed in Darfur, has to date been welcomed to the territory of three African countries that as ICC members are obliged to arrest and surrender him for trial. Bashir remains at large. The AU has on repeated occasions affirmed the actions of these three states because they are in line with a 2009 AU summit decision not to cooperate with the ICC in the arrest of Bashir.<sup>5</sup> At its most recent summit in July 2011, AU members extended their decision of non-cooperation with the ICC, this time in respect of the arrest warrant issued for Gaddafi. The decision is attributed to 'deep' concerns with the 'manner in which the International Criminal Court (ICC) Prosecutor handles the situation in

Libya' and because the Gaddafi warrant complicates efforts to negotiate a political solution in Libya.<sup>6</sup>

Despite the AU decision to the contrary, ICC states parties – including the 31 African members – are bound to assist in the arrest of Gaddafi and his co-accused. Resolution 1970 also 'urges' all states and concerned regional and other international organisations to cooperate with the court, although the primary obligation rests with Libyan authorities that are compelled to cooperate fully with the ICC.

Considering that African states parties cannot necessarily be relied upon to surrender ICC suspects, the prosecutor was no doubt encouraged by the April 2011 letter from the opposition in Libya, the Interim Transitional National Council, promising cooperation with the ICC.<sup>7</sup> Having acted swiftly on his UN Security Council mandate, Luis Moreno-Ocampo completed preliminary investigations and on 16 May requested the ICC's pre-trial chamber to issue arrest warrants for Gaddafi, al-Islam and al-Senussi for allegedly committing crimes against humanity throughout Libya.

### **Basis for the arrest warrants**

After conducting an independent assessment of the evidence presented by the prosecutor, on 27 June the judges of the ICC's Pre-trial Chamber I issued the warrants of arrest for alleged crimes against humanity of murder and persecution committed in Libya since 15 February 2011. To have arrived at that decision the judges must – under the Rome Statute that creates and governs the ICC – have been satisfied that there are 'reasonable grounds to believe' that the accused have committed crimes that fall within the jurisdiction of the ICC.

More specifically, the judges found that 'there are reasonable grounds to believe that there was a State policy designed at the highest level of the State machinery aimed at deterring and quelling the February 2011 demonstrations by any means, including the use of lethal force'. This policy included widespread and systematic attacks against civilian demonstrators by Libyan security forces that resulted in the arrest, detention, torture, injury and death of hundreds of civilians.

Despite Gaddafi's claims about not being Libya's president or to hold any official position, the chamber also found reasonable grounds to believe that Gaddafi had 'absolute, ultimate and unquestioned control over the Libyan State apparatus of power, including the Security Forces'.<sup>8</sup> In the case of Gaddafi's son Saif al-Islam, the judges concluded that, as likely successor to his father and the most influential person in Gaddafi's inner circle, Saif al-Islam controlled 'crucial parts of the State apparatus including finances and logistics and had the powers of a *de facto* Prime Minister'.<sup>9</sup> As to the third accused, the chamber found reasonable grounds to believe that as head of military intelligence and the highest authority of the armed forces, Abdullah al-Senussi had ordered and determined the actions of the armed forces that attacked civilians demonstrating in the city of Benghazi.

The ICC judges further determined that warrants of arrest are necessary to: ensure the appearance of the three accused before the court; to prevent interference in the ICC's ongoing investigation in Libya, especially through covering up crimes committed by the security forces; and to prevent the commission of further grave crimes. A request for cooperation in the arrest and surrender of Gaddafi, al-Islam and al-Senussi will be sent to the 'competent Libyan authorities', all states parties to the ICC's Rome Statute, all Libya's neighbouring states, and members of the UN Security Council that are not ICC states parties.

It is worth noting, especially in light of allegations of atrocities committed by all sides in the conflict (including NATO-led forces), that the prosecutor can still apply to the pre-trial chamber to open further cases relating to the Libya situation. In this regard the report of the International Commission of Inquiry for Libya set up by the UN Human Rights Council in February, is insightful. Released on 1 June, the

inquiry concluded that both government and rebel forces committed war crimes, but that no evidence was found to suggest that NATO forces had intentionally targeted civilian areas or engaged in indiscriminate attacks on civilians.<sup>10</sup> Organisations such as Human Rights Watch have urged the ICC prosecutor to continue to investigate grave crimes committed by any party to the conflict in Libya,<sup>11</sup> and the prosecutor will address the UN Security Council in December on progress in this regard. The value of a thorough investigation aside, it is the warrant for Gaddafi that has stirred debates about whether a political settlement now has any chance of succeeding in Libya.

### **Peace prospects under threat?**

Given the ICC's mandate to prosecute those most responsible for committing grave crimes, it should come as no surprise that ICC action in situations of ongoing conflict (like Libya) may pose challenges for the negotiation of political settlements. It stands to reason that the leaders with the power to stop large-scale violent conflicts (the targets of negotiations) will likely also have had the power to start them (the targets of the ICC). This is something the 15 members of the UN Security Council – including African states parties to the ICC, notably Gabon, Nigeria and South Africa – would have been well aware of when they voted unanimously in favour of Resolution 1970. Indeed, the resolution stresses in its preamble 'the need to hold to account those responsible for attacks, including by forces under their control, on civilians'.

That justice and accountability would be central to the international community's response to attacks on civilians in Libya was thus clear from the outset. What was less clear at the time was that the Libyan conflict would drag on for five months (and counting) with little prospect of resolution one way or another. Considering that between January and February this year, the long-time presidents of Tunisia and Egypt were toppled within a month and 18 days respectively by popular uprisings in their countries, some states voting in favour of ICC action in Libya no doubt anticipated that Gaddafi would also soon be ousted. The odds were that with one of Africa's longest serving rulers removed by his own people, those voting in favour of ICC intervention would find themselves on the right side of history, and the ICC could then proceed with its work in a relatively uncomplicated political environment.

The infamous words of Gaddafi's son, Saif al-Islam, on 21 February should have provided an early portent that events in Libya might take a different course to those of its neighbours: 'Libya is at a crossroads. If we do not agree today on reforms ... rivers of blood will run through Libya ... We will take up arms ... we will fight to the last bullet ... If everybody is armed, it is civil war, we will kill each other ... Libya is not Egypt, it is not Tunisia.'<sup>12</sup> This sentiment, together with the tenacity of both the opposition and the government's military forces, and Resolution 1973, has seen the violent conflict escalating to the point of an uneasy and costly military stalemate.

To the extent that some UN Security Council members supported Resolution 1970 less out of principle and more because the timing of events would likely render their vote a sound foreign policy decision, the reality on the ground is testing their judgement. There is no doubt that the unpredictable and turbulent nature of the conflict makes foreign policy decisions on Libya difficult. Considering this, it is ironic that the deliberately independent work of the ICC in Libya (specifically the announcement of the arrest warrants) has drawn criticism in Africa for being 'poorly timed' by the court.

Resolution 1970 did not provide timeframes, but given the urgency of the unfolding crisis in Libya, there could have been little doubt that all those called upon to implement the various provisions of the resolution, including the ICC, would act with all haste.<sup>13</sup> For the ICC this was the earliest that the court has ever become involved in a situation, creating the potential to deter future atrocities

and alter the conflict in a game-changing manner. The court has indeed moved swiftly, with the three arrest warrants being issued a mere four months after the matter was referred.

#### *South Africa's shifting allegiance*

Against this backdrop, the South African government's response to developments in Libya is worth considering in more detail. In its second term as a non-permanent member of the UN Security Council, South Africa voted in favour of both Resolutions 1970 and 1973. Less than two months later, South Africa's support for Resolution 1973 came into question when Zuma – a member of the AU's High Level Ad Hoc Committee on Libya – criticised the NATO air strikes in Libya and the 'West's' disregard for solutions to the conflict proposed by the AU.<sup>14</sup> When the ICC judges announced that an arrest warrant would be issued for Gaddafi, Zuma expressed his 'extreme disappointment' with the ICC's decision. These developments create the impression that South Africa is again backtracking from an earlier decision – this time with regard to Resolution 1970, which referred the Libyan situation to the ICC.

South Africa's changeable approach to these key foreign policy matters during its tenure on the UN Security Council could be damaging for the country and also for efforts to end impunity for gross human rights violations on the continent. South Africa's support for international criminal justice has been steadfast, with the country playing a role in the drafting of the ICC's Rome Statute as well as the functioning of the court since its inception. At meetings of the ICC Assembly of States Parties, the court's Review Conference in 2010, AU summits, and by committing to enforcing the ICC's arrest warrant for Bashir,<sup>15</sup> South Africa has led the way on the continent with regard to international justice.

Considering the country's support for the ICC so far, and the fact that South Africa played an active role on the UN Security Council in securing the ICC its mandate in Libya, Zuma's disappointment when the court does its job is surprising. Two factors may explain South Africa's shifting stance with regard to Libya. First, Zuma's leading role on the AU committee on Libya no doubt influenced his positions on both Resolutions 1973 and 1970. The committee is implementing the AU Roadmap on Libya, which has as its premise that a solution to the conflict in Libya 'has to be political and lies in the hands of the Libyan people'.<sup>16</sup> The AU has expressly rejected foreign military intervention in Libya, as have members of the AU committee on Libya, notably President Yoweri Museveni of Uganda who made his position clear early on: 'I am totally allergic to foreign, political and military involvement in sovereign countries, especially African countries.'<sup>17</sup> He also accused the West of double standards by imposing a no-fly zone on Libya but taking no action against other Arab nations facing popular upheavals.

The AU has also criticised the ICC's arrest warrant for Gaddafi because it 'seriously complicates the efforts aimed at finding a negotiated solution to the crisis in Libya'.<sup>18</sup> Zuma's remarks about the ICC's work in Libya suggest that he supports this AU decision, although official sources have explained that the president is concerned with the *timing* of the Gaddafi warrant rather than the decision itself, or the work of the ICC.<sup>19</sup> The ICC judges announced their decision a day after Zuma hosted the AU committee on Libya in Pretoria that reported two 'major breakthroughs': that Gaddafi had accepted the AU's roadmap on Libya and had agreed to stay out of peace talks.<sup>20</sup> While the difficulties created by the timing of the announcement can be appreciated, the work of the ICC pre-trial chamber is not something that should be influenced from outside. Judges whose only mandate is the Rome Statute and the evidence before them cannot and should not have regard to ad hoc committees or their political work.

A second possible explanation for Zuma's variable approach is the domestic pressure he faces from the increasingly powerful ANC Youth League (ANCYL) as the election of the ruling party's next leader approaches. At its annual congress at the end of June, the ANCYL not only made clear its disdain for the South African

government's foreign policy on Libya, but challenged the president directly: 'Congress vehemently disagrees with the justification and explanation given by the President of South Africa on the decision of South Africa to support a UN resolution that called for the imperialist invasion of Libya by neo-colonial forces.'<sup>21</sup> The SA Communist Party (a long-standing ally of the ruling ANC) had also criticised South Africa's support for Resolution 1973, labelling NATO's intervention as 'imperialist' and warning against aiding a 'lust for Libyan oil'.<sup>22</sup>

#### *Impact of the Gaddafi arrest warrant on peace prospects*

Considering that thousands have so far died in the fighting, around 650 000 others have fled the country, and an estimated 243 000 Libyans have been displaced internally, there is no denying that efforts to end the conflict must urgently be found.<sup>23</sup> However, justice cannot now be set aside because investigations reveal that Libya's leader may be responsible for the violence. Credibility is key to any justice process, not least where the gravest of crimes such as those committed in Libya this year are concerned. Human Rights Watch's Richard Dicker cautions that 'Justice, to be credible, must run its independent course'.<sup>24</sup>

This means that ways need to be found for the ICC to work alongside other efforts, including diplomatic and humanitarian activities, to resolve the crisis.<sup>25</sup> This is a principle that the Libya Contact Group has embodied since its establishment in March by over 30 states and international organisations, including the UN, Arab League, Organisation of the Islamic Conference, EU and NATO. Meeting monthly to provide political direction to the international effort in Libya, the group also provides a focal point in the international community for contact with Libyan parties. The group consistently recognises the need to implement *both* UN Security Council Resolutions 1970 and 1973, and includes 'justice for Libyans who have suffered atrocities during the conflict' as a principle guiding efforts towards political transition.<sup>26</sup>

The rebel Libyan National Transitional Council (NTC) wants accountability for atrocities committed in Libya and supports the ICC's investigations. When the international court's arrest warrants were announced, the NTC noted that the indictment of Gaddafi could end chances of negotiation because the rebels 'cannot negotiate with war criminals'.<sup>27</sup> Mustafa Abdel Jalil, head of the NTC, declared: 'The decision that was made today by the ICC stops all suggestions of negotiations with or protection for Gaddafi.'<sup>28</sup> Concerns now are that Gaddafi might be forced into a corner with no other option but to 'fight until the end'. The opportunities for negotiations between the opposition and Gaddafi may well have changed, but what is the context within which negotiations might take place, and what kind of space existed for talks before the warrants were issued?

Since early on, both Gaddafi and Saif al-Islam vowed on several occasions that they would 'fight to the last bullet' and that they had no intention of leaving Libya. For their part, the NTC leaders have made Gaddafi's relinquishing of all power and a retreat of government forces to their barracks a pre-condition for any discussions of a settlement. Even before the ICC warrants were announced, an NTC spokesperson said opposition leaders were also unwilling to talk to anyone in Gaddafi's family or his inner circle: 'It's very difficult to speak with anybody that has blood on his hands,' Gallal told Al Jazeera.<sup>29</sup>

It would therefore seem that the stalemate between Gaddafi and the opposition in Libya pre-dates the issuing of ICC arrest warrants. Moreover, it is unlikely that after ruling for 41 years, a dictator who is as brazen as Gaddafi about the lengths he will go to remain in power, and who has led Africa's charge against the ICC, would feel cornered by the court's indictment. To its credit, none of these obstacles has deterred the AU from attempting to resolve the conflict through negotiations. The AU's High Level Ad Hoc Committee on Libya was constituted in mid-March with the aim of 'finding a peaceful, political settlement in Libya on the basis of the AU Roadmap on Libya'.<sup>30</sup> Comprised of the presidents of South Africa, Uganda, Republic of Congo, Mauritania and Mali, the committee has met

several times since its establishment and interacted with Gaddafi and the Libyan opposition on several occasions. Members of the committee also met with the UN Security Council in an effort to find a solution in accordance with the Roadmap on Libya.<sup>31</sup>

Despite the AU's efforts, however, the military and political deadlock in Libya has continued. After the AU committee's meeting on 26 June in Pretoria, the leaders present welcomed the news that Gaddafi had agreed to stay out of negotiations as a 'major breakthrough'. The next step would be an end to all hostilities, after which an interim government could be formed – both of which were acknowledged as being 'a very long way off'.<sup>32</sup> The ICC warrants were announced the following day, leading to Zuma's expression of disappointment in the timing of the court's decision. His spokesperson explained: 'It's quite unfortunate that the ICC could take such a decision whilst the African Union through its ad hoc committee has done so much.'<sup>33</sup>

Quite how much the AU committee had achieved is unclear. Although the committee's work has gained momentum in recent months, the AU's initial 'political inertia'<sup>34</sup> meant that the organisation was the last to respond, after the EU, the Organisation of the Islamic Conference, the Arab League and the UN Commissioner for Human Rights had all made public statements condemning the government's use of force against civilians.<sup>35</sup> Despite the AU's consistent call for 'African solutions to African problems', it is the Arab world that has been credited with being at the forefront of initial action by the international community against the Libyan regime's suppression of public protests.<sup>36</sup>

Tangible success in breaking the political stalemate remains out of reach, and the AU committee on Libya has had no effect on the ongoing violence. A glimpse of the enormity of the challenge – which exists regardless of the Gaddafi warrant – is provided by the conflicting and ever-changing reports about both the Libyan government and NTC's intentions. On 26 June, the day the AU committee met in Pretoria, Moussa Ibrahim, a Libyan government spokesperson, made an offer to vote on Gaddafi's political future. Later that same day Ibrahim retracted, saying: 'Muammar Gaddafi is ... above all political actions, above all political and tactical games ... in this current stage and in the future, Gaddafi is the historical choice which we cannot drop.'<sup>37</sup> When asked about reports that the opposition was expecting an offer from Gaddafi very soon, he said: 'Gaddafi is here. He is staying. He is leading the country. He will not leave.'<sup>38</sup>

The NTC has also sent mixed messages about its position on negotiations. On 2 July, for example, after the conclusion of the recent AU summit, the rebels' representative for France welcomed the AU's peace proposal, explaining that: 'We understood that the spirit of the document is that Gaddafi will not have a role to play in the future of Libya.'<sup>39</sup> A day later the NTC in Benghazi reportedly rejected the AU peace plan on the grounds that it would leave Gaddafi in power.<sup>40</sup>

At this early stage, securing NTC acceptance of the AU's peace proposal appears to be a key challenge – and not because of the ICC's indictments but rather because the AU has thus far avoided dealing explicitly with Gaddafi's future. While the AU has done well to secure Gaddafi's commitment to stay out of any negotiations, this falls short of the NTC's most consistent demand: that Gaddafi must step down. Nevertheless, the proposal submitted to the two Libyan delegations attending the July AU summit was no doubt positively received since the AU announced that 'it will, very soon, begin peace talks in Addis Ababa'.<sup>41</sup> A 'technical interaction' between the Libyan government and the NTC is scheduled for 19 July in Addis Ababa.<sup>42</sup>

Early attempts at political settlement are no doubt unpredictable, but the one certainty is that the ICC arrest warrant will further undermine Gaddafi's legitimacy as a leader with a role in resolving the Libyan crisis. International experience shows that this can assist rather than undermine negotiated settlements. Arrest warrants for senior leaders can bolster peace efforts by 'stigmatizing those who

stand in the way of conflict resolution'.<sup>43</sup> Indictments for Radovan Karadzic and Ratko Mladic, the political and military leaders of the Bosnian Serbs, for example, helped marginalise these leaders during the Dayton peace talks that ended the war in Bosnia.<sup>44</sup>

Although the AU and most African leaders have been silent on Gaddafi's legitimacy to hold office, the chairman of the AU committee on Libya, Mauritanian President Mohamed Abdel Aziz, stated shortly before the ICC indictment that 'Gaddafi can no longer lead Libya' and that 'his departure has become necessary'.<sup>45</sup> In early June during a meeting with NTC officials in Benghazi, Senegal's President Abdoulaye Wade called on Gaddafi to step down, saying 'the sooner you leave, the better'.<sup>46</sup> Senegal is one of only two African countries to have recognised the NTC as the legitimate governing authority in Libya<sup>47</sup> (the other being Morocco). At its fourth meeting on 15 July, the nearly 30 governments and three international organisations represented by the Libya Contact Group also announced their formal recognition of the NTC as the legitimate government of Libya until an interim authority is in place.<sup>48</sup>

Within his country too, Gaddafi has been losing legitimacy since the attacks on civilians gathered pace in mid-February. Several diplomats resigned in protest at their government's actions during this time, and a series of defections by military officers, diplomats and members of government have followed ever since. As Gaddafi and his regime become increasingly isolated, it is likely that discord among his inner circle will grow. And since the ICC prosecutor's investigations in Libya are ongoing, the latest arrest warrants will be a stark reminder for those close to Gaddafi that they too could be indicted for crimes they order or commit, or those they do not prevent from happening.<sup>49</sup> This situation prompted ICC prosecutor Luis Moreno-Ocampo to urge Gaddafi's own aides to surrender him to the ICC for trial. Ocampo is reported to have said that Gaddafi's inner circle must 'decide whether to be part of the problem or part of the solution in Libya'.<sup>50</sup>

### **Implications for African states' decisions and actions**

1. The three African countries that voted in support of UN Security Council Resolution 1970, as well as other African states parties to the ICC, should recognise the political context and legal parameters within which the ICC is working in Libya. In issuing the arrest warrant for Gaddafi, the ICC acted independently in accordance with its political mandate from the UN Security Council and the legal provisions of the Rome Statute.
2. Africa and the AU are right to be concerned about any developments that limit opportunities for resolving the conflict in Libya. It is, however, difficult to see how peace and stability in Libya can be furthered by setting aside justice to appease one of the continent's longest-serving dictators who is wanted by the ICC for allegedly directing violence against his citizens, and has repeatedly threatened to fight to the last man, woman and bullet. If Gaddafi now finds himself in a corner, this should be attributed, first and foremost, to his regime's actions since mid-February. In direct response to these actions, UN Security Council Resolution 1970 has deliberately aimed to undermine Gaddafi's legitimacy and isolate his regime through an ICC referral, travel bans, asset freezes and an arms embargo that will 'separate [his regime] from assets, services, and goods that support its repression of the Libyan people'.<sup>51</sup>

Five months down the line, one easily forgets the urgency and unanimity prevailing in the international community when the resolution was passed. At the time, UN Secretary-General Ban Ki-moon welcomed the UN Security Council's firm action, stating that: 'While it cannot, by itself, end the violence and the repression, it is a vital step – a clear expression of the will of a united community of nations.' UN Security Council members expressed solidarity with the people of Libya, hoping that their 'swift and decisive' intervention would help bring them hope and relief.<sup>52</sup>



3. In the event that UN Security Council action or ICC intervention is regarded as obstructing all efforts to resolve the conflict in Libya, the appropriate legal and political remedies should be sought. With regard to Resolution 1970 as a whole, the UN Security Council is 'prepared to strengthen, modify, suspend or lift the prescribed measures in light of compliance or non-compliance with the resolution'.<sup>53</sup> With regard to the ICC's role, Resolution 1970 and Article 16 of the Rome Statute provide for the UN Security Council to defer an ICC investigation or prosecution for a renewable period of 12 months if the ICC action can be shown to pose a greater threat to international peace and security than the conflict itself.

At its July summit, the AU indicated its intention to follow the deferral route, requesting the UN Security Council to 'activate the provisions of Article 16 of the Rome Statute with a view to deferring the ICC process on Libya in the interest of Justice as well as peace in the country'.<sup>54</sup> The AU has thus far failed to secure the deferrals it requested from the UN Security Council in the ICC's Bashir and Kenya cases. Given this, African ICC members should note that to be successful, a sound legal basis for deferral must be made out. In this case, applicants will need to show that the Gaddafi arrest warrant constitutes a *greater* threat to international peace and security than deferring the proceedings for a year would. In addition, for such a case to be made effectively, African states and the AU need to engage fully with key actors within the UN. Credible evidence will need to be presented to the UN Security Council in a timely manner in accordance with the relevant rules of procedure and other relevant protocols.<sup>55</sup>

4. The Libyan authorities (under Resolution 1970) and all ICC states parties (under the Rome Statute) are legally obliged to cooperate with the ICC in the arrest and surrender of Gaddafi and his two co-accused. At its July summit, AU member states nevertheless decided not to cooperate with the court in the execution of the Gaddafi warrant. This follows a similar AU decision with respect to the warrant for the other sitting head of state wanted by the ICC: Omar al-Bashir of Sudan.

Decisions of the AU Assembly are potentially binding on member states. However, for the 31 African states that are also signatories to the Rome Statute and thus obliged to cooperate with the court, the AU decision potentially creates competing international legal obligations. In the absence of a clear legal solution (and in some cases a disregard for their international legal obligations with regard to the Rome Statute), African states have on the whole allowed their political priorities to determine whether or not they will cooperate with the ICC.

Some officials have argued that the AU call for non-cooperation takes precedence over their ICC treaty obligations, and have consequently either hosted ICC indictees on their territory, or given their assurances that they would not surrender indictees to the court should they visit.<sup>56</sup> In the case of South Africa – one of only a few African countries to have passed domestic ICC legislation – the existence of both local and international legal commitments has tipped the scales in favour of cooperating with the ICC.<sup>57</sup> Although Kenya is legally in the same position as South Africa, having domesticated the Rome Statute and recently overhauled its constitution, the east African country has hosted Bashir on its territory in open defiance of the ICC. Other ICC states parties have, even in the absence of domestic ICC legislation, affirmed their support for the court explicitly (notably Botswana) or through diplomatic channels to prevent Bashir visiting their territory.<sup>58</sup>

This practice of selectively adhering to international legal obligations severely undermines the ICC and in doing so means that the African victims of mass crimes might never see justice for the violations they have suffered. Domestic and regional courts could in theory handle these crimes, but what really are the prospects that feared rulers like Gaddafi and Bashir would ever stand

trial in their own capitals, or in Arusha, Kampala or Pretoria for that matter? The Rome Statute system is designed with these difficulties in mind. It recognises the relevance of national trials and thus frames the ICC as a court of last resort. Because it is unlikely that those who plan and direct gross human rights violations – usually leaders in positions of substantial power – will be tried domestically, the ICC focuses on those ‘most responsible’, opening the way for national courts to prosecute those who carried out the orders. Considering the continent’s poor track record of accountability for mass crimes, there is no denying that this is a sensible approach. More to the point, 31 African governments have indicated, legally and politically, that they support this approach. Rather than further weakening the ICC in what looks like the defence of another dictator, African ICC members should rely on their constitutional and national legal obligations, as well as those under the Rome Statute, to show their support for the victims of these crimes.

- 1 Zuma unhappy about Gaddafi warrant, *News24*, 27 June 2011, available at <http://www.news24.com/SouthAfrica/Politics/Zuma-disappointed-with-Gaddafi-arrest-warrant-20110627>.
- 2 Welcoming remarks by President Jacob Zuma at the meeting of the AU High Level Ad Hoc Committee on Libya, Pretoria, 26 June 2011.
- 3 Decision on the peaceful resolution of the Libyan crisis, Extraordinary Session of the Assembly of the Union on the State of Peace and Security in Africa, Ext/Assembly/AU/Dec/(01.2011), Addis Ababa, 25 May 2011.
- 4 Libya rejects Gaddafi arrest warrant, *Al Jazeera*, 28 June 2011 available at <http://english.aljazeera.net/news/africa/2011/06/201162853026807580.html>.
- 5 See the most recent 17th AU summit decision on the ICC, para 5, Draft Decision on the implementation of the Assembly decisions on the International Criminal Court, Doc.EX.CL/670(XIX), 30 June – 1 July 2011, Malabo, Equatorial Guinea.
- 6 See the most recent 17th AU summit decision on the ICC, para 6, Draft Decision on the implementation of the Assembly decisions on the International Criminal Court, Doc.EX.CL/670(XIX), 30 June – 1 July 2011, Malabo, Equatorial Guinea.
- 7 See Libya: Warrants send strong message to abusive leaders, *Human Rights Watch*, 27 June 2011.
- 8 Decision on the ‘Prosecutor’s application pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’, Pre-Trial Chamber I, ICC, ICC-01/11, 27 June 2011, para 72.
- 9 Ibid.
- 10 See Libya: Warrants send strong message to abusive leaders, *Human Rights Watch*, 27 June 2011.
- 11 Ibid.
- 12 Gaddafi son: Libya faces rivers of blood, *News24*, 21 February 2011, available at <http://www.news24.com/Africa/News/Gaddafi-son-Libya-faces-rivers-of-blood-20110221>.
- 13 For a sense of this urgency, see In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters, Department of Public Information, Security Council SC/10187/Rev.1, 26 February 2011.
- 14 Zuma criticises Nato bombing, *Business Live*, 31 May 2011, available at <http://www.businesslive.co.za/Feeds/businessday/2011/05/31/zuma-criticises-nato-bombing>; see also <http://mg.co.za/article/2011-05-06-do-they-jump-or-are-pushed>.
- 15 In a telephonic interview, Clayson Monyela, spokesperson for SA’s Department of International Relations and Cooperation (DIRCO), confirmed that ‘if Gaddafi were to travel to SA, law enforcement agencies would be under an obligation to arrest’, 8 July 2011.
- 16 Welcoming remarks by President Jacob Zuma at the meeting of the AU High Level Ad Hoc Committee on Libya, Pretoria, 26 June 2011, available at <http://www.thepresidency.gov.za/pebble.asp?releid=4367>.
- 17 See Uganda’s Museveni criticises West’s action on Libya, *India Report*, 22 March 2011, available at <http://www.indiareport.com/India-usa-uk-news/latest-news/1017629/International/2/20/2>.
- 18 See the most recent 17th AU summit decision on the ICC, para 6, Draft Decision on the implementation of the Assembly decisions on the International Criminal Court, Doc.EX.CL/670(XIX), 30 June – 1 July 2011, Malabo, Equatorial Guinea.
- 19 Telephonic interview with Clayson Monyela, spokesperson for SA’s Department of International Relations and Cooperation (DIRCO) on 8 July 2011.
- 20 Telephonic interview with Clayson Monyela, spokesperson for SA’s Department of International Relations and Cooperation (DIRCO) on 8 July 2011.
- 21 Declaration of the 24th National Congress, ANC Youth League, 20 June 2011, available at <http://www.ancyl.org.za/show.php?id=8037>.
- 22 William Clarke, Zuma Voices Unease on Libyan Intervention, *Think Africa Press*, 5 May 2011, at <http://thinkafricapress.com/south-africa/zuma-voices-unease-libyan-intervention>.
- 23 Libya rejects Gaddafi arrest warrant, *Al Jazeera*, 28 June 2011, available at <http://english.aljazeera.net/news/africa/2011/06/201162853026807580.html>.

- 24 Libya: Warrants send strong message to abusive leaders, *Human Rights Watch*, 27 June 2011.
- 25 Ibid.
- 26 See Excerpts from Libya Contact group Chair's Statement, *Reuters*, 15 July 2011, available at <http://uk.reuters.com/article/2011/07/15/uk-libya-meeting-excerpts-refile-idUKTRE76E3GJ20110715>.
- 27 International court orders Gaddafi's arrest, *Reuters*, 27 June 2011, available at <http://www.reuters.com/article/2011/06/27/us-libya-idUSTRE7270JP20110627>.
- 28 Gaddafi arrest a NATO cover, says Libya, *News24*, 28 June 2011.
- 29 Gaddafi vows to stay out of AU peace talks, *Al Jazeera*, 26 June 2011, available at <http://english.aljazeera.net/news/africa/2011/06/201162615731797543.html>.
- 30 Welcoming remarks by President Jacob Zuma at the meeting of the AU High Level Ad Hoc Committee on Libya, Pretoria, 26 June 2011.
- 31 Ibid.
- 32 Gaddafi vows to stay out of AU peace talks, *Al Jazeera*, 26 June 2011, available at <http://english.aljazeera.net/news/africa/2011/06/201162615731797543.html>.
- 33 Gaddafi arrest a NATO cover, says Libya, *News24*, 28 June 2011.
- 34 See Festus B Aboagye, The AU's policy on Libya isolates it, *ISS Today*, 6 June 2011, available at [http://www.issafrica.org/iss\\_today.php?ID=1292](http://www.issafrica.org/iss_today.php?ID=1292).
- 35 See M du Plessis and A Louw, *Justice and the Libyan crisis: the ICC's role under Security Council Resolution 1970*, Briefing Paper, ISS, 31 May 2011, available at <http://www.issafrica.org/pgcontent.php?UID=30878>.
- 36 On 22 February 2011 the Arab League condemned the use of force against civilians and suspended Libya's participation in the League until Libya meets its demands to immediately stop all violence. On 7 March 2011 the Gulf Cooperation Council issued a statement supporting a no-fly zone, and on 8 March 2011 the Organisation of the Islamic Conference released a statement supporting a no-fly zone over Libya but excluded foreign military operations on the ground. On 12 March 2011 the Arab League issued a statement noting the Libyan authorities' use of military aircraft, mortars and heavy weaponry against civilians and calling on the Security Council to impose a no-fly zone, for more see <http://www.securitycouncilreport.org/site/pp.aspx?c=glKWLMTIsG&b=6739039&printmode=1>. See also Festus B Aboagye, The AU's policy on Libya isolates it, *ISS Today*, 6 June 2011, available at [http://www.issafrica.org/iss\\_today.php?ID=1292](http://www.issafrica.org/iss_today.php?ID=1292); see also Co-chair's statement, Third meeting of the International Contact Group on Libya, Adu Dhabi, 9 June 2011, para 17.
- 37 Hague court issues arrest warrant for Gaddafi, *Reuters*, 27 June 2011, available at <http://www.polity.org.za/article/hague-court-issues-arrest-warrant-for-gaddafi-2011-06-27>.
- 38 Gaddafi won't leave power – or Libya, *News24*, 26 June 2011, available at <http://www.news24.com/Africa/News/Gaddafi-wont-leave-power-or-Libya-20110626>.
- 39 AU peace plan means Gaddafi exit – rebels, *News24*, 2 July 2011, available at <http://www.news24.com/Africa/News/AU-peace-plan-means-Gaddafi-exit-rebels-20110702>.
- 40 Libyan rebels reject AU peace plan, *News24*, 3 July 2011, available at <http://www.news24.com/Africa/News/Libyan-rebels-reject-AU-peace-plan-20110703>.
- 41 Final session of African Union announces that talks on Libya are near, Press release N.13/17th Summit, Directorate of Information and Communication, AU, 1 July 2011, Malabo, Equatorial Guinea.
- 42 Press Statement, AU Peace And Security Council, 285th Meeting, PSC/PR/PS/2.(CCLXXXV), 13 July 2011, Addis Ababa, Ethiopia.
- 43 See Libya: Warrants send strong message to abusive leaders, *Human Rights Watch*, 27 June 2011.
- 44 Ibid.
- 45 Gaddafi vows to stay out of AU peace talks, *Al Jazeera*, 26 June 2011, available at <http://english.aljazeera.net/news/africa/2011/06/201162615731797543.html>.
- 46 Senegal's President, in Libya, Urges Gadhafi to Quit, *VOA News*, 9 June 2011, available at <http://www.voanews.com/english/news/africa/Senegals-President-in-Libya-Urges-Gadhafi-to-Quit--123559949.html>.
- 47 Ibid.
- 48 See Excerpts from Libya Contact group Chair's Statement, *Reuters*, 15 July 2011, available at <http://uk.reuters.com/article/2011/07/15/uk-libya-meeting-excerpts-refile-idUKTRE76E3GJ20110715>.
- 49 Ibid.
- 50 Moreno-Ocampo calls for Gaddafi arrest, *IOL*, 28 June 2011, available at <http://www.iol.co.za/news/africa/moreno-ocampo-calls-for-gaddafi-arrest-1.1090183>.
- 51 Co-chair's statement, Third meeting of the International Contact Group on Libya, Adu Dhabi, 9 June 2011.
- 52 In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters, Department of Public Information, Security Council SC/10187/Rev.1, 26 February 2011.
- 53 Ibid.
- 54 See the most recent 17th AU summit decision on the ICC, para 6, Draft Decision on the implementation of the Assembly decisions on the International Criminal Court, Doc.EX.CL/670(XIX), 30 June – 1 July 2011, Malabo, Equatorial Guinea.
- 55 For more on article 16 of the Rome Statute see D Akande, M du Plessis and C Jalloh, *An African expert study on the AU concerns about article 16 of the Rome Statute of the ICC*, ISS Position Paper, Pretoria, 2010.
- 56 See Chad says it will not execute ICC warrant against Libya's Gaddafi, *Sudan Tribune*, 18 May 2011, available at <http://www.sudantribune.com/Chad-says-it-will-not-execute-ICC,38950>; Zambia says Sudanese president should not fear arrest on its territory, *Sudan Tribune*, 11 December 2010, available at <http://www>.

- sudantribune.com/spip.php?iframe&page=imprimable&id\_article=37241; Kenya pushes back over war crimes suspect's visit, *CNN*, 2 September 2010, available at [http://articles.cnn.com/2010-09-02/world/kenya.bashir.visit\\_1\\_al-bashir-president-bashir-alfred-mutua?\\_s=PM:WORLD](http://articles.cnn.com/2010-09-02/world/kenya.bashir.visit_1_al-bashir-president-bashir-alfred-mutua?_s=PM:WORLD); Namibia: Country Won't Arrest Gaddafi, Al Bashir, AllAfrica.com, 12 July 2011, available at <http://allafrica.com/stories/201107121582.html>.
- 57 See South Africa says it will arrest Sudan's Bashir despite AU resolution, *Sudan Tribune*, 31 July 2010, available at <http://www.sudantribune.com/South-Africa-says-it-will-arrest,35817>; Also, in a telephonic interview, Clayson Monyela, spokesperson for SA's Department of International Relations and Cooperation (DIRCO), confirmed that 'if Gaddafi were to travel to SA, law enforcement agencies would be under an obligation to arrest', 8 July 2011.
- 58 See Botswana breaks ranks over Gaddafi, *News24*, 6 July 2011, available at <http://www.news24.com/Africa/News/Botswana-breaks-ranks-over-Gaddafi-20110706>; Uganda will arrest Bashir, *Human Rights House Network*, 14 July 2009, available at <http://humanrightshouse.org/Articles/11332.html>.