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ICC Involvement on Libya and the Importance of the Court

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In the wake of the events in Libya, the United Nations Security Council adopted Resolution 1970, imposing a list of sanctions on Libyan authorities. Most important among these, perhaps, is the Security Council's decision to refer the situation in Libya to the International Criminal Court (ICC). That step set in motion a process that could eventually lead to arrest, trial, and imprisonment of those involved in the recent crackdown, up to and including Muammar Qaddafi himself.

On March 2, 2011, only four days after the adoption of the resolution, the ICC prosecutor announced that "following a preliminary examination of available evidence" he reached the conclusion "that an investigation is warranted." This speed is unprecedented, as the prosecutor normally spends many months before reaching a decision to actually commence an investigation. Both the Security Council resolution and the swift response by the prosecutor is an indicator of the growing importance of the ICC in international affairs.

The ICC is a court that hears cases about the most serious international crimes. Based in The Hague, the court has operated since 2003 and so far has acted mostly on allegations of crimes in Africa, such as in the Congo and Darfur. The ICC can hear only cases about grave violations and the most serious crimes, including genocide, crimes against humanity, and war crimes. Even then, however, the court is empowered to act only if a national judicial system has failed to investigate or prosecute genuinely.

The ICC is different from the International Court of Justice (ICJ), which, with its predecessor court, has operated for nearly a century. While the ICJ handles legal questions involving states (such as the West Bank security barrier), the ICC is a criminal court that tries individuals. This is one of the material differences of the ICC and the ad hoc international tribunals created largely in the past two decades: they can take custody of individuals, try them, and put them in prison. The idea is that holding individuals accountable (and not just states) is the most effective way to deter serious violations of humanitarian law and human rights.

The ICC was established through the Rome Statute, a multilateral treaty that entered into force in 2002. Some 114 states are parties to the Rome Statute, including all member states of the European Union, most of the countries in South America, and dozens of other states worldwide. A number of major powers – including the United States, Russia, China, and India – are not parties to the treaty. In the Middle East, only Jordan is a party. Objections to the ICC have arisen because of some states' concerns about the potential for politicized prosecutions of their nationals, including their soldiers.

Nonetheless, under some circumstances the ICC can have jurisdiction over a state's nationals even if that state has not signed on to the court. The ICC can have jurisdiction over a matter in one of three ways. First, the alleged crime is one committed by a national of a state that is a party to the Rome Statute or that has otherwise accepted ICC jurisdiction. Second, the ICC has jurisdiction if an alleged crime takes place on the territory of or on a vessel of a Rome Statute state (or of a state otherwise accepting ICC jurisdiction), regardless of the nationality of the accused. This tack is one currently being pursued by the Palestinian Authority, which has argued for "Palestine" to be considered a state, and that acts in that territory are thus within ICC jurisdiction – even though the potential targets of ICC investigation (if they are nationals of Israel) are not from a state that has signed on to the court. Third, the UN Security Council can refer a matter to the ICC's prosecutor. The Council can take this step regardless of who engaged in an act and regardless of where it was committed. So far, this path to ICC jurisdiction has been traveled only twice – once for Darfur and now for Libya.

In 2005, after years of reports of extreme violence in Darfur, the Security Council referred the matter to the ICC prosecutor. In the vote, the United States and China (permanent members and non-parties to the Rome Statute) both abstained. The referral led to an investigation of the violence and an arrest warrant against Sudanese President Omar al-Bashir (heads of state are not immune from ICC prosecution). The issuance of the arrest warrant obligated states that are party to the Rome Statute to hand Bashir over to the ICC if he entered their territory. Despite that obligation, Bashir has traveled to Chad and Kenya (both states parties) without being taken into custody. The Security Council resolution that referred the matter also "urge[d] all States [i.e., even those not party to the Rome Statute]...to cooperate fully [with the court]," but Bashir has traveled to Ethiopia, Eritrea, and a number of Arab states (including Libya) without incident.

The story of Bashir shows the limits of the ICC's reach. Still, Bashir has canceled a number of international trips for fear of arrest. Also, a number of defendants from Congo and the Central African Republic are in custody in The Hague, and some trials are underway. In other words, the ICC is indeed operating.

Interestingly, the United States not only supported the referring the Libyan situation to the ICC but even helped circulate a draft resolution with the idea, although it is not a party to

the Rome Statute and it abstained in the referral of the Darfur violence. US enthusiasm for this referral could be seen as a step toward greater US support for the court.

As in the case of Darfur, the investigation regarding Libya might lead to arrest warrants targeting not only Col. Qaddafi and his family but also officers, soldiers, paramilitaries, or mercenaries engaged in criminal acts. If the court succeeds in taking suspects into custody, the process could then continue toward trials or sentencing.

Even if the process does not go that far, ICC involvement could still affect events significantly. ICC action is now a card in the hands of opponents of the Qaddafi regime. In any negotiations with Qaddafi, his opponents could use the stick of ICC prosecution (and the carrot of the Security Council's suspending ICC action for renewable twelve month periods) as an incentive for Qaddafi to stand down. If Qaddafi decides to leave Libya with ICC action ongoing, then he might need to opt for countries like Nicaragua or Cuba that are not party to the Rome Statute, rather than a Rome Statute state like Venezuela. If violence continues, the threat of ICC prosecution also could motivate those working or fighting for Qaddafi to refuse orders.

Whether or not Qaddafi is ultimately seen handcuffed in The Hague, the events of the past week demonstrate how the ICC is becoming an important factor in international affairs, and its influence may increase further in the years to come.