On the Authority of the International Criminal Court to Issue a Warrant of Arrest Against Muammar Gaddafi

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The Pre-Trial Chamber of the International Criminal Court (ICC) authorised warrants of arrest for the capture of Colonel Muammar Gaddafi, his son Saif al-Islam, and Libyan intelligence chief Abdullah al-Senussi on June 27, 2011. The matter had been referred to the ICC by the United Nations Security Council (UNSC) for investigation and action. For the African Union (AU), these arrest warrants are of major concern, especially in respect of Gaddafi, as the AU has repeatedly stated that only political solutions and an ‘inclusive’ process can bring peace to Libya, and it is alleged that the ICC’s interventions would not allow this. The position of the AU is somewhat problematic, as 32 of its members are also signatories of the Rome Statute and therefore members of the ICC. In essence, the AU has therefore demanded of its members not to comply with their international law obligations. Of further concern is the fact that the South African government strongly supports the position of the AU on Libya, although the reasons for this position are not clear. In this contribution the position of the AU and South Africa is critically analysed in order to illustrate the misguided nature of the accusations that the ICC is acting under the influence of Western dictates. Although the issue of UNSC Resolutions 1970 and 1973 and the North Atlantic Treaty Organization (NATO) interventions have no doubt influenced the decisions of the AU, it is further argued that the two matters should be dealt with separately, as the ICC is an independent international institution that is carrying out its obligations in terms of the provisions of the Rome Statute, either at the request of conflict-affected member states, or referrals from the UNSC, on which South Africa is serving a second term as a non-permanent member.

Introduction

On Monday, 22 August 2011, the world awakened to news that the Libyan rebels had taken most of Tripoli and had gained control of the economy. Throughout the day there were media updates announcing the arrest of three of Gaddafi’s sons, and other rebel victories. As the day progressed,
and it appeared as if Muammar Gaddafi’s regime was on its last legs, speculation arose about what the future held for Gaddafi and for Libya. However, the next day, news agencies were publishing the news that Gaddafi’s sons were not in captivity, and that ‘Brother Leader’ was still safely ensconced in his bunker, with no intention of leaving Tripoli. Later, as support was expressed around the globe for the National Transitional Council (NTC) by, amongst others, Barack Obama, rumour had it that Gaddafi had indeed fled his compound in the capital, and speculation grew over where he would be offered and/or granted asylum.2

Set against this background, this contribution does not attempt to address in detail the (ongoing) revolution in Libya, or the many political complexities of the liberation of Libya, but rather aims at focusing on, and critically analysing, the authority of the International Criminal Court (ICC) to issue a warrant of arrest against Gaddafi. On 28 February 2011, Luis Moreno-Ocampo, the ICC Prosecutor, announced that ‘there will be no impunity in Libya’ as an investigation was launched on crimes against humanity committed by Libyan security forces and/or the rebels during the Libyan revolution.3 In May 2011 three investigators travelled to Libyan Arab Jamahiriya (Libya), where they met with members of both sides of the conflict, as well as human rights groups, medical professionals, and families of detained persons. The final report was based on interviews with 350 people in government-held and rebel-held areas of the country, as well as in refugee camps outside Libyan borders. In mid-May the Prosecutor released a statement concluding that ‘crimes against humanity and war crimes have been committed by the government forces of Libya’.4 The report also raised concerns about alleged torture and cruel treatment of migrant workers by the rebels.5

If it is established, as it is argued below, that the ICC warrant is binding only on member states, speculation about where Gaddafi would be granted asylum would raise questions about whether the state offering him exile is a signatory to the Rome Statute or not. In this respect, pundits have mentioned a number of possible options open to Gaddafi, including Angola, Zimbabwe, Venezuela, Cuba, Russia, China, and more recently, Guinea Bissau. As none of these countries are members of the ICC, none would be under an obligation to extradite Gaddafi to The Hague for prosecution.

However, despite its being a signatory of the Rome Statute and a member of the ICC, South Africa has also been mentioned as a possible asylum host, owing to close historical relations with Gaddafi during the liberation struggle, and extensive financial and political investments in Sub-Saharan Africa.6 President Jacob Zuma himself has expressed ‘extreme disappointment’ at the ICC’s decision.7 South Africa’s Department of International Relations and Cooperation (DIRCO), however, denied the fact that South Africa was considering offering refuge to Gaddafi. Nevertheless, the Zuma government has continued to extend offers to assist with peaceful transitional negotiations in Libya, which is in line with the approach of the African Union (AU) to find political solutions that are suitable to Africa.8 South Africa thus has had no intention of offering asylum to Gaddafi, but has stood in solidarity with a call from the African Union (AU) for African leaders to reject the authority of the ICC in this matter.9 President Zuma’s unyielding stance on Libya has not enhanced South Africa’s reputation for diplomacy.

The main question explored below is therefore whether South Africa, together with other African members of the court, is entitled under international law to reject the authority of a warrant for the arrest of Colonel Muammar Gaddafi, and what the consequences of such an ambiguous or selective position would be.

**The African Resistance**

On 1 July 2011 the AU released a statement that African nations would not execute an ICC arrest warrant issued for Libyan leader Muammar Gaddafi and two members of his government.10 The argument raised was that such a legalistic approach prevented the possibility of a ‘political solution’ to the conflict in Libya that would attempt to find a balance between impunity and reconciliation. The AU then called upon the UNSC to intervene ‘in the interests of peace and security’.11 Since the request to investigate the situation had emanated (unanimously) from the UNSC, further intervention would not have been proper, and the ICC has refused to withdraw the warrant.

This is the second warrant of arrest issued by the ICC in respect of an African leader still in office. In 2009 a warrant was issued for Sudanese President Omar al-Bashir on charges of genocide, war crimes and crimes against humanity committed by Sudanese forces in Darfur.12 Despite the duty on member states of the ICC to assist with the execution of the ICC warrant of arrest, al-Bashir travelled relatively freely within Africa, even attending the 2009 presidential inauguration...
in Kenya.\textsuperscript{13} When President Zuma was to be inaugurated in May 2009, an invitation was sent to al-Bashir to attend. At the same time the Sudanese ambassador in Pretoria was warned that if his president did accept the invitation and came to South Africa, he would be arrested and handed over to the ICC.\textsuperscript{14} This was South Africa’s duty and obligation as a state party to the Rome Statute.

Before returning to a more detailed discussion of the authority of the court, it is important to provide a brief illustration of South Africa’s evolving relationship with international law. Prior to 1994, the National Party (NP) government was suspicious of international law and there was no constitutional recognition of such law, as it would – and did – place into question the legitimacy of the apartheid legal order. However, with the dawning of democracy came a new attitude towards international law, and its legitimacy was recognised in the Constitution of the Republic of South Africa (Act 108 of 1996). The new democratic ANC government did not see such law as a threat, but rather as one of the pillars of democracy. Consequently, in the Constitution, section 231 deals with the ratification of international agreements; s 232 provides that international customary law is part of, but subordinate to, domestic law; and s 233 provides for an interpretation of domestic law that is consistent with principles of legislated international law.

Currently, however, when it comes to international relations, there appears to be an increasing tension between the government’s constitutional commitment to international law and South Africa’s commitment to further the African agenda as determined by the AU. This tension is, \textit{inter alia}, reflected in South Africa’s ambivalent attitude to UNSC Resolutions 1970 and 1973; the decision to oppose the Gaddafi arrest warrant; and the refusal to recognise the National Transition Council (NTC) in Libya as the new interim government.\textsuperscript{15}

South Africa, as a member of the AU, has once again expressed concern over the fact that the ICC seems to be ‘targeting the continent’ and ignoring crimes committed in other conflict-affected countries such as Afghanistan and Gaza. (However, investigations of similar charges are in fact in progress on situations in Afghanistan, Palestine, Georgia, Korea, Colombia and Honduras, among others.) Paragraph 16 of the AU statement \textit{African Union calls for an end to bombing and a political, not military solution in Libya}, submitted to the UNSC on 15 June 2011 – strongly supported by President Zuma – reads as follows:

‘The story that the rebels cannot engage in dialogue unless Gadaffi goes away does not convince us. If they do not want dialogue, then, let them fight their war with Gadaffi without NATO bombing. Then, eventually, a \textit{modus vivendi} will emerge between the two parties or one of them will be defeated. The attitude of the rebels shows us the danger of external involvement in internal affairs of African countries.’\textsuperscript{16}

The ICC Prosecutor, Luis Moreno-Ocampo, has been severely criticised for bias against Africa and its leaders, and his objectivity has been openly questioned by the AU, especially in respect of the arrest warrant issued against the Sudanese President, Al-Bashir. This is despite the fact that Ocampo has a solid reputation for prosecuting members of the right-wing military juntas in his native Argentina.\textsuperscript{17}

The problem with this approach by the AU is that it is based upon a fundamental misunderstanding of the ICC and its place within international law. The ICC, an international institution independent of the UN, is a product of the ad-hoc tribunals which were set up to deal with grievous human rights abuses around the globe after the atrocities of World War II. There were situations where human rights and humanitarian abuses were so terrible that the principle of non-interference (state sovereignty) – which has been the bedrock of international law for the past two hundred years – had to be set aside for the sake of protecting humanity. The first courts of this nature were the Nuremberg and Tokyo War Crimes Tribunals that were set up to prosecute Nazi and Japanese war criminals.\textsuperscript{18} It was fifty years before another court, the International Criminal Tribunal for the former Yugoslavia (ICTY), was created, when the international community decided that the people responsible for the atrocities in Bosnia Herzegovina should not escape with impunity.\textsuperscript{19} Impunity was highly likely, as the Yugoslavian domestic legal system had broken down and the courts would not be in a position to deal with the massacres and extensive human rights abuses that had taken place. Subsequent to this, the UN set up special tribunals for Rwanda (International Criminal Tribunal for Rwanda (ICTR)) and Sierra Leone (Special Court for Sierra Leone (SCSL)), when it became clear that their domestic courts could not deal with the matters.

Consensus eventually developed within the international community that rather than setting up an ad-hoc tribunal for each situation, it should
establish a permanent international court that would be equipped to deal speedily with situations as they arose. The result was the ICC, with its seat in The Hague, Netherlands.

**The Authority of the Court**

In terms of international custom, all states are under an obligation to investigate and, where enough admissible evidence is gathered, prosecute genocide, crimes against humanity and war crimes, as well as other crimes under international law such as torture, extrajudicial executions and enforced disappearances. Should a state refuse or fail to investigate such crimes, or should the likelihood of a fair trial be minimal, the matter may then be referred to the ICC for investigation and prosecution, which has a complementary and subsidiary jurisdiction vis-à-vis domestic courts. In July 1998, 120 members of the UN adopted the Rome Statute which constituted the ICC. On 1 July 2002 the ICC came into effect. So far 117 states have ratified the Rome Statute, with Tunisia becoming a new state party in September 2011. Of the members, 32 members are African states, 15 are Asian, 18 from Eastern Europe, 26 from Latin America and the Caribbean, and 25 are from Western European and other states. The map below provides an illustration of ICC membership.

The Preamble to the Rome Statute notes that in the twentieth century millions of men, women and children were victims of 'unimaginable atrocities that deeply shook the conscience of humanity' and that such crimes 'threaten the peace, security and well-being of the world'. It then goes on to refer to the need to take measures, through international cooperation, to 'put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'. The powerful would be held accountable for their crimes and victims would see justice being done.

These aims were summed up by the then Secretary-General of the UN, Kofi Annan, as follows:

‘In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only
then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.”

Beyond merely punishing the guilty, Article 75 of the Rome Statute also recognises effective remedies for victims of international crimes. Such reparations may take the form of restitution, compensation and rehabilitation. The Rome Statute has normatively shifted the paradigm of the international criminal justice system:

1. The ICC entails a comprehensive concept of international peace and security, which seeks to punish the perpetrators of serious international crimes.
2. The Court establishes reparations in the concept of international criminal justice.
3. It recognises and codifies the role of victims qua victims as parties to the international criminal proceedings with certain rights by establishing the possibility to participate at all stages of proceedings.

As an international institution, the court follows agreed-upon procedures when investigating cases that are referred to it. In the case of Gaddafi, the UNSC unanimously referred the case to the Prosecutor, who then referred the matter to the Pre-Trial Chamber of the ICC after investigations were conducted, and the chamber approved the issuing of the warrants of arrest. Cases are defined as ‘specific incidents during which one or more crimes within the jurisdiction of the Court appear to have been committed by one or more identified suspects’ and entail ‘proceedings that take place after the issuance of a warrant of arrest or a summons to appear.’

The following cases are currently before the Court:

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<th>Situation in the Democratic Republic of Congo (DRC)</th>
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<td>ICC-01/04-01/06 The Prosecutor v. Thomas Lubanga Dyilo</td>
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<td>ICC-01/05-01/08 The Prosecutor v. Jean-Pierre Bemba Gombo</td>
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<th>Situation in Uganda</th>
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<td>ICC-02/04-01/05 The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen</td>
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<th>Situation in Darfur, Sudan</th>
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<td>ICC-02/05-01/07 The Prosecutor v. Ahmad Muhammad Harun (&quot;Ahmad Harun&quot;) and Ali Muhammad Ali Abd-Al-Rahman (&quot;Ali Kushayb&quot;)</td>
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<td>Warrant of Arrest The Prosecutor v. Omar Hassan Ahmad Al-Bashir</td>
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<td>ICC-02/05-02/09 The Prosecutor v. Bahar Idriss Abu Garda</td>
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<td>ICC-01/09-02/11 The Prosecutor v. Francis Kirimr Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali</td>
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As a result of the fact that the ICC has been focusing on African atrocities, the AU has stated, in the name of ‘African solidarity’, that its own member states will not cooperate with the ICC. On 27 June 2011, Libya’s justice minister stated that Libya did not accept the ICC’s decision to call for Colonel Gaddafi’s arrest, claiming that the court was ‘a tool of the Western world to prosecute leaders in the third world’.27 This is despite the fact that 32 African states have ratified the Rome Statute and that the court is independent and mostly funded by member states. In addition, and probably most telling, the United States (US) – usually illustrative of the ‘West’ generally – has not ratified the Rome State, and therefore is not an influential member of the court.

Although it is indeed true that the ICC has dealt only with African matters, this may not be illustrative of the full story; in that five of the situations referred to the ICC were referred by the states themselves (Uganda, DRC, CAR, Darfur, Kenya). This is most probably because the key role of the ICC is to intervene only when the domestic courts are not in a position to deal with the matter. Article 17 of the Rome Statute deals with admissibility of cases and states that the court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

For instance, the ICC took no steps to exercise jurisdiction over Saddam Hussein because Iraq was not a signatory state; the UNSC had not referred the matter to the ICC; and the Iraqi courts were in a position to exercise their original jurisdiction over the matter. So despite the severe criticism levelled at the ICC by the AU, in most cases where the court has taken steps it has been at the request of the African state involved, in order to lift the burden from the domestic courts, which in most circumstances are unable to function as they should after extended conflicts. The ICC is thus a court of ‘last resort’ in terms of Article 17 of the Rome Statute.

AU responses in opposition to the Gaddafi arrest warrant do not make it clear whether its challenges to the authority of the court are based upon international law or ideology, or both. The ICC, it is alleged, lacks the authority to intervene in ‘Africa affairs’. The questions that need to be asked in the light of this refusal to cooperate with the court are, in terms of legal authority: whether there have been breach/es of international law; whether the breach/es constitute war crimes or crimes against humanity; and, most importantly, whether the ICC has jurisdiction over the matter. In laypersons’ terms jurisdiction refers to legal authority in terms of the principles of ius in bello (‘laws of war’).

As mentioned, Gaddafi and the AU have rejected the authority of the ICC to issue a warrant of arrest against the Libyan leader, so the question remains as to whether the ICC in fact has legal jurisdiction to hear the matter. Article 5 of the Rome Statute of the ICC provides that:

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.28

Once it has been established that international crimes have been committed in terms of the abovementioned provision, the next test is whether the crimes were committed after the adoption of the Rome Statute (temporal jurisdiction in terms of Article 11), as the law should never apply retrospectively. This is unless that state has made a declaration under article 12(3) of the Rome Statute, which provides that:

‘If a State [which] is not a Party to the Rome Statute, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception.’

On 22 January 2009, the Palestinian National Authority (PNA) made a declaration accepting the court’s jurisdiction in terms of the wording of Article 12(3) but, since the Palestinian territories are not recognised as a sovereign state, it is
unclear whether the Palestinian Authority had the authority to make such a declaration.29 Palestinian organisations have also requested South Africa to settle the docket, which calls on South African authorities to use the provisions of the International Criminal Court Act 27 of 2002 (hereinafter the ‘ICC Act’) to prosecute both Israeli officials and South Africans identified as having been implicated in war crimes during Operation Cast Lead.

Parliament has incorporated and operationalised South Africa’s commitment to criminal justice in the implementation of the ICC Act. This legislation allows local courts and the police service to co-operate with the ICC in apprehending suspects indicted by the ICC; and to ensure that South Africa fulfils its domestic treaty obligations to investigate individuals, such as those named in the ‘Gaza docket’.30

Furthermore, Article 13 provides that the ICC may exercise jurisdiction if:

- A State Party refers the matter to the Prosecutor in accordance with Article 14;
- The UNSC refers the matter to the Prosecutor under Chapter VII of the Charter of the UN; or
- The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

This complex process allows the Court to exercise jurisdiction only under the following limited circumstances:

- where the person accused of committing a crime is a national of a state party (or where the person’s state has accepted the jurisdiction of the Court);
- where the alleged crime was committed on the territory of a state party (or where the state on whose territory the crime was committed has accepted the jurisdiction of the Court); or
- where a situation is referred to the Court by the UN Security Council under Chapter VII of the UN Charter (Article 13(b)).

In terms of this framework, the following observations can be made in respect of the case of Gaddafi:

1. Libya is not a signatory to the Rome Statute and has not issued nor lodged a declaration of acceptance of jurisdiction in terms of Article 12(3). The ICC therefore lacks temporal and territorial jurisdiction.

2. The Libyan case was referred to the ICC by a unanimous decision of the UNSC in terms of Resolution 1970.

3. The Prosecutor launched an investigation in terms of this referral and it was established that sufficient evidence exists to arrest Gaddafi for committing crimes against humanity.

4. A warrant was issued by the Pre-Trial Chamber for the arrest of Gaddafi and two others.

5. Therefore, should Gaddafi travel to a state which is a signatory and member of the ICC, an obligation exists for that state to arrest him and hand him over to The Hague for prosecution.

In authorising the arrest warrant, the Pre-Trial Chamber of the ICC ‘considers that there are reasonable grounds to believe that, under article 25(5)(a) of the Rome Statute, Muammar Gaddafi and Saif Al-Islam Gaddafi are criminally responsible as indirect co-perpetrators and Abdullah Al-Senussi is criminally responsible as indirect perpetrator, for two counts of crimes against humanity; namely:

- Murder, within the meaning of Article 7(1)(a) of the Statute; and
- Persecution, within the meaning of Article 7(1) (b) of the Statute.’21

Based upon this evidence Moreno-Ocampo, the chief Prosecutor, issued the three warrants of arrest, including that for Gaddafi. Perhaps, however, the timing of the warrant, issued on 27 June 2011, one hundred days after NATO began its air strikes, and a day after the AU adopted a ‘roadmap to peace’, was particularly unfortunate.22 The geopolitics of both UNSC Resolutions 1970 and 1973 had been challenged, and South Africa has expressed concern over the fact that the no-fly zone had led to aggressive regime change efforts by the members of NATO.

The UNSC resolutions play a crucial factor in the lead-up to the issuance of the warrant. On 26 February 2011 the UNSC adopted Resolution 1970 to take proactive measures in respect of the internal conflict in Libya.23 The UNSC determined under Article 39 of the UN Charter that international peace and security were being threatened by the internal conflict in Libya, and referred the matter to the ICC for investigation. As the Libyan conflict escalated, the UNSC then passed the controversial Resolution 1973 on 17 March 2011.24 The latter resolution formed the legal basis for military intervention in the Libyan civil war, demanding ‘an immediate ceasefire’ and authorising the international community to establish a no-fly zone and to use all means necessary to protect civilians, short of foreign occupation and regime change [my emphasis].
On 18 March, Muammar Gaddafi’s government announced that they would comply with the resolution and implement a ceasefire. However, Libyan government forces continued to attack Misrata and Ajdabiya.35

Military intervention in Libya began on 19 March 2011, as French fighter jets destroyed several pro-Gaddafi vehicles advancing on the rebel stronghold of Benghazi. US and British submarines then fired over 110 Tomahawk cruise missiles at targets throughout Libya, severely disabling the regime’s air defence capability and allowing a wider enforcement of the no-fly zone.36 On 31 March, NATO assumed command of the no-fly zone. On Monday 27 June, the one hundredth day of the NATO intervention, Judge Sanji Mmasenono Monageng, who has served as a judge on the courts of Botswana, Swaziland and Gambia, issued warrants of arrest on behalf of the three-judge panel in the Pre-Trial Chamber of the ICC.37 The judge held that the evidence submitted by Prosecutor Ocampo was enough to establish ‘reasonable grounds to believe’ that Gaddafi had persecuted civilians, or committed ‘crimes against humanity’, and that he should be arrested and brought before the court.38

As mentioned, Gaddafi has dismissed the warrant of arrest, rejecting the authority of the ICC as an instrument of the West. In addition, President Jacob Zuma has severely criticised NATO military intervention; expressed regret at supporting UNSC resolution and implement a ceasefire. However, in a statement released on 14 September the AU High-Level Ad-Hoc Committee on Libya (chaired by Zuma) made a concession by calling for a ceasefire and stating in paragraph 8:

“To that end, the ad-hoc Committee committed itself to working with the NTC and all other Libyan stakeholders towards the goal of the early establishment of an all-inclusive national unity government, and encouraged the [AU] Commission to do the same.”39

This shift was inevitable, as by 6 September 2011, 60 countries worldwide had recognised the authority of the NTC, 18 of which were members of the AU which had individually recognised the new government in Libya.40 Leading up to the AU ad-hoc meeting in South Africa, more African leaders had ‘broken rank’ with the AU’s stance on Libya.

Postscript: A Call for Accountability

The situation in Libya remains, at the time of writing, unresolved, with the NTC attempting to begin anew and Gaddafi still at large, most probably still in Libya. He has called upon his supporters to resist the creation of a new government, and the ICC has clearly stated that it will not withdraw the warrants of arrest. In addition, the AU has not deviated from its position that Gaddafi should be dealt with by his own people as part of the process of developing an ‘all-inclusive’ Libyan government. In the most recent developments, the AU announced its support of the NTC on 19 September, and the following day the United Nations agreed on the recognition of a new Libyan government. At this meeting President Zuma stated that South Africa has decided to recognise the NTC as Libya is now ‘on the path to ending the conflict’. No other comments have been forthcoming.41

South Africa’s stance of solidarity with the AU in the matter of the Gaddafi warrant of arrest is an infringement of its international obligations as reflected in the ICC Act of 2002. The preamble to the Act states that:

[The Republic of South Africa, with its own history of atrocities, has, since 1991, become an integral and accepted member of the community of nations; the Republic of South Africa is committed to:
● bringing persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute: and
● carrying out its other obligations in terms of the said Statute.

As the debate rages on, Richard Dicker, the director of Human Rights Watch’s international
justice program, has argued that any political deal allowing Gaddafi to avoid prosecution before the ICC would compromise peace, and deny Libyan victims of crimes against humanity the possibility of redress and reparations. Dicker states that:

‘... governments involved in peace-brokering should bear in mind that the prosecution of people who are wanted for grave crimes should not be bargained away. Indeed, any political solution that avoids meaningful justice will undercut prospects for a long-lasting peace.’

Antoinette Louw, the former Head of the Crime and Justice Programme at the Institute for Security Studies (ISS) and currently a Senior Research Fellow for the International Crime in Africa Programme, also notes in a July 2011 situation report that ‘[t]his 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.’

Louw argues that rather than further weakening the ICC ‘in what looks like the defence of another dictator’, African ICC members – including South Africa – should fulfill their international, regional, and national legal obligations.

In fact, South Africa, as part of the ‘Africa agenda’, may choose to remain faithful to the AU roadmap, but in terms of international law, neither South Africa nor the other 31 African member states of the ICC have the discretion to ignore the warrants issued by the Pre-Trial Chamber, and may therefore not allow Gaddafi transit privileges, nor offer him asylum.

Max du Plessis, an associate professor at the University of KwaZulu-Natal and Senior Research Associate at the International Crimes in Africa Programme of the Institute for Security Studies, points out that the ICC takes seriously the words of Justice Robert Jackson, Chief Prosecutor at Nuremberg, who famously said that letting major war criminals live undisturbed to write their ‘memoirs’ in peace ‘would mock the dead and make cynics of the living.’ Through a commitment to accountability and justice that would take into account the sovereignty of the people of Africa, and no longer allow leaders to escape without justice being seen to be done.

Some African countries, such as Guinea Bissau, may offer Gaddafi asylum with ‘open arms’, and traditional leaders who declared the Colonel the African ‘King of Kings’ in 2008 may open doors for him, but it would not be advisable for South Africa to take the political, economic and diplomatic risks that would be involved in supporting Gaddafi as a refugee from the justice of the ICC. South Africa cannot afford to further alienate foreign investors when unemployment is so high. In addition, the progressive ICC Act places a legal obligation on South Africa to play a leading role on the continent in upholding the rule of law and principles of criminal justice as reflected in the Rome Statute. In fact, South Africa’s consistent support of the AU is in direct contravention of its constitutional and national legal obligations to uphold and protect the principles of international human rights and humanitarian law.

However, South African foreign policy in this matter so far has not paved the way for healthy diplomatic and trade relations with Libya in future, and one can only guess as to what will happen with Gaddafi’s numerous investments in Sub-Saharan Africa. In addition, South Africa’s ambiguous stance in continuing to support the AU’s position on Libya has tarnished its reputation as a defender and protector of human rights locally and globally. It would be most unfortunate if South Africa were to lose this part of its legacy, and its gift to the world.

References
5 Ibid.
6 Libya: Gaddafi vs NTC in sub-Saharan Africa, 8 September 2011. Available at: http://www.theafricareport.com/archives2/
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11 See 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.


23 Ibid., pp. 8-9.


25 Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, op. cit.


28 The crime of aggression has not yet been defined in the statute.


31 Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, op. cit.


37 Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, op. cit.

38 Ibid.


40 Ibid.


Ibid.
