

Briefing Paper

Justice and the Libyan crisis: the ICC's role under Security Council Resolution 1970



Max du Plessis and Antoinette Louw
Pretoria, 31 May 2011



As a leading African human security research institution, the Institute for Security Studies (ISS) works towards a stable and peaceful Africa characterised by sustainable development, human rights, the rule of law, democracy, collaborative security and gender mainstreaming. The ISS realises this vision by:

- Undertaking applied research, training and capacity building
- Working collaboratively with others
- Facilitating and supporting policy formulation
- Monitoring trends and policy implementation
- Collecting, interpreting and disseminating information
- Networking on national, regional and international levels

© 2011, Institute for Security Studies

Copyright in the volume as a whole is vested in the Institute for Security Studies, and no part may be reproduced in whole or in part without the express permission, in writing, of both the authors and the publishers.

The opinions expressed do not necessarily reflect those of the Institute, its trustees, members of the Council or donors. Authors contribute to ISS publications in their personal capacity.

ISBN 978-1-920422-53-0

First published by the Institute for Security Studies,
P O Box 1787, Brooklyn Square 0075
Pretoria, South Africa

www.issafrica.org

Cover photograph

Moammar Gaddafi's portrait is seen behind the window as people from several African countries are reflected gathering at Gaddafi's Bab al-Aziziya compound in Tripoli, Libya, on Monday, May 30, 2011. (AP Photo/Ivan Sekretarev)

Production Image Design + 27 11 469 3029

Printing Remata iNathi

Briefing Paper

**Justice and the Libyan
crisis: the ICC's role
under Security Council
Resolution 1970**

Max du Plessis and Antoinette Louw
Pretoria, 31 May 2011

Contents

Introduction	1
Security Council Resolution 1970 in focus	1
Prospects going forward	2
Africa – again and again	3
The African court involves itself	4
From 1970 to 1973: the importance of keeping the baby in the bathwater	4
Conclusion	7
About the authors	7
Notes	7

INTRODUCTION

On the evening of Saturday 26 February 2011 the United Nations (UN) Security Council unanimously passed Resolution 1970 (2011) referring the situation in Libya to the International Criminal Court (ICC). The resolution was part of a robust set of Security Council measures directed at the Libyan regime, including a travel ban and asset freezes for Libyan leader Muammar Gaddafi and his associates, and an arms embargo. It was the first concrete action by the Security Council in respect of the events that began several weeks earlier, as increasing reports of attacks on civilians in Libya confirmed the lengths to which Gaddafi would go to cling to power.

Intervention by the international community at this stage was largely welcomed across the globe and among Libyans on the receiving end of Gaddafi's offensive. Less than three months later, and in the wake of a second Security Council resolution authorising a no-fly zone and the use of 'all means necessary' short of foreign occupation to protect civilians in Libya (Resolution 1973), much has changed.

The role of international military forces in ending the bloodshed is now being questioned and criticised in Africa, at the African Union (AU), and beyond. While the focus of this condemnation is on the nature and impact of military operations underway in Libya, there is a real chance that the justice leg of the Security Council's intervention will be tarred with the same brush. For African leaders – most of whom are already reluctant to support the ICC – a rejection of international interventions in Libya more broadly can all too easily be extended to the ICC's work in that country. Given the potential that the ICC has in this case to prevent future atrocities by acting quickly and decisively, a lack of cooperation from African states would be regrettable for the thousands of victims of crimes against humanity and war crimes in Libya.

SECURITY COUNCIL RESOLUTION 1970 IN FOCUS

Resolution 1970 represents only the second time that the Security Council has used its discretion under the ICC's Rome Statute to refer a matter to the court for possible prosecution. The first referral, under Resolution 1593 (2005), was made in respect of the situation in Sudan's Darfur region, which led to arrest warrants being issued for, among others, Sudanese president Omar al-Bashir for war crimes, crimes against humanity and genocide. (Al-Bashir remains at large.)

The vote for Resolution 1970 followed increasing reports of 'gross and systematic human rights violations

committed in Libya, including indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, [and] detention and torture of peaceful demonstrators.¹ The Security Council was also mindful of expressions of concern and condemnation of the Gaddafi regime from high-profile regional and global bodies, several of which called for some type of international intervention.

A statement was released on 21 February by the European Union Foreign Affairs Council, and on 22 February by both the secretary general of the Organisation of the Islamic Conference,² and the Council of the League of Arab States.³ That same day, UN High Commissioner for Human Rights, Navi Pillay, called for an international investigation into Libya's attacks on anti-government protesters, saying they may amount to crimes against humanity.⁴ On 23 February the AU issued its first public statements on the issue. AU Commission chairperson, Jean Ping, condemned the 'disproportionate use of force against civilians' and together with the AU's Peace and Security Council (PSC) appealed for an immediate end to the violence. The PSC also decided to urgently send a mission to Libya to assess the situation.⁵

On 25 February, the UN's Human Rights Council – in a meeting that marked the first time that a council member was the subject of a special session¹⁶ – expressed its strong condemnation of the attacks on civilians and rejected 'the incitement to hostility and violence ... made from the highest level of the Libyan government'.⁷ The Human Rights Council also resolved to appoint an international independent commission of inquiry to investigate 'all alleged violations of international human rights law in Libya' in order to ensure that 'those individuals responsible are held accountable'.⁸

During this time the voices of Libyan civilians were seldom heard given the regime's targeting of journalists as well as the blocking of public access to the internet and telecommunication networks.⁹ Nevertheless, on 21 February, Ibrahim Dabbashi, the then deputy permanent representative at the Libyan mission to the UN, held a press conference at which he distanced himself from Gaddafi's government and reported that mercenaries were being used to suppress peaceful demonstrations in Libya:

Gaddafi's regime has already started the genocide against the Libyan people since January 15. His soldiers and the mercenaries being flown into the country were ordered to shoot to kill.

Dabbashi, surrounded by a dozen Libyan diplomats from the mission in New York, then spelled out several demands, including among others, the following:

We are calling on the UN to impose a no-fly zone on all Tripoli to cut off all supplies of arms and mercenaries to the regime. ... We call on the UN Security Council to use the principle of the right to protect to take the necessary action to protect the Libyan people against the genocide. ... We call on all countries in the world not to permit Gaddafi to escape to their territories and call on them to watch carefully for any amounts of money which may be flowing outside Libya. ... We also call on the prosecutor of the International Criminal Court to start immediately investigating the crimes committed by Gaddafi. ... We are calling on the Human Rights Council in Geneva to meet in an emergency session to study the situation in Libya and find a way to protect the Libyan people from the crimes against humanity and crimes of war.¹⁰

The diplomat's views were likely supported by several colleagues, as reports filtered in that Libyan envoys posted to Australia, Bangladesh, France, India, the US, the UN in New York and Geneva, and the Arab League resigned from their positions in opposition to the Gaddafi regime's actions.¹¹

While there was some support for international action in Libya, up until the Security Council vote on 26 February it was not clear whether China and Russia (states openly hostile to the ICC) would allow the resolution to pass. In the end the decision was adopted unanimously. Of equal significance is that the three African members of the Security Council – Gabon, Nigeria and South Africa – supported the referral, notwithstanding ongoing tensions between African states and the ICC over the court's Darfur and Kenyan investigations.

Notably, Resolution 1970 made explicit reference to article 16 of the Rome Statute, which allows the Security Council to defer an investigation by the ICC in order to maintain international peace and security. This was included as a result of concerns raised by some states that the referral might become an obstacle to future peace efforts in Libya.

For international criminal lawyers, Resolution 1970 is interesting in a number of other respects.

First, as far as the subject-matter jurisdiction is concerned the resolution's preamble states that 'the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity'. However, the Security Council's reference is by no means binding on the ICC, and the court's prosecutor has the duty to investigate, formulate and prove any charges relating to the ongoing violence. This includes the crucial element of the attacks' widespread and systematic nature – the distinguishing feature of crimes against humanity.

Further, the referral is not limited to crimes against humanity and individuals could potentially be charged with other crimes under the Rome Statute such as war crimes (and possibly even genocide). In a statement on 16 May the prosecutor confirmed that indeed arrest warrants are being sought for suspects accused of committing crimes against humanity and war crimes. In order for war crimes to be alleged, the situation in Libya must amount to an internal armed conflict, which the Rome Statute defines as a situation of 'protracted armed conflict between governmental authorities and organised armed groups or between such groups'. According to the Rome Statute, this excludes 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'. Again, although Resolution 1970 suggests that the situation in Libya does amount to an armed conflict when it urges the Libyan authorities to respect international humanitarian law (the law that relates to war crimes), the ICC will have to make its own determination in this regard.

Second, as far as the persons potentially falling within the ICC's jurisdiction are concerned, the resolution contains a controversial provision excluding 'nationals, current or former officials or personnel' of states other than Libya from the court's jurisdiction in respect of 'alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorised by the Council'. Such persons might only be prosecuted if their home states waive their jurisdiction.

This proviso, which would apply to any members of an international peacekeeping operation authorised by the Security Council, was included at the insistence of the United States, as a pre-condition to allowing the resolution to pass. Contrary to media reports, however, the proviso does not place the alleged mercenaries in Libya outside the ICC's jurisdiction since they are obviously not acting with the authority of the Security Council. Further, even though the resolution refers to attacks 'against civilians', suggesting it is only the conduct of the state and its proxies that will be investigated, there is nothing stopping the ICC from investigating atrocities committed by anti-government forces.

Third, and less controversially, the referral is limited to events that have taken place since 15 February 2011.

PROSPECTS GOING FORWARD

As with all the other matters currently before the ICC, the target of the investigation is an African country, which critics of the court will be quick to point out. Like Kenya, the crimes under investigation emerge from an internal political dispute that has escalated rather than a

typical armed conflict involving an organised rebel group or insurgency (such as Darfur, DRC and Uganda) or another state (such as Georgia or Gaza). Like Sudan, the investigation will have to take place in respect of a state that is not a party to the Rome Statute and despite the government under investigation being overtly hostile to the proceedings. For these reasons, sceptics are likely to conclude that it will result in the same difficulties that have left the ICC politically isolated in its region of operation (Africa).

There are, however, aspects of the Libyan referral that are different. For one, it is the earliest the ICC has ever become involved in a situation: just a few weeks since it started. This creates the potential for the court to act as a deterrent for future atrocities, and alter the conflict dynamics in a game-changing manner. For that to happen it was vital that the ICC prosecutor seize the initiative and move with all deliberate speed to investigate the offences.

It is encouraging therefore that on 4 May 2011, prosecutor Luis Moreno-Ocampo briefed the Security Council on the progress of his preliminary investigations in Libya. The prosecutor indicated that his preliminary investigations provide a reasonable basis to believe that the crimes against humanity of murder, rape, imprisonment, torture, persecution and other inhumane acts as well as the war crimes of violence to life and person, and intentionally directing attacks against civilians, among others, have been, and continue to be, committed in Libya. Then, on 16 May 2011, Ocampo disclosed that Gaddafi, his son Saif al-Islam, and intelligence chief Abdullah al-Sanussi, bore the greatest responsibility for 'widespread and systematic attacks' on civilians. It is now for the ICC judges to decide whether or not to issue warrants for their arrest. At a press briefing in The Hague, the prosecutor announced that he was almost ready for a trial, based on the quality and quantity of the testimony – particularly of those who had escaped from Libya.

Naturally, there will be difficulties in enforcing any future arrest warrants. However, the Libyan regime is one of the most politically isolated governments – both domestically and internationally – that the ICC has yet been asked to investigate. This will hopefully increase the prospects of states cooperating with the court to ensure that its orders are carried out. A useful comparison here is Sudan, where the ICC became involved in an established conflict, involving a government that had sufficient domestic support to ensure the court's officials could never operate in its territory, and sufficient regional and international support to prevent its orders – most notably the al-Bashir arrest warrant – from being executed despite legal obligations on states parties to the

Rome Statute. It will be recalled that Chad and Kenya, notwithstanding their membership of the ICC, allowed al-Bashir to visit their territories in defiance of the court's arrest warrant in 2010 (and most recently al-Bashir has visited a third African state party – Djibouti, in May 2011).

In Libya, the hope is that there may in due course be sufficient cooperation domestically, particularly from the 'successor' to the current regime should there be one, and internationally, to secure the arrest and prosecution of those most responsible for the violence.

The lesson of Ratko Mladic is a recent reminder that justice is patient. On 26 May Mladic, former Bosnian Serb army commander charged with several counts of genocide, crimes against humanity and war crimes in Bosnia, was arrested after years of evading capture. His arrest followed painstaking cooperation between various governments and the International Criminal Tribunal for the former Yugoslavia (ICTY), and shows that justice does inevitably catch up with alleged perpetrators of mass crimes. Mladic was first indicted by the ICTY in July 1995 and has been on the run for nearly 16 years. His arrest by security forces in Serbia shows that, despite more than a decade of protection from 'elements of the army outside effective control of the civilian authorities', it is nevertheless the Serbian authorities that delivered Mladic to face justice in The Hague.¹²

AFRICA – AGAIN AND AGAIN

Any hope of African countries cooperating with the ICC nevertheless stands a risk of being dashed by the AU's divisive approach to the court. The Libyan referral finds itself situated within the broader Africa-ICC narrative. To be sure, since the ICC's inception, African states have continued to support the budding court. Currently, the continent, with 31 states parties, is one of the most well represented regions of the world in the Rome Statute regime.

Moreover, three countries in the Great Lakes region of Africa (i.e. CAR, DRC and Uganda) were the first to self-refer their respective situations to the ICC prosecutor for investigations and possible prosecutions. Furthermore, Côte d'Ivoire, a non-party to the statute, has lodged a declaration accepting the ICC's jurisdiction. The court is thus positioned to open a formal investigation into post-election violence in Côte d'Ivoire that led to hundreds of deaths. The request for the ICC's assistance has come from the country's new president, Alassane Ouattara. Kenya's post-election violence is already before the ICC after prosecutor Ocampo sought and received authorisation from the ICC's Pre-Trial Chamber for his first *proprio motu* (of his own accord)

investigation of a situation. Before Libya, the only non-state party situation to be referred to the ICC was in respect of Darfur. And now, following Resolution 1970, Libya has joined Sudan at the ICC by way of a second Security Council referral.

While the ICC's continental focus is in large part explained by the invitations extended to it by African states, this Africa-heavy bias has drawn much criticism from the AU and the relationship between the AU and the ICC has suffered as a result. Ironically, Gaddafi has been a key protagonist in bringing the relationship to its current low – with the AU ordering non-cooperation with the ICC in respect of al-Bashir, requesting deferrals in respect of both the Darfur and Kenya investigations, and attempting to amend one of the Rome Statute's most finely balanced political compromises (article 16). While Gaddafi was once a powerful figure within the AU, it may well be that supporting the Libyan leader in the same manner as it has al-Bashir will prove a bridge too far. Many African states will be acutely aware of the potential contagion effect of the peoples' revolution sweeping across the north of the continent and the danger of being aligned with the Gaddafi regime.

It is thus telling that three African states voted in support of the Libyan referral to the ICC, including economic powerhouses Nigeria and South Africa. This raises questions about claims that the ICC's involvement in Libya is another example of the court's unhealthy preoccupation with Africa. That being said, Libya's repressive leaders – like the powerful elites in Kenya and Sudan – will no doubt seek to undermine the ICC's efforts by exploiting the court's African workload.

This move is already underfoot. On the same day that prosecutor Ocampo stated that he would be seeking an arrest warrant for Gaddafi, Libya's deputy foreign minister Khalid Kaim said the ICC was a 'baby of the European Union designed for African politicians and leaders' and its practices were 'questionable'. He added that Libya does not recognise the ICC's jurisdiction, like most African countries and the United States, and would ignore any announcement.¹³ This response to the ICC – no doubt fuelled by revelations about who the prosecutor is seeking to indict – was in contrast to Libya's response after the passing of Resolution 1970. In a measured letter to the Security Council on 2 March, authorities said the condemnation of Libya was premature and called for the resolution to be suspended until the allegations could be confirmed. The letter also noted that while Libya is not a party to the ICC's Rome Statute, authorities would form an independent judicial committee to investigate allegations.¹⁴

Libya will no doubt find African allies in its opposition to the ICC. Already on 18 May the

government of Chad reportedly stated that it would not cooperate with the ICC in arresting the three Libyans whom Ocampo has asked the ICC judges to indict. Chadian president Idriss Deby's press adviser explained that: 'It is true that we ratified the Rome Statute which established the International Criminal Court but we also endorsed the decision of the African Union adopted on July 2009 in Sirte, Libya refusing to cooperate with the ICC.'¹⁵ Even though this AU decision refers to the al-Bashir matter specifically, the press adviser said the decision applies to all suspects wanted by the ICC who are still at large.

THE AFRICAN COURT INVOLVES ITSELF

In light of Libya's predictable resistance to the ICC, the very welcome intervention of the new African Court on Human and Peoples' Rights is worth noting. Notwithstanding the sluggish response to the Libya crisis from the AU, on 25 March 2011 the African Court issued a unanimous Order for Provisional Measures in respect of Libya. The order demands that Libya 'immediately refrain from any action that would result in loss of life or violation of physical integrity of persons' and report back to the court within 15 days on measures taken in this regard. The order was made *proprio motu* (of its own accord) by the African Court while considering an urgent application brought against Libya by the African Commission on Human and Peoples' Rights on 16 March 2011 for alleged 'serious and massive violations of human rights guaranteed under the African Charter on Human and Peoples' Rights' (the Banjul Charter). The court is now 'seized' with the matter, having made a *prima facie* determination that it has jurisdiction to hear the case, and has asked Libya to respond to the application within 60 days.

Following 'successive complaints against Libya' received by the commission at its 9th Extraordinary Session in Banjul, The Gambia from 23 February – 3 March 2011, the commission concluded that there was evidence of violations of articles 1, 2, 4, 5, 9, 11, 12, 13 and 23 of the Banjul Charter. On this basis the commission brought an application against Libya to the African Court, alleging 'serious and widespread' violations of the Banjul Charter. The violations relate to, *inter alia*, the detention of an opposition lawyer in Benghazi; random shooting of demonstrators in Benghazi, Al Baida, Ajdabiya, Zayiwa and Dema by security forces; and 'excessive use of heavy weapons and machine guns against the population, including targeted aerial bombardment'.

The African Court responded to the commission's application timeously and with boldness. On 21 March

the court's registry acknowledged receipt of the application and forwarded copies to Libya the following day. In terms of the African Court's rules, Libya must, within 'thirty (30) days of receipt of the application, [indicate] the names and addresses of its representatives'. Libya has 60 days to respond to the application, but the court may grant an extension 'if the need arises'. In addition, and remarkably on its own initiative, the African Court decided to issue an Order for Provisional Measures that states:

The Great Socialist People's Libyan Arab Jamahiriya must immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of any other international human rights instruments to which it is party.

The Order was made pursuant to article 27(2) of the African Court's statute which provides that:

In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.

What is more, the African Court did so without eliciting the views of the parties to the matter, on the basis of the imminent risk to human life and the difficulty in scheduling an appropriate hearing involving Libya. In establishing the factual basis for the need for provisional measure, the African Court relied on the information contained in the commission's application. In particular, the court cited the statements of the AU (condemning the use of excessive force), the Arab League (suspending Libya) and Security Council Resolution 1970 (condemning gross and systematic violations of human rights and referring Libya to the ICC for possible crimes against humanity) in support of its finding that the situation was of extreme gravity and urgency and that such measures were necessary to avoid irreparable harm to persons.

FROM 1970 TO 1973: THE IMPORTANCE OF KEEPING THE BABY IN THE BATHWATER

Aside from the African Court's provisional order, on 17 March 2011 – about three weeks after the Security Council referred Libya to the ICC – the council adopted Resolution 1973 on the situation in Libya. Resolution 1973 was proposed by France, Lebanon, and the United Kingdom. Ten Security Council members voted in favour

(Bosnia and Herzegovina, Colombia, Gabon, Lebanon, Nigeria, Portugal, South Africa, and permanent members France, the United Kingdom, and the United States). Five (Brazil, Germany, and India, and permanent members China and Russia) abstained, with none opposed. The resolution formed the legal basis for military intervention in the Libyan conflict, demanding 'an immediate ceasefire' and authorising the international community to establish a no-fly zone and to use all means necessary short of foreign occupation to protect civilians.

The next day, on 18 March, Gaddafi's government announced that it would comply with the resolution and implement a ceasefire. However, in retrospect it is clear that the Libyan government had no intention of observing the ceasefire, and attacks by the regime's forces continued.

Military intervention in Libya began on 19 March, as fighter jets of the French Air Force destroyed several pro-Gaddafi vehicles advancing on rebel stronghold Benghazi. A coalition of 10 states from Europe and the Middle East initially participated in the intervention, later expanding to 17 states. On 31 March, NATO assumed command of the no-fly zone, while air strikes against ground targets remain in the hands of the coalition forces.

Even though all three African states on the Security Council voted in favour of Resolution 1973, the AU opposed foreign military intervention in Libya from the outset. On 10 March the AU Peace and Security Council (PSC) met at the heads of state level and issued a communiqué which roundly condemned the indiscriminate use of force by authorities in Libya but rejected 'any foreign military intervention, whatever its form'. The AU decided to establish a High Level Committee on Libya to facilitate dialogue among all parties to the conflict and engage with AU partners and in particular the Arab League, Organisation of the Islamic Conference, EU and UN.¹⁶ On 20 March, the day after international military action began, the AU's High Level Committee confirmed that it opposed foreign military intervention in Libya: 'Our desire is that Libya's unity and territorial integrity be respected as well as the rejection of any kind of foreign military intervention'.¹⁷ To date the High Level Committee has twice visited Libya to consult with Gaddafi and rebels groups, but notable progress or commitment to a ceasefire remains elusive.

The AU has also repeatedly stressed the need for 'African action' to solve the Libyan crisis – a view supported by several African heads of state. Soon after the international military operations began, Mauritanian president Ould Abdel Azia noted that '[t]he situation in North Africa demands urgent action so that an African solution can be found'.¹⁸ What precisely such urgent

action entailed was not spelt out; nor what African action had been taken up to that point to prevent the loss of life.

Although South Africa voted for Resolution 1973 at the Security Council, President Zuma has since criticised the interpretation and implementation of the resolution by NATO and its 'western allies'.¹⁹ This apparent backtracking by the South African government comes at a time of domestic criticism from the ANC Youth League who argued that the resolution had shown South Africa as 'an imperialist weakest link to the African continent'.²⁰ The South African Communist Party (a long-standing ally of the ruling ANC), also called the intervention 'imperialist' and warned against aiding a 'lust for Libyan oil'.²¹ Criticism from leaders on the continent no doubt also influenced South Africa's decision. On 22 March President Museveni of Uganda made his views on the issue clear: 'I am totally allergic to foreign, political and military involvement in sovereign countries, especially African countries'. 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.²²

The censure of African Security Council members who voted for Resolutions 1970 and 1973 was formalised at the meeting of AU heads of state on 25 May:

Finally, the Assembly stressed the need to strengthen collective African action within the AU and the need to maximise the effectiveness and impact of the AU contribution in the UN Security Council ... to ensure that Africa's positions are duly taken into account. In this regard, the Assembly requested the Commission to submit to it proposals on ways and means to better coordinate African positions in the Security Council, and ensure that they further reinforce the decisions taken by the PSC and other relevant organs of the Union.²³

These developments show how polarised the international response to the crisis in Libya has become. The AU (along with countries like Turkey, Venezuela and Russia, and regional bodies such as the Arab League) is now strongly opposed to the form that foreign military intervention has taken, as mandated by Resolution 1973. The lack of a common international strategy for Libya bodes ill for victims of the ongoing violence.

The situation on the ground continues to be dire and Gaddafi appears intent on entrenching himself through violence and repression on a mass scale. Since February when the violence started, more than 746 000 people have reportedly fled the country, with about 5 000 stranded at border points in Egypt, Tunisia and Niger and some 58 000 displaced in eastern Libya according to

UN humanitarian chief Valerie Amos in her report to the UN Security Council on 10 May. Recent estimates are that the death toll now ranges from between 10 000 and 30 000 people.²⁴ The infamous words of Gaddafi's son, Saif al-Islam Gaddafi, on 21 February have proved prophetic:

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. We will destroy seditious elements. If everybody is armed, it is civil war, we will kill each other ... Libya is not Egypt, it is not Tunisia.²⁵

The lack of a common strategy in the face of criticisms about Resolution 1973 threatens not only the safety of Libyans, but also the prospects of convicting those most responsible for orchestrating the violence. The ICC's focus on gross human rights abuses is appropriate, both in the pursuit of accountability and an end to impunity for these crimes, and also as a public declaration that Gaddafi's violent defiance of his own peoples' wishes will attract international attention and action. The ICC's involvement in Libya on account of Security Council Resolution 1970 was and remains for the right reasons. Concerns that African (and other) governments now raise of a different Security Council resolution – 1973 – and its authorisation of force in Libya, should not be allowed to detract and distract from the centrally important role that the ICC has been asked to play.

In short, the baby of the ICC must be kept in the bathwater that is Libya's ongoing humanitarian and human rights crisis. For that to be achieved it will be vital for the international community and civil society to guard against the conflation of criticisms against coalition and NATO efforts to enforce Resolution 1973 on the one hand, and the ICC's efforts to investigate and prosecute serious international crimes on the other.

The language of the 25 May AU Assembly decision suggests that criticisms of Resolutions 1973 and 1970 are already being conflated by African leaders. The decision reiterates that 'only a political solution to the current conflict will make it possible to promote sustainable peace in Libya'.²⁶ This reflects the Assembly's well-articulated concerns with the NATO-led military operation, but leaves little room for justice mechanisms as part of the solution. Moreover, the decision questions the implementation of *both* Resolutions 1970 and 1973 and calls on international actors to 'fully comply with the letter and spirit' of *both* resolutions. While the AU Assembly did restate its commitment to Resolutions 1970 and 1973, it is probable that when noting 'Africa's surprise and disappointment at the attempts to

marginalise the continent in the management of the Libyan conflict,' heads of state were also referring to the ICC's mandate in Libya.

CONCLUSION

The ICC's work in Libya's conflict zone is imperative and deserves continued support – although the road ahead already appears long and strewn with hurdles. In these early days there are at least positive signs from within the continent that Gaddafi's behaviour towards his country's citizens is unacceptable. In that respect the African Court's decision on Libya – both in form and substance – represents a bold advance into a situation whose political implications have made the work of the AU's other institutions difficult. The African Court's decision confirms that Gaddafi continues to terrorise his people in the face of both Western and African opposition.

That being said, the resistance to the ICC in some parts of the African continent is likely to increase. By requesting an arrest warrant for Gaddafi, it is only the second time the ICC has sought a warrant for a sitting head of state (the first being for al-Bashir). A chorus of voices can be expected to lament the ICC's targeting of African leaders. As solutions to the Libyan crisis are sought, the widespread condemnation of the human rights abuses by the Gaddafi regime in February this year – before the passing of Resolution 1970 – must be remembered. It was in the context of these statements and the need to hold those responsible to account, that Libya was referred to the ICC by the Security Council. While the interpretation and implementation of Resolution 1973 may well be questioned, the work of the ICC in Libya is a separate matter that requires the support of African countries if we are to dissuade leaders from declaring war on their citizens in future.

ABOUT THE AUTHORS

Max du Plessis is a senior research associate at the International Crime in Africa Programme, Institute for Security Studies, Pretoria. He is also an Associate Professor at the University of KwaZulu-Natal, Durban and an advocate and associate member of the KwaZulu-Natal Bar. Antoinette Louw is a senior research fellow at the International Crime in Africa Programme, Institute for Security Studies, Pretoria.

NOTES

- 1 UN Human Rights Council, 15th Special Session, A/HRC/S-15/2, 25 February 2011.
- 2 See OIC General Secretariat Condemns Strongly the Excessive Use of Force against Civilians in the Libyan Jamahiriya,

Organisation of the Islamic Conference, at http://www.oic-oci.org/topic_detail.asp?t_id=4947&xx_key=.

- 3 For a reference to the 22 February statement see Arab League Statement on Libya, No. 7360, 12 March 2011, located at Security Council Report, Update Report No. 1, Libya, 14 March 2011, http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.6621881/k.63C4/Update_Report_No_1brLibyabr14_March_2011.htm.
- 4 See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10760&LangID=E>.
- 5 Press release, The African Union deeply concerned about the situation in Libya, Addis Ababa, 23 February 2011, at <http://www.au.int/en/content/african-union-deeply-concerned-about-situation-libya>; and Communiqué of the 261st meeting of the Peace and Security Council, PSC/PR/COMM(CCLXI), Addis Ababa, 23 February 2011, at <http://www.au.int/en/content/communique%C3%A9-261st-meeting-peace-and-security-council-situation-libya>.
- 6 See Office of the High Commissioner for Human Rights, Human Rights Council holds a Special Session on The situation of human rights in the Libyan Arab, 23 February 2011, at Jamahiriya <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10749&LangID=E>.
- 7 UN Human Rights Council, 15th Special Session, A/HRC/S-15/2, 25 February 2011.
- 8 Ibid. According to Security Council Report, Update Report No 1, Libya, 14 March 2011, the commission's members were appointed on 11 March and include: Cherif Bassiouni (Egypt); Asma Khader (Jordanian/Palestinian); and Philippe Kirsch (Canada). The commission of inquiry is expected to report back to the Human Rights Council in June 2011.
- 9 See decision of UN Human Rights Council, 15th Special Session, A/HRC/S-15/2, 25 February 2011.
- 10 See <http://www.english.globalarabnetwork.com/201102219941/Libya-Politics/libyan-ambassador-to-un-urges-international-community-to-stop-genocide.html>.
- 11 Security Council Report, Update Report No. 3, Libya, 25 February 2011 http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.6586331/k.D62C/Update_Report_No_3brLibyabr25_February_2011.htm.
- 12 Human Rights Watch, Bosnia: Mladic arrest ends reign of impunity: UN Security Council's ongoing support essential for Yugoslav Tribunal, May 26, 2011, at <http://www.hrw.org/en/news/2011/05/26/bosnia-mladic-arrest-ends-reign-impunity>.
- 13 Libya: ICC prosecutor seeks warrant for Gaddafi, *BBC News*, 16 May 2011, available at <http://www.bbc.co.uk/news/mobile/world-africa-13408931>.
- 14 Security Council Report, Update Report No. 1, Libya, 14 March 2011, http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.6621881/k.63C4/Update_Report_No_1brLibyabr14_March_2011.htm.

- 15 Chad says it will not execute ICC warrant against Libya's Gaddafi, *Sudan Tribune*, 19 May 2011, at <http://www.sudantribune.com/Chad-says-it-will-not-execute-ICC,38950>.
- 16 Communique of the 265th Meeting of the Peace and Security Council, PSC/PR/COMM.2(CCLXV), Addis Ababa, 10 March 2011.
- 17 Meeting of the AU High-Level Ad Hoc Committee on Libya, Nouakchott, Islamic Republic of Mauritania, 19 March 2011.
- 18 See Libya: Chorus of African Criticism Rises Over Air Strikes, *Ghananation.com*, available at <http://news1.ghananation.com/africa/119864-libya-chorus-of-african-criticism-rises-over-air-strikes.html>.
- 19 See <http://thinkafricapress.com/south-africa/zuma-voices-unease-libyan-intervention>; <http://www.businesslive.co.za/Feeds/businessday/2011/05/31/zuma-criticises-nato-bombing>; <http://mg.co.za/article/2011-05-06-do-they-jump-or-are-pushed>.
- 20 ANC Youth League is concerned by the role played by South Africa in the United Nations Security Council on the Libyan situation. <http://www.anc.org.za/docs/pr/2011/pr0321.html>.
- 21 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>.
- 22 See Uganda's Museveni criticises West's action on Libya, *India Report*, 22 March 2011, at <http://www.indiareport.com/India-usa-uk-news/latest-news/1017629/International/2/20/2>.
- 23 Declaration on the state of peace and security in Africa, Extraordinary Session of the Assembly of the Union on the State of Peace and Security in Africa, Ext/Assembly/AU/Decl/(01.2011), Addis Ababa, 25 May 2011.
- 24 See <http://www.iol.co.za/news/africa/death-toll-in-libya-could-be-30-000-1.1061755>.
- 25 See <http://www.news24.com/Africa/News/Gaddafi-son-Libya-faces-rivers-of-blood-20110221>.
- 26 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.



ISS Head Office

Block C & D, Brooklyn Court, 361 Veale Street
New Muckleneuk, Pretoria, South Africa
Tel: (27-12) 346 9500 Fax: (27-12) 346 9570
E-mail: iss@issafrica.org

ISS Addis Ababa Office

5th Floor, Get House Building
Africa Avenue, Addis Ababa, Ethiopia
Tel: (251-11) 515 6320 Fax: (251-11) 515 6449
E-mail: addisababa@issafrica.org

ISS Cape Town Office

2nd Floor, The Armoury Building, Buchanan Square
160 Sir Lowry Road, Woodstock, South Africa
Tel: (27-21) 461 7211 Fax: (27-21) 461 7213
E-mail: capetown@issafrica.org

ISS Dakar Office

Stèle Mermoz, 100x Elhadji
Ibrahima Niassé MZ83, Senegal
Tel: (221-33) 824 0918/21 Fax: (221-33) 824 2246
E-mail: dakar@issafrica.org

ISS Nairobi Office

Braeside Gardens, off Muthangari Road
Lavington, Nairobi, Kenya
Tel: (254-20) 386 1625 Fax: (254-20) 386 1639
E-mail: nairobi@issafrica.org

ISS Pretoria Office

Block C, Brooklyn Court, 361 Veale Street
New Muckleneuk, Pretoria, South Africa
Tel: (27-12) 346 9500 Fax: (27-12) 460 0998
E-mail: pretoria@issafrica.org

www.issafrica.org

BRIEFING PAPER



This publication was made possible by funding provided by the Open Society Foundation for South Africa (OSF-SA), and the Government of the Netherlands. In addition, general Institute funding is provided by the governments of Denmark, the Netherlands, Norway and Sweden.

