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R2P, the ICC and the Libyan arrests

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Context

The arrest of Saif al-Islam Gaddafi and Abdullah al-Senussi constitutes a test case for international justice and the idea of ‘shared responsibility’¹, embraced by Heads of State and Government at the 2005 World Summit Outcome in the framework of the ‘Responsibility to Protect’ (R2P) doctrine. In February 2011, the UN Security Council adopted a unanimous resolution (Resolution 1970) to refer the situation in Libya to the International Criminal Court (ICC) after the failure of the Gaddafi regime ‘to protect its population’.² This resolution marked the first incident in which the ICC was expressly recognized in Council practice as a core element of preventing and adjudicating atrocities in line with the ‘R2P’ concept.³ The R2P principle is based on the idea that domestic authorities maintain primary responsibility to ‘protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity’.⁴ It contains at the same time a commitment to an international response in accordance with the United Nations Charter, should ‘peaceful means be inadequate and national authorities manifestly fail’ to live up to their responsibility.⁵ With the decision authorizing the use of force ‘to protect civilians and civilian populated areas under threat of attack’⁶ and the referral of the situation to the ICC under Chapter VII of the United Nations Charter, the protection against atrocity crimes took a central place in the collective response to the Libyan conflict. This type of reaction is likely to be perceived as a possible precedent for other contexts. With the Security Council referral, international justice has become one of the primary means of constraining violence and securing accountability, not only in the context of hostilities, but also in ensuring justice after conflict. The debate over the proper forum for proceedings against Saif al-Islam Gaddafi and Abdullah al-Senussi puts the interplay between domestic and international justice to a crucial test.

The Security Council and complementarity

When the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) were established by the Security Council at the beginning of the 1990s, they were endowed with primacy of international jurisdiction⁷ and had limited leeway to engage with domestic jurisdictions or refer cases to domestic institutions. They only did so after the end of hostilities and the start of trials, namely mainly in the context of their ‘completion strategy’.⁸ In the context of the ICC, interaction with domestic judiciaries is at the heart of the system of justice of the Statute, which embraces the principle of complementarity.⁹ The Court’s mandate is based on a division of responsibility between international and domestic authority. This leaves room to defer proceedings to national institutions. Domestic justice enjoys priority, and can be successfully invoked as an alternative to ICC proceedings, if it is supported by genuine investigations and prosecutions of international crimes, including application of principles of due process under international law.¹⁰

This framework applies to the Libyan context, although Libya is not a Party to the ICC,¹¹ because the situation was referred to the Court by the Security Council under Chapter VII of the United Nations Charter.¹² The Security Council highlighted the prospects of interaction with domestic justice initiatives in the context of its 2005 Darfur referral, when it encouraged the ICC to support international cooperation with ‘domestic efforts’ to combat impunity¹³ and to consider the possibility of ‘conducting proceedings in the region’.¹⁴ Now, these prerogatives are once again in the spotlight in the Libyan context.

The ICC and domestic proceedings

The ICC has not yet determined a firm policy or strategy with respect to engaging with parallel or competing proceedings at the national level. In the situation of the Democratic Republic of the Congo (DRC), the ICC considered the possibility of holding ICC trials *in situ*, following a self-referral of the situation by the DRC and proclaimed inaction by domestic authorities after transfer of defendants to the Court. The option ‘to sit in a State other than’ the host State is foreseen in the legal framework of the Court.¹⁵ Despite initial proposals from the Bench¹⁶, the Court refrained from using these powers, mostly due to concerns related to the security and protection of Court officials, witnesses or victims.

In the context of the investigation and prosecution of electoral violence in Kenya, the ICC Prosecutor used domestic ‘consent’ as a leverage and yardstick for the initiation of ICC proceedings. The Prosecutor agreed with Kenyan authorities to prioritize domestic justice, subject to certain conditions. The conditions were specified in Agreed Minutes¹⁷ which set out clear benchmarks and timelines for investigations and prosecutions by Kenyan authorities.¹⁸ The Office of Prosecutor decided to proceed with ICC investigations and prosecutions on its own motion for the first time in the history of ICC proceedings,¹⁹ after domestic authorities failed to comply with the terms of the ‘complementarity’ arrangement.

In the Libyan context, the situation is slightly different. The Court does not act on its own motion, but on the basis of a referral by the Security Council. This mandate makes the Court an agent of peace-maintenance. The Pre-Trial Chamber has issued warrants of arrest. An international ‘case’ exists, and judicial proceedings have started. This has an impact on subsequent action. There is less leeway to negotiate modalities and timing of justice outside the Courtroom. A deferral of proceedings to Libyan authorities following the issuance of warrants of arrest, and in the absence of prior international custody over defendants, would mark a novelty in international criminal justice. How the Court and the international community will deal with this issue is decisive for future cases.

The most radical option to bar the exercise of ICC jurisdiction is a request by the Security Council not to proceed with further investigation or prosecution for a renewable 12 month period. This possibility is mentioned in the Council referral²⁰ and Article 16 of the ICC Statute. This option has come under growing criticism in recent years. In 2010, African Union members encouraged the Council to use Article 16 in order to suspend the warrant of arrest against Omar al-Bashir and facilitate the peace settlement in Sudan.²¹ This initiative failed to gain sufficient support inside the Council, partly due to U.S.

opposition and concerns that interference in ongoing ICC cases would run counter to the stated aims of the resolution and compromise the Court's independence.

A second possibility to seek priority for domestic justice lies with domestic authorities. As a State with jurisdiction over crimes on the basis of territory and nationality, Libya may use the mechanisms under the Statute to challenge the admissibility of ICC proceedings.²² Such a motion has suspensive effect²³ but it does not affect the validity of previous ICC action or decisions.²⁴ As reiterated by the ICC, the final determination on admissibility rests with Chambers.²⁵

The Statute sets a relatively high burden for an admissibility challenge. The Rules of Procedure and Evidence of the Court provide that a State may *inter alia* share information with the Court showing that its courts 'meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct', or that the case is 'being investigated or prosecuted'.²⁶ Investigations or prosecutions must in particular, target the same 'case'²⁷, which has been defined by the Court as encompassing 'both the person and the conduct' charged.²⁸ This test might pose difficulties for domestic investigators and prosecutors, since domestic charges may have to reflect similar incidents, links or context associated with atrocity crimes (e.g., crimes against humanity²⁹, war crimes³⁰).³¹ If domestic trials are held, they only bar ICC proceedings under the 'double jeopardy' rule, if they relate to 'conduct also proscribed' under the core crimes provisions of the Statute.³² If a domestic case relates to different conduct, the Statute typically foresees consultations between the ICC and a requested State under the cooperation regime to facilitate the sequencing of proceedings.³³

The ICC Statute does not include the death penalty in its sentencing regime. It is controversial to what extent potential human rights violations to the detriment of the defendant should be taken into account in the determination of admissibility assessments under the Statute since they concern primarily jurisdictional issues.³⁴ An argument to that effect might be based on Article 21 (3) which provides the applicable law of the ICC must be interpreted and applied consistently 'with internationally recognized human rights'.³⁵ Rule 11 *bis* of the ICTR Rules of Procedure and Evidence specified specifically that a case shall only be referred back by a Trial Chamber if the accused will receive a fair trial and if 'the death penalty will not be imposed or carried out'.³⁶ Accordingly, the Appeals Chamber of the ICTR held that 'Chamber designated under Rule 11 *bis* must consider whether the State has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure'.³⁷ But neither the ICC Statute, nor the complementarity provisions under Article 17 were directly intended to serve as a general incentive for the harmonization of sentencing provisions in domestic jurisdictions (let alone in non-State Parties), or to rule out the death penalty *per se*.

At the Rome Conference, States were eager to maintain State sovereignty and different legal cultures, including divergent views on penalty regimes – a position expressly reflected in Part 7 of the ICC Statute.³⁸ They also sought to prevent that the ICC turns into a general human rights court. Contemporary developments concerning the death penalty, as well as the fact that other international courts such as the ICTR or the

European Court of Human Rights³⁹ have recognized the death penalty as a bar to transfer of suspects might put this traditional understanding of admissibility under the ICC Statute to a test.⁴⁰ In particular, once a defendant has been surrendered to the Court, the Court would face difficulties to transfer a person to a state where the death penalty is practiced, in line with existing human rights jurisprudence on the prohibition of inhuman or degrading treatment or punishment.

Finally, domestic authorities might ask the Prosecutor to withdraw⁴¹ or amend charges before the ICC.⁴² The closest precedent is the situation in Uganda where the option of the withdrawal of the arrest warrant against Josef Kony was discussed in the peace talks with the Lord's Resistance Army. In such situations, the final decision over such a request lies with the Pre-Trial Chamber.⁴³ If the Prosecutor comes to the conclusion that there is no longer a 'sufficient basis to prosecute' since the 'case is inadmissible', he cannot simply terminate proceedings, but must inform the Pre-Trial Chamber and the Security Council of 'his or her conclusion and the reasons for that conclusion'.⁴⁴ Any such assessment is likely to be based on the inadmissibility criteria set out in Article 17. The two logical steps in this inquiry have been set out by the ICC Appeals Chamber:

' [I]n considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability'.⁴⁵

It is unlikely that the Office of the Prosecutor would invoke the 'interests of justice' clause to defer to domestic proceedings.⁴⁶ This would run counter to previous practice according to which there is a 'presumption in favor of investigation or prosecution',⁴⁷ and a distinction between 'interests of justice' and 'issues related to peace and security'.⁴⁸

One possible option to reconcile domestic jurisdiction with accountability before the ICC may be a division of labor based on temporal jurisdiction. In line with the Council referral, the ICC enjoys jurisdiction as of 15 February 2011.⁴⁹ There is no conflict of jurisdiction with respect to crimes committed prior to that date. To frame accountability in light of this distinction may, however, pose significant challenges in practice. If proceedings go ahead first with respect to atrocity crimes before the ICC, and if defendants are sentenced, chances of a subsequent trial in Libya are remote. The ICC will have to enter into an arrangement with respect to the enforcement of a possible sentence in a 'State designated by the Court' which indicated its 'willingness to accept sentenced persons'.⁵⁰ An enforcement of sentence in Libya would be unlikely, given its status as non-State Party, its detention regime and its current penalty provisions.⁵¹ This would complicate a second domestic trial for conduct other than that adjudicated by the ICC.

If the National Transitional Council simply goes ahead with its own process, there may two parallel processes: domestic proceedings and proceedings before the ICC. In this situation, either Libya, or the Prosecutor can seek a ruling on admissibility by the Pre-Trial Chamber.⁵² If the 'case' before the ICC is found to be inadmissible by the Chamber

in light of genuine domestic investigations or prosecutions, domestic proceedings take precedence but remain under ICC scrutiny.⁵³

If the National Transitional Council fails to cooperate with the ICC, the Prosecutor can return to the Security Council and insist on cooperation in line with SC Resolution 1970.⁵⁴ Ultimately, a Chamber might make a finding of non-compliance.⁵⁵ This would put the Council's commitment to the referral to a severe test.

Conclusion

It is thus difficult to negate the role of international justice in the accountability efforts in Libya. Even if domestic proceedings against Saif al-Islam Gaddafi and Abdullah al-Senussi were given priority, this would not prevent continued ICC engagement. Admissibility challenges or the 'double jeopardy' rule⁵⁶ are confined to individual 'cases'. The scope of ICC engagement in relation to the 'situation' depends on the terms of the referral, and ICC criminal policy.⁵⁷ Even though some thought is now given inside the ICC to the proper scope, limits and closure of 'situations' under ICC jurisdiction⁵⁸, the Libyan mandate is currently open-ended according to the terms of Security Council Resolution 1970. The ICC is thus likely to remain on the map of Libya for a while.

Increased attention to the full spectrum of justice options (e.g., international, domestic and internationalized proceedings) may cause differences of opinion or frictions at the moment of arrest. But from a systemic and long-term perspective, this development is rather encouraging. Dialogue across jurisdictions over the most appropriate venue of justice, and continued monitoring of domestic justice by international entities forms a corollary, and an integral part of a commitment to 'shared responsibility' in relation to atrocity crimes. One should thus embrace, rather than condemn it, in particular in the context of the first express use of the 'R2P' principle in collective security action.

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¹ See generally André Nollkaemper and Dov Jacobs, *Shared Responsibility in International Law: A Concept Paper*, ACIL Research Paper No 2011-07, at <http://www.sharesproject.nl/wp-content/uploads/2011/08/Nollkaemper-Jacobs-Shared-Responsibility-in-International-Law-A-Concept-Paper.pdf>.

² See the preamble of SC Res. 1970 of 26 February 2011.

³ SC Resolution 1593 of 31 March 2005 does not expressly mention the R2P principle in connection with the triggering of ICC jurisdiction in relation to Darfur. It simply makes reference to 'violations of international humanitarian law'. See the preamble of SC Resolution 1593.

⁴ See World Summit Outcome Document, 15 September 2005, para. 138. For a study, see Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm*, 101 AJIL 99 (2007).

⁵ *Ibid.*, para. 139.

⁶ See para. 4 of SC Res. 1973 of 17 March 2011.

⁷ See Article 9 (2) of the Statute of International Criminal Tribunal for Yugoslavia and Article 8 (2) of the Statute of the International Criminal Tribunal for Rwanda.

⁸ See e.g. Rule 11*bis* of the Rules of Procedure and Evidence of the ICTY and the ICTR. At the ICTY, cases were referred back as of 2005.

⁹ See the preamble, Article 1 and Article 17 of the ICC Statute. For a recent account, see Carsten Stahn & Mohamed El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011).

¹⁰ See Article 17, and in particular, Article 19 of the ICC Statute, as well as Rule 51 of the Rules of Procedure and Evidence of the Court.

¹¹ See Article 12 (2) and 13 (b) of the ICC Statute.

¹² A Security Council referral triggers a fast-track procedure in which Article 18 is not applicable. The principle of complementarity, however, is applicable in the context of Security Council referrals. See Article 19 and Article 53 (3) (a).

¹³ See para. 4 of SC Resolution 1593 (2005).

¹⁴ See para. 3 of SC Resolution 1593 (2005).

¹⁵ See Rule 100 of the Rules of Procedure and Evidence of the ICC.

¹⁶ See e.g., Adrian Fulford, *Reflections of a Trial Judge*, 22 Crim. L. Forum 215 (2011).

¹⁷ See ICC, Agreed Minutes of the meeting between Prosecutor Moreno-Ocampo and the delegation of the Kenyan Government, The Hague, 3 July 2009, p.1.

¹⁸ On 3 July 2009, the Prosecutor and representatives of the Kenyan government specified in Agreed Minutes that 'the Office of the Prosecutor will have no ground to intervene' if 'Kenyan authorities carry out genuine judicial proceedings against those most responsible'. *Ibid.*, p. 1. The Kenyan delegation agreed to provide the Prosecutor by end of September 2009 with 'information on modalities for conducting national investigations and prosecutions for those responsible for the 2007 violence through a special tribunal or other judicial mechanism adopted by the Kenyan Parliament with clear benchmarks over the next 12 months'. *Ibid.*, p.2

¹⁹ *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010.

²⁰ See the preamble of SC Resolution 1970.

²¹ In its Ministerial Meeting on the Rome Statute of the ICC on 6 November 2009, the African Union made the following proposal for amendment to Article 16 of the Rome Statute (deviations from existing text of the Statute are marked in italics):

Article 16

Deferral of Investigation or Prosecution

- I) No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.
- II) *A State with jurisdiction over a situation before the Court may request the UN Security Council to defer a matter before the Court as provided for in (i) above.*

Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Council's responsibility under para 1 consistent with Res. 377 (v) of the UN General Assembly.

²² See Article 19 (2) of the ICC Statute.

²³ See Article 19 (7) of the ICC Statute.

²⁴ See Article 19 (9) of the ICC Statute.

²⁵ See ICC Press Release, 'Course of action before the ICC following the arrest of the suspect Saif Al Islam Gaddafi in Libya', ICC-CPI-20111123-PR746, 23 November 2011 ('Should the Libyan authorities wish to conduct national prosecutions against the suspect, they shall submit a challenge to the admissibility of the case before Pre-Trial Chamber I, pursuant to articles 17 and 19 of the Rome Statute of the ICC. Any decision on the admissibility of a case is under the sole competence of the Judges of the ICC').

²⁶ See Rule 51 of the ICC Rules of Procedure and Evidence.

²⁷ See Article 19 (2) ('challenges to the admissibility of a case'). For a study, see Rod Rastan, *What is a 'case' for the purpose of the Rome Statute?*, 19 Crim. L. Forum 435 (2008).

²⁸ *Prosecutor v. Lubanga*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-01/06-8-Corr, 24 February 2006, paras. 38-39.

²⁹ See Article 7 (1) and (2) of the ICC Statute.

³⁰ See Article 8 of the ICC Statute.

³¹ ICTR case law conceded that an international indictment could be adapted to national provisions under Rule 11bis. See *Prosecutor v. Bagaragaza*, Decision on Rule 11bis Appeal (AC), 30 August 2006, para. 17 ('The Appeals Chamber agrees with the Prosecution that the concept of a 'case' is broader than any given charge in an indictment').

³² See Article 20 (3) of the ICC Statute.

³³ See Article 89(4) and Article 94 of the ICC Statute.

³⁴ In *Lubanga*, the Appeals Chamber gave a narrow reading to admissibility challenges under Article 17. It noted: 'Jurisdiction apart, admissibility is the only ground envisaged by the Statute for which the court may validly refrain from assuming or exercising jurisdiction in any given cause. Abuse of process is not listed as a ground for relinquishing jurisdiction in article 17 of the Statute'. See Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, para. 34.

³⁵ The ICC Appeals Chamber held: 'Human rights underpin the Statute; every aspect of it *including the exercise of jurisdiction of the Court*. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety' (emphasis added). *Ibid.*, para. 37.

³⁶ Rwanda abolished the death penalty partly in order to be able to try cases referred back by the ICTR.

³⁷ See ICTR, *Prosecutor v. Bagaragaza*, Decision on Rule 11bis Appeal (AC), 30 August 2006, para. 9, referring to *Prosecutor v. Mejakić et al.*, Decision on Joint Defence Appeal Against Decision on Referral under Rule 11bis (AC), 7 April 2006, para. 60

³⁸ This is expressly enshrined in Article 80 of the Statute. It states: 'Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties in this Part'. This provision was inserted in light of contrasting views of delegations on capital punishment. See William Schabas, 'Penalties', in Antonio Cassese, Paola Gaeta, John Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (Oxford, Oxford University Press, 2002), 1497, 1505.

³⁹ See e.g., European Court of Human Rights, *Soehring v. United Kingdom*, 11 Eur. Ct. H.R. (Ser. A) (1989); *Al Sadoon and Mufdhi v. United Kingdom*, Application No. 61498/08, 2 March 2010.

⁴⁰ Practice of other courts and tribunals may be taken into account under Article 21 (1) (b) or Article 21 (3) of the ICC Statute.

⁴¹ Article 53 (4) of the ICC Statute.

⁴² Article 58 (6) of the ICC Statute.

⁴³ Article 58 (4) of the ICC Statute. The Pre-Trial Chamber also enjoys the power to make admissibility determinations on its own motion. See Article 19 (1) of the ICC Statute. See ICC, Pre-Trial Chamber II, *Prosecutor v Kony et al*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, para. 45.

⁴⁴ See Article 53 (2) of the ICC Statute.

⁴⁵ See Appeals Chamber, Judgment on the Appeal of Mr Katanga against the Trial Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 78.

⁴⁶ See Article 53 (1) and (2) of the ICC Statute.

⁴⁷ See OTP, Policy Paper on the Interests of Justice, September 2007, at 3, available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIterestsOfJustice.pdf>

⁴⁸ *Ibid.*, at 8.

⁴⁹ See para. 4 of SC Res. 1970 (2011). See with respect to surrender also Article 101 of the ICC Statute (Rule of speciality).

⁵⁰ See Article 103 of the ICC Statute.

⁵¹ See also the criteria listed in Article 103 (3) of the ICC Statute.

⁵² See Article 19 (2) and Article 19 (3) of the ICC Statute.

⁵³ See Article 19 (10).

⁵⁴ See para. 4 of SC Res. 1970 (2011).

⁵⁵ Technically, Article 87 (7) of the Statute addresses only the consequences of non-compliance by a State Party, and leaves it open what happens in case of non-compliance by a Non-State Party following a Security Council referral. The Pre-Trial Chamber adapted needs to reality, and justified its judicial finding on non-compliance by ‘inherent’ powers. See Pre-Trial Chamber I, *Prosecutor v. Harun and Ali Kushayb*, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, 25 May 2010, ICC-02/05-01/07, at 7.

⁵⁶ Article 20 (3) of the ICC Statute.

⁵⁷ For judicial review of prosecutorial policy, see Article 53 (3).

⁵⁸ In *Prosecutor v. Mbarushimana*, Pre-Trial Chamber Chamber held that referrals should not become instruments ‘permitting a State to abdicate its responsibility for exercising jurisdiction over atrocity crimes for eternity’ since this would be ‘antithetical to the concept of complementarity’. See Pre-Trial Chamber I, *Prosecutor v. Mbarushimana*, Decision on the Defence Challenge to the Jurisdiction of the Court, 26 October 2011, ICC-01/04/01/10, para. 16.