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**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION
INTERNATIONAL CRIMINAL COURT COMMITTEE***

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**LIBYA & THE INTERNATIONAL CRIMINAL COURT
QUESTIONS & ANSWERS
ABOUT THE ARREST WARRANTS AGAINST
SAIF AL-ISLAM GADDAFI AND ABDULLAH AL-SENUSSI**

**HAS THE INTERNATIONAL CRIMINAL COURT ISSUED WARRANTS FOR
CRIMES COMMITTED IN LIBYA?**

Yes, the International Criminal Court (“ICC”) issued warrants on June 27, 2011 covering three persons: Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi. The warrant against Muammar Gaddafi was terminated on November 22, 2011, after his death on October 20, 2011. The warrants allege that Saif Al-Islam Gaddafi exercised control over crucial parts of the state apparatus, including finances and logistics and had the powers of a *de facto* Prime Minister, while Abdullah Al-Senussi served as a Colonel in the Libyan Armed Forces and head of Military Intelligence.¹ The crimes alleged in the warrants are crimes against humanity, including murder and persecution of civilians across Libya committed through the state apparatus and security forces from February 15, 2011 until at least February 28, 2011.²

**WHY DOES THE INTERNATIONAL CRIMINAL COURT HAVE
JURISDICTION OVER CRIMES IN LIBYA?**

On February 26, 2011, the United Nations (“U.N.”) Security Council decided unanimously to refer the situation in Libya, for events occurring after February 15, 2011, to the ICC, thereby creating ICC jurisdiction over the situation.³ Ratification or accession to the Rome Statute by a state also creates ICC jurisdiction over genocide, war crimes and crimes against humanity committed by individuals within that state’s territory and by its nationals;⁴ Libya, however, has not ratified or acceded to the Rome Statute.

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¹ Warrant of Arrest, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11 at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/>.

² *Id.* See also Jurist, Legal News and Research, “ICC issues arrest warrants for Libya leader Gaddafi, his son, head of intelligence,” June 27, 2011, at <http://jurist.org/paperchase/2011/06/icc-issues-arrest-warrants-for-libya-leader-gaddafi,-his-son-head-of-intelligence.php>.

³ S/RES/1970 (2011).

⁴ See Rome Statute of the International Criminal Court, available at <http://untreaty.un.org/cod/icc/statute/rome.htm>, art. 12((2)(a)-(b)).

Alternatively, the ICC may also exercise jurisdiction when a state lodges a declaration under article 12(3) of the Rome Statute, accepting jurisdiction with respect to a particular crime in question,⁵ which Libya also has not done.

WOULD ICC JURISDICTION COVER CRIMES COMMITTED BY BOTH SIDES TO THE CONFLICT?

Yes. When the U.N. Security Council made its referral to the ICC, pursuant to Rome Statute article 13(b), it necessarily referred the “situation” as a whole to the court,⁶ giving the Office of the Prosecutor the ability to look at crimes committed by both sides to the conflict.

WOULD ICC JURISDICTION COVER CRIMES (IF ANY) BY U.S. FORCES IN LIBYA?

This is unlikely. U.N. Security Council Resolution 1970 excludes ICC jurisdiction over nationals from a state outside Libya that is not a party to the Rome Statute related to that state’s operations within Libya as authorized by the U.N. Security Council.⁷ Thus, the ICC most likely does not have jurisdiction over the conduct of U.S. nationals in Libya as part of the UN-authorized operations because the U.S. is not a party to the Rome Statute.⁸ However, the ICC would have jurisdiction over the conduct of other troop contributing countries that are Rome Statute State Parties.

COULD THE ICC EXPAND ITS WARRANTS TO COVER ADDITIONAL CRIMES AND/OR PERPETRATORS?

Yes. The ICC could issue additional warrants for additional crimes and/or perpetrators, such as crimes committed by pro-Gaddafi forces after February 28, 2011 or crimes committed by opposition (anti-Gaddafi) forces.

IN WHICH ADDITIONAL CRIMES ARE GADDAFI FORCES POTENTIALLY IMPLICATED?

Reports suggest that pro-Gaddafi forces may have committed additional war crimes, but these have not yet been charged. For example, there are reports of mass rapes by pro-Gaddafi forces that both allegedly directly participated in rapes, and paid or forced young men to rape women.⁹ If such allegations are substantiated, this could be grounds for additional charges of crimes against humanity under Rome Statute article 7(1)(g) and/or new war crimes charges under Rome Statute article 8(2)(b)(xxii) or 8(e)(vi). On June 1, 2011, the U.N. Human Rights Council issued a report by the International Commission of Inquiry on the situation in Libya.¹⁰ The UNHRC Report found evidence

⁵ See Rome Statute, art. 12(3).

⁶ *Id.* at art. 13(b).

⁷ See U.N. Security Council res. 1970.

⁸ Some might question whether the Security Council had the power to make the exclusion given that the Security Council only has competence over UN Members States. See U.N. Charter, art. 25.

⁹ U.S. Institute for Peace, “Libyan Forces Use Rape as Weapon of War, Experts Say,” June 9, 2011, at <http://www.usip.org/publications/libyan-forces-use-rape-weapon-war>; BBC Africa News, “Libya: ‘forced to rape in Misrata,’” May 23, 2011, at <http://www.bbc.co.uk/news/world-africa-13502715>.

¹⁰ United Nations Human Rights Council, *Report of International Commission of Inquiry to Investigate all the alleged violations of International human rights law in Libyan Arab Jamahiriya*, A/HRC/17/44, 1 June

that pro-Gaddafi forces have committed both crimes against humanity and war crimes.¹¹ As regards potential crimes against humanity, the UNHRC Report specifically enumerated several new allegations including: imprisonment or other severe deprivations of physical liberty, torture, and enforced disappearances. It also found evidence of murder and persecutions (already charged), and suggested that the crimes were both widespread or systematic, and implicated government officials.¹²

With regard to potential war crimes charges, the UNHRC Report identified allegations against pro-Gaddafi forces including: violence to life and person, outrages against personal dignity, and intentionally directing attacks against protected persons and targets.¹³ The UNHRC Report also stated that although pro-Gaddafi forces reportedly indiscriminately attacked civilians and civilian targets, such allegations required further investigation to ascertain whether the attacks were intentional and rose to the level of war crimes.¹⁴ There have also been allegations that pro-Gaddafi forces conscripted children for use as soldiers.¹⁵

IN WHICH CRIMES ARE OPPOSITION (ANTI-GADDAFI) FORCES POTENTIALLY IMPLICATED?

Both an Amnesty International Report¹⁶ and the UNHRC Report¹⁷ indicate that opposition forces may be implicated in war crimes. Opposition forces are reportedly involved in torture, illegal detention, and outrages against personal dignity allegedly committed against detained Gaddafi forces, suspected mercenaries, and migrant workers.¹⁸ The UNHRC Report also noted allegations that opposition forces committed rape¹⁹ and conscripted child soldiers,²⁰ both of which allegations required further investigation. Neither the UNHRC Report nor the Amnesty International report indicated whether the crimes committed by opposition forces were part of a widespread or systematic attack that would rise to the level of crimes against humanity.²¹

CAN LIBYA AVOID HAVING ITS NATIONALS PROSECUTED BEFORE THE ICC?

2011, at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf (hereafter, "UNHRC Report").

¹¹ *Id.* at 81, ¶ 256.

¹² *Id.* at 81, ¶ 257.

¹³ *Id.* at 81, ¶ 258.

¹⁴ *Id.* at 81-82, ¶ 259.

¹⁵ *Id.* at 6; *id.* at 75, ¶¶ 223-24; *id.* at 81-82, ¶ 259.

¹⁶ *The Battle for Libya: Killings, Disappearances and Torture*, Amnesty International, September 12, 2011, <http://www.amnesty.org/en/library/asset/MDE19/025/2011/en/8f2e1c49-8f43-46d3-917d-383c17d36377/mde190252011en.pdf>.

¹⁷ UNHRC Report, *supra* note 9, at 82, ¶ 261.

¹⁸ *The Battle for Libya: Killings, Disappearances and Torture*, *supra* note 15, at 70.

¹⁹ UNHRC Report, *supra* note 9, at 7; *id.* at 71, ¶ 212; *id.* at 73, ¶¶ 217-18.

²⁰ *Id.* at 74, ¶ 220; *id.* at 80, ¶ 249. *See also Rebels-in-waiting: The Children as young as SEVEN being trained to fight on the front lines against Gaddafi*, by Daily Mail Reporter, July 13 2011, at <http://www.dailymail.co.uk/news/article-2014236/Libya-Children-young-7-trained-fight-Gaddafi.html>.

²¹ *The Battle for Libya Killings, Disappearances and Torture*, *supra* note 15, at 70; UNHRC Report, *supra* note 9, at 82, ¶ 262.

Yes. A state can always avoid ICC prosecutions of its nationals by investigating and/or prosecuting the crimes in good faith and in accordance with the standards set forth in Article 17 of the Rome Statute.²²

WHAT IS THE RELATIONSHIP BETWEEN THE ICC AND LIBYAN NATIONAL COURTS?

It is a relationship of “complementarity,” whereby if crimes are investigated and/or prosecuted by the Libyan national authorities, in good faith and in accordance with the standards set forth in Article 17 of the Rome Statute, then charges based on those crimes are considered inadmissible before the ICC.²³ However, if the Libyan national authorities are “unwilling” or “unable” to investigate and/or prosecute, then the ICC retains jurisdiction and may prosecute those crimes.

In this context, “unwilling” refers to whether the courts will act diligently and in good faith, while “unable” refers to their capacity to act.²⁴ As defined in Article 17 of the Rome Statute, a state is deemed “unwilling” to investigate or prosecute when the national courts or prosecutions are “shielding the person” from justice, when there is “unjustified delay” in prosecution, or when the proceedings lack independence or impartiality such that there is no intent to bring the person to justice.²⁵ A state is considered “unable” to investigate or prosecute when there is a “total or substantial collapse or unavailability” of national courts, when the state is unable to obtain the accused or necessary evidence, or when the national courts are otherwise unable to carry out the proceedings.²⁶

WHAT IS THE STATE OF COURTS IN LIBYA?

According to Amnesty International, there is “no functioning police or judicial system”²⁷ in Libya and the “independence of Libya’s judiciary has been undermined by persistent political interference over decades.”²⁸ Although officials in the National Transitional Council (“NTC”) recognize the need to reform the justice system,²⁹ Human Rights Watch has found that the NTC has “comprehensively failed to start setting up a justice system” and militia brigades from Misrata have been “operating outside of any official military and civilian command since Tripoli fell”³⁰

While Libya’s transitional justice minister, Mohammed al-Alagi, did approve a measure in September to abolish the state security prosecution, trial, and appeals courts, which had

²² See Rome Statute, art. 17.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at art. 17(2).

²⁶ *Id.* at art. 17(3).

²⁷ *The Battle for Libya: Killings, Disappearances and Torture*, *supra* note 15, at 73.

²⁸ Amnesty International, *Libya: Pursuing al-Gaddafi – the Legal Questions Answered*, Aug. 25, 2011, <http://www.amnesty.org/en/news-and-updates/libya-pursuing-al-gaddafi-%E2%80%93-legal-questions-answered-2011-08-25>.

²⁹ Adam Nossiter, *On Road to Reconciliation, Libya Meets Trail of Anguish*, Nov. 3, 2011, *The New York Times*, <http://www.nytimes.com/2011/11/04/world/africa/libyas-new-leaders-to-investigate-qaddafi-and-crimes-of-the-past.html?pagewanted=all>.

³⁰ Daniel Williams, *The Murder Brigades of Misrata*, October 28, 2011, republished at <http://www.hrw.org/news/2011/10/28/murder-brigades-misrata>.

been used to prosecute, sentence, and imprison opponents of the Gaddafi regime,³¹ the measure still needs to be approved by the NTC.³² Jamal Bennour, a Libyan judge who is part of a team drafting the rules for a truth and reconciliation commission, said that although “[v]ictims can also demand trials, . . . Libya’s justice system will first have to be built from scratch.”³³

COULD THE LIBYAN COURTS INVESTIGATE OR PROSECUTE SAIF AL-ISLAM GADDAFI AND ABDULLAH AL-SENUSSI FOR CRIMES OUTSIDE THOSE LISTED IN THE ICC WARRANTS?

Yes. The Libyan courts could prosecute the accused for crimes outside those covered in the ICC warrants. In this scenario, there is no conflict between ICC prosecutions and those in Libya. However, if as a result of the Libyan prosecutions, the death penalty were to be applied, then, as a practical matter, ICC prosecutions would not occur.³⁴ The ICC also has no mechanism by which to request the Libyan authorities to suspend execution of the sentence of a Libyan domestic court during an ICC trial.

COULD THE LIBYAN COURTS AND THE ICC INVESTIGATE AND/OR PROSECUTE SAIF AL-ISLAM GADDAFI AND ABDULLAH AL-SENUSSI FOR THE SAME CONDUCT?

No. A defendant may not be prosecuted twice for the same conduct by two different courts.³⁵ In this scenario, if the Libyan national authorities were proven willing and able to investigate and/or prosecute in good faith, then the cases would be inadmissible for prosecution before the ICC.³⁶ If, however, the Libyan courts were deemed “unwilling” or “unable” to investigate and/or prosecute in good faith, then ICC prosecutions could proceed.³⁷ In evaluating willingness and ability, the ICC would likely consider the extent to which Libya has shown its willingness and ability to hold fair trials.

WHAT STANDARDS DOES THE ICC CONSIDER WHEN DETERMINING WHETHER A STATE IS WILLING AND ABLE TO HOLD A FAIR TRIAL?

³¹ Associated Press, *Libya Orders State Security Courts Abolished*, Sept. 26, 2011, available at <http://www.guardian.co.uk/world/feedarticle/9866256>; William Maclean, Reuters Africa, *Libya plans to abolish state security courts*, Sept. 26, 2011, available at <http://af.reuters.com/article/libyaNews/idAFL5E7KQ3X620110926>.

³² Associated Press, *Libya Orders State Security Courts Abolished*, Sept. 26, 2011, available at <http://www.guardian.co.uk/world/feedarticle/9866256>.

³³ Karin Laub, Associated Press, *New Libya faces mountain of grievances*, Nov. 8, 2011, available at <http://news.yahoo.com/libya-faces-mountain-grievances-202027579.html>.

³⁴ Over two-thirds of states no longer have the death penalty. See Amnesty International, *Death Penalty and Human Rights Standards*, <http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty/death-penalty-and-human-rights-standards>. It is not in use at any of the U.N.-sponsored international or hybrid tribunals.

³⁵ See Rome Statute, art. 20 (*ne bis in idem*). An exception exists where the national court prosecutions were for the purpose of “shielding the person concerned from criminal responsibility” or otherwise “were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner . . . inconsistent with an intent to bring the person concerned to justice,” in which case national court prosecutions would not preclude ICC prosecutions. *Id.* at art. 20(2)(a)-(b).

³⁶ Rome Statute, art. 17.

³⁷ *Id.*

There is a generally accepted list of fair trial standards set forth in Article 14 of the International Covenant on Civil and Political Rights, to which Libya is a party.³⁸ These are analogous to the fair trial standards set forth in the Rome Statute. The Rome Statute contains all the due process protections provided in the U.S. Bill of Rights, except for trial by jury. These standards include the right to remain silent or to not be forced to testify against oneself,³⁹ the right against self-incrimination,⁴⁰ the right to cross-examine witnesses,⁴¹ the right to be tried without undue delay,⁴² the protection against double jeopardy,⁴³ the right to be present during trial,⁴⁴ the presumption of innocence,⁴⁵ the right to representation by counsel,⁴⁶ the right to a written statement of charges against the accused,⁴⁷ the right to have compulsory process to obtain witnesses,⁴⁸ the prohibition against prosecution for crimes *ex post facto*,⁴⁹ freedom from warrantless arrest and search,⁵⁰ and the ability to exclude illegally obtained evidence.⁵¹ It is not necessarily the case that Libyan courts would need to satisfy all of these fair trial standards in order to be deemed “willing” and “able” to investigate and/or prosecute under article 17 of the Rome Statute.⁵²

WHO DETERMINES WHETHER LIBYAN AUTHORITIES ARE WILLING AND ABLE TO HOLD A FAIR TRIAL?

If a challenge to admissibility of an ICC case were brought, the ICC Pre-Trial Chamber judges have the exclusive competence to decide whether Libyan courts have satisfied the standards set forth in Article 17 of the Rome Statute.

WOULD LIBYAN AUTHORITIES BE REQUIRED TO COMPLY WITH AN ICC RULING?

³⁸ Libyan Arab Jamahiriya acceded to the ICCPR on May 15, 1970, Multilateral Treaties Deposited with the Secretary General, at Chapter IV(4), http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

³⁹ Rome Statute, art. 67(1)(g).

⁴⁰ *Id.* at art. 55(1)(a), 67(1)(g).

⁴¹ *Id.* at art. 67(1)(e).

⁴² *Id.* at art. 67(1)(c) (speedy and public trials).

⁴³ *Id.* at art. 20.

⁴⁴ *Id.* at art. 63, art. 67(1)-67(1)(c).

⁴⁵ *Id.* at art. 66.

⁴⁶ *Id.* at art. 67(1) (b),(d).

⁴⁷ *Id.* at art. 61(3).

⁴⁸ *Id.* at art. 67 (1)(e).

⁴⁹ *Id.* at art. 22.

⁵⁰ *Id.* at arts. 57 (3), 58.

⁵¹ *Id.* at art. 69(7). The above-listed fair trial rights compilation is found in AMICC, “Safeguards in the Rome Statute Against Abuse of the Court to Harass American Servicemembers and Civilian Officials,” at 7, at <http://www.amicc.org/docs/Safeguards.pdf>.

⁵² *But see* Kevin John Heller, “The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process,” 10 Criminal Law Forum (2006) (discussing that article 17 covers courts that are “shielding” the accused from justice (*i.e.*, “unwilling” to prosecute), and courts that are “unable” to prosecute, but questioning whether article 17 would address national courts that are willing and able to prosecute, but not necessarily with due process). Put another way, if an ICC case becomes inadmissible when national courts are “unwilling” or “unable” to prosecute, what happens when the national court is “all too willing” to prosecute?

Yes. Although Libya is not a state party to the Rome Statute, which is recognized by U.N. Security Council Resolution 1970, paragraph five specifically directs Libyan national authorities to cooperate fully with the ICC.⁵³ As a U.N. Member State, Libya has an obligation to comply with Resolution 1970 under Article 25 of the U.N. Charter,⁵⁴ irrespective of Libya's status as a non-state party to the Rome Statute.

In terms of priority of prosecutions, Libya has a current, ongoing obligation to comply with the current ICC warrants on Gaddafi and Al-Senussi. Should the Libyan authorities wish to prosecute the accused domestically for factual conduct covered by the charges in the current ICC warrants, the proper procedure is to bring an "admissibility" challenge⁵⁵ before the ICC. In its admissibility challenge, Libya would argue that the Libyan domestic courts (or, for example, a newly established hybrid tribunal)⁵⁶ have proven themselves "willing" and "able" to conduct the prosecutions.

If the ICC finds that Libya is "willing" and "able" to investigate and prosecute the crimes, then Libya would conduct the prosecutions. If the ICC finds Libya "unwilling" or "unable" to investigate or prosecute, then the cases would remain admissible before the ICC. While the ICC does not have any direct means to compel Libya to comply with the ICC's warrants, Libya is already under a Security Council obligation to do so, and the U.N. Security Council could also further direct Libya to comply pursuant to its obligations as a U.N. member state should the Libyan authorities refuse to comply with ICC rulings or arrest warrants.

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⁵³ See S/RES/1970 (2011).

⁵⁴ See U.N. Charter, art. 25.

⁵⁵ See Rome Statute, art. 19.

⁵⁶ A hybrid tribunal, for example, established by agreement between the Libyan authorities and the UN could be created to sit in Libya. One model for creating such a tribunal would be the State Court in Bosnia insofar as it started as a hybrid tribunal, but is in the process of reverting to a national tribunal, thereby leaving an ongoing, functioning court when international staff is phased out. Alternatively, another model would be the Special Court for Sierra Leone, also a hybrid, but one that is terminating its work entirely after its ninth trial (the Charles Taylor trial) concludes.