

Playing Politics With the ICC

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The Security Council's referral of Libya to the Hague court highlights the limitations of international justice.



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The unanimous decision of the United Nations Security Council to refer the Libyan case to the International Criminal Court, ICC, has been broadly welcomed by the international community. But will this political, as opposed to legal, move undermine the court's ability to deter crimes?

Court prosecutor Luis Moreno Ocampo's decision last week to launch an investigation into alleged crimes by government forces against civilians in Libya came just five days after the Security Council referred the current situation there to the court on February 26.

Since Libya is not a state party – that is a signatory to the ICC's founding treaty, the Rome Statute – the Hague court could only start an investigation at the request of the Security Council.

The referral procedure differs markedly from when the prosecutor himself seeks to initiate an investigation within the court's jurisdiction, as he recently did in Kenya. On that occasion, he had to first seek the approval of a three-judge panel that the alleged crimes merited investigation. This process serves to independently and legally assess the prosecutor's decision to investigate crimes. However, no such judicial approval is needed in the Libyan case because the Security Council referred it to the court.

While the referral itself should be welcomed – the alleged bombing by Gaddafi of his own civilians would seem grave enough to be investigated by the ICC – it does little to mask what remain severe political obstacles to international justice.

The Security Council's decision to refer the case was a political rather than a legal one (the legal decision as to whether any charges can be brought will be taken by the ICC's judges later on).

It spoke of the "widespread and systematic attacks" that have taken place in Libya, but are they any more horrific than what has gone on elsewhere yet been overlooked by the UN's top decision-making body?

In Sri Lanka, for example, some 7,000 ethnic Tamil civilians were killed, according to the UN, when government forces clashed with Tamil rebels.

And in Operation Cast Lead in Gaza, a conflict in which some 1,300 Palestinians were killed, a UN-backed report authored by Richard Goldstone suggested strong evidence of war crimes or crimes against humanity.

Many have hailed the unanimity of the Security Council's decision over Libya, and Ocampo declared in a press conference to announce his investigation that "we are witnessing a new situation where the world is united. No one can attack civilians".

But, given how the international community has turned on Gaddafi in recent weeks, asking the ICC to investigate Libya was not a particularly brave or bold action.

Aside from the media furore, the defiant leader had already been ostracised by western powers, not to mention the Arab League and the Organisation of the Islamic Conference. Even the African Union, AU, usually willing to defend one of its own leaders in defiance of international justice, was silent.

He is a leader on the ropes in his own country and without a lifeline abroad. If this is the scale of isolation an errant leader must face before we call for international justice, how is the court supposed to act as a meaningful deterrent?

Meanwhile, other states continue to act with impunity because the international community judges that a referral to the ICC is not politically expedient.

Support for the Libyan referral, particularly from the US, may be seen as a welcome step forward for international justice. The US abstained from the vote on the only previous referral by the Security Council - the Darfur conflict, which was referred to the court in 2005.

But the Libyan referral should not be confused with unfettered support for the court.

Just over a month ago the AU, led by South Africa, asked the Security Council to defer the case brought by the prosecutor against six senior Kenyan officials.

Moreover, since October 2009, the AU has been pressing its members not to cooperate in the arrest of Sudanese president Omar al-Bashir, who is charged with genocide in Darfur.

Some African countries seem to reject justice in a particular place one week and then support it in another the next.

Some of the inconsistencies in the Security Council's support for international justice were exposed in the detail of the UN body's move against Libya.

Although it has called upon the ICC to investigate, the Security Council has not yet offered to pay for the investigation or any ensuing trial, despite the court being increasingly strapped for cash. Why should the court pay for work demanded of it by the Security Council?

There was also a clause inserted into resolution 1970, passed last week, to impose sanctions on the Libyan regime, protecting any UN troops who may yet be deployed in the country, under whatever guise, from prosecution by the ICC.

Such selective justice is not consistent with the Rome Statute. According to Article 13 of the statute, the court has jurisdiction over a "situation" rather than specific crimes referred to the ICC, so it can investigate all and every aspect of it.

This is to prevent the ICC being used for political purposes - to investigate only one side in a conflict, for example. So it seems against the grain of the statute and international law to make this stipulation in the resolution.

If international justice is to become a genuine deterrent, it cannot be subjected to the political whims of countries on the Security Council.

International justice relies on objectivity. ICC investigations should either be limited to its jurisdiction - those countries that have signed up to it - or it should have a free rein to investigate wherever it likes, although it would be hard to envisage how this latter option could practically be enacted.

If the Security Council still insists on the authority to refer crimes, it should have a legal, rather than solely political, basis to do so, perhaps through appointing judges to assess crimes from a legal perspective.

This decision would then have nothing to do with political interests, and would help preserve the integrity of the court.

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