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Avoiding Amnesty: Bringing Gaddafi to Justice

JURIST Guest Columnist **Kevin Govern** of Ave Maria School of Law says that members of the Gaddafi regime must be brought to justice in accordance with international law and should not be allowed to go into exile like other dictators in the region...



The capture of Muammar Gaddafi's sons within the past few days, **rebel forces controlling much of Tripoli** and Gaddafi's heavily fortified Bab Al-Aziziya compound, accompanies the announcement by the rebel government that the country's transition "begins immediately" and that "the fall of the capital means the fall of the regime." This indicates a kill or capture confrontation in the very near future if or when

Muammar Gaddafi is found.

The die appears to be cast, inasmuch as representatives from the International Criminal Court (ICC) were reportedly **meeting with Libyan rebels** to discuss turning over Gaddafi's son Saif al-Islam Gaddafi to the court for prosecution for war crimes, despite conflicting reports on whether rebel leaders allowed Saif al-Islam and another of Gaddafi's seven sons to escape after arresting them. As an additional motivation to bring the erstwhile "Brother Leader and Guide of the Revolution" out of hiding, Libyan rebels are purportedly offering a \$1.7 million reward and amnesty for any regime loyalist who delivers Gaddafi to them, dead or alive.

The world has seen this scenario played out in months prior with leaders elsewhere in North Africa and the Middle East, particularly

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those of **Tunisia** and **Egypt**. In the former instance, Zine al-Abidine Ben Ali, as a deposed dictator and an internationally infamous subject, gained exile in Saudi Arabia. The latter, Hosni Mubarak, was **detained** by the Supreme Council of the Armed Forces to be brought to justice.

There are tremendously compelling reasons for bringing the Gaddafis and their hierarchy to justice for crimes against humanity; the mass murder of civilians, forced mass expulsion of foreign residents, and the unlawful detention and torture of hundreds. They must not be granted amnesty and comfortable exile in some foreign nation, as in the wake of the Tunisian "Jasmine Revolution."

A paradigm from seven years past is the siege of Baghdad, which eroded Saddam Hussein's grip on authority. Biding his time, the president and prime minister of the fallen government chose to hide in a "spider hole" in the ground. He was found shortly thereafter and **tried and hanged** in December 2006.

The Gaddafis, and their key co-conspirators, should be handled in a manner consistent with the trend emergent over the past decade; the refusal of subsequent governments to grant amnesty for the former dictator's acts of genocide, war crimes or crimes against humanity. While lacking a certain expediency in removing a dictator from control, this protocol reinforces state practices and international custom promoting accountability and respect for the rule of law.

A show trial, as in Iraq or Egypt, may rely on both domestic and international notions of crimes under *jus cogens*, or peremptory norms in international law. However, such a forum, or even the ICC, will face a challenge arising from the fact that no international convention exists specifically regarding crimes against humanity. Moreover, as for the other international crimes considered here, there is little evidence of a general, uniform and consistent practice by states supporting the existence of a customary obligation to prosecute crimes against humanity.

If the Gaddafis, and others, are brought to justice at the ICC, rather than in Libya or in some **other country**, the court has already predetermined that it will **not grant immunity** to any person perpetrating crimes against humanity in Libya. The inclusion of crimes against humanity in the **Rome Statute** of the ICC clearly indicates the existence of a broad consensus among most states that perpetrators of such crimes must face criminal prosecution.

Luis Moreno-Ocampo, Chief Prosecutor of the ICC, has already **obtained arrest warrants** for Muammar Gaddafi and two others in his inner circle on charges of crimes against humanity. Ocampo said his office has **gathered evidence** that Gaddafi, his son Saif al-Islam and his brother-in-law Abdullah al-Sanussi, plotted together to



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orchestrate attacks on civilians. He said al-Islam was acting as a "*de facto* Prime Minister" and called al-Sanussi Gaddafi's "right-hand man" and "executioner." Ocampo said his office was almost prepared for trial, having collected quality testimony from some who have fled Libya.

Prosecutors may seek to act under the **Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity**, establishing a specific duty on states to "assist each other in detecting, arresting, and bringing to trial persons suspected of having committed such crimes." Alternatively, they may well interpret and implement the **Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions**, endorsed by the UN General Assembly in 1989; as well as Article 14 of the **Declaration on the Protection of All Persons from Enforced Disappearance**, adopted by the UN General Assembly in 1992.

Calling for an international inquiry into Libyan violence and justice for victims in February 2011, Navi Pillay, the UN High Commissioner for Human Rights, **said**:

The state has an obligation to protect the rights to life, liberty and security. ... Protection of civilians should always be the paramount consideration in maintaining order and the rule of law. The authorities should immediately cease such illegal acts of violence against demonstrators. Widespread and systematic attacks against the civilian population may amount to crimes against humanity.

The time has come to assist the nascent, *de facto* National Transitional Council leadership of Libya to promote the protection of civilians and to bring the worst offenders of the Gaddafi regime to fully a constituted process of justice, and not summary execution or the perpetual summertime of exile.


Kevin Govern is an associate professor of law at Ave Maria School of Law. He began his legal career as a US Army Judge Advocate. He has also served as an assistant professor of law at the United States Military Academy and has taught at California University of Pennsylvania. Unless otherwise attributed, the conclusions and opinions expressed are solely those of the author and do not reflect the official position of the US government, Department of Defense, or Ave Maria School of Law.

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