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Qaddafi is dead. Why should we care?

By onlineeditor@nationalsecuritylawbrief.com / November 24, 2011 / Comments Off

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Muammar Qaddafi by all accounts was a terrible man. A ruthless dictator for over forty years, he debilitated his country's infrastructure, repressed any kind of political opposition, and committed egregious human rights violations. But did he deserve to die? Under any applicable legal regime, whether it be human rights or the law of armed conflict, Qaddafi deserved a fair trial. A trial would have served the interests of justice and would have bolstered the nascent Libyan government's legitimacy in its democratic endeavor. Unless specific circumstances exist, taking a life – whether that of a nun or a notorious dictator – is illegal. It was the new Libyan government's obligation to prosecute Qaddafi for his alleged crimes. Now, it has a duty to prosecute those responsible for Qaddafi's murder.

When earlier this year, the Libyan population protested against his repressive regime, Qaddafi's forces responded with violence. On February 27, 2011 the National Transitional Council (NTC) was established, creating the first serious political and military opposition to Qaddafi. Months of internal conflict ensued.

The international community was more than supportive of deposing Qaddafi: in March, France recognized the Council as the legitimate representative of the Libyan people; the United Nations Security Council sanctioned the establishment of a no-fly zone and the use of "all means necessary" to protect civilians within Libya; NATO launched attacks in support of the rebels. Qaddafi had to go.

In the interest of maintaining international peace and security, the Security Council referred the situation in Libya to the International Criminal Court (ICC). By the end of June, the ICC had issued [arrest warrants](http://www.icc-cpi.int/iccdocs/doc/doc1099314.pdf) for Qaddafi, his son, and his intelligence chief charging them with committing crimes against humanity. The Prosecutor of the ICC [met](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/head%20of%20the%20executive%20committee%20of%20the%20inc_libya%20mahmoud%20jibril%20meets%20with%20the%20icc%20prosecutor) with the leader of the NTC to discuss cooperation and potential surrender of the suspects if captured.

The rebels were winning. Qaddafi's forces were cornered. It was only a matter of time before this infamous dictator was captured and either surrendered to the ICC or tried domestically. The State Department allegedly [discussed](http://www.nytimes.com/2011/10/25/us/politics/before-qaddafis-death-us-debated-his-future.html?ref=world) (http://www.nytimes.com/2011/10/25/us/politics/before-qaddafis-death-us-debated-his-future.html?ref=world) the options of surrendering Qaddafi to the ICC or bolstering the judicial system in Libya to facilitate a fair domestic trial. From a political perspective, the advantages of a trial are obvious: it would bring legitimacy to the new government and show that even powerful dictators are held accountable for their crimes. Legally, it was the only viable option. Unless engaged in combat with Qaddafi or acting in self-defense, under no applicable legal regime could the NTC fighters choose to kill him without violating either the [laws of armed conflict](http://www.icrc.org/ihl.nsf/WebART/375-590006) (http://www.icrc.org/ihl.nsf/WebART/375-590006) or [human rights law](http://www.un.org/en/documents/udhr/) (http://www.un.org/en/documents/udhr/). For these reasons, a trial – whether in The Hague or in Libya – was imminent.

On October 20, 2011, Qaddafi was killed, rendering all discussions of a trial moot. The NTC celebrated. The shooter may receive a million pound award (http://www.spygun.com/richard-ruzylo/qaddafidied-or-alive). President Obama, Secretary Clinton, Prime Minister Cameron of the UK all [omitted mention](http://www.slate.com/articles/news_and_politics/fighting_words/2011/10/muammar_qaddafi_should_not_have_been_killed_but_sent_to_stand_tr.html) (http://www.slate.com/articles/news_and_politics/fighting_words/2011/10/muammar_qaddafi_should_not_have_been_killed_but_sent_to_stand_tr.html) of the option of a trial in their speeches after Qaddafi's death was confirmed.

On the day of his death, Qaddafi was traveling in a convoy near his hometown. The convoy was blown up by NATO planes. Qaddafi, severely injured, crawled into a drainpipe to hide. He was subsequently found and dragged out of the pipe by NTC fighters. There are conflicting accounts about what happened next, but judging from the available video footage, the most plausible scenario is the following: Qaddafi was injured and hiding; he had guns with him, but he was not trying to defend himself. He was captured by the NTC fighters, his weapons were taken away and he was immobilized. The fighters taunted him, beat him with their guns, kicked him, and then killed him with one shot to the abdomen and one to the head.

The question is why should we care? Should we not just be happy that an old dictator is dead? Does this not open up the path for a more democratic future in Libya? Trials are expensive, international criminal trials are fraught with political issues, Qaddafi was undoubtedly a terrible man who had committed innumerable crimes. Is it not just simpler for everyone that he is dead?

The short answer is a resounding no. Democratic societies – like the one the NTC claims to want to establish in Libya – are founded on the rule of law. Due process and fair trials are necessary ingredients to successful enforcement of the rule of law. A government will never have legitimacy when the cruel treatment of captured persons and extrajudicial killings are commonplace. One may argue that right now this was the smartest political move the NTC could make to bolster domestic support. But such a decision can only result in short term successes and comes at a major long term cost. More was lost here than the opportunity to prosecute Qaddafi: the new Libya lost the chance to prove that it intended to establish a democratic society based on principles of fairness, equality and the rule of law. The extrajudicial killing of an injured dictator as well as the [execution](http://www.nytimes.com/2011/10/25/world/middleeast/libyas-interim-leaders-to-investigate-qaddafi-killing.html?_r=1&ref=world) (http://www.nytimes.com/2011/10/25/world/middleeast/libyas-interim-leaders-to-investigate-qaddafi-killing.html?_r=1&ref=world) of dozens of Qaddafi loyalists marks the birth of the new Libya with violence and impunity.

Why are these killings extrajudicial when there was clearly an ongoing internal conflict? The international legal implications of the NTC's actions are not negligible. Pursuant to the law of armed conflict (international humanitarian law), the nature of the conflict in Libya is a non-international armed conflict, which determines the applicable legal regime. It was initially a conflict between government forces and a non-state actor, the NTC. Later the roles changed, arguably, the NTC became the government and Qaddafi's forces were the non-state actor. However, this does not change the nature of the conflict and applicable legal regime. The NATO air strikes against Qaddafi loyalists are unlikely to internationalize the conflict. However, if one were to argue that the conflict was indeed of an international character, a more generous legal regime would apply, providing for even more protections for potential prisoners of war.

In a non-international armed conflict, as in Libya, the protections prescribed in Common Article 3 to the Geneva Conventions and Additional Protocol II are applicable (Libya [ratified](http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P) (http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P) the Protocol in 1978). Common Article 3 provides protections for persons *hors de combat*, taking no active part in the hostilities, while Additional Protocol II elaborates on protections provided specifically for victims of non-international armed conflict.

By all accounts, Qaddafi was *hors de combat* due to his wounds when he was captured. Pursuant to [Common Article 3](http://www.icrc.org/ihl.nsf/WebART/375-590006) (http://www.icrc.org/ihl.nsf/WebART/375-590006), Qaddafi should have been treated humanely after being seized. "Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" are prohibited with respect to persons who are *hors de combat*. In addition, "outrages upon personal dignity, in particular humiliating and degrading treatment" is also prohibited. [Article 7\(1\)](http://www.icrc.org/ihl.nsf/full/475?OpenDocument) (http://www.icrc.org/ihl.nsf/full/475?OpenDocument) of Additional Protocol further elaborates and provides that "all wounded [. . .] **whether or not they have taken part in the armed conflict**, shall be respected and protected."

The NTC's actions were also illegal with regards to the dozens of Qaddafi loyalists who were found executed in Sirte. Pursuant to [Article 3\(1\)\(d\)](http://www.icrc.org/ihl.nsf/WebART/375-590006) (http://www.icrc.org/ihl.nsf/WebART/375-590006) of Common Article 3, "[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court" is prohibited. In this legal regime, the NTC forces breached Common Article 3 by murdering an already captured and disarmed Qaddafi and executing his supporters. Once they had him in custody, the NTC had a duty to treat him in a humane manner and subsequently provide him with a fair trial.

On demands from the international community, the NTC has stated that it will establish a [committee](http://www.nytimes.com/2011/10/25/world/middleeast/libyas-interim-leaders-to-investigate-qaddafi-killing.html?_r=1&ref=world) (http://www.nytimes.com/2011/10/25/world/middleeast/libyas-interim-leaders-to-investigate-qaddafi-killing.html?_r=1&ref=world) to investigate any potential crimes that may have been committed by its forces. It seems safe to be at the very least skeptical about the outcome of such an investigation. Especially considering that the leader of the NTC has [suggested](http://www.nytimes.com/2011/10/25/world/middleeast/libyas-interim-leaders-to-investigate-qaddafi-killing.html?_r=1&ref=world) (http://www.nytimes.com/2011/10/25/world/middleeast/libyas-interim-leaders-to-investigate-qaddafi-killing.html?_r=1&ref=world) that Qaddafi may have in fact been killed by his own supporters as they were the only ones who had an interest in avoiding a trial. Videos of the capture indicate that this scenario is highly unlikely.

While some of this analysis may seem hypothetical, it is important

to identify violations of the laws of armed conflict. These laws have developed over the centuries to protect civilians and persons who are no longer fighting. While too many violations go unpunished, it is beneficial to raise the attention and understanding of the international community by pointing out violations in hopes that one day they may be prosecuted. In the case of Libya, this possibility is not so remote: the new government is determined to hold a trial for the recently captured Seif Al Islam, Qaddafi's son. The ICC continues to have [jurisdiction](http://www.icc-cpi.int/NR/exeres/48f6b130-ec14-4a51-bc79-1ccf8633e270.htm) (http://www.icc-cpi.int/NR/exeres/48f6b130-ec14-4a51-bc79-1ccf8633e270.htm) over the situation though it appears most likely that Libya will challenge the admissibility of the case arguing that they are conducting national proceedings. It is too late to try Qaddafi now, but his son is in custody and his murderers continue to be at large. The situation should be investigated on both sides and if crimes have been committed, the perpetrators should be prosecuted and punished.

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Will the soon-deposed dictator resort to the use of WMDs in an act of desperation and vengeance? This question, and what must be done to prevent terrorist groups from accessing the Libyan stockpile present NATO with a substantial challenge. While it appears that "the governing

August 24, 2011

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(http://nationalsecuritylawbrief.com/2011/02/28/qaddafi-v-the-world-what-the-un-nato-and-the-eu-could-mean-for-resolution-in-libya)

Even with more and more of his people united against him, it's unclear whether the popular uprising against Col. Muammar el-Qaddafi will end like those of Libya's neighbors Tunisia and Egypt. Sanctions by international organizations has been touted as a solution to the ongoing

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(http://nationalsecuritylawbrief.com/2011/09/05/could-qaddafis-downfall-be-the-last-nail-in-the-coffin-for-the-war-powers-resolution)

As negotiations continue for the surrender of the few cities where deposed tyrant Col. Muammar el-Qaddafi could be hiding, how peaceful the endgame turns out to be may impact the rhetoric surrounding President Obama's decision to enter the fray in the first place. Part of that discussion will

September 5, 2011

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