The war in Libya has been under way for months, without any indication of when it might end. Libyan leader Moammar Gadhafi’s faction has been stronger and more cohesive than imagined and his enemies weaker and more divided. This is not unusual. There is frequently a perception that dictators are widely hated and that their power will collapse when challenged. That is certainly true at times, but often the power of a dictator is rooted in the broad support of an ideological faction, an ethnic group or simply those who benefit from the regime. As a result, naive assumptions of rapid regime change are quite often replaced by the reality of protracted conflict.

This has been a characteristic of what we have called “humanitarian wars,” those undertaken to remove a repressive regime and replace it with one that is more representative. Defeating a tyrant is not always easy. Gadhafi did not manage to rule Libya for 42 years without some substantial support.

Nevertheless, one would not expect that, faced with opposition from a substantial anti-regime faction in Libya as well as NATO and many other countries, Gadhafi would retain control of a substantial part of both the country and the army. Yet when we look at the situation carefully, it should be expected.

The path many expected in Libya was that the support around Gadhafi would deteriorate over time when faced with overwhelming force, with substantial defections of senior leaders and the disintegration of his military as commanders either went over to the other side en masse, taking their troops with them, or simply left the country, leaving their troops leaderless. As the deterioration in power occurred, Gadhafi — or at least those immediately around Gadhafi — would enter into negotiations designed for an exit. That hasn’t happened, and certainly not to the degree that it has ended Gadhafi’s ability to resist. Indeed, while NATO airpower might be able to block an attack to the east, the airstrikes must continue because it appears that Gadhafi has retained a great deal of his power.
The International Criminal Court

One of the roots of this phenomenon is the existence of the International Criminal Court (ICC), which became operational in 2002 in The Hague, Netherlands. The ICC has jurisdiction, under U.N. mandate, to prosecute individuals who have committed war crimes, genocide and other crimes against humanity. Its jurisdiction is limited to those places where recognized governments are unwilling or unable to carry out their own judicial processes. The ICC can exercise jurisdiction if the case is referred to the ICC prosecutor by an ICC state party signatory or the U.N. Security Council (UNSC) or if the prosecutor initiates the investigation him or herself.

The current structure of international law, particularly the existence of the ICC and its rules, has an unintended consequence. Rather than serving as a tool for removing war criminals from power, it tends to enhance their power and remove incentives for capitulation or a negotiated exit. In Libya’s case, Gadhafi’s indictment was referred to the ICC by the UNSC, and he was formally indicted in late June. The existence of the ICC, and the clause that says that it has jurisdiction where signatory governments are unable or unwilling to carry out their own prosecutions, creates an especially interesting dilemma for Gadhafi and the intervening powers.

Consider the case of Slobodan Milosevic of Yugoslavia. Milosevic, like Gadhafi, was indicted during a NATO intervention against his country. His indictment was handed down a month and a half into the air campaign, in May 1999, by the International Criminal Tribunal for the former Yugoslavia (ICTY), a court that was to be the mold, to a large extent, for the ICC. After the intervention, Milosevic clung to power until 2001, cracking down on the opposition and dissident groups whom he painted as traitors during the NATO air campaign. Milosevic still had supporters in Serbia, and as long as he refused to cede his authority, he had enough loyalists in the government who refused to prosecute him in the interest of maintaining stability.

One of the reasons Milosevic refused to cede power was the very real fear that regime change in Serbia would result in a one-way ticket to The Hague. This is exactly what happened. A few months after Serbia’s October 2000 anti-Milosevic revolution, the new and nominally pro-Western government issued an arrest warrant for Milosevic, finally sending him to The Hague in June 2001 with a strong push from NATO. The Milosevic case illustrates the inherent risk an indicted leader will face when the government falls in the hands of the opposition.

The case of Radovan Karadzic, the Bosnian Serb political leader, is also instructive in showing the low level of trust leaders like Gadhafi may place in assurances from the West regarding non-prosecution. Serbian authorities arrested Karadzic in July 2008 after being on the run for 12 years. He claimed in court proceedings at the ICTY that he was given assurances by the United States — denied by Washington — that if he were to step down and make way for a peace process in Bosnia, he would not be prosecuted. This obviously did not happen. In other words, the likely political arrangements that were arrived at to initiate a peace process in Bosnia-Herzegovina were wholly disregarded by the ICTY.

Gadhafi is obviously aware of the Balkans precedents. He has no motivation to capitulate, since that could result in him being sent to The Hague, nor is there anyone that he can deal with who can hold the ICC in abeyance. In most criminal proceedings, a plea bargain is possible, but this is not simply a matter of a plea bargain.

Regardless of what a country’s leader has done, he or she holds political power, and
the transfer of that power is inherently a political process. What the ICC has done since
2002 — and the ICTY to an extent before that — is to make the political process moot
by making amnesty impossible. It is not clear if any authority exists to offer and honor
an amnesty. However, the ICC is a product of the United Nations, and the authority of
the United Nations lies in the UNSC. Though there is no clear precedent, there is an
implicit assumption that the UNSC would be the entity to offer a negotiated amnesty
with a unanimous vote. In other words, the political process is transferred from Libya to
the UNSC, where any number of countries might choose to abort the process for their
own political ends. So the domestic political process is trumped by The Hague’s legal
process, which can only be trumped by the UNSC’s political process. A potentially
simple end to a civil war escalates to global politics.

And this is not simply a matter of a leader’s unwillingness to capitulate or negotiate. It
aborts the process that undermines men like Gadhafi. Without a doubt, most of the
men who have surrounded him for years are guilty of serious war crimes and crimes
against humanity. It is difficult to imagine anyone around Gadhafi whose hands are
clean, or who would have been selected by Gadhafi if their hands weren’t capable of
being soiled. Each of them is liable for prosecution by the ICC, particularly the senior
leadership of the military; the ICC has bound their fate to that of Gadhafi, actually
increasing their loyalty to him. Just as Gadhafi has nothing to lose by continued
resistance, neither do they. The ICC has forged the foundation of Gadhafi’s survival
and bitter resistance.

It is not a question only of the ICC. Recall the case of Augusto Pinochet, who staged a
coup in Chile against Salvador Allende and presided over a brutal dictatorship. His
support was not insubstantial in Chile, and he left power in a carefully negotiated
political process. A Spanish magistrate, a minor figure in the Spanish legal system,
claimed jurisdiction over Pinochet’s crimes in Chile and demanded that he be
extradited from Britain, where Pinochet was visiting, and the extradition was granted.
Today the ICC is not the only authority that can claim jurisdiction in such cases, but
under current international law, nations have lost the authority to negotiate solutions to
the problem of transferring power from dictators to representative democracies.
Moreover, they have ceded that authority not only to the ICC but also to any court that
wants to claim jurisdiction.

Apply this to South Africa. An extended struggle took place between two communities.
The apartheid regime committed crimes under international law. In due course, a
negotiated political process arranged a transfer of power. Part of the agreement was
that a non-judicial truth commission would review events but that prosecutions would
be severely limited. If that transfer of power were occurring today, with the ICC in place
and “Spanish magistrates” loose, how likely would it be that the white government
would be willing to make the political concessions needed to transfer power? Would an
agreement among the South Africans have trumped the jurisdiction of the ICC or
another forum? Without the absolute certainty of amnesty, would the white leadership
have capitulated?

The desire for justice is understandable, as is the need for an independent judiciary.
But a judiciary that is impervious to political realities can create catastrophes in the
name of justice. In both the Serbia and Libya cases, ICC indictments were used by
Western countries in the midst of bombing campaigns to legitimize their humanitarian
intervention. The problem is that the indictments left little room for negotiated
settlements. The desire to punish the wicked is natural. But as in all things political —
though not judicial — the price of justice must also be considered. If it means that
thousands must die because the need to punish the guilty is an absolute, is that
justice? Just as important, does it serve to alleviate or exacerbate human suffering?
Judicial Absolutism

Consider a hypothetical. Assume that in the summer of 1944, Adolph Hitler had offered to capitulate to the allies if they would grant him amnesty. Giving Hitler amnesty would have been monstrous, but at the same time, it would have saved a year of war and a year of the holocaust. From a personal point of view, the summer of 1944 was when deportation of Hungarian Jews was at its height. Most of my family died that fall and winter. Would leaving Hitler alive been worth it to my family and millions of others on all sides?

The Nuremberg precedent makes the case for punishment. But applied rigorously, it undermines the case for political solutions. In the case of tyrannies, it means negotiating the safety of tyrants in return for their abdication. The abdication brings an end to war and allows people who would have died to continue to live their lives.

The theory behind Nuremberg and the ICC is that the threat of punishment will deter tyrants. Men like Gadhafi, Milosevic, Karadzic and Hitler grow accustomed to living with death long before they take power. And the very act of seizing that power involves two things: an indifference to common opinion about them, particularly outside their countries, and a willingness to take risks and then crush those who might take risks against them. Such leaders constitute an odd, paradoxical category of men who will risk everything for power, and then guard their lives and power with everything. It is hard to frighten them, and harder still to have them abandon power without guarantees.

The result is that wars against them take a long time and kill a lot of people, and they are singularly indifferent to the suffering they cause. Threatening them with a trial simply closes off political options to end the war. It also strips countries of their sovereign right to craft non-judicial, political solutions to their national problems. The dictator and his followers have no reason to negotiate and no reason to capitulate. They are forced to continue a war that could have ended earlier and allowed those who would have died the opportunity to live.

There is something I call judicial absolutism in the way the ICC works. It begins with the idea that the law demands absolute respect and that there are crimes that are so extraordinary that no forgiveness is possible. This concept is wrapped in an ineluctable judicial process that, by design, cannot be restrained and is independent of any moderating principles.

It is not the criminals the ICC is trying who are the issue. It is the next criminal on the docket. Having seen an older dictator at The Hague earlier negotiate his own exit, and see that negotiation fall through, why would a new dictator negotiate a deal? How can Gadhafi contemplate a negotiation that would leave him without power in Libya, when the Milosevic case clearly illuminates his potential fate at the hands of a rebel-led Libya? Judicial absolutism assumes that the moral absolute is the due process of law. A more humane moral absolute is to remove the tyrant and give power to the nation with the fewest deaths possible in the process.

The problem in Libya is that no one knows how to go from judicial absolutism to a more subtle and humane understanding of the problem. Oddly, it is the judicial absolutists who regard themselves as committed to humanitarianism. In a world filled with tyrants, this is not a minor misconception.