
THE CLASH OF THE TITANS: JUSTICE AND REALPOLITIK IN LIBYA

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I. INTRODUCTION

In July 2012, the International Criminal Court (“ICC” or “Court”) celebrated its ten-year anniversary.¹ Supporters of the Court believed it would usher in a new era where perpetrators of atrocity crimes would be held accountable and victims would receive justice.² Realpolitik-oriented policy makers, on the other hand, thought the Court would be bureaucratically cumbersome, be timid in its approach, and shy away from indicting heads of state or senior military commanders.³ They did not anticipate that the Court would make a significant impact one way or the other on their efforts to maintain international peace and security.⁴

Without attracting much attention from key policy makers, the founding documents of the Court were developed mostly by lawyers in the various foreign ministries.⁵ It was not until the states realized

1. See 2012: Celebrating the ICC’s 10th Anniversary, COALITION FOR THE INT’L CRIMINAL COURT, <http://www.iccnw.org/?mod=icc-10th-anniversary> (last visited Nov. 19, 2012).

2. See *The International Criminal Court*, HUM. RTS. FIRST, <http://www.humanrightsfirst.org/our-work/crimes-against-humanity/the-international-criminal-court/> (last visited Nov. 17, 2012).

3. See Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT’L L. 407, 432–33 (2004); *Courting Disaster?*, ECONOMIST, May 27, 2010, <http://www.economist.com/node/16219717>.

4. See Gary T. Dempsey, *Reasonable Doubt: The Case Against the Proposed International Criminal Court* 12 (Cato, Policy Analysis No. 311, July 16, 1998), available at <http://www.cato.org/pubs/pas/pa-311es.html>.

5. See U.N. Preparatory Commission for the International Criminal Court,

they would be confronted with a draft treaty to create a permanent International Criminal Court (the Rome Statute) that they scrambled to develop a full understanding of how it might operate in the realpolitik world of foreign affairs. Even at that stage, there was little discussion as to how this Court might affect the ability to employ traditional methods of inducement and coercion to maintain peace and security.

The International Law Commission, which often takes years to consider draft treaties, moved quite rapidly in the wake of the end of the Cold War to prepare a draft treaty establishing the Court and present it to the United Nations (“UN”) General Assembly.⁶ The Rome negotiations in 1998 were characterized largely by an effort of the United States and a handful of other states to ensure that the Court fit within the existing architecture, in particular the preeminent authority of the UN Security Council to address matters that threaten international peace and security.⁷ In the end, while the Rome Statute did provide a role for the UN Security Council, this role was rather limited.

Once created, the Court acted with speed and surprising boldness.⁸ This caught policy makers by surprise, given the timid and tardy approach of precursor tribunals, such as the Yugoslav Tribunal, which took nearly six years to indict the former president of the Federal Republic of Yugoslavia, Slobodan Milosevic, for his crimes in Bosnia, and then embarked on a five-year trial, during which time he passed away.⁹

Proceedings of the Preparatory Commission at Its First, Second and Third Sessions, ¶¶ 7, 11–12, U.N. Doc. PCNICC/1999/L.5/Rev.1 (Dec. 22, 1999).

6. See *Chronology of the International Criminal Court*, INT’L CRIMINAL COURT [ICC], <http://www2.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Chronology+of+the+ICC.htm> (last visited Jan. 3, 2013).

7. See William A. Schabas, *United States Hostility to the International Criminal Court: It’s All About the Security Council*, 15 EUR. J. INT’L L. 701, 712–14 (2004) [hereinafter Schabas, *United States Hostility*] (referencing Bill Richardson, U.S. Ambassador to the U.N., as saying that the ICC should work in coordination with the U.N. Security Council in order to be effective).

8. See Daniel Donovan, *International Criminal Court: Successes and Failures of the Past and Goals for the Future*, INT’L POLICY DIGEST (Mar. 23, 2012), <http://www.internationalpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures-of-the-past-and-goals-for-the-future/>.

9. See Leila Nadya Sadat, *The Trial of Slobodan Milosevic*, ASIL INSIGHTS (Oct. 2002), <http://www.asil.org/insigh90.cfm> (detailing the indictments of

The Court has emerged as a dynamic and seemingly omnipresent force exerting its influence on the traditional processes for resolving international conflicts and maintaining peace and security. Since its creation, the Court has exerted its influence in numerous conflicts, including those in the Central African Republic (“CAR”), Côte d’Ivoire, the Democratic Republic of Congo, Kenya, Libya, Sudan, and Uganda.¹⁰ Moreover, the Prosecutor has aggressively pursued top-level suspects, including Omar Al-Bashir, the president of Sudan; Joseph Kony, the head of the Lord’s Resistance Army (“LRA”) in Uganda; Laurent Gbagbo, the former president of Côte d’Ivoire; Uhuru Kenyatta, Kenya’s Deputy Prime Minister; Jean-Pierre Bemba Gombo, former vice-president of the Democratic Republic of Congo (“DRC”); and Colonel Muammar Qadhafi, the former leader of Libya, and his son Saif Al-Islam Qadhafi.¹¹

The Court has established itself as an institutional fact of life that realpolitik-oriented policy makers must now account for as they seek to maintain international peace and security. The Court is unlike any other institution operating in the field of peace and security, as it is designed to operate largely outside of the usual political process of conflict resolution and is guided by the singular interest of justice.¹² An eclectic mix of principles and strategic state interests guides other institutions.

Unlike other international institutions, the Court derives its strength not from state interest or economic or military power, but from the intrinsic pull of justice—a normative pull universally held

Milosevic for acts committed in Bosnia-Herzegovina from 1992 to 1995 and also for crimes committed in Kosovo and Croatia); *see also Milosevic Found Dead in His Cell*, BBC NEWS (Mar. 3, 2006), <http://news.bbc.co.uk/2/hi/europe/4796470.stm>.

10. *See generally Situations and Cases*, ICC, <http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Jan. 3, 2012) (discussing the situations in each of the countries and the role of the Prosecutor).

11. *See id.*

12. *See* OFFICE OF THE PROSECUTOR, POLICY PAPER ON THE INTERESTS OF JUSTICE 1 (2007) [hereinafter POLICY PAPER ON THE INTERESTS OF JUSTICE], available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCTPInterestsOfJustice.pdf> (emphasizing that the ICC Prosecutor serves the objectives of the Rome Treaty to end impunity and, in doing so, is only concerned with the interest of justice, not the interests of peace and security defended by other institutions).

to some degree by all human beings.¹³ As such, the Court, possibly more so than other institutions, is characterized by a jealous regard for its independence, from which it gains much of its legitimacy.¹⁴

Most realpolitik-oriented policy makers, it seems, are to some degree uncomfortable with the Court.¹⁵ Their discomfort arises not because the Court is fueled by the norm of justice, but because it operates outside, yet has such a significant impact on, the traditional process for maintaining international peace and security.¹⁶ While the Court may at times be a useful tool in helping policy makers accomplish their objectives, it is a tool that they do not formally control, and one that can have a variety of unintended consequences.¹⁷ For highly skilled professionals trained in the realpolitik world of power and state interests, this can be unsettling. Many policy makers seem to prefer that the Court pursue issues of justice at the close of the conflict, not during the conflict while diplomats are primarily concerned with maintaining peace and security by managing the delicate balance of economic, military, and social power.¹⁸

The Court, however, has become intertwined with the political

13. See James A. Goldston, *The International Criminal Court: Justice and Politics*, OPEN DEMOCRACY (Jan. 13, 2010), <http://www.opendemocracy.net/james-goldston/international-criminal-court-justice-and-politics> (quoting U.N. Secretary General Kofi Annan calling the founding of the Court a “victory for justice”).

14. See Sarah Sewall & Carl Kaysen, *The United States and the International Criminal Court: The Choices Ahead*, AM. ACAD. OF ARTS & SCI., <http://www.amacad.org/projects/iccarticle.aspx> (last visited Nov. 22, 2012).

15. See Robert Cryer, *International Criminal Law vs State Sovereignty: Another Round?*, 16 EURO. J. INT’L L. 979, 980 (2005).

16. See John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America’s Perspective*, 64 L. & CONTEMP. PROBS. 167, 169 (2001).

17. See JOHNS HOPKINS UNIV., THE ICC AT EIGHT—ASSESSING US POLICY & INTERNATIONAL CRIMINAL LAW: RECIPROCAL INFLUENCES 93 (2010), available at http://transatlantic.sais-jhu.edu/transatlantic-topics/Articles/homeland-security/THE_ICC_AT_EIGHT.pdf.

18. See, e.g., HAMISH FALCONER ET AL., WAGING PEACE, MATCHING WORDS WITH ACTION: HOW TO PRESSURE SUDAN TO STOP ITS GENOCIDAL CAMPAIGN IN DARFUR 12 (Mar. 25, 2007), http://www.wagingpeace.info/index.php?option=com_content&view=article&id=121&Itemid=35 (discussing China’s change in diplomatic and economic policies toward Sudan in an effort to pressure the Sudanese into action with regard to Darfur).

process of guaranteeing peace and security.¹⁹ While the Court draws its potency from the normative demands of justice, in reality, justice is also subject to political interests, state power, and the political process.²⁰ In addition, the Court exerts its own influence on political efforts to ensure peace and security, sometimes even contributing to an alteration of the balance of power.²¹ In this way, it inches ever closer to the realm of the realpolitik policy makers, thereby increasing their discomfort with the Court.

This state of affairs has set the stage for a seemingly perpetual clash of the Titans, with the ICC and other mechanisms of justice in one group of powerful actors, and realpolitik-oriented policy makers and the state institutions they operate in another group of even more powerful actors.²² Just like the pre-Olympian Titans of Greek mythology, these groups often clash as they are driven by divergent desires (in the modern arena: justice on the one hand, and stability and the protection of national interests on the other). Nonetheless, at times, they can also cooperate in the pursuit of a common objective (in the modern arena: peace).

Whether cooperative or discordant, the relationship between the Court's activities and realpolitik efforts to maintain peace and security is embryotic, complex, and rapidly evolving.²³ This article is directed to policy makers who are perplexed and often frustrated by this independent actor; it is equally directed to advocates of justice frustrated by the perceived efforts of some policy makers to constrain justice. A better understanding of each perspective will yield a more

19. See, e.g., *Statement by H.E. Mr. Kazuo Kodama, Open Debate of the Security Council on the Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security*, PERMANENT MISSION OF JAPAN TO THE UNITED NATIONS, www.un.emb-japan.go.jp/statements/kodama101712.html (Oct. 17, 2012) (statement of Deputy Permanent Representative of Japan to the U.N. H.E. Mr. Kazuo Kodama).

20. See Miroslav Baros, *The International Criminal Court and the Maintenance of International Peace and Security: A Marriage of Convenience?* 2, 6 (Sheffield Hallam U., Working Paper, Nov. 7, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1955827.

21. See Baros, *supra* note 20, at 2.

22. See Samwel Mukira Mohochi, *Jurisdiction of the ICC: The Realpolitik by State Parties to the Rome Statute and United Nations Security Council in Its Efficaciousness* 5–6 (Sept. 2010) (unpublished LLM thesis), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1847474&download=yes.

23. See *id.* at 2–3.

effective tool for promoting durable resolutions of conflicts that threaten international peace and security. This article will describe six primary questions that policy makers and justice advocates should consider regarding the role of international justice mechanisms and realpolitik in conflict settings. It also uses the recent events in Libya as a case study designed to help further understand the relationship between the Court and policy makers.

Part II, “The Rise and Perseverance of International Justice,” describes how the norm of justice came to play a role in efforts to maintain international peace and security. It also details why this norm was incarnated into a permanent body, with a perceived entitlement to operate independently and with limited regard to the consequences for major state players and institutions in their efforts to maintain international peace and security.

Part III, “Deploying Justice,” explains how the ICC, particularly through its political mechanisms and consequences, becomes involved in international efforts to maintain international peace and security. The section further describes the role of strategic state interests in the deployment of justice.

Part IV, “Managing Justice,” notes the few political constraints that exist on the efforts of the ICC as it proceeds in indicting and prosecuting suspected criminals. Part V, “Justice and the Battlefield,” delves into the extent to which investigations or indictments by the ICC may help legitimize the use of force to maintain international peace and security.

Part VI, “Justice and the Peace Table,” describes the extent to which actions by the ICC may promote or inhibit efforts to reach a negotiated solution to a conflict threatening international peace and security. Finally, Part VII, “Justice and Post-Conflict Stability,” describes to what extent conflicts or synergy arise between the ICC and national efforts to prosecute those responsible for crimes, and how this affects post-conflict stability.

Each section will briefly restate the question, place the question in the context of other contemporary conflicts, and then delve into how the question was addressed in the context of the Libyan conflict.

II. THE RISE AND PERSEVERANCE OF INTERNATIONAL JUSTICE

How did the norm of justice come to play a role in efforts to maintain international peace and security? And why did this norm manifest itself into a permanent body, with a perceived entitlement to operate independently, regardless of its consequences for the efforts of major state players and institutions in maintaining international peace and security?

The concept of international justice started to play a role in efforts to maintain international peace at the beginning of the twentieth century.²⁴ The laws of war were codified comprehensively for the first time in several international treaties: the 1899 and 1907 Hague Conventions.²⁵ At the time, states determined that since armed conflict was sometimes unavoidable and necessary to serve the interests of humanity and civilization, they should implement a general code of conduct for armed conflict.²⁶ States believed that such a code of conduct would reduce the evils of war and curtail potentially arbitrary actions of military commanders.²⁷ At the same time, these treaties were not intended to create criminal liability for individuals; rather, they imposed obligations and duties on states.²⁸

Over the next fifty years, perspectives on the acceptance of armed conflict and the legality of war evolved significantly. This transition started with the 1919 League of Nations Covenant, which reflected nineteenth-century notions that resorting to war was permissible if

24. See Richard Goldstone, *SA Leads the Way in Standing Up Against War Criminals*, IJ CENTRAL (Sept. 27, 2010), <http://ijcentral.org/topics/tag/international+justice>.

25. See generally *Hague Convention*, ENCYC. BRITANNICA ONLINE (Oct. 14, 2012), <http://www.britannica.com/EBchecked/topic/251644/Hague-Convention>.

26. See Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, 632 [hereinafter Hague Convention IV]; Hague Convention No. II Multilateral Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247, 248 [hereinafter Hague Convention II].

27. See Hague Convention IV, *supra* note 26, at 632; Hague Convention II, *supra* note 26, at 248.

28. See WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 2 (2007) [hereinafter SCHABAS, INTRODUCTION]. See generally Hague Convention IV, *supra* note 26; Hague Convention II, *supra* note 26.

certain procedures were exhausted.²⁹ These procedures included a meeting of the Council of the League of Nations; submission of any conflicts to arbitration, judicial settlement, or the Council; and the severance of trade and financial relations.³⁰ The 1928 General Treaty for the Renunciation of War followed.³¹ This legally binding multilateral treaty, agreed to by a number of states including the United States, Japan, Germany, France, and Great Britain, represented a commitment not to resort to war for the resolution of conflicts.³²

After World War II, the United Nations replaced the League of Nations, an institution that many believed to be deeply flawed due to its inability to prevent the war.³³ The purpose of the UN was to prevent a third world war by promoting international peace and security, human rights, social and economic progress, and respect for international obligations.³⁴ The UN also represented a neutral forum for dialogue and cooperation among states. Several different bodies comprise the UN, including organs focused on international peace and security as well as justice.³⁵ For instance, the UN Security Council was created to maintain peace and security, and it can take measures that are binding on all states.³⁶ The International Court of Justice is the UN's principal judicial organ and tries cases between states in disputes arising from alleged violations of international law.³⁷

Concurrent to the creation of the United Nations, the victorious allies created the Nuremburg and Tokyo tribunals to try the military leadership of Germany and Japan for alleged war crimes. These trials

29. See Covenant of the League of Nations arts. 11–17, reprinted in 1 INTERNATIONAL LEGISLATION 16 (Manley O. Hudson ed., 1931) [hereinafter League of Nations]; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 697 (2003).

30. See League of Nations, *supra* note 29, arts. 11–17.

31. See generally Kellogg-Briand Peace Pact, Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 2 Bevans 732.

32. See *id.* at 732.

33. See *History of the United Nations*, U.N., <http://www.un.org/en/aboutun/history/> (last visited Nov. 22, 2012).

34. See U.N. Charter pmbl., art. 1.

35. See, e.g., UNITED NATIONS SECURITY COUNCIL, <http://www.un.org/en/sc/> (last visited Nov. 18, 2012) (highlighting the scope of the U.N. Security Council).

36. See U.N. Charter chs. V, VII.

37. See U.N. Charter ch. XIV.

are often thought of as the first modern international prosecutions for war crimes.³⁸ The relative success of the tribunals led some observers to conclude that there might be a serious role for justice as a part of efforts to maintain international peace and security.

As such, the United Nations began to consider the creation of a permanent, impartial tribunal that could try individuals responsible for international crimes. At the request of the UN General Assembly, the International Law Commission prepared a draft code of international crimes against peace and security.³⁹ Concurrently, a special rapporteur was tasked with drafting a statute that would establish an international criminal court.⁴⁰ This special committee submitted its first draft to the International Law Commission in 1950, followed by a second draft in 1951 that was revised in 1953.⁴¹ With the onset of the Cold War, these efforts were suspended.⁴²

With the dissolution of the Soviet Union and the genocidal conflict raging in the former Yugoslavia, and in the hope that it might help bring an end to the conflict, there was a renewed push in the 1990s to create an international tribunal to enforce the laws of war.⁴³ In many ways, the re-emergence of international justice mechanisms arose from the failure of the international community to take effective military action to stop the atrocities in Yugoslavia.⁴⁴ On October 6, 1992, the United Nations Security Council passed a resolution calling for the creation of a Commission of Experts to investigate

38. See ROBERT H. JACKSON CTR., *The Influence of the Nuremberg Trial on International Criminal Law*, <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-related-to-robert-h-jackson/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last visited Nov. 18, 2012) (commenting that, while these trials are thought of as biased or unfair, they created the framework for international criminal law).

39. See ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 323 (2008).

40. See *id.* at 323.

41. See Int'l Law Comm'n, *Question of International Criminal Jurisdiction*, UNITED NATIONS (June 30, 2005), http://untreaty.un.org/ilc/summaries/7_2.htm.

42. See CASSESE, *supra* note 39, at 324.

43. See PAUL R. WILLIAMS & MICHAEL P. SCHARF, *PEACE WITH JUSTICE* xvii–xix (2002).

44. See, e.g., MARGARET MIKYUNG LEE ET AL., CONG. RESEARCH SERV., RL 96404, *BOSNIA WAR CRIMES: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND U.S. POLICY* 1–2 (1998), available at <http://www.fas.org/sgp/crs/row/96-404.pdf> (stating that the U.N. Security Council established the first international tribunal against war crimes in fifty years following the conflict in the former Yugoslavia).

war crimes and other serious violations of international law in former Yugoslavia.⁴⁵ Although the Security Council assumed this Commission would take many months, if not years, to investigate the allegations of atrocities, the Commission rapidly completed its work and publicly recommended the creation of a Yugoslav tribunal.⁴⁶

In May 1993, while the conflict was still raging, the United Nations Security Council responded by creating the International Criminal Tribunal for the former Yugoslavia (“Yugoslav Tribunal”) to administer justice.⁴⁷ Some commentators argued that this decision was driven in large part by the desire to be seen as taking decisive action and to reduce political pressure to use force to end the conflict.⁴⁸ While the Yugoslav Tribunal was largely timid and tardy in the dispensation of justice, it did eventually indict Slobodan Milosevic, the former president of Yugoslavia and the main architect of the genocide in the Balkans.⁴⁹

Shortly after the creation of the Yugoslav Tribunal, the United Nations Security Council created a second international tribunal tasked with enforcing international justice. This new entity, the International Criminal Tribunal for Rwanda (“Rwanda Tribunal”) was created after the conflict in Rwanda had ended and was charged with determining the guilt and punishment of those responsible for the genocide of 800,000 Rwandans.⁵⁰ Many commentators viewed the creation of the Rwanda Tribunal as much as an expression of

45. See S.C. Res. 780, ¶ 2, U.N. Doc. S/RES/780 (Oct. 6, 1992).

46. See Fausto Pocar, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, U.N. AUDIOVISUAL LIBR. OF INT’L L. 1 (2008), available at www.un.org/law/avl (recounting that the Commissioner of Experts presented its recommendations on February 6, 1993, and the Security Council approved the establishment of the Yugoslav Tribunal on May 25, 1993).

47. See generally S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

48. See CASSESE, *supra* note 39, at 326.

49. See CASSESE, *supra* note 39, at 326; MIKYUNG LEE ET AL., *supra* note 44, at 21 (noting that, without the substantial political and financial support of the United States government and the non-profit sector, the Yugoslav Tribunal may never have survived its early months); WILLIAMS & SCHARF, *supra* note 43, at xvii; Sadat, *supra* note 9 (discussing how the three indictments against Milosevic were the first to be presented to a sitting head of state by an international tribunal).

50. See *International Criminal Tribunal for Rwanda*, UNICTR, <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited Nov. 22, 2012); *Rwanda: How the Genocide Happened*, BBC NEWS (Dec. 18, 2008), <http://news.bbc.co.uk/2/hi/1288230.stm>.

guilt for the failure to intervene in the Rwandan genocide as an instrument to pursue justice.⁵¹

The decade following the creation of these two international tribunals experienced the emergence of hybrid or *sui generis* tribunals comprising both international and domestic elements.⁵² The Special Court for Sierra Leone (“Sierra Leone Tribunal”) was established by agreement between the United Nations and the government of Sierra Leone to prosecute those who carried the greatest responsibility for the commission of crimes in Sierra Leone.⁵³ This tribunal, created at the end of the conflict,⁵⁴ was intended to promote justice and healing.⁵⁵ Interestingly, in addition to indicting both senior members of the Sierra Leone government as well as rebel groups, the Sierra Leone Tribunal also indicted Liberian President Charles Taylor for his role in supporting the rebels.⁵⁶ It thus entwined itself with the efforts of policy makers seeking to promote peace and stability in neighboring Liberia as well.⁵⁷ The Sierra Leone Tribunal was supported in large part by funding and

51. See, e.g., CASSESE, *supra* note 39, at 327.

52. See Anna Triponel & Stephen Pearson, *What Do You Think Should Happen? Public Participation in Transitional Justice*, 22 PACE INT'L L. REV. 103, 110–12 (2010) (explaining that hybrid tribunals apply a blend of international and national law and often take place within the country where the crimes took place).

53. See S.C. Res. 1315, ¶ 1, U.N. Doc. S/RES/1315 (Aug. 14, 2000) (expressing the concerns of the UN over the violations of international law during the conflict); MARY KALDOR & JAMES VINCENT, U.N. DEV. PROGRAMME, CASE STUDY SIERRA LEONE: EVALUATION OF UNDP ASSISTANCE TO CONFLICT-AFFECTED COUNTRIES 4 (2006) (summarizing Sierra Leone’s decade-long civil war, which resulted in 70,000 deaths, displacement of 2.6 million people, and widespread amputations and rapes).

54. See Agreement Between the United Nations and the Government of Sierra Leone on Establishing a Special Court for Sierra Leone (with Statute), Sierra Leone-U.N., Jan. 16, 2002, 2178 U.N.T.S. 137.

55. See Alexander Koff & Joseph L. Morales, *A Healing Justice*, 31 LEGAL TIMES, July 14, 2008.

56. See *The Prosecutor vs. Charles Gankay Taylor*, SPECIAL COURT FOR SIERRA LEONE, <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> (last visited Nov. 19, 2012) (detailing the indictment and subsequent conviction of Charles Taylor).

57. See Alpha Sesay, *Decision to Keep RUF’s Sam Bockarie in Liberia Was Taken by West African Leaders Says Issa Sesay*, GNN LIBERIA (July 10, 2010), http://gnnliberia.com/index.php?option=com_content&view=article&id=691:decision-to-keep-rufs-sam-bockarie-in-liberia-was-taken-by-west-african-leaders-says-issa-sesay&catid=51:events&Itemid=56.

other resources from the United States, whose policy makers thought the tribunal might help to secure a lasting peace in Sierra Leone and deter similar crimes in the future.⁵⁸ Notably, this tribunal was coupled with a truth commission responsible for the creation of an accurate historical record of the human rights abuses that occurred during the conflict to, in turn, promote community dialogue, healing, and reconciliation.⁵⁹

The Extraordinary Chambers in the Courts of Cambodia followed. The negotiations behind the creation of these chambers, which were tasked with prosecuting senior members of the Khmer Rouge, were politically sensitive and only led to the establishment of the court over two decades after the end of the conflict.⁶⁰

Negotiations between players in the international justice arena continued with the creation of two additional tribunals.⁶¹ The government of Iraq created the Iraqi Special Tribunal in collaboration with the United States to try high-level members of the Ba'ath Party regime accused of crimes committed between 1968 and 2003.⁶² The international community, however, shunned the tribunal because it allowed the death penalty.⁶³ Uganda created the Uganda

58. See SARA KENDALL & MICHELLE STAGGS, BERKELEY WAR CRIMES STUDIES CTR., FROM MANDATE TO LEGACY: THE SPECIAL COURT FOR SIERRA LEONE AS A MODEL FOR "HYBRID JUSTICE" 13 (2005).

59. See *Truth Commission: Sierra Leone*, U.S. INST. OF PEACE (Nov. 2002), <http://www.usip.org/publications/truth-commission-sierra-leone> (finding that the conflict was caused by corruption and resulted in six different human rights violations).

60. See David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in INTERNATIONAL CRIMINAL LAW 1–10 (Cherif Bassiouni ed., 2008) (citing governmental restructuring in Cambodia and later in the United States, as well as uncertainty about authority of the tribunal, as major reasons for the delay); *Introduction to the ECCC*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (ECCC) (2012), <http://www.eccc.gov.kh/en/about-eccc/introduction> (discussing the logistics and limitations of the Extraordinary Chambers following the negotiations).

61. See Statute of the Iraqi Special Tribunal art. 1, Dec. 10, 2003, 43 I.L.M. 231 [hereinafter IST Statute]; HUMAN RIGHTS WATCH, JUSTICE FOR SERIOUS CRIMES BEFORE NATIONAL COURTS: UGANDA'S INTERNATIONAL CRIMES DIVISION 1 (Jan. 2012) [hereinafter JUSTICE FOR SERIOUS CRIMES].

62. See IST Statute, *supra* note 61, art. 1.

63. See, e.g., *Iraq: Don't Add Death Penalty to Dujail Sentence*, HUM. RTS. WATCH (Feb. 12, 2007), <http://www.hrw.org/news/2007/02/11/iraq-don-t-add-death-penalty-dujail-sentence>; Thalif Deen, *Death Penalty: U.N. Faults Iraq for Continued Executions*, INTER PRESS SERVICE, Sept. 5, 2007, available at

International Crimes Division (“Uganda Tribunal”) within Uganda’s judiciary to prosecute senior leaders of the Lord’s Resistance Army.⁶⁴ It too was criticized for its acceptance of the death penalty.⁶⁵ Critiques also focused on Uganda’s sweeping amnesty laws and the Uganda Tribunal’s failure to prosecute international crimes prior to a certain date, despite their universality.⁶⁶

Most recently, Côte d’Ivoire created a Special Cell of Investigations into the Crimes Committed during the Post-Election Crisis to investigate those responsible for violence following the 2010 elections.⁶⁷ The investigations are intended to lead to prosecutions using both civil and military tribunals within the existing judiciary. Other tribunals, such as the Bosnia War Crimes Chamber, the mobile courts of the Democratic Republic of Congo, the International Crimes Tribunal in Bangladesh, and the Special Tribunal for Lebanon also operate within the existing national judiciary or resemble domestic tribunals with international elements, which is an emerging trend.⁶⁸

<http://www.ipsnews.net/2007/09/death-penalty-un-faults-iraq-for-continued-executions/> (explaining the UN’s moratorium on capital punishment and the shift away from the death penalty in the international legal community).

64. See *Uganda: War Crimes Trials Face Challenges*, HUM. RTS. WATCH (Jan. 16, 2012), <http://www.hrw.org/news/2012/01/15/uganda-war-crimes-trials-face-challenges>.

65. See JUSTICE FOR SERIOUS CRIMES, *supra* note 61, at 15 (noting that although the death penalty had not been utilized in recent times there are organizations that do not want the sanction to be an option under any circumstance).

66. See *id.* at 13–15.

67. See *La Présentation de la Cellule Spéciale d’Enquête Relative à la Crise Poste Electorale*, MINISTÈRE DE LA JUSTICE, <http://justice-ci.org/component/content/article/50.html> (last visited Nov. 19, 2012).

68. See, e.g., *War Crimes Chamber in Bosnia-Herzegovina*, TRIAL (Sept. 6, 2012), <http://www.trial-ch.org/en/resources/tribunals/hybrid-tribunals/war-crimes-chamber-in-bosnia-herzegovina.html> (stating the creation of domestic tribunals continues to promote justice while allowing international courts to focus on high-ranking criminals); *Jurisdiction, Organization, and Structure of the Court of Bosnia and Herzegovina*, COURT OF BOSN. & HERZ., <http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=3&id=3&jezik=e> (last visited Nov. 19, 2012) (highlighting the structure of the Bosnia and Herzegovina tribunal); *Fact Sheet: Democratic Republic of Congo Mobile Gender Courts*, OPEN SOC’Y FOUNDS. (July 19, 2011), <http://www.soros.org/publications/fact-sheet-democratic-republic-congo-mobile-gender-courts> (noting the Democratic Republic of Congo has created a mobile court using its justice system to try mass rape and other crimes); Jon Lunn & Arabella Thorp, *Bangladesh: the International Crimes Tribunal — Commons*

In parallel to the creation of some of the first ad hoc tribunals, plans for the creation of a permanent international criminal tribunal started once again. Following the end of the Cold War, the UN General Assembly renewed the International Law Commission's mandate to draft a statute for an international court, which it did in 1993 and amended the following year.⁶⁹ In 1996, the General Assembly established the Preparatory Committee on the Establishment of an International Criminal Court, a group composed of member states as well as non-governmental and international organizations, and tasked it with submitting a draft statute to the Diplomatic Conference in Rome.⁷⁰ Delegates from some 150 states attended along with representatives from hundreds of organizations.⁷¹ Working groups adopted provisions that were then reviewed by the Drafting Committee, chaired by Professor M. Cherif Bassiouni.⁷²

The rapid, month-long negotiations in Rome successfully led to the establishment of the ICC to prosecute perpetrators of the most serious crimes of concern to the international community, including genocide, crimes against humanity, and war crimes. The Court entered into force on July 1, 2002, after sixty states had ratified its founding treaty, the Rome Statute.⁷³

A split in opinion within the United States administration toward the ICC resulted in the lack of an orchestrated strategy toward the Court.⁷⁴ Ultimately, the Clinton administration signed on to the

Library Standard Note, UK PARLIAMENT (May 3, 2012), <http://www.parliament.uk/briefing-papers/SN06318>; *Unique Features*, SPECIAL TRIBUNAL FOR LEB., <http://www.stl-tsl.org/en/about-the-stl/unique-features> (last visited Nov. 19, 2012) (expressing criticism that the re-established domestic tribunal in Bangladesh may not meet international standards and proclaiming that the Special Tribunal for Lebanon is the first international tribunal to prosecute crimes under local criminal law).

69. See CASSESE, *supra* note 39, at 317, 328.

70. See *id.* at 329.

71. See Michael P. Scharf, *Rome Diplomatic Conference for an International Criminal Court*, ASIL INSIGHTS (June 1998), <http://www.asil.org/insigh20.cfm>.

72. SCHABAS, INTRODUCTION, *supra* note 28, at 20.

73. See *About the Court*, ICC, <http://www2.icc-cpi.int/Menus/ICC/About+the+Court/> (last visited Jan. 3, 2013); see also Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 2002 [hereinafter Rome Statute].

74. See Schabas, *United States Hostility*, *supra* note 7, at 719 (concluding that the U.S. intransigence toward the ICC was due in part to differences between Republicans and Democrats concerning U.S. relations with international bodies).

Rome Statute a few minutes before the December 31, 2000 deadline.⁷⁵ However, following the signing, the United States exerted tremendous political effort to shield itself from the reach of the Court. On May 6, 2002, the Bush administration withdrew the U.S. signature from the treaty.⁷⁶ The United States then formed bilateral agreements with more than 100 states to preclude those states from surrendering an American national to the Court.⁷⁷ In 2002, the United States announced that it would veto UN Security Council resolutions regarding collective security and peacekeeping operations so long as the Security Council failed to adopt a resolution that, in effect, excluded members of these operations from the ICC's jurisdiction.⁷⁸

Thus, the signing and ratification of the Rome Statute became a political issue, a situation that ultimately inhibited a serious discussion of its strategic utility. States positioned themselves either for or against the Court, and the discourse contained little emphasis on the manner in which the Court might operate. In addition, international criminal law was initially an evolving concept without consensus on how best to address it.⁷⁹ This political divide precluded efforts by both justice-oriented actors and policy makers to assess how the Court might fit into the broader array of tools used to maintain international peace and security.⁸⁰

Of course, this is not an exhaustive account of the rise and perseverance of justice. Other factors—among them the growth of mass media, the liberalization that followed the fall of the Soviet Union, and growing attention paid to conflict and devastation—play important roles in establishing and maintaining international accountability. While falling outside the ambit of this article, these factors, and others, play important roles in the manifestation of justice and peace in the international community.

75. SCHABAS, INTRODUCTION, *supra* note 28, at 28.

76. *Id.*

77. *Id.* at 29.

78. *Id.* at 30.

79. *Cf.* JOLYON FORD, BRINGING FAIRNESS TO INTERNATIONAL JUSTICE 12 (2009) (indicating that international criminal law was an evolving issue at the time without a lot of experts).

80. *See, e.g.*, Anup Shah, *United States and the International Criminal Court*, GLOBAL ISSUES (Sept. 25, 2012), <http://www.globalissues.org/article/490/united-states-and-the-icc> (discussing how U.S. efforts to get immunity for their personnel from the ICC undermined the entire point behind the organization).

In sum, the ad hoc tribunals were not created as part of a strategic effort to maintain international peace and security. Established in lieu of an orchestrated policy, many of the international tribunals were created after periods of conflict to assuage guilt for non-intervention.⁸¹ Accordingly, these purported organs of international justice were anything but a carefully crafted tool designed to complement the other tools in the realpolitik policy maker's toolbox. This foundation helped set the framework for the tension between policy makers and justice advocates regarding the role and mandate of the ICC.

III. DEPLOYING JUSTICE

How does the ICC come to be involved in international efforts to maintain international peace and security, and what role do strategic state interests play in deploying justice? To what degree are these actors in tension or cooperation?

While the preceding section explained how justice came to be institutionalized within the arena of peace and conflict resolution in the form of the ICC and ad hoc tribunals, this section discusses when and how the mechanism of the ICC is deployed and how it can be used to aid in efforts to resolve conflicts and maintain international peace and security.

This section describes the four primary ways in which the ICC can be called into action, and it briefly notes the consequences of doing so in various instances. Specifically, it discusses the inherently political nature of the decision to activate the ICC on a particular matter and the subsequent relationship between the ICC and the political actors' efforts to maintain international peace and security. The section highlights the tension that arises from the activation of the ICC. On the one hand, the deployment of the ICC is initially and appropriately a political act, both in mechanics and motivation, aimed at least in part to promote peace and security. But on the other hand, once the ICC is deployed, it operates as an independent authority guided by the principle of justice—not necessarily by prioritizing peace and security. Policy makers do not fully grasp the shift from political activation to independent operation, as well as the

81. See, e.g., *supra* note 47 and accompanying text.

underlying motivations of the Court and its consequences on the peace process. This information gap causes substantial friction between policy makers and the ICC. As a case study, this section explores in depth the political decision of the UN Security Council to activate the ICC in the case of Libya and briefly examines the current (as of July 2012) decision not to activate the ICC in the case of Syria. Finally, this section discusses the activation of the ICC through referral.

A. ACTIVATING THE ICC

The ICC can be deployed into the conflict resolution process in four ways: referral by a state party to the Rome Statute; by the initiation of the Prosecutor based on the prior consent of a state as a state party to the Rome Statute; by the initiation of the Prosecutor based on the request of a non-state party to the Rome Statute; or by the UN Security Council.⁸² In all cases, for the ICC to be deployed, there must be a reasonable belief that atrocity crimes (genocide, crimes against humanity, or war crimes) have occurred or are occurring.⁸³ Furthermore, such crimes must have occurred after July 1, 2002 (the entry into force of the Rome Statute)⁸⁴ and must have been properly referred to the Court.⁸⁵

1. State Party Referral

The political leadership of a state can decide that it would like to be subjected to the jurisdiction of the ICC in the event that atrocity crimes occur on its territory or by its nationals.⁸⁶ To do so, the state signs and ratifies the Rome Statute. To date, more than 120 states have accepted the jurisdiction of the ICC by becoming parties to the

82. *Jurisdiction and Admissibility*, ICC, <http://www2.icc-cpi.int/menus/icc/about%20the%20court/icc%20at%20a%20glance/jurisdiction%20and%20admissibility?lan=en-GB> (last visited Jan. 3, 2013) (explaining that the International Criminal Court is a court of limited jurisdiction and can only initiate proceedings against a person if it has jurisdiction over that person for the alleged misconduct, which requires that the Court have (1) subject-matter jurisdiction, (2) temporal jurisdiction, and (3) territorial jurisdiction).

83. Rome Statute, *supra* note 73, arts. 5, 8.

84. *Id.* art. 11(1) (providing that the effective date may be later if the statute entered into force after July 1, 2012).

85. *See Jurisdiction and Admissibility*, *supra* note 82.

86. Rome Statute, *supra* note 73, art. 12(2).

Rome Statute.⁸⁷ Once a state has subjected itself to the jurisdiction of the Court, it can subsequently request that the Court launch an investigation of alleged atrocity claims.⁸⁸

Notably, the ICC received its first three cases by referrals from state parties to the Rome Statute—Uganda, the DRC, and CAR.⁸⁹ In each case, the political leadership of the state determined that involving the ICC would in some way contribute to resolving conflict and promoting peace and security. In such cases, the political nature of the activation of the Court is both mechanical and motivational. That is, a political actor made the request to activate the Court, and the decision to make such a request is influenced in part by political concerns.

For instance, in 2003 the Ugandan government referred to the ICC the matter of atrocities committed by the LRA in northern Uganda.⁹⁰ The Prosecutor's office subsequently launched an investigation and issued an arrest warrant for five LRA leaders including Joseph Kony, commander-in-chief of the LRA.⁹¹ Similarly, the DRC referred the matter of atrocities committed in the Ituri region to the ICC.⁹² The

87. *The States Parties to the Rome Statute*, ICC, <http://www2.icc-cpi.int/menus/asp/states%20parties/the%20states%20parties%20to%20the%20rome%20statute?lan=en-GB> (last visited Jan. 3, 2013).

88. Rome Statute, *supra* note 73, art. 13(a) (providing that a state party can refer to the Court a situation that happened on its territory or on the territory of another state, or that involves one of its nationals or the national of another state party).

89. See Patrick Wegner, *Self-Referrals and Lack of Transparency at the ICC — The Case of Northern Uganda*, JUSTICE IN CONFLICT (Oct. 4, 2011), <http://justiceinconflict.org/2011/10/04/self-referrals-and-lack-of-transparency-at-the-icc-%E2%80%93-the-case-of-northern-uganda/>.

90. See Press Release, ICC, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (2004), *available at* http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc?lan=en-GB.

91. *Uganda: The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, ICC, <http://www2.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/uganda?lan=en-GB> (last visited Jan. 3, 2013).

92. Press Release, ICC, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (2004), *available at* <http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo?lan=en-GB>; see also Rebecca Browning, *Advancing the*

subsequent investigation led to the ICC's first conviction on March 14, 2012, of Thomas Lubanga Dyilo, rebel leader in the Ituri conflict, for the war crimes of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities.⁹³ The government of the CAR also referred a situation in its territory to the ICC, which led to the trial of former vice president of the DRC, Jean-Pierre Bemba Gombo.⁹⁴

Tension perceived by policy makers between state parties' political activation of the ICC and the Court's independent operation has begun to surface.⁹⁵ For instance, having made the political decision to sign onto the Rome Statute, and while initially enthusiastic about the engagement of the ICC in efforts to promote peace and security, Uganda and the DRC have come to believe that the ICC's efforts might be constraining their ability to promote peace. The Ugandan government has sought to assert a principle called complementarity to prosecute individuals involved in the conflict and referred to the ICC domestically,⁹⁶ and the DRC has been slow to cooperate with the ICC after referral.⁹⁷

In the case of Uganda, where the ICC indicted five leaders of the LRA including its supreme leader Joseph Kony, the government and

Rule and Role of Law in Africa, AFRICLAW (July 20, 2012), <http://africlaw.com/2012/07/20/fumbling-justice-icc-sentences-former-congolese-warlord-thomas-lubanga-dyilo-to-14-years-and-criticizes-ocampos-handling-of-the-case/>.

93. *The Prosecutor v. Thomas Lubanga Dyilo*, ICC, <http://www2.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/democratic%20republic%20of%20the%20congo?lan=en-GB> (last visited Jan. 3, 2013).

94. *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC, <http://www2.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/icc%200105%200108/case%20the%20prosecutor%20v%20jean-pierre%20bemba%20gombo> (last visited Jan. 3, 2013); see also Press Release, ICC, Prosecutor Receives Referral Concerning Central African Republic (2005), <http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2005/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic?lan=en-GB>.

95. Wegner, *supra* note 89.

96. See ERIC A. WITTE, PUTTING COMPLEMENTARITY INTO PRACTICE: DOMESTIC JUSTICE FOR INTERNATIONAL CRIMES IN DRC, UGANDA, AND KENYA 59 (2011).

97. See *id.* at 41 (noting that, while the DRC has cooperated with most ICC requests, it still failed to arrest rebel leader Bosco Ntaganda for its own internal political reasons).

the ICC have been under domestic pressure for keeping secret the terms of the referral to the Court.⁹⁸ Furthermore, there is a perception that the terms only charge the LRA and not the government.⁹⁹ As a result, the local population in the territory where the crimes were committed has become quite hostile to the ICC.¹⁰⁰ In one notable instance, a local radio station broadcasted the license plate number of the car used by the ICC investigators to limit their ability to conduct their investigation.¹⁰¹

The political decision not to cooperate with the ICC also results in tension between the search for justice and the promotion of peace and security. In the case of the DRC, for instance, the ICC indicted the rebel leader General Bosco Ntaganda, who the DRC government integrated into the DRC army through a reconciliation program.¹⁰² Despite repeated calls by the Prosecutor for his arrest, the DRC, supported by other member states in the international community, refused to arrest General Bosco Ntaganda on the basis that integration of rebel forces into the army was key to peace and stability.¹⁰³ General Ntaganda, however, subsequently defected from his new position and returned to the bush where he has allegedly committed further atrocity crimes.¹⁰⁴ The DRC's course of action arguably resulted in neither justice nor peace and security.

2. *Initiation by the Prosecutor Relating to a State Party*

The Prosecutor can also independently initiate an investigation of

98. PAUL SEILS & MARIEKE WIERDA, *THE INTERNATIONAL CRIMINAL COURT AND CONFLICT MEDIATION* 10–11 (2005).

99. *Id.* at 10.

100. MOHAMED NDIFUNA ET AL., *THE ROLE OF STATES PARTIES IN BUILDING THE ICC'S LOCAL IMPACT: FINDINGS FROM DELEGATES' VISITS TO UGANDA* 16–17 (2011), available at <http://www.ucicc.org/attachments/article/22/2011%20Groitus%20Centre%20Paper%20-%20The%20Role%20of%20States%20Parties%20in%20Building%20the%20ICC%E2%80%99s%20Local%20Impact.pdf>.

101. See Michael A. Newton, *A Synthesis of Community Based Justice and Complementarity 5* (unpublished working paper), available at <http://ssrn.com/abstract=2081904>.

102. WITTE, *supra* note 96, at 41.

103. *Id.*

104. See *DR Congo: Bosco Ntaganda Recruits Children by Force*, HUM. RTS. WATCH (May 16, 2012), <http://www.hrw.org/news/2012/05/15/dr-congo-bosco-ntaganda-recruits-children-force>.

a state party to the Rome Statute.¹⁰⁵ If sufficiently serious evidence exists to justify an investigation, the Prosecutor submits a pre-trial request for investigation, along with supporting evidence.¹⁰⁶ If the Pre-Trial Chamber agrees that there is a “reasonable basis to proceed with investigation,” it can authorize a full investigation.¹⁰⁷

The Prosecutor, per the permission of the ICC, initiated an investigation¹⁰⁸ following the failure of the Kenyan government to create a special tribunal as recommended by the Kenyan Commission of Inquiry in the 2007–2008 Post-Election Violence.¹⁰⁹ At the time, many Kenyans as well as mediator and former UN Secretary General Kofi Annan believed that justice might cool the tensions that led to the electoral violence and prevent its recurrence in the next round of elections.¹¹⁰ They also hoped that indictments might remove key individuals from the political scene. Somewhat surprisingly, the Prosecutor moved quickly to indict top-level government officials, including Deputy Prime Minister and Finance Minister Uhuru Kenyatta, the son of former President Kenyatta.¹¹¹

Again in the case of Kenya, tension emerged as the Court shifted from political activation to independent operation. Almost immediately, the Kenyan government sought to undermine the authority of the Court by seeking to delegitimize it.¹¹² The Kenyan government also unsuccessfully sought a deferral of the case by the UN Security Council under Article 16 of the Rome Statute and by

105. Rome Statute, *supra* note 73, art. 13(c).

106. *Id.* art. 15(2).

107. *Id.* art. 15(4).

108. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 83 (Mar. 31, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>.

109. *See generally* Commission of Inquiry on Post-Election Violence (2008).

110. *See* AFRICAN UNION, Statement by Kofi Annan, Chairman of the AU Panel of Eminent African Personalities (Jan. 25, 2011), *available at* <http://kofiannanfoundation.org/sites/default/files/StatementbyKofiAnnan%20ChairmanoftheAUPanelofEminentAfricanPersonalities25thJanuary2012.pdf> (expressing his hope that focusing on fair elections would strengthen the constitution and lay a foundation for peaceful elections in the future).

111. *Situation in the Republic of Kenya*, ICC, <http://www2.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/> (last visited Jan. 3, 2013).

112. WITTE, *supra* note 96, at 84.

formally challenging the Court's jurisdiction.¹¹³ The Kenya case provides another illustration of the possible tension between the goals of policy makers and justice advocates, and the shift between political activation and subsequent independent operation of the Court. While those in favor of activation believed that doing so would lead to both justice and the furtherance of peace, policy makers within the Kenyan government either disagreed or favored an alternate course to promoting peace and security. The Court's mandate, however, gave it the authority to proceed independently following its activation.¹¹⁴

3. Non-State Party Referrals

States that are not parties to the Rome Statute may request that the Court exercise its jurisdiction over a particular conflict. Upon such a request, the Prosecutor seeks permission from a panel of ICC judges to initiate an investigation.¹¹⁵

Côte d'Ivoire is not a party to the Rome Statute.¹¹⁶ However, shortly after contested results in the presidential election of November 2010 led to violence, President Ouattara called on the ICC Prosecutor to investigate the post-election violence.¹¹⁷ The Prosecutor accordingly requested authorization from ICC judges to open an investigation into the war crimes and crimes against humanity allegedly committed in Côte d'Ivoire following the

113. *Kenya: Impact of the ICC Proceedings*, INT'L CRISIS GRP., Jan. 9, 2012, at 9, available at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/kenya/B084%20Kenya%20----%20Impact%20of%20the%20ICC%20Proceedings.pdf>.

114. Rome Statute, *supra* note 73, art. 15(2).

115. *Id.* art. 15 (identifying this mechanism to trigger the Court's jurisdiction as a *proprio motu* investigation).

116. *See New Suspect in the ICC's Custody: Laurent Gbagbo Arrived at the Detention Centre*, ICC (Nov. 30, 2011), <http://www.icc-cpi.int/NR/exeres/4814FA54-AF2D-4EA3-8A89-9E809318D1D8.htm>.

117. *See, e.g.*, Letter from Alassane Ouattara, President of Cote D'Ivoire, Confirming Acceptance of ICC Jurisdiction (May 3, 2011), available at <http://www.icc-cpi.int/NR/rdonlyres/7DA08D8E-FF5E-40C8-92D7-F058D5B032F3/283315/LetterOuattaratoOTP030511%20.pdf>; *Côte d'Ivoire: Alassane Ouattara Demande à la CPI d'enquête*, RFI (May 19, 2011), <http://www.rfi.fr/afrique/20110519-cote-ivoire-alassane-ouattara-cpi-enquete>; *see also* U.N. High Commissioner for Human Rights, *On the Situation of Human Rights in Cote d'Ivoire*, para. 34, U.N. Doc. A/HRC/18/52 (Sept. 20, 2011).

presidential election.¹¹⁸ Ivorian leaders believed ICC intervention to be the best option to prevent resurgence of violence and promote political stability.¹¹⁹ Thus, they made the political decision to request activation of the Court, hoping that it would indict former President Gbagbo and his closest allies, some of whom had fled, and would bring them to The Hague. Gbagbo himself was arrested; he awaits trial.¹²⁰

4. UN Security Council Referral

When crimes occur in a state that has not ratified the Rome Statute and that does not assent to the Court's jurisdiction, the drafters of the Rome Statute envisioned one possibility for the ICC to nonetheless be granted jurisdiction: a referral to the Court by the UN Security Council.¹²¹ This referral allows the ICC Prosecutor to investigate, regardless of whether the alleged human rights violation occurred in the territory or by the national of a state party to the Rome Statute.¹²² The referral, however, must be based on a Chapter VII finding that the issue poses a threat to international peace and security.¹²³

The first UN Security Council referral occurred in 2005 when the Security Council adopted Resolution 1593,¹²⁴ which referred the situation in Darfur, Sudan, to the Court.¹²⁵ Acting on this referral, the

118. Rome Statute, *supra* note 73, art. 12(3). Both former President Laurent Gbagbo and current President Alassane Ouattara submitted official declarations to that effect under Article 12(3) of the Rome Statute.

119. Matt Wells, *What Will the ICC's Legacy Be in Côte d'Ivoire?*, HUM. RTS. WATCH (July 19, 2012), <http://www.hrw.org/news/2012/07/19/what-will-icc-s-legacy-be-c-te-d-ivoire>.

120. *Ivory Coast's Laurent Gbagbo Appears at ICC in Hague*, BBC NEWS (Dec. 5, 2011), <http://www.bbc.co.uk/news/world-africa-16027845>.

121. Rome Statute, *supra* note 73, art. 13(b).

122. *Id.*

123. Chapter VII of the UN Charter allows the UN Security Council to take peaceful as well as military measures when it has deemed there is a threat to the peace, breach of the peace, or act of aggression. These measures are binding on all Member States of the UN under Article 25 of the UN Charter. This is how the UN Security Council can take a measure that is binding on non-state parties to the Rome Statute: the source is the UN Charter rather than treaty law. U.N. Charter chs. V, VII.

124. Press Release, U.N. Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005) [hereinafter Security Council Refers Situation in Darfur].

125. S.C. Res. 1593, TBD, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

Prosecutor issued the first arrest warrant against a sitting head of state, Omar Al-Bashir, for war crimes, crimes against humanity, and genocide against three ethnic groups in Darfur.¹²⁶ Resolution 1593 was the result of long negotiations in the Security Council. While supporting accountability efforts in Darfur, the United States initially intended to veto the resolution, strongly opposing the notion that states not party to the Rome Statute, like itself, could be subject to ICC jurisdiction.¹²⁷ The United States, however, decided to abstain after the language of the resolution was modified to reaffirm the exclusive jurisdiction of non-state parties over their nationals.¹²⁸ Such negotiations highlight the political nature of activation and also the role of state- and self-interest in activation of the Court.

B. UN SECURITY COUNCIL REFERRAL OF LIBYA TO THE ICC

The situation in Libya represents the second ICC referral by the UN Security Council. After peaceful protests against Colonel Muammar Qadhafi spread outside of the eastern Libyan city of Benghazi in February 2011, security forces commanded by Colonel Qadhafi opened fire on the protestors.¹²⁹ The violent clashes between the protestors and the security forces intensified, and by February 25, Qadhafi was ordering his security forces to conduct air raids on the unarmed protestors and conscripting foreign nationals from neighboring African countries to assist in the fight.¹³⁰ The UN Security Council reacted by condemning and attempting to halt the ongoing use of violence.¹³¹ The day after Qadhafi ordered the air raid on protestors, the Security Council met in New York to call for an

126. Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”), Case No. ICC-02/05-01/09, Warrant of Arrest (Mar. 4, 2009); *see also* Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”), Case No. ICC-02/05-01/09, Second Warrant of Arrest (July 12, 2010).

127. *See* INT’L CRISIS GRP., SUDAN: JUSTICE, PEACE AND THE ICC 5 (July 17, 2009), available at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/sudan/Sudan%20Justice%20Peace%20and%20the%20ICC.pdf>.

128. Security Council Refers Situation in Darfur, *supra* note 124.

129. *Libya Forces ‘Open Fire’ at Funeral*, AL JAZEERA (Feb. 19, 2011), <http://www.aljazeera.com/news/africa/2011/02/2011219811665897.html>.

130. Int’l Comm’n of Inquiry, Rep., to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, 17th sess., 24, U.N. Doc A/HRC/17/44 (June 1, 2011).

131. *Libya Protests: UN Security Council Condemns Crackdown*, BBC NEWS (Feb. 23, 2011), <http://www.bbc.co.uk/news/world-middle-east-12548520>.

immediate end to violence in Libya by passing Resolution 1970.¹³² The UN Security Council also declared an arms embargo on Libya, as well as a travel ban and an asset freeze on Qadhafi, his family members, and his close aides.¹³³ At the same meeting, the UN Security Council, by a unanimous vote, referred the situation in Libya to the ICC Prosecutor.¹³⁴ The United States notably voted in favor of the resolution, rather than simply abstaining as it did in the case of Darfur.¹³⁵

The political decision to refer the case of Libya to the ICC resulted from a convergence of strategic interests among the UN Security Council members and the perception that the Court could be used as a tool of coercive diplomacy to help bring about an end to the conflict.¹³⁶ On one level, several key members of the Security Council, notably the United States, the United Kingdom, and France, had concluded that long-term peace and stability would be best promoted by regime change in Libya.¹³⁷ As such, an indictment of Qadhafi would further the likelihood of regime change post-conflict.¹³⁸ Whether the remaining Security Council members sought regime change is uncertain. Several key members, including Russia, China, and Brazil, expressed concerns that a referral could hinder

132. S.C. Res. 1970, para. 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011) [hereinafter Resolution 1970].

133. *Id.* paras. 9–21.

134. *Id.* para. 4.

135. See Mark Kersten, *The US and the ICC: Towards a Closer Relationship?*, JUSTICE IN CONFLICT (Apr. 10, 2011), <http://justiceinconflict.org/2011/04/10/the-us-and-the-icc-towards-a-closer-relationship/>.

136. See Adam M. Smith, *The Emergence of International Justice as Coercive Diplomacy: Challenges and Prospects* 1 (Harvard Human Rights Program, Working Paper No. 12-002, May 2012), available at <http://www.law.harvard.edu/programs/hrp/documents/Smith.pdf> (contrasting the situation in Libya with that of Darfur, where States were hesitant to make substantive commitments like assets freezes or arms embargos); see also LAWRENCE MOSS, THE UN SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT: TOWARDS A MORE PRINCIPLED RELATIONSHIP 9 (March 2012) (discussing how timing affected the quick referral from states that were usually hostile toward the ICC).

137. Barack Obama et al., *Libya's Pathway to Peace*, INT'L HERALD TRIB., Apr. 15, 2011, at EDIT7.

138. See Colum Lynch, *Security Council Sanctions Gaddafi, Authorizes Probe*, WASH. POST, Feb. 27, 2011, at A10; see also Ian Black, *Libya Regime Change Is West's Goal, but Doubts Remain over How to Achieve It*, GUARDIAN (Apr. 15, 2011), <http://www.guardian.co.uk/world/2011/apr/15/libya-regime-change-analysis>.

peace efforts, rather than deter Qadhafi.¹³⁹ These states, however, did not have key strategic relationships with Libya and seemed ambivalent toward the role that the ICC might play in promoting an end to the conflict.¹⁴⁰

In addition, the act of diplomatic staff of Libya's mission to the UN defecting to the National Transitional Council ("NTC"), the opposition body established by anti-Qadhafi forces in February 2011 in Benghazi, and the mission's call for referral to the ICC, likely played a key part in building support for Resolution 1970.¹⁴¹ Indeed, as soon as February 21, 2011, Libyan Deputy Ambassador Dabbashi renounced Qadhafi and requested an urgent meeting of the Security Council to discuss actions to address the situation in Libya.¹⁴² The Libyan mission to the UN then sent a letter to the Security Council president supporting a referral of Qadhafi to the ICC.¹⁴³ The strong support of the Libyan diplomats likely quelled the fears of some states that are traditionally protective of sovereignty. States such as Russia, China, and India were likely concerned that a referral to the ICC of the Libyan case to the ICC would set a precedent for the further erosion of state sovereignty; however, given the competing claims for sovereignty by the NTC and Qadhafi's government, the referral could have been cast as a quasi self-referral.¹⁴⁴

C. SYRIA CONFLICT NOT REFERRED TO THE ICC

Despite the willingness of the UN Security Council to deploy the ICC to assist with bringing an end to the conflict in Libya, the UN

139. Lynch, *supra* note 138.

140. Cf. *The U.N. Security Council and the Crisis in Syria*, AM. SOC'Y OF INT'L LAW (Mar. 26, 2012), <http://www.asil.org/insights120326.cfm> (discussing the motivating factors for action in Libya and explaining how the broad interpretation of authority in Libya has had a chilling effect on proposed action in Syria).

141. See Edward Wyatt, *Security Council Calls for War Crimes Inquiry in Libya*, N.Y. TIMES, Feb. 26, 2011, http://www.nytimes.com/2011/02/27/world/africa/27nations.html?_r=1.

142. U.N. Ambassador Dabbashi, Letter Dated 21 February 2011 from the Chargé d'affaires a.i. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2011/102 (Feb. 21, 2011).

143. Wyatt, *supra* note 141.

144. Till Papenfuss, *What if Syria Was Referred to the ICC?*, IPI GLOBAL OBSERVATORY (June 20, 2012), <http://www.theglobalobservatory.org/analysis/309-what-if-syria-was-referred-to-the-icc.html>.

Security Council has been unwilling to deploy the ICC in Syria.¹⁴⁵ In the case of Syria, key member states of the UN Security Council disagree as to the strategic utility of involving the ICC, or of imposing other coercive measures like economic sanctions and an arms embargo.¹⁴⁶ Syria is not a state party to the Rome Statute.¹⁴⁷ As such, without a political decision to deploy the ICC, the Court sits on the sidelines of the conflict, having no jurisdiction, and thus no impact.

Since protests began in Syria in March 2011, security forces of the Assad regime have, as of July 2012, reportedly killed more than 14,000 people.¹⁴⁸ Several reports by the Independent International Commission of Inquiry¹⁴⁹ and non-governmental organizations have provided evidence of repeated attacks on civilian populations and acts of torture¹⁵⁰ and have called for a referral of the situation to the ICC.¹⁵¹ Nonetheless, more than fifteen months into the Syrian crisis, the UN Security Council has not taken any action. Vetoes by Russia and China prevented the Security Council from passing two strongly worded resolutions authorizing peaceful measures to end the conflict in Syria, let alone referring the situation to the Court.¹⁵² Russia and China both appear to oppose UN Security Council deployment of the ICC in the Syria conflict. Political motivations likely play a key role

145. *Id.*

146. *Id.*

147. *The States Parties to the Rome Statute*, *supra* note 87.

148. See Jill Dougherty, *Clinton: World May Not Succeed in Syria*, CNN (July 1, 2012), http://edition.cnn.com/2012/07/01/world/meast/syria-unrest/index.html?hpt=hp_t1.

149. An organization created by the UN Human Rights Council.

150. See Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, 21st sess., ¶¶ 39–46, 58–70, U.N. Doc. A/HRC/19/69 (Feb. 22, 2012). See generally HUMAN RIGHTS WATCH, *TORTURE ARCHIPELAGO: ARBITRARY ARRESTS, TORTURE, AND ENFORCED DISAPPEARANCES IN SYRIA'S UNDERGROUND PRISONS SINCE MARCH 2011* (2012).

151. See, e.g., *Syria: Torture Centers Revealed*, HUM. RTS. WATCH (July 3, 2012), <http://www.hrw.org/print/news/2012/07/03/syria-torture-centers-revealed>.

152. See *Russia and China Veto UN Resolution Against Syrian Regime*, GUARDIAN (Oct. 4, 2011), <http://www.guardian.co.uk/world/2011/oct/05/russia-china-veto-syria-resolution> (reporting on the veto of a resolution that threatened sanctions); see also Paul Harris et al., *Syrian Resolution Vetoed by Russia and China at United Nations*, GUARDIAN (Feb. 4, 2012), <http://www.guardian.co.uk/world/2012/feb/04/assad-obama-resign-un-resolution> (describing a failed resolution that called for the prime minister to resign).

in these countries' opposition to intervention. Russian protection of the Assad regime, for instance, can be linked to Syria hosting Russia's only Mediterranean naval base and thus being a strategic ally.¹⁵³

Russia and China's opposition to adopting measures in Syria may also have been a reaction to the UN Security Council's action in Libya. That is, Russia and China had initially opposed the referral of the Libyan situation to the ICC but then changed their position to support it.¹⁵⁴ During the negotiations in February 2011, Russia had notably obtained the withdrawal of any language in the Security Council's Resolution 1970 that would allow for the use of military force.¹⁵⁵ When Resolution 1973 permitting the use of force was later introduced in March, Russia and China negotiated to restrict the scope of the authorization to use force.¹⁵⁶ The regime change that resulted from NATO's intervention in Libya reinforced Russia and China's initial concerns.¹⁵⁷ More generally, while military intervention may permit bringing individuals to justice,¹⁵⁸ the legitimacy of this justice may be affected by the fact that it is grounded in the use of force.

D. IMPACT OF SYRIAN AND LIBYAN CONFLICTS ON REFERRAL POLITICS

In addition to making certain states more reluctant to support UN

153. *Russia's Shame*, FIN. TIMES (May 31, 2012), <http://www.ft.com/cms/s/0/b0b0a496-ab25-11e1-b875-00144feabdc0.html> (arguing that the eventual fall of the Assad regime outweighs Russia's present strategic interests in supporting Syria).

154. Colum Lynch, *U.N. Votes to Impose Sanction on Gaddafi*, WASH. POST, Feb. 27, 2011, at A10.

155. *Id.*

156. See David Scheffer, *Fanning the Flames of Justice in Syria*, PROJECT SYNDICATE (Mar. 1, 2012), <http://www.project-syndicate.org/commentary/fanning-the-flames-of-justice-in-syria> (discussing the provisions of the Security Council's Libya resolution and prospects for similar language with regard to Syria).

157. See Ian Black, *Syria Blasts Call for ICC Investigation by UN Human Rights Commissioner*, GUARDIAN (Dec. 13, 2011), <http://www.guardian.co.uk/world/2011/dec/13/syria-icc-investigation-human-rights>.

158. See Stephen J. Rapp, Remarks on International Justice and the Use of Force (Aug. 30, 2010), available at http://www.state.gov/j/gcj/us_releases/remarks/2010/169465.htm (listing the use of force against the Nazi, Khmer Rouge, and Rwandan governments as precursors to criminal prosecutions).

Security Council referrals to the ICC, the Libyan situation combined with the Syrian situation has triggered a number of recent initiatives to minimize the political nature of ICC referrals. For instance, in October 2011, a number of experts meeting at a retreat on the future of the Court organized by the government of Liechtenstein specifically addressed this topic.¹⁵⁹ Participants suggested that state parties should “[e]ngage in a discussion on the relationship between the Court and the UN Security Council, with a special focus on referrals of the Council to the Court. To this effect, a checklist of factors to be taken into account in relevant decision-making processes could be useful.”¹⁶⁰ The idea was that this objective checklist of factors should be used to guide the policy makers, rather than their own subjective strategic interests.

A number of smaller states have also recently pronounced themselves in favor of such an approach. The “Small Five” group of Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland recently tabled a resolution for the UN General Assembly recommending that the permanent members of the UN Security Council consider “[r]efraining from using a veto to block Council action aimed at preventing or ending genocide, war crimes, and crimes against humanity.”¹⁶¹ In light of a negative response from the veto-wielding states, however, the resolution was withdrawn in May 2012.¹⁶² These efforts show a gradual shift in thinking toward the UN Security Council’s ability to refer situations to the ICC, triggered by the Libyan situation.

E. FUTURE OF ICC REFERRALS: TOWARD AN APOLITICAL SYSTEM?

Depoliticizing the UN Security Council referral process may calm rising criticism of bias and double standards, and it would assist in

159. Press Release, ICC, Assembly of States Parties, ICC, Retreat on the future of the ICC (Oct. 10, 2011), *available at* <http://www2.icc-cpi.int/Menu/ASP/Press+Releases/Press+Releases+2011/PR732>.

160. Assembly of States Parties, Retreat on the Future of the International Criminal Court, ¶ 35, 10th Sess., Dec. 12-21, 2011, ICC-ASP/10INF.3, *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-INF.3-ENG.pdf.

161. United Nations, Draft Resolution on Improving the Working Methods of the Security Council, ¶ 20, G.A. 66th Sess., U.N. Doc. A/66/L.42 (Mar. 28, 2012).

162. See Press Release, United Nations General Assembly, Switzerland Withdraws Draft Resolution in General Assembly Aimed at Improving Security Council’s Working Methods to Avoid ‘Politically Complex’ Wrangling (May 16, 2012), *available at* <http://www.un.org/News/Press/doc/2012/ga11234.doc.htm>.

removing the current sense of unpredictability and inconsistency in the Security Council's approach. However, completely removing from the political sphere the decision to refer a situation to the ICC is unrealistic and may not be beneficial in the long term. As evidenced by the unsuccessful efforts of the "Small Five," the five permanent members of the UN Security Council do not intend to give up their veto right or their ability to determine their own strategic interests as they seek to use the Court in maintaining international peace and security. Moreover, the deployment of judicial mechanisms quite naturally has a strategic aspect, whether at the national or international level.

The ICC is one of several tools available to restore and maintain international peace and security,¹⁶³ and members of the Security Council should be able to determine whether the Court would be a useful tool in any given instance. Separating the activation of the ICC from international peace and security considerations will lead to less coordination between peace and accountability efforts.¹⁶⁴ As such, isolating the ICC will likely make the ICC or Security Council action ineffective or even destabilize conflict-affected countries.

Political interests inherently determine the deployment of justice; it is a political decision whether to use the tool of the ICC or other mechanisms of justice to promote peace and security. The ICC, especially in the view of realpolitik decision makers, can only be an effective tool if its deployment is politically controlled. However, once deployed, it must act independently to be an effective, albeit unpredictable and complicated, tool. This is what makes the ICC such a unique and potentially powerful instrument in maintaining international peace and security.

IV. MANAGING JUSTICE

Once deployed, what political constraints exist on the efforts of the ICC as it proceeds in indicting and prosecuting suspected criminals?

163. See generally Smith, *supra* note 136, at 2, 5, 21 (classifying ICC referrals as unique tools available to the U.N. Security Council that yield unpredictable results).

164. Cf. Bala Mohammed Liman, LSE IDEAS (Jan. 18, 2012), <http://blogs.lse.ac.uk/ideas/2012/01/1528/> (arguing that the political impact of the Court's actions must be appreciated; otherwise, the ICC may intervene despite the potential impact of its actions on prospects of peace and stability).

A. POLITICAL CONSTRAINTS ON THE COURT'S OPERATION

Once the ICC is seized with jurisdiction over a case, the Prosecutor and judges of the Court act in complete independence. While the policy makers and states that activated the jurisdiction of the Court continue to have strategic interests in how the Court affects their other efforts to maintain peace and security, states have a very limited ability to manage the activities of the Court.

The Court prides itself on remaining free from the strategic interests of those who activated its jurisdiction. Even when a matter is referred to the Court, the case will not proceed until the Prosecutor has made a determination that there is sufficient evidence to seek an indictment from the bench.¹⁶⁵ In fact, former Prosecutor Luis Moreno Ocampo has specifically stated on many occasions that his office is only concerned with the interests of justice, not those of peace and security that are defended by other institutions.¹⁶⁶

The Rome Statute provides only one possibility for strategic political considerations to affect the operation of the Court. The UN Security Council can defer any situation already submitted to the ICC for a period of twelve months at a time under Article 16 of the Rome Statute.¹⁶⁷ While only a minor deviation from complete independence of the Court, Article 16 recognizes the possibility of a need for a safety valve to temporarily delay the pursuit of justice in the interest of peace and security.¹⁶⁸ It requires that a deferral occur

165. See Office of the Prosecutor, International Criminal Court, Policy Paper on Preliminary Examinations, ¶¶ 34–37 (Oct. 4, 2010) (draft manuscript), available at http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf (emphasizing that when the U.N. Secretary General submitted, accompanying a referral, the formal conclusions of a U.N. commission, the Office of the Prosecutor conducted its own independent investigation of the commission's findings). See generally *Communications, Referrals and Preliminary Examinations*, ICC, <http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/> (last visited Jan. 3, 2013) (“[W]hether a situation meets the legal criteria established by the Rome Statute . . . to warrant investigation by the court [is determined by] a preliminary examination . . . based on statutory criteria and the information available.”).

166. See, e.g., POLICY PAPER ON THE INTERESTS OF JUSTICE, *supra* note 12, at 8–9.

167. Rome Statute, *supra* note 73, art. 16.

168. See HEMI MISTRY & DEBORAH RUIZ VERDASCO, THE UN SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT 14 (Mar. 16, 2012),

via a resolution under Chapter VII of the UN Charter.¹⁶⁹ In practice, this has never been triggered, but there have been attempts to do so and to shift the power to delay prosecutions from the UN Security Council to the UN General Assembly.¹⁷⁰

As noted above, the Rome Statute negotiations reflected this tension between those states that wished for a court independent from international politics and those favoring an international court that would be an arm of the UN Security Council, or at least highly responsive to its direction.¹⁷¹ Surprisingly, despite knowing that the opportunity to influence the Court is very limited, policy makers have invoked the jurisdiction of the Court on numerous occasions.¹⁷² This indicates that many see value in ICC prosecutions as a contribution to the maintenance of peace and security in spite of the Court's independence.

B. POLICY MAKERS AND THE OPERATION OF THE COURT

While the independent actions of the ICC may often lead it to act in a manner that complements the efforts of policy makers to resolve a conflict, it has on more than one occasion acted in a manner that complicates those efforts. These situations heighten the tension between policy makers and advocates of the Court. The situations in

available at <http://www.pgaction.org/activity/2012/chatham-icc-sc.html>.

169. Rome Statute, *supra* note 73, art. 16.

170. *See, e.g.*, Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) Assembly of the African Union, 18th Sess., Doc. EX.CL/710(XX), ¶ 4 (Jan. 29–30, 2012) (recognizing Sudan's and Kenya's efforts to delay prosecution under Article 16); *see also* DAPO AKANDE ET AL., AN AFRICAN EXPERT STUDY ON THE AFRICAN UNION CONCERNS ABOUT ARTICLE 16 OF THE ROME STATUTE OF THE ICC 12 (2010) (characterizing a proposal by the African Union to amend Article 16 to “[a]llow the UN General Assembly to take a decision within a specified time frame in the face of the UNSC's failure to act . . . as reflecting . . . the extent and depth of the AU's anxiety over the interplay between peace and justice, and the proper sequencing of the two”).

171. MISTRY & VERDASCO, *supra* note 168 (describing Article 16 as a compromise and one of the Rome Statute's most controversial provisions).

172. *See, e.g.*, Wegner, *supra* note 89; *cf.* Otilia Anna Maunganidze & Antoinette Louw, *Mali: Implications of Another African Case as Mali Self-Refers to the ICC*, ALLAFRICA (July 24, 2012), <http://allafrica.com/stories/201207240748.html> (noting allegations that African self-referrals have been utilized to “cripple government adversaries rather than end impunity for grave crimes”).

Darfur, Kenya, and Côte d'Ivoire illustrate this point particularly well.

In the case of Darfur, the Prosecutor initially focused on two Sudanese senior but not top-level officials, thereby carefully attempting not to alienate the Sudanese government.¹⁷³ Prosecutor Luis Moreno Ocampo pursued a “small-step strategy,” proceeding gradually up the official ranks in requesting arrest warrants.¹⁷⁴ Despite Sudan’s refusal to cooperate after the Court issued the first two arrest warrants and its arguments that the ICC was impeding the peace process, the Prosecutor nonetheless continued his investigation and secured additional indictments, including that of Sudanese President Al-Bashir.¹⁷⁵ Throughout the development of the small-step strategy and the deliberations on whether to indict a sitting president, the ICC operated free of the direction, control, and interests of the Security Council and others trying to bring an end to the conflict.¹⁷⁶ Even when circumstances changed and it appeared the indictments were standing in the way of meaningful peace negotiations, the ICC continued to issue indictments of key actors in Sudan.¹⁷⁷

Following the 2007–2008 post-election violence in Kenya, the ICC Prosecutor visited Kenya to discuss the proceedings with President Kibaki and Prime Minister Odinga in an effort to secure domestic cooperation. When the government did not make a referral, the Prosecutor obtained authorization from the Court to investigate based on the fact that Kenya was a state party to the Rome Statute.¹⁷⁸

173. See ROYAL AFRICAN SOCIETY, *COURTING CONFLICT? JUSTICE, PEACE, AND THE ICC IN AFRICA*, 30–31 (Nicholas Waddell & Phil Clark eds., 2008).

174. See Int'l Justice Tribune, “*The Small Steps Strategy*” of the ICC in Darfur, RADIO NETH. WORLDWIDE (Mar. 5, 2007), <http://www.rnw.nl/international-justice/print/22939>.

175. See MOSS, *supra* note 136, at 6–7.

176. See Int'l Justice Tribune, *supra* note 174 (describing Prosecutor Moreno Ocampo as “very independent”).

177. See Sarah Webb & Alexander Dziadosz, *ICC Prosecutor Seeks Sudan Defense Minister’s Arrest*, REUTERS, Dec. 2, 2011, available at <http://www.reuters.com/assets/print?aid=USTRE7B121R20111202>; see also MOSS, *supra* note 136, at 7 (“Many observers, including some UN officials, believe the investigation and arrest warrants have made peace negotiations more difficult, alienating both the Sudanese government and African leaders whose cooperation was essential.”).

178. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation

The ICC Prosecutor moved quickly and issued summonses to appear to three individuals on each side of the conflict within a year after the Court authorized the investigation.¹⁷⁹ The involvement of the ICC in the Kenyan situation remains controversial, with some worried that it will destabilize a delicate political balance.¹⁸⁰ Others believe that the ICC has been the only institution to break the hold of corrupt political figures on the Kenyan process and that it may serve as the catalyst to put Kenya on the track of responsible governance.

The case of Côte d'Ivoire illustrates that, while the Court's interactions with policy makers may initially be complementary, prosecutions on both sides may frustrate efforts to build long-term stability. Following the post-election crisis, the new government of Côte d'Ivoire formally sought the assistance of the Court and gave it jurisdiction under Article 12(3) of the Rome Statute.¹⁸¹ As it did in Kenya, the ICC acted swiftly and issued an arrest warrant for former President Gbagbo. At that time, the ICC's actions appeared in line with the strategic interests of the new government as well as those seeking to promote peace in Côte d'Ivoire by removing Gbagbo from the country. Subsequently, the ICC Prosecutor declared that both sides of the conflict had committed crimes and that prosecutions would take place on both sides.¹⁸² This development may or may not be in line with the strategic calculations of international policy makers on how best to continue to build stability in Côte d'Ivoire.

into the Situation in the Republic of Kenya, 2 (Mar. 31, 2010).

179. *Situation in the Republic of Kenya*, *supra* note 111.

180. *See Kenya: Impact of the ICC Proceedings*, *supra* note 113, at 10–11 (explaining how the focus of the ICC on individuals coming from a certain region of Kenya has created a perception of bias and increased the risk for inter-community violence).

181. Côte d'Ivoire had first accepted the ICC's jurisdiction in a 12(3) declaration dated April 18, 2003, under President Gbagbo. This related to events since September 19, 2002. President Ouattara subsequently renewed this 12(3) declaration, modifying the dates for the ICC's involvement to the gravest crimes committed since November 28, 2010.

182. *See ICC Prosecutor Arrives in Ivory Coast to Probe Abuses*, BBC NEWS (Oct. 15, 2011), <http://www.bbc.co.uk/news/world-africa-15319222?print=true> (reporting that the ICC judges' decisions to allow the Prosecutor to conduct an inquiry in Côte d'Ivoire included a finding that both sides of the conflict had committed atrocity crimes); Mike Corder & Laura Burke, *Laurent Gbagbo: International Criminal Court Charges Former Ivory Coast President With Crimes Against Humanity*, HUFFINGTON POST (Nov. 30, 2011), http://www.huffingtonpost.com/2011/11/30/laurent-gbagbo-charged-icc_n_1120007.html.

C. OPERATION OF THE COURT IN LIBYA

In Libya, the ICC Prosecutor maintained his course of action—investigation, arrest warrants, and request for surrender—despite significant changes on the ground that affected prospects for peace. Once the ICC referral had been made, the judicial process could proceed in parallel to the military intervention. After more than two months of investigation, the Prosecutor requested that the ICC judges issue arrest warrants for Colonel Qadhafi, his son Saif Al Islam Qadhafi, and intelligence chief Abdullah Al-Senussi for the commission of murder and persecution of civilians as crimes against humanity.¹⁸³

During this time period, a military stalemate was slowly arising. From the viewpoint of policy makers, the issuance of an arrest warrant would make the negotiation of peace more difficult, as it would restrict Qadhafi's options for leaving the country.¹⁸⁴ The judges of the Court nevertheless issued the three arrest warrants on June 27, 2011.¹⁸⁵

Two months later, Tripoli was liberated by the forces opposing Qadhafi, and in October, Colonel Qadhafi was killed, which had the effect of terminating the ICC proceedings against him.¹⁸⁶ Saif Al-Islam and Abdullah Al-Senussi were captured and, since then, the ICC has been working to obtain their transfer to The Hague for prosecution.

183. Press Release, Office of the Prosecutor, International Criminal Court, The Office of the Prosecutor Will Request an Arrest Warrant Against Three Individuals in the First Libya Case. Judges Will Decide (May 4, 2011), *available at* <http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20%282011%29/pr659> [hereinafter *Prosecutor Will Request an Arrest Warrant in Libya Case*].

184. Cf. Brett Schaefer, *International Criminal Court Complicates Conflict Resolution in Libya*, HERITAGE FOUND., June 9, 2011, at 2, http://thf_media.s3.amazonaws.com/2011/pdf/wm3287.pdf (postulating that the Obama administration's interest in negotiating a prosecution-free exile for Qadhafi was precluded by the Prosecutor's request for arrest warrants).

185. *Situation in Libya*, ICC, <http://www2.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0111/situation%20index?lan=en-GB> (last visited Jan. 3, 2013).

186. *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC, <http://www2.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/> (last visited Jan. 3, 2013).

Another aspect of the ICC Prosecutor's approach to the Libyan situation may have surprised policy makers. Following reports of civilian casualties caused by NATO's military campaign,¹⁸⁷ the ICC Prosecutor declared that his office would investigate those allegations.¹⁸⁸ Although the Prosecutor concluded that supporting evidence was insufficient, this reinforced the notion that the Court is intended to be blind to politics when proceeding with investigations. NATO members did not expect this response when leading the military intervention.¹⁸⁹

V. JUSTICE AND THE BATTLEFIELD

To what extent do investigations or indictments by the ICC help legitimize the use of force to maintain international peace and security?

Investigations and indictments by international justice mechanisms, such as the ICC, can and do influence actions on the battlefield by helping legitimize the use of force to maintain international peace and security.¹⁹⁰ When one of the parties to a conflict is indicted for war crimes by an international tribunal, this collective act on behalf of member states of the international community can add legitimacy to the use of force by those states to bring about an end to the conflict. While an indictment does not require force and cannot compel force, it can support efforts to justify its use and to continue the use of force in the face of difficult

187. See Sebastian Moffett, *NATO Downplayed Civilian Deaths in Libya – HRW*, REUTERS, May 14, 2012, available at <http://www.reuters.com/article/2012/05/14/nato-libya-idAFL5E8GD21O20120514>.

188. See Mark Kersten, *Justice in Libya: Investigating NATO?*, JUSTICE IN CONFLICT (May 21, 2012), <http://justiceinconflict.org/2012/05/21/justice-in-libya-investigating-nato/>.

189. Cf. *id.* (detailing NATO's sharp reaction to accusations of war crimes); Damien McElroy, *Libya: Nato to be Investigated by ICC for War Crimes*, TELEGRAPH (Nov. 2, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8866007/Libya-Nato-to-be-investigated-by-ICC-for-war-crimes.html>.

190. See Patrick Wintour, *Cameron and Sarkozy Plan Libya Visit as G8 Says Gaddafi Must Go*, GUARDIAN (May 27, 2011), <http://www.guardian.co.uk/world/2011/may/27/g8-to-call-for-gaddafi-to-go> (acknowledging that a statement by the G-8 welcoming the ICC Prosecutor's request for arrest warrants would be "seen as a victory for the [sic] Sarkozy and Cameron following their decision to provide ground attack helicopters for use by NATO").

military circumstances.

A. THE STRUGGLE TO MAINTAIN IMPARTIALITY

At the same time, consideration must be given to the fact that justice is intended to be independent. Justice applies to the conduct of all actors involved in a conflict, and this indiscriminate approach often includes those seen as the “good guys”—those on whose behalf the international community intervenes—as well as those using force to bring an end to the conflict, such as NATO. Such indiscriminate justice is crucial to maintaining the independence and the effectiveness of international war crimes tribunals.

In practice, however, this even-handedness may be imperfectly implemented. There appears to be a culture among international war crimes tribunals that requires them to find indictees on all sides of a conflict as a way of proving their impartiality.¹⁹¹ The ICC appears to reflect this culture and seems to go out of its way, at times, to try to find indictments on all sides to a conflict.¹⁹² This can obviously, and possibly unnecessarily, complicate efforts of the realpolitik policy makers to use force to bring an end to atrocity crimes-based conflicts.

The conflict in the former Yugoslavia illustrates this tension between the legitimization of force and the commitment to provide justice to all actors in a conflict. In this case, the Yugoslav Tribunal indicted Yugoslavian President Slobodan Milosevic during the Kosovo campaign, a move that added support to humanitarian intervention.¹⁹³ This indictment helped to legitimize NATO's use of

191. See, e.g., Abdul Tejan-Cole, *Sierra Leone's 'not-so' Special Court*, in PEACE VERSUS JUSTICE? THE DILEMMA OF TRANSITIONAL JUSTICE IN AFRICA 240 (Chandra Lekha Sriram & Suren Pillay eds., 2011) (describing the indictment of “Hinga” Norman, the former defense minister and head of the Civil Defense Forces of Sierra Leone, considered to be a war hero who fought on behalf of the government).

192. See, e.g., *Kenya and the ICC: Brace Yourself*, ECONOMIST, Jan. 28, 2012, <http://www.economist.com/node/21543589/print> (describing indictments on both sides of the Kenyan election conflict); *ICC Prosecutor Arrives in Ivory Coast to Probe Abuses*, *supra* note 182.

193. See *NATO Yugoslav Strikes Won't Stop, Despite Indictments*, CNN (May 27, 1999), http://articles.cnn.com/1999-05-27/world/9905_27_kosovo.02_1_batajnica-military-airport-nato-yugoslav-nato-spokesman-jamie-shea?_s=PM:WORLD (stating that NATO “welcomed” the indictments by the tribunal).

force, particularly when NATO extended its air campaign beyond Kosovo and into Belgrade, as well as when NATO considered deploying ground troops because of the perceived failure of its air strikes to end atrocities committed by Serbian forces.¹⁹⁴ While NATO gained support for its offensive from the Yugoslav Tribunal's indictment of Slobodan Milosevic, the acts of Kosovar armed units and the acts of NATO were subsequently investigated.¹⁹⁵ In the case of NATO, the UN Prosecutor, Carla Del Ponte, assessing numerous complaints and allegations, concluded there was no basis to open an investigation.¹⁹⁶ The investigation on the Kosovar armed units culminated in the indictment of seven Kosovars, although they were later acquitted or their charges were dropped.¹⁹⁷ The Yugoslav Tribunal also decided not to pursue charges against NATO because it concluded that NATO's acts did not constitute war crimes.¹⁹⁸

B. THE LIBYAN CONFLICT AND JUSTIFICATION FOR THE USE OF FORCE

The recent conflict in Libya highlights the tension between the justification of the use of force and the commitment to be perceived as applying justice even-handedly. Prosecutor Luis Moreno Ocampo

194. *See Nato to Send 8,000 Ground Troops to Albania*, GUARDIAN (Apr. 8, 1999), <http://www.guardian.co.uk/world/1999/apr/08/balkans13/print> (detailing the deployment of troops to Albania to provide military support to humanitarian efforts after "reports that Serb forces [were] waylaying refugees and herding them back to Kosovo, possibly for use as human shields").

195. *History*, INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/95> (last visited Nov. 24, 2012).

196. Press Release, Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia, Prosecutor's Report on the NATO Bombing Campaign (June 13, 2000), *available at* <http://www.icty.org/sid/7846>.

197. *See* International Criminal Tribunal for the Former Yugoslavia, Case Information Sheet: Prosecutor v. Ramush Haradinaj, Idriz Balaj & Lahi Brahimaj (2012), *available at* http://www.icty.org/x/cases/haradinaj/cis/en/cis_haradinaj_al_en.pdf (showing that Haradinaj and Balaj were found not guilty while Brahimaj was sentenced to six years' imprisonment); International Criminal Tribunal for the Former Yugoslavia, Case Information Sheet: Prosecutor v. Fatmir Limaj, Isak Musliu & Haradin Bala, *available at* http://www.icty.org/x/cases/limaj/cis/en/cis_limaj_al_en.pdf (demonstrating that Limaj and Musliu were found not guilty, Bala was sentenced to thirteen years' imprisonment, and Murtezi was indicted).

198. *U.N. Prosecutor Finds No Evidence of NATO War Crimes in Yugoslavia*, CNN (June 2, 2000), *available at* <http://wesleyclark.h1.ru/nato-icty.htm> (quoting the chief U.N. war crimes prosecutor as "satisfied there was no deliberate targeting of civilians or any unlawful military targets during the NATO campaign").

of the ICC moved quickly to open a case on March 3, 2011 in Libya¹⁹⁹ following the UN Security Council's Resolution 1970 referring the situation to the Court.²⁰⁰ When the Prosecutor announced his decision to open an investigation into the situation in Libya,²⁰¹ he effectively indicated to the international community that he had found a reasonable basis to believe that crimes against humanity had been committed in Libya since February 15.²⁰² Several states, including the United States, the United Kingdom, and France, used this March 3 decision to reinforce their public articulations of the moral basis for intervention.²⁰³ This suggests that Ocampo's announcement played a role in bolstering the case for intervention.

This quick action by the ICC in opening a case in Libya provided moral support to those seeking Chapter VII support from the UN Security Council to use force, and, as noted above, the UN Security Council did exercise this authority. On March 17, 2011, two weeks after the ICC Prosecutor had opened the case, Qadhafi was preparing to retake the city of Benghazi, broadcasting that his forces located sixty miles from Benghazi would show "no mercy and no pity" to those who would not give up resistance.²⁰⁴ A few hours later, the UN

199. Prosecutor Will Request an Arrest Warrant in Libya Case, *supra* note 183.

200. Resolution 1970, *supra* note 132, at 1–2.

201. Luis Moreno Ocampo, Statement of the Prosecutor on the opening of the investigation into the situation in Libya (Mar. 3, 2011), *available at* http://www.icc-cpi.int/NR/rdonlyres/035C3801-5C8D-4ABC-876B-C7D946B51F22/283045/StatementLibya_03032011.pdf.

202. *See* Rome Statute, *supra* note 73, art. 53(1)(a) ("In deciding whether to initiate an investigation, the prosecutor shall consider whether the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.").

203. *See Obama Urges Gadhafi to Step Down; International Criminal Court Launches Inquiry* (PBS television broadcast Mar. 3, 2011), transcript *available at* http://www.pbs.org/newshour/bb/world/jan-june11/libya1_03-03.html (expressing President Obama's desire for Qadhafi to leave Libya to avoid "defenseless civilians . . . finding themselves trapped and in grave danger," and Senator McCain's belief that "people have God-given rights . . . not to live under a brutal dictator that's willing to slaughter and massacre his own citizens to stay in power"); Letter from David Cameron and Nicolas Sarkozy to Herman Van Rompuy (Mar. 10, 2011), *available at* <http://www.guardian.co.uk/world/2011/mar/10/libya-middleeast> (calling on Qadhafi to leave Libya and rebuking the use of military force on citizens as "unacceptable").

204. *See U.N. Okays Military Action on Libya*, REUTERS, Mar. 17, 2011, *available at* <http://uk.reuters.com/article/2011/03/17/uk-libya-idUKLDE71QOMP20110317>.

Security Council, with Resolution 1973, intervened a second time, this time with harsher measures: it authorized the use of military force in Libya.²⁰⁵ The resolution also instituted a no-fly zone, an arms embargo, and an asset freeze.²⁰⁶

As noted, the UN Security Council's decision to refer the Libyan situation to the ICC set the groundwork for the moral approval of the use of force. The UN Security Council's authorization of the use of force is a relatively uncommon act.²⁰⁷ The use of military force is intended as a method of last resort, when non-military measures have been tried and have not worked, or are not likely to work. The Security Council's referral to the Court can therefore help push the use-of-force process forward by delegitimizing a ruler.²⁰⁸ In depicting Qadhafi as a possible criminal of mass atrocities, the Security Council further isolated him from the international community.²⁰⁹ Though it is difficult to quantify the extent to which the Court's intervention played a role when measured against a variety of other strategic considerations, it is clear that this intervention bolstered the moral basis for the NATO-led military intervention. Supporters of UN Security Council Resolution 1973 have justified the authorization of the use of force on the grounds that Qadhafi continued to commit crimes against the civilian population, which had led to the referral of the situation to the ICC in Resolution 1970.²¹⁰

205. S.C. Res. 1973, ¶¶ 4, 8, U.N. Doc. S/RES/1973 (Mar. 17, 2011) [hereinafter Resolution 1973] (authorizing Member States to take "all necessary measures" to protect civilians and enforce a no-fly zone).

206. *Id.* ¶¶ 6, 13, 19.

207. For instance, the use of force has previously been approved in Iraq, Kuwait, Yugoslavia, and Haiti.

208. See, e.g., Brendan Leanos, *Cooperative Justice: Understanding the Future of the International Criminal Court Through Its Involvement in Libya*, 80 *FORDHAM L. REV.* 2267, 2291–92 (2012) (referring to "delegitimizing criminal regimes" as a general objective of the ICC).

209. See Carsten Stahn, *Libya, the International Criminal Court and Complementarity*, 10 *J. INT'L CRIM. JUST.* 325, 329–30 (2012) (characterizing the U.N. referral and ICC warrants as achieving the purpose of isolating the Qadhafi regime, but also as "raising concerns regarding the prospects of a negotiated solution").

210. See, e.g., *Libya: David Cameron on UN Resolution in Full*, TELEGRAPH (Mar. 18, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8390415/Libya-David-Cameron-on-UN-Resolution-in-full.html> (alleging that Qadhafi had ignored the demands of Resolution 1970 and was

This authorization to “take all necessary measures” to protect civilians laid the groundwork for the NATO campaign.²¹¹ The day after Resolution 1973 was adopted, U.S. President Barack Obama emphasized that Colonel Qadhafi had a choice and that military action could be avoided if Qadhafi implemented an immediate cease-fire and stopped the advance of troops on Benghazi.²¹² Qadhafi did not heed the warning, and the next day, on March 19, a British-French-led coalition launched an air campaign designed to protect the people of Libya against Qadhafi’s forces.²¹³

As the military intervention proceeded, so too did the judicial process against Qadhafi, providing constant reminders in the international arena that the military intervention was targeting a man and his regime that were allegedly committing mass atrocities against the civilian population. As with the Prosecutor’s March 2011 decision to open an investigation, his May arrest warrants for Qadhafi, Qadhafi’s son, and Abdullah Al-Senussi supported and legitimized public articulations of the moral basis for intervention heralded by states, including the United States, United Kingdom, and France.²¹⁴

The ICC approved these three arrest warrants on June 27, 2011, the NATO campaign’s 100th day.²¹⁵ This move further reinforced the notion that military action against such individuals could be acceptable because the Court’s judges had deemed that sufficient evidence existed to grant the Prosecutor’s request.²¹⁶ The campaign

“preparing for a violent assault” on Libyan citizens).

211. Resolution 1973, *supra* note 205, ¶ 5.

212. Press Release, White House Office of the Press Secretary, Remarks by the President on the Situation in Libya (Mar. 18, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/18/remarks-president-situation-libya>.

213. *See Libya: US, UK and France Attack Gaddafi Forces*, BBC NEWS (Mar. 20, 2011), <http://www.bbc.co.uk/news/world-africa-12796972?print=true>.

214. *See* Nicholas Watt, *Obama and Cameron Agree to ‘Turn up Heat’ on Gaddafi*, GUARDIAN (May 25, 2011), <http://www.guardian.co.uk/world/2011/may/25/obama-cameron-turn-heat-gaddafi> (reporting that after the arrest warrants were issued, Obama stated, “We will continue . . . operations until Gaddafi’s attacks on civilians cease. Time is working against Gaddafi and he must step down from power and leave Libya to the Libyan people”); Wintour, *supra* note 190.

215. *Situation in Libya*, *supra* note 185.

216. *See* Paul Koring, *Arrest Warrant for Gadhafi a New Complication for NATO*, GLOBE & MAIL (June 27, 2011), <http://www.theglobeandmail.com/news/>

continued past Qadhafi's indictment for another four months until October 2011, when he was captured and killed.

By the end of the conflict, both NATO and the NTC were under the Court's watchful eye.²¹⁷ In the case of the NTC, supervision by the ICC was a way of signaling that the rules of war should apply to each side consistently. To that end, the Prosecutor also investigated NATO's actions, although he found there was no evidence to conclude that NATO had intentionally directed attacks against civilians or launched attacks that were excessive in relation to the anticipated military advantage.²¹⁸

The experience in Libya demonstrates the constant tension between an international tribunal's ability to legitimize the use of force by the "good guys" in a conflict and the tribunal's commitment to apply justice indiscriminately to all actors. Although an indictment cannot compel action on the part of member states, it sends a message of solidarity against the indicted party. At the same time, international tribunals, including the ICC, are careful to examine all aspects of a conflict and remain ready to assign blame to those very "good guys" whose actions were tacitly supported by the indictments issued from these organs of international justice.

VI. JUSTICE AND THE PEACE TABLE

To what extent do actions by the ICC promote or inhibit efforts to reach a negotiated solution to a conflict threatening international peace and security?

Actions by the ICC can both promote and inhibit efforts to reach a negotiated solution to a conflict threatening international peace and

world/arrest-warrant-for-gadhafi-a-new-complication-for-nato/article4261900/ (noting that, while the arrest warrants legitimized NATO's use of military force, their issuance also created a "quandary . . . [because] [l]etting Col. Gadhafi escape might shorten the war and reduce the bloodshed, but it would also mean flouting ICC warrants").

217. See *International Court to Probe Nato Action in Libya*, CHANNEL 4 NEWS (Nov. 3, 2011), <http://www.channel4.com/news/international-court-to-probe-nato-action-in-libya>.

218. Press Release, Security Council, International Criminal Court Chief Tells Security Council Libya Wants Domestic Courts to Handle Proceedings Against Son of Former Libyan Leader Qadhafi, U.N. Press Release SC/10651 (May 16, 2012).

security, depending on the particular circumstances of the conflict.²¹⁹ In certain situations, the Court's actions can help delegitimize a party on the world stage and therefore provide moral clarity for policy makers seeking to negotiate the surrender of the aggressor.²²⁰ At the same time, when the key member states of the international community want to accommodate the aggressor as a strategic maneuver to achieve long-standing peace and stability, it may be more difficult—or they may be barred from doing so—because the aggressor is under investigation or indicted for atrocity crimes.²²¹

A. PROLONGING NEGOTIATIONS

Several recent case studies demonstrate this dilemma. For instance, some policy makers believe that an indictment can actually prolong a conflict, leading to more deaths, injuries, and displacement of the civilian population.²²² Some hold this position with respect to

219. Compare BRIONY MACPHEE & SHANNON FRANK, THE CURRENT INVESTIGATION BY THE ICC OF THE SITUATION IN NORTHERN UGANDA (2006), available at <http://amicc.org/docs/Northern%20Uganda%20Fact%20Sheet.pdf> (explaining ICC involvement in Uganda as, in some ways, standing in the way of peace negotiations), with Alison Smith, No Justice Without Peace, Address to the International Criminal Court Office of the Prosecutor (Apr. 5, 2011), available at http://www2.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/network%20with%20partners/public%20hearings/second%20public%20hearing/session%202/ms_%20alison%20smith%20%E2%80%93%20no%20peace%20without%20justice?lan=en-GB (characterizing ICC involvement in Uganda as essential to the peacemaking process).

220. See Leanos, *supra* note 208, at 2291–92; Nino Saviano, *Moral Clarity Beats Clarity in U.S. Sudan Policy*, SUDAN TRIB. (Aug. 14, 2008), <http://sudantribune.com/spip.php?article28268> (suggesting that the ICC's criminal filings with regards to Sudan highlighted the need for “[a] strong sense of clarity and determination in the U.S. policy on Sudan”).

221. See JACQUELINE GEIS & ALEX MUNDT, WHEN TO INDICT? THE IMPACT OF TIMING OF INTERNATIONAL CRIMINAL INDICTMENTS OF PEACE PROCESSES AND HUMANITARIAN ACTION 15 (2009), available at http://www.brookings.edu/~media/research/files/papers/2009/4/peace%20and%20justice%20geis/04_peace_and_justice_geis.pdf (explaining that, when facing a stalemate, negotiating peace may involve granting amnesty from prosecutions, which is no longer an option when the ICC has already issued an indictment); Katharine A. Marshall, *Prevention and Complementarity in the International Criminal Court: A Positive Approach*, 17 AM. U. HUM. RTS. BRIEF 21, 21 (2010) (detailing that some parties believe that the Court will only hinder peace negotiations).

222. See Austin Bay, *Libya: Toothless Lawfare Amid Warfare*, REAL CLEAR POLITICS (May 18, 2011), http://www.realclearpolitics.com/articles/2011/05/18/libya_toothless_lawfare_amid_warfare_109899-full.htm (explaining how some

Sudan and the ICC's indictment of Sudanese President Omar Al-Bashir.²²³ Similarly, the indictment of LRA leader Joseph Kony may be a contributing factor to why he has remained at large in the bush for several years as the conflict continues, even though, in his case, it is not clear that he would be willing to negotiate had the indictment never been issued.²²⁴ The ICC indictment of General Bosco Ntaganda, however, has had little impact on his role within the DRC. It did not prevent him from continuing to play an active role in the DRC's prolonged conflict, first as a rebel, then general, and then rebel again.²²⁵ It was not until after his defection from the government that an order for his arrest was made.²²⁶

Instances of this tension with respect to indictments by an international tribunal are not restricted to the African continent. In Kosovo, for instance, the Yugoslav Tribunal indicted Slobodan Milosevic, a move that nearly forced NATO to risk the lives of soldiers in a possible ground war.²²⁷ Some policy makers instead preferred to negotiate with Milosevic and were therefore resentful of the indictment.²²⁸ In the end, however, Russian envoy Viktor

view ICC indictments as giving indictees very few options).

223. See John Norris et al., *The Merits of Justice*, ENOUGH PROJECT 2 (July 14, 2008), <http://www.enoughproject.org/publications/merits-justice>; Meghan Stewart, *Indicting Bashir Is Right*, FOREIGN POLICY IN FOCUS (July 2, 2009), http://www.fpi.org/articles/indicting_bashir_is_right (explaining that some believe the indictment of al-Bashir will scuttle negotiations).

224. See Roy Gutman, *Is International Criminal Court the Best Way to Stop War Crimes?*, MCCLATCHY, Apr. 24, 2012, available at <http://www.miamiherald.com/2012/04/26/2767628/is-international-criminal-court.html>.

225. See *DR Congo: Bosco Ntaganda Recruits Children by Force*, *supra* note 104; Penny Dale, *Profile: Bosco Ntaganda the Congolese 'Terminator'*, BBC NEWS (May 15, 2012), <http://www.bbc.co.uk/news/world-africa-17689131>; *DR Congo: ICC-Indicted War Criminal Implicated in Assassinations of Opponents*, HUM. RTS. WATCH (Oct. 13, 2010), <http://www.hrw.org/news/2010/10/12/dr-congo-icc-indicted-war-criminal-involved-assassinations-opponents>.

226. See *DR Congo: Bosco Ntaganda Recruits Children by Force*, *supra* note 104.

227. See Martin Woollacott, *Milosevic's Indictment Shows Nato Has Burned Its Boats*, GUARDIAN (May 27, 1999), <http://www.guardian.co.uk/world/1999/may/28/balkans1>.

228. See Norris et al., *supra* note 223, at 1; Zachary Ochieng, *Milosevic, Taylor Cases Prove Bashir Arrest Will Help Sudan — Nation Media*, ENOUGH PROJECT (July 21, 2008), <http://www.enoughproject.org/news/milosevic-taylor-cases-prove-bashir-arrest-will-help-sudan-nation-media> (highlighting Russia's frustration with the indictment).

Chernomyrdin and Finnish President Martti Ahtisaari, the European Union's envoys to Yugoslavia, still managed to negotiate a surrender of Kosovo with Milosevic, and a ground war was avoided.²²⁹

As these case studies demonstrate, the actions of the ICC can prevent negotiations—or at least limit how they can take place. Some states lament these limitations on the pursuit of negotiations and strategic diplomacy as possible solutions to the conflict.²³⁰ Others support the role of the ICC in putting an end to any type of bargaining with an aggressor even if that will likely disrupt diplomatic attempts at a solution.²³¹

Adding to the complexity of this dilemma is the fundamental purpose of the Court. While the ICC can indeed be used as a tool by the UN Security Council to further its mandate of promoting peace and security, justice is its primary goal. To that end, once the Court is called upon and its jurisdiction is triggered, its involvement cannot be stopped to enable a political deal to be struck. This can be seen with the indictment of Slobodan Milosevic mentioned above. Provisions in the Rome Statute support this point. For instance, the Rome Statute specifically provides that the withdrawal of a country from the Rome Statute does not affect the consideration of a matter that was already under consideration by the ICC.²³² Furthermore, such a state remains obliged to cooperate with criminal proceedings commenced prior to the withdrawal.²³³ The rationale here is that the Court's mandate to promote justice is greater than its protection of

229. See SECURITY COUNCIL REPORT, <http://www.securitycouncilreport.org/chronology/kosovo.php?page=11> (last visited Nov. 24, 2012) (“Slobodan Milošević accepted terms offered by Martti Ahtisaari and Russian special envoy Victor Chernomyrdin, and agreed to withdraw FRY troops from Kosovo in a phased retreat beginning 10 June.”); Clive Baldwin & Lotte Leicht, *Syria, A Path to Justice*, OPEN DEMOCRACY (Aug. 6, 2012), <http://www.opendemocracy.net/clive-baldwin-lotte-leicht/syria-path-to-justice>.

230. See, e.g., Jack Morkhiber, *Why Did Milosevic Give Up?*, PBS FRONTLINE (last visited Nov. 24, 2012), <http://www.pbs.org/wgbh/pages/frontline/shows/820osovo/fighting/giveup.html>; *Gadhafi Indictment Hinders Peace: African Union*, CBC NEWS (July 2, 2011), <http://ca.news.yahoo.com/gadhafi-indictment-hinders-peace-african-union-002833824.html>.

231. See generally Norris et al., *supra* note 223 (arguing that holding people accountable for war crimes not only directly promotes peace but decreases the likelihood for future abuses).

232. See Rome Statute, *supra* note 73, art. 127.

233. See *id.*

peace and security.²³⁴ Indeed, as remarked upon by the former ICC Prosecutor, “[t]here is a difference between the concepts of the interests of justice and the interests of peace [The] matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.”²³⁵

B. LIBYA, THE ICC, AND THE PEACE TABLE

The recent situation in Libya provides another instance of the Court’s ability to preclude an orchestrated diplomatic strategy. In this case, by mid-2011, the parties on the ground were quickly approaching a political and military stalemate.²³⁶ As a result, realpolitik policy makers started to float the idea of Qadhafi stepping down or going into exile as possible solutions to the stagnation.²³⁷ In late July, as the military conflict was at its height, a shift in political discourse occurred. Previously, the leaders of the military campaign had consistently called on Colonel Qadhafi to leave Libya. By late July, some policy makers, such as French Minister for Foreign Affairs Alain Juppé, suggested that Qadhafi could stay in Libya on the condition of giving up all political activity in the country.²³⁸ At the time, policy makers were starting to realize that to negotiate a ceasefire to halt the violence, Qadhafi would need to step down and

234. See Mark Kersten, *Did the UN Security Council Just Outsource Peace in Libya to the ICC?*, JUSTICE IN CONFLICT (Feb. 28, 2011), <http://justiceinconflict.org/2011/02/28/did-the-un-security-council-just-outsource-peace-in-libya-to-the-icc/>.

235. POLICY PAPER ON THE INTERESTS OF JUSTICE, *supra* note 12, at 1.

236. See Jonathan Marcus, *Libya Stalemate Leaves Nato Without ‘Plan B,’* BBC NEWS (May 11, 2011), <http://www.bbc.co.uk/news/world-africa-13358885>.

237. See, e.g., *Clinton Calls on Gaddafi to Step Down*, AL JAZEERA (July 2, 2011), <http://www.aljazeera.com/news/africa/2011/07/201172173956886276.html>; *In Diplomatic Shift, Russia Calls for Gadhafi to Step Down*, CNN (May 27, 2011), http://articles.cnn.com/2011-05-27/world/libya.war_1_moammar-gadhafi-nato-led-european-leaders?_s=PM:WORLD.

238. See *World Leaders Urge Gaddafi to Step Down*, FIN. TIMES (Aug. 22, 2011), <http://www.ft.com/cms/s/0/4378d698-cc99-11e0-b923-00144feabdc0.html#axzz25ilzCT00>; *Kadhafi Pourrait Rester en Libye sous Conditions, dit Juppé*, FRANCE INTER, July 20, 2011, available at <http://www.franceinter.fr/depeche-kadhafi-pourrait-rester-en-libye-sous-conditions-dit-juppe>; Joby Warrick & William Booth, *NATO Flexible on Gaddafi’s Future*, WASH. POST (July 26, 2011), http://www.washingtonpost.com/world/national-security/nato-flexible-on-gaddafis-future/2011/07/26/gIQAyY7XbI_story.html.

be immune from prosecution by the Court.²³⁹

In the context of these evolving perspectives on the conflict in Libya, the ICC Prosecutor stepped in to remind the decision makers of the outstanding arrest warrant.²⁴⁰ Other actors, including non-governmental organizations and various states, also reminded countries such as the United Kingdom, France, and the United States that the arrest warrants were outstanding.²⁴¹ These actions indeed precipitated a policy shift. Shifting course once again, states including the United Kingdom and France, who headed the NATO mission in Libya, invoked the indictment by the Court to back away from the negotiations on the grounds that Qadhafi was now a wanted war criminal. Accordingly, policy makers were forced into a rapid retreat from a path of common practice in the realpolitik world, effectively crossing out an entire chapter of their playbook.

In addition to stifling a diplomatically negotiated solution, the Court's involvement limits the availability of immunity as an option

239. See Mark S. Ellis, Op-Ed, *Peace for All or Justice for One?*, N.Y. TIMES, Aug. 11, 2011, http://www.nytimes.com/2011/08/12/opinion/12iht-edellis12.html?pagewanted=all&_r=0; Max Fisher, *Will ICC Arrest Warrant for Qaddafi Make Any Difference?*, ATLANTIC (June 27, 2011), <http://www.theatlantic.com/international/archive/2011/06/will-icc-arrest-warrants-for-qaddafi-make-any-difference/241078/>; Tim Lister & Zain Verjee, *Gadhafi Exile Option Poses Many Legal, Political Problems*, CNN (Mar. 31, 2011), <http://www.cnn.com/2011/WORLD/africa/03/31/libya.end.game/index.html>.

240. See Richard Norton-Taylor & Chris Stephen, *Gaddafi Can't Be Left in Libya, Says International Criminal Court*, GUARDIAN (July 26, 2011), <http://www.guardian.co.uk/world/2011/jul/26/gaddafi-in-libya-hague-icc>; *Libya Live Blog*, AL JAZEERA (July 27, 2011), <http://blogs.aljazeera.com/topic/libya/libya-jul-27-2011-1802>.

241. See AMICC *Urges US Cooperation to Execute ICC Arrest Warrants for Col. Gaddafi and Others*, AM. NON-GOVERNMENTAL ORGS. COAL. FOR THE INT'L CRIMINAL COURT (June 27, 2011), <http://amicc.blogspot.com/2011/06/amicc-calls-for-us-cooperation-to.html?spref=tw> (urging other civil society networks to put pressure on the U.S. government to implement the arrest warrant); see also Press Release, Arab Center for the Independence of the Judiciary and the Legal Profession (ACIJLP), *The Arrest Warrant for the Libyan Leader Upholds Justice and Human Rights* (June 27, 2011), available at http://www.iccnw.org/documents/The_Arrest_Warrant_for_the_Libyan_Leader_Upholds_Justice_and_Human_Rights.pdf (welcoming the decision to issue the arrest warrants and calling upon Arab governments to support the ICC); Press Release, International Federation for Human Rights (FIDH), *Gaddafi Must Be Arrested to Face ICC Accusations* (June 28, 2011), <http://www.fidh.org/Gaddafi-must-be-arrested-to-face> (noting that UN members are responsible for executing arrest warrants in this instance and should do so without delay).

to cease the military conflict. Once an individual is subject to an arrest warrant, all state parties, by virtue of their obligation to cooperate with the Court,²⁴² are required to facilitate the surrender of this person to the Court.²⁴³ This obligation implies that state parties cannot welcome those individuals who have been indicted by the ICC into their sovereign territories. In practice, this means that states not party to the Rome Statute, such as Russia, Zimbabwe, Namibia, and Venezuela, could have technically welcomed Qadhafi on their soil, but state parties could not do so. However, the ICC's competing interpretation of the Rome Statute is that the obligation to cooperate extends not only to state parties of the Rome Statute, but also to all UN member states when the Court's jurisdiction is triggered by the UN Security Council,²⁴⁴ as was the case in Libya.

VII. JUSTICE AND POST-CONFLICT STABILITY

To what extent do conflicts or synergy arise between the ICC and national efforts to prosecute those responsible for crimes, and how does this affect post-conflict stability?

Tensions also arise between states and the ICC because they both have the ability to bring prosecutions against those responsible for serious violations of international criminal law. The relationship between domestic and international organs of prosecution is very sensitive and can enhance, complicate, or even undermine post-conflict stability. This relationship is also subject to change over time. For instance, while the victim party to a conflict often welcomes the involvement of the ICC during a conflict, this welcome may rapidly cool if the accused emerges victorious.²⁴⁵

A. NATIONAL, INTERNATIONAL, AND HYBRID TRIBUNALS

Many states have a strong desire to prosecute at the national level.²⁴⁶ This preference often arises from the notion that a post-conflict state needs to exercise its sovereignty and address problems

242. See Rome Statute, *supra* note 73, art. 86.

243. See *id.* art. 59(1).

244. See *FAQs: Who Has to Execute the Warrants of Arrest?*, ICC, <http://www2.icc-cpi.int/menus/icc/about%20the%20court/frequently%20asked%20questions/23> (last visited Jan. 3, 2013).

245. See *supra* notes 219–22.

246. See Cryer, *supra* note 15, at 994.

internally to heal and move forward.²⁴⁷ It may also be due to the particular penalties permitted under a state's domestic code that are unavailable at the international level. For instance, Rwanda was the only state to vote against the Rwanda Tribunal, in part, because Rwandan policy makers knew they could not seek the death penalty in an international tribunal, whereas they could under the Rwandan domestic code.²⁴⁸ Similarly, following the 2003 liberation by coalition forces, the Iraqi Interim Governing Council favored prosecution at home, where it could and did use the death penalty against those convicted of serious crimes.²⁴⁹

Other states embrace any efforts to get those criminally responsible out of town and therefore welcome intervention by the ICC.²⁵⁰ For instance, policy makers from Côte d'Ivoire supported the ICC's recent opening of an investigation into the 2010 post-election violence.²⁵¹ As recently as February 2012, rivals from both sides of the conflict supported the Court's decision to extend its investigation back to crimes committed since 2002.²⁵²

Yet, even for those states that initially supported the actions of the ICC, controversy can arise over whether the Court is a destabilizing force. As noted above, the Ugandans have started to voice concerns regarding their preference for local justice in light of the ICC's inability to detain LRA leader Joseph Kony seven years after the

247. *See id.* at 985–86.

248. *See* Wayne Sandholtz, *Creating Authority by the Council: The International Criminal Tribunals*, in *THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY* 137 (Bruce Cronin & Ian Hurd eds., 2008).

249. *See* ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW & PROCEDURE* 194–95 (2010).

250. *See* Mark Kersten, *Outsourcing Justice to the ICC – What Should Be Done?*, *JUSTICE IN CONFLICT* (Oct. 31, 2012), <http://justiceinconflict.org/2012/10/31/outourcing-justice-to-the-icc-what-should-be-done/> (recognizing that some governments are sending some cases to the ICC despite having established internal mechanisms); Cryer, *supra* note 15, at 985 (explaining that the creation of the ICC was an act of state sovereignty because states had to agree to its formation).

251. *See* Situation in the Republic of Cote D'Ivoire, ICC, <http://www2.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0211/> (showing that Cote D'Ivoire submitted to the ICC's jurisdiction and promised to fully cooperate).

252. *See Ivory Coast Rivals Soro and Gbagbo Welcome ICC Move*, BBC NEWS (Feb. 24, 2012), <http://www.bbc.co.uk/news/world-africa-17154032>.

Court issued the original warrant against him.²⁵³ Similarly, in Kenya, there is a strong voice of discontent within the government against the Court's role in the prosecution of those most responsible for violence following the 2007 election.²⁵⁴ This difference of opinion regarding prosecutions at the national and international levels helps to demonstrate why some states, such as Sierra Leone and Cambodia, have opted to use hybrid tribunals.²⁵⁵

Although this tug of war between prosecutions at the Court and at the state level continues to some degree, there also appears to be a shift toward favoring prosecutions brought domestically to maintain peace and security.²⁵⁶ This trend may be based in part on emerging demands by states for the Court to respect the principle of complementarity, or deference to a national state for prosecution. Complementarity is enshrined in the Rome Statute and seeks to strike a balance between ending impunity on the one hand and respecting the primacy of domestic proceedings on the other.²⁵⁷ Consistent with this principle of complementarity, the ICC exists as a court of last resort, which only intervenes if a state cannot, or does not wish to, pursue domestic prosecutions.²⁵⁸ The Rome Statute affirms the principle that the jurisdiction of the Court is complementary to the

253. See Laura Clarke, *The State of Justice in Uganda: The International Criminal Court Versus Local Justice*, CONSULTANCY AFRICA INTELLIGENCE (Mar. 2, 2012), http://www.consultancyafrica.com/index.php?option=com_content&view=ar...minal-court-versus-local-justice&catid=91:rights-in-focus&Itemid=296.

254. See Allan Ngari, *Kenya's Ongoing Battle with Complementarity at the ICC*, ICC KENYA (May 16, 2012), <http://www.icckkenya.org/2012/05/kenyas-ongoing-battle-with-complementarity-at-the-icc/>.

255. See EILEEN SKINNIDER, EXPERIENCES AND LESSONS FROM "HYBRID" TRIBUNALS: SIERRA LEONE, EAST TIMOR, AND CAMBODIA 4–5 (Feb. 2007), available at <http://www.icclr.law.ubc.ca/site%20map/icc/ExperiencesfromInternationalSpecialCourts.pdf>.

256. See William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L. J. 729, 730, 751–53 (2003).

257. See *Prosecutor v. William Samoei Ruto, Henry Kipono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ¶ 44 (May 30, 2011), <http://icc-cpi.int/iccdocs/doc/doc1078822.pdf>.

258. See Rome Statute, *supra* note 73, art. 1; see also *ICC at a Glance*, ICC, <http://www2.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/> (last visited Jan. 3, 2013).

national criminal proceedings of its member states.²⁵⁹ The Court therefore only has authority to exercise jurisdiction when a state party to the Rome Statute is genuinely unwilling or unable to carry out the necessary investigations or prosecutions.²⁶⁰

Accordingly, if the ICC is investigating or prosecuting a case, a state may resort to an admissibility challenge if it believes that it is able to try the case domestically.²⁶¹ In such a challenge, the state would demonstrate that it is currently investigating or prosecuting, or has already investigated or prosecuted, the case.²⁶² The Court then determines whether the state is willing and able to investigate or prosecute the case.²⁶³ The Court would also determine whether genuine investigations or proceedings against the *same person for the same conduct* at the national level has occurred or is occurring.²⁶⁴ Despite this clearly delineated process, the ICC has its own institutional psychology, including self-preservation, so it may search for reasons to prosecute high-level indictees. In other words, the Court might be subconsciously biased against complementarity, despite its position as the arbiter of a state's admissibility challenge.

B. LIBYA, JUSTICE, AND POST-CONFLICT STABILITY

Libya presents the most recent instance of a state asserting the principle of complementarity in support of its claim for prosecution on a national level. Despite the NTC's initial support for the ICC's

259. See Rome Statute, *supra* note 73, pmb., art. 1.

260. See *id.* art. 17(1)(a).

261. See Panel Discussion, *Justice Should Be Done, but Where? The Relationship Between National and International Courts*, 101 AM. SOC'Y INT'L L. PROC. 289, 290 (2007).

262. See Rome Statute, *supra* note 73, art. 19(2)(b); SCHABAS, INTRODUCTION, *supra* note 28, at 173–74 (noting that a case referred to the ICC by the United Nations Security Council follows the same admissibility procedure as any other ICC case).

263. See *Prosecutor v. William Samoei Ruto, Henry Kipono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ¶ 48 (May 30, 2011), <http://icc-cpi.int/iccdocs/doc/doc1078822.pdf>.

264. See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 80 (Sept. 25, 2009), <http://icc-cpi.int/iccdocs/doc/doc746819.pdf>.

June 2011 indictment of Colonel Muammar Qadhafi, following Qadhafi's death and the end of the revolution, the NTC sought to assert its rights under the principle of complementarity to prosecute Saif Al-Islam Qadhafi and Abdullah Al-Senussi domestically.²⁶⁵

As with the tribunal in Iraq, if these perpetrators are prosecuted domestically, then Libya can institute and employ the death penalty, whereas the ICC forbids this type of sentence.²⁶⁶ Domestic prosecution could also mean looking further back in time than February 2011, such that crimes committed by Qadhafi's son and Al-Senussi under Qadhafi's forty-two-year rule could be included.²⁶⁷ A domestic court could also prosecute domestic crimes in addition to genocide, crimes against humanity, and war crimes. These national prosecutions might demonstrate the capacity of the post-Qadhafi government to uphold justice and handle the aftermath of its conflict internally.²⁶⁸ Moreover, domestic prosecutions may be viewed as the only way to secure Libya's full participation in the justice process because the Court lacks the ability to create a hybrid tribunal, a mechanism that was effective in Sierra Leone.

The ICC, however, also seeks prosecution for Saif Al-Islam Qadhafi and Abdullah Al-Senussi.²⁶⁹ Accordingly, the Libyan government requested on January 23, 2012 that the Court postpone the request for Saif Al-Islam's surrender pending the completion of

265. See Martin Chulov, *Libya Insists Saif al-Islam Gaddafi Should Be Tried at Home*, GUARDIAN (Oct. 29, 2011), <http://www.guardian.co.uk/world/2011/oct/29/libya-saif-gaddafi-justice>; ICC *Considering Request by Libya to Try Qadhafi's Son in National Court*, U.N. NEWS CTR. (May 16, 2012), <http://www.un.org/apps/news/story.asp?Cr1=&NewsID=42018&Cr=libya#.UJrvw45XC5Q>.

266. See Richard Spencer et al., *Libyan Officials Will Seek Death Penalty for Saif al-Islam Gaddafi*, TELEGRAPH (Nov. 21, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/89...ibyan-officials-will-see-death-penalty-for-Saif-al-Islam-Gaddafi.html>; Francois Murphy & Ali Shuaib, *Libya's NTC Unveils New Government Lineup*, REUTERS, Nov. 22, 2011, available at <http://www.reuters.com/article/2011/11/22/us-libya-idUSTRE7AL0JM20111122>.

267. See Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, ¶¶ 50–52 (May 1, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1405819.pdf>.

268. See Chulov, *supra* note 265.

269. See INTERNATIONAL CRIMINAL COURT, <http://www2.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0111/> (last visited Jan. 3, 2013) (charging Qadhafi's son and Al-Senussi as indirect perpetrators, for two counts of crimes against humanity including murder and persecution).

national proceedings in relation to other crimes he committed.²⁷⁰ The Court dismissed this request on March 7, 2012, and ordered instead that the government of Libya surrender Saif Al-Islam to the Court.²⁷¹

A few days after this ruling, news emerged from Tripoli of an agreement between the Libyan government and the Prosecutor of the ICC, whereby Saif Al-Islam Qadhafi could be tried in Libya “under ICC supervision.”²⁷² Under this agreement, the Court would provide security and legal supervision. As attractive as this option may have sounded, however, the Rome Statute does not provide for the possibility of holding a domestic trial under the Court’s supervision. Discussions on this deal were therefore promptly replaced by discussions regarding an admissibility challenge.

The Libyan government notified the Court on March 22, 2012 of its intention to challenge the admissibility of Saif Al-Islam’s case and requested that the Court suspend the request for Saif Al-Islam’s surrender for an additional few weeks until it could file its admissibility challenge.²⁷³ The Court, however, denied the Libyan government’s request to suspend the execution of the surrender request,²⁷⁴ a decision that the Appeals Chamber affirmed.²⁷⁵ The

270. *See generally* Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11-72, Decision on Libya’s Submissions Regarding the Arrest of Saif Al-Islam Gaddafi (Mar. 7, 2012), <http://icc-cpi.int/iccdocs/doc/doc1365494.pdf>.

271. *See id.* at 8.

272. *See Gaddafi Son Saif al-Islam ‘May Be Tried in Libya,’* BBC NEWS (Apr. 17, 2012), <http://www.bbc.co.uk/news/world-africa-17739076>; Mark Kersten, *A New Deal: An ICC “Supervised” Trial for Saif Gaddafi in Libya?*, JUSTICE IN CONFLICT (Apr. 17, 2012), <http://justiceinconflict.org/2012/04/17/a-new-deal-an-icc-supervised-trial-for-saif-gaddafi-in-libya/>. *See generally* *Libya Complementarity Challenge at the ICC*, INTLAWGRRLS (Jan. 17, 2012), <http://www.intlawgrrls.com/2012/01/libya-complementarity-challenge-at-icc.html>.

273. *See* Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Notification and Request by the Government of Libya in Response to “Decision on Libya’s Submissions Regarding the Arrest of Saif Al-Islam Gaddafi,” Case No. ICC-01/11-01/11, ¶¶ 2–4 (Mar. 22, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1384800.pdf>.

274. *See* Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, 9 (Apr. 4, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1391624.pdf>.

275. *See* Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Decision on “Government of Libya’s Appeal Against the ‘Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of

Court made clear that Article 95, which the government was relying on to postpone the arrest warrant, only applies when an admissibility challenge is under consideration by the Court, and not when an admissibility challenge is forthcoming.²⁷⁶

Accordingly, on May 1, 2012, the Libyan government filed its admissibility challenge contesting the Court's jurisdiction over Saif Al-Islam.²⁷⁷ The admissibility challenge first noted that allowing the national jurisdictions to try Saif Al-Islam in Libya is consistent "with the object and purpose of the Rome Statute, which accords primacy to national judicial systems."²⁷⁸ The challenge also described the progress made with regard to the investigations into Saif Al-Islam's conduct.²⁷⁹ It highlighted differences in the judicial system between the court system under the Ministry of Justice, which was generally seen as positive, and the special courts operated by Colonel Qadhafi's security forces.²⁸⁰ The admissibility challenge further described Libya's fair trial guarantees, as well as the manner in which due process guarantees applied throughout the various stages of a domestic criminal case.²⁸¹ As of the date of writing, the Court is considering Libya's admissibility challenge.

This situation illustrates the tension between the Court and states with respect to prosecutions. On the one hand, it is important for a post-conflict state, such as Libya, to have national ownership over the proceedings. Such a process can promote reconciliation, develop a clear historical record, and contribute to the country's transitional justice process. Libya is also trying to demonstrate that it is able to prosecute on the national level, as evidenced in part by the building of courtrooms and its handling of the trial of former intelligence chief Buzeid Dorda, who is currently on trial for crimes related to his

Saif Al-Islam Gaddafi" of 10 April 2012, Case No. ICC-01/11-01/11 OA 2, ¶ 1 (Apr. 25, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1404377.pdf>.

276. See Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, ¶¶ 15–18; see also Rome Statute, *supra* note 73, art. 95 (stating that "[w]here there is an admissibility challenge under consideration by the Court . . . , the requested State may postpone the execution of a [cooperation] request . . . pending a determination by the Court . . .").

277. See *id.* ¶ 1.

278. *Id.* ¶ 2.

279. *Id.* ¶¶ 42–49.

280. See *id.* ¶¶ 54–55.

281. See *id.* ¶¶ 56–57.

conduct in 2011.²⁸²

On the other hand, there are indications that the Libyans are not able to conduct effective prosecutions. The government does not seem to have control over Saif Al-Islam, as he is imprisoned in Zintan, where the militia guarding him has vowed not to turn him over until the formation of a new government.²⁸³ The Libyans have also compromised their position with the ICC with their support of laws inconsistent with international standards. For instance, the National Transitional Council recently passed a controversial blasphemy law criminalizing the glorification of the former dictator or the spread of propaganda critical of the state.²⁸⁴ However, in June the Libyan Supreme Court found the law to be unconstitutional because it violated the freedom of expression.²⁸⁵

Even before this admissibility challenge, Qadhafi had received retributive justice at the hands of the rebel forces, who in practice avoided an internal conflict over the handling of the fallen dictator. Qadhafi's death demonstrates that no matter how much non-violent justice the Court may inject into the process, the reality remains that fighters may catch and kill those most criminally responsible. At the same time, the story circulating in Libya—that a young militiaman killed Qadhafi to avoid a clash between two anti-Qadhafi militias—shows that realpolitik forces never cease to be at work.

This emerging tension between the ICC's desire to prosecute Saif Al-Islam Qadhafi and the Libyan government's focus on dealing with the conflict on a national level has caused additional strains in the relationship between the two. For instance, the Registrar of the ICC made a mistake when it posted for two hours on the Internet a document that presented allegations that Saif Al-Islam Qadhafi had

282. See *Libya Opens First Trial of a Loyalist*, AL JAZEERA (July 6, 2012), <http://www.aljazeera.com/news/africa/2012/06/2012660025963302.html>.

283. See John Thorne, *Libya's Saif Al Islam Pleads: 'Fire a Bullet to My Head,'* NATIONAL (Nov. 20, 2011), <http://www.thenational.ae/news/world/africa/libyas-saif-al-islam-pleads-fire-a-bullet-to-my-head>.

284. See Katerina Nikolas, *Libya's 'Glorification' Law 37 Challenged by Lawyers*, DIGITAL JOURNAL (May 31, 2012), <http://digitaljournal.com/article/325814>.

285. See *Libya Court Scraps Law Banning Glorifying Gaddafi*, REUTERS, June 14, 2012, available at <http://uk.reuters.com/article/2012/06/14/uk-libya-law-idUKBRE85D0X420120614>.

been tortured.²⁸⁶ The document included a portion describing that the Registrar of the ICC asked him if he was mistreated, and he held up his injured hand.²⁸⁷ This posting infuriated the Libyan government.

The Libyans likewise infuriated the international community by detaining Saif Al-Islam Qadhafi's lawyer, Melinda Taylor.²⁸⁸ On June 7, 2012, four international civil servants working for the ICC were detained in Libya, where they had come to meet with Saif Al-Islam.²⁸⁹ Taylor was arrested for allegedly attempting to pass documents directly addressing issues of Libya's national security to Saif Al-Islam Qadhafi from a fugitive supporter, Mohammed Ismail.²⁹⁰ After weeks of pressure from the president of the ICC, Judge Sang-Hyun Song, and the UN Security Council and Australian government, the Libyans finally released Taylor.²⁹¹

It is possible that the Libyans could prosecute Saif Al-Islam on the national level for domestic crimes, while the ICC handles allegations of serious violations of international law, such as crimes against humanity. The drafters of the Rome Statute had indeed envisaged the possibility of a competing trial, as it allows for a state to postpone requests by the Court subject to its completion of a domestic prosecution.²⁹² On its face, the Rome Statute would indeed appear to

286. See Chris Stephen, *Libya's Failure to Hand Over Gaddafi Son Must Be Referred to UN, Says ICC Counsel*, GUARDIAN (Apr. 12, 2012), <http://www.guardian.co.uk/world/2012/apr/12/libya-failure-hand-over-gaddafi-icc>.

287. See *id.*

288. See *Australia Urges Release of Melinda Taylor, ICC Lawyer Held in Libya*, BBC NEWS (June 11, 2012), <http://www.bbc.co.uk/news/world-africa-18391333>; see also Press Release, ICC, *Four ICC Staff Members Detained in Libya; Immediate Release Requested*, (June 9, 2012) [hereinafter *Four ICC Staff Members Detained in Libya*], available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr805>.

289. See *Four ICC Staff Members Detained in Libya*, *supra* note 288.

290. See *generally Libya: ICC Staff Held in Zintan Released*, BBC NEWS (July 2, 2012), <http://www.bbc.co.uk/news/world-africa-18671454>.

291. See *generally id.*; Luke Harding & Julian Borger, *Libya Frees International Criminal Court Legal Team Accused of Spying*, GUARDIAN (July 2, 2012), <http://www.guardian.co.uk/world/2012/jul/02/libya-releases-icc-officials>.

292. See Rome Statute, *supra* note 73, art. 94(1) ("If the immediate execution of a [cooperation] request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court." (emphasis added)). The postponement of the cooperation request, however, must not be for a period longer than necessary for the state to complete

allow the Libyan government to postpone the surrender request for Saif Al-Islam while it is prosecuting him for other crimes.²⁹³ On March 7, 2012, however, the Court found otherwise.²⁹⁴ The Court determined that once an arrest warrant for an individual is outstanding or a surrender request is issued, the Rome Statute requires the state to first surrender the person and then consult with the Court on the next steps.²⁹⁵ Accordingly, the Libyan government is first required to surrender Saif Al-Islam to the Court, and only then can it apply to have him surrendered back.

The relationship between domestic and international organs of justice is one that is further refined with each additional case considered by the Court. The outcome of the Libyan government's admissibility challenge and the Court's reasoning for granting or denying, as the case may be, the government's wish to try Saif Al-Islam in Libya will be informative for countries that may seek domestic prosecution after a change of heart or pursuant to Security Council referral. The Libyan government's response to the Court's decision will also be a crucial moment in the Court's history: should the Court deny Libya jurisdiction, there is not much the Court can do to enforce its decision if the Libyans decide to disregard the Court. This would further demonstrate the Court's lack of teeth when a state is unwilling to cooperate. Here again the marriage between realpolitik and justice comes to the forefront, as realpolitik will be one of the real levers that powerful states may use to shift Libya's attitude toward the Court.

VIII. CONCLUSION

An examination of the role of the ICC in Libya has helped to further refine our understanding of the complex relationship between

the relevant investigation or prosecution, and the state must have considered whether it could comply with the Court's request subject to certain conditions and found that it could not. *See id.*

293. *See id.* art. 94.

294. *See* Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11-72, ¶¶ 14–15.

295. *See id.*; Rome Statute, *supra* note 73, art. 89(4) (“If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.” (emphasis added)).

the efforts of the ICC to promote justice and the ICC's impact on the efforts of policy makers to promote peace and security. In the case of Libya, the Court has served many different roles and is affecting post-Qadhafi Libya in ways that were not predicted at its initial involvement. The Libyan case demonstrates many dilemmas with which the Court, its proponents, and policy makers are confronted. These dilemmas are not easily solved; however, there are six main conclusions that can be drawn.

First, justice has become entwined within the fabric of conflict resolution. Over the past twenty years, the norm of justice and mechanisms to deliver justice, culminating in the creation of the ICC, have increasingly come to occupy space in what was previously the exclusive arena of realpolitik-oriented policy makers.

Second, the activation of the mechanisms of justice remains in the hands of policy makers. In many cases, states have consented to the jurisdiction of the Court by becoming parties to the Rome Statute. They have thus pre-activated the ICC in the event there is an atrocity-based conflict associated with their territory or their nationals, thereby giving substantial discretion to the ICC. In other cases, the state (non-parties) must make a political determination to request that the ICC take up the matter, or it must be referred by a Chapter VII vote of the UN Security Council.

Third, once the ICC or other mechanisms of justice are activated, they operate as truly independent mechanisms. The fundamental premise of effective justice is that it be applied and administered impartially. While it is a political reality that the ICC can only be activated via a political decision, it is also a judicial reality that judicial mechanisms eschew political influences and considerations. In part because the ICC is activated through a political determination, the ICC is all the more protective of its independence once activated. While this independence leads to the effective operation of justice, it does add a degree of unpredictability to the mix and can be unsettling for policy makers seeking to maintain international peace and security.

Fourth, the investigation and indictment of those responsible for atrocity crimes can lend significant moral authority to the use of force to end them. Indictments may also provide the necessary moral guidance when international support for the continued use of force

wanes. The ICC's drive for moral equivalence and penchant for indicting all sides to prove its impartiality, however, may result in a chilling effect on the initial use of force or may erode the moral authority for continued engagement on behalf of the victims.

Fifth, the ICC may limit the ability of policy makers to halt an intervention and negotiate a peace settlement if the ICC has indicted the head of state or other top-level officials. While this may constrain the options of policy makers, there is also a lengthy record of failed efforts at accommodation and appeasement by policy makers, and in the end this constraint may do more to promote lasting peace and security.

Sixth, in the post-conflict state, the ICC and domestic forms of justice can play key roles in reconciliation and aiding long-term peace and security. There is, however, an emerging tension between the ICC and domestic policy makers who prefer domestic accountability, and who have developed reservations about the manner in which the ICC operates.

Since its creation, the Court has emerged as a dynamic and seemingly ever-present force exerting its influence on the traditional processes for resolving international conflicts and maintaining peace and security. On the whole, this influence positively promotes long-term peace and security. As realpolitik-oriented policy makers and diplomats continue to refine their understanding of the operation of the Court and develop a more nuanced approach to maximizing the utility of the independent actions of the Court, they are likely to realize an enhanced ability to resolve international conflicts and promote long-term peace and stability. Failure to develop an adequate understanding of the role of the Court and mechanisms of justice will only further complicate an already complex environment and may undermine otherwise effective approaches to maintaining peace and security.