THE SECURITY COUNCIL AND THE COMPLEMENTARY REGIME OF THE INTERNATIONAL CRIMINAL COURT: LESSONS FROM LIBYA

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On February 26, 2011, in the wake of sweeping protest movements and resulting government-sponsored violence across the Arab world, the Security Council adopted Resolution 1970 referring the Situation in Libya to the Prosecutor of the International Criminal Court (ICC). This was only the second occasion that the Council had, in acting under its Chapter VII powers of the Charter of the United Nations, referred a situation to the Court pursuant to Article 13(b) of the Rome Statute. When, just two weeks later, the United Nations Security Council adopted Resolution 1973 creating the legal basis for military intervention in Libya, it appeared that the ICC was well placed to strike a powerful blow for international criminal law, justice, and the Libyan people. Unfortunately, this has not been the case. This article asks why—it finds that an impasse exists between the ICC and the Libyan National Transitional Council due to the doctrinal uncertainty as to the applicability of the principle of complementarity under Security Council referrals. Although complementarity has been described as the cornerstone of the ICC, questions persist as to whether the Security Council, as the body charged with the primary responsibility for the maintenance of international peace and security, can abrogate this principle and confer jurisdictional primacy upon the ICC. This article seeks to resolve this issue through a comprehensive analysis of the Rome Statute, the Charter of the United Nations and subsequent practice of the Office of the Prosecutor of the ICC. Finding that the Security Council must abide by the principle of complementarity, this article concludes by analyzing the consequences for Libya and for future Council referrals, proposing that an ICC trial in situ offers compelling benefits for this and similar cases involving states transitioning from despotism.

Keywords: international criminal law procedure, the Security Council, the International Criminal Court, complementarity, Libya, Gaddafi

I. INTRODUCTION

On February 26, 2011, in the wake of sweeping protest movements and resulting government-sponsored violence across the Arab world, the United Nations Security Council (SC) adopted Resolution 1970 imposing a series of international sanctions on Libya and refer-

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ring the situation in the Libyan Arab Jamahiriya occurring since February 15, 2011 to the Prosecutor of the International Criminal Court (ICC).[1] This was only the second occasion, and the first unanimous instance,[2] that the Council had, in acting under its Chapter VII powers of the United Nations Charter, referred a situation to the ICC pursuant to Article 13(b) of the Rome Statute. Less than one week later the Prosecutor announced that, "following a preliminary examination of available information,"[3] he had reached a conclusion that an investigation into the situation in Libya was warranted and that he had, therefore, opened an investigation.

Just three months later, Pre-Trial Chamber I issued arrest warrants against Muammar Mohamed Abu Minyar Gaddafi, Saif al-Islam Gaddafi, and Abdullah Senussi.[4] The Chamber found that there were "reasonable grounds to believe" that crimes against humanity had been committed throughout Libya from February 15-28, 2011.[5] The "lightning speed"[6] with which the Prosecutor conducted his preliminary examination, and the swift issuance of the arrest warrants, reflected the desire of the Office of the Prosecutor (OTP) to maximize both its impact and its "contribution to the fight against impunity"[7] by acting accurately, efficiently, and effectively.[8] When Tripoli, Muammar Gaddafi, and his entire regime fell on October 20, 2011, supporters of the Court hoped for a quick and effective solution. Regrettably, the Court has failed this test.[9]

The reasons for the OTP's shortcomings are numerous, but chief among them is the apparent uncertainty as to the applicability of the principle of complementarity to SC referrals. Complementarity is "the corner-

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[1] S.C. Res. 1970, ¶ 4, U.N. SCOR, 65th Sess., U.N. Doc. S/RES/1970 (26 Feb. 2011).

[2] The first referral by the Security Council to the Prosecutor was the situation in Darfur. *See* S.C. Res. 1593, U.N. SCOR, 60th Sess., U.N. Doc. S/RES/1593 (31 Mar. 2005) [hereinafter Darfur Referral].

[3] Press Release, ICC, Off. of the Prosecutor, ICC Prosecutor to Open an Investigation in Libya (2 Mar. 2011), www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/ofice%20of%20the%20prosecutor/comm%20and%20ref/libya/Pages/statement%20020311.aspx.

[4] *See Libya*, OFFICE OF THE PROSECUTOR, INTERNATIONAL CRIMINAL COURT, www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/libya/Pages/libya.aspx (last visited 8 Mar. 2013).

[5] Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, Pre-Trial Chamber, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi, ¶¶ 41-65 (27 June 2011), www.icc-cpi.int/iccdocs/doc/doc1099314.pdf.

[6] Carsten Stahn, *Libya, the International Criminal Court and Complementarity: A Test for "Shared Responsibility*," 10 J. INT'L CRIM. JUST. 325, 329 (2012).

[7] ICC Off. of the Prosecutor, *Prosecutorial Strategy 2009-2012*, ¶ 55 (1 Feb. 2010), www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf [hereinafter Prosecutorial Strategy].

[8] *See id.* ¶¶ 21, 25, 43, 49, 56, 58, 60. For additional coverage on this topic, *see id.* ¶¶ 55-77.

[9] *See e.g.*, William A. Schabas, *Libya Referred to International Criminal Court by Security Council*, PhD studies in human rights, 27 Feb. 2011, http://humanrightsdoctorate.blogspot.com.au/2011/02/libya-referred-to-international.html.

stone"[10] of the ICC, a court whose very existence today "is due in no small measure to the delicate balance developed"[11] by that principle. Complementarity conforms to the contemporary Westphalian international legal order, holding that domestic authorities retain the primary right to prosecute the perpetrators of international crimes occasioning within their jurisdiction. The result is that the ICC, as a court of last resort, may only step in where states are genuinely unwilling or unable to act.[12]

Yet alongside the ICC sits the SC, the body charged with the primary responsibility for the maintenance of international peace and security. Does this preeminence enable the SC to abrogate both sovereignty and the complementary regime of the international court and invest jurisdictional primacy onto that body? Although scholarship is moving towards a position that complementarity does apply to SC referrals,[13] academic thought remains divided.[14] This article seeks to resolve the issue through a comprehensive analysis of the Rome Statute, the UN Charter, and subsequent practice of the OTP. The answer will have important real world consequences, not just for Saif al-Islam and Senussi, but also for future SC referrals.

This article is divided into three sections. Section II begins by examining the Libyan situation, demonstrating that the difficulties encountered stem from uncertainty as to whether the principle of complementarity applies to SC referrals. It will then take a step back and explore the ICC itself, focusing on complementarity as enumerated in the Rome Statute and detailing exactly how the Court's jurisdiction may be triggered. This will set up Section III's key conceptual examination of the central question of this article: whether complementarity applies to SC referrals. This section will be informed by a comprehensive analysis of the Rome Statute and its

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[10] Sharon A. Williams & William A. Schabas, *Article 17, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 605, 606 (Otto Triffterer ed., 2d ed. 1999).

[11] John T. Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, AND RESULTS 41, 74 (Roy Lee ed., 1999).

[12] *See* Rome Statute of the International Criminal Court art. 17, 17 July 1998, 2187 U.N.T.S. 90 (2002) [hereinafter Rome Statute].

[13] *See, e.g.*, Jann K. Kleffner, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 165–66 (2008); Jakob Pichon, *The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court*, 8 INT'L CRIM. L. REV. 185, 189 (2008); Jens David Ohlin, *Peace, Security, and Prosecutorial Discretion*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 185, 194–95 (Cartsen Stahn & Göran Sluiter eds., 2009); ICC Off. of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, U.N. Doc. ICC-01/04-01/07-1008-AnxA, ¶ 21 (30 Mar. 2009), www.icc-cpi.int/iccdocs/doc/doc654724.PDF [hereinafter OTP Informal Expert Paper].

[14] Many scholars remain convinced that complementarity does not apply to SC referrals. *See, e.g.*, M. Cherif Bassiouni, *Observations Concerning the 1997–98 Preparatory Committee's Work*, 25 DEN. J. INT'L L. & POL'Y 397, 411–12 (1997); Michael Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT'L L. 115 (2010); Rosanna Lipscomb, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182 (2006); George Fletcher & Jens David Ohlin, *The ICC: Two Courts in One?*, 4 J. INT'L CRIM. JUST. 428, 431 (2006).

travaux préparatoires (official record of negotiation), the UN Charter, and subsequent practice of the OTP. It will find that complementarity does apply to SC referrals.

Section IV will then investigate the practical consequences for Libya. It will also project forward, offering thoughts on how the SC may deal with a similar situation in the future. At the time of writing, the situation in Libya has been characterized as a farce that damages the ICC and international criminal justice as a whole.[15] Recalling the central importance of the SC in the international legal order, this article will discuss a number of methods the Council may utilize to resolve a dispute between the ICC and a state transitioning from despotism and civil war, in order to avoid the problems encountered in Libya. It will conclude by suggesting that an *in situ* trial could offer significant benefits in this and similar cases.

The issue at the heart of this article is the legal relationship between the SC and the ICC. In light of the importance of each in maintaining international peace and security, ending impunity, and strengthening deterrence,[16] a cooperative and productive relationship is essential. It is hoped that by outlining a number of methods the SC may utilize in order to avoid potentially damaging disputes between states and the Court, this relationship will be strengthened.

II. LIBYA AND COMPLEMENTARITY IN THE INTERNATIONAL CRIMINAL COURT

This section will begin by examining the current standoff affecting the Libyan situation. It will demonstrate that the impasse between the National Transitional Council (NTC) and the Court lies in the disconnect between the OTP and the chambers over the applicability of the Court's complementary regime under SC referrals. It will then step back and introduce the ICC as a court with concurrent latent complementary jurisdiction that must be triggered before it can be exercised. Its focus will be on the SC triggering mechanism as encapsulated in Article 13(b) of the Rome Statute, and the three primary provisions concerning complementarity: the Preamble, Article 1, and Article 17. This examination will set the scene for Section III's conceptual analysis.

A. The Current Situation in Libya

The international acclaim and expectant hope that surrounded SC Resolution 1970 and the Pre-Trial Chamber I's speedy issuance of arrest warrants stands in striking contrast to the situation after the fall of Tripoli. The situation post-regime change has been marked by disconnect and uncertainty: both between the OTP and the Trial Chambers, as well as between the Court as a whole and the new Libyan authorities.

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[15] *See, e.g.*, Kevin Jon Heller, *The ICC Commits Cooperation Seppuku*, OPINIO JURIS (23 June 2012), www.opiniojuris.org/2012/06/23/the-icc-commits-cooperation-seppuku/.

[16] Rome Statute, *supra* note 12, at pmbl. ¶ 5.

Understandably, the NTC has expressed its desire to try Saif al-Islam and Senussi, pointing to the benefits of local justice "as a foundation for reconciliation, democracy and rule of law."[17] However, the degree to which the OTP has indicated support for this position has caused friction within the Court. The Office has twice met with Libyan authorities, spoken favorably of a solution regarding Libya, and even asserted that it is "not competing for the case."[18] These pronouncements have led the Office of the Public Counsel for the Defence (OPCD) to publicly question the OTP, submitting to the Court that the Prosecutor's conduct "undermine[s] the appearance of the independence of the Prosecution" by "creat[ing] the impression that certain issues . . . are predetermined . . . [and] that the question of admissibility of the case is predetermined . . . ."[19] For their part, the Chambers have insisted on a rigorous application of procedure, reminding all parties involved that Pre-Trial Chamber I has "exclusive competence to decide on the continuation of the [case]."[20]

The Chamber has held three times that Libya is required to surrender Saif al-Islam to the Court.[21] Yet the NTC has repeatedly failed to comply. Their method has been to obfuscate and delay: they have reversed their early promise to cooperate and to ensure the "fast implementation of such arrest warrants,"[22] frequently requested additional time to respond or to file motions,[23] asserted to the international media that their applications had been accepted and the ICC had agreed to a trial in Libya "according to Libyan law,"[24] and indicated that such a trial would not center on crimes

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[17] Prosecutor v. Gaddafi & Senussi, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, at 7 (1 May 2012). [hereinafter NTC Admissibility Challenge].

[18] Rana Jawad, *Trial of Saif al-Islam Gaddafi Will Test Libya Justice*, BBC NEWS (23 Nov. 2011), www.bbc.co.uk/news/world-africa-15864948.

[19] Prosecutor v. Gaddafi & Senussi, Case No. ICC-01/11-01/11, OPCD Application in Relation to Public Statements of the Prosecutor, ¶¶ 1–2 (17 Apr. 2012).

[20] ICC Press Release, Course of Action Before the ICC Following the Arrest of the Suspect Saif al-Islam Gaddafi in Libya, ICC-CPI-20111123-PR746 (23 Nov. 2011), http://www.icc-cpi.int/en_menus/icc/press and media/press releases/press releases (2011)/Pages/course of action before the icc following the arrest of the suspect saif al is.aspx.

[21] Prosecutor v. Gaddafi & Senussi, Case No. ICC-01/11-01/11, Request to the Libyan Arab Jamahiriya for the Arrest and Surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi and Abdullah al-Senussi (4 July 2011), Decision on Libya's Submissions Regarding the Arrest Warrant of Saif al-Islam Gaddafi (7 Mar. 2012), Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi (4 Apr. 2012). Please note however that on June 1, 2012, the Pre-Trial Chamber held that pending the final determination of Libya's admissibility challenge, Libya is entitled to postpone its obligation to surrender Saif al-Islam. *See id.*, Decision on the Postponement of the Execution of the Request for Surrender of Saif al-Islam Gaddafi Pursuant to Article 95 of the Rome Statute (1 June 2012).

[22] *Libya: Q&A on the ICC and Saif al-Islam Gaddafi*, HUMAN RIGHTS WATCH (23 Jan. 2012), www.hrw.org/news/2012/01/23/libya-qa-icc-and-saif-al-islam-gaddafi.

[23] Prosecutor v. Gaddafi & Senussi, Case No. ICC-01/11-01/11, Transmission of the Request of Libya for Extension of Time Limit to Submit Observations Regarding the Arrest of Saif al-Islam Gaddafi, 2 (9 Jan. 2012).

[24] Mahmoud Habboush & Ali Shuaib, *ICC Set to OK Saif Trial in Libya, Tripoli Says*, REUTERS, 12 Jan. 2012, www.reuters.com/article/2012/01/12/ozatp-libya-saif-trial-idAFJOE80B0AS20120112?sp=true.

against humanity but on Saif al-Islam's "alleged failure to have a license of camels, and issues concerning fish farms . . . ."[25] Amidst all this, Libya only finally raised an admissibility challenge in May 2012,[26] and does not even appear to have *de facto* control over Saif al-Islam, who is not directly detained by the Libyan authorities but by the Zintan militia, a group unwilling to lose custody of their precious detainee.[27] To further complicate matters, Senussi is currently held by Mauritania, with France joining the ICC and Libya in seeking his extradition.[28]

On June 7, 2012, the situation descended further into farce when the Zintan militia detained four ICC staff visiting Saif al-Islam.[29] Despite the individuals possessing widely accepted diplomatic immunity,[30] Melinda Taylor, Alexander Khodakov, Esteban Peralta Losilla, and Helene Assaf spent over three weeks under house arrest, accused of spying and of passing on a letter written by Saif al-Islam's right-hand man, Mohammed Ismaili.[31] It was unclear from the very beginning, however, whether the allegations involving an alleged pen camera, "dangerous" documents, and coded letters were the true focus of the dispute, or as Mohammed al-Hareizi, a Zintani spokesman, explained that "[w]e don't have anything against this woman. Just we need some information from her, after that she will be free."[32]

Yet for all intents and purposes, the ICC appeared to abandon its staff,[33] issuing an apology to the NTC that included the stunning phrase, "welcom[ing] the commitment of the Libyan authorities to cooperate fully

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[25] Prosecutor v. Gaddafi & Senussi, Case No. ICC-01/11-01/11, Response to the Government of Libya's Appeal Against the Decision Regarding the Second Request by the Government of Libya for the Postponement of the Surrender of Saif al-Islam Gaddafi, 30 (12 Apr. 2012), www.icc-cpi.int/iccdocs/doc/doc1393651.pdf.

[26] NTC Admissibility Challenge, *supra* note 17.

[27] Damien McElroy, *Saif al-Islam Gaddafi "To be Tried in Remote Mountaintop Town,"* THE TELEGRAPH (London) (2 May 2012), www.telegraph.co.uk/news/worldnews/africaandindianocean/ libya/9241547/Saif-al-Islam-Gaddafi-to-be-tried-in-remote-mountaintop-town.html (explaining that the Zintan group even declared that it will hold Saif al-Islam's trial).

[28] Mark Kersten, *Justice in Libya? The Senussi Sweepstakes!*, JUSTICE IN CONFLICT (30 Mar. 2012), www.justiceinconflict.org/2012/03/30/justice-in-libya-the-senussi-sweepstakes/.

[29] *Four Detained ICC Staff Members Released in Libya*, UN NEWS CENTRE (2 July 2012), www.un.org/apps/news/story.asp?NewsID=42373#.UUYNj1vSM5g [hereinafter *Detained ICC Staff*].

[30] *See, e.g.*, Dapo Akande, *The Immunity of the ICC Lawyers and Staff Detained in Libya*, EJIL TALK! (18 June 2012), www.ejiltalk.org/the-immunity-of-the-icc-lawyers-and-staff-detained-in-libya/; Heller, *supra* note 15.

[31] *Detained ICC Staff*, *supra* note 29; *Australian Lawyer "Free if She Reveals Libya's Most Wanted Man,"* THE TELEGRAPH (London) (12 June 2012), www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9326099/Australian-lawyer-free-if-she-reveals-Libyas-most-wanted-man.html [hereinafter *Australian Lawyer*]; Mark Kersten, *ICC Staff Locked Up In Libya: An Unfolding Debacle*, JUSTICE IN CONFLICT (12 June 2012), www.justiceinconflict.org/2012/06/12/icc-staff-locked-up-in-libya-an-unfolding-debacle/.

[32] Kersten, *supra* note 31 (noting the "dangerous" documents); *Australian Lawyer*, *supra* note 31 (citing Mohammed al-Hareizi).

[33] *See* Heller, *supra* note 15.

with the ICC . . . ."[34] Fortunately, on July 2, 2012 the four ICC staff members were released and all were able to return home to The Hague.[35] Notwithstanding the ultimately successful resolution, this experience, and the weak ICC response, bodes ill for the Court's continuing relationship with Libya and indeed its relationship with future transitional states.

There is no doubt that the NTC has played off the inherent uncertainty of an unfolding situation to maximize its interests, but the disconnect between the OTP and the Chambers has enabled it to do so. The OTP's and Chambers' failure to disseminate a clear, consistent, and coherent message concerning proper legal procedure to the public and to the parties involved masks a larger ailment; an apparent uncertainty as regards the principle of complementarity under SC referrals. Indeed, the absence of any clear doctrine promotes tension between the differing attitudes and approaches towards complementarity of the OTP and the Chambers. As explained by Carsten Stahn, while the OTP has spoken of "dialogue," "partnership," and "reverse cooperation," reflecting a lenient attitude towards national authorities, the Chambers have taken a firmer line, conceptualizing complementarity in a classic "carrots and sticks" tradition.[36] This distinction between a classical interpretation of complementarity, which holds that the principle is designed primarily to salve sovereignty concerns, and the OTP's more nuanced "positive" framework, which treats the relationship between national authorities and the Court in a more "managerial" and cooperative manner[37] is well established in the literature by scholars on the topic,[38] and borne out in the Court's interaction with Libya.

The conflict between the prosecutor's eagerness to find a solution for Libyan situation and the Pre-Trial Chamber's insistence on following proper procedure suggests uncertainty as how to proceed under a SC referral. Scholarly opinion is still divided on this issue, with much analysis either simply assuming complementarity applies in all situations,[39] or that it applies except when a situation is referred to the Court by the SC or where a state is unable or unwilling to investigate or prosecute crimes under the

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[34] Press Release, ICC, Statement on the Detention of Four ICC Staff Members, ICC-CPI-20120622-PR815 (22 June 2012), www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr815.aspx.

[35] *Detained ICC Staff*, *supra* note 29; Luke Harding & Julian Borger, *Libya Frees International Criminal Court Legal Team Accused of Spying*, THE GUARDIAN (London) (2 July 2012), www.guardian.co.uk/world/2012/jul/02/libya-releases-icc-officials.

[36] Stahn, *supra* note 6, at 333.

[37] Carsten Stahn, *Complementarity: A Tale of Two Notions*, 19 CRIM. L.F. 87, 88 (2008), *available at* http://openaccess.leidenuniv.nl/bitstream/handle/1887/13539/carsten%20stahn%20-%20complementary%20a%20tale%20of%20two%20notions.pdf?sequence=1.

[38] *See id.*; *see also* William Burke-White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice*, 19 CRIM. L.F. 59 (2008); Nidal Nabil Jurdi, *Some Lessons on Complementarity for the International Criminal Court Review Conference*, 34 S. AFR. Y.B. INT'L L. 28, 33 (2009), http://papers.ssrn.com/sol3/papers.cfm?Abstract_id=1651851.

[39] Stahn, *supra* note 6, at 332 n. 50.

Court's jurisdiction.[40] Once this issue is clarified, secondary issues of cooperation as regarding enforcement of arrest warrants, transfer of suspects, and the commencement of trial proceedings will be more easily resolved. The vesting of jurisdiction is only a preliminary issue, but it is a crucial one if the Court is to establish a firm strategy in dealing with future Council referrals.

B. The Court's Jurisdiction: Concurrent, Latent, and Complementary

An international court with potentially universal territorial jurisdiction[41] requires concrete jurisdictional and admissibility limitations in order to attain state support and function effectively. For the ICC, the Rome Statute places clear restrictions on the Court's subject matter, temporal, and personal jurisdiction, as well as establishing four admissibility criteria that encapsulate the Court's complementary jurisdiction.[42] However, as a result of the Court's *concurrent* jurisdiction with national authorities, a further preliminary restriction hampers its activities. That is, the Court enjoys only latent jurisdiction, which must be triggered or "activated" before any investigation can commence.[43] As a whole, these restrictive instruments defer to the sovereign right of states to prosecute criminal acts occurring within their jurisdiction by limiting the situations when the Court can act. This part will introduce and analyze the complementary regime and SC-initiated triggering mechanism of the Court.

1. Complementarity in the Rome Statute

"Complementarity" appears in the Rome Statute in only one article and the Preamble,[44] is addressed only once more in Article 17 regarding admissibility issues without express mention,[45] and is not defined anywhere in the entire Rome Statute. Yet, despite this dearth of discussion, it is widely considered "central to the philosophy of the Court."[46] The princi-

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[40] Otto Triffterer, *Article 1*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 49, 57 (Otto Triffterer ed., 2d ed. 2008).

[41] The ICC arguably already possesses universal jurisdiction for crimes rising to a breach of a *jus cogens* norm, which allows such jurisdiction, although the notion of universal jurisdiction has been challenged on numerous occasions. Additionally, should universal ratification of the Rome Statute occur, without significant substantive reservations, then the ICC would also acquire universal jurisdiction over crimes within its purview. For a discussion on the jurisdiction of the Court over non-party nationals, *see* Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618 (2003), www.oxfordjournals.org/our_journals/jicjus/2003 award.pdf.

[42] Rome Statute, *supra* note 12, at arts. 5–8, 11–12.

[43] Héctor Olásolo, THE TRIGGERING PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT 39 (2005).

[44] Rome Statute, *supra* note 12, at pmbl. ¶ 10, art. 1.

[45] *Id.* art. 17.

[46] William Schabas, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 336 (2010).

ple runs like a thread throughout the entire Statue,[47] and, significantly, both informs the practice of the Prosecutor[48] and affects domestic debates concerning ratification of the Rome Statute itself.[49] In its simplest form, it means that the Court will defer investigation and prosecution to a state with jurisdiction, unless that State is unwilling or unable genuinely to carry out an investigation or prosecution.[50] As a principle, complementarity was accepted and agreed upon early in the drafting of the Statute,[51] but because of its importance in delicately balancing the competing interests of state sovereignty and an independent supranational judicial body with a broad mandate, defining the exact relationship between the proposed court and national jurisdictions was "both politically sensitive and legally complex."[52]

Paragraph 10 of the Statute's Preamble first introduces the concept, "emphasizing" that the ICC's jurisdiction "shall be *complementary* to national criminal jurisdictions."[53] This is followed by Article 1, which repeats the preambulatory language, reinforcing the notion that the Court's jurisdiction is complementary. Jann Kleffner notes this "duplicative reference," arguing that it "reflects the fundamental importance that states have attached to" complementarity.[54] Indeed, though the repetition and the provisions themselves do not create a legal rule from which rights, consequenc-

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[47] Complementarity is central to various other articles, including 1, 15–20, and 53.

[48] *See* Prosecutorial Strategy, *supra* note 7, ¶¶ 2, 3, 15–17, 19, 28.

[49] *E.g.*, Lee A. Casey & David B. Rivkin, Jr., *Making Law: The United Nations' Role in Formulating and Enforcing International Law*, *in* CONUNDRUM: THE LIMITS OF THE UNITED NATIONS AND THE SEARCH FOR ALTERNATIVES 31, 48 (Brett D. Schaefer ed., 2009) (arguing that "[t]he United States has rightly refused to become a part of the ICC . . . ." and explaining that the principle of complementarity only applies "if the state in question handles the particular case at issue in a manner consistent with the ICC's understanding of the applicable legal norms."); INT'L FED'N FOR HUM. RTS. REPORT, INTERNATIONAL CRIMINAL COURT: IMPLEMENTATION OF THE ROME STATUTE IN CAMBODIAN LAW 22-23 n. 443/2 (Mar. 2006), www.fidh.org/IMG/pdf/cambodge443angformatword.pdf (focusing on the implementation of the Rome Statute in Cambodia, as opposed to ratification, and discussing complementarity as it relates to the jurisdiction of the Cambodian Extraordinary Chambers). For an Australian context, see the debate over the International Criminal Court Bill in 2002, *see* Cth, Parliamentary Debates, *International Criminal Court Bill 2002 and Consequential Amendments, Second Reading*, House of Representatives, 25 June 2002, 4365 (Bob Katter), http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F2002-06-25%2F0082;query=Id%3A%22chamber%2Fhansardr%2F2002-06-25%2F0000%22. In the Australian Senate, *see* Cth, Parliamentary Debates, *International Criminal Court Bill 2002 and Consequential Amendments, Second Reading*, Senate, 27 June 2002, 2833 (Austl.) (Senator Len Harris), http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F2002-06-27%2F0129;query=Id%3A%22chamber%2Fhansards%2F2002-06-27%2F0000%22. For a broader understanding of the debate in the Australian context, *see* David Blumenthal, *Australian Implementation of the Rome Statute of the International Criminal Court*, in THE LEGACY OF NUREMBERG: CIVILISING INFLUENCE OR INSTITUTIONALISED VENGEANCE? 283, 283–325 (David A. Blumenthal & Timothy L.H. McCormack eds., 2008).

[50] Rome Statute, *supra* note 12, art. 17.

[51] Katherine Doherty & Timothy McCormack, *"Complementarity" as a Catalyst for Comprehensive Domestic Penal Legislation*, 5 U.C. DAVIS J. INT'L L. & POL'Y 149, 150–51 (1999).

[52] Holmes, *supra* note 11, at 41.

[53] Rome Statute, *supra* note 12, at pmbl. ¶ 10 (emphasis added).

[54] Kleffner, *supra* note 13, at 99.

es, and obligations follow, but rather a "general goal" emanating from their "programmatory nature,"[55] many states have since incorporated complementarity into their domestic law,[56] transforming this general goal into a defined legal rule.

The explicit legal rules are found in Article 17, the clearest manifestation of complementarity,[57] which regulates the principle through the framework of admissibility. As discussed above in brief and below in detail, the Court's concurrent jurisdiction must be triggered before any investigation can be initiated. Once jurisdiction is triggered, admissibility issues are implicated. Admissibility, therefore, is the pivotal procedural step balancing the "complex relationship between national legal systems and the ICC."[58] The four situations that Article 17 enumerates carefully defer to the sovereign right of states to prosecute criminal acts occurring within their jurisdiction. Under Article 17(1), a case will be determined inadmissible where:

> (a) The case is being investigated or prosecuted by a State, which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> (b) The case has been investigated by a State, which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> (c) The person concerned has already been tried for conduct, which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
> (d) The case is not of sufficient gravity to justify further action by the Court.[59]

Notwithstanding the absence of a clear definition, a plain reading of paragraph 10 of the Preamble, as well as Articles 1 and 17, "compel[s] the conclusion" that the intention of the drafters was not to preclude national authorities from exercising their authority to investigate and prosecute

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[55] *Id.* at 100.

[56] Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86 (2003). As a specific example, Australia has incorporated complementarity into its domestic law through the International Criminal Court (Consequential Amendments) Act of 2002, which amended Division 268.114 of the Criminal Code Act of 1995 to prohibit transfer of Australian citizens to the ICC unless the Attorney-General issues a certificate under sections 22 and 29 of the International Criminal Court Act of 2002. *See International Criminal Court (Consequential Amendments) Act 2002* (Cth) (Austl.); *Criminal Code Act 1995* (Cth) (Austl.); *International Criminal Court Act 2002* (Cth) (Austl.).

[57] Mahnoush Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AMER. J. INT'L L. 22, 27 (1999).

[58] William Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 66-67 (4th ed., 2011).

[59] Rome Statute, *supra* note 12, art. 17.

international crimes, but to encourage it.[60] Complementarity is supposed to supplement domestic enforcement of international criminal law, rather than to supplant it. This intention found voice in the negative language by which Article 17 regulates the relationship between national jurisdictions and the Court. Article 17 presumes that cases will be investigated and prosecuted by national authorities *unless* an exception applies. It is only when states are unwilling or unable genuinely to act that the Court, as a court of last resort, will step in. Until that step is determined, it is the Court's role to encourage and assist national authorities to themselves prosecute core crimes at international law. But complementarity only becomes an issue once the Court's jurisdiction has been triggered.

2. The Triggering Procedure

The Court's concurrent jurisdiction lies dormant and cannot be exercised unless it is triggered. The Rome Statute provides for three triggering mechanisms: referral by a state party,[61] referral by the SC,[62] and initiation of an investigation by the Prosecutor *proprio motu*.[63] This article focuses on referral by the SC, the method through which the Court's investigation into the situation in Libya was activated. The relevant provision is Article 13(b).

The Court may exercise its jurisdiction with respect to a crime referred to in Article 5, in accordance with the provisions of this Statute, if "[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations . . . ."[64]

The Court has indicated that the Council must act within the parameters of Article 13(b).[65] Therefore, it may only refer a situation to the Court if it meets the Chapter VII criteria, *i.e.*, the situation constitutes a "threat to the peace."[66] Jurisprudence of international tribunals and the practice of SC resolutions indicate that an internal armed conflict, like that which occurred in Libya, meets this threshold.[67] Since Article 13(b) does not explicitly refer to the Court's complementary regime, does complementarity apply, or can the Council confer jurisdictional *primacy* onto the Court? Regrettably, the Rome Statute is unclear on this point.

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[60] Mohammed El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 896 (2002).

[61] Rome Statute, *supra* note 12, arts. 12, 13(a).

[62] *Id.* art. 13(b).

[63] *Id.* arts. 13(c), 15(3).

[64] *Id.* art. 13(b).

[65] Situation in Darfur, Sudan, Case No. ICC-02/05, Decision on Application Under Rule 103, ¶ 31 (4 Feb. 2009).

[66] Charter of the United Nations art. 39, 26 June 1945, 1 U.N.T.S. XVI, 59 Stat. 1031 (1945) [hereinafter U.N. Charter].

[67] *E.g.*, Prosecutor v. Tadic, Case No. IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 30 (Int'l Crim. Trib. for the Former Yugoslavia 2 Oct. 1995). *See also* Darfur Referral, *supra* note 2 (noting that the conflict was essentially internal).

Simple examination of the Rome Statute does not clarify whether Council referrals confer complementary or primary jurisdiction. Indeed, this question "appears to have been intentionally left unresolved at the Rome Conference."[68] Article 18(1) states that:

> When a situation has been referred to the Court pursuant to article 13(a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13(c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.[69]

Under Article 18(2), if a state informs the Court that it is "investigating or has investigated" individuals with respect to criminal acts under Article 5, the Prosecutor "shall defer to the State's investigation of those persons . . . ."[70] Together these provisions require that the Prosecutor notify domestic authorities *and* defer to their proceedings when the Court's jurisdiction has been triggered by a state party referral or by the Prosecutor's *proprio motu* powers. That they explicitly *do not* mention referral by the SC, while explicitly noting the two other triggering mechanisms, implies that the principle of complementarity does not apply to Council referrals.[71]

However, Article 53 complicates this finding. Once jurisdiction is triggered, Article 53 requires that the Prosecutor evaluate all information available before deciding whether to initiate an investigation.[72] Articles 53(1)(b) and 53(2)(b) explicitly declare that this information includes *whether the case is inadmissible under Article 17.* Article 53(2)(b), in particular, holds that:

> If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because [t]he case is inadmissible under Article 17 the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 *or the Security Council in a case under article 13, paragraph (b)*, of his or her conclusion and the reasons for the conclusion.[73]

This provision seems to indicate that a case can be declared inadmissible under Article 17 even if the Court's jurisdiction has been triggered by SC referral.[74] Additionally, Articles 17 and 19 do not differentiate between an

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[68] Schabas, *supra* note 46, at 301.
[69] Rome Statute, *supra* note 12, art. 18(1).
[70] Rome Statute, *supra* note 12, art. 18(2).
[71] Fletcher and Ohlin, *supra* note 14, at 431.
[72] Rome Statute, *supra* note 12, art. 53(1).
[73] *Id.* art. 53(2) (emphasis added).
[74] *Id.* art. 17(1)(d). Although complementarity is not completely equivalent to admissibility under Article 17, which does include a gravity threshold criterion, it is unlikely that the Prosecutor would consider that a case referred to the Court under the SC's Chapter VII powers would not meet this threshold. The reference to Article 17 in Article 53(2)(b) is likely a reference to the Court's complementary regime.

Article 13(b) referral and the other mechanisms, perhaps indicating no different application of the admissibility test.[75]

Articles 18(1) and (2) explicitly declare that complementarity applies to state party referral and the Prosecutor's *proprio motu* powers. However, the Rome Statute is ambiguous when it comes to the question of a SC referral. The Council has now twice referred a situation to the Court, and neither in Darfur nor in Libya has the transition from investigation to prosecution proceeded smoothly. It is crucial that this ambiguity is dispelled if the Court is to act upon future SC referrals.

III. THE COMPLEMENTARITY CONUNDRUM

Complementarity strikes a delicate balance between the competing desires of an independent supranational judicial body to combat impunity and the practical realities of state sovereignty. It is the driving force of the Rome Statute. But the Statute is ambiguous on its relationship with the SC. As the body charged with the primary responsibility for the maintenance of international peace and security, can the Council, acting under Chapter VII of the UN Charter, disregard the Court's complementary regime and confer jurisdictional *primacy* upon the Court? Scholars have differed in their opinions, with those that posit that complementary does not apply generally basing their argument on two points: *either* that the provisions of the Statute implicitly suggest it,[76] *or* that the powers of the Council provided for in the UN Charter extend to conferring primacy on the Court.[77]

This section will begin with an examination of the importance of complementarity to the Court through an investigation of the Rome Statute's *travaux préparatoires* and the experience of the ad hoc tribunals. This study will find that "[t]he principle of complementarity is integral to the functioning of the Rome Statute system and its longterm efficacy,"[78] thus, requiring unequivocal authority affirming rejection of the applicability of this principle to SC referrals. Assuming no such authority is found, the analysis will switch to an exploration of the powers of the SC under the UN Charter to evaluate whether the Council has the authority to invest jurisdictional primacy in the Court. Finally, the practice of the OTP will be analyzed to determine how the relationship between complementarity and the Council has been interpreted. This comprehensive study will find that SC referrals must abide by the Court's complementary regime. Section IV will then examine the theoretical consequences and practical implications aris-

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[75] Nidal Nabil Jurdi, THE INTERNATIONAL CRIMINAL COURT AND NATIONAL COURTS: A CONTENTIOUS RELATIONSHIP 215 (2011); *see also* Fletcher & Ohlin, *supra* note 14, at 433 (questioning why one should assume SC referrals apply to Article 19 if they were not referred to in the preceding Article).

[76] *See* Fletcher & Ohlin, *supra* note 14, at 431.

[77] *See* Newton, *supra* note 14, at 131–32. *See also* Lipscomb, *supra* note 14, at 202.

[78] ICC, *Report of the Bureau on Stocktaking: Complementarity, Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap, Assembly of States Parties*, 8th Sess., 22-25 Mar. 2010, at 2, U.N. Doc. ICC-ASP/8/51 (18 Mar. 2010), www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf [hereinafter ICC Assembly of States Parties].

ing from this conclusion for Libya and for the future relationship between the Court and the Council.

A. Why Complementarity?

This study begins by examining the importance of complementarity to the Court through analysis of the Rome Statute's *travaux préparatoires* and the experience of the ad hoc tribunals.

1. Analyzing the Travaux Préparatoires

The Vienna Convention on the Law of Treaties (VCLT) allows recourse to supplementary means of interpretation in order to determine the meaning of a treaty when ordinary good faith interpretation leaves its meaning ambiguous or obscure.[79] The confusion between Articles 18 and 53 allows for examination of the *travaux préparatoires*. The International Law Commission (ILC) first identified complementarity as a concept in its 1994 Draft Statute. The ILC directly referred to complementarity in the Preamble of the Draft Statute: "Emphasizing further that such a court is intended to be *complementary* to national criminal justice systems in cases where such trial procedures may *not be available or may not be effective*."[80]

The commentary to the Preamble developed this principle further, emphasizing that the Court will "complement existing national jurisdictions," and is "not intended to exclude the existing jurisdiction of national courts."[81] This concept was expanded in Draft Article 35, which enumerated three specific admissibility criteria. Under this provision the Court was to determine that a case before it was inadmissible on the ground that the crime in question:

> (a) Has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;
>
> (b) Is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or
>
> (c) Is not of such gravity to justify further action by the Court.[82]

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[79] Vienna Convention on the Law of Treaties art. 32(a),23 May 1969, 1155 U.N.T.S. 331 (1980) [hereinafter VCLT].

[80] Draft Statute for an International Criminal Court, U.N. GAOR, 49th Sess., Supp. No. 10, Annex 2, pmbl. § 3, U.N. Doc. A/49/355 (1994) (emphasis added) [hereinafter ILC Draft Statute].

[81] Rep. of the Int'l L. Comm'n, *Draft Statute for an International Criminal Court with Commentaries*, 49 U.N. GAOR, 49th Sess., Supp. No. 10, 91(b1), U.N. Doc. A/49/10 (1994), *reprinted in* 2 Y.B. Int'l L. Comm'n, pt. 2, at 26-27, U.N. Doc. A/CN.4/SER.A/1994/Add 1 (Part 2) (1994) [hereinafter Draft Statute for an International Criminal Court with Commentaries].

[82] *Id.* art. 35.

The Ad Hoc Committee on the Establishment of an ICC examined the ILC Draft Statute. In their 1995 Report the Committee noted that delegations described complementarity as an "essential element," but called for "further elaboration."[83] In this regard there was significant debate as to how *strict* the principle should be. Some delegations stressed that it should create "a strong presumption in favour of national jurisdiction[s],"[84] while others disagreed, arguing that the ICC "should always have primacy of jurisdiction."[85] A middle ground eventually emerged whereby delegations emphasized that "it was important not only to safeguard the primacy of national jurisdictions, but also to avoid the jurisdiction of the court becoming merely residual to national jurisdiction."[86] However, making the general specific and putting the theoretical into practice took three years and over six Preparatory Committee Meetings.

The final result was a significant amendment of Draft Article 35 that struck a fine balance between the preservation of the primacy of domestic jurisdictions,[87] and an independent Court. Complementarity would preclude exercise of the Court's jurisdiction, unless national authorities were "unable or unwilling to carry out the investigation or prosecution."[88] The principle was adopted because it recognizes and balances competing desires for a global response to international crime with concerns over the erosion of sovereignty. Achieving consensus between these competing desires was "one of the great achievements"[89] of the drafters, and this balance should be maintained. Equally important to its adoption, however, was the experience of the ad hoc tribunals.

2. Lessons from the Ad Hoc Tribunals

Any discussion of the ICC's complementary regime requires an examination of the ad hoc tribunals. Both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) enjoyed jurisdictional primacy over national courts, meaning that at any stage of the procedure the Tribunals had the power to "request national courts to defer" to their competence.[90] The reason for

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[83] Rep. of the Ad Hoc Comm. on the Establishment of an International Criminal Court, U.N. GAOR, 50th Sess., Supp. No. 2, at ¶ 29, U.N. Doc A/50/22 (1995) [hereinafter Ad Hoc Committee Report].

[84] *Id.* ¶ 31.

[85] *Id.* ¶ 32.

[86] *Id.* ¶ 33.

[87] Newton, *supra* note 14, at 133.

[88] Williams & Schabas, *supra* note 10, at 610.

[89] *Id. citing* Amnesty Int'l, *The International Criminal Court: Making the Right Choices – Part V: Recommendations to the Diplomatic Conference*, AI Index IOR 40/10/1998, at 35, 30 April 1998.

[90] Statute for the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 8(2), U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/Res/955 (1994) [ICTR Statute]; *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* art. 9(2), S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), S.C. Res. 827, U.N. Doc. S/RES/827 (1993).

this important difference is simple, and rather than consider the ICC an exceptional body for dispensing with the primacy of the ad hoc tribunals, it is those tribunals themselves that are exceptional. The significant impingement upon sovereignty was tolerated only because the tribunals were: granted very limited territorial jurisdiction, temporary bodies, and specifically created "to address a threat to international peace and security."[91] Significantly, however, even with these considerable jurisdictional limitations, the permanent members of the SC remained careful not to suggest a precedent had been established.[92] Additionally, in practice, financial, personnel, and time constraints necessitated a more nuanced exercise of their jurisdictional supremacy. Consequently, rather than following a strict application of primacy, the tribunals occasionally outlined "a clear complementarity approach . . . based on co-operation."[93] The introduction of a completion strategy[94] and the amendment of Rule 11*bis*, which enabled the tribunals to refer a case to national authorities if they were "willing and adequately prepared to accept such a case,"[95] simply hastened this shift.

The lesson from the ad hoc tribunals is clear: for a specific threat to international peace and security, states were only barely willing to confer jurisdictional primacy to a temporary international court. When it came to a permanent international court, it is clear a different balance would need to be struck.[96] On a practical level, even with stable funding, the ad hoc tribunals discovered that a strict application of primacy would overwhelm them and undermine their effectiveness. Their response was a pragmatic realignment towards cooperation and complementarity.[97] Similarly, for a permanent international court, financial and resource constraints would preclude a heavy caseload, necessitating strong cooperation between the supranational judicial entity and national jurisdictions. For the ICC, primacy was plainly neither politically nor economically viable.[98]

Importantly, financial and resource constraints at the ICC have also forced a revaluation of its jurisdictional regime. Rather than shifting towards absolute primacy however, the Court has developed a more nuanced approach towards its guiding principle. The constraints have dictated that, as a practical matter, not all crimes committed can be prosecuted before

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[91] Bartram Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 408 (1998).

[92] *See* U.N. SCOR, 48th Sess., 3217th mtg., at 33–34, U.N. Doc. S/PV.3217 (1993). *See also* Jurdi, *supra* note 75, at 17.

[93] Mohamed M. El Zeidy, *From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 bis of the Ad Hoc Tribunals*, 57 INT'L & COMP. L.Q. 403, 408 (2008).

[94] S.C. Res. 1503, para. 8, U.N. SCOR 4817th mtg. at 7, U.N. Doc. S/RES/1503 (2003).

[95] *See* ICTY, Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Rule 11*bis*(A)(iii), IT/32/Rev.46 (2011). The ICTY referred cases to the national authorities in a number of instances. *See* El Zeidy, *supra* note 92, at 142.

[96] El Zeidy, *supra* note 60, at 889.

[97] Jurdi, *supra* note 38, at 52.

[98] Brown, *supra* note 91, at 431.

the Court. Recalling that the fundamental purpose of the ICC is "to put an end to impunity,"[99] the Court's positive approach to complementarity recognizes that while the primary right to prosecute international crimes necessarily falls to national authorities, the responsibility to prosecute also lies with the state.[100] This shift conceptualizes the principle as cooperation-based, not competition-based,[101] and the Court therefore encourages, where possible, genuine national proceedings.[102] Indeed, this should be the focus in Libya, but due to the doctrinal uncertainty concerning the application of complementarity to SC referrals, difficulties persist.

B. Untangling the Complex Relationship Between the Court and the Security Council

The preceding discussion demonstrates that complementarity is "integral to the functioning of the Rome Statute system and its long-term efficacy."[103] The SC triggering mechanism must therefore be presumed to abide by the complementary regime, unless an explicit authority to the contrary is found. The search for this authority begins with an examination of the relationship between the Court and the Council as developed by the drafters. The Rome Statute granted considerable powers to the SC, allowing it to both trigger the Court's jurisdiction and defer any investigation for a period of twelve months.[104] Importantly, however, given that decisions of the Council are likely to be influenced by political considerations, the Statute "intentionally weakened the use of these powers concerning situations referred to the Court by the Council."[105] The question is whether the Council's broad authority to confer primacy onto international tribunals was retained. This analysis will be limited to the development of Article 13(b), which best evidences the dynamic.

1. The Drafting of the Triggering Mechanism

The 1994 ILC Draft Statute first proposed granting the SC the authority to trigger the Court's jurisdiction through the exercise of its Chapter VII powers.[106] The commentary indicates that this provision would allow the Council "to initiate recourse to the court by dispensing with the requirement of the acceptance by a State of the court's jurisdiction under article 21,"[107] potentially extending the jurisdictional reach of the Court to encom-

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[99] Rome Statute, *supra* note 12, at pmbl. ¶ 5.

[100] Lijun Yang, *On the Principle of Complementarity in the Rome Statute of the International Criminal Court*, 4 CHINESE J. INT'L L. 121, 124 (2005); OTP Informal Expert Paper, *supra* note 13, ¶ 2.

[101] OTP Informal Expert Paper, *supra* note 13, ¶ 2.

[102] *Id.* at ¶ 17. *See also* Stahn, *supra* note 37, 95.

[103] ICC Assembly of States Parties, *supra* note 78, ¶ 3.

[104] Rome Statute, *supra* note 12, art. 16.

[105] El Zeidy, *supra* note 60, at 957.

[106] ILC Draft Statute, *supra* note 80, art. 23(1).

[107] Draft Statute for an International Criminal Court with Commentaries, *supra* note 81, at 44.

pass the entire globe. However, as some delegates to the Ad Hoc Committee argued, internationalizing the proposed Court through the rubric of a SC resolution would have worrying consequences for its "credibility and moral authority."[108]

At the First Preparatory Committee Meeting, many states repeated their concerns at allowing a political body to impinge on the independent operation of a judicial entity.[109] They argued that "[t]he court should be permanent, universal, impartial and independent," and that "[t]he manipulation of that court by the Security Council would politicize its work and reduce its authority."[110] These delegations believed that enabling the SC to trigger the Court's jurisdiction would result in a politicized Court, impotent to act in the face of atrocities committed by Council members, but eager when committed by non-Council states. However, delegations that favored the retention of Draft Article 23(1) argued that an effective Court *necessitated* a role for the SC.[111] Providing a role for the SC would "obviate the creation of ad hoc tribunals,"[112] while not doing so would compel the Council to act outside the Court, and essentially counter to it.

These divergent views had generally coalesced by the Fourth Preparatory Committee Meeting,[113] and the final version accepted at the Rome Conference is found in Article 13(b). The provision ties the Court to the SC, but safeguards its independence in two important ways: first, by limiting referrals to general "situations" and thereby excluding political investigations focused on particular individuals or parties to a conflict, and second, by granting the Prosecutor a discretionary power to refuse to exercise the

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[108] Ad Hoc Committee Report, *supra* note 83, ¶ 121.

[109] ICC, Prep. Comm. on Establishment of International Criminal Court, 1st Sess., 16th mtg., *Role of Security Council in Triggering Prosecution Discussed in Preparatory Committee for International Criminal Court* (1996), www.iccnow.org/documents/RoleofSC4Apr96.pdf [hereinafter Role of Security Council]; Prep. Comm. On Establishment of International Criminal Court, 1st Sess., 17th mtg., *Conflict Between Security Council Powers, International Court, Discussed in Preparatory Committee* (1996), www.iccnow.org/documents/ConflictSCandCourt4Apr96.pdf [hereinafter Conflict Between Security Council Powers].

[110] Role of Security Council, *supra* note 109, at 3.

[111] *Id.* at 1, 3 (noting the delegations in favor of Article 23(1) were Austria, Tunisia, Italy, Russia, and Thailand); *see also* Conflict Between Security Council Powers, *supra* note 109, at 2, 3–4 (noting the delegations in favor of Article 23(1) were China, Chile, and Norway, and explaining that the Sweden delegation agreed on the role of the Security Council to refer a case to the ICC but requested a revision of paragraph (1) of Article 23).

[112] ICC, Prep. Comm. on the Establishment of an International Criminal Court, *Summary of the Proceedings of the Preparatory Committee During the Period 25 March-12 April 1996*, U.N. Doc. A/AC.249/1, ¶ 150 (7 May 1996), www.iccnow.org/documents/ProceedingSummary.pdf.

[113] The U.N. Fourth Preparatory Committee was held from 4 to 15 August 1997 at the U.N. Headquarters in New York to continue the work on the draft statute with respect to the establishment of the ICC. For a list of all the official documents of the Fourth Preparatory Committee, *see* Coalition for the International Criminal Court, 4-15 Aug. 1997, *History of the ICC, Preparatory Committee, 4th Preparatory Committee*, www.iccnow.org/?mod=prepcommittee4.

Court's jurisdiction when triggered by the Council.[114] It was "both logical and necessary"[115] to provide a mechanism for the Council to trigger the jurisdiction of the Court as the Council is the primary organ responsible for the maintenance of international peace and security. Significantly, however, the power of the Council was not intended to override the Court's judicial functions.

Importantly, defining the parameters of the Council's role *vis-à-vis* the Court was not resolved at the Rome Conference–the debate still simmers today. At the 2010 Kampala Review Conference, significant discussion centered on how the exercise of the Court's jurisdiction over the crime of aggression would be triggered. Similar arguments on both sides were aired. Delegations favoring a role solely for the SC pointed to Article 39 of the UN Charter, while those who supported a role for the Prosecutor with the Pre-Trial Chamber acting as a jurisdictional filter congruent to the Prosecutor's traditional *proprio motu* powers "stressed the need for the Court to be able to act independently and to avoid politicization, with a view of ending impunity."[116] The final result at Kampala incorporates both,[117] allowing the SC to trigger jurisdiction similarly to Article 13(b),[118] but also providing for authorization of an investigation by the Pre-Trial Division after six months of Council inaction.[119] As the Rome and Kampala conferences demonstrate, the appropriate relationship between the SC and the Court is very delicate. Any derogation from the carefully crafted text is therefore ill advised.

2. The Security Council and Complementarity

The 1994 ILC Draft Statute did not clarify the relationship between the SC and complementarity. This ambiguity led to discussion at the 1995 Ad Hoc Committee, whose Report noted that:

> A question was also raised concerning the effects of a Security Council referral in terms of the possible primacy of the court's jurisdiction and the concurrent jurisdiction of national courts under the principle of complementarity, which attention being drawn to the statutes of the ad hoc tribunals in this respect.[120]

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[114] However, some authors dispute this. *See* Jens David Ohlin, *On the Very Idea of Transitional Justice*, 8 WHITEHEAD J. DIPL. & INT'L REL. 51, 61 (2007). This view is a minority one. It is clear through the word "may" in the Rome Statute article 13(b) and the provisions in article 53, that the prosecutor has discretion.

[115] ICC, Prep. Comm. on the Establishment of an International Criminal Court, 4–15 Aug., 1997, *Working Group 3 on Complementarity and Trigger Mechanisms*, at 5 (4–15 Aug. 1997), www.iccnow.org/documents/4PrepCmtWorkGrp3Summary.pdf.

[116] ICC, Review Conference of the Rome Statute, 31 May – 11 June, 2010, *Report of the Working Group on the Crime of Aggression*, at 4, ¶ 19, RC/5 (10 June 2010), www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-5-ENG.pdf.

[117] *Id.* at 1-2, ¶¶ 5-6. However, articles 15*bis* (3) and 15*ter* (3) of the Rome Statute provide that jurisdiction cannot be triggered until at least 1 January 2017.

[118] *Id.* at 10, art. 15*ter* (1).

[119] *Id.* at 9, art. 15*bis* (4).

[120] Ad Hoc Committee Report, *supra* note 83, ¶ 120.

The Committee's Report sheds no light on the discussion over this issue. Additionally, a close reading of all six of the Preparatory Committee Meetings indicates that this question was discussed only once more–by the representative of Chile who simply raised "concern" as to this ambiguity.[121] The exact relationship between Council referrals and complementarity was never articulated at any Preparatory Committee and was also left unsettled at the Rome Conference.[122] Nevertheless, the insights gleaned from analyzing the development of the triggering mechanism can aid our understanding.

Defining the relationship between the Council and the Court was highly contentious and "among the main difficulties in the negotiating process of the ICC Statute."[123] The delicate balance reached between the competing desires for an independent Court and the necessity of authorizing a role for the SC demonstrates that complementarity *does* apply to SC referrals. As Phani Dascalopoulou-Livada argues:

> If, therefore, even a slight degree of preponderance were afforded the Security Council on this matter (that is, by considering that complementarity is dispensed with in the case of Security Council referrals), there would be a risk of upsetting the balance reached in the Statute with potentially far-reaching consequences.[124]

Complementarity is regarded as "central to the philosophy of the Court"[125] and was the "cornerstone" to its successful adoption.[126] Any departure from the normal operation of the regime requires a clear statement to that effect. Absent this clarification, either in the Statute or in any accompanying preparatory document, declaring *ex post facto* that Council referrals confer jurisdictional primacy on the Court is dubious to say the least. The correct interpretation is that, because the *travaux préparatoires* do not stipulate the consequence of the Council acting, it should be assumed that the principle of complementarity applies as usual. This presumption can only be displaced if it can be demonstrated that the UN Charter grants the SC the power to confer jurisdictional primacy on the Court, or if the subsequent practice of the OTP interprets it as doing so.

C. The Powers of the Security Council

The SC is charged with the primary responsibility for the maintenance of international peace and security and is imbued with strong and broad powers under Chapter VII of the UN Charter. These muscular powers stem from the failure of the League of Nations to prevent international conflict,

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[121] Conflict between Security Powers, *supra* note 109, 3.

[122] Schabas, *supra* note 46, at 301.

[123] Phani Dascalopoulou-Livada, *The Principle of Complementarity and Security Council Referrals*, in THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS 57, 59 (Mauro Politi & Federica Gioia eds., 2008).

[124] *Id*.

[125] Schabas, *supra* note 46, at 336.

[126] Williams & Schabas, *supra* note 10, at 606.

a failure that in turn arises from the non-coercive enforcement powers of the League of Nations Council (LNC), which largely relied on "the willingness of member States . . . ."[127] Indeed, under Article 16 of the Covenant of the League of Nations, the LNC had the power to issue recommendations for the enforcement of military action, rather than binding resolutions.[128] Additionally, although Article 11 of the Covenant granted the LNC the authority to "take *any* action that may be deemed wise and effectual to safeguard the peace of nations" in relation to "any war or threat of war,"[129] member states never accepted that LNC decisions on this basis enjoyed binding force.[130] This power was exercised only once in the League's life, against Italy for its invasion of Ethiopia, and the fact that Italy protested against the measures undertaken to individual states rather than the LNC, evidences the impotence of the League.[131]

The drafters of the UN Charter bore the failings of the League in mind as they set to work. Agreement between the great powers of the necessity of a strong, centralized body with coercive and far-reaching powers was achieved as early as the Dumbarton Oaks Conference in 1944. The delineations of this broad authority were debated at the San Francisco Conference but "no principled objections against a strong Security Council were raised."[132] The result is a Charter that "poses few express limitations"[133] on its Council.[134] The question seems to remain of whether the broad powers of the SC impose obligations beyond the Rome Statute?

As a preliminary point it should be noted that, quite clearly, the SC's powers are not defined or limited by the Rome Statute, but instead by the UN Charter. Therefore, as scholars have suggested, in theory, the Council could "specify particular measures to enable the Prosecutor to avoid strict requirements for state co-operation,"[135] over and above those envisioned in the Statute. In practice, the Council has indeed taken decisions that "go further" and "modify the provisions of the Statute,"[136] twice excepting nationals of states not party to the Rome Statute from the jurisdiction of the Court when referring a situation,[137] contrary to a strict reading of Article

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[127] Jochen Frowein & Nico Krisch, *Introduction to Chapter VII*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 702 (Bruno Simma ed., 2002).

[128] Covenant of the League of Nations art. 16, 28 June 1919, 225 C.T.S. 195.

[129] *Id.* art. 11 (emphasis added).

[130] Frowein & Krisch, *supra* note 127, at 702.

[131] *Id.*

[132] *Id.* at 703.

[133] *Id.* at 702.

[134] Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 167 (20 July). Of course there are some limitations. *See*, *e.g.*, U.N. Charter, *supra* note 66, art. 24(2).

[135] ICC, Off. of the Prosecutor, *Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Co-operation*, ¶ 93 (2003), www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281983/ state_ cooperation.pdf.

[136] Dapo Akande, *The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC*, 10 J. INT'L CRIM. JUST. 299, 308 (2012).

[137] *See*, *e.g.*, *S*.C. Res. 1970, ¶ 6, U.N. SCOR, 65th Sess., U.N. Doc. S/RES/1970 (26 Feb. 2011); S.C. Res. 1593, ¶ 6, U.N. SCOR, 60th Sess.,U.N. Doc. S/RES/1593 (31 Mar. 2005).

13(b).[138] However, modifying a particular provision is entirely different from disregarding the guiding principle of the Statute. The question is whether the Charter provides a power to do so.

Some scholars have argued that Articles 25 and 103 of the UN Charter grant this power.[139] These two provisions are powerful enforcement mechanisms of the Council. Under Article 25 all members of the UN "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[140] Article 103 is a conflict-of-laws provision,[141] which safeguards the supremacy of the Charter, declaring that, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[142]

While there is significant debate as to whether Article 103 extends to obligations under general customary international law,[143] the ICJ has affirmed that it *does* include obligations created under SC resolutions.[144] When read together these provisions appear to indicate that the Council *does* have the authority to abrogate the ICC's complementary regime. Any Statute purporting to curtail the powers of the Council must necessarily be read down pursuant to Article 103. The Council's authority to confer jurisdictional primacy on international tribunals is unquestionable,[145] and therefore a SC resolution rejecting the complementary regime must be followed.

However, under Articles 3 and 4(1) of the UN Charter, only *states* can become members of the UN. As Kleffner notes, the wording of these provisions, as well as Articles 25 and 103 "suggests that Chapter VII resolutions are binding only on member *States*," and not on international organizations.[146] This interpretation is valid. Nowhere does the Charter declare that

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[138] *See* Robert Cryer, *Sudan, Resolution 1593, and International Criminal Justice*, 19 LEIDEN J. INT'L L. 195, 208–214 (2006).

[139] Louise Arbour & Morten Bergsmo, *Conspicuous Absence of Jurisdictional Overreach*, *in* REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS 129, 135 (Herman A.M. von Hebel et al. eds., 1999).

[140] U.N. Charter, *supra* note 66, art. 25.

[141] Some scholars regard it a "constitutional" provision. *See*, *e.g.*, Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 593 (1998).

[142] U.N. Charter, *supra* note 66, art. 103.

[143] *See* Rain Liivoja, *The Scope of the Supremacy Clause of the United Nations Charter*, 57 INT'L & COMP. L.Q. 583, 608-612; *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslav. (Serb. & Montenegro)), Provisional Measures, 1993 I.C.J. 325, 440 (13 Sept.) (separate opinion of Lauterpacht, J.).

[144] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Provisional Measures, 1992 I.C.J. 3, 15 (14 Apr.).

[145] Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia 2 Oct. 1995); *see also* Prosecutor v. Kanyabashi, Case No. ICTR 96-15-T, Decision on the Defence Motion on Jurisdiction, ¶ 13 (18 June 1997).

[146] Kleffner, *supra* note 13, at 165-66.

Chapter VII resolutions are binding on international organizations and jurisprudence has confirmed that the Charter does not directly bind international organizations,[147] with the exception, of course, of the UN. Additionally, the practice of the SC indicates acquiescence to this rule: when referring directly to international organizations the Council has generally "refrained from imposing explicit demands" but has "tended to emphasise a cooperative approach."[148] The ICC is not a state but both an autonomous legal entity and an international organization. As such, a SC referral under Chapter VII may expressly preclude a state from challenging the admissibility of the case under Article 19(2)[149] but it cannot override the complementary regime itself, because to do so would compel the Court to "contravene its own constitutive act . . . ."[150]

The practical outcome may first appear absurd. If the SC is to maintain its role as the body charged with the primary responsibility for the maintenance of international peace and security, its powers should not be limited by any treaty, aside from the UN Charter.[151] But the important distinction here is that while the Rome Statute has circumscribed the SC's powers *vis-à-vis* the ICC, it has not exhausted them; they still exist and can be exercised in the creation of ad hoc tribunals. This result is "not fully consistent" with a primary motivation for the creation of the ICC, the desire to obviate the need to establish future tribunals,[152] but it does remain consistent with the "underlying logic"[153] of the Statute, that national courts retain the primary responsibility to prosecute international crimes. Whether the SC will ever establish another ad hoc tribunal with jurisdiction congruent to the Court is an entirely different question, and, bearing in mind the rushed circumstances of the Statute's drafting,[154] it is likely that this consequence was never considered.

The powers of the SC do not extend to allow the Council to abrogate the Court's complementary regime. However, the VCLT allows recourse to "any subsequent practice"[155] in interpreting the provisions of a treaty. If the practice of the OTP has been to accept that SC referrals confer jurisdictional primacy onto the Court, this practice should be followed.

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[147] Dorsch Consult Ingenieurgesellschaft mbH v. Council of the European Union, Case T-184/95, 1998 E.C.R. II-670, 694 (28 Apr. 1998).

[148] Security Council Report, SECURITY COUNCIL ACTION UNDER CHAPTER VII: MYTHS AND REALITIES 20 (2008); *see, e.g.*, S.C. Res. 1776, ¶ 4, U.N. S/RES/1773 (19 Sept. 2007) (the Council "*encourages* ISAF . . . to sustain their efforts, as resources permit, to train, mentor and empower the Afghan national security forces").

[149] *See infra* Part IV. B. 2(a).

[150] Luigi Condorelli & Santiago Villalpando, *Can the Security Council Extend the ICC's Jurisdiction?*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 571, 577 (Antonio Cassese et al. eds., 2002); *see also* OTP Informal Expert Paper, *supra* note 13, ¶ 68.

[151] As regard Member States, treaties outside the U.N. Charter cannot limit the SC's powers. *See* U.N. Charter, *supra* note 66 art. 103.

[152] Arsanjani, *supra* note 57, at 28.

[153] Lipscomb, *supra* note 14, at 201.

[154] Kleffner, *supra* note 13, at 91 n. 17.

[155] VCLT, *supra* note 79, art. 31(3)(b).

D. Practice of the Office of the Prosecutor

The importance of the OTP's practice in determining the relationship between complementarity and the Council "cannot be overemphasized"[156] as it creates a very strong precedent. Significantly, the OTP has made it "abundantly clear"[157] that it consider itself bound by complementarity when jurisdiction is triggered under Article 13(b). When addressing the SC on the Court's ongoing activities in Darfur, the former Prosecutor Luis Moreno-Ocampo repeatedly noted that the ICC is "complementary to national criminal jurisdictions,"[158] and that the OTP is continuing to gather "significant amounts of information to determine whether the Government of Sudan has dealt with, or is dealing with, the cases."[159] William Schabas notes that there have been "no objections or comments on this by members of the Council,"[160] allowing one to assume acceptance by acquiescence. Additionally, as discussed earlier, the entire prosecutorial strategy in Libya has been marked by an eagerness to find a "Libyan solution." Absent any condemnation or declaration by the Council, it can again be assumed that complementarity applies.

This section has comprehensively demonstrated that SC referrals abide by the complementary regime of the Court. The next section will address the consequences arising from this conclusion for Libya and for the Council's ongoing and future relationship with the Court.

IV. THE SECURITY COUNCIL AND A PRECEDENTIAL SOLUTION

The conclusion that complementarity applies to SC referrals under Article 13(b) has important consequences both for Libya specifically and for the ongoing relationship between the Court and the Council generally. The SC is the "highest rule-making authority in the post-World War II international legal order,"[161] but its power to invest jurisdictional primacy in an international court is effectively constrained by a multilateral treaty. As the Libyan situation descends into farce it is clear complementarity has important real-world consequences. Is there room for the SC to act, either through a binding resolution or a Presidential Statement, to resolve the impasse? This section will examine the options available to the SC with an eye to establishing a precedent that may be followed in future Council referrals in transitioning states. It will however, begin by proposing a potential resolution in Libya.

A. What Now for Libya?

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[156] Dascalopoulou-Livada, *supra* note 123, at 60.

[157] Schabas, *supra* note 46, at 301.

[158] U.N. SCOR, 60th Sess., 5321st mtg. at 3, U.N. Doc. S/PV.5321 (13 Dec. 2005); *see also* U.N. SCOR, 61st Sess., 5589th mtg. at 3, U.N. Doc. S/PV.5589 (14 Dec. 2006); U.N. SCOR, 60th Sess., 5216th mtg. at 2-3, U.N. Doc. S/PV.5216 (29 June 2005).

[159] U.N. SCOR, 61st Sess., 5459th mtg. at 3, U.N. Doc. S/PV.5459 (14 June 2006).

[160] Schabas, *supra* note 46, at 301.

[161] Fletcher & Ohlin, *supra* note 14, at 433.

Libya retains the first right to investigate and prosecute the alleged crimes committed by Saif al-Islam and Senussi, described in the ICC arrest warrants. However, because an ICC investigation has commenced and arrest warrants have been issued, to exercise their right Libya must formally challenge the admissibility of the case per Article 19(2). On May 1, 2012 Libya raised this challenge.[162] Put simply, if their challenge is successful they will try Saif al-Islam and Senussi, but if unsuccessful the ICC will try the two accused in The Hague. However, there is a better scenario that could hold precedential value in the case of future SC referrals where the territorial state has undergone a regime change: an *in situ* trial.

1. Resolving the Impasse

For the NTC to successfully challenge admissibility, the Court must be convinced that Libya is both willing and able to investigate and/or prosecute Saif al-Islam and Senussi.[163] While the NTC investigation is experiencing significant delay, the Court is unlikely to find it symptomatic of a lack of intent to bring them to justice. Indeed, the NTC has frequently and repeatedly indicated it is willing to try the case.[164] Therefore, the determination is likely to revolve around whether Libya is "able." This will involve an examination of the state of the Libyan judiciary and whether it is suffering from a "total or substantial collapse or unavailability."[165] Importantly, this test does not include any fair trial standards, and although Saif al-Islam's human rights are likely being violated,[166] "the absence of due process is not a grounds for admissibility."[167]

Clearly, without access to the evidence before the Court it is impossible to accurately predict the final determination. However, notwithstanding the fact that complementarity favors national proceedings, it is likely that Libya's challenge will be defeated. The International Commission of Inquiry on Libya has found that '"accountability mechanisms in Libya are deficient,"[168] and that Libya does not have a "functioning court system."[169] Indeed, the arrest and detention of Melinda Taylor and her three colleagues in June 2012 illustrates the depth of the dysfunction. At the very least, the Libyan government appears unable to exert its control over the

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[162] Prosecutor v. Gaddafi & Senussi, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, ¶ 1 (1 May 2012).

[163] Rome Statute, *supra* note 12, art. 17.

[164] Prosecutor v. Gaddafi & Senussi, Case No. ICC-01/11-01/11, Prosecution's Submissions on the Prosecutor's Recent Trip to Libya, ¶ 5 (25 Nov. 2011).

[165] Rome Statute, *supra* note 12, art. 17(3).

[166] Saif al-Islam lacks access to sunlight, has been kept in isolation and has not received medical treatment for injuries sustained prior to detention. *See* Prosecutor v. Gaddafi & Senussi, Case No. ICC-01/11-01/11, Report of the Registry on the Visit to Libya, Public Redacted Version, ¶¶ 27–28 (11 Apr. 2012), www.opiniojuris.org/wp-content/uploads/RegistryReport.pdf.

[167] Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255, 277 (2006).

[168] Hum. Rts. Council, 19th sess., 27 Feb. – 23 Mar. 2012, Rep. of the Int'l Comm'n of Inquiry on Libya, ¶ 101, U.N. Doc. A/HRC/19/68 (2 Mar. 2012).

[169] *Id.* ¶ 104.

Zintan militia group, casting into doubt its ability to obtain Saif al-Islam.[170] More likely, however, is that this latest event demonstrates the Libyan government's inability to conduct a potential trial in an independent and impartial manner.[171] If the Court agrees, it is likely then that the case will be determined admissible and Libya will remain obliged to transfer Saif al-Islam to the Court for trial in The Hague. The OTP has, however, indicated that possibilities for cooperation exist either by sequencing trials or by holding the ICC trial *in situ*.[172]

The first option involves Libya investigating and prosecuting Saif al-Islam for crimes outside the narrow ICC arrest warrant before transferring him to the ICC.[173] However, the scenario is severely complicated by the fact that the Rome Statute "fails to specify criteria for sequencing"[174] and the specter of a possible death sentence for Saif al-Islam. The second option avoids these problems. An ICC trial in Libya is legally available to the Court, which may sit wherever "it considers desirable"[175] and has in fact been suggested by several commentators[176] and even the OTP.[177] While there are some significant practical difficulties, not the least of which involves ensuring political support within the state and transferring the ICC machinery to a secure location within Libya, the benefits of a trial *in situ* are plain, and will be outlined in Part IV.B.3(c).

2. The Libyan Farce Should Not be Repeated

Notwithstanding the potential for a successful resolution, the Court's involvement in Libya has so far been characterized by farce. As Section II noted: the ICC issued arrest warrants in June 2011, Saif al-Islam was captured in November that year, the NTC repeatedly refused Court orders to transfer him to their custody, and Libya only finally challenged the Court's

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[170] Kim Sengupta, *International Criminal Court Staff Freed From Libyan Prison After Painstaking International Negotiations*, INDEP., 2 July 2012, www.independent.co.uk/news/world/africa/international-criminal-court-staff-freed-from-libyan-prison-after-painstaking-international-negotiations-7904317.html.

[171] *ICC Lawyer Says Her Actions in Libya Were Legal*, ASSOCIATED PRESS, 6 July 2012, www.salon.com/2012/07/06/icc_lawyer_says_her_actions_in_libya_were_legal/. This is Melinda Taylor's view.

[172] Prosecutor v. Gaddafi & Senussi, Case No. ICC-01/11-01/11, Prosecution's Submissions on the Prosecutor's Recent Trip to Libya, ¶¶ 8–9 (25 Nov. 2011).

[173] Rome Statute, *supra* note 12, art. 94. This could allow for a greater acknowledgment of Saif al-Islam's criminality. The crimes outlined in the ICC arrest warrant are very narrow, occurring only from 15–28 February 2011.

[174] Stahn, *supra* note 6, at 342.

[175] Rome Statute, *supra* note 12, arts. 3(3), 4(2), 62; *see also* Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Rules of Procedure and Evidence, 1st sess., Doc. No. ICC-ASP/1/3 and Corr.1, part II.A. (3-10 Sept. 2002) [hereinafter ICC Rules of Procedure and Evidence].

[176] Mark Kersten, *Having Cake and Eating it Too: An ICC Trial in Libya?*, JUST. IN CONFLICT (26 Aug. 2011), www.justiceinconflict.org/2011/08/26/having-cake-and-eating-it-too-an-icc-trial-in-libya/; *see also* David Kaye, Op-Ed., *What to do with Qaddafi*, N.Y. TIMES, 31 Aug. 2011, www.nytimes.com/2011/09/01/opinion/what-to-do-with-qaddafi.html?_r=0.

[177] Prosecutor v. Gaddafi & Senussi, Case No. ICC-01/11-01/11, Prosecution's Submissions on the Prosecutor's Recent Trip to Libya, ¶ 9 (25 Nov. 2011).

admissibility in May 2012.[178] The Chambers and the OTP have seemingly worked under different interpretations of proper procedure, causing the OPCD to publicly question the OTP's conduct. Additionally, the farcical arrest and detention of Melinda Taylor and her three ICC colleagues has exposed the divisions between all three actors in this charade (and covered none in glory). The Zintan militia appear determined to continue to extract as much political capital from Saif al-Islam as possible, the Libyan government continues to obfuscate and harass the ICC process, and the ICC has been accused of abandoning its own staff.[179] Fortunately, now that Melinda Taylor and her colleagues have been released, the ICC has suggested that this latest embarrassment will not impact on Libya's admissibility challenge,[180] but it certainly should.

There is no doubt that the NTC has played off the uncertainty inherent in the then unfolding circumstances, but it is the hitherto uncertain doctrinal applicability of complementarity to SC referrals, reflected in the disconnect between the OTP and the Chambers that has enabled the NTC to further delay progress. Ultimately, whatever the reasons, the Libyan debacle is damaging to the legitimacy of the ICC and the international criminal justice mission as a whole – its mistakes should not be repeated.

Where a SC referral takes place in the beginnings or midst of a civil war, and regime change subsequently occurs, it is understandable and expected that the new authorities will wish to exercise their jurisdictional primacy to investigate and prosecute their former leaders, yet they may struggle to do so. Take, for example, potential SC action in Syria. If the SC refers the situation in Syria to the ICC, and, subsequently, the Free Syrian Army defeats the Assad regime and takes overall control of the state, it could be expected that the Syrian judiciary will at least initially be ill equipped to handle the case. In this situation, resolving the dispute early and avoiding the damaging disputes that have characterized the Libyan situation, would clearly be beneficial. The question is: If the Council believes that, post-regime change, the trial will be best handled by the Court or by the territorial state, can it *practically* ensure that outcome? It is highly desirable that Libya becomes a model for future SC referrals in transitioning states. If lessons are to be learned from Libya, it is worth considering the full range of potential SC action post-regime change.

B. Possible Security Council Action

The SC is the body charged with the primary responsibility for the maintenance of international peace and security and remains the "highest rule-making authority in the post-World War II international legal or-

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[178] Prosecutor v. Gaddafi & Senussi, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, ¶ 1 (1 May 2012).

[179] Heller, *supra* note 15; *see also* Mark Kersten, *Melinda Taylor and the 'ICC4' Released: Five Pressing Questions*, JUST. IN CONFLICT (4 July 2012), http://www.justiceinconflict.org/2012/07/04/melinda-taylor-and-the-icc4-released-five-pressing-questions/.

[180] Kersten, *supra* note 176.

der."[181] If, in the course of the Prosecutor's investigation, a regime change occurs and the new authorities indicate their wish to try their former leaders even though their judicial system will likely fail the Article 17 test, the SC has a number of options available to it. This part will analyze what the SC can do. What Libya has made clear is that the SC cannot wait for the events to resolve themselves. Doing nothing risks a damaging dispute between the Court and territorial state.

1. Resolving a Dispute in Favor of the State

Resolving a dispute in favor of the state accords with the principle of complementarity, as it favors domestic proceedings. Curiously, however, there is only one option available for the SC.

Article 16 enables the Council to defer ICC proceedings for a period of 12 months through a resolution under Chapter VII.[182] Curiously, the Council must therefore determine that the ICC prosecution itself is a threat to international peace and security. This provision, designed as an instrument to aid peace negotiations,[183] uses the Court as a political body and the referral as a stick; removing the "stick" is said to act as a carrot to entice indicted individuals into negotiations. Although moot in relation to the case against al-Bashir,[184] it is unclear whether Article 16 will ever have this effect. The suspension only lasts 12 months and must be renewed each year, while any peace negotiation and transitional phase is likely to last much longer. Granting the SC the power to completely withdraw a referral would likely aid negotiations more than simple deferral but such a provision was never seriously considered during the drafting phase.[185]

Deferral would enable the Libyans to commence their own investigation and prosecution or provide time to re-establish their judicial system in order to raise a successful admissibility challenge. Importantly, however, Article 16 has not been suggested by any commentator and is unlikely to achieve support in the SC, where the U.K. or France, in particular, may veto the resolution. Having achieved the politically difficult task of referring the situation in Libya to the Prosecutor, it is unclear whether those same states would be willing to undo their work, especially as a SC deferral would essentially authorize Saif al-Islam's execution. A deferral in Libya thus seems unlikely. But what other options does the SC have? More specifically, notwithstanding the applicability of complementarity to SC referrals, can the Council practically ensure the Court takes the case?

2. Resolving a Dispute in Favor of the Court

Resolving a dispute in favor of the Court does not necessarily clash

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[181] Fletcher & Ohlin, *supra* note 14, at 433.

[182] Rome Statute, *supra* note 12, art. 16.

[183] Schabas, *supra* note 46, at 329.

[184] African Union Peace and Security Council, 142nd mtg., Communiqué, ¶ 11(i), PSC/MIN/Comm (CXLII) Rev.1 (21 July 2008).

[185] Schabas, *supra* note 46, at 325-28.

with complementarity. The Council may act within the complementary framework and resolve a dispute in favor of the Court by acknowledging that, in general, states enjoy jurisdictional primacy but that particular circumstances require ICC involvement in this case. As already discussed, with regard to transitioning states, practically conferring on the ICC an early and clear mandate to act and forgoing lengthy investigations into the state's judicial system would clearly be beneficial to all parties. There are several options available to the Council.

a. Chapter VII Resolution Precluding Investigation

Although the SC cannot abrogate the complementary regime of the Court, it can issue binding orders to states.[186] Could the Council therefore issue a resolution with the practical effect of investing primacy onto the Court by obliging the new authorities not to exercise their jurisdiction with regard to the crimes outlined by the ICC? While complementarity would still apply, the state would clearly fall within the Article 17(1)(a) condition of being "unwilling or unable genuinely to carry out the investigation or prosecution," allowing the Court to determine that the case is admissible and undertake proceedings.[187] A binding resolution precluding a state from investigating the situation accomplishes the goal of ensuring the case is run by the ICC. However, any SC resolution compelling an affected state to defer to ICC proceedings will likely be challenged by that state as *ultra vires*.[188]

It is not clear whether such a challenge would be successful, as the ICJ has avoided the question of judicial review of SC resolutions.[189] Nevertheless, in a dissenting opinion in the *Lockerbie Case*, ad hoc Judge Jennings broached the issue, noting that while the SC does not enjoy a general immunity from review, resolutions under Chapter VII do.[190] If this dissenting opinion were followed, the challenge would be defeated.

The fact that the SC may explicitly preclude states from exercising their criminal jurisdiction with regard to international crimes is an intensely worrying proposition, not only to the principle of sovereignty, but also because of the perception that such a decision would appear to support impunity. Of course, this has happened before, but as discussed, the ICTY and ICTR were exceptional bodies and should not be seen as precedential. Furthermore, though it should be noted that the Council would be ordering "non-action in order to facilitate prosecution by the ICC,"[191] rather than to enable impunity, the disturbing perception would persist, particularly if any trial was far from expeditious. It seems, therefore, that a SC

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[186] U.N. Charter, *supra* note 66, at art. 25.

[187] Rome Statute, *supra* note 12, art. 17(1)(a).

[188] This assumes that the state will wish to try their former leaders themselves.

[189] *See*, *e.g.*, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Preliminary Objections Judgment, 1998 I.C.J. 9, 26 (27 Feb.).

[190] *Id.* at 105–6 (Jennings, J., dissenting).

[191] OTP Informal Expert Paper, *supra* note 13, ¶ 69.

resolution precluding a state from taking action is problematic. Does a "softer" option exist?

b. Presidential Statement Indicating Deficient Judicial System

The Council does have another mechanism available to it—the Presidential Statement. Presidential Statements are adopted by consensus and, while not legally binding or enforceable, do "provide an important indication of the Council's position on a given matter."[192] Despite imposing no legal obligations, this "softer" mechanism may be more useful.

In a situation where the transitioning state's judicial system has likely suffered a total or substantial collapse, what would be the result of a SC Presidential Statement to the Court? Such a statement would take into account Article 17, but would be designed to resolve admissibility challenges prior to a lengthy assessment by the Court. There is nothing in the UN Charter that would prevent the SC issuing such a statement and some commentators have suggested that the Council's view would "carry a great deal of weight . . . ."[193] However, it is likely that the Court would disregard the statement as an impingement upon its judicial functions,[194] as the Court has the sole power to satisfy itself of admissibility.[195] Indeed, this authority was reiterated at the Kampala Review Conference on the Crime of Aggression, which adopted Article 15*ter*(4) affirming the Court's position as the final arbiter.[196] A Presidential Statement pre-empting the Court's determination is unlikely to have the desired effect.

c. Presidential Statement Advocating a Trial *In Situ*

A third option available to the Council strikes a balance between the sovereignty concerns of a transitioning state eager to bring former leaders to justice and the probable likelihood of a defeated admissibility challenge. It envisions the SC issuing a Presidential Statement requesting that the Court consider a trial *in situ*.

The fact that the ICC has never held a trial *in situ* should not discount the possibility of one occurring in the future. The recent proliferation of international tribunals at least partly located in the affected state reflects a growing awareness that, for too long, international justice has been "justice

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[192] Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* 21 (2007).

[193] John T. Holmes, *Complementarity: National Courts* Versus *the ICC*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667, 683 (Antonio Cassese et al. eds., 2002).

[194] Jurdi, *supra* note 75, at 218.

[195] Rome Statute, *supra* note 12, arts. 19(1), 21(1)(a).

[196] Assemb. Of States Parties Res. RC/Res.6, art. 15*ter*(4), 13th plenary mtg. (11 June 2010), www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf ("A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.").

divorced from local realities."[197] International criminal law's challenge is to make justice available on a personal level; locating particular hearings or the entire trial *in situ* could assist in this endeavor.[198] The Court has previously acknowledged the importance of local justice, having considered holding some hearings in territorial states. In *Lubanga,* the Prosecutor, the Defense, and the legal representatives of the victims were all supportive.[199] In that case, the territorial state considered the proposed location inappropriate,[200] and the trial continued in The Hague. This experience simply reinforces the necessity of state consent to an *in situ* trial. If feasible, and if supported by global political will as reflected in a SC Presidential Statement, an *in situ* trial could hold the solution to the Libyan situation and to future SC referrals in transitioning states.

i. Procedural Aspects

An *in situ* trial is legally available to the Court.[201] However, as a practical matter, holding the trial, or some hearings, outside The Hague, requires fulfilling several procedural steps. After the initiation of an investigation, the Prosecutor, the Defense, or a majority of the Court's judges may make an application or recommendation to the President, who then examines the views of the particular chamber and consults with the state.[202] If the state agrees, a decision to hold proceedings *in situ* will be made by a two-thirds majority of the judges.[203] While not mentioned in either the Rome Statute or the Rules of Procedure and Evidence, a decision to hold the trial or parts of the trial *in situ* could only be made after the results of a detailed feasibility study. This study would identify a proposed location allowing a relationship agreement between the state and the Court to be drawn-up.

ii. The Potential Benefits Outweigh the Expected Difficulties

There will, of course, be difficulties relating to the security of victims, witnesses, the accused and staff, as well as the transfer of machinery and delineating the exact arrangement between the Court and the state. However, there is broad agreement among scholars within the transitional jus-

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[197] Mina Rauschenbach & Damien Scalia, *Victims and International Criminal Justice: A Vexed Question?*, 90 INT'L R. OF THE RED CROSS 441, 455 (2008) (*citing* Pierre Hazan, LA JUSTICE FACE A LA GUERRE: DE NUREMBERG A LA HAYE (2007)).

[198] The Pre-Trial Hearing must always be conducted in The Hague. Stuart Ford, *The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the ICC's Trials to Take Place at Local or Regional Chambers?*, 43 J. MARSHALL L. REV. 715, 739 (2010).

[199] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, ¶¶ 68-70 (24 Apr. 2008), www.icc-cpi.int/iccdocs/doc/doc484920.pdf.

[200] *Id.* ¶ 105.

[201] *See supra* Part IV. B 2 (c).

[202] ICC Rules of Procedure and Evidence, *supra* note 175, r. 100(2)–(3).

[203] *Id.* r. 100(3).

tice movement that localized courts can provide significant benefits.[204] An *in situ* trial will open up opportunities for knowledge transfer between ICC staff and the domestic judicial system, promoting effective legal structures at the national level and thereby enhance "the capacity of national judiciaries to prosecute international crimes."[205] Indeed, an *in situ* trial would conform to the cooperative framework epitomized by the OTP's positive approach towards complementarity and reinforced by paragraph 4 of the Rome Statute Preamble.

Of course, simply locating the court within the affected state will not automatically realize these benefits nor ensure the benefits of localized justice,[206] but it will offer significantly more than the current ICC model. Ignoring the problems within the Extraordinary Chambers in the Courts of Cambodia,[207] one of its significant and lasting achievements will be the fact that over 31,000 individuals witnessed the trial of Kaing Guek Eav.[208] While the ICC does not keep a record of the number of people visiting its viewing gallery, it can be assumed to have accommodated vastly fewer individuals and victims than in Phnom Penh. The staggering number in Cambodia is indicative of the importance that victims place in seeing the accused with their own eyes.[209] In fact, this accords with the overarching concern of complementarity: to be effective, justice must be local.

An *in situ* trial offers significant advantages for the successful resolution of the Libyan mess and should be considered in future SC referrals within transitioning states. The potential benefits of localized justice and knowledge transfer between the international court and domestic authorities are too great to ignore any longer. However, it should be remembered that, although the Court recognizes the importance of transitional justice,[210] a criminal trial is not primarily a peacebuilding exercise, but a retributive mechanism designed to bring justice to victims. Locating international criminal proceedings *in situ* does offer real benefits, but it alone does not hold the answer to a transitioning state seeking reconciliation. Whether an *in situ* trial is an appropriate option will depend on the particular circumstances of each case. Assuming it is, and that the expected diffi-

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[204] *See, e.g.*, Laura A. Dickinson, *The Promise of Hybrid Courts* 97 AM. J. INT'L L. 295, 295–96 (2003).

[205] Burke-White, *supra* note 38, at 62.

[206] Ellen Emilie Stensrud, *New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia*, 46 J. OF PEACE RESEARCH 5, 13 (2009).

[207] The major problems that the Extraordinary Chambers have faced in relation to victim participation are examined in: Harry Orr Hobbs, *Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice*, 49 TEX. INT'L L.J. (forthcoming 2013) (on file with author).

[208] Pham Phuong et al., *After the First Trial: A Population Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia* 14 (2011), www.law.berkeley.edu/files/HRC/Publications_After-the-First-Trial_06-2011.pdf.

[209] *See id.*

[210] I.C.C. President Judge Sang-Hyun Song recently presented a keynote address on this topic. Judge Sang-Hyun Song, President of the Int'l Crim. Ct., Keynote Address at the World Bank Law, Justice and Development Week (14 Nov. 2011).

culties are settled, the SC can play an important role in promoting its establishment.

V. CONCLUSION

This article has demonstrated that the Security Council must abide by the Court's complementary regime. When the Council acts under its Chapter VII powers and refers a situation to the Prosecutor of the ICC pursuant to Article 13(b) of the Rome Statute, it confers only complementary jurisdiction onto the Court. As a corollary, the territorial state retains the primary right to investigate and prosecute the alleged criminal acts, but may only exercise that right if its formal admissibility challenge under Article 19(2) is upheld. If it is unsuccessful, the ICC will continue managing the case. The situation in Libya is the first time that an Article 13(b) referral has resulted in an indicted individual being detained. This development should be good news to supporters of the Court.

However, as Libya has revealed, the tug-of-war between the territorial state and the Court can damage the standing of the ICC and international criminal justice more generally. Importantly, in these situations, the SC as the pre-eminent body in the international legal order has a number of options available to it. Working within the complementary regime of the Court, the Council can prompt an efficient and effective resolution of the dispute in favor of either party. While respecting the Court's juridical functions, the Council can defer the ICC proceedings for a period of 12 months or, through a Presidential Statement, request that the Court consider an *in situ* trial. Where a state that is the subject of a Security Council referral subsequently undergoes a regime change, the SC should intervene to recommend the best option available in the circumstances and avoid the damaging dispute that has characterized the Libya situation. Firm action by the Security Council has the potential to benefit international criminal justice as a whole.

At the time of this writing, the ICC and international criminal law more generally appears to be at a high point: Thomas Lubanga Dyilo has become the first person convicted by the ICC and Charles Taylor has become the first head of state convicted of war crimes and crimes against humanity since Nuremberg.[211] Despite these successes, victims would benefit more if these prosecutions were not a world away. It is time the ICC seriously considers *in situ* trials as a means not just to bring perpetrators to justice, but also as a way to bring justice to victims. As the primary body in the international legal order, there is scope for the Security Council to promote such an endeavor. If any lessons are to be learned from Libya, this should be one of them.

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[211] Marlise Simons & J. David Goodman, *Ex-Liberian Leader Gets 50 Years for War Crimes*, N.Y. TIMES, 30 May 2012, www.nytimes.com/2012/05/31/world/africa/charles-taylor-sentenced-to-50-years-for-war-crimes.html?pagewanted=all; Alison Cole & Kelly Askin, *Thomas Lubanga: War Crimes Conviction in the First Case at the International Criminal Court*, 16 AM. SOC. OF INT'L L. INSIGHTS, 27 Mar. 2012, at 1.