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ARTICLE

International Judicial Intervention in the Case of Libya: From Justice Enforcer to Peace Maker Right
Constituency and Institutional Independence: Virtues of a Fight against Realpolitik

Heidarali TEIMOURI

Lecturer in International Law, University of Tehran, College of Farabi, Iran
Email: ha.teimouri@ut.ac.ir

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Abstract

This article investigates the case of Libya; the way the International Criminal Court responded to it; what went wrong; and what the Court could learn from the case for its future. It attempts to show that the regime change strategy followed in Libya jeopardized the international criminal justice mandate of the Court, created a failed state conundrum, and rendered the Court's intervention counterproductive. Also, in cases like Libya, where judicial intervention sits alongside military intervention, it is difficult for the Court to claim jurisdiction independent of untamed realpolitik while finding the right constituency, which is an urgent issue that remains unsolved. This research concludes that only a dispute settlement approach oriented towards a peacemaking mandate, and its incorporation into the jurisdiction of the Rome Statute, can protect the Court's independence and international criminal justice promises regarding the different limitations the Court faces.

Keywords: international criminal justice; International Criminal Court; peaceful settlement of disputes; realpolitik

The International Criminal Court (the ICC or the Court, used interchangeably) is a permanent international institution with jurisdiction to prosecute the most heinous international crimes. It has become the embodiment of International Criminal Justice (ICJ) for our age.[1] The guiding philosophy of the ICC is articulated in Paragraphs 3 to 5 of the preamble to its Statute, which states that international crimes are "a threat to the peace and security of the world", and the Court aims to contribute to "ending impunity" and the "prevention of those crimes".[2] However, these goals do not always coincide and

* Heidarali Teimouri is a Lecturer in International Law at the University of Tehran, College of Farabi, Faculty of Law.

[1] Frederic MÉGRET, "What Sort of Global Justice is 'International Criminal Justice'?" (2015) 13(1) Journal of International Criminal Justice 77 at 77–8.

[2] *Rome Statute of the International Criminal Court*, 17 July 1998 (entered into force 1 July 2002) [*ICCSt*], Preamble. The preamble is an integral part of the Statute. Both the preamble and the operative part of the Statute shall be treated equally, and it is "intended to assist in the interpretation and application of the Statute"; Otto TRIFFTERER and Kai AMBOS, *The Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 3rd ed. (Beck, Hart, Nomos, 2015) at 4–6.

need legal evaluation in each case. Unfortunately, there has been no comprehensive attempt to evaluate how these conflicting goals should be applied or which needs to be prioritized.

In this regard, the Court is entrenched in the unequal contemporary world with discrepancies between developed/developing states and stable/unstable ones. Hence, the ICC is prone to exacerbate these existing discrepancies; that is, it might create or consolidate more profound distinctions between states and disintegrate the international community and the international legal system altogether.[3] Accordingly, the "criminalization" of international politics might strengthen the hand of those in a position to determine which behaviours count as international crimes and identify those who can be referred to the police[4] to address the danger of *realpolitik* hijacking the ICJ.[5] This scenario might readily occur in cases where the Security Council refers a situation to the ICC. In other words, intervention by the ICC as a supposed legally impartial and independent institution can reproduce an unfair and contested "international distribution of power under the guise of judicializing it".[6] Even worse, the referral may result in a failed/weak state situation due to the limitations of current international law. The ICC has recently been criticized for its proactive application of its jurisdiction and the negative impact of its attempt at conflict resolution.[7]

The ICC's architecture is supposed to be based on established principles under the ICJ. However, the complicated nature of international law as a special legal system depends on adopting a cognizant and nuanced approach. It is against this backdrop that the present research is written. This research explores the judicial intervention of the ICC in the Libyan crises, from the beginning to the most recent developments of the post-Gaddafi era. The focus on Libya is because this situation is the second and the most recent referral of the Security Council to the Court; that is, where the ICC had to function alongside a protracted armed conflict and where the Court's intervention was criticized for being an accomplice to the *realpolitik* that created the current Libyan chaos. Therefore, the primary questions are (1) how does the case of Libya contribute to the evolving jurisprudence of the Court and, relatedly, (2) how must the Court respond to the abovementioned critiques while enforcing its ICJ promise to avoid unruly *realpolitik*?

[3] Carsten STAHN, "Justice Civilisatrice? The ICC, Post-Colonial Theory, and Faces of 'the Local'" in Christian DE VOS, Sara KENDALL and Carsten STAHN, eds., *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015), 46 at 61, 71–2.

[4] Martti KOSKENNIEMI, "Hersch Lauterpacht and the Development of International Criminal Law" (2004) 2(3) Journal of International Criminal Justice 810 at 825; Martti KOSKENNIEMI, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization" (2007) 8(1) Theoretical Inquiries in Law at 9–36.

[5] According to the school of realism in international relations, realpolitik means states only pursue their self-interest within the international arena, take no notice of international law, or have recourse to international legal mechanisms only as a veneer for states' "self-interests". Therefore, law and moral ideals play no role; at best, they only play a limited part in achieving their international self-interests. This can be embodied in one phrase: "[t]he law of the strong is the determining factor in politic", John BEW, *Realpolitik: A History* (United States of America: Oxford University Press, 2016) at 15, 32. See also John BEW, "The Real Origins of Realpolitik" (2014) 130 The National Interest 40 at 43–4, 49. In the same sense, politics means: "officials are *not really doing law* but rather using legal argumentation as a mere mask or pretext as they pursue their political (apologist or utopian) aims" as "deformed legalism", Darryl ROBINSON, "Inescapable Dyads: Why the International Criminal Court Cannot Win" (2015) 28 Leiden Journal of International Law 323 at 345.

[6] MéGRET, *supra* note 1 at 95. See also Sarah NOUWEN and Wouter WERNER, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan" (2010) 21(4) European Journal of International Law 941, 962–4.

[7] David BOSCO, *Rough Justice: The International Criminal Court in a World of Power Politics* (United States of America: Oxford University Press, 2014) at 167–72.

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The remainder of the present research is organized to address these questions. Section I examines the case referral and how military and judicial interventions were engaged in the crisis. Section II investigates the regime change in Libya, its nature and consequences, and how the Court's behaviour impacted it. Section III, as the central part of this work, deals with the problem of the Court's independence and provides legal suggestions that the Court could apply to overcome legal lacunae in cases like Libya. Finally, the research findings will conclude and be prescribed for the "Libyan case" and the future of the Court.

I. LIBYAN CRISIS AND REFERRAL

A. The Referral's Characteristics

On 26 February 2011, after the violent reaction of the Libyan government to the Libyans' uprising, the Security Council of the United Nations (UN) adopted Resolution 1970 by consensus. According to this Resolution, under Article 13(b) of the Rome Statute, the situation in Libya was referred to the ICC to investigate the alleged crimes.[8] On 17 March, the judicial intervention was accompanied by military intervention authorized through Resolution 1973, reaffirming the referral.[9] Subsequently, the Prosecutor completed the preliminary examination and opened the formal investigation in March.[10] Finally, on 16 May, Moreno-Ocampo, the then ICC Prosecutor, asked the Court to issue three arrest warrants. On 27 June, the Pre-Trial Chamber (PTC) approved warrants against all three named persons: Muammar Gaddafi, Saif al-Islam Gaddafi, and Abdullah Senussi.[11]

The referral was unique for several reasons. First, the international community's reaction was surprisingly fast, given that it was triggered less than two months after the Libyan uprising. Second, it was adopted by consensus, with the United States (US) – one of the strongest opponents of the ICC – voting for it. Also, two other non-members and opponents of the ICC, well-known for their advocacy of the principle of sovereignty/non-interventionism, namely China and Russia, voted in favour. Third, on 17 March 2011, judicial intervention was accompanied by military intervention authorized by the Security Council.[12] Fourth, the Court expeditiously initiated a formal investigation two months after the referral. In contrast, according to the records of the Court, preliminary investigations usually take several months or even years: to compare the case of Libya with that of Sudan, where another Security Council referral was warranted, the Court took two years to move from accepting it to issuing the arrest warrants.[13]

B. Negotiation Attempts and Instrumentalization

Simultaneously, several peace negotiation initiatives were designed to find a solution to the crisis in Libya but, unfortunately, this track of international interference began

[8] Rome Statute of the International Criminal Court, SC Res. 1970 (2011), UN Doc S/RES/1970 (2011); ICCSt, *supra* note 2, Art. 13(b).

[9] Rome Statute of the International Criminal Court, SC Res. 1973 (2011) at 2, UN Doc S/RES/1973 (2011).

[10] Michael CONTARINO, Melinda NEGRÓN-GONZALES, and Kevin MASON, "The International Criminal Court and Consolidation of the Responsibility to Protect as an International Norm" (2012) 4(3) Global Responsibility to Protect 275 at 306.

[11] *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi*, (ICC-01/11-01/11-2), Pre-Trial Chamber I, 27 June 2011; *Warrant of Arrest for Saif al-Islam Gaddafi*, (ICC-01/11-01/11-14), Pre-Trial Chamber I, 27 June 2011; *Warrant of Arrest for Abdullah Senussi*, (ICC-01/11-01/11-4), Pre-Trial Chamber I, 27 June 2011.

[12] Rome Statute of the International Criminal Court, SC Res. 1973 (2011) at 2, UN Doc S/RES/1973 (2011).

[13] Mark KERSTEN, "Between Justice and Politics: The ICC's Intervention in Libya" in De Vos, Kendall and STAHN, *supra* note 3, at 463.

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even before Resolution 1973,[14] whose provision required a peaceful settlement of the Libyan conflict[15] and continued for a few weeks before the fall of Tripoli in August of that year.

The UN Secretary-General appointed Al-Khatib, the former Jordanian foreign minister, to explore ways of settling the Libyan Crisis. He travelled to Libya on 14 March 2011, met the Libyan Foreign Minister, Kusa, and established a line of communication with Saif al-Islam. Unfortunately, his failed attempt happened after the adoption of Resolution 1970 and before Resolution 1973.[16] More vigorously, in April 2011, the African Union (AU) initiated efforts to resolve the conflict, keeping in mind that the Prosecutor began its formal investigation in March. To do so, a five-member AU High-Level Panel, led by the President of South Africa, travelled to Libya to broker a peace agreement to end the crisis.[17] The AU-led initiative requested: (i) the cessation of hostilities, including intervention led by the North Atlantic Treaty Organization (NATO); (ii) the unimpeded delivery of humanitarian assistance; (iii) the protection of foreign nationals; and (iv) an official peace negotiation between the government of Gaddafi and the Libyan National Transitional Council (NTC) to implement the necessary political reform.[18] On 11 April, the AU panel announced that Gaddafi had accepted the AU road map.[19] However, the National Transitional Council (NTC) rejected the AU's plan on the same day. Abdul-Jalil, former chair of the NTC, described why the NTC rejected the AU road map: "The initiative does not include the departure of Gaddafi and his sons from the Libyan political scene, therefore, it is outdated."[20] Their message was crystal clear – they wanted outright regime change; that is, the removal of Gaddafi and his family from the Libyan government. To make matters worse, according to the Libyan politician Ahmad Gebreel, the NATO powers failed to support the AU's initiative. They also threatened the NTC by withdrawing their support from the Libyan opposition in case they wanted to accept the AU's plan.[21] Conversely, Gaddafi did not indicate that he would resign as a precondition of the peace negotiation.[22] Therefore, the main obstacle to the peace negotiation's advancement was disagreement about Gaddafi's fate.[23]

[14] Ruben REIKE, "Libya and the Prevention of Atrocity Crimes: A 'Controversial Success'" in Serena SHARMA and Jennifer WELSH, eds, *The Responsibility to Prevent: Overcoming the Challenges of Atrocity Prevention* (United States of America: Oxford University Press, 2015) 324 at 340–1.

[15] Rome Statute of the International Criminal Court, SC Res. 1973 (2011) at 2, UN Doc S/RES/1973 (2011).

[16] REIKE, *supra* note 14 at 340–1.

[17] African Union, "Decision on the Peaceful Resolution of the Libyan Crisis" (Extraordinary Session of the Assembly of the Union on the State of Peace and Security in Africa) (African Union, Addis Ababa 2011) EXT/ASSEMBLY/AU/2(01.2011).

[18] KERSTEN, *supra* note at 13 at 445.

[19] See Mark RAI and Milan BOWERY, "Libyan Peace Deal Undermined by West" *Peace News* (1 May 2011) online: Peace News http://peacenews.info/node/6131/libyan-peace-deal-undermined-west; "Gaddafi accepts Chavez talks offer" *Al Jazeera* (3 March 2011) online: Al Jazeera https://www.aljazeera.com/news/2011/3/3/gaddafi-accepts-chavez-talks-offer; "Libya: Gaddafi Government Accepts Truce Plan, Says Zuma" *BBC* (11 April 2011) online: BBC News http://www.bbc.co.uk/news/world-africa-13029165; Harriet SHERWOOD and Chris McGREAL, "Libya: Gaddafi Has Accepted Roadmap to Peace, Says Zuma" *The Guardian* (11 April 2011) online: The Guardian https://www.theguardian.com/world/2011/apr/10/libya-african-union-gaddafi0-rebels-peace-talks.

[20] "Libyan Rebels Reject African Union Peace Plan" *The Independent* (11 April 2011) online: The Independent http://www.independent.co.uk/news/world/africa/libyan-rebels-reject-african-union-peace-plan-2266294.html.

[21] Mark KERSTEN, *Justice in Conflict: The Effects of The International Criminal Court's Interventions on Ending Wars and Building Peace* (United States of America: Oxford University Press, 2016) at 162.

[22] "Libya: Zuma Says Gaddafi Will Not Quit" *BBC News* (31 May 2011) online: BBC News http://www.bbc.co.uk/news/world-africa-13597702.

[23] KERSTEN, *supra* note 13 at 464–5; Reike, *supra* note 14 at 341–2. See also David SMITH, "Where Could Colonel Muammar Gaddafi Go If He Were Exiled?" *The Guardian* (21 February 2011) online: The Guardian https://www.theguardian.com/world/2011/feb/21/muammar-gaddafi-exile-options; David SANGER and Eric SCHMITT, "U.S.

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On 26 May, just days after the request by the ICC Prosecutor for the issuance of arrest warrants, the Libyan government offered its most advanced initiative for a ceasefire; this required formal talks with the NTC, forming a constitutional government, and compensating the victims of the conflict. Interestingly, Gaddafi's name was absent from this new ceasefire offer. Instead, the government officials were "trying to recast the despot as a figure who will not play a prominent role in the country's affairs after the fighting stops".[24] Unfortunately, this attempt also failed because the interveners and the NTC never took it seriously.

With regard to this train of events, gradually, after issuing three arrest warrants, numerous states, including some members of the Court, reportedly offered safe exile to Gaddafi to resolve and terminate the prolonged conflict. Western states, in particular, were searching for a non-ICC recipient member state.[25] In a round of attempts to ignite peace negotiations between the NTC and the Gaddafi government, after the indictments were warranted at the end of June, the AU offered Gaddafi exile.[26] It was reported that NATO powers such as France and Britain had privately approved that Gaddafi could go into exile in a non-ICC member state.[27] In another round of attempts in July, led by Turkey, it was reported that some NATO powers had privately acknowledged that they would support Gaddafi's exile to a non-ICC member state.[28] Finally, in its Statement on Libya on 8 June 2011 – a few weeks after the Prosecutor requested three arrest warrants – NATO declared its regime change approach: "Time is working against Qadhafi, who has clearly lost all legitimacy and therefore needs to step down. There is no future for a regime that has systematically threatened and attacked its own population." The statement also mentioned the significance of different military, political, and economic measures to help end attacks on civilians. Accordingly, the possibility of an ICC contribution was set aside.[29]

Several commentators claimed that the ICC's intervention would make Libya's transition to peace unlikely. They proclaimed that the Court's biased approach would make Gaddafi determined to "fight to the death and take a lot of people down with him",[30] that the ICC "may have perpetuated, rather than ended, crimes",[31] and that Libya was

and Allies Seek a Refuge for Qaddafi" *The New York Times* (16 April 2011) online: The New York Times http://www.nytimes.com/2011/04/17/world/africa/17rebels.html.

[24] Martin CHULOV, "Libyan Regime Makes Peace Offer that Sidelines Gaddafi" *The Guardian* (26 May 2011) online: The Guardian https://www.theguardian.com/world/2011/may/26/libyan-ceasefire-offer-sidelines-gaddafi.

[25] Deborah Ruiz VERDUZCO, "The Relationship between the ICC and the United Nations Security Council" in Carsten STAHN, ed., *The Law and Practice of the International Criminal Court* (United States of America: Oxford University Press, 2015) at 42.

[26] Farouk CHOTHIA, "Gaddafi: African Asylum Seeker?" *BBC News* (12 September 2011) online: BBC News http://www.bbc.co.uk/news/world-africa-14806140; Vivienne WALT, "Death, Prison or Exile: Gaddafi Is out of Options" *Time* (1 June 2011) online: Time http://content.time.com/time/world/article/0,8599,2074926,00.html.

[27] *Ibid*.

[28] Ian BLACK, "Turkey Asks Libya Summit to Back Peace Negotiations" *The Guardian* (14 July 2011) online: The Guardian https://www.theguardian.com/world/2011/jul/14/libya-turkey-peace-negotiations-roadmap. These non-ICC states include Sudan, Belarus, and Zimbabwe.

[29] "Statement on Libya: Following the Working Lunch of NATO Ministers of Defence with non-NATO Contributors to Operation Unified Protector" NATO (4 June 2011) online: NATO https://www.nato.int/cps/en/natohq/news_75177.htm.

[30] Max BOOT, "Qaddafi Exile Unlikely" *Commentary Magazine* (23 March 2011) online: Commentary Magazine https://www.commentary.org/max-boot/qaddafi-exile-unlikely/.

[31] Doug SAUNDERS, "When Justice Stands in the Way of a Dictator's Departure" *The Globe and Mail* (2 April 2011) online: The Globe and Mail https://www.theglobeandmail.com/opinion/when-justice-stands-in-the-way-of-a-dictators-departure/article623912/.

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mired "in a civil war in large part because of Gaddafi's international prosecution".[32] This concern became more acute when it appeared increasingly unlikely that the conflict would be ended quickly and the ICC's warrants would reinforce a military and political deadlock.[33] On the other hand, according to close confidants of Gaddafi, "he felt trapped after the ICC issued arrest warrants and did not see any other option than to continue fighting".[34] In July 2011, the AU – in an attempt to deal with the deadlock in which the ICC's intervention was one undeniable factor – officially requested the Security Council to activate the provision of Article 16 of the Rome Statute to defer the ICC's process on Libya "in the interest of justice as well as peace".[35] By that point, however, the request never gained the momentum of the international community due to its absolute rejection, this time by, among others, international human rights organizations.[36]

During the summer, a "ripe moment" for a peaceful resolution of the conflict crystallized from June to early August. The NATO powers, specifically the US, were seriously considering the possibility of a peaceful settlement,[37] bearing in mind that they had rejected any chance of a peace negotiation just a few months ago. This change of position was because, in the mentioned period, the conflict between Gaddafi's army and the NTC fighters had reached a stalemate. It seemed like neither side would emerge victorious. Moreover, the country's East was mainly under the control of the NTC, while Gaddafi's loyalists held much of the West, including the capital, Tripoli. During this period, the international community should have appeared most keen to ignite negotiations.[38]

Some final points are noteworthy to understand the ambivalence among intervening states towards the ICC. At the beginning of the military intervention, NATO supported the investigations conducted by the ICC. However, in the eyes of the interveners, the ICC should have focused solely on the Gaddafi government rather than other parties to the conflict: the NTC and NATO itself or their allies. The reason is that the permanent members of the Security Council leading the military intervention, namely the US, the United Kingdom (UK), and France, two of which are members of the ICC, generally interpret referrals as a method of political pressure rather than a method of ICJ commitment. Therefore, the general attitude among the interveners was to instrumentalize the Court to achieve their political purposes.[39] When the Court's investigations became a potential obstacle to pursuing such political goals, the Court's role in trying Gaddafi was largely abandoned in favour of ending the war as soon as possible.[40] This tendency among powerful states "to direct the court without committing to its success" has become reflective of several situations, including Libya.[41]

[32] Philippe SANDS, "The ICC Arrest Warrants Will Make Colonel Gaddafi Dig in His Heels" *The Guardian* (4 May 2011) online: The Guardian https://www.theguardian.com/commentisfree/2011/may/04/icc-arrest-warrants-libya-gaddafi.

[33] KERSTEN, *supra* note 13 at 463–4. See also Boot, *supra* note 30; Saunders, *supra* note 31; Sands, *supra* note 32.

[34] See Priscilla HAYNER, "International Justice and the Prevention of Atrocities Case Study: Libya: The ICC Enters during War" *ECFR background paper* (November 2013) online: ECFR http://www.ecfr.eu/page/-/IJP_Libya.pdf at 4.

[35] KERSTEN, *supra* note 21 at 151.

[36] *Ibid*.

[37] *Ibid*., at 161.

[38] *Ibid*., at 152.

[39] Carsten STAHN, "Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility'" (2012) 10(2) Journal of International Criminal Justice 325 at 330–2; BOSCO, *supra* note 7 at 167–8; KERSTEN, *supra* note 13 at 467–8; Sarah BABAIAN, *The International Criminal Court – An International Criminal World Court? Jurisdiction and Cooperation Mechanisms of the Rome Statute and its Practical Implementation* (New York: Springer Cham, 2017) at 180.

[40] REIKE, *supra* note 14 at 338–9.

[41] BOSCO, *supra* note 7 at 172.

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C. The Aftermath

When the peace talks failed and were abandoned due to the ICC's intervention, there remained no other option than to follow the regime change strategy, favoured overwhelmingly by the NTC, and end the military intervention as soon as possible, which was increasingly favoured by NATO. This happened when Tripoli fell after a NATO-led coalition operation was launched in August; two months later, the rebels summarily executed Gaddafi himself. Afterwards, during the post-military intervention years, Libya witnessed a vying for power between rival blocks of Islamists, federalists, and minority claims, which resulted in the present-day chaos and paved the way for the sheltering of international terrorism.[42] The lack of central authority to incorporate these rivalries into a national political process undermined the NTC and the UN-backed Government of Libya (UNGL) of requisite sovereignty. As a result, Libya became a no man's land, and the UNGL lacked "effective control", a hallmark of Westphalian sovereignty and statehood.[43] Meanwhile, more casualties and deaths were described as international crimes. According to one report, from 2012 until February 2020, a minimum of 611, or a maximum of 899, civilians were killed in all strikes by all belligerents. Also, regarding the total number of individuals (including combatants and those unknown), at least 1,820 persons were killed, with the highest estimate being 2,440. The number of civilians wounded during the same period ranges from 871 to 1,384 individuals.[44] Another report expressed an increase of 45 per cent in casualties between January and March 2020 compared with the fourth quarter of 2019. Further, the Libyan casualty rate had been inflating and deflating over more than a decade since the termination of military intervention.[45] Worse, the Human Rights Solidarity detected around 3,719 casualties in Libya in 2018, including killed, injured, and captured individuals. On the other hand, during the first phase of the Libyan civil war, between February and October 2011, the Uppsala Conflict Data Program recorded that more than 3,000 individuals had been killed.[46] This figure did not include those injured. According to Kuperman, less than 1,000 people were killed before NATO's operation.[47] Thus, although the number of casualties in 2011 is by far the highest, the number of casualties since then clearly demonstrates that criminal activities continued and worsened in the following decade.

Furthermore, the other dilemma that the new government of Libya faced after the military intervention ended was the return of those loyal to Gaddafi's regime. Several reports of loyalist insurgencies, especially after widespread revenge and looting committed by

[42] Ben FISHMAN, "Could Libya's Decline Have Been Predicted?" (2015) 57(5) *Survival* 199 at 204. See SPENCER ACKERMAN, Chris STEPHEN, and Ewen MacASKILL, "US Launches Airstrikes against Isis in Libya" *The Guardian* (1 August 2016) online: The Guardian https://www.theguardian.com/world/2016/aug/01/us-airstrikes-against-isis-libya-pentagon; "Gaddafi wants EU Cash to Stop African Migrants" *BBC News* (31 August 2010) online: BBC News https://www.bbc.com/news/world-europe-11139345; Rana JAWAD, "How Libya Became a Dead End for Migrants" *BBC News* (17 June 2010) online: BBC News http://www.bbc.co.uk/news/10338790.

[43] James CRAWFORD, *The Creation of States in International Law*, 2nd ed. (United States of America: Oxford University Press, 2006) at 55–61.

[44] "New America, Airstrikes, Proxy Warfare, and Civilian Casualties in Libya" *New America* online: New America https://www.newamerica.org/international-security/reports/airstrikes-proxy-warfare-and-civilian-casualties-libya/key-findings.

[45] "Civilian casualties report from 1 January – 31 March 2020" *reliefweb* (30 April 2020) online: reliefweb https://reliefweb.int/report/libya/civilian-casualties-report-1-january-31-march-2020; "United Nations Support Mission in Libya" *UNSMIL* (29 July 2020) online: UNSMIL https://unsmil.unmissions.org/civilian-casualties-report-1-april-30-june-2020.

[46] "Number of Deaths in Libya" *Uppsala Conflict Data Program* Online: UCDP https://ucdp.uu.se/country/620.

[47] Alan KUPERMAN, "NATO's Intervention in Libya: A Humanitarian Success?" in Aidan HEHIR and Robert MURRAY, eds., *Libya: The Responsibility to Protect and the Future of Humanitarian Intervention* (London: Palgrave Macmillan, 2013) 191 at 2014.

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anti-Gaddafi forces, demonstrated the challenge of those opposing the new regime. Moreover, the unsuccessful attempt by the NTC to unify all the rebels, given their preference to follow their tribal ambitions, made several loyalists turn against the new government and strengthened their resolve to oppose the NTC. This challenge continues.[48] The key armed loyalist groups include, among others, the Saif al-Islam clan and the Fezzan-centred group led by Ali Kana, the former head of the armed forces in the South under Gaddafi. All groups have one goal in common: to reinstate the old Jamahiriya. For the first time, the UN invited Gaddafi loyalists to the Libyan political negotiations in August 2016.[49] This turn of events acknowledges that removing Gaddafi and his regime from power was not the consensual object of all Libyans. Second, regime change and its consequent failed state situation made the prosecution of Gaddafi's son (now the leader of one of the military groups resisting the UN-backed government of Libya) extremely difficult and depended on the political atmosphere in the Libyan conflict. Meanwhile, Saif al-Islam's case remains in the pre-trial stage, pending his transfer to The Hague. Subsequently, even the case against Senussi was declared inadmissible on 11 October 2013.[50]

However, in total disregard of the described chaos, the engagement of the ICC did not end due to the abovementioned three indictments, and the Court found it easy to continue its judicial intervention in the Libyan aftermath. Furthermore, the Court issued three more indictments for two other persons: one for Al-Tuhamy Mohamed Khaled in 2013 (later publicized in 2017) as the former Lieutenant General of the Libyan army and former head of the Libyan Internal Security Agency in 2017, and two in the name of Mahmoud Mustafa Busayf Al-Werfalli in 2017 and 2018, a Major in the Al-Saiqa Brigade and a member of the Libyan military opposition group. It should be noted that both indictees were never in the Court's custody, and both are dead now, their cases being withdrawn in 2022.[51] Therefore, who could have had the requisite power and commitment in Libyan territory to prosecute or extradite them to the Court?

II. INTERNATIONAL CRIMINAL JUSTICE: REGIME CHANGE AND FAILED STATE CRISIS

A. Regime Change and the ICC's Independence

Regime change, a lethal strategy towards a country's government, can be defined as "the forcible replacement by external actors of the elite and/or governance structure of a state

[48] Jeune AFRIQUE, "Libya: Gaddafi regime's last loyalists are negotiating their release from prison" The *Africa Report* (4 July 2022) online: The Africa Report https://www.theafricareport.com/218935/libya-gaddafi-regimes-last-loyalists-are-negotiating-their-release-from-prison/; "Libya elections: Presidential poll postponed" *BBC News* (24 December 2021) online: https://www.bbc.com/news/world-africa-59755677; Anthony BELL, Spencer BUTTS and David WITTER, "The Libyan Revolution: The Tide Turns Part 4" *Institute for the Study of War (ISW)* (November 2011) online: Institute for the Study of War http://www.understandingwar.org/sites/default/files/Libya_Part4.pdf at 25; Colin FREEMAN, "Gaddafi Loyalists Join West in Battle to Push Islamic State from Libya" *The Telegraph* (7 May 2016) online: The Telegraph http://www.telegraph.co.uk/news/2016/05/07/gaddafi-loyalists-join-west-in-battle-to-push-islamic-state-from/.

[49] Mathieu GALTIER, "Libya: Why the Gaddafi Loyalists Are Back" *Middle East Eye* (11 November 2016) online: Middle East Eye http://www.middleeasteye.net/news/libya-why-gadhafi-loyalists-are-back-2138316983.

[50] Situation in Libya, *International Criminal* Court, See online: ICC https://www.icc-cpi.int/libya.

[51] *Warrant of Arrest for Al-Tuhamy Mohamed Khaled*, (ICC-01/11-01/13), Pre-Trial Chamber I, 18 April 2013; *First Warrant of Arrest for Mahmoud Mustafa Busayf Al-Werfalli*, (ICC-01/11-01/17-2), Pre-Trial Chamber I, 15 August 2017; *Second Warrant of Arrest for Mahmoud Mustafa Busayf Al-Werfalli*, (ICC-01/11-01/17-13), Pre-Trial Chamber I, 04 July 2018; Situation in Libya in the case of *The Prosecutor v. Al-Tuhamy Mohamed Khaled* ICC: online ICC https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_05887.PDF; Situation in Libya in the case of *The Prosecutor v. Mahmoud Mustafa Busayf*: online ICC https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_04813.PDF.

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so that the successor regime approximates some purported international standard of governance".[52] It means, in a very crude sense, the removal of a government's head of state or the other ringleaders/political officials. This might happen through the issuance of ICC indictments, and the indictments, if executed, could cause the arrest of those leaders. Otherwise, a regime change can delegitimize the targeted government "thereby potentially facilitating their exit from the national political scene in a less direct manner".[53] As the world "shamer-in-chief", the ICC brings "a kind of international opprobrium" that is without parallel in the international community.[54] Indeed, the Court's engagement in conflicts provides a form of soft power to shape international and domestic narratives. Each side might justify its ends and means, as was the ICC's undeniable impact on shaping the narratives of the Libyan conflict. The Court contributed to a perception of the conflict between the "good" NTC and the international community and the "evil" Gaddafi regime; it helped the NTC and NATO coalition justify their regime change strategy.[55]

This argument is best demonstrated by the NTC being recognized as the sole legitimate authority in the Libyan territory. Even though the series of the Libyan opposition's recognitions came as early as March 2011 – by France, who was intensely involved in the military operation[56] – by 15 July of that year, less than a month after the issuance of three arrest warrants, a group of thirty-two states (including the US, the UK, and other states leading the operation) declared, at the Libya Contact Group meeting in Turkey, that they would deal with the NTC as the "legitimate governing authority in Libya".[57] The international community acquiesced to this somewhat controversial "collective recognition"[58] simply because the Gaddafi government was pictured as the only evil side of the conflict, which had to be eliminated as soon as possible.

In this sense, given that the ICC can intervene in ongoing conflicts, it has the power to directly affect the dynamics of these conflicts and incapacitate key parties, including incumbent leaders. Therefore, judicially or militarily pursuing regime change is prone to concealing powerful states' abusive behaviour and triggering judicial intervention to punish adverse regimes on a whim. In recent decades, using the ICJ as a trigger for coercive response has become prevalent.[59] This tendency has been developing since the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY).[60] Thus,

[52] Michael REISMAN, "The Manley O. Hudson Lecture: Why Regime Change s (Almost Always) a Bad Idea" (2004), 98(3) American Journal of International Law, 516.

[53] Nesam McMILLAN and David MICKLER, "From Sudan to Syria: Locating 'Regime Change' in R2P and the ICC" (2013) 5(3) Global Responsibility to Protect 283 at 297.

[54] Geoff DANCY, "Searching for Deterrence at the International Criminal Court" (2017) 17 International Criminal Law Review 625 at 634.

[55] KERSTEN, *supra* note 21 at 163. This biased approach has a longer pedigree since the Court's establishment in Uganda's case. Despite crimes committed from both sides of the conflict, the Uganda government and the LRA, the Prosecutor only preferred to select the senior commanders of the LRA for prosecution. This created a "good" versus "evil" narrative that undeniably impacted the peace talks considerably. See also Anni PUES, *Prosecutorial Discretion at the International Criminal Court* (Oxford: Hart Publishing, 2020) at 146.

[56] "Libya: France recognises rebels as government" *BBC* News (10 March 2011) online: BBC News https://www.bbc.com/news/world-africa-12699183.

[57] AADAPO Akande, "Recognition of Libyan National Transitional Council as Government of Libya" *EJIL:Talk!* (23 July 2011) online: EJIL:Talk! https://www.ejiltalk.org/recognition-of-libyan-national-transitional-council-as-government-of-libya/.

[58] *Ibid*; Stefan TALMON, "Recognition of the Libyan National Transitional Council" *Insights* 15(16) (16 June 2011) online: Insights https://www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council.

[59] Carsten STAHN, "Syria and the Semantics of Intervention, Aggression, and Punishment" (2013) 11(5) Journal of International Criminal Justice 955 at 956.

[60] Iavor RANGELOV, "Justice as a Security Strategy? International Justice and the Liberal Peace in the Balkans" (2016) 21(1) Journal of Conflict and Security Law 9 at 25.

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the implications of "regime change by stealth" and the use of the ICC to achieve a non-ICJ objective of removing governments, specifically in the case of so-called rogue regimes, might be highly damaging to the independence and credibility of the ICC.[61] In other words, intervention by the ICC, as a supposed independent institution, can reproduce and justify unjust *realpolitik*.[62] As a result, Security Council referrals have been widely subjected to critiques of a North-South dimension in international relations. Critics usually argue that the Court is acting as a servant of the "permanent five" – as a tool in the hands of powerful Western states. On the other hand, another critique of referral cases is that Security Council members decide on referrals without providing any real support and commitment. Consequently, the ICC intervenes without international community sponsorship, making it ineffective and undermining its legitimacy.[63]

More fundamentally, this illuminates the problematic aspect of international law in general and the ICJ in particular: the unavoidable influence of *realpolitik* on the law.[64] The then-Prosecutor of the ICC has declared unambiguously that the law is applied "without political considerations, but the other actors have to adjust to the law".[65] In addition, at the conclusion of the Rome Conference, Bassiouni claimed that "realpolitik, which sacrifices justice at the altar of political settlements, is no longer accepted".[66] Nonetheless, it has been argued cogently that the Court does not merely replace politics but enacts and legitimizes them.[67] The boundaries of the ICJ are not as "apolitical" as they seem,[68] which urges the Court to provide a wise pattern of behaviour. The instrumentalization of the Court by powerful states within the international community is a contemporary issue that the Court needs to counter.[69] At any rate, the presumption that states in the international community will "sacrifice" themselves for the greater moral good of others' sake is not a very plausible scenario, especially when *realpolitik* dominates interstate relations.[70]

[61] McMillan and Mickler, *supra* note 54 at 286; Kenneth RODMAN, "Justice as a Dialogue between Law and Politics Embedding the International Criminal Court within Conflict Management and Peacebuilding" (2014) 12(3) Journal of International Criminal Justice 437 at 448; James PATTISON, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford University Press, 2010) at 272–3.

[62] Mégret, *supra* note 1 at 95. See also Nouwen and Werner, *supra* note 6 at 962–4.

[63] Robinson, *supra* note 5 at 328.

[64] Luigi CORRIAS and Geoffrey GORDON, "Judging in the Name of Humanity International Criminal Tribunals and the Representation of a Global Public" (2015) 13(1) Journal of International Criminal Justice 97 at 107; Martti KOSKENNIEMI, "Between Impunity and Show Trials", (2002) 6 Max Planck Yearbook of United Nations Law 1 at 9; Immi TALGRE, "The Sensibility and Sense of International Criminal Law" (2002) 13(3) European Journal of International Law 561 at 591–2.

[65] Luis MORENO-OCAMPO, Prosecutor of the International Criminal Court, "Keynote Address Council on Foreign Relations" (4 February 2010). See also Nouwen and Werner, *supra* note 6 at 942; Bosco, *supra* note 7 at 163.

[66] Cherif BASSIOUNI, *The Legislative History of the International Criminal Court* (Netherlands: Martinus Nijhoff, 2005) at 121.

[67] Martti KOSKENNIEMI, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2002) at 177.

[68] Robert CRYER, "International Criminal Law vs. State Sovereignty: Another Round?" (2005) 16(5) European Journal of International law 979 at 989; William SCHABAS, *The International Criminal Court: A Commentary on the Rome*, 2nd ed. (Oxford University Press, 2016) at 378; Sarah NOUWEN and Wouter WERNER, "Monopolizing Global Justice International Criminal Law as Challenge to Human Diversity" (2015) 13(1) Journal of International Criminal Justice 157 at 161–2.

[69] Frederic MéGRET, "In whose name? The ICC and the search for constituency" in De Vos, Kendall, Stahn, *supra* note 3 at 31–2, 35–6.

[70] *Ibid*., at 33.

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B. Failed State and Principle of Sovereignty

On the one hand, Libya has been torn apart by political rivalries and proxy wars with no real functioning government, having filled in the power vacuum arising from the pursuit of regime change.[71] On the other hand, the numerous political negotiations initiated to end the conflict remain in limbo.[72] As a result, Libya has become a failed state, and there are no bright prospects for ending this chaos in the foreseeable future.[73]

Gaddafi's army could have defeated the insurgents without international military intervention and might have won the conflict.[74] However, ignoring the benefits achieved by the peaceful solution of the conflict for Libyans at the outset of military intervention, later hindered by the ICC's intervention when there was a better chance to resolve it, significantly extended the armed conflict and magnified the harm to civilians,[75] contrary to both the intent of the UN resolution and the Court's mission. Bearing this analysis in mind, the Gaddafi government's victory could, beyond doubt, have led to more cases of international crimes. In contrast, international military/judicial intervention paved the way for the current chaos and routine crime in Libyan territory.

Discussing the text of Resolution 1973 itself is also relevant. The ICJ promise is linked to establishing a ceasefire and finding a peaceful solution to the conflict.[76] During its adoption, abstaining states – namely Russia, China, Germany, Brazil, and India – expressed clearly that the best solution to the conflict was to end it peacefully.[77] Further, according to its preamble, the Court is responsible for preventing international crimes[78] but has

[71] Magdi ABDELHADI, "Libya conflict: Why Egypt might send troops to back Gen Haftar" *BBC News* (17 August 2020) online: BBC News https://www.bbc.com/news/world-africa-53779425; Giorgio CAFIERO and Daniel WAGNER, "How the Gulf Arab Rivalry Tore Libya Apart" *The National Interest* (11 December 2015) online: The National Interest http://nationalinterest.org/feature/how-the-gulf-arab-rivalry-tore-libya-apart-14580.

[72] See "Germany, UN to host Libya conference" *Al Jazeera* (1 June 2021) online: Al Jazeera https://www.aljazeera.com/news/2021/6/1/germany-un-to-host-libya-conference; "UN envoy: Libya mercenaries a threat to entire North Africa" *Al Jazeera* (22 May 2021) online: Al Jazeera https://www.aljazeera.com/news/2021/5/22/un-envoy-failure-to-get-rid-of-libya-mercenaries-a-threat; "Tensions persist as Libya's warring sides debate road to peace" *Al Jazeera* (13 November 2020) online: Al Jazeera see https://www.aljazeera.com/news/2020/11/13/tensions-persist-as-libyas-rival-side-debate-road-to-peace; "Libya summit: Participants agree to respect arms embargo" *Al Jazeera* (19 January 2020) online: Al Jazeera https://www.aljazeera.com/news/2020/01/world-powers-meet-berlin-discuss-libya-crisis-200119023145417.html; "Libya's warring sides pull out of Geneva peace talks" *Al Jazeera* (25 February 2020) online: Al Jazeera https://www.aljazeera.com/news/2020/02/eastern-libya-legislators-pull-geneva-peace-talks-200224160824800.html.

[73] See "Why is Libya so lawless?" *BBC News* (23 January 2020) online: BBC News https://www.bbc.com/news/world-africa-24472322; Garikai CHENGU, "Libya: From Africa's Richest State Under Gaddafi to Failed State After NATO Intervention" *Global Research* (14 September 2016) online: Global Research http://www.globalresearch.ca/libya-from-africas-richest-state-under-gaddafi-to-failed-state-after-nato-intervention/5408740; Richard LARDNER, "The Top American General in Africa Says Libya is a Failed State" *US News* (8 March 2016) online: US News https://www.usnews.com/news/politics/articles/2016-03-08/us-commander-in-africa-says-libya-is-a-failed-state; Cafiero and Wagner, *supra* note 72.

[74] Kuperman, *supra* note 48 at 198–202. See also Tony KARON, "U.N. Intervention Vote Saves Libya's Revolution from Defeat" *Time* (17 March 2011) online: Time http://world.time.com/2011/03/17/u-n-intervention-vote-saves-libyas-revolution-from-defeat/; John BURNS, "NATO Begins Helicopter Attacks in Hopes of Ending the Stalemate With Qaddafi" *The New York Times* (4 June 2011) online: The New York Times http://www.nytimes.com/2011/06/05/world/africa/05libya.html?ref=africa; "Evolution of the Frontlines in Libya- March to September 2011" *NATO* online: NATO https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2011_09/20110922_110922-libya-frontlines.pdf; Paul WILLIAMS and Colleen POPKEN, "Security Council Resolution 1973 on Libya: A Moment of Legal and Moral Clarity" (2011) 44(1) Case Western Reserve Journal of International Law 225 at 245–8.

[75] Kuperman, *supra* note 48 at 197.

[76] Rome Statute of the International Criminal Court, SC Res. 1973 (2011) at 2, UN Doc S/RES/1973 (2011).

[77] Overview of Security Council 6498th Meeting S/PV.6498 5–6, 8, 10 (2011).

[78] ICCSt, *supra* note 2, Preamble.

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added fuel to the fire in the Libyan conflict instead.[79] The ICC, among others, bolstered the resolve of the NTC to refuse to negotiate with the Gaddafi regime and thus motivated them to seek regime change via military means.[80] As Hisham Matar, a Libyan author, indicated, the result was that "Libyans used to be afraid of a brutal state; now they are afraid of the absence of the state."[81] Consequently, it is argued that there was no real cessation of international crimes after the regime change, which is bolstered by the statistics discussed earlier.[82]

Mission creep – which follows the regime change strategy rather than the Resolution 1973 authorized mandate – in the case of Libya, conspicuously demonstrates the danger of *realpolitik* on the one hand and, on the other, the threat of a failed state catastrophe in a multilateral mission authorized by the UN. A failed state situation or a territory without a centralized functioning government is a conundrum leading to dangerous circumstances that contemporary international law urgently needs to avoid.[83] Contrastingly, from a *realpolitik* perspective, a failed state is not necessarily detrimental or forbidden. However, there must be an effective central government for all judicial functions. The lack of one leads to chaos and unlawful behaviours.[84] In other words, justice needs a governmental sanction because the Rome Statute primarily makes states responsible for fighting with impunity and prosecuting criminals before their judicial systems.[85] Consequently, the ICC must take the initiative without jeopardizing the principle of sovereignty and creating a power vacuum.

The abovementioned dilemma arises because courts and other legal tribunals are an "epiphenomena of stability". There is no evidence that the mere existence of courts can "create the minimum political order that is necessary for their operation".[86] Hence, the principle of sovereignty and its concomitant effective control is vital to the success of the Court.[87] The Rome Statute emphasizes that "nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State".[88] More precisely, this conundrum is rooted in the paradox of contemporary international law: a horizontal/vertical system and constant tension between the principle of sovereignty and international community objectives such as international human rights law and international criminal law. However, preventing

[79] Schabas, *supra* note 69 at 377–8. See also Jeremy BOWEN, "Libya conflict: Russia and Turkey risk Syria repeat" *BBC News* (31 May 2020) online: BBC News https://www.bbc.com/news/world-africa-52846879.

[80] Kersten, *supra* note 21 at 154; Courtney HILLEBRECHT, "Trying the Perpetrators and Fueling the War: The (Perverse) Effects of the International Criminal Court?" (2011) APSA Annual Meeting 1 at 22.

[81] Hisham MATAR, "The Killing of Abdelsalam al-Mismari, and the Triumph of Fear in Libya" *The Guardian* (30 July 2013) online: The Guardian http://www.theguardian.com/commentisfree/2013/jul/30/killing-mismari-triumph-fear-libya; "Things Fall Apart" *The Economist* (18 May 2014) online: The Economist http://www.economist.com/blogs/pomegranate/2014/05/libya-0.

[82] See Section I(C).

[83] Chiara GIORGETT, "Why Should International Law Be Concerned About State Failure?" (2010) 16(2) ILSA Journal of International and Comparative Law at 469–87; Kenneth CHAN, "State Failure and the Changing Face of the *Jus ad Bellum*" (2013) 18(3) Journal of Conflict and Security Law at 395–426; Armin VON BOGDANDY et al., "State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches" (2005) 9 Max Planck YearBook of United Nations Law at 579–613.

[84] Cryer, *supra* note 69 at 1000.

[85] ICCSt, *supra* note 2, Art. 17.

[86] Michael REISMAN, "Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics" (1998) 6(1) Tulane Journal of International and Comparative Law 5 at 46 (emphasis in original).

[87] Martti KOSKENNIEMI, *The Politics of International Law* (Bloomsbury Publishing, 2011) at 281.

[88] ICCSt, *supra* note 2, Preamble.

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international crimes is impossible unless a sovereign state exists. For example, Somalia still has no functioning government to stop the warring factions. In the case of Sierra Leone, rebels fought a weak government which could not control the whole territory. The state (and its governmental apparatus) has a protective role that cannot be replicated by the international community, particularly when the transformative occupation is not sanctioned. Resolution 1973 precludes the occupation of Libyan territory,[89] and the UN-sponsored administration of a territory is not the case.[90] This relates again to the nature of international law. Cryer perfectly observes this complication as follows:

> An excess of sovereignty and state power can lead to international crimes, as in the Holocaust, but so can a lack of sovereign authority … sovereignty is still part of the society in which we find ourselves, and its relationship to ICL [International Criminal Law] is multifaceted and not easily reducible to shibboleths on either side.[91]

Instead, from the late nineteenth century onwards, international lawyers have assigned "egoism, arbitrariness and absolute power" to sovereignty, disregarding its foundational role within the international legal system. It is rightly argued that international cooperation among states can best guarantee the binding nature of international law. At the same time, sovereign states are limited to the raison d'être of statehood to provide protection and welfare of their people.[92]

The Court's contribution to any conflict cannot justify breaching the principle of sovereignty and changing a violent conflict into a failed state. This fact, again, urges the Court to provide a wise pattern of behaviour.

III. JUSTICE AND PEACE FOR THE PEOPLES

A. Independence: A Requirement against Realpolitik

Fundamentally, judicial independence is critical for the international rule of law. The rule of law "is essential for peaceful coexistence and cooperation among States" as international peace and security depend on international cooperation and peaceful settlement of disputes.[93] The Statute's preamble confirms that it was established as an independent judicial institution.[94] However, owing to the structural flaws within the ICC, the Court can be instrumentalized by the states of the international community, and its independence is easily compromised – as recent history testifies.[95]

As a result, to achieve and guarantee the independence of the Court, one contributing factor can be the Court's self-perception as independent and the way the institution expresses its independence to the outside world.[96] Therefore, to enhance its standing

[89] SC Res. 1973 (2011) at 4, UN Doc S/RES/1973 (2011).

[90] Cryer, *supra* note 69 at 985.

[91] *Ibid*., at 1,000. See also Carsten STAHN and Larissa VAN DEN HERIK, "Fragmentation, Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?" in Carsten STAHN, and Larissa VAN DEN HERIK, eds., *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff Publishers, 2012) 21 at 23–4; Robinson, *supra* note 5 at 331–2.

[92] Martti KOSKENNIEM, "Miserable Comforters: International Relations as New Natural Law" (2009) 15(3) European Journal of International Relations 395 at 403.

[93] Theodor MERON, "Judicial Independence and Impartiality in International Criminal Tribunals" (2005) 99(2) American Journal International Law 359 at 360; United Nations General Assembly (UNGA) Res 70/118 (2015) at 1–2.

[94] ICCSt, *supra* note 2, Preamble.

[95] Catherine GEGOUT, "The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace" (2013) 34(5) Third World Quarterly 804–5.

[96] Meron, *supra* note 94 at 1–2.

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in the international legal system, the ICC needs to assess each situation unilaterally, independent of uninvited external influence such as *realpolitik,* to the greatest extent possible.[97]

Secondly, the ICC legal system cannot be similar to the domestic legal systems that apply to every kind of wrongdoing. Instead, it must be selective, triggered only when it finds a cooperative partner to execute its decisions in select cases. This complication urges the existence of an independent Court to interpret and implement its promises on its own instead of merely giving in to the wishes of international interveners before ensuring their reliable commitment to executing the Court's orders or to the chameleon-like nature of an ongoing, evolving conflict.

Last but not least, the negative implications of *realpolitik* on the international legal system are undeniable facts. But the law may help harness intractable politics. If it becomes sufficiently independent, the ICC can be the best body to harness *realpolitik*.

Overall, the Court has no institutional capacity to control the behaviour of intervening states and other actors engaged in a conflict. As a result, instrumentalization is possible and can discredit the Court and make it delegitimized. This means the ICC must fight for its independence and eliminate perilous *realpolitik*. The aim should be to protect the Court's independence and avoid its hijack by powerful states and non-state actors such as internal insurgents and even international human rights non-governmental organizations – something it failed to do during the Libyan crisis. To do so, the Court must resolve another lacuna its jurisprudence suffers from, which will be discussed in the sections below.

B. State Cooperation and the Court

As recognized by the first Chief Prosecutor of the ICC, Luis Moreno-Ocampo, there is a paradox in the enforcement pillar of the Court. "[T]he ICC is independent and interdependent at the same time. It cannot act alone. It will achieve efficiency only if it works closely with other members of the international community".[98] Because of this, drafters of the ICC Statute adopted a hybrid model encompassing characteristics of both the horizontal and vertical models. Under this model, states must comply with the Court's request for cooperation.[99] However, according to Cassese, the Rome Statute creates a more traditional horizontal model, where relations between state parties and the Court are facilitated by inter-state judicial cooperation.[100] The Court needs constructive relationships with external partners to maintain constant support to enforce its decisions.[101]

The AU and NATO could have been considered international enforcing partners for the Court's warrants in Libya. Instead, the AU became an adversary to the ICC's intervention while NATO followed the regime change. The conflicting actors negatively impacted the resolution of the conflict, and the lack of cooperation from members of the Court is an undeniable fact. This has occurred in situations referred to the Court by the state

[97] Allen S. WEINER, "Prudent Politics: The International Criminal Court, International Relations, and Prosecutorial Independence" (2013) 12(3) Washington University Global Studies Law Review 545 at 549.

[98] Luis MORENO-OCAMPO, "Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court" (16 June 2003) online: ICC https://www.icc-cpi.int/nr/rdonlyres/d7572226-264a-4b6b-85e3-2673648b4896/143585/030616_moreno_ocampo_english.pdf.

[99] Rita MUTYABA, "An Analysis of the Cooperation Regime of the International Criminal Court and Its Effectiveness in the Court's Objective in Securing Suspects in Its Ongoing Investigations and Prosecutions" (2012) 12(5) International Criminal Law Review 937 at 944.

[100] Antonio CASSESE, "The Statute of the International Criminal Court: Some Preliminary Reflections" (1999) 10(1) European Journal of International Law 144 at 165.

[101] Robinson, *supra* note 5 at 338.

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members themselves: the best example is the case of Uganda, in which the lack of expected cooperation from the government resulted in the Prosecutor changing his cautionary stance to a more confrontational one.[102] Additionally, the case of Kenya is intriguing, where the Prosecutor triggered his *proprio motu*. This time, new narratives of victimhood emerged after the Court's intervention. Although Kenyatta and Ruto, the main indictees, were able to frame their indictment as an attempt by the ICC to victimize the Kenyan nation, it was also clear that inside Kenyan society the ethnic communities to which the Court's suspects belonged were also writing their victimhood narratives. Therefore, in addition to those who were the real victims of the electoral violence, a new category of victims also comes to light: those targeted by the ICC and the ethnic communities they belonged to.[103] This reaction trend from the people tends to create domestic resistance towards the ICC, making its decisions difficult to enforce. Therefore, it can be examined that the enforcement pillar of the ICC constitutes the weakest part of the Rome Statute in its current form; consequently, other factors such as the domestic perception of their people, their needs, and priorities are the facts the ICC has to take into account. Otherwise, it is prone to be instrumentalized, and its pivotal independence ended.

C. The Quest for the Right Constituency

So far, it is argued that the Court's intervention in Libya accelerated the current failed state situation and the resulting civil war, which paved the path for more criminal activities. Some profound questions can be asked: Why have powerful states instrumentalized the Court so easily, and why did it do nothing to stop their abusive behaviour endangering its independence? The answer is in the fundamental problem of the constituency the Court is supposed to represent.

Every legal system needs a society to represent and address the law, which needs to respond to the social context in which it operates.[104] Law has a "social meaning"; this understanding derives not from the law's legislator or enforcer's intention but rather from how relevant interlocutors, such as the whole of society or the people in a bottom-up perspective, understand and communicate with the law in light of their social necessities.[105] What is essential to ensure the legitimacy of the judiciary? One unquestionable factor is the respect people of the society to whom the Court is engaged pay it.

However, the situation for the ICC is more complicated. Two points are prominent in each case of the Court's jurisdiction. First, the Court does not have independent execution power. Second, as a result of the first point, it must rely on the cooperation of states, either in whose territory the crimes are perpetrated or the international community; that is, states and international organizations intervening in a specific conflict. If neither of the abovementioned scenarios is ready to execute the Court's orders, ICJ fulfilment will be severely limited. Moreover, practice over the past two decades has shown that the function of the ICJ remains embedded in the horizontal basis of state consensualism, the principle of sovereignty and international cooperation of states,[106] which the Preamble to the Rome Statute welcomes. In contrast, the main beneficiaries of ICJ promises are the people of each society.

[102] Oumar BA, *States of Justice: The Politics of The International Criminal Court* (Cambridge; New York: Cambridge University Press, 2020) at 92–3.

[103] *Ibid*., at 110–11.

[104] Pues, *supra* note 56 at 3.

[105] Margaret deGUZMAN, "Choosing to Prosecute: Expressive Selection at the International Criminal Court" (2012) 33(2) Michigan Journal of International Law 265 at 312–3. See also Lon FULLER, *The Morality of Law*, Rev. Ed. (Yale University Press, 1969).

[106] STAHN and van den HERIK, *supra* note 92 at 29–30.

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As a result, the Court currently suffers from a low degree of legitimate constituency; (1) it lacks a defined community to which it is responsible as it is not clear whether the Court is primarily responsive to the targeted society entangled in a conflict or other actors and institutions and (2) it is unable to demonstrate a consistent practice of values associated with each party/constituent it decides to represent.[107] For example, potential ICC interlocutors can be state parties; non-state actors such as belligerents fighting against their governments or international NGOs; the international community; the Security Council; victims of violence; and people in the society where the conflict is occurring. As a result, the Court might have different constituencies respecting complicated divergent situations and has to intervene.[108] This fundamental flaw, perhaps better described as a normative confusion in the Court's design, makes it vulnerable to intractable *realpolitik* because it must give in to the momentum of war and power politics instead of independently assessing its ICJ promises.

Investigations and prosecutions of state officials are also hindered by the ICC's professed vow not to venture into politics and to protect its legal formality as an impartial and apolitical institution. As a result, the ICC is compelled to negotiate with state officials and gain their cooperation to be effective. This requires the Court to develop a capacity to consider interests and facts other than the legal formulae produced in the Statute. In any case, in a world of states where state cooperation is needed for the ICC to deliver its ICJ promises, the Court is overwhelmed by challenges when the targets for prosecution are the incumbent agents of the state.[109] As a result, state cooperation and compliance with their ICC obligations result from *realpolitik* calculations, especially when the stakes are high and include incumbent officials and heads of state.[110]

As expressed by Higgins, to remain "legal" is not to ignore everything that is not "rules". This approach allows the Prosecutor to reflect on the purposes and objects of the ICC's architecture and its Statute within the global context and then identify effective methods of fulfilling those objectives.[111] Rather than a formalistic application of the rule of law, the Prosecutor and the Court must consider the array of extralegal interests to produce the support necessary to enforce its decisions.[112] For example, the United Nations High-Level Panel on Threats, Challenges and Change has, with regard to the prevention of conflicts, concluded that the ICC is a useful tool for promoting peace and security, but this depends on when and how it will decide to intervene.[113] Among different plausible ones, which constituency is invoked in any given situation will depend on "a range of exogenous and endogenous" elements, the degree of resistance the ICC has to face, and the pertinent manoeuvres to achieve judicial goals in circumstances concerning ICJ principles.[114] Accordingly, it is necessary to consider several extralegal contextual factors in each assessment case.[115]

[107] Deguzman, *supra* note 107 at 276.

[108] Line ENGBO GISSEL, "Legitimising the Juba Peace Agreement on Accountability and Reconciliation: The International Criminal Court as a Third-Party Actor?" (2017) 11(2) Journal of Eastern African Studies at 369; MéGRET, *supra* note 70 at 45.

[109] BA, *supra* note 103 at 111.

[110] *Ibid*., at 112.

[111] Matthew BRUBACHER, "Prosecutorial Discretion within the International Criminal Court" (2004) 2(1) Journal of International Criminal Justice 71 at 74.

[112] *Ibid*., at 94.

[113] UNGA Res A/59/565, para. 90.

[114] MéGRET, *supra* note 70 at 43–4.

[115] KOSKENNIMI, *supra* note 65 at 32–3; Tom BUITELAAR, "The ICC and the Prevention of Atrocities: Criminological Perspectives" (2016) 17 Hum Rights Review 285 at 294–5.

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Indeed, the best constituency the Court should represent, at least in complicated scenarios such as Libya, is the people of the society in the throes of war because the Prosecutor should maximize deterrence potential and prevent future crimes through the power bestowed upon them.[116] The Rome Statute's preamble recognizes the preventive obligation of the Court and its interrelations with the peace and security of mankind and international legal principles such as the principle of sovereignty.[117] In light of this interpretation, protecting people against the perpetration of international crimes has been accepted, according to international jurisprudence and scholarship, as a component of peace within the international community.[118] The "quest for justice for yesterday's victims of atrocities should not be pursued in such a manner that it makes today's living the dead of tomorrow".[119] Pursuing justice must not motivate entrenched leaders to dig in their heels, eventually making the conflict more violent and intractable. This is called the critique of "morbid justice".[120] To avoid this, the Court is strongly advised to be unhurriedly cognizant in complicated scenarios and only trigger its weapon of prosecution when it benefits the people of that society and results in greater peace and fewer crimes. This conclusion needs further clarification.

The ICC might have multiple constituencies to consider, which change over time and across different contexts. For example, states may support the ICC intervention in one context but not another for political reasons. The people may at once support an ICC investigation but not members of the factions they support. How should the Court respond to each complex situation? It is a truism to claim that the real telos of the ICC, described in its preamble, is to guarantee the safety and well-being of people in their societies. Hence, it is necessary to represent them in times of necessity and to behave as their surrogate towards the international community. This orientation will solidify international respect for the ICC as an independent judicial institution and lead people entangled in violent situations. The ICJ's principal beneficiaries often turn to the ICC for a legitimate settlement of international disputes and for prosecuting international criminals.[121]

To explain, the Court is a means to serve ICJ principles, among which is crime prevention. The ICC is not officially designed to address the war's prevention, end, or post-conflict process. Instead, it aims to counter specific acts of atrocity "regardless of the context in which they occur". In criminology, deterrence means "omission of a criminal act because of the fear of sanctions or punishment", *puniter, ne peccetur*, or "punishment so there will be no crime".[122] This type of deterrence is rooted in the presumption that "would-be criminals weigh the potential benefits of committing [a] crime against the potential costs of being punished for the crime". The calculation is affected by "the

[116] deGUZMAN, *supra* note 107 at 313.

[117] See Sections II and III(C).

[118] Silvia BORELLI and Simon OLLESON, "Obligations Relating to Human Rights and Humanitarian Law" 1177 at 1184, and Charles LEBEN, "Obligations Relating to the Use of Force and Arising from Peremptory Norms of International Law" in James CRAWFORD, Alain PELLET and Simon OLLESON, eds, *The Law of International Responsibility* (Oxford University Press, 2010) 1198 at 1198; Case of Lašva Valley (The Prosecutor v. Kupreškić et al.), Judgment, [1995] ICTY-95-16-T, Trial Chamber, 14 January 2000, §§ 201–4; Case of Lašva Valley (The Prosecutor v. Anto Furundžija), Judgment, [1995] ICTY-95-17/1, Trial Chamber, 10 December 1998, §§ 142, 145–6; *Draft Articles on the Responsibility of International Organizations, with Commentaries*, International Law Commission (UN Doc. A/66/10, 2011) Art. 58; *Report of the International Law on the Work of Its Forty-Eighth Session, 6 May – 26 July 1996*, International Law Commission (UN Doc. A/51/10, 1996) 23.

[119] NOUWEN and WERNER, *supra* note 69 at 169. See also Reike, *supra* note 14 at 25–6, 28.

[120] Frederic MÉGRET, "ICC, R2P, and the International Community's Evolving Interventionist Toolkit" (2010) 21 Finish Yearbook of International Law at 27–8; RANGELOV, *supra* note 61 at 24–5; Schabas, *supra* note 69 at 839.

[121] MERON, *supra* note 94 at 359.

[122] DANCY, *supra* note 55 at 628.

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certainty, severity and swiftness of punishment in the legal system".[123] Unfortunately, this interpretation of deterrence is not helpful to ICC for two main reasons. The first is that the plausibility of punishment by the ICC is "far from certain and very slow". The second reason is that "atrocity criminals are exceptional, highly risk-acceptant actors unlikely to worry more about international criminal punishment than the constant local dangers they face". For leaders ordering the commission of crimes against humanity, the presence of "a far-removed, lurching court in the Hague" simply cannot put off their criminal will.[124] Generally, leaders and commanders order or acquiesce in the perpetration of crimes to gain or maintain power. This usually means that when threatened by international prosecution, "the alternatives are either to surrender and be sentenced or to continue the violence through which they maintain their hold on power". Naturally, most of them prefer the latter.[125]

Moreover, it has been argued that the ICC's contribution to preventing future atrocity crimes through timely intervention is potentially great.[126] Prevention is premised on the assumption of the future victims of a crime. It could even consider the significance of the apparatus necessary to prevent future crimes, which is precisely the role of the government in each national society. Thus, following this understanding, the Court must protect those governmental institutions necessary for forging partnerships, protecting their people, and implementing ICJ principles during a conflict and its aftermath. In this regard, it is not an exaggeration to claim that serving the people of each society in the throes of war in complicated scenarios such as Libya is meant to follow a preventive rather than a retributive approach. The Court's two-decade trajectory does not provide sufficient testimony to the theorized argument. The individual perpetrator punishment approach surpasses other non-retributive measures that the Court might have taken in different situations.[127]

To exemplify, the rupture between the Court's punitive approach and the reality of peoples' needs can never be better explained than the research conducted in the Democratic Republic of the Congo (DRC). In one survey, when the Congolese were asked what should happen to those who committed international crimes, 69 per cent of the victims surveyed confirmed that the perpetrators should be tried and punished. However, when researchers asked the victims to list their priorities for their government, "justice" occupied only the lowest of their immediate priorities. In eastern DRC, only 1 per cent of the survey victims answered that the government should direct immediate attention to prosecuting criminals.[128]

The ICC may have followed a retributive path to the Libyan situation without difficulty. Nevertheless, regarding the limitations the Court faces in cases like Libya, the focus on punishment of the individuals was justified by ending the impunity principle of the ICJ, which gives rise to doubts among international commentators as to whether mere punishment could be considered a right and adequate response to deal with the criminal events given their "enormous moral, historical and political significance". Considering

[123] *Ibid.*, at 629–30.

[124] *Ibid.*, at 630.

[125] BUITELAAR, supra note 118 at 294.

[126] Hector OLáSOLO, "The Role of the International Criminal Court in Preventing Atrocity Crimes Through Timely Intervention: From the Humanitarian Intervention Doctrine and Ex Post Facto Judicial Institutions to the Notion of Responsibility to Protect and the Preventative Role of the International Criminal Court", Inaugural Lecture as Chair in International Criminal Law and International Criminal Procedure, Utrecht University, delivered on 18 October 2010 at 25.

[127] Laurel FLETCHER, "Refracted Justice: The Imagined Victim and the International Criminal Court" in DE VOS, KENDALL and STAHN, *supra* note 3 at 305–6.

[128] *Ibid.*, at 321–2.

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the abhorrent collective nature of these crimes and the way ordinary people find themselves in the throes of a violent conflict and have to choose sides, whether or not punishment can be regarded as the best way of prevention becomes highly questionable.[129] As a result, the strategy to end impunities at the likely expense of disregarding the principles the ICC has been founded upon does not seem wise or efficient. It has been argued that the goal with the highest expected value is preventing the commission of international crimes. This is because of the enormous and destructive nature of the violation of international criminal law and, particularly, the enormous societal costs associated with those crimes.[130] But the following questions remain: How will necessary prevention be realized, and who are the real interlocutors of law in situations like Libya?

The late Justice William J. Brennan of the US Supreme Court once said, "the law is not an end in itself, nor does it provide ends. It is pre-eminently a means to serve what society thinks is right."[131] This applies to the ICC Statute too. What does Libyan society think is right? For an independent Court primarily responsible for protecting people, including preventing and deterring future crimes against them, the principle of sovereignty and its concomitant peaceful resolution of the conflict come first. This is because every society needs a centralized functioning government to procure requisite peace and security. Otherwise, regime change and its consequent failed state status can only pave the path to more criminal activities. The Court's best strategy would have been to prevent future crimes and victims or avoid having Libyan society fall victim to a failed state situation facilitated by court intervention. Sadly, many human rights organizations and NGOs share this biased retributive approach,[132] but the Court must be independent of their demands.

D. Peace v. Justice Dilemma: Preventing Future Crimes and Serving Constituent People

Officially, the position of the Court has been to prioritize justice over peace. In the Statute itself, peace is mentioned only once in the preamble. A 2007 policy paper of the Office of The Prosecutor, confirmed by Fatou Bensouda, Moreno-Ocampo's successor, states that peace is not part of the Prosecutor's mandate and that "any political or security initiative" must conform to the Rome Statute in a justice enforcer sense of view.[133] This approach, referred to as "legalism", seeks to detach other extralegal factors and interests from the law and claims to emancipate the ICJ from *realpolitik*.[134] However, protection from international crimes does not necessarily coincide with an interest in punishment.[135] Article 16 of the Rome Statute recognizes that a prosecution can have a dangerous effect on the peacebuilding process regarding the deferral of prosecutions.

[129] KOSKENNIEMI, *supra* note 65 at 2–3, 7–9.

[130] Stuart FORD, "Can the International Criminal Court Succeed? An Analysis of the Empirical Evidence of Violence Prevention" (2020) 43 Loyola of Los Angeles International and Comparative Law Review at 106–8. See also Stuart FORD, "A Hierarchy of the Goals of International Criminal Courts" (2018) 27 Minnesota Journal of International Law 179 at 182.

[131] Justice William BRENNAN, "Remarks: What's Ahead for the New Lawyer?" (1986) 47 University of Pittsburgh Law Review 705 at 708.

[132] BUITELAAR, *supra* note 118 at 285.

[133] "Office of the Prosecutor, Policy Paper on the Interests of Justice", Policy Paper, 1 September 2007 at 4; "Office of the Prosecutor, Policy Paper on case selection and prioritisation", Policy Paper, 15 September 2016 at 12.

[134] RODMAN, *supra* note 62 at 439; Mégret, *supra* note 123 at 16; Daphna SHRAGA, "Politics and Justice: The Role of the Security Council", in Antonio CASSESE, ed., *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 168 at 174; Judith SHKLAR, *Legalism: Law, Morals and Political Trials* (Harvard University Press, 1986) at 122–3. See also KOSKENNIEMI, *supra* note 88 at 110–1.

[135] STAHN, *supra* note 60 at 967.

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Therefore, the tension between conflict resolution (peace) and criminal accountability (justice) is a reality that needs great attention.[136] In this regard, peace is undoubtedly one of the primary concerns of international law. However, detaching the ICJ from its more political connotation[137] can risk the danger of regime change and, ironically, invite more *realpolitik* or increase international crime – as witnessed in Libya. Therefore, a legal middle ground must be found.

E. Peacemaking Mandate of the ICC

As the ICC needs to follow and tailor its jurisdiction to assist people entangled in the targeted society, it is possible to argue that the ICC's jurisdiction needs to come close to the UN regime of law since the latter was designed first and foremost to protect the principle of sovereignty. The UN Charter regime is built upon restoring and maintaining international peace and security based on sovereignty. In contrast, the ICC promotes the ICJ agenda based on individual criminal accountability. In particular, the referral cases lend new urgency to the mentioned argument as both regimes seem to coexist naturally. To garner the requisite peace discussed above, the ICC must respect the principle of sovereignty as the bedrock of the international legal system. But this principle, cited above, has been mentioned in the preamble of the Statute only *en passant* without accentuation.[138] As a result, the ICJ promises to come close to the regime of the UN, in which the principle of sovereignty is accentuated. Moreover, General Assembly resolutions recognize the role of the Court to "achieve sustainable peace, in accordance with international law and the purposes and principles of the Charter".[139]

Be that as it may, the Court cannot apply the UN Charter automatically and needs a legally solid foundation to respond to the mentioned necessity. Regarding the provisions of the Rome Statute, there are two paths the Court might take.

1. Article 21

First, Article 21(1)(b) of the Rome Statute puts forward a solution where it confirms the applicability of "treaties, principles and rules of international law",[140] which justifies the Charter's involvement. As a result, the Court shall determine whether the Security Council has preliminarily determined the existence of a threat to the peace, a breach of the peace, or an act of aggression as provided for in Article 39 of the Charter. Since the Security Council's discretionary power on the situation, described in Article 39, is not "totally unfettered", the Court should, therefore, determine that the Security Council has acted according to the purposes and principles of the Charter. The Court, for instance, should determine if the Security Council's resolution of the referral in

[136] Darryl ROBINSON, "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court" (2003) 14(3) European Journal of International Law 481 at 484; Lutz OETTE, "Peace and Justice, or Neither? The Repercussions of the *al-Bashir* Case for International Criminal Justice in Africa and Beyond" (2010) 8(2) Journal of International Criminal Justice 345 at 350; MéGRET, *supra* note 118 at 9–10; CONTARINO, NEGRóN-GONZALES and MASON, *supra* note 10 at 307; Stahn, *supra* note 3 at 51–2. To trigger Article 16, the Security Council must take the initiative otherwise this legal possibility remains deactivated. Since this research is focused on the independent practice of the ICC to further ICJ principles, Article 16 remains out of this research's scope.

[137] Hersch LAUTERPACHT, *The Function of Law in the International Community*, Rev. Ed. (United States of America: Oxford University Press, 2011) at 446.

[138] ICCSt, *supra* note 2, Preamble.

[139] Report of the International Criminal Court, UNGA A/Res 61/15, UN Doc A/RES/61/15 (20 November 2006) at 2.

[140] ICCSt, *supra* note 2 at Art. 21(1)(b).

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that situation "is in accordance with its settled practice" and the common understanding of the UN Charter.[141] This implies that the Court has permission to interpret the Security Council's referral and supervise any resolution implemented, which can pave a path for better enforcement and non-partisan fulfilment of the ICJ agenda. Furthermore, the Statute's preamble reaffirms:

> the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.[142]

It continues to state that the Court is determined "to establish an *independent* permanent International Criminal Court in relationship with the United Nations system" (*emphasis added*).[143] This phrase confirms the importance of the Court's independence, its relationships with peace, and the principle of sovereignty highlighted in the Charter. Moreover, this account implies that the ICC can supervise and indirectly judge the Security Council's decisions and how they are implemented, but only if the former maintains its independence and finds its proper constituency.[144]

2. Article 53

Second, the Rome Statute formulates a criterion of "interests of justice" to give discretion to the Prosecutor to reject the initiation of or halt an investigation. Article 53(1) states, "The Prosecutor may in some circumstances decline to prosecute on the grounds that it would not serve the interests of justice."[145] More specifically, Article 53(1)(c) requires the Prosecutor to consider whether, in taking into account the "gravity of the crime" and the "interests of victims", there are, nonetheless, substantial reasons to believe that an investigation would not serve the interests of justice.[146] Again, this grants prosecutorial discretion, which needs further explanation.

Prosecutorial discretion is the power held by the Office of the Prosecutor (OTP) to exercise selectivity in the choice of occasions, including both situations and specific cases in a given situation for the Statute's enforcement.[147] In this context, selectivity is the "discretionary power to do nothing about a case in which enforcement would be clearly justified".[148] More fundamentally, discretion is meant to be "the faculty of deciding or determining in accordance with circumstances and what seems just, right, equitable,

[141] Luigi CONDORELLI and Santiago VILLALPANDO, "Referral and Deferral by the Security Council", in Antonio CASSESE, Paolo GAETA, and John JONES, eds., *The Rome Statute of the International Criminal Court* (Oxford University Press, 2002) 627 at 647.

[142] ICCSt, *supra* note 2, Preamble. Additionally, the Relationship Agreement between the ICC and the UN under Article 2 of Principles certainly binds the Court to act in conformity with the purposes and the principles of the UN Charter as reaffirmed in the preamble of the Statute too. See *Negotiated Relationship Agreement between the International Criminal Court and the United Nations* under Article 2.

[143] *Ibid*.

[144] CONDORELLI and VILLALPANDO, *supra* note 139 at 578. See also Vera GOWLAND-DEBBAS, "The Relationship between the Security Council and the Projected International Criminal Court" (1998) 3(1) Journal of Armed Conflict 97 at 112.

[145] ICCSt, *supra* note 2 at Art. 53(1).

[146] *Ibid*., at Art. 53(1)(c)

[147] Hitomi TAKEMURA, "Prosecutorial Discretion in International Criminal Justice: Between Fragmentation and Unification", in STAHN, van den HERIK, *supra* note 92 at 635.

[148] Kenneth DAVIS, *Discretionary Justice, A Preliminary Inquiry* (Louisiana State University Press, 1969) at 163. See also PUES, *supra* note 56 at 9.

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and reasonable in those circumstances".[149] The nature and consequences of international crimes and the limited resources available to the ICC "may necessitate and justify selective justice". This concept appears in various legal systems "where it is generally used to acknowledge the need for discretion and the inability of legal texts to codify answers for difficult issues", as discretion is also necessary to respond to highly politicized cases and situations.[150] Thus, the most urgent rationale for prosecutorial discretion is to protect prosecutorial independence,[151] which is why the term remains undefined.[152]

Notwithstanding Article 53, the Statute lays the foundations for interpreting the controversial concept of the interests of victims; the gravity of the crimes; and, at the prosecutorial level, the age or infirmity of the alleged perpetrators or the role they had in the crime. It should be noted that this list is not exhaustive; the drafters intentionally opted for practical ambiguity of the concept to allow for broad interpretation. The term "in the interests of justice" shall require the Prosecutor to take account of the broader interests not expressly mentioned in the Rome Statute, including the potential ramifications of an investigation into the state's political environment over which the Court is exercising jurisdiction.[153] Also, the criterion allows for dynamic assessments and enables the Prosecutor to adjust to changing realities of complicated situations. To do so allows them to constantly evaluate and adapt their strategy of invoking the ICJ.[154] This gives the Court a multipurpose tool, allowing a case-by-case approach adjustable to every situation of complication and idiosyncrasy.[155] The participants of the Rome Conference preferred to maintain it undefined, to be triggered in complicated cases when there was no straightforward answer.[156] Schabas (impliedly) and Pues (expressly) confirm this practicableness of having a broad interpretation.[157] However, although the discretion seems broad, it is not unfettered. The goals and principles of the Statute pose certain legal constraints on the power granted to the Prosecutor.[158]

Dworkin had a very helpful metaphor: "discretion is the hole in a doughnut", where the dough is considered to be the legal framework limiting and determining the hole and the space for discretionary manoeuvre in a system. In this interpretation, even "strong discretion" is conditional as it is all located within the legal system.[159] Therefore, the Prosecutor should focus efforts so that the application of prosecutorial discretion actively contributes to the objects and principles expressed in the Statute, as those are the guidelines that connect the relevant constituent mentioned above – the people of each society in conflict with the ICC.[160]

[149] The Oxford Companion to Law, quoted in TAKEMURA, *supra* note 150 at 635.

[150] PUES, *supra* note 56 at 16, 145.

[151] TAKEMURA, *supra* note 150 at 636; Brubacher, *supra* note 116 at 71–2.

[152] SCHABAS, *supra* note 69 at 835–6.

[153] BRUBACHER, *supra* note 114 at 81.

[154] Jo STIGEN, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Leiden: Martinus Nijhoff, 2008) at 484.

[155] PUES, *supra* note 56 at 136.

[156] SCHABAS, *supra* note 69 at 836–7.

[157] William SCHABAS, "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court" (2008) 6(4) Journal of International Criminal Justice 761 at 748; Pues, *supra* note 56 at 136.

[158] Luc CÔTÉ, "Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law" (2005) 3(1) Journal of International Criminal Justice 162 at 163.

[159] Pues, *supra* 56 note 31 at 12. See also Ronald DWORKIN, *Taking Rights Seriously* (Harvard University Press, 1977) at 31.

[160] Pues, *supra* note 56 at 14–5. These objects are relevant to the analysis here, enumerated in the Rome Statute Preamble: Peace and security of mankind, prevention of crimes, independence of the Court and, impliedly, the principle of sovereignty and peace.

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The objective constraint relevant to the application of the ICJ can, therefore, be the promise of restoring/making peace, respecting the principle of sovereignty, and understanding peace as the backbone of public international law based on the UN Charter, which, in the preamble of the Statute, is to serve the interests of the peoples entangled in a conflict.

Generally speaking, despite the above argument, the policy papers issued by the Office of the Prosecutor do not support this interpretation as they prefer to separate the interests of justice from the interests of peace, noting that "the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions".[161] This is because the OTP has a policy that rests on a presumption that favours investigation, prosecution, and punishment.[162] This "legalism" approach is seemingly more aligned with the ICJ but, in reality, works to the detriment of the Court's independence and efficiency, as seen in Libya. Therefore, in light of mentioned discretionary selection, the interpretive presumption in favour of mere investigation and prosecution rings hollow and seems contradictory.[163]

Curiously, the Rome Statute distinguishes between investigation and prosecution and nowhere is this more transparent than in the first two paragraphs of Article 53. Paragraph 1 explains the Prosecutor's decision to "initiate an investigation". It refers to a "situation", although "potential cases" remain part of the landscape. However, Paragraph 2 is triggered after the decision to "initiate an investigation", referring to the Prosecutor's decision not to proceed with a prosecution. Indeed, it is possible at each stage for the Prosecutor to not proceed with a case without first removing the situation referred to from the Court's order.[164] By implication, a referral remains activated, but the specific case is suspended, capable of reactivation at any time in light of new facts, information, or necessity.

Generally, Article 53 juxtaposes several ICJ punishment and prevention considerations under the expedient notion of the "interests of justice", indicating that the latter prerogative might trump the former. Thus, it is possible to conclude that the idea of interests of justice is a "relatively broad concept" that could be interpreted to serve a peace imperative[165] and bring the Rome Statute closer to the UN Charter. This should be applied wisely in the necessary circumstances and should, exclusively, become a routine approach of the Court but only if it provides more protection for its constituents, with the caveat that its application should be limited to satisfy the criterion of "drastic necessity".[166] As a matter of procedure, to restrict its application, it must be approved by the Prosecutor and the PTC jointly rather than by the Prosecutor alone.[167]

[161] Policy Paper on the Interests of Justice, *supra* note 136 at 5, 2–9.

[162] Pues, *supra* note 56 at 132–3; Policy Paper on the Interests of Justice, *supra* note 136 at 1, 5. For the first time in the history of the ICC jurisprudence, the PTC II referred in its Afghanistan decision to the concept of interests of justice, although beyond Article 53 domain. Interestingly, in this sole case, the PTC II took the initiative and the Prosecutor herself did not make any submission on having recourse to the interests of justice. See *Situation in the Islamic Republic of Afghanistan*, Decision under Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Pre-Trial Chamber II, ICC-02/17-33, 12 April 2019, para. 53.

[163] PUES, *supra* note 56 at 134.

[164] SCHABAS, *supra* note 69 at 833; Pues, *supra* note 56 at 140–1, 144.

[165] ROBINSON, *supra* note 139 at 488.

[166] *Ibid*., at 495–6, 487–8. See also Pues, *supra* note 56 at 146; Schabas, *supra* note 64 at 835; Carlos NINO, "The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina" (1991) 100(8) Yale Law Journal 2619 at 2620; Jose ZALAQUETT, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations" (1992) 43(6) Hastings Law Journal at 1425–38; Payam AKHAYAN, "Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism" (2009) 31(3) Human Rights Quarterly 624 at 633.

[167] ICCSt, *supra* note 2 at Art. 53(3)(a)-(b).

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3. Overall assessment

Article 21(1)(b) is considered an external path linking the Rome Statute directly to the application of the Charter. Although, in contrast, the concept of interests of justice is more internal, the concept is supposed to reconcile the mentioned rigidity of legalism and the necessity of peace.[168] Indeed, these two paths provide legal opportunities for the ICC to integrate the definition of and commitment to peace with the relevant understanding of the UN Charter law within its jurisdiction. It is not far from a truism to express that the reason behind the mentioned Articles is to guarantee the independence of the Court in complex scenarios.[169] Accordingly, the ICC must direct the ICJ's promise of the Rome Statute towards conflict resolution and peacemaking mandates.[170] Furthermore, the study suggests that providing the Court with the basis to work independently and effectively requires the integration of peacemaking into the jurisprudence of the ICC; peace is supposed to be the best guarantee of the Court's independence to serve its constituents simultaneously.

IV. CONCLUDING REMARK: CONSTITUENT INDEPENDENT COURT IN LIBYA

The ICC's jurisprudence is young and evolving and is still in the process of trial and error. Nevertheless, the way it responds to different situations and the precedent it sets plays a crucial role in the future of this international institution, its legitimacy, and its enforcement. Therefore, the questions underpinning this article are: What has the Court set as a precedent in the case of Libya, and what could they have set? So far, the Libyan precedent seems vague and contradictory or is not concrete.

Generally speaking, any position the ICC takes "seems constantly vulnerable to justifiable counter-arguments".[171] The indeterminacy originates essentially from the "enterprise of law", which, at the same time, "claims to constrain power" and yet "reflects and depends upon power".[172] This dyadic contradiction is an inherent characteristic of the law itself: it is at the same time "descriptive" and "prescriptive", so it sits astride "is and ought". This nature of law cannot be eradicated.[173] Against this backdrop, Kant provides the famous indeterminate condition of law. He insists that mere legal rules do not declare the conditions of their application concretely. To do so, "judgement" is necessary,[174] and "judgement is located in the institutional act of applying the law in one way rather than another, choosing one among many alternative meanings offered by the available vocabulary".[175] To make this indeterminacy more complicated, international law plays a role of complication in international relations, as the latter described more with *realpolitik*; thus, any decision the Court makes is prone to counterargument and criticism, but the ICC must act despite this.

Regarding the ICC, the mentioned indeterminacy divulges itself within the text of the Statute due to the fundamentally contradictory goals assigned to it, particularly in the preamble, which enumerates various ICJ principles. According to Robinson, awareness

[168] Frank MEYER, "Complementing Complementarity" (2006) 6(4) International Criminal Law Review 549 at 579–80.

[169] SCHABAS, *supra* note 69 at 830.

[170] RODMAN, *supra* note 62 at 439.

[171] Martti KOSKENNIEMI, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005) at 16.

[172] ROBINSON, *supra* note 5 at 325–6.

[173] *Ibid*., at 344; KOSKENNIEMI, *supra* note 175 at 18.

[174] KOSKENNIEMI, *supra* note 93 at 413.

[175] *Ibid*., at 414.

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of these structural contradictions would help the Court toward greater efficiency. If the Court acknowledges that "all decisions are by some metric 'flawed'", it can take the analysis to the next level: "what to do with the admittedly-flawed options"?[176] The ICC must provide a "framework of evaluation" to find the right path in each situation it intervenes in.[177] The framework the Court desires cannot be achieved before establishing the right constituency(ies) of the Court to implement the principles of ICJ in every scenario. However, according to the research, this evaluation framework cannot be a singular one applicable to every divergent situation the Court has to intervene in. Instead, there must be various frameworks appropriate to each scenario.

The Court itself is the real contender to choose between these conflicting constituencies and deciding which constituency is appropriate to invoke in each situation of complication; this is the real meaning of independence the Court needs to consider,[178] and it is only through this process of action that the ICC will be empowered to set a reliable legal precedent contributing to the development of its young and evolving jurisprudence. The central hypothesis of this research is that constituency building is a key part of the Court's search for independence. This can help legitimize the Court as, in recent years, its identity and functionality have been severely criticized.[179]

For Libya, the Court, from the start, had difficulty in deciding between a view of the conflict as entailing primarily a humanitarian crisis, the perpetration of the crimes by the tyrant, a regional destabilization, and a domestic political revolution.[180] Needing proper constituency, the Court merely followed the prosecution of the ringleaders instead of considering other more complicated factors and actors. Notably, in the referral cases when the risk of arbitrary *realpolitik* is high, and the cooperation of the target state is absent, this strategy only helps the Court delegitimize and depend on the *realpolitik* at a whim instead of following the ICJ promise in the Statute. Therefore, the one-sided (biased) approach of the ICC contributed to facilitating regime change – put simply, military and judicial interventions and the quest for regime change never allowed peace negotiations to gain momentum. Hence, in cases such as Libya, the Prosecutor must be cognizant of having a timely strategy for deciding when and in which circumstances to issue an indictment or even accept the admissibility of the application. This proposed jurisprudential approach assists the Court in determining the trigger of its jurisdiction independently, without blindly following the military intervention momentum and *realpolitik*. In Libya, to avoid causing a failed state was a jurisprudential compass; the Court could have avoided assisting the controversial regime change. The principle of sovereignty is the bedrock of contemporary international law. Its dysfunction can easily satisfy the blueprint of drastic necessity discussed before, as the power vacuum left after a regime change results in more crimes perpetrated to the detriment of Libyans, who are the principal constituency of the Court.

Be that as it may, judicial intervention in Libya could have been stalled until the termination of the military intervention and the beginning of the settlement of the conflict. Meanwhile, the Court might have signalled its firm commitment to prosecuting high-profile criminals by wielding its jurisdiction as a "Sword of Damocles" over the parties to the conflict. The judicial arm of the intervention could have been waiting to trigger its authority, providing the interveners, the Gaddafi government or the

[176] ROBINSON, *supra* note 5 at 344.
[177] *Ibid*., at 346–7.
[178] MÉGRET, *supra* note 70 at 45.
[179] *Ibid*., at 43.
[180] *Ibid*., at 34–6.

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NTC, with a peace negotiation process. The above proposition could have directed all parties to seriously consider establishing a ceasefire alongside the no-fly zone, as requested by Resolution 1973, and communicate their readiness for peace negotiations. Moreover, even when the indictments were issued, the Court could have made offers to the indictees and the international community to remove the warrants if a final peace agreement between the Gaddafi government and the NTC was signed and implemented. This position could have been justified through the trigger of Article 53(1)(c) and by stating that the Court commits itself to respect the principle of sovereignty and the maintenance of international peace and security in the Charter according to Article 21(1)(b).

Notwithstanding the Court's initial speedy and proactive intervention, it remained silent on the recent widespread crimes committed in Libyan territory. Notably, the Court preferred to stand idle and not take action against warlord Haftar's army, their crimes, and his claim to Tripoli and Libya contrary to the international community's requests. It further ignored the foreign states' proxy rivalries haunting Libya right now.[181] Worse still, both Haftar and Saif al-Islam Gaddafi declared their candidacy for the upcoming (but postponed) presidential election,[182] which makes a mockery of the ICJ promise of the ICC and every criminal activity attributable to them.

Again, considering how many peace talks have been held in recent years, and most recently the peace talk held in Geneva at the time of this work's completion,[183] the ICC is still missing a proper understanding of the constituency it might represent and prefers to ignore its possible peace enforcement obligations and dispute settlement capabilities altogether. This inactivity alone acknowledges the ambivalence that informed the whole approach of the Court towards the Libyan situation and, more generally, warns us that the same scenario might happen in similar situations in the future. It further emphasizes the urgency of the abovementioned suggestions: an independent Court serving the people is a peacemaking one.

A key concluding point also needs to be stressed. This work does not claim that the ICC alone made the regime change in Libya possible or that the Libyan conflict would have been resolved peacefully without ICC intervention. The critical point – and perhaps an often ignored one – is that the ICC has a general obligation to prevent future crimes, among the other ICJ purposes mentioned in its preamble. This international institution cannot exclusively prioritize one purpose of its raison d'être more than others; it is prone to be instrumentalized by *realpolitik*, especially considering the practical limitations the Court suffers from.

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[181] "Khalifa Haftar: The Libyan general with big ambitions" *BBC News* (8 April 2019) online: BBC News https://www.bbc.com/news/world-africa-27492354; "Libya: Lawyers to press ICC to probe Khalifa Haftar" *Al Jazeera* (14 November 2017) online: Al Jazeera https://www.aljazeera.com/videos/2017/11/14/libya-lawyers-to-press-icc-to-probe-khalifa-haftar/?gb=true; BOWEN, *supra* note 80; ABDELHADI, *supra* note 72.

[182] "Libya elections: Presidential poll postponed" *BBC News* (24 December 2021) online: BBC News https://www.bbc.com/news/world-africa-59755677.

[183] "Libya talks in Geneva end without breakthrough" *Reuters* (30 June 2022) online: Reuters https://www.reuters.com/world/africa/libya-talks-geneva-end-without-breakthrough-2022-06-30/.

Heidarali TEIMOURI I am an Iranian, born in 1983. I graduated with BA Political Science from Shahid Beheshti University in 2006. Then in 2006, I moved to the realm of law and obtained an LLM in Public Law from Shahid Beheshti University. In 2011 I graduated from the University of Groningen and obtained an LLM in International Law and Law of International Organisations. Then, in 2017 I finished my thesis entitled: Responsibility to Protect and International Intervention: A Case Study of Libya, supervised by Professor Surya Subedi, and Obtained a Ph.D. in Law. Currently, I am a lecturer in international law at the University of Tehran, College of Farabi, Department of Law, since 2019. My main interests of research are: International Law of the Armed Conflict and the Use of Force, History of International Law, Philosophical and Theoretical Development of International Law, Creation and Development of Nation-States in International Legal System, and Internationally Criminal Law.

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