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Cooperative Justice: Understanding the Future of the International Criminal Court Through Its Involvement in Libya

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COOPERATIVE JUSTICE: UNDERSTANDING THE FUTURE OF THE INTERNATIONAL CRIMINAL COURT THROUGH ITS INVOLVEMENT IN LIBYA

*Brendan Leanos**

In February 2011, the Libyan government began systematically and ruthlessly attacking its own citizens in an attempt to put down a political uprising. These attacks escalated into a full-fledged armed conflict between the government and rebel militias that engulfed the country for several months. With the old regime finally overthrown, and a new transitional government now in place, Libya looks to mend itself and to undo decades of oppression.

Although the conflict is officially over, the world's attention remains on Libya as the new government searches for ways to address the significant challenges left behind by the revolution. One such challenge is bringing members of the old regime to justice for crimes they committed both before and during the revolution. As a start to this process, the government has detained Saif Al-Islam Gaddafi, Muammar Gaddafi's son and former de facto prime minister, with the hope of trying him for crimes against humanity. But because Libya shares jurisdiction over Saif with the International Criminal Court (ICC), it is unclear what that trial will look like or who will conduct it. This Comment seeks to help clarify how justice should be pursued in light of the ICC's governing principles and Libya's present circumstances.

This Comment first describes the evolution of international criminal justice over the past century, which culminated in the creation of the ICC. It then explores the ICC's fundamental principles and goals, and offers different ways to conceptualize them. Finally, this Comment observes some of the domestic issues that Libya faces and concludes that, given those issues, the ICC should work cooperatively with Libya to try Saif in his home country.

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TABLE OF CONTENTS

INTRODUCTION.....	2269
I. THE ROAD TO THE INTERNATIONAL CRIMINAL COURT.....	2271
A. <i>Historical Development of International Criminal Justice</i>	2271
1. International Criminal Tribunals.....	2272
2. Hybrid Tribunals.....	2274
3. Domestic Courts.....	2275
B. <i>The ICC</i>	2276
1. Creating the ICC	2277
2. The Rome Statute.....	2278
3. The Principle of Complementarity.....	2279
a. <i>The Theoretical and Practical Foundations of the</i> <i>Principle of Complementarity</i>	2279
b. <i>Manifestations of the Principle of Complementarity</i> <i>in the Rome Statute</i>	2282
i. Jurisdiction	2282
ii. Admissibility	2283
iii. Procedural Mechanisms	2286
II. EXPLORING THE ICC’S FOUNDING PRINCIPLES AND GOALS.....	2287
A. <i>Competing Conceptualizations of Complementarity</i>	2288
1. “Classic” (Passive) Complementarity.....	2288
2. Proactive Complementarity	2289
B. <i>The Court’s Quest to End Impunity</i>	2291
III. LIBYA.....	2293
A. <i>Libya’s Current Political and Legal Landscape</i>	2294
B. <i>The ICC’s Involvement in Libya</i>	2296
IV. RECONCILING THE SITUATION IN LIBYA WITH THE ICC’S GOALS AND UNDERLYING PRINCIPLES	2298
A. <i>The Admissibility of Saif’s Case</i>	2299
B. <i>The Decision of Where and How to Try Saif Should Be</i> <i>Governed by the Court’s Founding Principles and Goals,</i> <i>Not by the Case’s Admissibility</i>	2300
1. The Court’s Ultimate Goals Are Most Effectively Achieved Through the Concept of Proactive Complementarity.....	2301
2. Using the Concept of Proactive Complementarity, the Court Should Ensure a Fair Trial for Saif in Libya with the Help and Involvement of Libyan Authorities.....	2302
CONCLUSION	2304

INTRODUCTION

In February 2011, the people of Libya rose up against their government.¹ That government, led by Muammar Gaddafi (Gaddafi),² responded with anger, violence, and mass murder.³ For the months that followed, armed conflict pervaded Libya and threw the country into chaos.⁴ Ultimately, on August 23, 2011, rebel fighters gained control of the capital city, Tripoli,⁵ and with it, the nation.⁶ After capturing and killing their former ruler a few months later,⁷ Libyans finally came face to face with the opportunity they so desired—an opportunity to turn the page on their oppressed past and to begin a new chapter as a free and democratic society.⁸

But Libya still must reckon with its past. Saif Al-Islam Gaddafi (Saif) and Abdulla Al-Senussi (Al-Senussi), two prominent members of Gaddafi's regime,⁹ face charges before the International Criminal Court (ICC or Court) for crimes against humanity for their role in the government's

1. See HUMAN RIGHTS WATCH, WORLD REPORT 2012: EVENTS OF 2011, at 595 (2012). The uprising began with peaceful protests in Benghazi, Libya's second-largest city, and quickly spread west to other large cities throughout the country. *Id.*

2. Gaddafi's name can be spelled in multiple ways. For instance, "Gadhafi," "Qaddafi," and "Qadhafi" are all acceptable variations on the spelling. This Comment follows the ICC's spelling.

3. See *Prosecutor v. Gaddafi*, Case No. ICC-01/11, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ¶ 20 (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1101337.pdf> ("[I]t appears from the Materials that people who opposed [Gaddafi's] regime [during the uprising] . . . as well as members of their families, were arrested, tortured and in some instances even disappeared."); HUMAN RIGHTS WATCH, *supra* note 1, at 595 (observing the government's use of live fire on peaceful protestors as well as the "disappearance of hundreds of people suspected of involvement in anti-government demonstrations").

4. HUMAN RIGHTS WATCH, *supra* note 1, at 596–600 (describing the government attacking civilians with mortars and rockets, laying "perhaps tens of thousands" of land mines, and detaining thousands of people—both revolutionary fighters and civilians—in undisclosed locations to be tortured, raped, and/or killed).

5. *Libya — Revolution and Aftermath*, N.Y. TIMES, <http://topics.nytimes.com/top/news/international/countriesandterritories/libya/index.html> (last updated Mar. 7, 2012).

6. Cf. Karin Laub & Ben Hubbard, *Libya Rebels Overtake Tripoli as Gaddafi Regime Crumbles*, HUFFINGTON POST (Aug. 22, 2011, 2:12 AM), http://www.huffingtonpost.com/2011/08/22/libya-rebels-tripoli_n_932706.html (describing the fall of Tripoli as marking the crumbling of Gaddafi's regime and quoting President Obama, who declared: "The future of Libya is now in the hands of the Libyan people.").

7. Gaddafi was captured and killed on October 20, 2011. *Libya — Revolution and Aftermath*, *supra* note 5. Indications are that rebel fighters executed him after capturing him, and his death is now being investigated. See HUMAN RIGHTS WATCH, *supra* note 1, at 599.

8. See HUMAN RIGHTS WATCH, *supra* note 1, at 601 (describing the opportunity Libyans have to rebuild their country).

9. The ICC notes that even though Saif, who is the late Gaddafi's son, appeared to lack any official position in the regime, he was essentially "Gaddafi's unspoken successor and the most influential person within his inner circle," operating as the "*de facto* Prime Minister." *Prosecutor v. Gaddafi*, Case No. ICC-01/11, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ¶ 72 (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1101337.pdf>. Al-Senussi was Gaddafi's national head of Military Intelligence. *Id.* ¶ 84.

reaction to the 2011 revolts.¹⁰ In addition, they face the prospect of justice at home, in Libyan courts.¹¹ The question of where and how to try these two men for their international crimes—a question that is complicated by the current circumstances in Libya and by the dynamics of the international criminal justice community—is what this Comment seeks to answer.

This Comment also raises several issues that apply more generally to all of the ICC's cases moving forward. These issues get to the heart of what the ICC's central goals are, how it operates to achieve those goals, and, ultimately, its proper place within the international criminal justice community.

The creation of the ICC marked a momentous occasion for the international community—one that promised to redefine international criminal justice, and bring stability to an area of law that has long been unstable.¹² However, the Court—almost ten years old¹³—faces a host of challenges in making those goals a reality. Most notably, the ICC, a static, centralized institution, exists in a world and operates in a discipline that is dynamic and extremely nuanced. The Court's ability to succeed and carry out its mandate therefore depends on its ability to use its founding principles to adapt to the various situations and cases it confronts. As this Comment argues, some of that adaptation will require the ICC to conceptualize those principles more broadly than the way in which the Court's founding statute ostensibly presents them. The current situation in Libya provides an opportunity to explore what this process might look like, and how the Court should think about its mandate moving forward.

Part I of this Comment provides background on the ICC, including its structure, governing principles, and history, as well as its place in the evolution of international criminal justice. Part II analyzes the two most salient features of the ICC—the principle of complementarity and the ultimate goal of ending impunity for the world's most serious crimes—and presents arguments for putting those features into practice. Part III then describes the current political and legal landscape in Libya and introduces the challenge of determining where to prosecute captured members of Gaddafi's regime. Part IV proposes a comprehensive solution to the

10. *See id.* ¶¶ 41–42 (listing the charges against Saif and Al-Senussi for crimes against humanity). The ICC's involvement in these cases, and in the Libyan situation more generally, began when the U.N. Security Council issued Resolution 1970 and referred the situation to the Court. *See* S.C. Res. 1970, ¶ 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011); *see also* INT'L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, FIRST REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UN SECURITY COUNCIL PURSUANT TO UNSCR 1970 (2011), ¶¶ 1, 22 (Apr. 5, 2011), <http://www.icc-cpi.int/NR/rdonlyres/A077E5F8-29B6-4A78-9EAB-A179A105738E/0/UNSCLibyaReportEng04052011.pdf> (discussing the Security Council referral and acknowledging the decision to initiate an investigation in Libya).

11. *See* Prosecution's Submissions on the Prosecutor's Recent Trip to Libya ¶¶ 1–14, *Prosecutor v. Gaddafi*, Case No. ICC-01/11-01/11 (Nov. 25, 2011) [hereinafter *Prosecution's Submissions*], available at <http://www.icc-cpi.int/iccdocs/doc/doc1276955.pdf> (describing procedures the Libyan government has taken to bring Saif to justice).

12. *See infra* note 71 and accompanying text.

13. *See infra* note 91 and accompanying text.

problem that the ICC faces in Libya, concluding that Libya and the ICC should work together to prosecute Saif Al-Islam Gaddafi in Libya. While this solution is narrowly addressed to the Libya situation, it also provides a more general context in which the ICC should consider its work.

I. THE ROAD TO THE INTERNATIONAL CRIMINAL COURT

While the ICC is less than a decade old, the wheels leading to its creation have been in motion for the better part of the past century. Part I of this Comment chronicles the path the international community has taken to the ICC by first describing the institutions that preceded, and formed the jurisprudential basis for, the ICC. It then introduces the ICC and its salient features.

A. *Historical Development of International Criminal Justice*

Over the past century, “millions of human beings [have] perished as a result of genocide, crimes against humanity, war crimes, and other serious crimes under international law.”¹⁴ The global community’s attempt to prosecute crimes under international law¹⁵ is known generally as international criminal justice.¹⁶ Historically, the international criminal justice community has been largely unsuccessful in keeping up with these crimes and the human rights abuses that accompany them.¹⁷ Nevertheless,

14. PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 23 (Stephen Macedo ed., 2001) [hereinafter PRINCETON PRINCIPLES]. The International Institute of Higher Studies in Criminal Sciences, in a comprehensive project designed to assist international organizations and governments in developing “an integrated approach to post-conflict justice,” found that between 92 and 101 million people have been killed as a result of genocide, crimes against humanity, war crimes, slavery, slave-related practices, and torture since 1945. 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE, at xiii, 3 (M. Cherif Bassiouni ed., 2010) [hereinafter PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE].

15. International law is defined as “[t]he legal system governing the relationships between nations; more modernly, the law of international relations, embracing not only nations but also such participants as international organizations and individuals (such as those who invoke their human rights or commit war crimes).” BLACK’S LAW DICTIONARY 892 (9th ed. 2009). For a detailed discussion of how international law developed, see generally Dapo Akande, *Sources of International Criminal Law*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 41, 41–53 (Antonio Cassese ed., 2009). Substantively, there is a direct relationship between international crimes and international human rights, in that international crimes are often considered “gross offences against universal values.” Antonio Cassese, *The Rationale for International Criminal Justice*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra*, at 123, 127.

16. M. Cherif Bassiouni, *International Criminal Justice in Historical Perspective: The Tension Between States’ Interests and the Pursuit of International Justice*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 15, at 131, 131 (defining international criminal justice as “the application of the principle of accountability for certain international crimes, whether before an international or national judicial body”). Bassiouni also states that the general “goals of international criminal justice are to: contribute to peace and reconciliation, provide a remedy to victims and eventually some closure, and to generate prevention through deterrence.” *Id.* at 140.

17. See *Statements of the Presidents of the ICJ and of the International Criminal Tribunals*, in 1 PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 14, at 133, 134

the work of that community, in creating visibility for international criminal justice and giving life to a new kind of global jurisprudence, paved the way for the ICC and the current criminal justice landscape. This section describes that landscape and outlines the institutions and basic ideas that led to its creation.

1. International Criminal Tribunals

The birth of the modern international criminal justice community began with the creation of international criminal tribunals.¹⁸ In general, these tribunals are ad hoc institutions that arise from, and react to, conflicts where serious international crimes and human rights abuses are alleged to have occurred.¹⁹ Ordinarily, these tribunals are temporary, are created by international law statute or treaty, and exist to adjudicate a specific set of crimes arising out of a specific conflict over a specific period of time.²⁰ They also tend to use exclusively international judges and international law in their proceedings.²¹ And while their international features cause the nation from which the conflict arose to lose some of its legal sovereignty, the international community has welcomed international criminal tribunals in exceptional circumstances.²²

In those circumstances, international criminal tribunals are thought to be preferable for a number of reasons. First, when conflicts are severe and atrocities are committed, public resentment may be so strong in the conflict state that a fair trial and certain due process rights would be unavailable to the defendant.²³ Thus, the impartiality of an international judge in an international proceeding is sometimes necessary to protect these interests.²⁴ Second, international criminal tribunals are likely to create more international visibility than purely domestic proceedings, and a greater amount of visibility is thought to help deter future violations and

(observing that until recently, “effective impunity reigned for those who committed genocide, crimes against humanity and serious war crimes”); *Establishment of an International Criminal Court*, U.N. TREATY COLLECTION, <http://untreaty.un.org/cod/icc/general/overview.htm> (last visited Mar. 23, 2012) (“Most perpetrators of war crimes and crimes against humanity throughout history have gone unpunished. . . . [T]he same holds true for the twentieth century.”). José Ayala Lasso, former U.N. High Commissioner for Human Rights, once observed, “[a] person stands a better chance of being tried and judged for killing one human being than for killing 100,000.” *Establishment of an International Criminal Court*, *supra*.

18. Cf. Cassese, *supra* note 15, at 123 (stating that international criminal justice in the modern world is characterized by an increased use of international courts and tribunals).

19. See Florian Jessberger, *International v. National Prosecution of International Crimes*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 15, at 208, 209; see also Akande, *supra* note 15, at 41 (noting the jurisdictional restrictions of three prominent international criminal tribunals).

20. See Jessberger, *supra* note 19, at 209.

21. See Cassese, *supra* note 15, at 127.

22. See Nadia Bernaz & Rémy Prouvèze, *International and Domestic Prosecutions*, in 1 PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 14, at 269, 270.

23. See Cassese, *supra* note 15, at 127.

24. See *id.*

conflicts.²⁵ Third, international crimes “infringe values that are transnational and of concern for the whole world community.”²⁶ Thus, when such crimes are committed, the international community is thought to be the proper community to “pronounce on [them],” and this pronouncement can only truly occur through an international trial.²⁷

Examples of international criminal tribunals in history begin with the International Military Tribunal at Nuremberg (IMTN).²⁸ A product of a multilateral treaty known as the London Agreement, the tribunal was created at the end of World War II and exercised jurisdiction over “‘persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed’ crimes against peace, war crimes and crimes against humanity.”²⁹ It succeeded in prosecuting prominent Nazi officials thanks in part to its novel prohibition on pleading an official position as a defense to criminal liability,³⁰ as well as the defense that crimes were committed as a result of following a superior’s orders.³¹ Due to its “recognition that some crimes [can] be so massive, so egregious, and so abhorrent to all decent people that they could be truly described as crimes . . . against all of humanity,”³² and its commitment to successfully shedding light on those crimes, the IMTN is considered a watershed event for the international criminal justice community.³³

However, after the conclusion of the IMTN and its cousin tribunal in the Pacific, the International Military Tribunal for the Far East,³⁴ international criminal justice did not take another significant step forward until the early 1990s,³⁵ when the U.N. Security Council established two new ad hoc tribunals. The first, created in 1992, was the International Criminal Tribunal for the Former Yugoslavia (ICTY), which was created to address the “ethnic cleansing” that had occurred there beginning in 1991.³⁶ Shortly thereafter, the Security Council set up the International Criminal Tribunal

25. *See id.* (noting that international criminal tribunals will create greater visibility and thus “better contribute to international efforts against impunity”).

26. *Id.*

27. *Id.*

28. *Id.* at 128.

29. Bernaz & Prouvèze, *supra* note 22, at 272 (quoting Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279).

30. Before the IMTN, international law generally dealt only with conduct at the state level, while “[the individuals] who [led] the conduct were protected from culpability under the doctrine of state sovereignty.” *Id.* at 274. In terms of developing the system of international law we have today and enabling that system to prosecute heads of state for gross human rights offenses, *see id.* at 273 & n.12, this aspect of the IMTN was “groundbreaking,” *id.* at 274.

31. *See id.* at 273.

32. Richard Goldstone, Lecture, *International Human Rights at Century’s End*, 15 N.Y.L. SCH. J. HUM. RTS. 241, 244 (1999).

33. *See* Bernaz & Prouvèze, *supra* note 22, at 274.

34. *See id.* at 277–78.

35. *See infra* notes 72–75 and accompanying text (noting that the idea for an international criminal court was first proposed in 1948 but not acted upon for over forty years).

36. Bernaz & Prouvèze, *supra* note 22, at 283–84.

for Rwanda (ICTR) to prosecute those responsible for the 1994 Rwandan genocide.³⁷ Both tribunals still exist today.³⁸

The ICTY and the ICTR were significant to the development of international criminal justice for a number of reasons. First, their very creation reflected a firm and coordinated commitment within the international community to punish gross violators of international criminal law.³⁹ Second, the case law and jurisprudence from these tribunals has helped develop, consolidate, and give shape to international criminal law.⁴⁰ Third, and perhaps most important, the success⁴¹ of these institutions has proven that international criminal justice is more than just a dream, and that purposeful international courts can have a real impact.⁴²

2. Hybrid Tribunals

A more recent development in international criminal justice is internationalized, or “hybrid,” tribunals. Like international criminal tribunals, these are ad hoc institutions established to address past violations of international criminal law.⁴³

The primary difference between the two types of institutions is that hybrid tribunals have both international and domestic elements.⁴⁴ For instance, hybrid tribunals frequently use local judges or institutions in their proceedings.⁴⁵ Precisely because they have national components, these tribunals are “often regarded as giving more deference to state sovereignty than [international criminal] tribunals.”⁴⁶ This increased deference is preferable in some circumstances because it allows the conflict state to involve itself in the conflict resolution process, thus giving that state a voice in the healing process while also helping it build up its domestic judicial system.⁴⁷ Some examples of hybrid tribunals are the Special Court for Sierra Leone (established in 2002),⁴⁸ the Extraordinary Chambers in the

37. *Id.* at 289. For four months in 1994, extremist members of the Hutu ethnic group systematically killed between 500,000 and 1 million Tutsi civilians, another ethnic group, and moderate Hutus. *Id.*

38. See Jesse Melman, Note, *The Possibility of Transfer(?): A Comprehensive Approach to the International Criminal Tribunal for Rwanda's Rule 11bis to Permit Transfer to Rwandan Domestic Courts*, 79 FORDHAM L. REV. 1271, 1287 (2010) (explaining that the Security Council has extended the mandates of both tribunals until 2013).

39. See Jessberger, *supra* note 19, at 210.

40. *See id.*

41. As of 2009, the ICTY had indicted 161 persons and convicted 48 (with 5 acquittals), and the ICTR has indicted 94 persons and convicted 28 (also with 5 acquittals). *Id.* at 209.

42. *See id.* at 209–10.

43. Bernaz & Prouvèze, *supra* note 22, at 293–94.

44. *Id.* at 294.

45. *See* Cassese, *supra* note 15, at 129.

46. Bernaz & Prouvèze, *supra* note 22, at 294.

47. *Id.* (noting that hybrid tribunals include states more in the post-conflict process, which leads them to be preferable to international tribunals in situations that require sensitivity to local issues).

48. *Id.* at 302–07.

Court of Cambodia (2005),⁴⁹ the War Crimes Chamber in Bosnia-Herzegovina (2005),⁵⁰ and the Special Tribunal for Lebanon (2007).⁵¹

3. Domestic Courts

International criminals need not be tried in international institutions; national court systems may, and frequently have, assumed this responsibility.⁵² From a legal standpoint, national domestic courts exercise jurisdiction over international crimes in a couple of ways, depending on the “constitutional position of international law within the law of that state.”⁵³ Some states allow national courts to try international crimes directly, without requiring that the international law be implemented into the domestic legal regime.⁵⁴ In those states, courts exercise jurisdiction over an international crime simply by virtue of the fact that the crime is punishable in international law.⁵⁵

More commonly, however, domestic courts may apply international law only if the state’s legislation has incorporated the law.⁵⁶ Practically speaking, this requirement does not usually impede a domestic court’s ability to try international crimes, because international treaties often require national legislatures to include certain international crimes in domestic law.⁵⁷ And to the extent that domestic legislation does not directly implement international law, and thus does not feature the same definitions or language, domestic legislation often includes analogous laws that are based on international law principles.⁵⁸

In addition to requiring a legal basis upon which to try an international crime, state domestic courts also need jurisdiction over the perpetrator. Jurisdiction can arise in a number of ways. First, “[u]nder . . . one of the most basic aspects of state sovereignty, states have jurisdiction over crimes committed in their territory.”⁵⁹ This notion is known as the territorial principle of jurisdiction, and applies regardless of the perpetrator’s citizenship.⁶⁰ Second, in what is known as the nationality principle, a “state

49. *Id.* at 307–12.

50. *Id.* at 312–15.

51. *Id.* at 316–22.

52. See Jessberger, *supra* note 19, at 208 (“History . . . shows notable domestic efforts to address international crimes by means of criminal law.”).

53. Akande, *supra* note 15, at 41.

54. *Id.* at 41–42. Akande notes that this scenario is typical in many common law countries, such as the United States and United Kingdom. *Id.* at 42 (providing examples where courts in these states “have recognized that international law may create crimes subject to domestic prosecution without the need for domestic legislation”).

55. See *id.* at 42–43.

56. See *id.* at 41–42.

57. See *id.* at 42 (“For example, domestic legislation criminalizing genocide, war crimes, and torture [is] enacted in order to implement the state’s obligations under the Genocide Convention [of] 1948, the GCs of 1949 or the 1984 Torture Convention.” (emphasis omitted)).

58. See *id.*

59. Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT’L L. 383, 391 (1998).

60. See *id.*

has jurisdiction to prosecute its own nationals for crimes even when committed outside of its own territory.”⁶¹ Both the territorial and nationality principles are ordinary and relatively undisputed jurisdictional premises.⁶²

Two other concepts may also give state domestic courts jurisdiction over international crimes: the passive personality principle, under which “states may claim jurisdiction over crimes committed against their nationals wherever they may occur,”⁶³ and “the protective principle, which grants states jurisdiction over aliens for acts committed abroad but that present a threat to the security of the state.”⁶⁴

Under a concept known as universal jurisdiction, states are also entitled to bring domestic proceedings against the perpetrator of certain crimes based solely on the nature of the crime.⁶⁵ Universal jurisdiction holds that these crimes—namely genocide, crimes against humanity, war crimes, and torture—are considered “so harmful to international interests” and basic human rights that domestic courts anywhere in the world can prosecute them, and might be obligated to do so.⁶⁶ As a result, a domestic court may apply universal jurisdiction irrespective of a crime’s location or the perpetrator’s nationality.⁶⁷ Although rarely used,⁶⁸ universal jurisdiction is nevertheless considered to be a very powerful concept that “holds promise for . . . justice for the victims of serious human rights violations around the world.”⁶⁹

B. The ICC

Despite the development and growing prevalence of international criminal justice over the past seventy years, gaps and inefficiencies remained in the international community’s quest to prosecute the growing number of international crimes and atrocities.⁷⁰ In an attempt to close these

61. *Id.*

62. *Id.* at 391–92.

63. *Id.* at 392.

64. *Id.*

65. PRINCETON PRINCIPLES, *supra* note 14, at 16.

66. *Id.* For instance, “[f]or crimes such as torture and grave breaches of the Geneva Conventions, the relevant treaties say clearly that offenders who are found within the territory of a state must be prosecuted or extradited to face prosecution elsewhere.” INT’L COUNCIL ON HUMAN RIGHTS POLICY, HARD CASES: BRINGING HUMAN RIGHTS VIOLATORS TO JUSTICE ABROAD, A GUIDE TO UNIVERSAL JURISDICTION 37 (1999).

67. PRINCETON PRINCIPLES, *supra* note 14, at 16.

68. Courts have historically used universal jurisdiction in the context of the international crime of piracy. See Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L.J. 121, 130 (2007) (citing *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 195–97 (1820)). In modern times, the most prominent use of universal jurisdiction occurred in 1999 when Spain sought the extradition of Augusto Pinochet from England in order to prosecute him for human rights violations he committed as President of Chile. See generally INT’L COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 66, at 1–2, 29–34.

69. PRINCETON PRINCIPLES, *supra* note 14, at 18.

70. See Jessberger, *supra* note 19, at 210 (observing that international criminal tribunals are often subject to criticisms of “malfunctions and missed opportunities,” and that efforts to

gaps, the United Nations sought to create a permanent international criminal court.⁷¹ This section introduces that court and describes some of its central features. It first briefly describes the creation of the ICC. It then introduces the Rome Statute, which provides the statutory basis for the ICC. Finally, this section describes the ICC's most important and distinctive feature: the principle of complementarity.

1. Creating the ICC

The U.N. first formulated the idea of a permanent international criminal court in 1948, when the General Assembly (GA) adopted Resolution 260.⁷² In that Resolution, the GA recognized the need for an international criminal court and invited the International Law Commission (ILC) to study the possibility and desirability of establishing one.⁷³ Although the ILC prepared several draft statutes pursuant to the Resolution, a number of factors caused the GA to put the idea on hold.⁷⁴

This remained so until 1989 when Trinidad and Tobago, seeking a new means to prosecute drug trafficking, requested that the GA revisit the idea of a permanent international criminal court.⁷⁵ At that time, the ILC prepared another draft statute⁷⁶ to be presented at a diplomatic conference.⁷⁷ That conference, which met in Rome in the summer of 1998,⁷⁸ turned that draft into the statutory and legal blueprint for the ICC: the Rome Statute of the International Criminal Court (Rome Statute or Statute).⁷⁹

prosecute in domestic courts “have been highly selective, largely uncoordinated, and, in sum, not satisfactory”).

71. See *Establishment of an International Criminal Court*, *supra* note 17 (indicating that one of the central reasons for establishing the ICC was to remedy deficiencies in the current transitional justice landscape).

72. Bernaz & Prouvèze, *supra* note 22, at 323.

73. See *Establishment of an International Criminal Court*, *supra* note 17.

74. See Bernaz & Prouvèze, *supra* note 22, at 323–24 (citing, as reasons for the delay, the Cold War and a lack of a consensus over a definition of the crime of aggression).

75. See *Establishment of an International Criminal Court*, *supra* note 17.

76. *Id.* The draft was prepared just after the Security Council established the ICTY and the ICTR, *id.*, further demonstrating the impact these tribunals had on establishing the ICC.

77. See Bernaz & Prouvèze, *supra* note 22, at 324. The GA established two ad hoc committees to review and consolidate the draft statute: the Ad Hoc Committee on the Establishment of an International Criminal Court, and the Preparatory Committee on the Establishment of an International Criminal Court. *Id.*

78. *Id.* at 324–25. The conference was formally called the United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference). It met between June 15, 1998 and July 17, 1998. *Id.*

79. Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90 (amended 2010) [hereinafter Rome Statute], available at www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf. The Statute officially entered into force on July 1, 2002. See Bernaz and Prouvèze, *supra* note 22, at 332.

2. The Rome Statute

The Rome Statute is a carefully articulated, skillfully negotiated⁸⁰ document that not only created the ICC,⁸¹ but also established what kinds of cases the Court may hear, the process by which it hears them, and how the Court should deal with issues that it confronts. While a comprehensive outline of the Rome Statute is beyond the scope of this Comment, this section describes its most salient features and provides a background for the issues that will confront the Court as its involvement in Libya progresses.

The Statute first establishes the Court as “a permanent institution [with] the power to exercise its jurisdiction over persons for the most serious crimes of international concern.”⁸² The Statute then lists those crimes as genocide, crimes against humanity, war crimes, and the crime of aggression,⁸³ defining each with specificity.⁸⁴ Structurally, although the ICC is a single institution, the Rome Statute divides it into four organs: the Presidency, Chambers, Office of the Prosecutor, and Registry.⁸⁵ While these organs work together to collectively achieve the Court’s objectives, they maintain their own responsibilities and immediate priorities. For instance, the Chambers constitutes the judiciary of the ICC and, with its three subdivisions,⁸⁶ is responsible for conducting trials and managing cases.⁸⁷ The Prosecutor’s Office, on the other hand, operates independently from the Court⁸⁸ and is responsible for investigating potential cases, conducting investigations, and advocating before the Court.⁸⁹

80. See generally Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22 (1999); M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT’L L.J. 443 (1999); Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT’L L. 2 (1999).

81. See Rome Statute, *supra* note 79, art. 1.

82. *Id.*

83. *Id.* art. 5. The Court may not exercise jurisdiction over the crime of aggression until after January 1, 2017. *Id.* art. 15bis(3).

84. Even if a crime fits within these definitions, however, the Court may only exercise jurisdiction if certain conditions are satisfied. For an overview of some of these conditions, see *infra* notes 118–28 and accompanying text. For other examples of what aspects of a case may or may not prevent the ICC from having jurisdiction, see the Rome Statute, *supra* note 79, art. 27(1) (extending jurisdiction over individuals regardless of their official capacity), art. 29 (declining to limit the ICC’s jurisdiction to the statute of limitations to which a crime might otherwise be subject), and art. 11 (declining jurisdiction if the crime was committed in a state before it became a Party to the Statute).

85. Rome Statute, *supra* note 79, art. 34.

86. The three subdivisions of the Chambers are the Pre-Trial Division, Trial Division, and Appeals Division. See *id.* art. 39. The responsibilities of each division vary based on the stage of a particular case before the court. See *id.*

87. See *id.*

88. See *id.* art. 42(1) (“The Office of the Prosecutor shall act independently as a separate organ of the Court.”). As a whole, the Court’s relationship to the U.N. mirrors the Prosecutor’s relationship with the ICC, in that while the ICC exists within the U.N. system, it operates as an independent institution. See *id.* pmbl. (establishing the ICC as an “independent permanent [court] in relationship with the [U]nited Nations system”).

89. See *id.* art. 42(1).

As of this writing, there are 120 States Parties to the Rome Statute.⁹⁰ Compared to the 105 states that were original signatories in 1998, and the 60 that had ratified it as of July 1, 2002,⁹¹ the Court's current membership demonstrates its growing support from the international community.⁹² And although the ICC has conducted only one full trial thus far,⁹³ the Court has initiated trial proceedings in two more cases⁹⁴ and investigated many others.⁹⁵

3. The Principle of Complementarity

This section explains one of the most significant and unique features of the ICC: the principle of complementarity. The section begins by explaining the theoretical and practical bases for the principle. The section then describes the manifestation of the principle in the Rome Statute.

a. The Theoretical and Practical Foundations of the Principle of Complementarity

All of the Court's work is guided by a single phrase in the Rome Statute—a phrase so important that it appears twice. The preamble and article 1 both state that the ICC “shall be complementary to national criminal jurisdictions.”⁹⁶ This statement is broadly referred to as the principle of complementarity, and, as many commentators have noted, it is the cornerstone of the Rome Statute and the foundation upon which the ICC is built.⁹⁷

90. See *The States Parties to the Rome Statute*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Mar. 23, 2012). The United States is not currently a State Party to the Rome Statute. See *id.* For an explanation of why the U.S. did not join, see Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855 (1999).

91. See Bernaz & Prouvèze, *supra* note 22, at 328.

92. See Judge Sang-Hyun Song, President of the Int'l Criminal Court, Address to the U.N. General Assembly 2 (Oct. 26, 2011), available at <http://www.icc-cpi.int/NR/rdonlyres/D5CA5004-362D-4C37-86D8-01B6F6E7642B/283903/11026ICCPresidentspeechtoUNGAENG.pdf> (acknowledging his delight “that international support for the ICC has continued to grow”).

93. *Id.* at 3 (“The ICC's first trial concluded in August [2011] with closing statements against Thomas Lubanga Dyilo, charged with the use of child soldiers in the Democratic Republic of the Congo.”). The Court entered a guilty verdict against Dyilo on March 14, 2012. Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶ 1358 (Mar. 14, 2012), www.icc-cpi.int/iccdocs/doc/doc1379838.pdf.

94. See Song, *supra* note 92 (noting that the presentation of evidence is “nearing its conclusion” in one trial, and that a third trial opened in November, 2010). A fourth trial is in its preparation stages. See *id.*

95. See *Situations and Cases*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases> (last visited Mar. 23, 2012) (noting that, in total, “14 cases in 7 situations have been brought before the [ICC]”).

96. Rome Statute, *supra* note 79, pmbl., art. 1.

97. See, e.g., Jimmy Gurulé, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L.J. 1, 7 (2002) (“The complementarity regime is one of the cornerstones on which the [ICC is] built.”); Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with*

In practice, this principle is meant to limit the ICC's jurisdictional scope by giving primary jurisdiction over crimes to national criminal jurisdictions.⁹⁸ This dynamic between the ICC and domestic courts stands in contrast to the operations of the ICTY and the ICTR,⁹⁹ as their charters give them jurisdictional primacy over the domestic courts with whom they share jurisdiction.¹⁰⁰

Considered against the backdrop of the ICC's predecessor institutions, the complementarity principle thus reflects the Court's somewhat paradoxical identity: while the ICC is the most ambitious criminal court ever created in terms of the scope of its goals and the gravity of the crimes on which it focuses,¹⁰¹ its power to actually try cases is limited by elements that are primarily outside of its control.¹⁰² Luis Moreno-Ocampo, the ICC's first Chief Prosecutor, acknowledged this tension at his swearing-in ceremony on June 16, 2003 when he said, "As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before [the] Court, as a consequence of the regular functioning of national institutions, would be a major success."¹⁰³ Thus, given the Court's broad ambition and status in the international criminal justice community, the ICC's jurisdictional power has been described as timid.¹⁰⁴

Drafters of the Statute, however, consciously constructed this timidity to serve both a theoretical and practical purpose.¹⁰⁵ Theoretically, the complementarity principle serves to demonstrate respect for the sovereignty of national jurisdictions.¹⁰⁶ Practically, and perhaps more importantly in the eyes of some commentators, the complementarity principle allows the international criminal justice community to allocate its collective resources in ways that most efficiently and effectively achieve the Rome Statute's fundamental goals.¹⁰⁷ The principle does this in a number of ways.

the Rome Statute of the International Criminal Court, 167 MIL. L. REV. 20, 29 (2001) ("The principle of complementarity is . . . the bridge that carries the weight of the Rome Statute.").

98. See Newton, *supra* note 97, at 26–29.

99. See *supra* notes 36–37 and accompanying text.

100. For a discussion of the primacy of the ICTY, see Brown, *supra* note 59, at 395–96. For a discussion of the primacy of the ICTR, see Melman, *supra* note 38, at 1280–81.

101. See Rome Statute, *supra* note 79, pmb., art. 1, art. 5 (highlighting the ICC's commitment to fighting the world's "most serious crimes").

102. See INT'L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE ¶ 1 (2003) [hereinafter INFORMAL EXPERT PAPER], available at <http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf> ("The Statute recognizes that States have the first responsibility and right to prosecute international crimes.").

103. *Id.* (quoting Luis Moreno-Ocampo, Chief Prosecutor of the ICC, Ceremony for the Solemn Undertaking of the Chief Prosecutor (June 16, 2003)).

104. Brown, *supra* note 90, at 878.

105. INFORMAL EXPERT PAPER, *supra* note 102, ¶ 1 ("The principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness . . .").

106. See Gregory S. Gordon, *Complementarity and Alternative Justice*, 88 OR. L. REV. 621, 628 (2009).

107. *Id.* at 627–28; INFORMAL EXPERT PAPER, *supra* note 102, ¶¶ 1–2.

First, the ICC has limited resources in terms of financing, infrastructure, and personnel,¹⁰⁸ and thus can only feasibly prosecute a small number of cases per year.¹⁰⁹ Therefore, the sheer impossibility of the Court achieving its goals on its own necessitates that domestic courts share in the ICC's responsibility.¹¹⁰ Moreover, it seems more efficient to give primary prosecutorial responsibility to domestic jurisdictions because they usually will have better access than the ICC to evidence and witnesses.¹¹¹ Finally, the complementarity principle empowers domestic jurisdictions throughout the world and encourages them to build up their domestic judicial systems.¹¹² In the long run, this allocation will ostensibly help the global community achieve the ICC's fundamental goal of ending impunity for the world's most serious crimes.¹¹³ For these reasons, the principle of complementarity fundamentally guides all of the ICC's work.¹¹⁴

108. Gordon, *supra* note 106, at 627.

109. INFORMAL EXPERT PAPER, *supra* note 102, ¶ 1 (“[T]here are limits on the number of prosecutions the ICC . . . can feasibly conduct.”). It is estimated that the ICC, given its resources, can only conduct two to three trials per year. Lisa J. Laplante, *The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court’s Sphere of Influence*, 43 J. MARSHALL L. REV. 635, 636 (2010).

110. See Laplante, *supra* note 109, at 645.

111. See INFORMAL EXPERT PAPER, *supra* note 102, ¶ 1; see also Gordon, *supra* note 106, at 628 (“[T]hese domestic courts would likely have more means available to collar the accused and to collect the necessary evidence.”).

112. See Gordon, *supra* note 106, at 628 (“[C]omplementarity enlarges the field of battle against the culture of impunity by incentivizing a large number of domestic jurisdictions to become more operational and effective at investigating and prosecuting cases of genocide, crimes against humanity, and war crimes.”).

113. See *id.*

114. There is some debate within the academic community as to the validity of this statement. Specifically, it is unclear in the eyes of some commentators whether the ICC is required to comply with the principle of complementarity in cases that originate as referrals from the U.N. Security Council, pursuant to article 13(b) of the Rome Statute. See *infra* note 125 and accompanying text. Professor Michael A. Newton, for instance, argues that the ICC is not required to follow the principle of complementarity in such situations for two reasons: first, a U.N. referral operates as a mandate that, by virtue of article 103 of the U.N. Charter, all United Nations members must follow; second, in Council-referred cases, the ICC is not required to formally notify any State Party that it has initiated an investigation, according to article 18 of the Rome Statute. Newton, *supra* note 97, at 49; Michael A. Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT’L L. 115, 130–31 (2010) [hereinafter Newton, *Complementarity Conundrum*]. Other commentators argue that because article 17 of the Rome Statute makes no distinction between Security Council referrals and other types of cases in the Court’s substantive admissibility analysis, the principle of complementarity applies equally to all cases. See Mark A. Summers, *A Fresh Look at the Jurisdictional Provisions of the Statute of the International Criminal Court: The Case for Scrapping the Treaty*, 20 WIS. INT’L L.J. 57, 79–80 (2001). The Office of the Prosecutor has shed some light on the debate by concluding that technically the ICC is bound by the principle of complementarity in all cases because all cases are subject to the same substantive admissibility analysis. See INFORMAL EXPERT PAPER, *supra* note 102, ¶¶ 68–69. Theoretically, however, the Security Council has the power to create jurisdictional primacy for the ICC, even within the framework of the complementarity principle, if it issues an order to the effect that member states must comply with requests from the ICC, and the ICC requests jurisdictional primacy. *Id.* ¶ 69. But given the reverence the Court has displayed for the complementarity principle, and the lack of precedent that exists for the Security Council to issue such an order, see Elizabeth C. Minogue, Comment, *Increasing the Effectiveness of the Security Council’s Chapter VII*

b. Manifestations of the Principle of Complementarity in the Rome Statute

For all of its importance, the complementarity principle is not expressly defined anywhere in the Rome Statute.¹¹⁵ Thus, in order to understand how the ICC preserves the principle of complementarity, one must understand “the provisions of the Rome Statute that bear [the principle’s] fingerprints,”¹¹⁶ and how they interact to give life to the complementarity concept.¹¹⁷ These provisions are those that outline (1) the requirements that must be met for the Court to exercise jurisdiction over a case, (2) the features of a case that might make it inadmissible, and (3) the procedural mechanisms that guide the Prosecutor and Court to those determinations.

i. Jurisdiction

Before the ICC can have jurisdiction over a case, certain preconditions must be satisfied.¹¹⁸ These preconditions require, in certain cases,¹¹⁹ that either the state on whose territory the alleged crime took place (or if the crime was committed on a vessel or aircraft, the state where the vessel or aircraft is registered), or that the state of whom the alleged violator is a national is a party to the Statute.¹²⁰ This requirement serves to ensure that when the ICC exercises jurisdiction over a crime, the state or states that might also have jurisdiction over the crime consent to, and accept, the ICC’s jurisdiction.¹²¹ If a state with jurisdiction over the crime happens not to be a party to the Statute, article 12’s preconditions may nevertheless be satisfied if the state affirmatively consents to the ICC’s jurisdiction.¹²²

Authority in the Current Situations Before the International Criminal Court, 61 VAND. L. REV. 647, 673 (2008), for all practical purposes it seems that the ICC is bound by the principle of complementarity in Security Council referrals, just as it is in other cases.

115. See Newton, *supra* note 97, at 26; see also Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT’L L. 107, 134 (2009) (taking a slightly more cynical view of complementarity, the author notes that “[t]he ICC . . . is an institution structured on a relationship between national justice and international authority. Yet it is this very relationship that the Rome Statute leaves fundamentally undefined, ultimately calling into question the very justifications invoked to create the ICC in the first place”).

116. Newton, *supra* note 97, at 48.

117. *Id.* at 45 (“Complementarity is an intellectually simple principle that cannot be distilled into one snippet of isolated treaty text.”).

118. Rome Statute, *supra* note 79, art. 12. These preconditions are in addition to the basic requirement that the Court only has jurisdiction over certain types of crimes, see *supra* note 83 and accompanying text, committed after the Statute entered into force, see Rome Statute, *supra* note 79, art. 11.

119. The consent requirements in article 12(2) do not apply to cases referred to the ICC by the U.N. Security Council. See Rome Statute, *supra* note 79, art. 12(2) (excluding article 13(b) from consideration); see also Newton, *Complementarity Conundrum*, *supra* note 114, at 127–28.

120. Rome Statute, *supra* note 79, art. 12(2).

121. *Id.* art. 12(1) (“A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.”).

122. *Id.* art. 12(3) (“If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.”).

Article 12 is thus a significant check on the ICC's power in that it represents the notion "that the Court should not have jurisdiction where states involved have not consented to it."¹²³

Once a case meets these basic jurisdictional requirements, there are three circumstances that would allow the Court to actually exercise its jurisdiction over the case: (1) if it is "referred to the Prosecutor by a State Party"¹²⁴ (state referral), (2) if it is "referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations"¹²⁵ (Security Council referral), or (3) if "[t]he Prosecutor has initiated an investigation in respect of such a crime"¹²⁶ (*proprio motu* investigation).¹²⁷ These provisions, which provide multiple options for initiating cases, emphasize that the ICC is meant to be an independent institution whose authority and legitimacy are determined by legal and international justice principles rather than political considerations.¹²⁸

ii. Admissibility

In addition to the jurisdictional requirements and preconditions that must be satisfied before the Court hears a case,¹²⁹ the Rome Statute requires that a case also be admissible.¹³⁰ The interplay between jurisdiction and admissibility is that the jurisdictional provisions give the Court power to hear certain cases, based upon the nature of the case, the parties involved, and how the case was initiated, while the admissibility requirement defines the Court's ability to use that power.¹³¹ Practically, the admissibility regime helps guide the ICC in circumstances where it shares jurisdiction with domestic courts.¹³² Moreover, the admissibility requirement represents the essence of the complementarity principle and serves to

123. Newton, *Complementarity Conundrum*, *supra* note 114, at 127.

124. Rome Statute, *supra* note 79, art. 13(a).

125. *Id.* art. 13(b).

126. *Id.* art. 13(c).

127. *Id.* art. 15(1). The elements of article 13—specifically the issue of how much control over ICC cases the U.N. Security Council would have—were subject to somewhat contentious negotiations. See Greenawalt, *supra* note 115, at 153–54. For instance, many countries in attendance at the Rome Conference felt that giving too much power to the Security Council would politicize and ultimately undermine the work of the Court. *Id.* That concern is reflected in article 13's composition. *Id.* at 154.

128. See Greenawalt, *supra* note 115, at 153–54 ("The ostensible reason [that the drafters of the Rome Statute expanded case referrals beyond the Security Council] reflects the . . . concern . . . that mandatory Security Council referral 'would reduce the credibility and moral authority of the court; excessively limit its role; . . . [and] introduce an inappropriate political influence over the functioning of the institution.'" (quoting *Report of the Ad Hoc Comm. on the Establishment of an Int'l Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, ¶ 121, U.N. Doc. A/50/22 (1995))).

129. See Newton, *Complementarity Conundrum*, *supra* note 114, at 131 (noting that the Rome Statute's jurisdictional requirements are a "legal inquiry distinct from admissibility").

130. Rome Statute, *supra* note 79, art. 17.

131. See Newton, *supra* note 97, at 52.

132. See *id.*

directly implement that principle in the Rome Statute.¹³³ The admissibility regime achieves this goal by providing both substantive guidelines and a procedural mechanism through which to apply them.¹³⁴

Cases are presumed to be admissible.¹³⁵ The Rome Statute therefore speaks of admissibility in terms of what would make a case *inadmissible*.¹³⁶ Article 17 lays out the criteria the Court considers in making that determination, establishing that a case over which the Court has jurisdiction is nevertheless inadmissible in four circumstances:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.¹³⁷

Emphasizing that these substantive elements of admissibility are a direct reflection of the complementarity principle, the Rome Statute instructs the Court, in considering this criteria, to have “regard to paragraph 10 of the Preamble and article 1,”¹³⁸ each of which states that the Court “shall be complementary to national criminal jurisdictions.”¹³⁹

The two most significant substantive concepts within admissibility are reflected in articles 17(1)(a) and 17(1)(b).¹⁴⁰ These provisions establish

133. See William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 76–82 (2008) (describing the statutory basis for complementarity in terms of the Rome Statute's admissibility criteria); Gordon, *supra* note 106, at 629–30 (“Complementarity is operationalized in the form of an admissibility examination set forth in [the Rome Statute].”); Newton, *supra* note 97, at 52 (“The admissibility mechanism provides the most direct implementation of the complementarity principle in the Rome Statute.”); Newton, *Complementarity Conundrum*, *supra* note 114, at 126 (“[T]he text of Article 17 articulates the [States Parties'] agreed upon framework for assessing the balance of authority and implicitly preserves the preference of the drafters for domestic power.”).

134. See Gordon, *supra* note 106, at 630–34.

135. Summers, *supra* note 114, at 69 (“The statutory scheme of the ICC presumes admissibility.”). *But cf.* Gregory S. McNeal, *ICC Inability Determinations in Light of the Dujail Case*, 39 CASE W. RES. J. INT'L L. 325, 326 (2006) (“Nations are presumed capable to prosecute cases.”).

136. See Rome Statute, *supra* note 79, art. 17.

137. *Id.* art. 17(1)(a)–(d).

138. *Id.* art. 17(1).

139. *Id.* pmb., art. 1.

140. The other two substantive aspects of admissibility, which do not garner as much scholarly attention but nevertheless contribute significantly to the cohesiveness of the admissibility regime, state that a case is inadmissible if “[t]he [defendant] has already been tried for conduct which is the subject of the complaint,” *id.* art. 17(1)(c), or if it “is not of

that the ICC may only hear a case if its judges determine that the domestic state with jurisdiction over that case is “unwilling or unable genuinely”¹⁴¹ to carry out the investigation or prosecution.”¹⁴² With respect to the first prong, article 17(2) instructs the Court that a state is “unwilling” to prosecute or investigate if one of the following three scenarios exists:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court . . . ;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.¹⁴³

The Prosecutor’s Office has characterized the “unwillingness” determination as complicated and “technically difficult,” for it will often require the Court to infer its conclusions from highly circumstantial evidence, and those conclusions will often implicate “politically sensitive” issues.¹⁴⁴

sufficient gravity to justify further action by the Court,” *id.* art. 17(1)(d). Article 17(1)(c) refers to the concept of *ne bis in idem*, which is conceptually similar to the notion of “double jeopardy.” See Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT’L L. 635, 687–88 (2007) (citing Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT’L L. 57, 79 n.43 (1999) (“[*Ne*] *bis in idem* addresses the possibility of repeated prosecutions for the same conduct in different legal systems, whereas double jeopardy generally refers to repeated prosecutions for the same conduct in the same legal system.”)). The Rome Statute’s adherence to *ne bis in idem*, fully articulated in article 20, presents a significant limitation on the Court’s power vis-à-vis national criminal jurisdictions and also provides substantive due process protections for individual defendants. See *id.* at 687–89. Article 17’s “sufficient gravity” requirement is also an important element of admissibility, and, according to commentators, is another requirement that demonstrates the Court’s commitment to complementarity. See Newton, *supra* note 97, at 38–39; Newton, *Complementarity Conundrum*, *supra* note 114, at 134–35.

141. Meant to modify the terms “to carry out” and “to prosecute,” see INFORMAL EXPERT PAPER, *supra* note 102, ¶ 21, “genuinely” injects a subjective element into the Court’s admissibility requirement that some commentators find potentially problematic, see McNeal, *supra* note 135, at 327–28; Newton, *supra* note 97, at 63–64 (describing how the Prosecutor, without any institutional constraints, could potentially take advantage of that language); Summers, *supra* note 114, at 76–77. The Prosecutor’s Office downplays these concerns and contends that “genuinely” properly balances the principle of complementarity with the Court’s fundamental goal of ending impunity. See INFORMAL EXPERT PAPER, *supra* note 102, ¶ 22 (describing how “genuinely” serves the Court’s need to assess the quality of national proceedings, but does so by setting the standard low enough that domestic courts can reach it if they are serious about achieving the same goals as the ICC).

142. Rome Statute, *supra* note 79, art. 17(1)(a).

143. *Id.* art. 17(2)(a)–(c).

144. See INFORMAL EXPERT PAPER, *supra* note 102, ¶ 14. This document also provides a detailed list of indicia for the “unwilling and unable” determination. See *id.* at 28–31.

The Court's "unable" determination is ostensibly more straightforward.¹⁴⁵ To make such a determination, the Rome Statute directs the Court to "consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."¹⁴⁶ To further assist the Court in this inquiry, the Prosecutor's Office has highlighted certain factors it finds particularly relevant to determining if a national judicial system is "unavailable": "lack of necessary personnel, judges, investigators, prosecutor; lack of judicial infrastructure; lack of substantive or procedural penal legislation . . . ; lack of access [to the system]; obstruction by uncontrolled elements . . . ; and amnesties [or] immunities."¹⁴⁷

iii. Procedural Mechanisms

As significant as the Rome Statute's substantive representations of the complementarity principle are, in practice they are only as effective as the procedural mechanism the Statute has in place to protect them. That mechanism consists primarily of articles 53, 18, and 19.

Article 53 lays out the first steps the Prosecutor must take in order to initiate any investigation.¹⁴⁸ Specifically, it instructs the Prosecutor that, upon receiving a referral from a State Party¹⁴⁹ or the Security Council,¹⁵⁰ or before beginning the process of initiating an investigation on his own,¹⁵¹ he shall evaluate all the information available to him and decide if there is a reasonable basis to proceed with an investigation.¹⁵² In making that decision, the Prosecutor is instructed to consider three factors: whether (a) it is reasonable to believe a crime has been or is being committed that falls within the Court's jurisdiction;¹⁵³ (b) "[t]he case is or would be admissible under article 17;"¹⁵⁴ and (c) considering "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."¹⁵⁵

In most instances,¹⁵⁶ if the Prosecutor decides to investigate a situation, article 18 requires him to notify all states that would normally have jurisdiction over it of his decision.¹⁵⁷ If those states have already begun an

145. *Id.* at 15 ("An 'inability' assessment is likely to be less complex than an 'unwillingness' assessment . . .").

146. Rome Statute, *supra* note 79, art. 17(3).

147. INFORMAL EXPERT PAPER, *supra* note 102, ¶ 50.

148. Rome Statute, *supra* note 79, art. 53.

149. *See supra* note 124 and accompanying text.

150. *See supra* note 125 and accompanying text.

151. *See supra* note 126 and accompanying text.

152. Rome Statute, *supra* note 79, art. 53(1).

153. *Id.* art. 53(1)(a).

154. *Id.* art. 53(1)(b).

155. *Id.* art. 53(1)(b). The Prosecutor may also conduct a similar inquiry at any point during the investigation as more information becomes available. *Id.* art. 53(2).

156. *See infra* note 161 and accompanying text (indicating that article 18 does not apply to Security Council referrals).

157. Rome Statute, *supra* note 79, art. 18(1).

investigation of their own, they may request that the Prosecutor defer entirely to them.¹⁵⁸ That request will be granted so long as the Pre-Trial Chamber determines that the state is willing and able to carry out the investigation and prosecution genuinely.¹⁵⁹ This process constitutes the Court's preliminary ruling on admissibility.¹⁶⁰

Article 18, however, does not apply to investigations that begin as Security Council referrals.¹⁶¹ Thus, the Court's first determination on the admissibility of a Council-referred case comes under article 19, either on the Court's own motion¹⁶² or as a result of a challenge to admissibility.¹⁶³ Challenges can come from three potential sources, including "[a] State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case."¹⁶⁴ These challenges, which may only be made once and before the start of a trial,¹⁶⁵ have the effect of suspending the Prosecutor's investigation until the Court makes a ruling.¹⁶⁶

II. EXPLORING THE ICC'S FOUNDING PRINCIPLES AND GOALS

Given the ICC's brief history and relatively limited experience conducting investigations and prosecuting cases, the Court has had few opportunities to put the aforementioned provisions of the Rome Statute to work. Of the aspects of the Rome Statute that remain untested in practice, two are especially significant: those containing the principle of complementarity, and those outlining the Court's ultimate goal of ending impunity.

Part II of this Comment explains the different ways to conceptualize these two central concepts, with the hope that elucidating them and exploring the ways in which they can be interpreted will help readers and members of the international criminal justice community think about how

158. *Id.* art. 18(2).

159. *Id.* art. 18(2)–(3).

160. *See id.* art. 18. This initial ruling on admissibility is open to review as circumstances change with respect to a state's ability or willingness to investigate and prosecute. *Id.* art. 18(3)–(4).

161. *Id.* art. 18(1) (referring to articles 13(a) and 13(c), but not 13(b)). The likely reason for not requiring notice in Security Council referrals is that "[i]n practice, the process of generating a [Security Council] Chapter VII resolution would almost certainly give notice to the affected states." Newton, *supra* note 97, at 55.

162. Rome Statute, *supra* note 79, art. 19(1) ("The Court may, on its own motion, determine the admissibility of a case in accordance with article 17."). The fact that the Court is not obligated to make a formal admissibility ruling, either in article 19 or article 18, is consistent with the notion that cases are presumed to be admissible to the ICC. *See supra* notes 135–39 and accompanying text. In contrast, article 19 makes clear that the Court *must* ensure that it has jurisdiction over any case brought before it. *See* Rome Statute, *supra* note 79, art. 19(1).

163. *Id.* art. 19(2).

164. *Id.* art. 19(2)(b). The other two potential sources of a challenge are "[a]n accused or a person for whom a warrant of arrest or a summons to appear has been issued," *id.* art. 19(2)(a), and "[a] State from which acceptance of jurisdiction is required under article 12," *id.* art. 19(2)(c).

165. *Id.* art. 19(4).

166. *Id.* art. 19(7).

the ICC can most effectively put them into practice. Part II.A presents competing conceptualizations of the principle of complementarity, while Part II.B discusses the Court's fundamental goal of ending impunity.

A. *Competing Conceptualizations of Complementarity*

By building itself around the principle of complementarity, the ICC "reflects the notion that the sovereign nations of the world are joined . . . as interdependent components of a larger global civil society . . . to promote values fundamental to all democratic and peace-loving states."¹⁶⁷ Determining exactly how the complementarity principle defines the working relationship of those components, however, is another challenge entirely. Although the general concept behind the complementarity principle, and even the principle's manifestation in the Rome Statute, are relatively clear, the principle's role in actually defining how the Court goes about its business remains subject to interpretation. This section outlines two interpretations of how, in practice, the complementarity principle can be conceptualized.

1. "Classic" (Passive) Complementarity

The prevailing interpretation of how the principle of complementarity defines the ICC's relationship with national criminal jurisdictions can be called "passive complementarity."¹⁶⁸ Under this interpretation, the ICC is effectively a "'safety net' in place for those rare cases where no national court system is willing and able to investigate allegations of serious international crimes."¹⁶⁹ Commentators who support this notion refer to the ICC as a "last resort court,"¹⁷⁰ a court modestly designed to fill the gaps where domestic courts are inadequate or fail in their responsibilities,¹⁷¹ and "an additional [or substitute] forum [within the international system] for dispensing justice."¹⁷²

Proponents of this approach to complementarity ordinarily cite, as shorthand for the principle itself, the "unwilling or unable" feature of the Rome Statute's admissibility analysis under article 17.¹⁷³ Effectively, this interpretation construes the complementarity principle as a restriction on the

167. Laplante, *supra* note 109, at 649 (internal quotation marks omitted); *see also* INFORMAL EXPERT PAPER, *supra* note 102, ¶ 6 ("The principle of complementarity . . . prompts a network of . . . States Parties and other States to carry out consistent and rigorous national proceedings.").

168. *See* Burke-White, *supra* note 133, at 56.

169. Brown, *supra* note 90, at 878.

170. *See, e.g.*, Julie B. Martin, *The International Criminal Court: Defining Complementarity and Divining Implications for the United States*, 4 LOY. U. CHI. INT'L L. REV. 107, 109 (2006).

171. *See* Gurulé, *supra* note 97, at 6–7.

172. Newton, *supra* note 97, at 72.

173. *See, e.g.*, Gurulé, *supra* note 97, at 7–8; Martin, *supra* note 170, at 108–09.

Court's power, telling it when it may not act and when it should instead defer to a State Party.¹⁷⁴

2. Proactive Complementarity

In contrast with the "passive" vision of complementarity is the notion that complementarity is actually an empowering mechanism for the ICC rather than a restrictive one, allowing it to actively effectuate its vision of justice throughout the world.¹⁷⁵ Professor William Burke-White, who introduced this view and termed it "proactive complementarity," posits that the ICC should use the principle of complementarity to "participate more directly in efforts to encourage national governments to prosecute international crimes themselves."¹⁷⁶ This concept envisions the ICC as an international criminal justice catalyst, instead of as a court with purely passive adjudicatory responsibilities.¹⁷⁷

In effect, Burke-White argues, conceptualizing the Court in such a way would expand the ICC's role beyond its classic formulation as just another fixture in the international justice community and ultimately create a "tiered system of prosecutorial authority."¹⁷⁸ As the leader of that system, the ICC would then be in a position to cooperate with domestic courts from the beginning stages of an investigation and help them prosecute international crimes.¹⁷⁹ Such a policy, he urges, is not only legally consistent with the existing framework of the Rome Statute,¹⁸⁰ but would also allow the Court to maximize its resources as well as its broader impact on the international criminal justice community.¹⁸¹

Proponents of this proactive complementarity concept contend that it fulfills the principle's basic purposes and the Court's fundamental goals more effectively than its passive counterpart. As Professor Lisa J. Laplante explains, by involving domestic states in investigations and prosecutions to the greatest extent possible, proactive complementarity allows the party with the best access to evidence, witnesses, and local knowledge to participate in an investigation and trial.¹⁸² In so doing, it advances one of the fundamental reasons for having the principle in the first place.¹⁸³

174. See Newton, *Complementarity Conundrum*, *supra* note 114, at 123 ("[C]omplementarity is best viewed as a restrictive principle rather than an empowering one . . .").

175. See Burke-White, *supra* note 133, at 54–56.

176. *Id.* at 54. Professor Lisa J. Laplante concurs with Professor Burke-White that this is how the ICC should conceptualize the complementarity principle. See Laplante, *supra* note 109, at 638. She also proposes extending the idea even further and applying it to situations over which the Court lacks jurisdiction under Article 11, as well as situations that are inadmissible under Article 17. See *id.*

177. See Burke-White, *supra* note 133, at 56.

178. Burke-White refers to this system as the "Rome System of Justice." See *id.* at 57.

179. See *id.* at 54–56.

180. See *id.* at 76–85.

181. See *id.* at 56.

182. See Laplante, *supra* note 109, at 645.

183. See *supra* notes 108–14 and accompanying text (explaining the impossibility of the ICC achieving its goals on its own).

Furthermore, Laplante urges that using the principle of complementarity proactively would allow the ICC to enjoy the benefits of a national trial alongside the benefits of international expertise, similar to a hybrid tribunal.¹⁸⁴ By allowing legal proceedings to be run at the national level, she claims, the ICC would thus enjoy a greater perception of legitimacy and would also provide a richer and more satisfying type of justice for the local population.¹⁸⁵

As the Office of the Prosecutor's informal expert paper on complementarity demonstrates,¹⁸⁶ this proactive approach to the complementarity principle is not an abstract product of legal academia. Rather, based on some of the paper's recommendations, it appears that the ICC has contemplated some of the same ideas. For one, the paper encourages the Chief Prosecutor to establish partnerships with domestic court systems whereby the ICC would directly advise¹⁸⁷ and assist States in initiating and carrying out domestic prosecutions.¹⁸⁸ This type of relationship, which the paper makes clear is consistent with the Rome Statute,¹⁸⁹ could also yield more long-term "cooperative anti-impunity strategies" between the Prosecutor and domestic institutions.¹⁹⁰

The paper further supports the concept of proactive complementarity by suggesting that the Prosecutor, in addition to assisting states during actual investigations and prosecutions, could also provide training to those states.¹⁹¹ While acknowledging that this kind of cooperation might exceed the Prosecutor's express responsibilities, the paper nevertheless finds that "such training would advance the overall objective of building a network of [s]tates able to carry out effective prosecutions."¹⁹² The paper encourages such a training policy as long as it does not appear to divert resources from the Court's more explicit mandates.¹⁹³

The paper does acknowledge some of the risks that a policy of proactive complementarity might pose in the context of the Court's article 17 admissibility analysis.¹⁹⁴ The paper recognizes that if the ICC is actively engaged in the domestic court system throughout an investigation, it may not be able to extricate itself from that system in order to conduct an

184. *See supra* notes 44–46 and accompanying text.

185. *See* Laplante, *supra* note 109, at 645.

186. INFORMAL EXPERT PAPER, *supra* note 102.

187. *Id.* ¶ 11 ("Providing technical advice [about investigating and prosecuting mass crimes] would also be generally consistent with the Prosecutor's mandate.").

188. *Id.* ¶ 3.

189. *Id.* ¶ 10 (citing Rome Statute, *supra* note 79, art. 93(10)).

190. *Id.* ¶ 3.

191. *See id.* ¶ 12.

192. *Id.* The paper additionally suggests that the Prosecutor may act as an intermediary between States, helping them coordinate and complete their own domestic proceedings even if the ICC would not otherwise be involved in the prosecutions. *Id.* ¶ 13. This suggestion, and the level of cooperation between ICC and domestic courts it entails, echoes what Professor Burke-White conceptualizes to be the logical end of a policy of proactive complementarity: the "Rome System of Justice." *See* Burke-White, *supra* note 133, at 56–57.

193. *See* INFORMAL EXPERT PAPER, *supra* note 102, ¶ 12.

194. *See id.* ¶ 14.

impartial admissibility analysis.¹⁹⁵ On the other hand, the paper observes that the benefits associated with this conduct, such as encouraging fair, efficient, and effective avenues for criminal justice at the domestic level, outweigh the risks as long as the ICC is careful to take precautions against them.¹⁹⁶

B. The Court's Quest to End Impunity

Complementarity is the principle that guides the ICC to its goals, but it is not a goal in and of itself. This section explains the most fundamental of the ICC's goals—ending impunity for the world's most serious crimes—and explores a number of ways in which the ICC might address it.

As expressed in the preamble to the Rome Statute, the ICC's most fundamental goal is ensuring that “the most serious crimes of concern to the international community as a whole . . . [do] not go unpunished.”¹⁹⁷ Based on this language, the Court could be understood as simply a logical extension of the international tribunals that came before it, concerned narrowly with prosecuting certain crimes over which it has jurisdiction.¹⁹⁸ But commentators, the ICC President, and surrounding provisions in the Rome Statute suggest that the Court was designed with broader goals in mind.

First, various phrases in the preamble indicate that the ICC's ultimate aim in prosecuting international criminals extends beyond pure punishment and retribution for single crimes. Instead, the preamble makes clear that the Court's focus in ending impunity is “to guarantee lasting respect for and the enforcement of international justice,”¹⁹⁹ for the benefit of both “present and future generations.”²⁰⁰ Supporting this long-term focus, the U.N. has explained that the ICC was created for the broader purpose of ensuring peace and justice, deterring all future war criminals, and ending conflicts altogether.²⁰¹ Commentators have further echoed this sentiment, proclaiming that the ICC is “focused not simply on the goal of giving particular defendants their deserved punishments, but also on the broader aspiration[s] of . . . facilitat[ing] society-wide transformation by breaking

195. *See id.*

196. *See id.*

197. Rome Statute, *supra* note 79, pmb1.

198. *See* George P. Fletcher & Jens David Ohlin, *The ICC—Two Courts in One?*, 4 J. INT'L CRIM. JUST. 428, 432 (2006) (arguing that a plausible way to think about the ICC is simply as a “logical culmination” of the Security Council's program to restore peace and security following the ICTY and the ICTR); Ruti G. Teitel, *Transitional Justice in a New Era*, 26 FORDHAM INT'L L.J. 893, 902–03 (2003) (“The ICC can be understood to symbolize the entrenchment of the exceptional Nuremberg Nazi War Crime Tribunals as a model for the creation of a standing international war crimes tribunal to prosecute war crimes under the international law of conflict.”).

199. Rome Statute, *supra* note 79, pmb1.

200. *Id.*

201. *Establishment of an International Criminal Court*, *supra* note 17.

cycles of violence, delegitimizing criminal regimes, and fostering peaceful societies rooted in the rule of law.”²⁰²

So articulated, the ICC’s ultimate goals are often considered in relation to the concept of transitional, or post-conflict, justice.²⁰³ Transitional justice is a rapidly growing academic discipline²⁰⁴ that refers, in its simplest terms, to the conception of justice that emerges from periods of dramatic political change “as reflected [by] primarily legal responses that deal with the wrongdoing of repressive predecessor regimes.”²⁰⁵ Transitional justice works within a larger system that seeks to achieve “truth, justice, reconciliation and peace” in conflict-ridden societies.²⁰⁶ The fundamental goals of that system are to rehabilitate and provide closure to victims, and to allow societies to rebuild and liberalize.²⁰⁷ This process, it is thought, cannot truly take place unless violators for past crimes are held accountable for their actions.²⁰⁸

As an institution committed to achieving accountability and international criminal justice, the ICC recognizes the importance of promoting and implementing transitional justice principles throughout the world.²⁰⁹ Commentators similarly recognize this connection between the ICC and

202. Greenawalt, *supra* note 115, at 128 (citing RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 28 (2000)); *see also* M. Cherif Bassiouni, *Introduction*, in 1 *PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE*, *supra* note 14, at xiii, xiv (framing the ICC’s mission broadly in order to link the ICC’s capacity for international justice with the goals it sets out in the Preamble); Laplante, *supra* note 109, at 640.

203. *See* M. Cherif Bassiouni, *Assessing Conflict Outcomes: Accountability and Impunity*, in 1 *PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE*, *supra* note 14, at 3, 7 n.5 (referring to transitional justice as post-conflict justice); Gordon, *supra* note 106, at 628; Teitel, *supra* note 198, at 902–03.

204. *See* Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 *TEMP. L. REV.* 1, 6 (2006) (observing the “burgeoning literature on transitional justice”).

205. Teitel, *supra* note 198, at 893; *see also* TEITEL, *supra* note 202, at 5–6 (describing the fundamental nature of transitional justice); Zachary D. Kaufman, *The Future of Transitional Justice*, 1 *ST. ANTONY’S INT’L R.* 58, 58 (2005), *available at* http://users.ox.ac.uk/~stair/1_1/kaufman.pdf (“Transitional justice involves states and societies shifting from a situation of conflict to one of peace and, in the process, using judicial and/or non-judicial mechanisms to address past human rights violations.”).

206. Bassiouni, *supra* note 203, at 7.

207. *See* Bassiouni, *supra* note 202, at xiv (describing the goals of “promot[ing] accountability and rehabilitation for countries emerging from conflict and for victim groups in need of closure”).

208. Bassiouni, *supra* note 203, at 7 (“[Transitional] justice is premised on an understanding that domestic stability, security and democratic governance in the aftermath of atrocity are strengthened by a commitment to accountability.”).

209. The ICC’s current President, Judge Sang-Hyun Song, said recently in a speech to the World Bank Group that “[l]asting peace and prosperity in . . . post-conflict societies can only be achieved if development challenges and justice enforcement are addressed in a coordinated manner.” *See* Judge Sang-Hyun Song, President of the Int’l Criminal Court, Keynote Address: Law, Justice and Development Week 2011, World Bank 9 (Nov. 14, 2011), *available at* <http://www.icc-cpi.int/NR/rdonlyres/038425E6-C9DD-465E-953C-C56A81091D0C/0/111114ICCPresidentKeynoteSpeechAtWorldBank.pdf>.

more general transitional justice principles,²¹⁰ and urge the Court to make transitional justice an even more explicit feature of its goals.²¹¹

There is, however, an inherent difficulty in identifying the ICC with transitional justice so directly.²¹² As most commentators who study this area emphasize, transitional justice is highly contextualized and particular to a given society's conditions,²¹³ and is often defined by the conflict itself.²¹⁴ Thus, experts recognize that "there is no 'one size fits all' approach to [transitional] justice."²¹⁵ So for any transitional justice regime to be successful, it is important for it to be sensitive to local conditions and needs, and flexible enough to meet those needs.²¹⁶

As an independent, centralized, and supranational institution, the ICC appears to some to be removed from these localized conditions and thus ill-suited to provide comprehensive transitional justice solutions.²¹⁷ Therefore, in order to remedy this perceived deficiency in the ICC's structure, some commentators have encouraged the ICC to actively coordinate with domestic courts and other members of the international criminal justice community.²¹⁸ This coordination, they hope, will ensure that the ICC's conception of justice incorporates local needs and promotes long term, holistic solutions to the problems that gross international crimes generate.²¹⁹

III. LIBYA

Part III describes the situation in Libya—a situation in which the ICC is currently involved and which raises some acute issues related to the themes discussed in Part II. Part III.A begins by describing the political and social landscape in Libya following the nation's recent revolution. Part III.B then explains the ICC's involvement in Libya to date, focusing on the upcoming trial of Saif al-Islam Gaddafi²²⁰ and introducing the various options that exist for where and how to try him.

210. See Bassiouni, *supra* note 202, at xiv; Teitel, *supra* note 198, at 903 ("The establishment of the ICC . . . is . . . a sign of the normalization of post-conflict law as the global rule of law.").

211. See Bassiouni, *supra* note 202, at xiv (explaining that framing the ICC's mission broadly to encompass transitional justice goals brings the Court more in line with the goals the Rome Statute sets out in its preamble).

212. See Teitel, *supra* note 198, at 900.

213. See *id.* at 896–97.

214. In her book, *Transitional Justice*, Ruti Teitel articulates this notion by observing the paradoxical nature of law as it relates to transitional justice: "In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order even as it enables transformation." TEITEL, *supra* note 202, at 6.

215. Bassiouni, *supra* note 203, at 8.

216. See *id.*

217. See *id.*

218. See *id.*

219. See *id.*; Gordon, *supra* note 106, at 678–79.

220. Parts III and IV focus solely on Saif's case because Al-Senussi's situation is significantly more uncertain. Al-Senussi was captured in Mauritania on March 17, 2012, but his ultimate destination is unclear; Libya, France, and the ICC all seek to extradite and prosecute him. See Laurent Prieur & Taha Zargoun, *Libya Says Gaddafi Spy Chief Arrested*

A. Libya's Current Political and Legal Landscape

After forty-two years of oppression and nine months of revolution, Libya finally liberated itself from Muammar Gaddafi's reign on October 23, 2011.²²¹ The National Transitional Council (NTC), the interim government established on March 5, 2011 to guide Libya through the conflict and toward a permanent democratic government,²²² has begun the process of stabilizing the nation. On October 31, 2011, its fifty-one members elected Abdel Rahim el-Keab to the position of interim prime minister.²²³ According to the timeline the NTC established for itself, el-Keab and his cabinet are charged with conducting elections by June 2012 for an interim national assembly.²²⁴ That assembly will then spend one year drafting a new constitution, which it will put to a referendum in mid-2013.²²⁵ Around that same time, the NTC also hopes to have a full parliamentary election.²²⁶

But while Libya is moving toward a permanent, stable democracy, the current state of affairs indicates that the road to that end is not without bumps.²²⁷ Despite Gaddafi's death and Libya's formal liberation,²²⁸ much of the violence continues.²²⁹ For instance, many local militias who fought to overthrow Gaddafi have refused to put down their weapons until an elected government is freely and fairly established.²³⁰ As a result, fighting

in Mauritania, REUTERS (Mar. 17, 2012, 6:56 PM), <http://www.reuters.com/article/2012/03/17/us-libya-senussi-idUSBRE82G07Q20120317>. Meanwhile, Saif is in custody in Libya. *See infra* notes 247–48 and accompanying text.

221. *Libya — Revolution and Aftermath*, *supra* note 5 (“The country was formally declared liberated three days [after Gaddafi’s death].”).

222. LIBYAN INTERIM NAT'L COUNCIL, <http://www.ntclibya.org/english/> (last visited Mar. 23, 2012).

223. David D. Kirkpatrick, *Libya Names an Engineer as Premier*, N.Y. TIMES, Nov. 1, 2011, at A11. El-Keab succeeded the NTC's first prime minister, Mahmoud Jibril, who had promised to resign after Libya's formal liberation from Gaddafi's rule. *Id.*

224. *Id.* This assembly will consist of roughly 200 people. Alastair Macdonald, *Fearing Libya Vacuum, Ex-PM Urges Rapid Vote*, REUTERS (Nov. 16, 2011, 10:45 AM), <http://www.reuters.com/article/2011/11/16/us-libya-jibril-idUSTRE7AF16S20111116>.

225. *See* Macdonald, *supra* note 224. Jibril, the former interim prime minister, has spoken out against this plan for fear that any delay in establishing a permanent government will only subject the nation to more insecurity. *See id.* As an alternative plan, Jibril proposes that the unelected NTC expand to about 130 members by including representatives from various factions within the country, and then draft a constitution. *See id.*

226. *See id.*

227. *See, e.g.*, Moni Basu, *Libyans Face Tough Challenges in Building a New Nation*, CNN (Jan. 26, 2012), http://articles.cnn.com/2012-01-26/africa/world_africa_libya-challenges_1_national-transitional-council-libyan-cities-libyan-uprising?_s=PM:AFRICA (noting various “signs that Libya faces challenges on several fronts as it struggles to craft a new nation from the ashes of tyranny”).

228. *See supra* notes 5–7 and accompanying text.

229. *See, e.g.*, Liam Stack, *Pro-government Libyan Militia Routed from a Qaddafi Bastion*, N.Y. TIMES, Jan. 25, 2012, at A10 (describing one violent episode that represents a “renewed conflict between revolutionary forces and those supportive of [Gaddafi]”).

230. David D. Kirkpatrick, *In Libya, Fighting May Outlast the Revolution*, N.Y. TIMES, Nov. 2, 2011, at A4 (“Many members of military councils insist that they need to stay armed until a new constitution is ratified because they do not trust the weak provisional government to steer Libya to democracy on its own.”); Mark Lowen, *Libya's Ex-rebels Reluctant to Down Arms*, BBC NEWS (Jan. 6, 2012, 8:49 PM), <http://www.bbc.co.uk/news/world-africa-16443441>.

in some parts of the country has continued between these militias and a few remaining Gaddafi loyalists.²³¹ And with the country's first true national army only in its infancy, putting down these skirmishes and ending the fragmentation the militias represent appears a long way off.²³²

Further preventing the NTC from fully stabilizing the country are the revenge killings that these militias and other vigilantes have embarked on against people thought to have supported Gaddafi.²³³ At the site of one such killing, plastic ties were found next to the victims' bodies, suggesting that militia members tied the victims' hands behind their backs before executing them.²³⁴ Although the NTC has denounced this kind of conduct as antithetical to its central mission, and has urged its citizens to use the justice system for redress, it has nevertheless been slow to investigate, let alone stop, this behavior.²³⁵

Another problem facing the NTC is that even if people heeded its instructions and sought retribution in the justice system, it is unclear if a proper legal system exists that can adequately handle these disputes.²³⁶ Under Gaddafi, Libya's judicial system mirrored its political system in that everything revolved around the leader.²³⁷ During his reign, the country's "constitution" consisted essentially of Gaddafi's personal book of political thoughts, and "trials" more closely resembled tribal negotiations than formal proceedings.²³⁸ Now, after over four decades of deliberate repression and erosion of the nation's public institutions, observers worry that Libya lacks a viable judicial system.²³⁹

As for the makeshift judicial system that is in place, concerns abound regarding its treatment of prisoners and its adherence to due process

231. See Kirkpatrick, *supra* note 230 (describing reports of sporadic skirmishes between local militias); see also Basu, *supra* note 227 (noting that as frustration continues to grow throughout the country, "[c]lashes between pro- and anti-Gadhafi forces have turned lethal").

232. See Clifford Krauss, *Libya Tries to Build Army that Can March Straight and Defang Militias*, N.Y. TIMES, Nov. 22, 2011, at A4. A captain in the new army expressed doubt about its ability to successfully get these militias to surrender their guns, and noted that stability in Libya is unlikely until this happens. *Id.*; see also Anthony Shadid, *Libya Struggles to Curb Militias as Chaos Grows*, N.Y. TIMES, Feb. 9, 2012, at A1.

233. See HUMAN RIGHTS WATCH, *supra* note 1, at 599 ("Revenge attacks against populations deemed to have supported Gaddafi also grew in September and October."); Maria Golovnina, *Analysis: Cycle of Revenge Hangs over Libya's Fragile Peace*, REUTERS (Oct. 31, 2011, 8:08 AM), <http://www.reuters.com/article/2011/10/31/us-libya-revenge-idUSTRE79U1OF20111031>.

234. Kareem Fahim & Adam Nossiter, *In Libya, Massacre Site Is Cleaned Up, Not Investigated*, N.Y. TIMES, Oct. 25, 2011, at A4.

235. See *id.*

236. See Francois Murphy, *Libya Vows It, Not ICC, Will Try Saif, Senussi*, REUTERS (Nov. 20, 2011, 10:32 PM), <http://www.reuters.com/article/2011/11/21/us-libya-icc-idUSTRE7AK08K20111121>.

237. See Golovnina, *supra* note 233.

238. See *id.*

239. See Fahim & Nossiter, *supra* note 234. However, on November 8, 2011, a Tunisian appeals court approved the extradition of Gaddafi's former prime minister to Libya. Before entering this order, the judge expressly considered human rights concerns raised by human rights groups and foreign government related to treatment of Gaddafi loyalists. See *Libya — Revolution and Aftermath*, *supra* note 5.

principles.²⁴⁰ First, there are numerous reports that detainees from the revolution currently held in Libyan prisons are being tortured and subjected to human rights abuses.²⁴¹ Also, according to Amnesty International, many of the over 8,000 detainees²⁴² were arrested without a warrant and without any legitimate reason whatsoever, other than being thought to have supported Gaddafi.²⁴³ The NTC does not officially condone this conduct, nor does it directly control these detention centers.²⁴⁴ But despite their knowledge of these alleged abuses, Libyan authorities have been powerless to stop them.²⁴⁵

B. The ICC's Involvement in Libya

The issues regarding Libya's social, political, and legal stability are on full display as the ICC seeks to determine how to handle the trial of Saif Al-Islam, Gaddafi's son and former de facto prime minister. Saif, who faces charges from the ICC for crimes against humanity,²⁴⁶ was captured by a local militia on November 19, 2011 and has been detained in the Libyan town of Zintan ever since.²⁴⁷ But while the President of the ICC's Assembly of States Parties has publicly lauded the Libyan authorities for arresting Saif,²⁴⁸ and for "tak[ing] a major step towards ensuring

240. See HUMAN RIGHTS WATCH, *supra* note 1, at 599 (reporting sub-standard prison conditions and "consistent reports of abuse, including beatings and some use of electric shock").

241. See *Libya: Protesters Accuse Prison Officials of Mistreating Pro-Qaddafi Detainees*, N.Y. TIMES, Nov. 4, 2011, at A6.

242. See Liam Stack, *Qaddafi Son Being Held by Rebels, Rights Group Says*, N.Y. TIMES, Dec. 21, 2011, at A12. According to human rights activists who visited Libya, none of these 8,000 prisoners have had a trial date set by the Libyan government, and none have had access to a lawyer. *Id.*

243. See AMNESTY INT'L, DETENTION ABUSES STAINING THE NEW LIBYA 5–8 (2011), available at <http://www.amnesty.org/en/library/asset/MDE19/036/2011/en/e1c30d0f-8ec3-4368-8537-03f1bb15a051/mde190362011en.pdf>.

244. See *Libya: Protesters Accuse Prison Officials of Mistreating Pro-Qaddafi Detainees*, *supra* note 241.

245. See AMNESTY INT'L, *supra* note 243, at 5 (describing, in particular, an example of prison officials purposely ignoring release orders given by judicial police and prosecution). *But see Member States Vote to Reinstate Libya as Member of UN Human Rights Council*, UN NEWS CENTRE (Nov. 18, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40438&Cr=libya&Cr1=> ("United Nations Member States voted overwhelmingly . . . to readmit Libya as a member of the UN Human Rights Council . . . [due to Libya's] recent commitments . . . to promote and protect human rights, democracy and the rule of law . . .").

246. See *Prosecutor v. Gaddafi*, Case No. ICC-01/11, Warrant of Arrest for Saif Al-Islam Gaddafi, at 6 (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1101345.pdf> (charging him for the crime of murder within the meaning of article 7(1)(a) of the Rome Statute, and persecution within the meaning of article 7(1)(h) of the Rome Statute).

247. See Stack, *supra* note 242.

248. It is unclear how much control Libya's central government had over Saif's initial capture, and how much control it now has over his detention. It appears that a local militia from the mountain town of Zintan is responsible for his arrest, and are the ones now detaining him, in cooperation with the NTC. *See id.* (quoting a representative from Human Rights Watch, who explains that "[i]t is not accurate to say [Saif] is being held by a militia outside of government control, although it is not true that he is in a prison directly controlled by the government, either").

accountability”²⁴⁹ in their regime, it remains to be seen whether the ICC will actually allow Libyan domestic courts to handle Saif’s trial, as Libyan leaders and citizens urge,²⁵⁰ or whether the uncertainties surrounding the new government and the perceived need for swift and efficient justice necessitate that the ICC conduct the trial.²⁵¹ As the ICC’s Chief Prosecutor explained to the Libyan authorities during a November 2011 visit, the present circumstances provide several options for bringing Saif to justice.²⁵²

The first option is for the Libyan judicial system to try Saif itself.²⁵³ Since Saif’s capture, and especially during the Prosecutor’s November trip to Libya, Libyan authorities have stated that this is their desired course of action, citing the significance that such a trial would have for Libyans and for the future of the country more generally.²⁵⁴ However, the Prosecutor and the ICC have made clear that Libya’s desire to try Saif does not automatically give the Libyans that privilege.²⁵⁵ Despite urgings from the Libyan authorities that they are committed to conducting a fair trial in accordance with international law standards,²⁵⁶ the ICC has repeatedly emphasized that the decision is not for the Libyan government to make.²⁵⁷ Pursuant to articles 17 and 19 of the Rome Statute, Libya must formally

249. See Press Release, Assembly of States Parties, President of the Assembly of States Parties Welcomes Arrest of Saif Al-Islam Gaddafi (Nov. 19, 2011), <http://www.icc-cpi.int/NR/exeres/2243BC6E-B58C-4A8A-9B21-D309E49AE5AC.htm>.

250. See Rami Al-Shaheibi, *Gaddafi’s Son Saif al-Islam Seized in Southern Libya*, TIME (Nov. 19, 2011, 11:00 AM), <http://www.time.com/time/world/article/0,8599,2099886,00.html> (citing Libya’s Informational Minister Mahmoud Shammam); Murphy, *supra* note 236 (citing an interview with Libya’s interim justice minister Mohammed al-Alagi).

251. See Al-Shaheibi, *supra* note 250 (citing a member of Amnesty International who emphasized that in order for Saif to be brought to justice as quickly as possible, he must be handed over to the ICC).

252. See Prosecution’s Submissions, *supra* note 11, ¶¶ 7–9. The Court has already decided that Saif’s case falls within its jurisdiction. See Prosecutor v. Gaddafi, Case No. ICC-01/11, Decision on the Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ¶ 10 (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1101337.pdf>; see also *supra* notes 118–28.

253. See Prosecution’s Submissions, *supra* note 11, ¶ 7.

254. See *id.* ¶ 4; Murphy, *supra* note 236; *Arrest of Qadhafi’s Son Vital ‘for the Future of Justice in Libya’ — UN Human Rights Chief*, UN NEWS CENTRE (Nov. 21, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40464&Cr=libya&Cr1=>.

255. See Prosecution’s Submissions, *supra* note 11, ¶ 4; Press Release, Int’l Criminal Court, Course of Action Before the ICC Following the Arrest of the Suspect Saif Al Islam Gaddafi in Libya (Nov. 23, 2011), <http://www.icc-cpi.int/NR/exeres/48F6B130-EC14-4A51-BC79-1CCF8633E270.htm>; see also *Saif al-Islam Gaddafi Could Be Tried in Libya, Says ICC Prosecutor*, GUARDIAN (Nov. 22, 2011, 10:14 AM), <http://www.guardian.co.uk/world/2011/nov/22/saif-al-islam-gaddafi-trial-libya> (quoting the ICC Chief Prosecutor, who emphasized that Libya may prosecute Saif only if it complies with ICC standards).

256. See Prosecution’s Submissions, *supra* note 11, ¶ 5.

257. See *id.* ¶ 7; Public Redacted Version of “OPCD Observations on Libya’s Submissions Regarding the Arrest of Saif Al-Islam” ¶ 5, Prosecutor v. Gaddafi, ICC-01/11-01/11 (Feb. 3, 2012) [hereinafter OPCD Observations], available at <http://www.icc-cpi.int/iccdocs/doc/doc1326934.pdf> (emphasizing that the ICC retains jurisdiction over the case until a formal admissibility challenge is made).

challenge the admissibility of Saif's case to the ICC;²⁵⁸ only if ICC judges are satisfied that Libya displays an adequate commitment to justice will Libya be permitted to try Saif at home.²⁵⁹ If, however, the ICC deems the case admissible, or if Libya does not challenge the admissibility issue, then the case is in the ICC's hands.²⁶⁰

Even with control over the case, the ICC Prosecutor has stated that there might nevertheless be opportunities for the ICC and Libya to cooperate in the trial process.²⁶¹ The first option for cooperation would be to sequence trials, which would allow Libya to fully investigate and try Saif for crimes unrelated to the ICC's charges before handing him over to the ICC, where he would then be tried for the more serious crimes with which he is charged.²⁶² The second option would be for the ICC to actually conduct its trial of Saif in Libya.²⁶³ However, neither of these options appears to interest Libyan authorities as much as prosecuting Saif themselves in domestic courts.²⁶⁴

IV. RECONCILING THE SITUATION IN LIBYA WITH THE ICC'S GOALS AND UNDERLYING PRINCIPLES

As the situation in Libya continues to develop, and decisions about how to bring Saif (and eventually others) to justice loom, the ICC faces a critical juncture that could define how it operates and its place within the international criminal justice community. Recognizing the opportunity before the ICC, and taking into account the Court's founding principles and ultimate goals, this part proposes a comprehensive solution to the problem of where and how to try Saif al-Islam Gaddafi.

Part IV.A begins by outlining how the Court is likely to approach the question of whether Saif's case is admissible. Part IV.B then argues that, despite the attention it is receiving, the question of admissibility should not ultimately be the determinative one in deciding where and how to bring Saif to justice. In addition to admissibility, Part IV.B.1 contends that the ICC's underlying principles and goals should dictate its course of action with

258. See *supra* notes 161–66 and accompanying text (describing the process by which Libya can challenge the admissibility of the case).

259. See Prosecution's Submissions, *supra* note 11, ¶ 7; Press Release, *supra* note 255.

260. See Prosecution's Submissions, *supra* note 11, ¶¶ 7–9.

261. See *id.*; see also *Saif al-Islam Gaddafi Could Be Tried in Libya, Says ICC Prosecutor*, *supra* note 255 (“[Libya has] decided to [try to prosecute Saif], and that is why [the ICC is] here—to learn and to understand what they are doing and to co-operate.”). However, even though Libya has asked the ICC to “provide advice and . . . monitor [their] domestic proceedings,” the Prosecutor has made clear that “it is not within the mandate of the Office of the Prosecutor to serve as advisor or to monitor a domestic trial.” Prosecution's Submissions, *supra* note 11, ¶¶ 6–7.

262. See *id.* ¶¶ 5, 8 (citing Rome Statute, *supra* note 79, art. 94). Libyan authorities are currently investigating Saif for corruption that occurred prior to the February 2011 revolution. See Stack, *supra* note 242.

263. See Prosecution's Submissions, *supra* note 11, ¶ 9; Murphy, *supra* note 236. The Rome Statute allows the Court to sit in an alternate location if it so desires. Rome Statute, *supra* note 79, art. 3(3).

264. Cf. Prosecution's Submissions, *supra* note 11, ¶ 9.

respect to Saif. And that course of action, Part IV.B.2 argues, should be to try Saif in Libya with the help and cooperation of the Libyan judicial system.

A. *The Admissibility of Saif's Case*

At the heart of the Court's mandate is the requirement that every case it adjudicates must be admissible.²⁶⁵ Understanding how the ICC will and should proceed with respect to Saif's case thus requires some attention to the question of its admissibility. This section outlines how the Court will likely approach that question and highlights the salient issues the Court will need to consider in answering it.²⁶⁶

Given the circumstances surrounding Libya and this case, as well as the criteria under which the ICC will examine those circumstances, the Court's admissibility analysis will likely be very complicated. Pursuant to article 17, the first issue the Court will have to address is whether Libya is currently investigating Saif's case in a way that indicates that it is "[willing] genuinely to carry out the investigation [and eventual] prosecution."²⁶⁷ Even though Libya's investigation against Saif is experiencing some delay,²⁶⁸ it does not appear to be the kind of delay that is "inconsistent with an intent to bring [him] to justice"—which is what article 17 requires in order for the Court to come to an "unwilling" determination.²⁶⁹ In fact, by all accounts, Libyans seem intent on ensuring that Saif is brought to justice.²⁷⁰

The more interesting and controversial aspect of the Court's admissibility determination will be assessed under article 17(1)(a)'s "unable" prong. On one hand, there is strong evidence that Libya will be unable genuinely to carry out an investigation and prosecution in a way that is truly consistent with justice and international due process standards. For one, Libya's current legal and judicial infrastructure is limited.²⁷¹ Of the infrastructure

265. See *supra* note 130 and accompanying text (noting the admissibility requirement); *supra* notes 96–97 and accompanying text (describing the significance and textual origins of the principle of complementarity); *supra* notes 131–33 and accompanying text (describing that the admissibility regime directly implements the principle of complementarity into the Statute).

266. The Court may never actually have to issue a formal admissibility ruling. See *supra* note 162 (observing that as a general matter "the Court is not obligated to make a formal admissibility ruling"); note 161 and accompanying text (observing that article 18's process of conducting a preliminary admissibility ruling does not apply to Security Council referrals); note 10 (indicating that Saif's case began with a Security Council referral). However, given Libya's strong desire to try Saif at home, see *supra* notes 250, 254 and accompanying text, it appears likely that Libyan officials will eventually challenge the case's admissibility pursuant to article 19.

267. See *supra* notes 142–43 and accompanying text.

268. See OPCD Observations, *supra* note 257, ¶ 5 (indicating how little information regarding the investigation Libya has provided to the ICC, and that the information it has provided has been delayed); *id.* ¶ 34 ("There is no indication or evidence that the current domestic investigation against [Saif] had commenced at the time of his arrest.").

269. See *supra* note 143 and accompanying text.

270. See *supra* notes 250, 254 and accompanying text.

271. See *supra* notes 236–39 and accompanying text.

that is in place, reporters and human rights groups have raised grave concerns about its adequacy in protecting prisoners and conducting fair and efficient proceedings.²⁷² Moreover, adding to these general concerns is information suggesting that Saif's detention in particular has failed to provide some basic due process protections—namely, Saif's captors have not allowed him to see a lawyer or talk to family members, and it is even unclear whether he is being detained pursuant to a valid arrest warrant.²⁷³

On the other hand, important members of the international community have praised the Libyan government for its commitment to defending human rights and the promise it has shown thus far to that end.²⁷⁴ Also, because the bar for demonstrating “inability” is meant to be high, “as the ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards,”²⁷⁵ the ICC judges might very well be reticent to conclude that the aforementioned concerns rise to the level necessary to constitute “a total or substantial collapse or unavailability of [Libya's] national judicial system,” or that those concerns demonstrate that Libya is “otherwise unable to carry out [Saif's] proceedings.”²⁷⁶ Weighing these factors against the arguments that Libya will be unable to effectively and fairly bring Saif to justice, the Court faces a difficult decision with respect to the admissibility of Saif's case. Given the ICC's founding principles and goals, however, the Court's course of action in Libya need not turn on that decision.

B. The Decision of Where and How to Try Saif Should Be Governed by the Court's Founding Principles and Goals, Not by the Case's Admissibility

While the admissibility requirement is certainly an important part of the principle of complementarity,²⁷⁷ this Comment has sought to demonstrate that admissibility is but one aspect of the complementarity regime.²⁷⁸ As such, the issue of admissibility should not be the sole factor in determining where and how Saif will see justice. Instead, in deciding this issue, the Court should look to its underlying purpose, and allow that purpose to shape its conceptualization of complementarity in a new, more proactive direction. Part IV.B.1 explores the Court's underlying purpose and explains how a proactive approach to complementarity better helps fulfill that purpose, and Part IV.B.2 then applies that approach to Saif's case and proposes a plan for bringing him to justice.

272. See *supra* notes 240–43 and accompanying text.

273. See OPCD Observations, *supra* note 257, ¶¶ 2, 15.

274. See *supra* note 245 (observing that the U.N. General Assembly recently readmitted Libya to its Human Rights Council).

275. See INFORMAL EXPERT PAPER, *supra* note 102, ¶ 49.

276. See *supra* note 146 and accompanying text.

277. See *supra* notes 129–46 and accompanying text.

278. See *supra* Parts I.B.3, II.A.

1. The Court's Ultimate Goals Are Most Effectively Achieved
Through the Concept of Proactive Complementarity

As discussed above, the ICC was founded on the notions that impunity for the world's most serious crimes must end, and that violators of these crimes must never be allowed to escape justice.²⁷⁹ But when the ICC became part of the international criminal justice landscape almost a decade ago, it entered into a preexisting system of domestic courts and other types of international tribunals that was also designed to bring about this end.²⁸⁰ The idea behind the ICC's creation was that the Court would supplement those existing mechanisms and provide an avenue for justice when the others failed to do so.²⁸¹ Reflecting that idea, the principle of complementarity thus guides the Court's work.²⁸²

But to so narrowly conceptualize the Court's ultimate goal of ending impunity, its guiding principle of complementarity, and the relationship between the two is to overlook the broader purpose that the ICC should serve. The Court extends beyond prosecuting and adjudicating individual criminal cases for the sake of providing justice and peace instance-by-instance. More fundamentally, its purpose, as recognized by commentators,²⁸³ the ICC President,²⁸⁴ and the Rome Statute,²⁸⁵ is to end impunity for the world's most serious crimes altogether.²⁸⁶ Ideally, that goal is achieved by building a system of domestic courts that are so interconnected, efficient, and committed to achieving justice that, ultimately, every case is prosecuted at the domestic level and thus every case becomes inadmissible for the ICC.²⁸⁷ Essentially, the ICC's long-term goal, as the ICC's first Chief Prosecutor recognized, should be to make itself irrelevant.²⁸⁸

For the ICC to make that goal a reality, a number of requirements and considerations come into play—considerations that touch on transitional justice issues and require a broader, proactive approach to complementarity.²⁸⁹ Practically speaking, creating a global system of interconnected domestic courts fundamentally requires that individual domestic legal systems be properly equipped with the requisite competence, sophistication, and commitment to justice that the ICC and international criminal justice community demand. And in the context of countries that are emerging from conflict and seeking transitional justice, that competence

279. *See supra* notes 198–202 and accompanying text.

280. *See supra* Part I.A (discussing the nature of, and relationship between, international tribunals, hybrid tribunals, and domestic courts).

281. *See supra* notes 96–112 and accompanying text.

282. *See supra* notes 96–112 and accompanying text.

283. *See supra* note 202 and accompanying text.

284. *See supra* note 209 and accompanying text.

285. *See supra* note 209 and accompanying text.

286. *See supra* notes 201–02 and accompanying text.

287. *See supra* note 103 and accompanying text.

288. *See supra* note 103 and accompanying text.

289. *See supra* notes 175–81 and accompanying text.

and commitment can only truly be developed by giving the society an opportunity to address its past crimes directly and to heal from them.²⁹⁰

In building this system over the long term, the ICC will thus be required to balance the objective due process standards to which the international community is committed with the subjective, individualized needs of countries in dire need of criminal justice.²⁹¹ The only way for the ICC to satisfy both requirements is for it to actively cooperate with domestic legal systems in investigating and prosecuting cases.²⁹² Creating this dynamic within the confines of the Rome Statute requires an acknowledgment that the principle of complementarity does more than just tell the Court when it may not do something.²⁹³ Instead, the Court must be able to follow some of the ideas of commentators²⁹⁴ and experts²⁹⁵ and use the principle of complementarity proactively as a mechanism that empowers it to help domestic states achieve justice on their own terms.²⁹⁶ Adopting such an interpretation of the complementarity principle would, in the short term, ensure that justice is attained adequately and in line with international standards. In the long term, it would help build up domestic legal systems to the point where the ICC's help is no longer needed.

2. Using the Concept of Proactive Complementarity, the Court Should Ensure a Fair Trial for Saif in Libya with the Help and Involvement of Libyan Authorities

Due to its obligations²⁹⁷ and limited resources,²⁹⁸ the ICC cannot and should not transform itself from a court of international criminal law into a nation-building institution. But the ICC should make it a priority to assist states, in some circumstances, in bringing the world's most serious criminals to justice. This section proposes a way for the ICC and Libya to cooperate in light of these goals, considerations, and limitations. This plan emphasizes that Saif should be tried for his crimes against humanity in Libya by some combination of both ICC and Libyan prosecutors and judges.

Regardless of how the ICC judges ultimately rule on the question of admissibility, the first priority in bringing Saif to justice should be to try him in Libya. The importance of trying Saif in Libya, in front of the Libyan people, stems from Libya's need to face its past and exact justice from a

290. *See supra* notes 212–19 and accompanying text.

291. *See supra* notes 213–19 and accompanying text (referring to transitional justice principles).

292. *See supra* note 176 and accompanying text.

293. *See supra* note 175 and accompanying text (providing a basic definition of proactive complementarity).

294. *See supra* notes 175–85 and accompanying text.

295. *See supra* notes 178–96 and accompanying text.

296. *See supra* notes 213–16 and accompanying text.

297. *See supra* notes 82–83 and accompanying text.

298. *See supra* notes 108–09 and accompanying text.

person, and a regime, that caused the nation so much harm.²⁹⁹ As an important part of Gaddafi's regime, Saif not only was a direct participant and coordinator of the February 2011 violence,³⁰⁰ but he is also seen, following Gaddafi's death, as a symbol of that regime and of all the pain it inflicted on the Libyan people.³⁰¹ Thus, in order for Libya to emerge from its most recent conflict fully healed, it is important that the Libyan people see and feel that justice in their country.³⁰²

If Saif's case is inadmissible, then it will be tried in Libya, because his case will be entirely in the hands of the Libyan government.³⁰³ If the case turns out to be admissible, however, the ICC should utilize article 3 of the Rome Statute³⁰⁴ and, as the Prosecutor has suggested,³⁰⁵ conduct the trial in Libya instead of The Hague. In the event that the case is admissible, taking this step to nevertheless try it in Libya has the additional benefit of providing an example for Libya's troubled³⁰⁶ judicial system to follow as it develops.

In addition to trying Saif's case in Libya, it is also incredibly important that members of the Libyan judicial system participate alongside ICC personnel, or vice versa, throughout the course of the investigation and trial. Such cooperation would satisfy both Libya's need to heal and develop itself in the long term,³⁰⁷ as well as the international criminal justice community's need to try Saif efficiently and fairly in the short term.³⁰⁸ In effect, the ICC should follow the suggestion proposed in the Office of the Prosecutor's informal expert paper on complementarity, and use the trial as an opportunity to train Libyan prosecutors and judges in how to conduct a high-profile international criminal case.³⁰⁹

If the case is admissible, then for reasons of fairness, due process, or security, the ICC prosecutors and judges will need to have primary control over it.³¹⁰ In such a scenario, then, the Court should invite members of the Libyan judicial system to observe and participate in the trial's various stages. If, on the other hand, the case is inadmissible, and the ICC relinquishes complete control of the case over to Libya, the ICC should nevertheless assist the Libyans to the extent that they request it,³¹¹ as long

299. *See supra* note 208 and accompanying text (noting the importance, from a transitional justice perspective, of holding criminals from past regimes accountable).

300. *See supra* note 246 and accompanying text.

301. *See supra* note 3 and accompanying text.

302. *See supra* note 207 and accompanying text.

303. *Cf. supra* notes 130–31 and accompanying text (describing the admissibility requirement for the ICC to hear a case).

304. *See supra* note 263 and accompanying text.

305. *See supra* note 263 and accompanying text.

306. If the case is deemed to be admissible, that necessarily means that the ICC detects some problem with either Libya's ability or willingness to try the case pursuant to international law standards. *See supra* notes 129–47 and accompanying text.

307. *See supra* note 227 and accompanying text.

308. *See supra* notes 251–52 and accompanying text.

309. *See supra* note 191 and accompanying text.

310. *See supra* notes 142–43 and accompanying text.

311. *See supra* note 261 and accompanying text.

as such assistance does not develop into the ICC effectively conducting the prosecution itself.³¹²

Even though this kind of assistance or training would be beyond the Rome Statute's express instructions,³¹³ and beyond what the Chief Prosecutor has said he is willing to do,³¹⁴ it nevertheless makes sense for this kind of cooperation to take place, considering the ICC's long-term interest in building up Libya's judicial system³¹⁵ and Libya's current deficiencies.³¹⁶ Thus, for these reasons and in these ways, the mechanism that prosecutes Saif, whether it is primarily the ICC or primarily a Libyan court, should act like a hybrid tribunal³¹⁷ and incorporate both international and domestic components.

CONCLUSION

Facing a decision on how to proceed with the situation in Libya, the ICC is in a very significant place in its short life. In its decision, the Court will be forced to reconcile the central concepts on which it was founded—ending impunity for the world's most serious crimes and the principle of complementarity—with the complicated circumstances in Libya. But while the solutions to the problems Libya poses are not readily apparent from the plain text of the Rome Statute, this Comment has argued that by re-conceptualizing some of its own basic principles, the Court can reach a satisfying conclusion for itself, Libya, and the international criminal justice community.

While the ultimate success or failure of the Court does not rest on what it decides to do in Libya, the Libya situation nevertheless provides an opportunity for the Court to demonstrate how it intends to interpret its fundamental goals and founding principles moving forward. Properly taking advantage of that opportunity will require the Court to think creatively, and in a way that brings Libya and the ICC together in a cooperative effort toward justice.

312. *See supra* note 193 and accompanying text.

313. *See supra* note 192 and accompanying text.

314. *See supra* note 261 (indicating the Prosecutor's reluctance to advise Libya and monitor a trial if the case is deemed inadmissible).

315. *See supra* note 103 and accompanying text.

316. *See supra* notes 230–45 and accompanying text.

317. *See supra* Part I.A.2.