
Between justice and politics

The ICC's intervention in Libya

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Introduction

Prior to the Arab Spring, there were few signs or predictions that the Arab world would attract the attention of the International Criminal Court (ICC). The events that unfolded and the effects of the Court on developments in conflict and post-conflict Libya speak to the tension between the vision of an apolitical pursuit for accountability and the deeply political work of the Court in practice. This chapter critically examines the effects of the ICC on the conflict in Libya and on the pursuit of international criminal accountability since the beginning of the Arab Spring in February 2011. It considers both the impact of the ICC on conflict and post-conflict Libya as well as the impact of the Court's intervention on the institution itself, and suggests that this reciprocal relationship epitomises the politics of international criminal justice. The central argument of the chapter builds upon a growing body of scholarship that recognises the role of political interests on international criminal justice and on the work of the ICC in particular.¹ The Court's effects in Libya have ultimately been determined not by the ICC itself but rather by political actors and the political contexts in which it operates.

The chapter first contextualises the Court's intervention in Libya, followed by an examination of the politics of the UN Security Council's referral to the ICC. In the third section, the chapter focuses on the so-called peace versus justice debate as it pertains to Libya. The effects of the ICC's intervention on efforts to establish and negotiate peace and

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¹ See, e.g., G. Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity Press, 2007); A. Branch, *Displacing Human Rights – War and Intervention in Northern Uganda* (New York: Oxford University Press, 2011).

stability in Libya are assessed. The fourth section discusses the political instrumentalisation of the ICC's work by the 'international community' and intervening North Atlantic Treaty Organization (NATO) forces. Part five offers an assessment of the sharply dichotomous debate over where to try Saif Al-Islam Gaddafi and Abdullah Al-Senussi, the two surviving members of the Gaddafi regime against whom arrest warrants were issued. This leads to an analysis of the politics and law of Libya's admissibility challenges at the ICC. The chapter concludes by offering some reflections of the Court's role and its impact on conflict and post-conflict Libya.

The ICC's Libya intervention in context

Few could have foreseen that Libya would be the target of an ICC investigation, that arrest warrants would be issued against its head of state, Muammar Gaddafi; his heir apparent, Saif Al-Islam Gaddafi; and his head of intelligence, Abdullah Al-Senussi – let alone that it would be the locus of a NATO military intervention drawing upon the doctrine of the 'Responsibility to Protect'.² As Alex Bellamy points out, no crisis or conflict-monitoring group had Libya on its 'at risk' lists.³ On the contrary, just months before Gaddafi's crackdown on protesters, a number of states had praised Libya's human rights record during the country's Universal Periodic Review, while Foreign Policy's 2010 Failed States Index ranked Libya ahead of India, Turkey, Russia and Mexico – none of which would generally be considered candidates for foreign military intervention.⁴

In 2011, however, fissures in the four-decade-long rule of Muammar Gaddafi began to appear. Emboldened by events in neighbouring 'Arab Spring' states in the early months of the year, protesters, primarily in the eastern part of the country, took to the streets to voice ongoing socio-economic concerns and demand reform. In response, the regime moved to crush what until then were largely peaceful demonstrations. Protests escalated in the eastern capital of Benghazi and quickly transformed into a full-scale rebellion, seeking the overthrow of the Gaddafi government. Increasingly fervent, organised and armed groups began clashing with the regime's feared security forces. The opposition also set up the

² A. Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm', *Ethics & International Affairs*, 25 (2011), 263–269.

³ *Ibid.*

⁴ The concept of failed states is controversial but oft-evoked in discussions regarding candidates for humanitarian intervention.

National Transitional Council (NTC) to manage political objectives and present a political face to the people of Libya and the international community. As violence escalated, a consensus began to emerge among states at the UN Security Council and beyond: in order to prevent Gaddafi from indiscriminately slaughtering any challengers to his regime, concerted international action was needed.⁵

The situation in Libya was remarkable for the pace with which seemingly peaceful protests deteriorated into mass violence as well as the extent of the threat to civilian lives posed by the Gaddafi regime.⁶ Equally significant was the speed with which states reacted and responded by turning towards the ICC. Amongst others, the Organization of the Islamic Conference, the Arab League and the African Union called on the international community to become involved. The UN's High Commissioner for Human Rights likewise added her support for an investigation of what she declared were crimes against humanity being committed by Gaddafi forces.⁷ If detractors of international intervention had reservations, Libya's deputy permanent representative to the United Nations, Ibrahim Dabbashi, encouraged them to take action. On 21 February 2011 he declared:

We call on the UN Security Council to use the principle of the right to protect to take the necessary action to protect the Libyan people against the genocide . . . We also call on the prosecutor of the International Criminal Court to start immediately investigating the crimes committed by Gaddafi.⁸

Emboldened, if not pressured, by support from key regional and international organisations and leaders, on 26 February 2011 the UN Security Council passed Resolution 1970, a package of sanctions aimed at pressuring the Gaddafi regime to desist in its violent crackdown on civilians in Libya.⁹ Amongst its measures was the Security Council's second-ever referral of a situation to the ICC.

⁵ S. Chesterman, "Leading from Behind": The Responsibility to Protect, The Obama Doctrine, and Humanitarian Intervention after Libya', *Ethics & International Affairs*, 3 (2011), 279–285.

⁶ *Ibid.*, 4.

⁷ See statement by Navi Pillay, UN High Commissioner for Human Rights, to the Fifteenth Special Session of the Human Rights Council, 'Situation of Human Rights in the Libyan Arab Jamahiriya' (25 February 2011).

⁸ See M. Du Plessis and A. Louw, 'Justice and the Libyan Crisis: The ICC's Role under Security Council Resolution 1970', ISS Africa Briefing Paper (2011), 1–2.

⁹ UN Doc. S/RES/1970 (2011).

The referral was roundly praised. Human rights groups highlighted, in particular, that it had been passed with unprecedented speed and was authorised unanimously by all members of the Council.¹⁰ For advocates and proponents of the Court, Resolution 1970 contained many important advances for the ICC and for the project of international criminal justice. A number of countries who are not ICC member states and which had, to varying degrees, opposed the ICC all voted in favour of the resolution.¹¹ Despite these ‘triumphs’, however, it would be dangerous to overstate international support for the referral or the extent to which it was a ‘victory’ for international criminal justice. Indeed, the litany of celebratory statements obscured the deeply political and politically controversial contours of the referral.

Mixing justice and politics: Security Council Resolution 1970

Despite the violence of Libyan state forces, it was not clear that the Security Council would seek the ICC’s intervention. A number of states on the Council were ambivalent about the prospect of the Court’s involvement. However, when the Arab League issued a statement condemning the Gaddafi regime, the balance appeared to tip: a strong resolution and referral to the ICC became a political possibility. Still, even with the unanimous referral, statements by Security Council members revealed their anxiety. Following the passing of Resolution 1970, both the Chinese ambassador and his Russian counterpart avoided any mention of the ICC in explaining their decisions to support the resolution. Moreover, neither directly criticised Gaddafi or his government. China claimed that it was only because of ‘special circumstances’ that the resolution was passed while Russia took the opportunity to highlight that it ‘opposed counterproductive interventions’.¹² Meanwhile, the Indian ambassador suggested that India would have ‘preferred a “calibrated approach” to the issue’, suggesting that the state had its concerns as well.¹³

¹⁰ ‘UN: Security Council Refers Libya to ICC’, Human Rights Watch (27 February 2011); ‘United Nations Security Council Refers Libya to the ICC’, Coalition for the International Criminal Court (27 February 2011); ‘Unanimous Security Council vote a crucial moment for international justice’, Amnesty International (27 February 2011).

¹¹ This includes China, Russia, the United States and India.

¹² See ‘In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters’, UN Doc. SC/10187/Rev.1 (2011).

¹³ *Ibid.*

Nevertheless, an agreement was brokered. One consequence of the referral was to expose issues in the relationship between the Security Council and the Court and, in particular, the proximity of the Council member states' political interests with the supposed apolitical justice served by the Court. A key issue of contention for drafters of the ICC's Rome Statute had been the role of the Security Council in the Court's mandate.¹⁴ Proponents of the ICC were determined to avoid giving the Council too much influence over the functioning of the Court for fear it would result in politicisation of its work and would place international criminal justice at the whim of the Council's five permanent members.¹⁵ In Libya, however, this fear appeared to largely evaporate.

Yet the high politics of Resolution 1970 made the referral a matter of the political prerogatives of the Security Council's members as much as one of international criminal accountability. Three aspects of the resolution highlight the politicisation of the ICC's mandate: the exclusion of non-state parties from the jurisdiction of the Court, the inclusion of a reference to Article 16 of the Rome Statute and the temporal limitations imposed on the ICC's jurisdiction. Each will be considered in turn.

Similar to Resolution 1593 (2005), which referred the situation in Darfur to the ICC, Resolution 1970 precludes the ICC from investigating or prosecuting citizens of states that are not members of the Court. Operative paragraph 6 of the Resolution 1970 reads:

[The Security Council] ... Decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.¹⁶

The exclusion of non-states parties in Resolution 1970 exposes a paradox in the treatment of the ICC by powerful states. This is particularly true of the United States, which insisted on the exclusion of non-states parties as a pre-condition for supporting the referral.¹⁷ Commentators have noted the paradox of having 'the United States putting forward a resolution to

¹⁴ See M. Glasius, *The International Criminal Court: A Global Civil Society Achievement* (Oxford/New York: Routledge, 2006), 47–60.

¹⁵ Under Article 16 of the Rome Statute, negotiators eventually achieved a compromise that allowed the UN Security Council to defer investigations and prosecutions for twelve months, renewably.

¹⁶ See Resolution 1970. ¹⁷ See du Plessis and Louw, 'Justice and the Libyan Crisis', 2.

the Security Council in support of a referral to a court from which it had insisted its military personnel and political elite were immune'.¹⁸ Moreover, the exclusion of non-states parties undermines a key goal of the Court: the achievement of universal jurisdiction. Brazil was the only ICC state party to openly express its reservations with expanding the Court's jurisdiction through the referral.¹⁹

The legality of excluding non-states parties from the ICC's jurisdiction is also highly questionable. In the context of the Security Council's referral of Sudan, Robert Cryer argued that the exclusion of non-states parties was legally dubious. Cryer's critique is equally applicable to Resolution 1970. As he argues, 'the exclusion of some states' nationals fails to respect the Prosecutor's independence and makes it difficult to reconcile the resolution with the principle of equality before the law. Some states' nationals, it would appear, are more equal than others.'²⁰ In short, the political tailoring of the referral to exclude non-states parties from the ICC's jurisdiction both undermines the Court's stated aim to achieve universal justice and suggests a hierarchy wherein similar crimes within the same context will not be similarly investigated and prosecuted.

A second controversial feature of the referral was the inclusion of a preambular reference 'recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect'. Article 16 of the Rome Statute can be invoked by the Council to suspend an investigation or prosecution by the Court for up to twelve months, renewable yearly, if either is deemed to pose a threat to international peace and security. The reference to Article 16 was almost certainly included in order to assuage the concerns of states that the ICC could complicate attempts to negotiate a political settlement to the conflict.²¹ In this context, the prospect of an Article 16 deferral can be seen as a concession to efforts to negotiate peace.

On the surface, the inclusion of Article 16 may be unproblematic. After all, it is part of the Rome Statute and it had previously been

¹⁸ T. Dunne and J. Gifkins, 'Libya and the State of Intervention', *Australian Journal of International Affairs*, 65 (2011), 515–529.

¹⁹ See UN Doc. SC/10187/Rev.1.

²⁰ R. Cryer, 'Sudan, Resolution 1593, and International Criminal Justice', *Leiden Journal of International Law*, 19 (2006), 195–222.

²¹ This is also suggested by Du Plessis and Louw, 'Justice and the Libyan Crisis', 2. It has further been suggested that the inclusion of the reference to Article 16 was part of a compromise necessary to have Resolution 1970 pass. See 'UNSC refers situation in Libya to ICC, Sanctions Gaddafi and Aides', *Sudan Tribune*, 27 February 2011.

included in Resolution 1593 (2005). However, many international criminal justice scholars had expected – and perhaps hoped – that Article 16 would never become relevant in practice.²² The invocation of Article 16 would undoubtedly run contrary (at least temporarily) to attempts to end impunity and is certainly an uncomfortable proposition for those who fear manipulation of the ICC's work by the Security Council. The concern and controversy of the reference in the referral, then, lies both in the possibility that it would set a precedent for subsequent referrals and that it may indicate that states consider Article 16 a viable option where political prerogatives would trump the aims of justice and accountability.

The third notable element of Resolution 1970 is the restriction placed on the temporal jurisdiction of the ICC. Article 11 of the Rome Statute provides the ICC with jurisdiction for crimes allegedly perpetrated after 1 July 2002, the date the Court came into existence.²³ Operative Paragraph 4 of the Security Council's resolution, however, reads that it: 'Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court.'²⁴ To date there has been no official explanation by states or by the United Nations as to why the ICC's jurisdiction was restricted to events post-February 15. The Court has also remained silent on the subject. But it is clear that Security Council members negotiated this temporal limitation on the Court's jurisdiction.

It would appear that the restriction to events after 15 February 2011 was included in order to shield key Western states from having their affairs and relations with Libya come under judicial scrutiny. In the years preceding the intervention, many of the same Western states that ultimately intervened in Libya and helped overturn the regime had maintained close economic, political and intelligence connections with the Libyan government. These connections helped legitimise and sustain Gaddafi's regime.²⁵ During the NATO intervention itself, the head

²² See, e.g., J. Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court', *The International and Comparative Law Quarterly*, 51 (2002), 91–117; C. Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court', *Journal of International Criminal Justice*, 3 (2005), 698–699; M. Freeman, *Necessary Evils – Amnesties and the Search for Justice* (New York: Cambridge University Press, 2009), 81.

²³ Article 11, Rome Statute. ²⁴ See UN Doc. SC/10187/Rev.1.

²⁵ See, e.g., R. St John, *Libya – From Colony to Revolution* (Oxford: Oneworld, 2011), 225–278; J. Wright, *A History of Libya* (London: C. Hurst & Co., 2010), 221–229.

rebel commander in Tripoli, Abdel Hakim Belhadj, declared that he was seeking to sue the British and American governments for their complicity in his extraordinary rendition and torture.²⁶ Meanwhile, the disruption stemming from the conflict resulted in abandoned political offices flush with confidential government files. In September, documents found by officials from Human Rights Watch in the office of Gaddafi's defected foreign minister, Moussa Koussa, detailed American and UK engagement with Libyan intelligence and anti-terrorism practices, including the extraordinary rendition of individuals to be interrogated and tortured.²⁷ In short, there is ample evidence to suggest that the ICC's temporal jurisdiction was curtailed to prevent investigators from shedding light on damaging relations between the Gaddafi regime and the same states that engineered its collapse.

Peace versus, or with, justice in Libya?

Just two weeks after the Security Council's referral, ICC prosecutor Luis Moreno-Ocampo opened an investigation into alleged crimes committed in Libya. On 16 May 2011 he requested that the Court issue the three arrest warrants; two months later, the Pre-Trial Chamber approved warrants against all three. This represented a remarkable turnaround from the time of the referral to the issuance of warrants, especially in comparison to previous ICC interventions. In Darfur, the Court took two years to move from accepting the Security Council's referral to issuing arrest warrants. Not unlike other contexts in which the ICC has intervened, a debate ensued as to the effects of the ICC's involvement on developments during the Libyan conflict, most notably on efforts to transition the country from conflict to peace.²⁸ This is often referred to as the 'peace versus justice' debate.²⁹

Numerous commentators claimed that the ICC's involvement would make a transition to peace in Libya less likely. It was proclaimed that the ICC's intervention would give Gaddafi an incentive to 'fight to the death and

²⁶ See 'Libya commander Abdel Hakim Belhaj to sue UK government', *BBC News*, 19 December 2011.

²⁷ 'Libya: Gaddafi regime's US-UK spy links revealed', *BBC News*, 4 September 2011.

²⁸ In particular, debates on the effects of the ICC on peace negotiations and peace processes have characterised analyses of the Court's involvement in northern Uganda and Darfur.

²⁹ See R. Kerr and E. Mobekk, *Peace and Justice – Seeking Accountability after War* (Cambridge: Polity Press, 2007); C. L. Sriram and S. Pillay (eds.), *Peace versus Justice? The Dilemma of Transitional Justice in Africa* (Scottsville: University of KwaZulu-Natal Press, 2010).

take a lot of people down with him',³⁰ that the ICC 'may have perpetuated, rather than ended, [Gaddafi's] crimes',³¹ and that Libya was mired 'in a civil war in large part because of Gaddafi's international prosecution'.³² Concerns that the ICC would obstruct a resolution to the conflict only increased later, when it appeared increasingly likely that the conflict would become a long, protracted civil war, and that the ICC would reinforce a military and political stalemate. There were two primary options of conflict resolution highlighted by observers during the conflict that could have been pursued by the ICC's intervention: the negotiation of a peace agreement between Gaddafi and the rebels, or the removal of Gaddafi by negotiating his exile or asylum. This section explores the possible effects of the ICC on both options. The analysis offered suggests that political actors and dynamics ultimately precluded any non-military solution to the war.

Peace agreement between Gaddafi and the Libyan opposition

It was not always clear that Gaddafi's removal from power was a necessary condition for a transition in Libya. Resolution 1973, authorising the establishment of a no-fly zone in Libya, said nothing that could justify outright regime change.³³ While some states, including the United States and the United Kingdom, almost immediately called on Gaddafi to relinquish power,³⁴ others worked to find a negotiated compromise between the rebels and his regime.

In April 2011, a five-member African Union (AU) High-Level Panel, led by South African president Jacob Zuma, travelled to Libya in an attempt to broker an end to hostilities. In addition to a cessation of all hostilities – including NATO airstrikes – the AU's peace plan included allowing the unimpeded delivery of humanitarian aid, the protection of

³⁰ M. Boot, 'Qaddafi Exile Unlikely', *Commentary Magazine*, 23 March 2011.

³¹ D. Saunders, 'When Justice Stands in the Way of a Dictator's Departure', *Globe and Mail*, 2 April 2011.

³² See, e.g., P. Sands, 'The ICC Arrest Warrants Will Make Colonel Gaddafi Dig in His Heels', *The Guardian*, 4 May 2011.

³³ The targeting of Gaddafi himself, however, became a topic of heated debate and an area of much confusion. By June 2011, NATO officials admitted that they did see Gaddafi as a legitimate military target as the head of the regime's military command and control. Importantly, however, this is not spelled out in UN Security Council Resolution 1970. See 'Libya: Removing Gaddafi not allowed, says David Cameron', *BBC News*, 21 March 2011; and F. Townsend, 'NATO official: Gadhafi a legitimate target', *CNN*, 10 June 2011.

³⁴ E. O'Brien and A. Sinclair, 'The Libyan War: A Diplomatic History, February – August 2011', Center on International Cooperation (2011), 9–10.

foreign nationals and official peace talks between rebels and the Gaddafi regime. On 11 April, it was announced that Gaddafi had accepted the AU road map. However, on the very same day, the rebels rejected the AU's plan. As Zuma and the AU delegation reached rebel-held Benghazi, they were greeted with slogans that declared 'African Union take Gaddafi with you'. Mustafa Abdel Jalil, who subsequently became the chair of the NTC, made it clear why the rebels rejected the plan: 'The African Union initiative does not include the departure of Gaddafi and his sons from the Libyan political scene, therefore it is outdated.'³⁵ In short, for the Libyan opposition, a peace negotiation that in any way legitimised Gaddafi, or that included provisions for him to maintain a position of power, would have been rejected as a condition to peace talks.

For his part, Gaddafi did not show any indication that he would step down as a precondition to talks. Moreover, there is no evidence that he sought to address the ICC's investigation as an issue at the negotiating table. Thus, it can neither be said that the Court's intervention gave Gaddafi an incentive to negotiate a peaceful resolution to the conflict, nor that it prevented negotiations from taking place. Furthermore, it is not possible to suggest that the arrest warrant against Gaddafi led to the failure of the peace negotiations. Rather, the preliminary talks consistently failed to move forward because a pre-condition for negotiations taking place could not be met: an agreement on the fate of Gaddafi. Indeed, the rebels went so far as to reject any negotiations that included Gaddafi. The ICC may have bolstered the ability of the NTC to reject negotiations, but, even if this is the case, it is difficult to imagine that the NTC could have persuaded the various militias to accept a deal. This is an important finding: the ICC cannot have a negative or a positive effect on a peace process if the parties in conflict are either unwilling or unable to negotiate peace.

Negotiated exile/asylum for Gaddafi

Reflecting the importance of Gaddafi's personal fate as a dynamic in resolving the conflict, the possibility of his going into exile was a key topic of contention throughout the civil war. Numerous states were reported to have offered Gaddafi exile.³⁶ Western states were reportedly focused on

³⁵ 'Libyan Rebels Reject African Union Peace Plan', *The Independent*, 11 April 2011.

³⁶ This included Uganda, Chad, Malawi, Venezuela and Zimbabwe. See D. Smith, 'Where Could Colonel Muammar Gaddafi Go If He Were Exiled?', *The Guardian*, 21 February 2011; and D. Sanger and E. Schmitt, 'U.S. and Allies Seek a Refuge for Qaddafi', *The New York Times*, 16 April 2011.

non-ICC member states as possible targets. During attempts to re-ignite peace talks between the rebels and the Gaddafi regime led by Turkey, it was reported that NATO had privately acknowledged that it would approve of Gaddafi's exile to non-ICC-member states.³⁷

Despite pleas from his closest advisors that he leave Libya, Gaddafi was steadfast in his refusal to accept any such deal. By contrast, many senior members in Gaddafi's coterie defected beginning just days after the conflict erupted in February 2011.³⁸ It is difficult to attribute the defections of senior officials to any single aspect of the conflict including the ICC's intervention, investigations or arrest warrants. Such causal claims risk overly and inappropriately simplifying the multiple dynamics at play and the complexity of the conflict. (A fear of being killed by siding with Gaddafi – and perhaps losing the war – is likely to have played as much, if not more, of a role in the decision-making of former Gaddafi loyalists to defect.) Still, the apparent correlation between the ICC's involvement and Gaddafi's subsequent abandonment by his allies deserves careful analysis. In the end, however, assertions that the ICC closed the space available for Gaddafi to accept an offer of exile are misplaced. There is no evidence that he was ever interested in exploring that space in the first place.

Instrumentalisation of the ICC in Libya

In the wake of the unanimous vote to refer the situation in Libya to the ICC, Western states voiced their support for the Court and its role in the crisis. In a joint letter, UK prime minister David Cameron, French president Nicolas Sarkozy and US president Barack Obama expressed their confidence in the ICC's work, declaring that the Court 'is rightly investigating the crimes committed against civilians and the grievous violations of international law'.³⁹ In early May 2011, the US ambassador to the United Nations reaffirmed support for the ICC, stating that the administration 'welcome[d] the swift and thorough work the Prosecutor has done . . . The specter of ICC prosecution is serious and imminent and should again warn those around Qadhafi about the perils of continuing to

³⁷ These states included Sudan, Belarus and Zimbabwe. See I. Black, 'Turkey Asks Libya Summit to Back Peace Negotiations', *The Guardian*, 14 July 2011.

³⁸ R. Spencer, 'Libya: Five Generals Defect as Pressure Mounts on Muammar Gaddafi', *The Telegraph*, 30 May 2011.

³⁹ B. Obama, D. Cameron, and N. Sarkozy, 'Libya's Pathway to Peace', *The New York Times*, 14 April 2011.

tie their fate to his.⁴⁰ As the organisation leading the military intervention, NATO also similarly supported the work of the ICC.⁴¹

These statements made clear that the ICC's intervention was, in the eyes of intervening powers, singularly about targeting Gaddafi and his regime. Additionally, this language was critical in framing the intervention in Libya as one that was fundamentally about justice.⁴² Yet this lofty rhetoric obscured the fact that Western intervening forces were instrumentalising the ICC for political purposes such that, when it became a potential obstacle to shifting political goals, the Court's role in trying Gaddafi was largely abandoned. Indeed, attempts by intervening forces to push Gaddafi into exile as a tactic of conflict resolution ran contrary to the ICC's involvement insofar as they posed additional (and intentional) barriers to enforcing the Court's arrest warrants. Thus, there appears to have been significant double-speak by the intervening powers. They invoked and supported the ICC while exploring possible states for Gaddafi to permanently or temporarily evade prosecution.

As the conflict continued and it became clear that Gaddafi would not leave Libya, Western states increasingly accepted the possibility of the Libyan leader remaining in country. In response, Human Rights Watch argued that Security Council members 'should be reaffirming the message that impunity is no longer an option, instead of proffering a get out of jail free card to end a military stalemate'.⁴³ The ICC's Office of the Prosecutor (OTP) also voiced concern, maintaining that Gaddafi could not remain in Libya.⁴⁴ But these remarks coincided with an important shift in the rhetoric of Western states. When faced with questions about Gaddafi's fate, officials increasingly suggested that what happened to him was not a matter of international criminal law but 'up to the Libyan people'. Gaddafi's future was thus re-branded as a question of respect for the sovereign wishes of the Libyan people. Asked in late August 2011 where the 'Tripoli Three' should be tried, the US ambassador declared:

⁴⁰ See remarks by Susan Rice, US Permanent Representative to the United Nations, to the Security Council, 'Briefing on Libya and the International Criminal Court' (4 May 2011).

⁴¹ See press briefing on Libya by Oana Lungescu, NATO Spokesperson, and Wing Commander Mike Bracken, Operation Unified Protector Spokesperson (17 May 2011).

⁴² See D. Kaye, 'Wanted: Qaddafi & Co. Can the ICC Arrest the Libya Three?', *Foreign Affairs*, 19 May 2011.

⁴³ R. Dicker, 'Handing Qaddafi a Get-Out-Of-Jail-Free Card', *The New York Times*, 1 August 2011.

⁴⁴ R. Taylor and C. Stephen, 'Gaddafi Can't be Left in Libya, Says International Criminal Court', *The Guardian*, 26 July 2011.

This is something that must be decided not by the United States or any other government, but by the people of Libya and by the interim transitional government that we expect will soon be constituted . . . These are all choices that the Libyan people will ultimately have to make for themselves.⁴⁵

This shift in rhetoric also coincided with changes in the nature of the conflict. As noted above, during the summer of 2011, the stalemate between the rebels and pro-Gaddafi forces began to falter. By late August, Tripoli fell and the same NATO states that had intervened to support the opposition began to position themselves to benefit from the presumed economic windfall that an NTC-controlled Libya would enable.⁴⁶

In this context, the calculus of Western states reverted from backing international criminal justice to other political interests in a post-Gaddafi Libya. The utility of the ICC – to frame the intervention in the name of justice and to marginalise and pressure Gaddafi – had been exhausted. In the context of building strong relations with a post-Gaddafi Libya, the shift towards employing language of ownership – that ‘it was up to Libyans’ – was politically cunning. To argue against it would patronise Libyans, deny them a right to establish their own accountability mechanisms and potentially undermine the intervening powers’ future economic and political role. Similarly, there was little incentive for the international community to insist that Gaddafi’s death was a missed opportunity for accountability.⁴⁷

The lack of commitment amongst intervening states to the obligations spelled out both in Resolution 1970 and in the Rome Statute was also made evident through two additional developments: the surrender of Al-Senussi to Libya from Mauritania and the visit by Sudanese president Omar al-Bashir. In March 2012 it was confirmed that Al-Senussi had been arrested in a joint operation of French and Mauritanian officials in Nouakchott, Mauritania.⁴⁸ Immediately following his arrest, Al-Senussi’s

⁴⁵ See C. Lynch, ‘Rice Says Libyan People Can Decide Whether to Try Qaddafi; ICC Says Not So Fast’, *Foreign Policy*, 23 August 2011.

⁴⁶ R. Cornwell, ‘World Powers Scramble for a Stake in Future of the New Libya’, *The Independent*, 23 August 2011.

⁴⁷ Despite the ICC prosecutor’s belief that his death ‘create[d] suspicions’ that a war crime had been committed, the matter has never been investigated. The attitude of Western states following Gaddafi’s death can thus be seen as an abrogation of responsibility to the very mandate they gave to the ICC. See ‘ICC Says Muammar Gaddafi Killing May Be War Crime’, *BBC News*, 16 December 2011.

⁴⁸ It is widely believed that intelligence officials from numerous states, primarily from the West, interrogated him while in detention. See L. Hilsum, ‘Abdullah al-Senussi, Gaddafi’s “Black Box”’, *FT Magazine*, 2 June 2010; L. Prieur, ‘Libya Steps Up Call for Senussi

fate emerged as the centrepiece in an extradition dispute between Libya, France and the ICC. France had long sought custody of Al-Senussi for his role in the 1989 bombing of UTA Flight 772 in which 170 passengers, including 54 French citizens, had perished.⁴⁹ The French government maintained that its role in capturing him gave it a privileged position in requesting his surrender to France.⁵⁰ There is no evidence that France pushed for Al-Senussi's surrender to the ICC, despite the fact that it is a member state. The ICC was effectively cut out of the picture.⁵¹

In January 2012, Sudanese president Omar al-Bashir visited Tripoli. Bashir remains wanted by the ICC, yet he had also provided significant material support to the rebels during their fight against Gaddafi, whose removal Bashir called the 'best piece of news in Sudan's modern history'.⁵² Predictably, no Western state admonished Bashir's visit. Only the United States stated (two days after the visit) that it had brought the issue up with the NTC and disagreed with Bashir's visit, but that '[t]his is the first time as a free government [the NTC] have had to encounter these issues'.⁵³ ICC member states, including France and the United Kingdom, remained silent, suggesting that their priorities, too, had shifted.

The possible effects and contributions of the ICC during the Libyan Revolution were ultimately shaped and even determined by the political prerogatives and interests of the Security Council and NATO powers. Commitment to the ICC's mandate was heeded only insofar as it advanced the political aims of the intervening powers, namely the marginalisation of Gaddafi. Once the Court stopped serving these interests, its work was of limited value. The relationship between the ICC and those who invoked it was thus not one of legal obligation, but rather political convenience.

The ICC, Libya and 'local ownership'

The decision of where to hold post-conflict judicial proceedings has always been politically charged. Gerry Simpson notes that the question

Transfer', *Reuters*, 19 March 2012; 'Mauritania Agrees to Extradite Senussi: Libya vice PM', *RNW: International Justice Desk*, 21 March 2012

⁴⁹ L. Prieur and H. al Shachi, 'Mauritania Agrees to Senussi Extradition, Libya Says', *Reuters*, 20 March 2012.

⁵⁰ *Ibid.*

⁵¹ L. Harding and I. Black, 'Mauritania Extradites Gaddafi Spy Chief Senussi to Libya', *The Guardian*, 5 September 2012.

⁵² 'Bashir Denounces Gaddafi During Libya Visit', *ABC News*, 8 January 2012.

⁵³ 'US opposes Sudan's Bashir visit to Libya', *AFP*, 9 January 2012.

and controversy of where to adjudicate international crimes has coloured international criminal justice since its inception. 'Law's place' is complicated by the tension between the internationalisation of criminal justice and the fact that 'justice is best served at the local level where the crime has taken place, where the evidence is located, and where the witnesses live'.⁵⁴ Simpson's observation points to the fact that the decision of where to serve justice for atrocities is rarely obvious and often rife with political manoeuvring. The case of Libya affirms this point.

Even before Gaddafi's demise, questions abounded about where the defendants could and should be tried. The debate was largely framed in dichotomous terms: either a trial would be conducted in Libya by Libyans or in The Hague by the ICC. This obscured middle-ground options and left the OTP with little choice but to support Libya's intentions to try Saif Al-Islam Gaddafi and Abdullah Al-Senussi in Libya.

If a trial in The Hague by ICC judges was ever a real possibility, it was short-lived. There was little-to-no apparent will on the part of the NTC or the international community to arrest any of the 'Tripoli Three' and surrender them to the Court. Nevertheless, a legal debate ensued over whether Libya was under an obligation to surrender Gaddafi or Al-Senussi *before* bringing its admissibility challenge under the Court's complementarity regime. Human rights groups were adamant that they should be transferred to the ICC.⁵⁵ This, in combination with concern that other Gaddafi-era officials would be physically abused and perhaps even tortured and killed if tried in Libya, belied scepticism amongst groups that Libya had the capacity to try key figures of the former regime.⁵⁶ It remained clear, however, that Libyan authorities in the NTC had no interest in transferring either defendant to The Hague and that the Security Council had little interest in pressuring them to do so. As Ahmed Jehani, Libya's representative to the Court, declared: 'No amount of pressure will push Libya' to surrender Gaddafi or Senussi.⁵⁷

Some observers suggested that a middle ground be pursued: holding an in situ trial in Libya or sequencing prosecutions between Libya and

⁵⁴ Simpson, *Law, War and Crime*, 30.

⁵⁵ 'Saif Gaddafi Must be Transferred Safely to ICC', Amnesty International (28 October 2011); 'Parliamentarians for Global Action (PGA) Calls for the Prompt Surrender of Saif Al Islam Gaddafi and Abdullah Al-Senussi to the International Criminal Court', Parliamentarians for Global Action (21 November 2011).

⁵⁶ 'Tunisia to Extradite Libya ex-PM if Fair Trial Possible', *BBC News*, 2 January 2012.

⁵⁷ See 'Saif al-Islam to be Moved to Tripoli: Officials', *AFP*, 7 April 2012.

The Hague.⁵⁸ An in situ trial would have had numerous advantages: being in closer proximity to the victims, witnesses and evidence; contributing, perhaps, to building of the rule of law in Libya and providing a material legacy; and upholding 'international standards' for criminal justice. The latter concern was particularly salient amidst growing concerns that Libyan authorities would apply the death penalty against those convicted of crimes during the conflict.

The Rome Statute envisages the possibility of a travelling Court.⁵⁹ Article 3(3) of the Statute notes that proceedings may take place 'elsewhere, whenever it considers it desirable' and the idea has been explored by the ICC in other contexts. It further appears that the OTP saw the option of an in situ trial favourably, as the OTP reported that it had offered the option of a trial by ICC judges to the NTC.⁶⁰ However, while its reasoning remains unknown, the NTC rejected the possibility of an in situ trial. It became increasingly clear that the new Libyan government wanted local proceedings, with the support of the majority of Libyans and the acquiescence (or lack of interest) of much of the international community.⁶¹

The prosecutor also suggested that the ICC and the NTC could sequence prosecutions. Sequencing, envisioned under Article 94 of the Rome Statute, would entail Libya trying Gaddafi and Al-Senussi and subsequently transferring them to the ICC to be tried over the alleged crimes outlined in their indictment (or vice versa).⁶² Importantly, a trial at the ICC might have given time for the Libyan government to stabilise and to build an independent judiciary capable of trying Gaddafi and Al-Senussi domestically for crimes other than those charged by the Court. Indeed, sequencing could have ensured that alleged crimes committed before and after 15 February 2011 were investigated and prosecuted by Libya before (or after) Gaddafi and Al-Senussi faced charges relating to their conduct during the uprising.

⁵⁸ See D. Kaye, 'What to Do with Qaddafi?', *The New York Times*, 31 August 2011.

⁵⁹ For an analysis of this issue, see S. Ford, 'The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the ICC's Trials to Take Place at Local or Regional Chambers?', *John Marshall Law Review*, 43 (2010), 715.

⁶⁰ Prosecutor's Submissions on the Prosecutor's recent trip to Libya, *Prosecutor v. Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11, Pre-Trial Chamber I, ICC, 25 November 2011.

⁶¹ See F. Murphy, 'Libya Vows It, Not ICC, Will Try Saif, Senussi', *Reuters*, 20 November 2011; C. Stephen, 'Saif Gaddafi Sets Libya's New Rulers a Test of Commitment to Human Rights', *The Guardian*, 7 January 2012.

⁶² See C. Stahn, 'Libya, the International Criminal Court and Complementarity – A Test for "Shared Responsibility"', *Journal of International Criminal Justice*, 10 (2012), 325–349.

The role of Western states that had invoked and supported the ICC's involvement in Libya helped to determine these outcomes. It is a distinct possibility that had these states used their influence to support the Court's mandate, the ICC would have had more leverage either to gain custody of accused, to negotiate with Libyan authorities to establish an in situ proceeding or at the very least to participate in the process. By the same token, it is important to consider the possibility that the lack of willingness on the part of Libyan authorities for these options was at least partly due to the fact that the Court did very little to communicate or demonstrate its work locally or to establish any kind of local presence during the conflict.⁶³ The ICC thus appeared foreign and removed, and Libyans understandably felt reluctant handing over key individuals from the Gaddafi regime to a Court they hardly knew. As the executive director of Lawyers for Justice in Libya noted:

The press and NGOs were in Libya and were gathering evidence but there was no visible presence of the ICC. People were not clear as to what should happen after the indictments and did not understand why, for example, the BBC was in Libya but the ICC was not. That the words of the ICC and the international community were not backed up by the actions in the country and the lack of communication was a real problem.⁶⁴

With a minimal presence in the country during the war, the ICC likely hampered the possibility of playing a more proactive role in prosecuting the accused. Combined with insufficient interest from the international community, this difficult situation left the OTP with little choice but to support the NTC's desire to try the accused in Libya.⁶⁵

Libya's admissibility challenge(s)

On 1 May 2012, Libya officially filed its admissibility challenge at the ICC. Lawyers representing the new regime in Tripoli argued that the case was inadmissible on the grounds that its national judicial system is 'actively investigating Mr. Gaddafi and Mr. Al-Senussi for their alleged criminal responsibility for multiple acts of murder and persecution, committed

⁶³ See E. Saudi, 'Milestones in International Criminal Justice', Chatham House Meeting Summary: International Law Programme (2011), 10.

⁶⁴ *Ibid.*

⁶⁵ Timothy William Waters has argued that Moreno-Ocampo's acquiescence was pragmatic and a response to needing the cooperation of Libyan authorities 'to have any hope of influencing the process'. See T. Waters, 'Let Tripoli Try Saif al-Islam – Why the Qaddafi Trial is the Wrong Case for the ICC', *Foreign Affairs*, 9 December 2011.

pursuant to or in furtherance of State policy, amounting to crimes against humanity'.⁶⁶ The resultant legal battle created acrimonious divisions within the ICC and, more specifically, between the OTP and the Office of Public Counsel for the Defence (OPCD).

Despite widespread concerns that holding fair trials may be impossible in Libya, the OTP has sided with Libya's insistence upon trying Gaddafi and Senussi itself. In Moreno-Ocampo's words, 'The standard of the ICC is that it has to be a judicial process that is not organised to shield the suspect . . . and I respect that it's important for the cases to be tried in Libya . . . and I am not competing for the case.'⁶⁷ Rather than holding up the orthodox standard of complementarity, whereby a state has to persuade ICC judges that it is actively and genuinely able and willing to prosecute the same individuals for the same crimes, the OTP apparently calculated that it was better to argue that its initial investigation had contributed positively to Libya's pursuit of justice.⁶⁸ There are a number of plausible reasons for this leniency.

First, the OTP's position can be seen as paying respect to the obvious interest and willingness of Libyans – not just the government – to hold trials themselves. In this context, denying that Libya had any right to investigate or prosecute Gaddafi or Al-Senussi would have been tantamount to declaring that Libya's interest and efforts were irrelevant. Relatedly, there was a risk of conflating the previous, autocratic regime with the new transitional one.

Other reasons contributed to the OTP's position towards Libya's admissibility challenges. It was not a given that the OTP would be able to successfully convict Gaddafi. The Libya Working Group noted in February 2012 that '[t]here is speculation that the ICC does not want Saif to be put on trial in The Hague as they do not have a strong case against him'.⁶⁹ Timothy William Waters has argued, alternatively, that Moreno-Ocampo's acquiescence was a pragmatic response aimed at ensuring the cooperation of Libyan authorities

⁶⁶ Application on Behalf of the Government of Libya Pursuant to Article 19 of the Rome Statute, *Prosecutor v. Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11, Pre-Trial Chamber I, ICC, 1 May 2012, para. 1.

⁶⁷ 'No Libyan Response on Gaddafi Son as Deadline Nears', *BBC News*, 10 January 2012.

⁶⁸ It should be noted that, in response to Libya's admissibility challenge, the OTP has expressed some concern about the fact that Saif is not in the custody of Libya. See Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the Rome Statute, *Prosecutor v. Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11, Pre-Trial Chamber I, ICC, 5 June 2012.

⁶⁹ See 'Libya's Recovery: Prospects and Perils', Chatham House MENA Programme: Libya Working Group Meeting Summary (2012), 6.

so as 'to have any hope of influencing the process'.⁷⁰ The ICC has received limited support from the Security Council as well, which appeared largely uninterested in the pursuit of post-Gaddafi accountability. The international community's disinterest in pressing for trials at the ICC has acted as a virtual endorsement of Libya's intent to prosecute both of the accused.

Not long after the civil war concluded, the OTP shifted its focus away from seeking custody of Gaddafi or Al-Senussi towards framing the Court's role in Libya as contributing to 'positive complementarity'.⁷¹ The prosecutor argued that 'the ICC is still providing an important service, because we will ensure justice in Libya, whoever will do it'.⁷² Moreover, he appeared on numerous occasions with NTC leaders, reaffirming the perception that his office's role is to support rather than to compete with Libya. This may have also been a pragmatic framing on Moreno-Ocampo's part. It does not appear that the Court will have much, if any, impact on the prosecution of Gaddafi or Al-Senussi, irrespective of Libya's admissibility challenges. Claiming a degree of responsibility by couching arguments in terms of positive complementarity may thus have served to avoid the ICC from appearing impotent.

The attitude of the OTP led to tensions within the Court, especially between the OTP and the OPCD, which has insisted that both men be tried in The Hague. In November 2011, the OPCD claimed that the OTP was employing a double standard in its application of complementarity in the context of Libya,⁷³ and it later filed a motion with the ICC's Appeals Chamber to disqualify Moreno-Ocampo due to 'an objective appearance that the Prosecutor is affiliated with both the political cause and legal positions of the NTC government'.⁷⁴ The application was ultimately dismissed but not before judges admonished the prosecutor, declaring that his 'behaviour was clearly inappropriate in light of the

⁷⁰ T. Waters, 'Let Tripoli Try Saif al-Islam – Why the Qaddafi Trial is the Wrong Case for the ICC', *Foreign Affairs*, 9 December 2011.

⁷¹ See C. Stahn, 'Taking Complementarity Seriously: On the Sense and Sensibility of "Classical", "Positive" and "Negative" Complementarity', in C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011), 233–282.

⁷² See T. Papenfuss, 'Interview with Luis Moreno Ocampo, Chief Prosecutor of the International Criminal Court', *Global Observatory*, 25 January 2012.

⁷³ See OPCD Request for Authorisation to Present Observations in Proceedings Concerning Mr Saif Gaddafi, *Prosecutor v. Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11, Pre-Trial Chamber I, ICC, 28 November 2011.

⁷⁴ See Request to Disqualify the Prosecutor from Participating in the Case Against Mr Saif Al Islam Gaddafi, *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11, The Appeals Chamber, ICC, 3 May 2012, para. 28. The application was subsequently dismissed.

presumption of innocence' and 'may lead observers to question the integrity of the Court as a whole'.⁷⁵

As time passed, it became clear that the key to the admissibility challenges was whether Libya could demonstrate that it had custody of the accused. With Al-Senussi in the custody of the Libyan government and Tripoli having begun proceedings against the former intelligence chief, the judges in Pre-Trial Chamber I ruled that the case against him was inadmissible before the ICC.⁷⁶ Ultimately, the chamber found that 'the same case against Mr. Al-Senussi that is before the Court is currently subject to domestic proceedings being conducted by the competent authorities of Libya – which has jurisdiction over the case – and that Libya is not unwilling or unable genuinely to carry out its proceedings in relation to the case'.⁷⁷ In response, one of Libya's legal representatives declared that the ruling 'vindicates the efforts [the Libyan government] has made to give effect to the principle of complementarity, which allows Libya to conduct the trial of Mr. Senussi if it satisfies the court, as it has done, that it can conduct a fair trial'.⁷⁸

By contrast, because Gaddafi is not in the custody of the national authorities, Libya has had a more difficult time convincing the Court that he too should be prosecuted there. The government sought to publicly demonstrate its preparations to try Gaddafi: it unveiled a refurbished courtroom in Tripoli and a personal prison for him. However, despite numerous announcements suggesting that Gaddafi would be transferred from Zintan to Tripoli, the government has been unable to gain custody of him. In line with Article 17(3) of the Rome Statute, the OPCD put this argument forward in claiming that Libya's admissibility challenge should be rejected.⁷⁹

Ultimately, the Libyan government's failure to gain custody of Gaddafi meant that the OPCD 'won' the admissibility challenge. In May 2013, ICC judges ruled that Gaddafi's case was admissible before the Court because, in part, the state was *unable* to prosecute him so long as he remained outside the

⁷⁵ Application on behalf of the Government of Libya pursuant to Article 19 of the Rome Statute, *Prosecutor v. Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11, Pre-Trial Chamber I, ICC, 3 May 2012.

⁷⁶ See Decision on the admissibility of the case against Abdullah Al-Senussi, *Prosecutor v. Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11, Pre-Trial Chamber I, ICC, 11 October 2013.

⁷⁷ *Ibid.*, para. 311.

⁷⁸ 'Gaddafi-era spy chief al-Senussi to be tried in Libya', *BBC News*, 11 October 2013.

⁷⁹ Public Redacted Version of the Corrigendum to the 'Defence Response to the "Application on behalf of the Government of Libya pursuant to Article 19 of the Rome Statute"', *Prosecutor v. Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11-01/11, Pre-Trial Chamber I, ICC, 31 July 2012, paras. 358–368.

custody of Libyan authorities. It found that the ‘national system cannot yet be applied in full in areas or aspects relevant to the case, being thus “unavailable” within the terms of article 17(3) of the Statute’. As a consequence, the chamber held, ‘Libya is “unable to obtain the accused” and the necessary testimony, and is also “otherwise unable to carry out [the] proceedings” in the case against Mr. Gaddafi in compliance with its national laws’.⁸⁰

Libya appealed the judgment, continuing to contend that Gaddafi should be tried domestically. Libya’s justice minister responded that ‘[w]e will give what is needed to convince the ICC that Libya is capable of conducting a fair trial in accordance with international standards’.⁸¹ It appears unlikely, however, that Gaddafi will be transferred from Zintan into the custody of central authorities. Fearing for Gaddafi’s security and potentially his life if transferred to Tripoli, the Zintani militia holding him has claimed that it will host his trial. The Zintani brigade has benefitted from leveraging its custody of their prized prisoner. Indeed, Zintani defence minister Osama al-Juwali’s surprise appointment to his post was reportedly linked to Zintan’s continued custody of Gaddafi.⁸²

Libya has thus been partially successful in its admissibility challenges. However, the nature of the admissibility hearings was not about where Gaddafi and Al-Senussi would be tried; that question had been answered before the Libyan uprising had even concluded. Emboldened by a mixture of support and silence from the international community, Libya was clear that it would try Gaddafi and Senussi. The admissibility challenges were instead about whether or not the ICC would endorse Libya’s intentions. Furthermore, it remains difficult to see what ultimate effect the ICC will have on criminal accountability in post-Gaddafi Libya: regardless of what the Court has said, it does not appear that Libya would surrender either of the accused to The Hague.

Concluding reflections

This chapter has sought to demonstrate that the effects of the ICC in Libya have been bound, mitigated and, in some instances, determined by

⁸⁰ Decision on the admissibility of the case against Saif Al-Islam Gaddafi, *Prosecutor v. Gaddafi and Al-Senussi, Situation in Libya*, ICC-01/11, Pre-Trial Chamber I, ICC, 31 May 2013, para. 205.

⁸¹ M. Gumuchian and G. Schennib, ‘Libya to Appeal ICC Ruling to Hand Over Gaddafi’s Son’, *Reuters*, 2 June 2013.

⁸² C. Stephen and L. Harding, ‘Libyan PM Snubs Islamists with Cabinet to Please Western Backers’, *The Guardian*, 22 November 2011.

the political actors and political context in which the ICC intervened. From its inception, the political considerations and interests of the UN Security Council's major stakeholders tailored Resolution 1970. The ICC's intervention at the behest of the Council then left the Court vulnerable to instrumentalisation: after the ICC had served the political goals of NATO states, support for its mandate rapidly dwindled. Once willing to back its role in Libya in order to legitimise the intervention and marginalise the Gaddafi regime, intervening states quickly abandoned the Court. This *volte face* has left the ICC in a difficult position. Demanding the surrender of individuals knowing that it would never happen, and where there was virtually no political support for such an outcome, risked creating an impression of impotence. The OTP has instead sought to claim a victory for 'positive complementarity', but it had little other choice.⁸³

The Court's experience in Libya points to a central tension facing the Court: on the one hand, there is an obvious desire to investigate crimes committed in non-member states. Doing so, however, requires playing by the political rules set by the Security Council. On the other hand, tethering the politics of the Council with the accountability sought by the ICC guarantees that the interests of the most powerful states will mould the scope of the Court's work. Resolution 1970 ensured that atrocities in Libya would be investigated but guaranteed that this would be done selectively.⁸⁴ Libya may thus teach the ICC a harsh lesson: Security Council referrals come at too large a cost to its own legitimacy.

The Court's ongoing relationship with the Security Council demands greater scrutiny – from scholars as well as from proponents of the ICC. The relationship will continue to shape the potential for the Court to investigate some of the worst human rights violations. Amongst the most pressing is the situation in Syria. However, even if a referral of Syria becomes a possibility, unless there is a greater political commitment to the Court's mandate from the Council, there is good reason for the ICC to be wary of engaging in yet another highly volatile conflict. Ultimately, the Court's intervention in Libya has had mixed effects. In a

⁸³ On a visit to Tripoli, Luis Moreno-Ocampo, for example, declared, 'In May, we requested a warrant because Libyans couldn't do justice in Libya. Now, as soon as Libyans decide to do justice they could do justice and we'll help them to do it.' See 'Saif al-Islam Gaddafi Can Face Trial in Libya – ICC', *BBC News*, 22 November 2011.

⁸⁴ As Carsten Stahn writes, 'The language of the SC Res. 1970 stands as an unfortunate precedent for future practice'. See Stahn, 'Libya, the International Criminal Court and Complementarity', 348.

situation as complex as that of the Libyan revolution, civil war and transition, such an outcome is unsurprising. But, as this chapter has argued, the effects of the ICC's intervention were shaped and determined not only by the Court's decision-making and behaviour, but also by the constraints imposed upon it, given the broader political context in which it operates.