



## **The Emergence of International Justice as Coercive Diplomacy: Challenges and Prospects**

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## **The Emergence of International Justice as Coercive Diplomacy: Challenges and Prospects**

By Adam M. Smith

Emboldened by the fall of autocrats on their eastern and western borders, Libyan citizens began a revolt against Muammar Qaddafi's forty-two-year rule in early February 2011. Brutal reprisals faced the movement. Within days of the first clashes, individual States and the international community commenced a brief period of increasingly forceful diplomacy to pressure Qaddafi to change course.

Unilateral actions were the centerpiece of these initial efforts – individual statements of concern from States were followed by some calling for Libya's removal from international institutions such as the United Nations Human Rights Council.<sup>1</sup> One State, Switzerland, froze all the regime's assets within its jurisdiction.<sup>2</sup>

On February 26, 2011, the UN Security Council's Resolution 1970 added multilateral measures to these unilateral instruments. Among other actions, the resolution invoked Article 13(b) of the Statute of the International Criminal Court (ICC) and referred the situation in Libya to the ICC for potential action.<sup>3</sup> This was not the first time the Security Council had referred a matter to the Court. In 2005, the Security Council adopted Resolution 1593 which referred the Darfur situation.<sup>4</sup> Resolution 1970, however, was the first time a referral had been made in a resolution that simultaneously ordered the imposition of other sanctions, including an arms embargo, a travel ban and asset freeze for senior leaders. These longstanding mainstays of diplomatic pressure are leading instruments of "coercive diplomacy" – a term which refers to the various coercive means, short of significant physical force, that States deploy to compel other States to act. By invoking Article 13(b) alongside these traditional tools of coercion, and

deploying the ICC referral in support of the same stated goals, Resolution 1970 confirmed what had been implicit in Resolution 1593: ICC referrals have become tools of coercive diplomacy.

A core objective of coercive diplomacy is to “avert war, or... serious military escalation, and... accelerate diplomatic progress on an issue.”<sup>5</sup> In this regard, Resolution 1970 proved unsuccessful. Violence against civilians intensified and little progress was made toward a diplomatic solution. Less than a month later, on March 19, 2011, the Security Council adopted Resolution 1973 which, in authorizing “all necessary means” to protect civilians, called for military intervention with the hope that force could achieve what diplomacy could not.<sup>6</sup>

A similar outcome was seen in the wake of the Darfur referral. Here too, in the weeks, months, and years following the referral, the situation remained perilous, the death toll unrelenting, and a diplomatic resolution wanting.

Responsibility for the failures of Resolutions 1593 and 1970 to stem violence and resolve the crises cannot be placed on the ICC referrals alone. All aspects of diplomacy failed to achieve the objectives. However, this chapter will argue that the referrals did not help the cause. As tools of coercive diplomacy, ICC referrals are at best ineffective and at worst injurious to achieving diplomatic goals.

This chapter will explore referrals through the lens of international relations theory and history and explain why they make for flawed tools of coercive diplomacy. In short, referrals are fundamentally different from their ostensible brethren such as economic sanctions and travel bans. Despite this, it is likely that States will continue to deploy the ICC as a tool of coercive diplomacy; the chapter will therefore conclude with an assessment of whether there are ways to use the threat of prosecution – international or otherwise – in support of diplomatic objectives.

## Coercive Diplomacy: A Primer

If diplomacy is the art of States furthering their interests on the global stage, then “coercive diplomacy” refers to the diplomatic strategies States undertake when their interests are opposed by other States. While such diplomacy, in this sense, has existed as long as States have interacted, modern coercive diplomacy – practiced since World War II and even more so since the end of the Cold War – refers to an increasingly sophisticated set of non-military instruments deployed unilaterally and multilaterally to extract change in “target States” behavior. The tools of coercive diplomacy are varied but they share a core feature: the change in behavior coercers seek is furthered by threats of pain, and in many cases, the actual imposition of pain.<sup>7</sup>

Modern coercive diplomacy includes a spectrum of actions promising different sorts of pain. One of the oldest tools of coercion involves diplomatic consequences. Elements in this regard include the “strongly worded demarche,”<sup>8</sup> the withdrawal of ambassadors, and the breaking of diplomatic relations. More recent additions to these diplomatic consequences include votes against targets in multilateral fora such as development banks,<sup>9</sup> the passage of condemning resolutions by international organizations, and the expulsion of targets from such organizations. A follow-on diplomatic consequence is the implicit or explicit branding of a recalcitrant state as a “pariah.” Economic consequences are a second group of coercive measures, the most enduring version of which are broad-based, “comprehensive” sanctions against States, including trade prohibitions<sup>10</sup> and arms embargoes. A final set of tools is of more recent vintage; while it was once thought that sanctions imposed by foreign powers and international organizations could only be placed on States themselves, and not on individuals or entities within States,<sup>11</sup> since the Cold War “smart,” individually-targeted prohibitions have been

added to the toolbox. Such instruments include travel bans and financial sanctions that focus solely on noncompliant entities (persons and institutions) rather than countries as a whole.

No matter which tool is used, the prospects of success for any instance of coercion simplifies to a common-sensical calculation: if a target State assesses that the net benefits it can obtain by resisting coercion are greater than the net costs it believes will arise from complying, coercive diplomacy will fail.<sup>12</sup> To be successful, practitioners of coercive diplomacy must deploy tools that impact the calculus of target States by calibrating coercive measures such that the cost of resistance becomes unacceptable.<sup>13</sup>

Making an assessment of the correct level and type of coercion relies on a nuanced appreciation of the psychology, history, politics, and economics of target States. The importance of these dynamic factors means that the calculation described above rarely manifests itself. Indeed, successful examples of its application are hard to find. It is noteworthy that in the case of the United States – one of the world’s most fervent practitioners of coercive diplomacy – economic sanctions, a central instrument of coercive diplomacy, were deployed *prior to* armed conflict in nearly two-thirds of the military engagements the U.S. waged between 1950 and 2000.<sup>14</sup> Coercive diplomacy evidently did not forestall military action.

Paradoxically, coercive diplomacy’s seeming lack of success helps explain why innovations in coercive tools, such as ICC referrals, are so alluring. Coercive diplomacy provides the potential for significant benefits (achieving important State objectives) without the expense and risk of military engagement. Though some have bemoaned that policymakers have been “beguiled” by coercive diplomacy’s promise of “big gains with minimal costs,”<sup>15</sup> in an era of soft budgets and war-weary citizenries the attractiveness of coercive instruments will remain.

The potential gain from finding that elusive suite of tools that *will* work is too great for diplomats not to try – and continue trying – any instruments of coercive diplomacy that emerge.

Despite its lackluster record, coercive diplomacy has played a role in some notable achievements.<sup>16</sup> President John Kennedy used various coercive instruments to defuse the Cuban Missile Crisis. Successes have also been claimed by some scholars with respect to aspects of the 1990s Balkan wars (where, *inter alia*, at various points in the conflict Serb leader Slobodan Milosevic was compelled to withdraw forces and accept military observers)<sup>17</sup> and in Haiti in 1994 (where an elected government was restored).<sup>18</sup> A more recent success ironically concerns Libya; in 2003, coercive diplomacy was largely responsible for Tripoli abandoning its nuclear and chemical weapons program, renouncing its support for terrorism, and settling liabilities from its involvement with terrorism.<sup>19</sup>

### The Makings of Successful Coercive Diplomacy

Though varied, successful instances of coercive diplomacy have shared five inter-related characteristics.<sup>20</sup> First, the goals of the coercive exercise have been clearly stated and realistic. Second, the target State believed that the threat of punishment was credible. Third, the target State had limited ability to mitigate pain caused by the coercive tools. Fourth, the coercive strategies included credible inducements for compliance. And, fifth, both the diplomatic objective and the coercive tools employed enjoyed widespread international support.

Traditional coercive tools – diplomatic consequences, limitations on international travel, and broad and targeted sanctions – can all be deployed in line with these criteria. Referral to the ICC has a much more uncertain relationship with these criteria.

### *Clarity and Reasonableness of the Objective*

A clearly-articulated objective is a basic ingredient for coercive diplomacy as it allows the coercer to calibrate its efforts and the target to accurately weigh the costs and benefits of compliance and resistance. In the case of Libya in 2003, for instance, the goals were unambiguous: give up your weapons of mass destruction (WMD), cease support for terror, and provide redress for past acts of terror. In Resolution 1970, the goals were also clear. The Security Council demanded the “immediate end to the violence” and called for the Libyan government to undertake “steps to fulfill the legitimate demands of the population.”<sup>21</sup>

Determining the reasonableness of the goal of any coercive effort requires a more case-specific analysis. In Libya in 2003, asking the country to surrender its WMD ambitions and cease its support for terror proved realistic for several reasons. A key driver was that Libya’s economy desperately needed foreign investment, a situation that made demands from the international community *a priori* more palatable.<sup>22</sup> Regarding WMD, the fact that Libya faced limited existential threats and that other States – such as Brazil, South Africa, Ukraine and others – had given up WMD capabilities and/or programs, further eased the request. And, regarding terrorism, in the post-9/11 world, asking Libya to terminate support was also reasonable.

In the case of Resolution 1970, the stated objective seemed similarly realistic, especially in the context of the Arab Spring. In February 2011, demands that an Arab government cease attacking its citizens and move towards meeting their needs were within the realm of possibility.

In each instance of successful coercive diplomacy, practitioners started from the clearly-stated objective and assessed the best tools to achieve the aim. As such, the 2003 outcome in Libya was the result of “skilled and deft diplomacy” that called to bear unilateral and multilateral measures across the full scope of coercive instruments.<sup>23</sup> The ability for the coercer to change

instruments as the situation evolved – in order to keep the clearly-stated objective in sight and to react to the target’s shifting calculations of risk and cost – was vital to the eventual success.

However, in the 2011 Libya case – as in the 2005 Sudan case – practitioners of coercive diplomacy were hamstrung once the ICC referral was deployed. This is because no matter what the Resolution explicitly states, ICC referrals commit the Security Council to an objective of regime change. Rather than allowing coercers the freedom to assess the best means to achieve their goal, the ICC referral instrument dictates the goal and makes the objective much more difficult to achieve.

The reason referrals implicitly call for regime change stems from both the prosecutorial strategy of international tribunals and the circumstances that have surrounded referrals. Concerning prosecutorial strategy, all post-Cold War international tribunals have been charged with prosecuting those “most responsible” for the crimes under their jurisdiction.<sup>24</sup> While the ICC could pursue anyone deemed “most responsible,” it is unlikely to do so. The political expectation of the Court’s backers and the arguable fact that one must be of high rank in order to be “most responsible” for the crimes it deals with has led the ICC to also seek prosecution of only the most senior officials.<sup>25</sup>

Moreover, in both Sudan and Libya, the context of the referrals was damning to the regime. Each referral was made with explicit reference to alleged crimes of senior leadership. In the case of Sudan, Resolution 1593 took note of a Security Council-commissioned report which concluded that a number of senior government officials “may be responsible” for crimes.<sup>26</sup> In Libya, the preamble to Resolution 1970 noted that the Council “deplored...incitement to hostility and violence against the civilian population made from the *highest level of government*.”<sup>27</sup>



Consequently, even though the Security Council only referred the “situations” in Sudan and Libya and mentioned neither President al-Bashir nor Colonel Qaddafi, both men could rationally have assumed that it was them, and their senior leadership, who were being “sent to The Hague.” By ordering that their governments submit to the ICC –both referrals were paired with a demand that Sudan and Libya “cooperate fully” with the Court,<sup>28</sup> which presumably includes extraditing their leaders to the ICC in the likely event of their indictment – the Security Council effectively demanded al-Bashir’s and Qaddafi’s removal from office.

Compelling change in a target State’s government is the most difficult objective for coercive diplomacy to achieve.<sup>29</sup> Once regime change is pursued, diplomacy becomes a zero-sum engagement and the comparative motivations between the coercer and the coerced – a determinative variable in assessing the perceived costs and benefits posed by coercive diplomacy – changes in favor of the coerced. The motivation of the coerced becomes survival and unless the coercer feels a similar imperative, it is unlikely to win the test of wills no matter the strength of diplomatic efforts.<sup>30</sup> With regime change as the explicit or implicit objective, it becomes far more likely that the only way a coercer will secure its objective is to engage militarily.

Libya’s prior experience with coercive diplomacy is enlightening. In the lead-up to Libya’s 2003 decision, the U.S. and others repeatedly assured Qaddafi that giving up WMD and providing redress for terrorism would not be a backdoor to his removal. That the international community pursued the more limited objective of “behavior” rather than “regime” change was a strategic choice that many credit with allowing the diplomatic coercion to succeed.<sup>31</sup>

### *Credibility of Threatened Punishment*

Whether a coercive instrument threatens the onset or exacerbation of pain, a coercers' ability to productively threaten is largely based on whether the target views the threat as genuine. In this regard, an ICC referral is distinct from the traditional tools of coercive diplomacy.

There is no doubt that the Security Council's demand to institute travel bans, arms embargoes, or asset freezes has teeth. Hundreds of entities (individuals, organizations, and States) have been sanctioned under such programs by the UN, with provisions against malefactors implemented globally by Member States. And, the pain of being targeted is real. Sanctioned countries have been significantly deprived,<sup>32</sup> sanctioned organizations have been bankrupted,<sup>33</sup> and sanctioned individuals have publicly recounted the harms endured due to their listing – inability to provide for family, lost profits, legal fees, and other major encumbrances.<sup>34</sup>

Additionally, the potential for increased pain under these traditional measures is credible. The severity of all of these tools can be, and has often been, increased on both unilateral and multilateral bases. For instance, during the 1990s and into the 2000s, Liberia saw prohibitions expand from an arms embargo, to bans on the export of diamonds and timber, and limitations on the travel of senior leadership.<sup>35</sup> Leading up to its 2003 decision, Libya faced an initial round of UN sanctions, which were strengthened over time; unilateral U.S. sanctions were also increased from limited prohibitions to a near total trade ban.<sup>36</sup>

In contrast, the credibility attached to an ICC referral is more suspect. As an initial matter, while a referral may be tantamount to calling for regime change it is not a statement of case and it does not compel the ICC prosecutor or judges to proceed. The real pain of referral arguably comes if and when the ICC decides to indict an individual, a decision that is not the Security Council's to make.

Further, even if an indictment could be guaranteed, the actual outcome of an indictment is uncertain. As yet, there are no examples of an ICC indictment arising from a referral forcing an indictee to cease his indictable behavior,<sup>\*</sup> let alone to be prosecuted for it.<sup>37</sup> An indictment should, at the very least, compel an indictee to remain in his country so as to avoid arrest; all ICC States-party are theoretically treaty-bound to act on an ICC warrant if an indictee comes into their jurisdiction. However, even in this limited regard, ICC States-party – let alone non-States party – have been reluctant to comply with the Court’s warrants. Since his indictment, for example, President al-Bashir has undertaken several trips abroad – to both States-party and non-States-party;<sup>38</sup> and, even after the referral of Resolution 1970, and the clear likelihood of a Qaddafi indictment, senior officials in State-party Uganda noted Kampala’s willingness to consider offering him asylum.<sup>39</sup>

Finally, it is important to recognize that aiding the ICC in its investigations, let alone pursuing indictees in order to deliver them to the ICC, are both largely beyond the Security Council’s competency. This further weakens the credibility of the instrument.

### *Ability of Target to Mitigate Pain*

Long the Achilles’ Heel of coercive diplomacy, the ability for a target to mitigate pain caused by coercive tools can render even the most forceful instruments ineffective. Such mitigation has been seen in many of the traditional coercive tools such as economic sanctions. Targets have undermined prohibitions through various means, ranging from the diversion of sanctioned goods to sophisticated legal chicanery, including the establishment of fronts, the re-naming of sanctioned entities, and the use of third countries to re-export goods.<sup>40</sup>

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<sup>\*</sup> In the case of Libya in 2011 it is true that the three senior officials the ICC indicted (Colonel Qaddafi, Saif Qaddafi, and Abdullah al-Senoussi) ceased their troubling activities in the wake of the indictment; however, it is evident that their change in behavior was linked largely to military, rather than legal, pressures.

In this regard, one might conclude that an ICC referral, and especially one that results in the indictment of a named individual, is uniquely immune to mitigation. There would seem no way for a named indictee to push his indictment onto others, nor is there a way that an indictee could reorganize his affairs in such a manner that the indictment could be rendered moot. Yet, effective mitigation has remained possible. Some indictees have been successful at dispersing the pain of their indictments by casting their alleged crimes as accusations against the State (or their people). By selling an indictment as a complaint against all, not only can an indictee mitigate personal pain, but he may also be able to repurpose the indictment to provide a platform that increases his standing amongst his people and engage in still more troubling behavior. In Sudan, President al-Bashir successfully cast his indictment as a “neocolonial conspiracy,” and an attack on all Sudanese; this energized many Sudanese into a classic “rally ‘round the flag” frenzy,<sup>41</sup> and helped Bashir to domestically justify his reaction to the indictment: he further imperiled thousands of Darfuris by expelling numerous aid groups that were working in the region, claiming that they too were working to harm Sudan’s sovereignty.<sup>42</sup>

It is not surprising that ICC indictments would lend themselves to this sort of repurposing by indictees. The subject matter of international justice regularly concerns issues related to central elements of statehood and identity – elements in which all citizens hold a stake. Indeed, many citizens may have been involved in, or benefited from, the alleged crimes. In the Balkans, for instance, the International Criminal Tribunal for the former-Yugoslavia (ICTY) indictments concerning Operation Storm, the Croatians’ much-revered 1995 military action that solidified the geography and demography of their modern State, were viewed by the majority of unindicted Croatians as a direct attack on them.<sup>43</sup> The “unvarnished good” that was Operation Storm is a central plank in Croatia’s historical narrative and Croatians felt that questioning it questioned

them all – even though the indictments were limited to three senior generals. The ICTY’s Milosevic trial also saw this closing of ranks. Milosevic’s indictment addressed many crimes that had been ostensibly committed in the name of the “Serb nation” and the indictment was viewed both inside and outside Serbia as implicating the entire State.<sup>44</sup>

Once a population has been made defensive, it is even less likely that a target State will come into compliance. This effect is a powerful demonstration of the counterintuitive fact that while there may be a point at which a target State will buckle under diplomatic pressure, the addition of further pressure beyond that point may make it harder for a State to bend. Too heavy an approach (such as an ICC referral that implicitly demands regime change and can effectively accuse an entire nation of core malfeasance) can be as unsuccessful as one that is too timid.

### *Presence and Credibility of Inducements*

Coercive strategies have been much more effective when coupled with credible inducements. At a minimum, such inducements include the removal of punishments; at best they include the promise of real benefits. Such enticements can allow face-saving by the coerced and make compliance more agreeable.

Inducements were central to the diplomacy surrounding Libya’s 2003 WMD and terrorism renunciations. At each step the international community and individual States granted concessions: UN sanctions were suspended following the surrender of the Pan Am 103 suspects; diplomatic relations with Britain were restored after Libya provided redress for the death of a British policewoman; and, the U.S. lifted its sanctions once the WMD agreement was finalized.<sup>45</sup>

In Resolution 1970, the UN included the potential for some weak inducements. The Security Council pledged that it was “prepared to review the...measures contained in the

resolution” leaving open the possibility for “the... modification, suspension or lifting of the measures.”<sup>46</sup> The credibility of these inducements with respect to traditional coercive tools is evident. Not only has Libya had direct experience with the viability of such carrots, but also scores of entities have been removed from sanctions lists, and the UN itself has altered and even ended more than a dozen sanctions program when circumstances no longer warranted prohibitions.<sup>47</sup>

After an ICC referral, the possibility for such inducements, let alone a complete removal of the sanction, is very limited. The sole inducement the Security Council appears to offer with respect to the referral is noted in the preambles to both its Sudan and Libya referrals. The texts reference Article 16 of the ICC statute<sup>48</sup> which provides that the Security Council can request ICC investigations and prosecutions be delayed for a renewable period of 12 months.<sup>49</sup> Although unstated, presumably the Security Council could invoke Article 16 if either Sudan or Libya came into compliance. The Council sheds no light on what other inducements it may consider to ameliorate the sting of the referral.

However, an Article 16 deferral has neither the quality nor credibility of a true inducement. It is doubtful that a renewable 12 month deferral is sufficiently attractive to indictees to encourage compliance. In the case of Uganda, for instance, some have proposed that an Article 16 deferral should be granted to cajole at-large ICC-indictee Joseph Kony out of the bush.<sup>50</sup> However, many observers have concluded that having such a Sword of Damocles swinging over Kony every 12 months would be insufficient to alter his behavior.<sup>51</sup>

Moreover, the Security Council’s appetite for and ability to invoke Article 16 are uncertain. As an initial matter, deferral requests are to be provided in a Chapter VII resolution which implies that the Security Council concludes that deferral is in the interest of international

peace and security.<sup>52</sup> Even if that threshold is surmounted, deferrals are highly contentious. It would enrage many States-party and dozens of non-governmental activists who are concerned about Security Council interference with the ICC and who militated strongly against Article 16 when the ICC Statute was being drafted and have continued to do so ever since.<sup>53</sup> Critics have claimed that such deferrals would weaken the Court's independence – all the more so if the deferral concerned a situation that the Security Council had initially referred.<sup>54</sup> In such a case, the Security Council's control of the Court would appear near complete.

Finally, because no Article 16 deferral has ever been approved for an ICC case<sup>55</sup> – despite requests by some parties that the Security Council do so<sup>56</sup> – there is no track record to provide targets comfort nor is there any clarity regarding what a deferral would actually mean. Plainly, an indictment would not disappear under an Article 16 deferral, and any of the further means to withdraw charges or otherwise suspend proceedings – such as the ICC Prosecutor deciding that “the interests of justice” mandate suspension<sup>57</sup> – are manifestly not in the Security Council's power.

### *Degree of International Support*

The power of coercive diplomacy is depleted if a target is able to exploit weaknesses in the coercive net. To this end, it has become critical for the effectiveness of most coercive tools that they be implemented multilaterally to ensure that the prohibition imposed by one jurisdiction is not overcome by an absent prohibition elsewhere.<sup>58</sup>

In the case of Resolution 1970 regarding Libya, the imprimatur of a unanimous UN is unequivocal with respect to the arms embargo, travel ban, and asset freeze. In contrast, in both the Sudan and Libya cases, the ICC referral has been a much more cabined demand. Unlike the

broad, usually unquestioned support for traditional tools of coercion, targets know that three of the permanent members of the Security Council and several other major States are not members of the ICC (and such States have noted, in varying degrees, their aversion to the Court even in the midst of approving the referrals<sup>59</sup>). This equivocation regarding the Court is reflected in a weaker imposition of referrals as compared with the other coercive measures.

For instance, referrals have come with the explicit exemption of certain entities from the ICC's purview – according to Resolutions 1970 and 1593 respectively, crimes committed by nationals from outside Libya and Sudan whose home States are not party to the ICC and who are engaging in operations in Libya or Sudan under UN authority, do not fall under ICC jurisdiction.<sup>60</sup> No matter the egregiousness of the acts of peacekeepers, for instance – some of whom have in the past committed outrageous atrocities while on UN missions<sup>61</sup> – and no matter that some question whether this exemption is consistent with the ICC Statute,<sup>62</sup> the Court will have no power to judge their crimes. In comparison, no parties are exempted from the requirement to impose an arms embargo, asset freeze, or travel ban.

Additionally, in a concession to ICC non-States-party, the Security Council clarified for both referrals that none of the expenses incurred by the ICC in furtherance of the referrals are to be “borne by the United Nations.”<sup>63</sup> Though the Security Council similarly does not pay for the domestic implementation of other tools of coercive diplomacy – States must independently fund implementation of Security Council-mandated arms embargoes, for example – other coercive measures can be implemented with comparatively minimal cost. It is a different matter when the UN “leases” the already cash-strapped ICC to undertake a task that is likely to be vastly expensive.<sup>64</sup> The Darfur case alone could cost “hundreds of millions of dollars”; the total ICC budget for FY2012 is \$170 million.<sup>65</sup> Even if this refusal to bear costs was not legally dubious –



some claim that it is<sup>66</sup> – the Security Council’s denying support to the ICC for its own referral negatively impacts the Court, further reveals the weakness of international support for the body, and diminishes the referral as a coercive tool.

As a consequence, the Security Council’s language in its referrals has been much less forceful than when it has instituted other tools of coercion. In the case of traditional coercive efforts, the Security Council relies on the language of legal compulsion “deciding” that Member States will immediately impose certain sanctions. Even though the Security Council has used the same language in “deciding” to refer situations to the Court, the Council has used the much softer language of “urging” States to cooperate with the ICC. “Decide” imparts an enforceable imperative, “urge” does not. State cooperation is the ICC’s lifeblood, without which no prosecution can occur. The Council’s refusal to “decide” that States must cooperate<sup>67</sup> – going out of its way in both referrals to recognize that non-States parties to the ICC “have no obligation under the [ICC] Statute”<sup>68</sup> – further weakens the coercive impact of the referral.

### A Way Forward?

Even if the referrals did not cause the failures, the lack of success the Security Council has had in achieving its chosen diplomatic aims after it has promulgated an ICC referral is to be expected. For the reasons noted above, deploying international justice for diplomatic gain is often unproductive, or even counter-productive to achieving the desired diplomatic goals and may increase the likelihood of forcing military engagement.

This does not imply that the referrals have had no positive outcome. For example, even if referrals failed to coerce a targeted entity, they may have influenced, and perhaps coerced, others.<sup>69</sup> It is possible that the specter of a judicial comeuppance in Resolution 1970 induced

some Libyan leaders to reassess their attachment to the regime and perhaps even to defect. Or, the expectation that the Security Council will continue to deploy ICC referrals may result in decision makers in other States opting against replicating Qaddafi's brutality.

While these positive outcomes may exist, they are very difficult to demonstrate empirically. It is, however, evident that there are significant limits and risks to using international justice as a coercive tool. Consequently, the question is whether there is a way to extract any of the potential benefits of invoking justice as a coercive measure while avoiding the detriments.

One way to do so involves calling on *domestic* justice, rather than the ICC. The Council could "decide" under Chapter VII that Member States will work with a State to make sure that it will receive appropriate legal redress for whatever crimes are committed. From the perspective of coercive diplomacy, domestic justice is a superior tool to international justice, more credible, more flexible, more able to provide real inducements, and less susceptible to mitigation.

Regarding credibility, the threat of ICC justice suffers credibility concerns for a host of reasons including the fact that the "promise" of international justice remains abstract, a geographically and intellectually removed reality. In contrast, local, domestic justice is understood and tangible, even in the most lawless dictatorships.

Local justice is also more flexible than international justice, allowing the coercer to more powerfully calibrate the correct type and amount of pain. For instance, unlike the ICC, local authorities have potentially unlimited prosecutorial and judicial discretion, and can opt to focus on particular crimes at particular times, or withdraw or alter indictments, depending upon on how a target behaves. They are not bound by temporal limitations,<sup>70</sup> ICC procedure, or the interface between the Security Council and the Court. In short, in domestic proceedings, coercers enjoy

credibility on both sides: the threat to impose pain and the potential of lifting pain.<sup>71</sup> Contrarily, once it has ordered an ICC referral, the Security Council cedes its ability to increase the pain (via indictment) or ameliorate the pain (via a refusal to prosecute) to an entity over which it has limited authority.

Local judicial solutions can even calibrate the type of case that is to be pursued. For example, domestic prosecutions could pursue civil remedies – seeking redress for financial crimes that all too often accompany more serious criminal infractions. While there is no standing international judicial capacity for adjudicating civil harms, there is no reason the UN could not mandate that Member States help a jurisdiction find both criminal and civil redress. The benefit of civil cases is not only that they are often immediately credible – they are usually easier to establish and can potentially be pursued during a conflict (as they often concern assets held abroad) – but also that they can serve to both punish the indictee “where it hurts” and further sap his support. Citizens may not countenance that their leader engaged in war crimes; however, “the same people will be far less patient with a leader who is charged with corruption and fraud.”<sup>72</sup> If successful, such cases may “extinguish” whatever remains of the popular support of the leaders, and may allow the subsequent pursuit of more serious criminal charges.<sup>73</sup>

This relates to the fact that it is far more difficult for an indictee under domestic justice to mitigate the impact of such an action by claiming that the charge is actually being leveled against the entire State. In the case of Milosevic, for instance, though Serb nationalists were upset when he was imprisoned and charged under domestic authorities with abuse of power before his transfer to the ICTY, there was little talk of the Belgrade indictments accusing all Serbs of these crimes. It was only once The Hague indictments were acted upon that many Serbs felt judicially attacked.

### *Additional Benefits – Complementarity and Subsidiarity*

Far from subverting international justice, a focus on local solutions supports the international judicial endeavor by making complementarity – a central building block of the ICC – an internationally-supported end. Complementarity is enshrined in Article 17 of the ICC Statute and provides that the Court will only assume jurisdiction if a domestic system cannot or will not engage in prosecutions.<sup>74</sup> Many scholars have argued that if complementarity is to have any meaning, it implies that the international community must pursue an “active complementarity” helping States develop their own capacities.<sup>75</sup>

Bringing the focus of resolution back to the locality not only furthers complementarity, but also supports another core value of the UN and one that is critical in the context of post-conflict States: subsidiarity. Dubbed a “most basic principle” of the UN,<sup>76</sup> subsidiarity holds that, as a general matter the international community ought to act only when tasks cannot be accomplished by Member States themselves.<sup>77</sup> Subsidiarity does not ask the international community to abdicate any role; rather, subsidiary suggests that the international community limit its action to those instances in which multilateral actions have a comparative advantage over individual Member State actions. This is the case with the traditional tools of coercive diplomacy, such as arms embargoes, travel bans, and asset freezes. As noted, no State acting on its own, or even with other States, could adequately implement global prohibitions on target States. Such sanctions are only effective if universal and the UN is uniquely positioned to demand and coordinate such instruments.

The same is not true for providing justice. Apart from the prospects for domestic justice, even in the narrower context of ICC referrals, individual States, including non States-party like

Libya and Sudan, do not require the Security Council to refer matters for them. Under Article 12(3) of the ICC Statute, a non-State party can lodge a declaration with the ICC accepting the Court's jurisdiction over a matter.<sup>78</sup> Though challenging in the context of Sudan, in Libya by summer 2011 much of the global community had come to recognize the anti-Qaddafi forces as the legitimate Libyan government. As the recognized representatives of the State, they could have lodged a request with the Court or quickly acceded to the treaty itself if they had desired.

A commitment to subsidiarity is especially critical in post-conflict States. Helping States emerge from crises and rebuild institutions is imperative. Allowing States to take the lead in doing so, and providing multilateral assistance as required – in justice and otherwise – is both a cost-effective strategy and one that has arguably seen more success than the top-down approaches practiced in many post-conflict situations.<sup>79</sup>

In the context of the fight for Libya in 2011, the international community recognized the importance of aspects of subsidiarity. Acting through the North Atlantic Treaty Organization the international community provided determinative military support to the effort but was careful to limit its engagement such that it was the Libyan people themselves who were responsible for ousting the regime. It was thought critical to a post-Qaddafi Libya that the revolution was truly domestic in origin and prosecution. It is unclear why the international community did not follow this dictum with regard to the pursuit of justice. It is equally important for the Libyan people to engage in a moral reckoning with their past – via domestically addressing the wrongs of the Qaddafi regime – and to be empowered by the international community to that end.<sup>80</sup>

## Conclusion

International justice remains nascent; twenty years after its reemergence, diplomats, as much as lawyers, are still assessing what it means, how it changes the rules, and how it should be used. Though the novelty of the system counsels prudence, given the attraction of coercive diplomacy and the limited number of other coercive tools the international community has at its disposal, ICC referrals are understandably appealing to the Security Council. However, this chapter posits that deploying ICC referrals poses risks to whatever underlying diplomatic objectives the international community pursues. Such risks flow to more than just diplomatic goals – in as much as referrals fail to result in prosecutions they can weaken the standing of the Security Council. And, regardless the judicial outcome, the Council’s seeming control over the ICC could injure the Court’s standing as well. Additionally, an abundance of referrals could degrade core values of international justice (complementarity) and the UN itself (subsidiarity).

In taking up its role as an instrument of coercive diplomacy, the ICC referral has become a centerpiece in the debate over “peace versus justice.” As seen in Sudan, Uganda, and elsewhere, the pursuit of international justice may at times at least seem to impede the simultaneous pursuit of peace.<sup>81</sup> However, if domestic rather than international justice becomes the goal, peace and justice become more clearly parallel rather than potentially contrary aims. The alchemy of using the threat of domestic proceedings in coercive diplomacy is that such threats cannot only be stronger and more credible than threats of international justice, but also less divisive and less likely to exacerbate conditions in an ongoing conflict or cause the over-reaction seen in response to international justice.

No tool of coercive diplomacy is a panacea. Much as with the traditional instruments of embargoes, asset freezes and travel bans, invoking domestic justice in coercive efforts may fail more often than succeed. However, for an international community hungry for more coercive

instruments and eager for tools that provide lasting, collateral benefits, invoking domestic justice is more propitious than relying on ICC referrals. It provides a better chance of delivering diplomatic goals, while aiding in securing the peace and justice beleaguered populations deserve.

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<sup>1</sup> Carmen Chai, “Harper Condemns Violence in Libya,” *Postmedia News* (Canada), February 22, 2011; “World Condemns Gaddafi,” *Australian Broadcasting Corporation*, AM, February 22, 2011; “World Powers Heap Pressure on Libya’s Qaddafi to Step Down,” *Radio Free Europe*, February 27, 2011.

<sup>2</sup> “Federal Council Condemns the Use of Force Against the Libyan People and has Blocked the Assets held by Moammar Gaddafi in Switzerland,” Federal Department of Foreign Affairs (Switz.), February 24, 2011.

<sup>3</sup> UN Security Council Resolution 1970, February 26, 2011; Statute of the International Criminal Court, Article 13(b), providing that the ICC has jurisdiction if a situation in which one or more the crimes under its remit has been alleged is “referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”

<sup>4</sup> UN Security Council Resolution 1593, March 31, 2005.

<sup>5</sup> David L. Asher, Victor D. Comras, and Patrick M. Cronin, “Pressure: Coercive Economic Statecraft and U.S. National Security,” Center for New American Security, January 2011, pg. 16. Accessed August 29, 2011. [http://www.cnas.org/files/documents/publications/CNAS\\_Pressure\\_AsherComrasCronin\\_1.pdf](http://www.cnas.org/files/documents/publications/CNAS_Pressure_AsherComrasCronin_1.pdf).

<sup>6</sup> UN Security Council Resolution 1973, March 19, 2011, para. 4.

<sup>7</sup> Peter D. Feaver and Eric B. Lorber, “Coercive Diplomacy: Evaluating the Consequences of Financial Sanctions,” Legatum Institute, November 2010, 9. Accessed August 29, 2011. <http://www.li.com/attachments/Legatum%20Institute%20-%20Coercive%20Diplomacy.pdf>.

<sup>8</sup> *Id.*, 8.

<sup>9</sup> See e.g., Nicholas J. Wheeler and Tim Dunne, “East Timor and the New Humanitarian Intervention,” *International Affairs* 77 (2001): 818-20.

<sup>10</sup> Prohibitions can be on key commodities such as oil, or more broad trade sanctions. See e.g. UN Security Council Resolution 841, June 16, 1993, para. 5.

<sup>11</sup> The conventional wisdom was that sanctioning any entities below States was “impossible...under international law.” Johann Galtung, “On the Effects of International Sanctions: With the Examples from the Case of Rhodesia,” *World Politics* 19(3) (1967): 378-416.

<sup>12</sup> Bruce Jentleson, *Coercive Diplomacy: Scope and Limits in the Contemporary World*, Stanley Foundation: Policy Analysis Brief (December 2006), 3. Accessed August 29, 2011. <http://www.stanleyfdn.org/publications/pab/pab06CoerDip.pdf>.

<sup>13</sup> Alexander L. George & William E. Simons, *The Limits of Coercive Diplomacy* (Boulder: Westview Press, 1994), 10.

<sup>14</sup> Monika A. Klimek and Jerome F. Venteicher, II, “Where Does Diplomacy End? Turning the Screw from U.S. Economic Sanctions to Military Disputes,” International Studies Association in Chicago (March 1, 2007). Accessed August 29, 2011. [http://www.allacademic.com/meta/pmla\\_apa\\_research\\_citation/1/8/0/3/6/pages180363/p180363-1.php](http://www.allacademic.com/meta/pmla_apa_research_citation/1/8/0/3/6/pages180363/p180363-1.php).

<sup>15</sup> Jentleson, “Coercive Diplomacy,” 6.

<sup>16</sup> “Success” is often a function of the definition used for “coercive diplomacy,” and exactly what sort of activities are included in the concept. Some scholars include military action (limited or up to and “including invasion”), others do not. See e.g. Feaver and Lorber, “Coercive Diplomacy,” 8 (includes “invasion”); Peter Viggo Jakobsen, “Coercive Diplomacy: Frequently Used, Seldom Successful,” *Kungl. Krigsvetenskapsakademiens Handlingar och Tidskrift* (Sweden) (2007), 29. Accessed August 30, 2011. [http://www.kkrva.se/wp-content/uploads/Artiklar/074/kkrvaht\\_4\\_2007\\_3.pdf](http://www.kkrva.se/wp-content/uploads/Artiklar/074/kkrvaht_4_2007_3.pdf) (only “limited use of force”); Alexander L. George, *Forceful Persuasion: Coercive Diplomacy as an Alternative to War* (Washington, DC: U.S.I.P. Press, 1991), ix (only the “threat” of force or exemplary use of force).

<sup>17</sup> Jakobsen, “Coercive Diplomacy,” 32-33.

<sup>18</sup> See e.g. Robert A. Pastor, “The Delicate Balance between Coercion and Diplomacy: The Case of Haiti,” in *The United States and Coercive Diplomacy*, ed. Robert J. Art and Patrick M. Cronin (Washington, DC: U.S. Institute of Peace, 1994), 119-156.

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- <sup>19</sup> Some have argued, however, that Qaddafi's desire to capitulate when he did was due to his fear that in the wake of the Iraq invasion, Libya would be next. See e.g., Amitai Etzioni, "The Coming Test of U.S. Credibility," *Military Review* 91 (March-April 2011), p. 2. Accessed August 29, 2011. [http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview\\_20110430\\_art004.pdf](http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20110430_art004.pdf).
- <sup>20</sup> Different theorists include different core characteristics; however, some form of the items in this chosen quintuplet is included in much of the literature. See, e.g., Robert J. Art, "Coercive Diplomacy: What do we Know," in *The United States and Coercive Diplomacy*, p. 371; Jentleson, "Coercive Diplomacy," 3; Asher, Comras, and Cronin, "Pressure," 21-2.
- <sup>21</sup> UN Security Council Resolution 1970, para. 1.
- <sup>22</sup> Robert J. Art and Patrick M. Cronin, "Coercive Diplomacy," in ed. Chester A. Crocker, Fen Osler Hampson and Pamela R. Aall, *Leashing the Dogs of War: Conflict Management in a Divided World* (Washington, DC: U.S. Institute of Peace Press, 2007), 311.
- <sup>23</sup> Jentleson, "Coercive Diplomacy," 4.
- <sup>24</sup> See, Adam M. Smith, *After Genocide: Brining the Devil to Justice* (Amherst, N.Y.: Prometheus Books, 2009), 138-139, and accompanying notes.
- <sup>25</sup> See Situations and Cases pursued by the ICC. Accessed August 29, 2011. <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>.
- <sup>26</sup> United Nations, Report of the International Commission of Inquiry on Darfur to the Secretary General, S/2005/60 (January 25, 2005), 5.
- <sup>27</sup> UN Security Council Resolution 1970, Preamble. *Emphasis added*
- <sup>28</sup> UN Security Council Resolution 1970, para. 5; UN Security Council Resolution 1593, para. 2.
- <sup>29</sup> Bruce Jentleson, "The Reagan Administration versus Nicaragua," in George and Simons, *Limits of Coercive Diplomacy*, 174-177; Feaver and Lorber, "Coercive Diplomacy," 10.
- <sup>30</sup> George and Simons, *Limits of Coercive Diplomacy*, 15.
- <sup>31</sup> Robert Litwak, "Force and Diplomacy," Stanley Foundation – Working Paper (After the Unipolar Moment: Clarifying the Purposes of U.S. Hard Power) (April 26-27, 2007), 8. Accessed August 29, 2011. [http://www.stanleyfoundation.org/publications/working\\_papers/Litwak\\_working\\_paper\\_April\\_conference\\_FINAL.doc](http://www.stanleyfoundation.org/publications/working_papers/Litwak_working_paper_April_conference_FINAL.doc); Jentleson, "Coercive Diplomacy," 5.
- <sup>32</sup> Richard Garfield, "The Public Health Impact of Sanctions," *Middle East Report* 215 (Summer 2000), 16-19.
- <sup>33</sup> See e.g. Blocking Faith, Freezing Charity, ACLU, 2009. Accessed August 29, 2011. <http://www.aclu.org/files/pdfs/humanrights/blockingfaith.pdf>; Fourth Freedom Forum, Sanctions and Human Rights, <http://www.fourthfreedom.org/sanctions/sanctions-and-human-rights-2/>.
- <sup>34</sup> See generally, Gavin Sullivan and Ben Hayes, "Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights," European Center for Constitutional and Human Rights (December 10, 2010). Accessed August 29, 2011. <http://www.ecchr.eu/index.php/ecchr-publications/articles/blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights.html>; specific cases detailing harms include: *M and Others v. HM Treasury*, Case C 340/08 (April 29, 2011); the case of Yassin al-Kadi (which has been litigated in several fora) in which the complainant asserts to have lost \$200 million and spent more than \$10 million in legal defense since his listing. Hamid al-Attas Omar, "\$200 million Lost..." *Okaz* (Saudi Arabia), December 12, 2006. Accessed August 29, 2011. <http://www.okaz.com.sa/okaz/osf/20061226/Con2006122674454.htm>.
- <sup>35</sup> See UN Security Council Resolution 788, 19 November, 1992; UN Security Council Resolution 1343, 7 March, 2001.
- <sup>36</sup> Bruce W. Jentleson and Christopher A. Whytock, "Who 'Won' Libya?: The Force-Diplomacy Debate and its Implications for Theory and Policy," *International Security* 30 (Winter 2005/2006), 57-67.
- <sup>37</sup> The lack of direct deterrent effect of ICC actions (and those of other international courts) has been widely noted. See, e.g. Kenneth A. Rodman, "Darfur and the Limits of Legal Deterrence," *Human Rights Quarterly*, 30 (2008), 529-560.
- <sup>38</sup> As of this writing, al-Bashir has *inter alia* travelled to ICC parties Chad, Djibouti, and Kenya. Other signatories, such as Comoros, have also publicly noted that they will not arrest al-Bashir. "President Bashir Defies Arrest Warrant by Traveling to Djibouti," *Sudan Tribunal*, May 9, 2011.
- <sup>39</sup> "Uganda Would Welcome Gaddafi," *The Nation* (Nairobi), March 30, 2011.
- <sup>40</sup> See e.g., Najmeh Bozorgmehr, et al, "China and Iran Plan Oil Barter," *Financial Times*, July 24, 2011; Jo Becker, "Web of Shell Companies Veils Trade by Iran's Ships," *New York Times*, June 7, 2010; Feaver and Lorber, "Coercive Diplomacy," 12.



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<sup>41</sup> Michael Slackman and Robert Worth, “Setting Aside Divisions, Arab Leaders Rally Behind Sudan’s President at Meeting,” *New York Times*, March 31, 2009.

<sup>42</sup> Lynsey Addario and Lydia Polgreen, “Aid Groups’ Expulsion, Fears of More Misery,” *New York Times*, March 22, 2009.

<sup>43</sup> See, Adam M. Smith, “Understanding the Alienated Constituents of International Tribunals: Bridging the Gap,” in ed. Henry F. Carey and Stacey Mitchell, *Trials and Tribulations: International Criminal Tribunals and the Challenges of International Justice* (Lanham, MD: Lexington Books/Rowman and Littlefield, 2012).

<sup>44</sup> Nebojsa Bugarinovic, “Beograd: 37 Posto Gradana Smatra da Milosevic u Hagu Brani Srbiju I Srpski Narod,” *Danas*, February 20, 2002. Cited/translated in: Emily Shaw, “The Role of Social Identity in Resistance to International Criminal Law: The Case of Serbia and the ICTY,” Abstract, Berkeley Program in Soviet and Post-Soviet Studies (2003); Smith, *After Genocide*, 108.

<sup>45</sup> Jentleson, “Coercive Diplomacy,” 5.

<sup>46</sup> UN Security Council Resolution 1970, para. 27.

<sup>47</sup> See “Terminated Sanctions Committees,” at UN Security Council Sanctions Committee, <http://www.un.org/sc/committees/>. Accessed August 29, 2011.

<sup>48</sup> UN Security Council Resolution 1970, Preamble; UN Security Council Resolution 1593, Preamble.

<sup>49</sup> ICC Statute, Article 16 provides that “No investigation or prosecution may be commenced or proceeded with...for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII..., has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

<sup>50</sup> The Canadian government, among others, was supportive of an Article 16 deferral in this case. See “Ugandan Proposal Pits Justice vs. Peace,” *Ottawa Citizen*, July 18, 2008. Accessed August 29, 2011.

<http://www.canada.com/ottawacitizen/news/story.html?id=76bfd693-f814-40f8-acec-c0db4a5fbc85>

<sup>51</sup> See e.g. “Uganda: What is Needed for Peace,” *The Monitor* (Uganda), September 20, 2006; Adrian Traylor, “Uganda and the ICC,” *Eyes on the ICC* 6:1 (2009-2010), 39.

<sup>52</sup> Chapter VII, UN Charter. While the Security Council could act under Chapter VII without meeting this requirement, that both the Sudan and Libya referrals explicitly reference this threshold suggests that a deferral would do the same. See Edward C. Luck, *UN Security Council: Practice and Promise*, (London: Routledge, 2006), 23.

<sup>53</sup> See e.g. Philippe Kirsch and John T. Holmes, “The Rome Conference on an International Criminal Court, the Negotiating Process,” *American Journal of International Law* 93 (1999), 2; Lionel Yee, “The International Criminal Court and the Security Council,” in ed. Roy Lee, *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer, 1999), 149; Amnesty International Letter to Security Council, April 1, 2008. Accessed August 29, 2011. <http://appablog.wordpress.com/2008/04/04/uganda-amnesty-international-letter-to-unsc-re-icc-and-joseph-kony/>; Civil Society Letter to the Ministries of Foreign Affairs of African ICC States Parties on the UN Security Council, March 2, 2011. Accessed August 29, 2011.

<http://www.hrw.org/news/2011/03/02/gabonnigeriasouth-africa-reconsider-support-deferral-icc-kenya-investigation>.

<sup>54</sup> See, e.g. M. el Zeidy, “The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Deferrals and Resolution 1442,” *Vanderbilt Journal of Transnational Law* 35 (2002), 1509, positing that “Article 16...deters the establishment of an independent and impartial jurisdictional mechanism.”

<sup>55</sup> The Security Council has exercised Article 16 authorities, but only on a preemptive basis, rather than in reference to an existing case. UN Security Council Resolution 1422, July 12, 2002 invoked Article 16 in order to prevent the ICC from proceeding in a matter that could arise involving current or former peacekeepers whose crimes arose while on a UN mission. UN Security Council Resolution 1487, June 12, 2003, renewed Resolution 1422 for 12 months.

<sup>56</sup> In the wake of the al-Bashir indictment, the African Union, Arab League, Non-Aligned Movement and Organization of Islamic Conference – supported by permanent members China and Russia – called for invoking Article 16, to no avail. “Analyst Says ICC Crisis ‘Well Beyond’ Sudan’s Political, Diplomatic Capacity,” *Sudan Tribune*, September 12, 2008. BBC Monitoring Middle East; “China Says Opposed to ‘Irresponsible’ ICC Move Against Sudanese President,” *Sudan Tribune*, August 31, 2008. BBC Monitoring Middle East.

<sup>57</sup> ICC Statute, Article 53(2).

<sup>58</sup> See, e.g. Peter Viggo Jakobsen, *Western Use of Coercive Diplomacy after the Cold War: A Challenge for Theory and Practice* (New York: St. Martin’s Press, 1998) 138; see also, United Nations Security Council Sanctions Committees. Available at: <http://www.un.org/sc/committees/>.

<sup>59</sup> For instance, following the Sudan referral, on which the U.S. and others abstained, the U.S. delegate noted that her government had not dropped its “firm objections to the ICC [and believed that]...the Rome Statute was flawed.” (UN Security Council Press Release, SC/8351, March 3, 2005). In the wake of Resolution 1970, various delegations

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also distanced themselves from the referral. The Indian representative, who was serving as the Council's president, went so far as to note that his government would have preferred not to refer the matter. (UN Security Council Press Release, SC/10187/Rev.1, February 26, 2011).

<sup>60</sup> UN Security Council Resolution 1970, para 6.

<sup>61</sup> See e.g., Colum Lynch, "UN Faces More Accusations of Sexual Misconduct," *Washington Post*, March 13, 2005, A22; Smith, *After Genocide*, 120.

<sup>62</sup> Article 13(b) allows the Security Council to refer "situations" to the Court. "There is nothing to suggest that the Council can 'salami-slice' a situation so as to exempt some parties...from the jurisdiction of the Court." Matthew Happold, "Darfur, the Security Council and the International Criminal Court," *International and Comparative Law Quarterly* 55 (2006), 231.

<sup>63</sup> UN Security Council Resolution 1970, para. 8; UN Security Council Resolution 1593, para. 7.

<sup>64</sup> W. Michael Reisman, "On Paying the Piper: Financial Responsibility for Security Council Referrals to the International Criminal Court," *American Journal of International Law* 99 (2005), 616; William Pace, Coalition for the International Criminal Court, Open Letter, July 6, 2011. Accessed August 29, 2011. [http://www.coalitionfortheicc.org/documents/CICC\\_Letter\\_on\\_the\\_2012\\_ICC\\_Budget\\_-\\_6\\_July\\_2011.pdf](http://www.coalitionfortheicc.org/documents/CICC_Letter_on_the_2012_ICC_Budget_-_6_July_2011.pdf).

<sup>65</sup> Reisman, "On Paying the Piper," 616; ICC, Proposed Programme Budget for 2012 of the International Criminal Court, ICC-ASP-10, December 12-21, 2011. Accessed August 29, 2011. [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-10-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-ENG.pdf).

<sup>66</sup> Article 115 of the ICC Statute notes that the expenses of the Court will be provided by the States party and by "Funds provided by the UN...in particular in relation to the expenses incurred due to referrals by the Security Council." Though the language of the statute provides flexibility for the UN to refuse to cover these costs, many have argued that it is still unacceptable. Further some posit that given that under the UN Charter it is the General Assembly, not the Security Council that holds the power of the purse, it is improper for the Security Council to preempt this authority by refusing UN support for such referrals. See, e.g., Happold, "Darfur, the Security Council and the International Criminal Court," 234.

<sup>67</sup> Ironically, the only two states that are required to assist the Court are those that are likely least willing and/or able to do so: Libya and Sudan. In both Resolution 1970 and Resolution 1593 both are legally mandated to assist the Court.

<sup>68</sup> UN Security Council Resolution 1970, para. 5; UN Security Council Resolution 1593, para. 2.

<sup>69</sup> For a related point on the potential of "general deterrence" of international justice, see Payam Akavan, "Justice in the Hague. Peace in the Former-Yugoslavia? A Commentary on the United Nations War Crimes Tribunal," *Human Rights Quarterly* 20 (1998), 746.

<sup>70</sup> The ICC can only investigate crimes that occurred after it began operations on July 1, 2002; the Sudan referral provides the Court jurisdiction for all crimes since then; the Libya referral cabins the temporal jurisdiction further and provides the Court with jurisdiction from February 15, 2011. UN Security Council Resolution 1593, para. 1; UN Security Council Resolution 1970, para. 4. The crimes in both Sudan and Libya had their geneses from well before July 1, 2002; these pre-jurisdiction delicts can be addressed in domestic proceedings but cannot be in ICC proceedings. This could be problematic for achieving the "justice" those on the ground desire. See, generally, Smith, *After Genocide*, 131-7.

<sup>71</sup> Feaver and Lorber, "Coercive Diplomacy," 13.

<sup>72</sup> Alex Boraine, "Reconciliation in the Balkans," *New York Times*, April 22, 2001.

<sup>73</sup> Smith, *After Genocide*, 265-269.

<sup>74</sup> ICC Statute, Article 17.

<sup>75</sup> See e.g. William W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice," *Harvard International Law Journal*, 49 (2007), 53-108.

<sup>76</sup> Statement of the President of the 65<sup>th</sup> Session of the General Assembly, Opening Remarks at the Conference on "Global Governance and Security Council Reform," May 16, 2011. Accessed August 29, 2011. <http://www.un.org/en/ga/president/65/statements/globalgovandscref160511.shtml>

<sup>77</sup> J.A. Moore and Jerry Pubantz (ed.), *Encyclopedia of the United Nations, Vol. 1* (New York: Infobase, 2008), 397-8.

<sup>78</sup> ICC Statute, Article 12(3) provides that a non-party "State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court..."; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press), 287-291.

<sup>79</sup> See, Smith, *After Genocide*, 334-8.

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<sup>80</sup> *Id.*, 327. See also, Jason Pack, “Capturing the Qaddafis,” *Foreign Policy*, November 21, 2011. Available at: [http://www.foreignpolicy.com/articles/2011/11/21/abdullah\\_senussi\\_capture\\_libya](http://www.foreignpolicy.com/articles/2011/11/21/abdullah_senussi_capture_libya).

<sup>81</sup> See e.g., in Uganda, Payam Akhavan, “The Lord’s Resistance Army Case,” *American Journal of International Law* 99 (2005) 417-418; in Sudan, Addario and Polgreen, “Aid Groups’ Expulsion, Fears of More Misery.”