The International Criminal Court's Unjustified Jurisdiction Claims: Libya As A Case Study

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STUDENT NOTES
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INTRODUCTION

The International Criminal Court ("ICC" or "the Court") benefits global society with its mission to end impunity for perpetrators of the gravest crimes that concern the international community.1 However, because the ICC infringes upon the sovereignty of nations by replacing that nation’s criminal justice system in a specific situation, valid jurisdiction of the court depends on the consent of the sovereign nations.2 The United States for instance, chose not to sign the treaty of the Court, the Rome Statute, which would subject the country, its citizens, and leaders to the jurisdiction of the Court.3 Likewise, Libya is not one of the 121 States Parties to the Rome Statute.4 However, the ICC claims that it maintains proper jurisdiction over the political conflict in Libya with respect to the violence beginning on February 15, 2011 because the United Nations Security Council referred this situation in Libya to the ICC.5 United Nations Security Council Resolution 1970 was adopted unanimously on February 26, 2011 with the hope of putting an end to

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1. About the Court, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx [last visited Feb. 25, 2013] [hereinafter About the Court].

2. Jurisdiction and Admissibility, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/jurisdiction%20and%20admissibility.aspx [last visited Feb. 25, 2013] [hereinafter Jurisdiction and Admissibility]. The ICC also states that it has jurisdiction when the United Nations Security Council refers a situation to the ICC, regardless of the nationality of the accused or the location of the alleged crime. However this paper argues that jurisdiction of the Court is invalid if its sole basis is a referral by the UN Security Council, and this paper uses the current situation in Libya to demonstrate the problems presented by such an exercise of jurisdiction.


4. Id.

the attacks against the civilian population in Libya, which “may amount to crimes against humanity.” On March 17, 2011, the United Nations Security Council adopted Resolution 1973, which in relevant part, called on United Nations Member States “to take all necessary measures” to protect civilians in Libya against the violence of the Gaddafi Regime.

The Security Council has the ability to refer situations to the ICC, which in turn grants the ICC authority to investigate and prosecute, regardless of whether or not the countries or nationals involved are State Parties to the Rome Statute. Academics have looked at this and simply concluded, or assumed without analysis, that the jurisdiction claims are legitimate when the United Nations Security Council refers an issue to the ICC.

The Security Council has only used its ability to refer a situation to the ICC in two instances: (1) with Libya, regarding the violence beginning February 15, 2011; and (2) on March 31, 2005 for the crisis in Darfur. After the Darfur referral, academics considered issues regarding whether the ICC should have the ability to investigate and prosecute a sitting head of state. They have also concluded that the jurisdictional stretch of the ICC is valid simply because these nations


8. Jurisdiction and Admissibility, supra note 2.


11. Buzzard, supra note 9, at 908-09.

12. Id. at 902.
are members of the United Nations.\textsuperscript{13} Seemingly, academics have taken the ability of the Security Council to grant unwarranted jurisdiction to the ICC, a treaty based court, for granted.\textsuperscript{14} They do not ask how the Security Council can have the immense power to subject people or countries to an investigation and prosecution by the ICC when the sovereign country explicitly chose not to sign the treaty that governs the Court.

This Note argues that a referral to the ICC from the United Nations Security Council is an improper extension of the ICC’s jurisdiction when it involves a state that is not a signatory to the ICC’s treaty. It uses the recent situation in Libya as a case study to demonstrate this principle, specifically by considering the arrest warrants of Muammar Gaddafi (“Gaddafi”), Saif Al-Islam Gaddafi, and Abdullah Al-Senussi. While the United Nations Security Council passed a resolution saying it would protect the civilians in Libya\textsuperscript{15}, the action it chose to achieve this—subjecting the country to the jurisdiction of the ICC without its agreement (i.e. through ratification of the Rome Statute)—improperly extends the jurisdiction of the ICC and in fact hurts the people of Libya and their new liberalized government by infringing on its sovereignty.

This Note analyzes the problems that exist with the current regulation that allows the Security Council to refer any situation or person to the ICC, regardless of their subscription to the Rome Statute. It argues that the UN Security Council should not have this referral power. It will do this by first giving an overview of the recent conflict in Libya and the international response to this conflict. This Note then undermines the ICC and the Security Council’s justification for claiming valid jurisdiction over a country and its citizens solely based on a referral from the Security Council. Finally, this Note looks at additional reasons that demonstrate why the Security Council should not have the ability to expand the jurisdiction of the ICC, with a focus on important policy concerns.

I. OVERVIEW OF THE CONFLICT IN LIBYA

In order to better understand the theories set forth in this paper, it is important to know basic information with respect to the recent conflict in Libya. This Section will first discuss the relevant political

\textsuperscript{13} Bohlen, supra note 9, at 704; Falligant, supra note 9, at 728.
\textsuperscript{14} See supra note 9.
history and origin of the conflict, and then set forth the international response to the rebellions and resulting violence.

A. Political History and Origin of the Recent Conflict

Colonel Muammar Gaddafi took power in 1969 after leading the military coup that deposed King Idris. He immediately nationalized most economic activity, including the oil industry, thus introducing socialism. In 1977, Gaddafi changed the country’s official name from the Libyan Arab Republic to the Great Socialist People’s Libyan Arab Jamahiriya, and declared a “people’s revolution,” which brought about institutionalized chaos and economic decline. Libya began experiencing confrontations with the United States and the United Kingdom in the 1980s. In 2002, the United States and Libya held talks to mend relations; however, one year later the United States opposed Libya’s election as chairman of the United Nations Human Rights Commission. In May of 2006, the United States restored full diplomatic ties with Libya, and two years later U.S. Secretary of State Condoleezza Rice visited the country, marking the highest-level U.S. visit since 1953. In 2010, Russia agreed to sell weapons worth $1.8 billion to Libya.

B. The 2011 Libyan Conflict

Opposition forces in Libya rose up against Muammar Gaddafi’s regime, joining the pro-democracy movement across North Africa and the Middle East. Many Libyan diplomats resigned in protest of Gaddafi’s violent response. Even some of the senior figures of Libya, including Prime Minister Moussa Koussa, left in protest of the attacks on the rebels. However, Gaddafi and his regime resisted the protests;

17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
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Gaddafi insisted that he would remain in power and held control of the capital, Tripoli.25 From the beginning of the movement in February of 2011 to at least June of 2011, hundreds of people were killed.26 An ICC investigation indicated that the deaths of protesters were a direct result of Muammar Gaddafi's orders.27 Muammar Gaddafi's son, Saif Al-Islam Gaddafi, recruited mercenaries, and the former head of intelligence forces, Abdullah Al-Senussi, also played a role in attacks on protesters.28

Through its investigation, the ICC obtained evidence suggesting that the Libyan Government repressed demonstrations by using live ammunition; that heavy artillery was used against civilians in funeral processions; and that snipers killed worshipers leaving mosques after prayer.29 The ICC Prosecutor, Luis Moreno Ocampo, stated that these are crimes, not just against Libyans, but against humanity as a whole.30

In the wake of the opposition movement, the Libyan Interim National Council (“INC”), (referred to as the “Interim National Council” on ICC official documents and reports31 but as the "National Transition Council" (“NTC”)32 by the United Nations) announced its official establishment in the city of Benghazi on March 5, 2011.33 The INC was established to “work on the Liberalization of Libya” from “the hands of the tyrant Mu’ammur Gaddafi.”34

After months of violence, and with the help of NATO forces, the rebels took control of Tripoli in August of 2011.35 Gaddafi sought ref-

25. Libya Profile: Timeline, supra note 16.
26. ICC issues arrest warrants, supra note 23.
28. ICC issues arrest warrants, supra note 23; ICC Prosecutor, supra note 27.
29. ICC Prosecutor, supra note 27.
30. Id.
34. Id.
uge in Sirte, but on October 20, 2011, he attempted to escape with a convoy of approximately seventy-five vehicles. Gaddafi and several men escaped together on foot, but Gaddafi was found and killed by rebel forces. According to Mahmoud Jibril, Head of the Executive Council of the NTC, a forensic report after the autopsy of Gaddafi’s body, which adhered to rules from the ICC, concluded that Gaddafi was wounded when caught by rebel forces. The rebel forces captured Gaddafi, and on their way to the hospital they were caught in cross-fire with Gaddafi’s Security Brigades; Gaddafi was shot in the head, but it is unknown by whom. The particular details surrounding Gaddafi’s death are not clear though, as amateur videos show evidence that in moments after his capture Gaddafi was possibly sodomized with a pole or knife, and initial footage seemed to show his body dragged through the streets by the rebels. To this regard, Jibril did not disagree with the possibility of carrying out a full investigation under international supervision.

C. International Response to the Libyan Conflict

In response to the eruption of violence, the United Nations Security Council authorized a no-fly zone over Libya to protect civilians, and placed NATO in command. The Arab League voted to support the no-fly zone over Libya, and the United States and European Union called on Gaddafi to step down. NATO air raids helped the Libyan rebels, and together they initially captured some territory, but were forced back by pro-Gaddafi forces.

36. Muammar Gaddafi: How he died, supra note 35; Libya Profile: Timeline, supra note 16.
37. Id.
38. Id.
40. Id.
41. Muammar Gaddafi: How he died, supra note 35.
43. Libya Profile: Timeline, supra note 16.
45. Libya Profile: Timeline, supra note 16.
On February 26, 2011, the UN Security Council passed Resolution 1970 to refer the situation to the ICC.\(^\text{46}\) On June 27, 2011, the ICC issued arrest warrants for Muammar Gaddafi, his son Saif Al-Islam Gaddafi, and Abdullah Al-Senussi, the head of Libya’s intelligence forces, for crimes against humanity, murder and persecution of Libyan civilians, committed from February 15, 2011 to at least February 28, 2011.\(^\text{47}\) In July 2011, the International Contact Group on Libya, the main opposition group, recognized the National Transitional Council as the new legitimate government of Libya.\(^\text{48}\)

On September 16, 2011, The General Assembly of the United Nations voted to recognize the Libyan Interim Transitional National Council as the official leadership of Libya, and soon after formally welcomed the INC’s President and Prime Minister as representatives of the “New” Libya to its first major United Nations meeting.\(^\text{49}\) The African Union also joined in recognizing the INC as the new Libyan Authority.\(^\text{50}\) The Security Council further established the United Nations Support Mission in Libya (UNSMIL) in order to protect the Libyan people from violence.\(^\text{51}\) Secretary-General Ban Ki-moon stated that this effort must be “fully consistent with Libyan needs, Libyan priorities and the Libyan context.”\(^\text{52}\)

In response to the ICC’s arrest warrants, and during the ICC’s investigation of the matter pursuant to the requests set forth in United Nations Resolution 1970, Mahmoud Jibril made clear that the INC held the position that Libya should take the lead in anything related to Libya.\(^\text{53}\) However, the ICC Prosecutor, Luis Moreno-Ocampo, and Mahmoud Jibril did agree on the necessity of ending “impunity of the most responsible perpetrators of the alleged war crimes and crimes against humanity in Libya.”\(^\text{54}\)

47. Pre-Trial Chamber I issues three warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi, INTERNATIONAL CRIMINAL COURT (June 27, 2011), http://www2.icc-cpi.int/menus/icc/situations%20and%20cases/situations/kk0111/press%20releases/pre_trial%20chamber%20%20issue%20%20three%20warrants%20of%20arrest%20for%20muammar%20gaddafi%20saif%20al-islam%20gaddafi%20and%20a. Because various spellings are used for the names of Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi, this Note uses the spellings that the ICC uses on the arrest warrant. Even some of the official ICC articles use varied spellings.
48. Libya Profile: Timeline, supra note 16.
49. Secretary General Formally Welcomes ‘New’ Libya, supra note 32.
50. Libya Profile: Timeline, supra note 16.
51. Secretary General Formally Welcomes ‘New’ Libya, supra note 32.
52. Id.
53. Head of the Executive Committee of the INC, supra note 31.
54. Id.
II. THE INTERNATIONAL CRIMINAL COURT’S JURISDICTIONAL CLAIMS BASED ON A REFERRAL BY THE SECURITY COUNCIL

The United Nations Security Council and the International Criminal Court are the relevant bodies for the scope of this Note. It is helpful to understand background information regarding each of these bodies in order to analyze the formal relationship they have with each other. The relevant documents to consider are the Rome Statute of the ICC, Chapter VII of the United Nations Charter, and UN Security Council Resolution 1970. None of these documents justify the power of the Security Council to refer any situation to the ICC without regard to whether the ICC could otherwise claim valid jurisdiction.

A. Background Information on the Relevant Bodies

1. The International Criminal Court

   The ICC is a permanent, neutral and independent body that investigates and prosecutes people who have been accused of the gravest crimes that are of international concern.55 The Court is based on a treaty, joined by 121 countries, as of July 1, 2012.56 This treaty, the Rome Statute of the International Criminal Court ("Rome Statute") governs the jurisdiction and functioning of the ICC.57 Through the "principle of complementarity," the ICC complements, rather than replaces, national criminal justice systems.58 The ICC will only prosecute and try individuals when the state is unwilling or unable to genuinely investigate and prosecute.59

   The countries that accepted the rules in the Rome Statute by ratifying this treaty are known as States Parties.60 These countries are represented in the Assembly of States Parties, which meets at least once a year to set the general policies for the administration of the Court and any other issues relevant to the ICC.61 The States Parties have a legal obligation to cooperate with the ICC when it investigates

56. Id.
57. Id.
59. Id.
60. Id.
61. Id.
and prosecutes crimes within the jurisdiction of the Court. This is particularly important because the ICC does not have a police force, so it relies on the cooperation of states in the arrest and surrender of suspects. When the ICC’s claim for jurisdiction is solely based on a referral from the Security Council, then the duty to cooperate is extended to all United Nations Member States, regardless of whether or not they are a Party to the Rome Statute.

2. The United Nations Security Council

The primary responsibility of the Security Council is to maintain international peace and security. When the Security Council receives a complaint of a threat to peace, the Security Council may, in some instances, undertake the investigation and mediation, and set forth principles for a peaceful settlement. If the dispute leads to violence, the Security Council’s ultimate and primary concern is to end the violence as soon as possible. For instance, the Security Council can work towards ending the violence by sending United Nations peacekeeping forces, or by using enforcement measures, including economic sanctions such as trade embargos, or going as far as collective military action.

The Security Council has influence over the International Court of Justice ("ICJ"), particularly in its election of Judges. The ICJ, established by the United Nations Charter in 1945, is the “principal judicial organ of the United Nations.” The ICJ exists to settle legal disputes that states submit to the ICJ and to answer legal questions referred to the ICJ by an authorized UN organ. Similarly, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are subsidiary courts created by

62. Id.
63. Id.
64. Id.
66. Id.
67. Id.
68. Id.
71. Id.
and under the control of the United Nations. Both the ICTY and ICTR were created in accordance with Chapter VII of the UN Charter. Unlike the ICC, these courts fully operate as bodies of the United Nations, and therefore the Security Council's influence and authority over them is warranted.

3. The Official Relationship Between the International Criminal Court and the United Nations

The ICC and the United Nations negotiated an agreement regarding the terms of their relationship, which is formally published as the Negotiated Relationship Agreement between the International Criminal Court and the United Nations ("Negotiated Relationship"). While the Negotiated Relationship recalls that the Rome Statute of the ICC reaffirms the purposes and principles of the UN Charter, it more significantly includes provisions that recognize the entities' independence from one another. For instance, in the preamble, the Negotiated Agreement states that the ICC is a permanent institution in relationship with the United Nations, but meaningfully provides that "the International Criminal Court is established as an independent permanent institution."

The ICC and the United Nations signed the Negotiated Agreement on October 4, 2004, and the bodies still operate according to these principles. The Negotiated Agreement is helpful because both the UN and the ICC can cooperate when they are dealing with matters of mutual interest in order to avoid duplication in collection, analysis, and

75. Id. at Preamble, art. 2.
76. Id. at Preamble (emphasis added).
publication of information. The Negotiated Agreement specifically defines the relationship between the Security Council and the Court.

B. Analysis of the Official Relationship between the International Criminal Court and the United Nations

In defining the relationship between the United Nations and the ICC, the Negotiated Agreement explains the proper procedure for situations when the Security Council adopts a resolution that either refers an issue or stops an investigation or prosecution of which the Court is currently involved. While the ICC may propose items for consideration to the United Nations, it does not have the ability to refer something to the UN that the UN would otherwise lack authority to deal with. Likewise, if the UN Security Council maintains the power to refer a situation to the ICC, this referral should also not allow for the ICC to exercise what would otherwise be considered an unwarranted jurisdictional claim.

The motivations behind the Negotiated Agreement are cost saving and efficiency; the Negotiated Agreement was not entered into in order to grant great powers to either body that they otherwise would not have. Article 20 of the Negotiated Agreement also supports the understanding that the ICC should not have increased jurisdictional claims based on this relationship. Article 20 stipulates that if the ICC makes a request of the UN to supply documents that were disclosed in confidence, the UN shall not give these documents to the ICC if the originator is not a State Party and does not consent to disclosure. When the ICC cannot even obtain documents from the United Nations regarding a nation that is not a State Party, it is inconsistent and inexplicable to then allow the ICC to have a valid claim of jurisdiction over a non-State Party.

This relationship between the organizational bodies does not justify the argument that the UN General Assembly or the UN Security Council should have authority over or power to control the ICC and the States Parties. Rather, the relationship between the two bodies, as

78. NEGOTIATED RELATIONSHIP, supra note 74, at art. 5.
79. Id. at art. 17.
80. Id.
81. Id. at art. 7.
82. Id. at art. 9.
83. Id. at art. 20.
84. Id.
formalized in the Negotiated Agreement, signifies that the UN will recognize that the ICC is an “independent permanent judicial institution” and that both the UN and the ICC will “respect each other’s statutes and mandate.”

The two bodies agree to consult one another on matters of mutual interest, and to come to an agreement that conforms to the UN Charter and the Rome Statute.

C. Relevant Documents And Why They Do Not Support the Power For The United Nations Security Council To Refer Issues To The International Criminal Court

The Security Council claims the authority to refer a situation to the ICC through the provisions of the Rome Statute and the United Nations Charter. Together, provisions in these two treaties allow the ICC to claim jurisdiction through a referral from the Security Council to investigate and potentially prosecute a person or situation. After considering the actual provisions of the documents, and the nature of the relevant bodies, it is clear that the Security Council’s claimed authority to refer a situation to the ICC is improper, particularly with regard to a non-State Party.

1. The Rome Statute Of The International Criminal Court

The Rome Statute of the ICC is the treaty that provides the legal basis for the establishment of the permanent ICC. Like all treaties and international agreements entered into by United Nations Members, the Rome Statute can be found in the United Nations Treaty Collection.

The ICC only has jurisdiction over some crimes, including crimes against humanity, and there are only specific instances when the ICC can exercise jurisdiction over a nation or individual. First, when a state becomes a Party to the Rome Statute, it accepts the jurisdiction of the Court. Secondly, the Court can exercise jurisdiction if a State Party contains the territory in which the conduct in question occurred, or

85. Id. at art. 2.
86. Id. at art. 3.
87. About the Court, supra note 1.
90. Id. at art. 12.
the State Party is the home of the person accused of the crime.91 Thirdly, the ICC can exercise jurisdiction over a situation referred to by a State Party, but a State Party can only make referrals of a situation when the crime(s) that appear to have been committed are already within the jurisdiction of the court.92 An exception to these limitations exists, and the Court can exercise valid jurisdiction if a state that is not a Party to the Rome Statute accepts the Court’s jurisdiction by its own accord.93 Finally, the ICC may exercise jurisdiction if one or more crimes have been referred to the Prosecutor by the Security Council, acting under Chapter VII of the Charter of the United Nations.94

2. Chapter VII of the United Nations Charter

Although the Rome Statute reaffirms the purposes and principles of the Charter of the United Nations ("the Charter"), this should not be understood to mean that the United Nations Security Council should have authority over this separate body. However, the ICC’s involvement with non-State Parties can be justified in part by the Security Council’s referral ability of an issue to the ICC in accordance with Chapter VII, Article 39 of the Charter of the United Nations.95 This provision in the Charter states that the Security Council shall make recommendations or decisions as to what measures should be taken if the Security Council determines that there is an existence of any threat to international peace and security.96 Pursuant to Articles 41 and 42, these measures may include the interruption of economic relations and severance of diplomatic relations.97 If these measures are inadequate, the Security Council can take more severe action including demonstrations, blockades, and other operations by air, sea, or land forces of the Members of the UN, as necessary to restore international peace and security.98

91. Id.
92. Id. at arts. 13-14.
93. Id. at art. 12.
94. Id. at art. 13.
95. Fallignant, supra note 9, at 728, 739.
97. Id. at arts. 41-42.
98. Id. at art. 42. The Security Council has the power to call upon United Nations Members to start potentially violent air, sea, and land operations, for the purpose of maintaining international peace. Therefore, some may argue that the Security Council should also have the lesser power to refer a situation to the International Criminal Court. However, this logic does not follow because the United Nations members all agreed to the UN Charter, and understood these to be the powers

On February 26, 2011, the United Nations Security Council responded to the violence in Libya by adopting Security Council Resolution 1970 (the “Resolution”) to refer the situation to the ICC.99 The Resolution also imposed an arms embargo on Libya, and an asset freeze and travel ban on certain government officials and the Gaddafi family.100 In the comments to the Resolution, Security Council members expressed solidarity with the people of Libya, hoping that the Resolution and actions it called for would bring them relief.101

The Security Council recognized that “States not party to the Rome Statute that established the Court had no obligations to it, but urged all States . . . to cooperate fully with the Court’s Prosecutor.”102 The Security Council further noted that five of its members were not parties to the Rome Statute, but ignored the significance of this statement.103 While the Security Council members unanimously passed Security Council Resolution 1970, some countries noted reservations to referring a non-State Party to the ICC.104 For instance, the representatives from Lebanon and the Russian Federation brought attention to the importance of “affirming the sovereignty and territorial integrity of Libya.”105 While India’s representative believed the Resolution would help bring an end to the violence, he stated that he would have preferred a different approach and stressed the importance of the provisions in the Rome Statute that deal with non-States Parties to the statute.106


Allowing the ICC to exercise jurisdiction based on a referral from the Security Council, justified by the Rome Statute, is problematic in two ways. First, the ICC is an independent body from the UN, and so

of the Security Council, whereas not all UN members became States Parties to the Rome Statute, and thus should not be subjected to the jurisdiction and powers of this separate body.

100. Id.
102. Id.
103. Id.
104. Id.
105. Id.
106. Id.
the Security Council of the UN should not have authority over what issues or people the ICC chooses to investigate. Secondly, although a provision in the Rome Statute allows for a referral by the Security Council, it has now been exercised twice over non-States Parties, infringing on these nations’ sovereignty.\textsuperscript{107} Similarly problematic is Article 16 of the Rome Statute, which gives the Security Council power to defer an investigation or prosecution indefinitely for periods of twelve months at a time.\textsuperscript{108}

This is inconsistent with the rest of the Rome Statute because the treaty governs an independent Court. The Rome Statute is a treaty that required ratification by sovereign nations in order to bring the ICC into existence. A state or accused person does have the clear ability to challenge the jurisdiction of the Court, and if it does so, the Prosecutor may seek a ruling from the ICC regarding the question of jurisdiction.\textsuperscript{109} However, when the state involved never ratified the treaty that governs the ICC, it should not be forced to take this measure to defend its sovereignty and hope that the Court will rule in its favor.

Allowing the ICC to exercise jurisdiction based on a referral by the United Nations Security Council through Chapter VII of the United Nations Charter is also problematic. Although the list of measures from Articles 41 and 42 in Chapter VII, which the Security Council can use in the face of threats to international security, is not intended to be comprehensive, it tellingly does not include any form of judicial action, particularly through a body that is not part of the United Nations.\textsuperscript{110} Rather, the justification for the power to refer cases and confer unwarranted jurisdiction is based on the Security Council’s general power to take action or recommend certain action in the face of a threat to international peace and security.\textsuperscript{111} However, this responsibility should not be broadened so far as to allow for infringement on the sovereignty of nations that purposefully chose not to sign the Rome Statute.


\textsuperscript{108} Rome Statute, supra note 89, at art. 16 (This specific provision and its greater implications are out of the scope of this paper, but closely related to the argument for the ICC and Security Council to respect the sovereignty of nations that did not ratify the Rome Statute. It is an issue that demands further research and analysis.).

\textsuperscript{109} Id. at art. 19.

\textsuperscript{110} U.N. Charter, supra note 96, at ch. VII, art. 41-42.

\textsuperscript{111} Functions and Power, supra note 69.
Finally, even the text of United Nations Security Council Resolution 1970 does not provide a convincing or consistent rationale that would allow the ICC to exercise jurisdiction solely based on this, or any future, referral by the United Nations Security Council. Although Security Council Resolution 1970 was passed unanimously, the text of the Resolution itself is ambiguous and not fully committed to its stated cause. In the Resolution, the Security Council “Reaffirm[ed] its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya.” 112 Further, in referring the situation from February 15, 2011 to the Prosecutor of the International Criminal Court, the Security Council “decide[d] that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to [the] resolution.”113 Conversely, in that same paragraph, the Security Council recognized that States not party to the Rome Statute have no obligation under the Statute.114 Finally, after making these demands, and boldly extending the jurisdiction of the ICC, the Resolution states that none of the expenses connected to the referral, including those related to investigations or prosecutions, shall be borne by the United Nations.115

The Security Council purports to be taking action through Resolution 1970 that will help the Libyan people, but also align with the Security Council’s strong commitment to support the sovereignty and independence of Libya,116 presumably through its new transitional government. However, there is a clear disconnect between this motivation and the action itself. For instance, the United Nations formally recognized the INC as the official representation of the new Libyan democracy, and welcomed the INC’s then representatives President Mustafa Abdel Jalil and Prime Minister Mahmoud Jibril, to its first major United Nations meeting after the General Assembly voted to accept the credentials of the new leadership of Libya.117 This was an act of international support, recognizing Libya’s change towards a democratic government.118 Secretary General Ban Ki-moon further recognized the country’s sovereignty under its new leadership by declaring that the United Nations support of Libya must be in the “Libyan context”

113. Id.
114. Id.
115. Id.
116. Id.
117. Secretary General Formally Welcomes ‘New’ Libya, supra note 32.
118. Id.
and consistent with the needs and priorities of the Libyan people.119 Contrary to the United Nation’s recognition and welcoming of Libya’s new leadership, Security Council Resolution 1970 directly infringes on the sovereignty of the new democracy. The leaders of the INC made it very clear that it did not welcome the referral.120 The Prime Minister of the INC directly told the Prosecutor of the ICC that the INC’s official position was that anything related to Libya should be led and handled by Libyan people, and take place on Libyan soil.121 This is a direct and unambiguous expression that Libya’s new government wanted to investigate and prosecute the crimes against humanity, and did not want a third party, the ICC, controlling its judicial dealings.

If the United Nations Security Council truly had been considering the best interests of Libya’s democratic movement, and genuinely chose to respect Libya’s sovereignty under its new leadership, then it would have responded to the INC’s clear disapproval of the referral, and allowed for the INC to take control over investigations, arrests and prosecutions. In particular, the Security Council would have recognized (and acted upon the recognition) that the new leadership in Libya had and still does have the opportunity to ratify the Rome Statute if it chooses to subject itself to the jurisdiction of the ICC, and either wanted or believed it needed the aid of the ICC in investigating and prosecuting former Libyan officials for their alleged human rights violations. For instance, after the Tunisian president was ousted following a revolution in January 2011, the Tunisian Interim Government ratified the Rome Statute in its first cabinet meeting.122 In fact, on October 27, 2011 the Coalition for the International Criminal Court sent a letter to the President of the INC urging the transitional government to ratify the Rome Statute as quickly as possible.123 Rather than following the suggestion, the INC exercised its sovereignty and made the decision not to ratify the Rome Statute and become a Party to the ICC, just as five members of the current sitting Security Council have done in the past.124

119. Id.
120. Head of the Executive Committee of the INC, supra note 31.
121. Id.
123. Id.
The comments to the Resolution by some representatives of the nations in the Security Council demonstrate reservations to referring an issue of a non-State Party to the ICC.125 Even at the time of taking action and making this referral, the Security Council demonstrated ambiguity, and this lack of full commitment to the referral shows that even some members of the Security Council may have recognized that broadening the jurisdiction of the ICC over countries that the Court should otherwise not have any authority over could lead to very problematic results. The Security Council must not enforce its stated power to refer a situation without conditioning that the state at issue is a party to the ICC.

Even though under the UN Charter, all Members of the United Nations agree to accept and carry out the decisions of the Security Council,126 a Resolution that refers a situation to another organizational body, the ICC, which would otherwise lack jurisdiction and authority to deal with the issue, should not constitute a valid decision.127

III. BEYOND THE RELEVANT DOCUMENTS, OTHER PRINCIPLES SUPPORT THE CONTENTION THAT THE SECURITY COUNCIL SHOULD NOT HAVE THE ABILITY TO REFER A SITUATION TO THE JURISDICTION OF THE ICC WHEN THE ICC WOULD NOT OTHERWISE HAVE PROPER JURISDICTIONAL CLAIM

The Security Council should not maintain the ability to refer a situation to the ICC, particularly where the referral is for an issue that is not otherwise within the Court’s jurisdiction, or where the referral acts as a justification to promulgate a proper claim of jurisdiction over a non-State Party. In addition to the analysis above, this power should be eliminated, or no longer utilized, for the following reasons: (1) legislative history demonstrates that the ICC did not intend to have universal jurisdiction; (2) sovereign countries cannot be held to a treaty they did

125. See infra Part II(C)(3).
127. Security Council Resolution 1970, supra note 10; Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, to the United Nations Security Council on the situation in Libya, INTERNATIONAL CRIMINAL COURT (Feb. 23, 2011), http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/reports%20by%20the%20Prosecutor%20on%20the%20situation%20in%20Libya.aspx (Just days before the passage of Security Council Resolution 1970, the ICC Prosecutor stated that the Libyan people should make and act upon the decision to do justice in Libya, and because Libya is not a State Party to the Rome Statute, the ICC will only intervene if Libya declares acceptance of jurisdiction of the Court with the Registrar, or if the Security Council refers the situation to the Court.).
not sign under the Vienna Convention on the Law of Treaties and the ICC demonstrates its general respect of sovereignty through its complementarity principle; (3) some of the UN Security Council Members are not States Parties to the Rome Statute themselves; and (4) jurisdiction claims based solely on a Security Council Referral delegitimize the ICC.

A. Legislative History

As explained above, the text and purpose of the Rome Statute leaves unanswered questions with regard to the power of the Security Council to refer a situation to the ICC Prosecutor, despite the relevant nations’ State Party status. A simple statutory analysis of the Rome Statute further demonstrates that the Security Council’s referral power is uncalled for and allows for an invalid extension of the ICC’s jurisdiction.

First, it is important to look at the legislative history of the Rome Statute. Early drafts of the Rome Statute gave the ICC universal jurisdiction over certain crimes, including genocide. However, this universal jurisdiction was not the final version of the Rome Statute that nations chose to ratify, bringing the ICC into existence. If the states were comfortable with automatic jurisdiction, even over the most heinous crimes, they would have passed an earlier draft that provided for universal jurisdiction. Instead, the final version of the Rome Statute states that the Court has jurisdiction only over the specified crimes and over nations that ratify the Rome Statute.

B. Sovereign Countries Cannot be Held To a Treaty They Did Not Sign

A fundamental premise of treaty law is that no state should be bound by any treaty, unless it voluntarily relinquished part of its sovereign rights by signing and implementing that treaty. Even the former President of the ICC articulated that the Rome Statute does not bind states that are not parties.

129. Id.
130. Rome Statute, supra note 89, at art. 12 (the only exception being Article 13(b), which states that jurisdiction may be based on a referral from the Security Council).
131. Newton, supra note 128, at 124
132. Id. at 125-26.

The Vienna Convention on the Law of Treaties ("VCLT") explicitly provides that "[a] treaty does not create either obligations or rights for a third State without its consent."133 By the principles of the VCLT, the Rome Statute also cannot create obligations for a non-State Party unless that nation "expressly accepts that obligation in writing."134 Article 38 of the VCLT states that this does not "preclude a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."135 However, the Security Council and the ICC cannot use this in their defense to create a Resolution that confers unwarranted jurisdiction over a non-State Party because it is not a customary rule of international law to allow a state to "be held responsible for obligations under treaties to which they are not parties."136 In fact, the preamble to the VCLT states that in creating the VCLT, the parties have considered the principles of international law including "equal rights and self-determination of peoples, of the sovereign equality and independence of all States, [and] of non-interference in the domestic affairs of States."137

An interference of the domestic judicial affairs of Libya, which constitutes an infringement on the new government’s sovereignty, is not a customary rule of international law that would justify subjecting Libya to the jurisdiction of the ICC. Rather, such infringement over the nation that independently chose not to ratify the treaty is in conflict with core principles of international law, as they are reflected in the Vienna Convention on the Law of Treaties.

Further, it has been argued that the Rome Statute does not violate the VCLT because the Rome Statute does not expressly create obligations for states that are not party to the statute.138 This argument does not stand because Article 13(b), the provision that allows the Security Council to refer a case to the ICC, does not maintain the condition that the state at issue must be a party to the Rome Statute.139 Therefore, the Security Council violated the Vienna Convention when it acted upon Article 13(b) of the Rome Statute by issuing Resolution 1970 and sub-

134. Id. at art. 35.
135. Id. at art. 38.
136. Bohlen, supra note 9, at 696.
138. Bohlen, supra note 9, at 696-97.
139. Id. at 695-97.
jecting Libya to the obligations of the Rome Statute, despite the fact that Libya chose not to become a member of the ICC.

2. The ICC’s Complementarity Principle Calls For The Respect Of The Sovereignty Of Nations

The Rome Statute itself, except for the provision that allows for the overreaching Security Council referral power, respects and understands the importance of sovereignty. This is clear with the complementarity principle. The complementarity system protects the sovereignty of even the States Parties to the Rome Statute, because in order for the ICC to exercise its jurisdiction, exercising the Court’s jurisdiction always requires an analysis of “the progressive factual inquiries and judicial findings that implement an appropriate balance of authority between the supranational court and domestic states.”

The complementarity principle shows that there is agreement between the ICC and States Parties that the individual states are not always relinquishing sovereignty, but rather, the states will be the “primary forum for investigation and adjudication,” with the ICC Prosecutor only assuming responsibility when the state is deemed incapable.

Therefore, Security Council Resolution 1970 calling for the use of Article 13(b) of the Rome Statute to refer a situation to the ICC where the ICC should not have jurisdiction is an insufficient rationalization for the clear violations of the Vienna Convention on the Law of Treaties and the principles inherent in the ICC’s the “complementary” jurisdiction. If the Court does not have automatic jurisdiction even over the states that chose to ratify the Rome Statute, it is inconsistent and erroneous for the same treaty to simultaneously allow the Court to have jurisdiction over a state that did not ratify the treaty, solely based on a referral from the Security Council, an outside organizational body.

C. Some of the Security Council Members are Not States Parties to the Rome Statute

The Security Council has five permanent members, and ten-non permanent members that are elected by the UN General Assembly for two-year terms. For any decision of the Security Council to pass, all

140. Newton, supra note 128, at 124.
141. Id. at 125.
142. Id. at 126.
permanent members must concur.\textsuperscript{144} This is referred to as the rule of "great Power unanimity," or the "veto" power.\textsuperscript{145} These five members are China, France, the Russian Federation, the United Kingdom, and the United States.\textsuperscript{146} The other ten members in 2011 that were part of the Security Council that passed Resolution 1970 were Bosnia and Herzegovina, Brazil, Colombia, Gabon, Germany, India, Lebanon, Nigeria, Portugal, and South Africa.\textsuperscript{147} One third of these Security Council members, China, Russia, the United States, India and Lebanon, are not parties to the Rome Statute.\textsuperscript{148}

Security Council Resolution 1970, referring the situation in Libya to the ICC’s Prosecutor, was adopted unanimously, meaning that the five non-States Parties to the Rome Statute had a role in subjecting another sovereign nation to the ICC.\textsuperscript{149} The Rome Statute allows for States Parties to refer situations to the ICC when they involve another State Party to the Rome Statute or nationals of a State Party.\textsuperscript{150} However, the provision that the UN Security Council uses in justification of Resolution 1970 is different than this provision and problematic in two respects. First, it allows for non-States Parties to have an influence over the procedures of the ICC. Secondly, it has allowed for the Security Council to refer a situation to the Court that the Court would otherwise not have jurisdiction over.

This is problematic because if the Security Council has the ability to refer any situation in any country, or involving nationals of any nation—whether or not they are parties to the Rome Statute—then ratifying the Rome Statute would hold no purpose. The Security Council’s referral ability effectively creates an international court with universal jurisdiction, rather than an international court structured to promote peace and punish crimes against humanity and a Court that calls on the support and acceptance of sovereign nations. Even more controversial though, this principle creates a court with universal jurisdiction over all nations, except for China, Russia, and the United States, as permanent members with veto power.

\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Countries Elected Members of the Security Council, supra note 124.
\textsuperscript{147} Id.
\textsuperscript{148} The States Parties, supra note 3.
\textsuperscript{149} In Swift Decisive Action, supra note 6.
\textsuperscript{150} Rome Statute, supra note 89, art. 13.
D. Jurisdiction Claims Based Solely on a Security Council Referral Delegitimize the ICC

Not only is the extension of jurisdiction over non-States Parties inconsistent with the rest of the Rome Statute, and contrary to basic principles of international law, but it is also a detrimental policy decision for the ICC. At least one scholar has recognized that the ICC must deal with the fine line between the need for individual accountability and the need to respect state sovereignty. The Rome Statute was enacted to both eliminate impunity for perpetrators of the most heinous crimes, but also to guarantee respect for state sovereignty and the internal affairs of states. Therefore, part of the ICC’s duty is to hold accountable the individuals that are most culpable for these crimes, while being sure not to infringe upon the rights of the individual states. However, the same scholar that recognized the fine line between a need for individual accountability and respecting state sovereignty argued for the Security Council to have an even greater role in dictating the workings of the ICC. This argument is flawed because even he concluded that “[i]n the end, it may well be that the Prosecutor’s application serves a more political rather than judicial purpose.”

If the ICC does not respect the sovereignty of both States Parties and non-States Parties, and the Security Council continues to have the ability to refer any situation to the ICC regardless of whether or not that nation ratified the Rome Statute, then the ICC will undoubtedly begin serving political, rather than solely judicial, purposes. This is fully inconsistent with the ICC’s central policies. The ICC officially stated that it is “an independent judicial institution that is not subject to political control... its decisions are based on legal criteria and rendered by impartial judges in accordance with the provisions of its founding treaty.” Political undertones and influences would hurt the

151. The rest of the Rome Statute talks about the importance of state sovereignty and the fact that while the United Nations and the ICC have a relationship, they are separate and distinct bodies. Further, this principle goes against the Vienna Convention on the Law of Treaties, which says that third party states cannot be held to a treaty it did not expressly sign.
152. Bazzard, supra note 9, at 917.
153. Id.
154. Id.
155. Id. at 939-41.
156. Id. at 941.
158. Id.
Court’s reputation for neutrality and delegitimize the institution as a whole, and thus decrease the Court’s ability to further its goal of helping end impunity for perpetrators of the gravest crimes.\footnote{159}

Furthermore, when the ICC investigates and intends to prosecute nationals of a state that it would not have jurisdiction over if not for a Security Council Resolution referring the situation, the Court may lose support from both current members and nations that would otherwise have likely ratified the Rome Statute in the future. For instance, preceding the recent issue in Libya, the UN Security Council issued Resolution 1593 that referred the investigation and prosecution of the President of Sudan, Omar Al Bashir, to the ICC for alleged genocide.\footnote{160} Sudan is also not a party to the Rome Statute.\footnote{161} After the Court’s judges issued the warrant of arrest for Al Bashir on March 4, 2009, the ICC confronted an open rebellion in Africa, which has more ICC member states than any other continent.\footnote{162} In July 2009, African Union members expressed their regret that the Security Council did not respond to their request to defer the prosecution, and promised not to cooperate in the execution of Al Bashir’s warrant of arrest.\footnote{163} This was the first time that there existed a serious possibility of states withdrawing from the Rome Statute.\footnote{164} One of the main concerns that became especially apparent in this situation, and following the Security Council’s referral, was the ICC’s alleged exclusive focus on Africa.\footnote{165}

The difference with the situation in Libya though, is that Al Bashir was a sitting head of state at the time of the arrest warrant, and the Gaddafi regime was in the process of being ousted at the time Resolution 1970 was issued. Nonetheless, even though Resolution 1970 was issued with the proclaimed purpose of helping the Libyan people and the rebels to overthrow the oppressive regime, end the violence, and encourage democracy, the referral itself does not actually function to achieve this purported goal. For instance, the formal statement on the Resolution from the United Kingdom’s representative, Mark Lyall Grant, expressed that the Resolution was a powerful signal of the international community’s determination “to stand with the Libyan peo-

\footnote{159} About the Court, supra note 1.
\footnote{160} Security Council Resolution 1593, supra note 107.
\footnote{161} The States Parties, supra note 3.
\footnote{163} Id. at 385.
\footnote{164} Id.
\footnote{165} Id.
ple as *they* charted their future." To the contrary, the Resolution does not allow for the Libyan people to chart their own future, but subjects the new government to the jurisdiction of the ICC, even when it expressed its desire to investigate and prosecute the individuals through its own judicial system.  

Therefore, by the ICC following the Security Council's referral, and exempting itself from a need to otherwise demonstrate proper jurisdiction, it is delegitimizing its reputation and functionality in the international community.

**CONCLUSION**

The United Nations Security Council should not have the ability to refer a situation to the International Criminal Court, particularly when the Court would otherwise not have a claim for valid jurisdiction over that situation. The ICC is independent from the United Nations, and although the two bodies formed the Negotiated Agreement, formalizing the terms of their relationship, it was not intended that they ever exert control over one another. Additionally, the ICC is a treaty-based court, and thus governed by the Vienna Convention on the Law of Treaties. The VCLT holds that no nation can be held by a treaty it did not ratify. Although Article 13 of the Rome Statute allows the Security Council to refer a situation to the ICC regardless of whether or not the relevant nation ratified the Rome Statute, the use of this provision over nations that did not ratify the Rome Statute is improper and in violation of the VCLT.

The Security Council must stop referring situations to the ICC Prosecutor when the relevant nation is not a State Party to the Rome Statute. Additionally, the Rome Statute must be amended to remove the provision that allows for a Security Council referral, particularly in situations where the ICC does not have any other valid jurisdictional claim. This is the best policy decision for the ICC, as it promotes neutrality, legitimacy, and success in the international community. It also speaks more honestly to the rest of the Rome Statute, which purposefully did not adopt universal jurisdiction. The respect of state sovereignty is a core international principle. The sovereignty of Libya's new government, the government that was formally welcomed into the

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166. *In Swift Decisive Action*, supra note 6 (emphasis added).
167. *Head of the Executive Committee of the INC*, supra note 31.
United Nations, was undermined with this referral as it explicitly chose not to ratify the Rome Statute and become a State Party to the ICC.

Further, other members of the United Nations General Assembly that chose not to ratify the Rome Statute may be subject to the same undermining of their sovereignty, and if nothing is changed, the only countries that will be immune to this very real threat to sovereignty are the permanent members of the Security Council. This puts the ICC in a political, rather than legal realm, and so the original noble purpose of the ICC is lost.

Therefore, the ICC should not have the ability to greatly expand its jurisdictional claims over situations where jurisdiction would otherwise be invalid, solely because the United Nations Security Council, a separate body, referred a situation to the Court. The ICC must recognize that this is a violation of core international principles. The provision of the Rome Statute that allows for this unwarranted expansion of the Court’s jurisdiction must be removed from the treaty.